SUBMISSION TO THE COMPETITION POLICY REVIEW PANEL

BY
THE COMMISSIONER OF COMPETITION
COMPETITION BUREAU

JANUARY 11, 2008

Executive Summary

The Commissioner of Competition is pleased to provide the following submission regarding the issues raised by the Competition Policy Review Panel's Discussion Paper, *Sharpening Canada's Competitive Edge*, dated October 30, 2007.

As discussed in greater detail below, the evidence is overwhelming that economic growth is strongly related to the openness and competitiveness of a country's markets and that competition is a key driver of innovation, productivity and prosperity. Canada has achieved substantial success over the past two decades through privitization, free trade and deregulation in placing greater reliance on competition and market forces as the driving forces of our economy.

The *Competition Act* (the Act) is a crucial instrument of Canada's competition policy. However, it is only one element of a broader legislative, policy and regulatory framework that affects the competitiveness of Canadian businesses and the overall performance of the Canadian economy. Other areas of critical importance include tax policy, interprovincial trade barriers, investment restrictions, sectoral or industrial support programs and regulatory or legislative market restrictions.

While there are specific amendments that would enhance the effectiveness of the Act as a safeguard against anti-competitive practices and restraints of trade, the Act is well recognized as world-class competition legislation that is modern and flexible.

The merger provisions of the Act include an explicit requirement to balance efficiency gains arising from a merger against any substantial prevention or lessening of competition. The explicit efficiency exception recognizes that, in some cases, firms may need to combine to achieve the scale necessary for efficient operation and to be competitive in international markets. However, domestic market dominance may offer no advantages for firms seeking to compete in global markets. On the contrary, there is evidence that firms that face vigorous competition in domestic markets are more likely to become internationally competitive.

The policy recommendations from this Panel should be directed at continuing the trend toward open competition and avoiding a return to protectionism and economic regulation that would stifle innovation and productivity.

<u>Recommendations:</u>

The Government of Canada should consider the effect of its own regulations and laws on Canadian competitiveness. While there are legitimate reasons for governments to intervene in the economy, policymakers should be required to identify and weigh the effect of such policies on competition. This approach, already in use in Australia, is aimed at cultivating a culture among policymakers wherein market forces are favoured over regulation. Accordingly:

1. The Government of Canada should establish an independent assessment process responsible for reviewing and identifying the effects of proposed new laws and policies on competition. Such a process would assist legislators and policymakers to

identify alternatives that rely on open markets and harm competition as little as possible and only where necessary.

The Panel should recommend the reduction or elimination of foreign ownership restrictions in sectors vital to the economy, such as telecommunications and airlines. Specifically:

2. At a minimum, foreign ownership limits for Canadian airline carriers operating in international and transborder markets pursuant to bilateral air agreements should be increased from 25% to 49%, and a new class of licensee under the *Canada Transportation Act* should be created to allow 100% foreign ownership of carriers that carry passengers and goods only within Canada.

3. Foreign ownership restrictions in the telecommunications market should be eliminated.

The Panel should support the recommendations of the 2002 House of Commons Industry Committee Report and the Organization for Economic Co-operation and Development (OECD) recommendations regarding amendments to the Act so that it remains consistent with international best practices. Specifically:

4. The criminal anti-cartel provision should be narrowed to ensure that it captures only clearly egregious conduct and does not chill potentially beneficial alliances or arrangements among firms; the criminal provisions on predatory pricing and price discrimination should be repealed so these acts would be treated as reviewable practices under the civil provisions only; meaningful incentives should be created for compliance with the abuse of dominance provisions through, for example, administrative monetary penalties, or a wider right of private action for enforcement; and, where possible, industry-specific provisions and carve-outs should be eliminated so that the Act is returned to a law of general application.

Introduction

The Competition Policy Review Panel's (the "Panel") mandate of enhancing Canadian productivity and competitiveness is both timely and important. As the Government recognized in *Advantage Canada*, ensuring robust competition based on free market principles creates a more resilient, adaptable economy and provides Canadians with more and better jobs as well as lower prices, innovative products, better choice, quality and service.[1]

While the *Competition Act* (the "Act") is a crucial instrument of Canada's competition policy, it is only one element of a broader legislative, policy and regulatory framework that affects the competitiveness of Canadian businesses and the overall performance of the Canadian economy. Other areas of critical importance include tax policy, interprovincial trade barriers, investment restrictions, sectoral or industrial support programs and regulatory or legislative market restrictions. Many of our major trading partners have already implemented broad based reforms aimed at identifying and, wherever possible, eliminating restrictions on competition, whether private or government-imposed, and it is essential that Canada pursue a similar course.

To increase the prosperity of Canadians, Canada needs to continue to foster conditions that drive technological change and increase efficiency. Recent economic and business research overwhelmingly concludes that productivity — a concept that combines efficiency and measures of output — explains why some countries increase wealth while others remain poor.[2] But this work also leads to another conclusion, one that is not always noticed: that vigorous competition is the key driver of productivity growth. In the words of Dr. Andrew Sharpe, at Canada's Centre for Living Standards, "the evidence in favour of more open and competitive markets as drivers of innovation and productivity is overwhelming".[3] The Competition Bureau ("the Bureau") believes that the link between competition and productivity should be the fundamental focus of the Panel as it searches for policy options to ensure the prosperity of the Canadian economy.

The Panel's review comes at a time of tremendous activity and change in global competition policy. Less than a generation ago, jurisdictions differed on the role competition should play in the economy. The fall of the Berlin Wall in 1989 was followed by the rapid transformation of many state-run economies to market-based economies. In Central and Eastern Europe, Latin America and Asia, privatization and de-monopolization were accompanied by the adoption of laws aimed at fostering and maintaining competition, with many countries seeking assistance from developed nations like Canada. The global economy, and Canada's place within it, will continue to change at a rapid pace in the future. Trade agreements are opening national markets while global investments are reaching unprecedented levels. Business is also becoming global, and production is increasingly centred on global value chains.

Canada has made significant progress towards greater reliance on competition and market forces through the adoption of policies promoting privatization, free trade and deregulation. These policies have created a more resilient, adaptable and prosperous economy that has benefited both Canadian consumers and has created opportunities for Canadian businesses. While the Bureau recognizes that there are broader social policy goals that governments must achieve, Canada needs to resist adopting policies that insulate Canadian industries from competition. Rather,

barriers to competition should be identified (whether private or government-imposed), assessed and, where possible, eliminated. This was recognized by the Government in *Advantage Canada* when it noted: "[i]n Canada, we must ensure that we have strong and effective regulations to protect people and enhance our quality of life, while minimizing regulations that are unnecessary or that put Canada at a significant competitive disadvantage."[4]

The Commissioner of Competition ("the Commissioner") is pleased to provide this submission to the Panel. Part I of the submission focuses on those questions posed by the Panel that are directly related to the Bureau's mandate to administer and enforce the Act. Part II addresses sectoral investment regimes and Part III discusses further measures that the Bureau believes could be implemented to promote greater reliance on competition as a means of enhancing the productivity of the Canadian economy and Canada's economic welfare.

PART I - The Competition Act

How does Canada's competition policy affect Canadian competitiveness in an environment of globalization and free trade?

The best way to help maximize the prosperity of our society is to protect competition and the competitive process, not competitors. Two of the key objectives of the Act are the promotion of the efficiency and adaptability of the Canadian economy, and expanding opportunities for Canadian participation in world markets.[5]

The purpose of the Act is to maintain and encourage competition in Canada, thereby protecting Canadians from the harm caused by anti-competitive conduct or policies. Among other things, the Act does this by prohibiting conspiracies to lessen or prevent competition unduly as well as preventing abuse of market dominance and mergers that prevent or lessen competition substantially. The Act also provides the Commissioner with the ability to advocate before government decision-makers, including regulatory boards, commissions and tribunals, in favour of market forces and for the removal of government barriers that can harm competition.

Reliance on market forces is the best means of ensuring a robust, resilient and adaptable economy. Government intervention and regulation in the economy is an inferior alternative to competition. The Ontario Institute for Competitiveness and Prosperity recently noted:

> Public policy also needs to drive towards creating greater pressure on businesses. No matter how much government support is given for innovation, businesses only innovate to the extent their customers and competitors pressure them to.[6]

The Institute restated this same theme earlier this year:

> An important part of an agenda for achieving our prosperity potential is greater intensity of competitive pressure on our companies and their leaders. Businesses need a supporting environment of publicly funded infrastructure and research, educated workers, and other programs. Complementing this support is the need for pressure from highly sophisticated customers and capable rivals. Competitive pressure spurs innovation, risk-

> taking, and expansive strategies - the best defence is a good offence.[7]

The founding director of the McKinsey Global Institute, William Lewis, addressed the same issues in the book he authored summarizing the results of a 12-year research project, covering the period 1991-2003. The study examined the underlying reasons why many nations continue to remain poor despite billions of dollars in aid while others succeed and are able to continue to grow their economies. He noted that:

> [C]ompetition is the way more productive firms win out. Productivity increases as more productive firms expand and take market share away from less productive firms. Sometimes the less productive firms go out of business. Other times they react to the competitive pressure and increase their own productivity. Either way, overall productivity increases.[8]

Ultimately, Lewis concludes that competition policy explains which countries are the most productive, because competition policy influences the extent to which a culture of competition takes hold, not just in global markets, but in smaller domestic markets as well.

What changes to Canada's competition regime would enhance the competitiveness of Canadian firms in the global economy? What international best practices, if any, would strengthen Canadian competitiveness as a destination for foreign investment if we were to adopt them?

In 1986, the provisions of the former *Combines Investigation Act* were substantially reformed and modernized with the introduction of the *Competition Act*. Since that time, the Act has been the subject of a number of updates and refinements. The Act has also been the subject of a number of reviews, including two by the Organization for Economic Co-operation and Development (OECD) over the past five years[9] and a review by the House of Commons Standing Committee on Industry, Science and Technology completed in 2002. The Committee's report, entitled *A Plan to Modernize Canada's Competition Regime* ("the INDU Report") describes the Act as a well-crafted economic instrument reflecting modern economic analysis, though "minor modifications might be desirable."[10] The 2005 OECD review observed that competition policy in Canada continues to evolve rapidly in favour of a strengthened role for competition law as a replacement for regulation.

While these reviews concluded that the Act is fundamentally sound and does not require major reform, both bodies identified specific aspects of the Act that could be amended to reflect current economic thinking and best practices in international competition law enforcement. In this regard, the Panel may wish to consider the following recommendations made by both the INDU Committee and the OECD:

1. Narrow the criminal anti-cartel provision to ensure that it captures only clearly egregious conduct such as price fixing, and does not chill potentially efficiency enhancing or competitively benign business alliances or arrangements.

2. Align the pricing provisions of the Act with current economic thinking by repealing the criminal pricing provisions (predatory pricing, price discrimination and discriminatory

promotional allowances) and rely on the existing civil abuse of dominance provisions to address these practices where they have a significant anti-competitive effect.

3. Address the lack of effective deterrence for abuse of dominance either by giving the Competition Tribunal the authority to impose financial consequences, such as administrative monetary penalties; or by providing private parties with access to the Competition Tribunal in abuse of dominance cases and giving the Tribunal the ability to award damages.

4. Return the Act, where possible, to a law of general application by, for example, repealing the airline specific provisions.

While the Bureau is of the view that each of these areas merit consideration by the Panel, it believes that a recommendation to reform section 45 (the conspiracy or anti-cartel provision) is the most significant proposal for reform that could be made at this time. Canadian firms need the certainty of a more clearly defined conspiracy provision to pursue strategic alliances and thereby enhance their ability to compete in the global economy.

Section 45 – The Case for Reform

It has become increasingly clear that in today's global economy, any law or regulation directed at scrutinizing collaborations among competing firms must be able to effectively deter and prohibit harmful cartel behaviour, while remaining flexible enough to allow firms to enter into potentially beneficial strategic alliances. However, Canada's current anti-cartel provision does not achieve either of these objectives. Our anti-cartel provision neither effectively deters some blatant instances of hard-core cartel conduct nor is it properly circumscribed so as to avoid chilling the formation of potentially beneficial alliances between firms. Despite its central importance as a cornerstone provision of the Act and its clear deficiencies, Canada's anti-cartel provision has remained largely unchanged since 1889.

The conspiracy or anti-cartel provision of the Act (found in section 45) is intended to protect Canadian firms and consumers from the serious harm caused by price-fixing cartels and other egregious agreements among competitors that impair competition, such as market allocation agreements and agreements to restrict output. Such cartels, which are almost always covert in nature, have been characterized as the "antithesis of open competition" that "tear at the economic fabric of our society".[11] Studies and the level of prosecutions conducted in various jurisdictions demonstrate that cartels are more prevalent and harmful than previously believed.[12] Some studies suggest that the average overcharge (i.e., the amount that prices charged by the cartel exceeded that which would have been charged absent the conspiracy) in recent cartel cases has been 40 percent and that the median overcharge is 25 percent.[13]

Hard-core criminal cartel conduct, both domestic and international, is the Competition Bureau's top antitrust enforcement priority. The essence of cartel behaviour is to reduce the competition that spurs efficiency, productivity and long-term economic growth. By conspiring to insulate themselves from competition, members of a cartel can force Canadian consumers and businesses

to pay higher prices and deprive them of innovative product choices and other benefits of competition, thereby making it more difficult for Canadian companies to compete in domestic and foreign markets. Most jurisdictions recognize that cartels are "the most egregious violations of competition law and that they injure consumers in many countries by raising prices and restricting supply, thus making goods and services completely unavailable to some purchasers and unnecessarily expensive for others".[14] In 1998, the OECD recommended that Governments of Member countries prohibit outright so-called hard-core cartel agreements (those agreements with no socially redeeming value), namely price fixing, bid-rigging, market sharing and output restriction agreements.[15]

While cartels are clearly damaging to business customers, consumers and to the economy as a whole, that does not mean that all agreements between competitors are harmful. In *Competition and Innovation in a Flat World*, Thomas Friedman explores how the world we once knew, composed of distant and distinct economies, has been shrunk by technology, emerging global competitors, transportation developments and international commercial frameworks. He aptly described this transformation as a triple convergence: “new players, on a new playing field, developing new processes and habits for horizontal collaboration.”[16] There is growing recognition that, to be effective and efficient competitors, Canadian firms may need to enter into strategic alliances or other forms of collaboration. As the US Federal Trade Commission recognizes, “[c]ompetitive forces are driving firms toward complex collaborations to achieve goals such as expanding into foreign markets, funding expensive innovation efforts, and lowering production and other costs.”[17] Similarly, the European Commission notes:

> …horizontal cooperation can lead to substantial economic benefits. Companies need to respond to increasing competitive pressure and a changing market place driven by globalization, the speed of technological progress and the generally more dynamic nature of markets. Cooperation can be a means to share risk, save costs, pool know how and launch innovation faster. In particular for small and medium-sized enterprises cooperation is an important means to adapt to the changing market place.[18]

A number of commentators have recognized that section 45 requires modernization.[19] These commentators note that section 45 is overly inclusive because it subjects all strategic alliances and other collaborations among firms to the threat of criminal sanctions even when these agreements may potentially increase economic welfare. At the same time, while Canada has a *per se* prohibition against bid-rigging, section 45 is under-inclusive because it can allow manifestly anti-competitive agreements relating to price fixing, market sharing and output restrictions to escape sanction.

There are three principal aspects to the over-inclusiveness and chilling effect of section 45. First, section 45 is potentially applicable to all types of agreements, including agreements between customers and suppliers, joint ventures and strategic alliances that might otherwise be beneficial. Second, section 45 potentially subjects these agreements to serious criminal sanctions, including imprisonment for up to 5 years and fines of up to $10 million per count. Third, in determining whether an agreement should be subject to criminal sanctions, the court is not permitted to

consider whether the agreement will result in gains in efficiency that benefit the parties and the Canadian economy.[20]

As a result, section 45 can deter Canadian businesses from entering into beneficial strategic alliances, such as collaborations that increase the efficiency and competitiveness of Canadian businesses. Concerns regarding the over-breadth of the conspiracy provision and its "chilling" effect on strategic alliances have been expressed by a number of commentators. For example, as Mr. Tim Kennish, a senior Canadian competition law practitioner, noted:

> [I]t is now more apparent than ever that it is inappropriate that section 45, which adopts a relatively inflexible and essentially structural approach to the determination of the legality of horizontal agreements among competitor firms and is largely insensitive to consideration of efficiencies or pro-competitive effects, should be governing as to the legality of such arrangements. Be that as it may, section 45 continues to have potential application to these situations and the risk remains that the full development of strategic alliances may be impeded by the chilling prospect of potential criminal enforcement of section 45.[21]

As indicated, section 45, as it is currently constituted, is also under-inclusive, as it does not allow for the effective prosecution of plainly anti-competitive agreements, such as hard-core cartels. Unlike our major trading partners, including the United States and European Union, Canada's conspiracy provision requires the Crown to prove under the criminal law standard of "beyond a reasonable doubt" that even an agreement among competitors to fix prices lessens competition "unduly". This requires a criminal court to undertake a complex economic analysis, including a determination of the relevant market, barriers to entry and the degree of remaining competition. These complex economic issues are ill suited for determination by a criminal court and are extremely difficult to establish to the criminal standard of beyond a reasonable doubt.

The 2002 INDU Report recommended, among other things, that stopping cartels be designated one of the Bureau's highest priorities and that the law targeting agreements between competitors be amended to create a two-track (criminal/civil) approach.[22] In response, the Government launched a consultation process on proposed changes to the Act, including a proposal to amend section 45. While some stakeholders were of the view that no reform was necessary, those in favour of reform indicated substantial support for a two-track approach, but that more discussion, analysis and consultation were required. In 2005, the Bureau formed an External Working Group of lawyers, economists and academics who possess extensive knowledge of competition law, criminal law, and economics, to assist the Bureau in its consideration of the reform of section 45. Based on this work, and additional consultations, the Bureau is developing a proposal to reform section 45.

Any model for a reformed section 45 should be narrowed to prohibit hard core cartels, namely agreements among competitors to fix prices, allocate markets or restrict output making them criminal offences *per se* (*i.e.*, without the additional requirement on the Crown to establish harm to competition, as in the current bid-rigging provision). This would efficiently and effectively proscribe the most egregious forms of cartel agreements and provide the certainty that Canadian businesses require to cooperate in the current global environment. In addition, a prohibition on

hard-core cartels would more closely align our law with those of the United States and European Community, an important consideration given the international scope of business activity and anti-cartel enforcement.

Consistent with the recommendations of the INDU Committee, reforms to section 45 should also include a non-criminal or "civil track" to address other agreements among competitors that may harm Canadians' welfare but which should not be prohibited outright. Under such an approach, only those agreements between competitors that are found to be anti-competitive could be subject to an order of the Tribunal.

Overall, such reforms would be consistent with international best practices and would bring our laws regarding hard-core cartels in line with those of our major trading partners. Such consistency is important as it provides a common and predictable threshold for firms whose activities span the global market.

Does Canada's approach to mergers strike the right balance between consumers' interest in vigorous competition and the creation of an environment from which Canadian firms can grow to become global competitors?

Effective merger review is essential if Canadians are to receive the benefits of a competitive marketplace. Anticompetitive mergers can lead to fewer choices, less innovation, and increased prices for consumers. Moreover, increased concentration arising from mergers may also facilitate cartel behaviour or the emergence of dominant firms that may abuse their market power. However, mergers can also generate benefits, such as lower costs and increased innovation. Indeed, mergers have the potential to contribute to growth and productivity of the Canadian economy.

In the Bureau's view, the current approach to merger review under the Act strikes an appropriate balance between protecting the public interest of maintaining competition and the ability of Canadian firms to grow to become global competitors. Inasmuch as it has an explicit statutory exception for transactions that are likely to generate gains in efficiency, Canada currently has the most receptive regime for the consideration of efficiency claims in merger review. Canada's major trading partners, such as the United States and European Union, do not have an equivalent provision to the explicit efficiency exception found in the Act.[23]

Assessing the future effects of proposed mergers to separate those that are likely to harm competition from those that should proceed is one of the biggest challenges faced by competition agencies worldwide. The Bureau's *Merger Enforcement Guidelines*[24] and backgrounders on merger decisions provide a comprehensive and transparent framework of analysis for making those assessments. The *Guidelines* describe a methodology that is flexible enough to deal with the variety of issues that arise in merger analysis including the global nature of competition and the dynamic nature of emerging industries. Each merger is looked at on its own facts, taking into account the particular characteristics of the industry and the nature of competition in the market. Market share is only one consideration in merger review as the Bureau considers all relevant factors that affect competition in the markets involved in the merger.[25]

Merger review by the Bureau focuses on whether the merger is likely to result in a substantial lessening or prevention of competition. The merger review provisions attempt to balance the potential negative effects of anti-competitive mergers on Canadian consumers[26] with the positive effects of efficiencies arising out of such mergers.[27] In 1986, Parliament enacted an efficiency exception in section 96 of the Act. Pursuant to this exception, a merger that would likely result in a substantial prevention or lessening of competition will be allowed if the merger is likely to bring about gains in efficiency that will be greater than and offset the anti-competitive effects.

The efficiencies exception in section 96 allows firms to merge to attain efficiencies, even if the merger will result in higher prices to customers or have other anti-competitive effects, where the merger will result in efficiency gains that outweigh the anti-competitive effects of the merger. Underlying the efficiencies exception is the view that Canada's economy will benefit if the real resource savings generated by a merger offset the loss to the economy arising from harm to competition in domestic markets.

The question of the appropriate trade-off between anti-competitive effects and gains in efficiency resulting from a merger has been debated since at least 1969 when the Economic Council of Canada published its *Interim Report on Competition Policy*.[28] The *Superior Propane* case in 2003[29] is the only case in which the Competition Tribunal and the courts have applied the efficiencies exception in the *Competition Act*. The jurisprudence in that case established that "balanced weights" is an appropriate standard for making the trade-off, but it is not necessarily the only appropriate standard.[30] Nevertheless, since the decision in *Superior Propane*, there continues to be debate on the issue of the appropriate standard for the trade-off in section 96.

The ongoing efficiencies debate should be considered in context. The vast majority of mergers are not challenged by the Bureau on the basis of factors other than efficiencies. These include, for example, relevant market definitions that reflect regional or global competition, the fact that sufficient competition will remain in affected markets following the merger or that low barriers to entry will prevent the exercise of market power. Accordingly, despite the existence of a mechanism that allows firms to grow to scale in order to compete globally, to date few firms have needed to take advantage of this provision.[31]

As the Panel may hear, there are differing views regarding the appropriate welfare standard to be applied under the Act's efficiency exception and the workability of the exception itself, given the complexity of quantifying the substantial lessening or prevention of competition, identifying and measuring the relevant efficiencies and assessing the likelihood that these efficiencies will be achieved.[32] However, there has been very limited enforcement experience in respect of the relatively new balancing weights standard and the debate thus far has not produced any consensus on an alternative approach. The Bureau will continue to study and develop its approach to efficiencies in competition law analysis.

A related question that has recently resurfaced in the public debate is whether the process of merger review acts as an impediment to the emergence of so-called "national champions". The term "national champion" can have many meanings. For some, it can mean globally renowned

companies that are efficient and globally diversified and inspire national pride. To others, it means the creation of domestic monopolies at the expense of Canadian consumers and businesses.

The Act does not impede the emergence of national champions through superior competitive performance. However, the Bureau does not support the selection and promotion of so-called national champions by protecting domestic firms from foreign competition or supporting them through government subsidies or other preferential treatment. Such policies are harmful to the productivity of the Canadian economy and the competitiveness of Canadian firms. Moreover, promoting national champions by exempting firms or industries from general competition laws or allowing firms to merge based on "public interest" criteria other than competitive effects and economic efficiency may carry similar risks.

In his study of international competitiveness, Michael Porter explained that "creating a dominant domestic competitor rarely results in international competitive advantage. Firms that do not have to compete at home rarely succeed abroad."[33] Other researchers have reached similar conclusions. For example, William Lewis explains "economic progress depends on increasing productivity, which depends on undistorted competition. When government policies limit competition . . . more efficient companies can't replace less efficient ones. Economic growth slows and nations remain poor."[34]

Speaking on the subject of national champions, Deborah Majoras, Chairman of the U.S. Federal Trade Commission, has said:

> Thus, it is not surprising that while the political issues and debates of our time come in many shapes and sizes, their central undercurrent often is whether a government will displace market competition to favor special interests. By providing subsidies to or trade barriers for a domestic champion, and prohibiting foreign ownership, a country can certainly preserve the domestic firm far longer than it might survive in the market. What, however, does the country gain by such policies? Perhaps it protects domestic jobs, but only for those who work for the national champion. Maybe it gains a flagship company to showcase in foreign countries, but I question an economic policy that would place pride ahead of productivity. Most importantly, the evidence shows that any benefits to protecting national firms come at a substantial cost. One study suggests that if post-Uruguay Round trade barriers were removed, global wages would rise by $1.9 trillion – including increases of $512 billion in Europe and $537 billion in the United States.[35]

The Panel should carefully scrutinize arguments in favour of promoting national champions at the expense of competition and Canadian consumers taking the following into consideration:

- The Act already contains a mechanism, in the form of the efficiencies exception, through which firms can grow to an efficient scale, even at the expense of competition in Canada. This approach appropriately requires firms proposing an otherwise harmful merger to bring forward credible and convincing evidence, rather than arguments, of anticipated efficiency gains.

- Although the existing approach to balancing efficiencies against anti-competitive harm may be complex in some cases, it is based on principled and objective criteria that allow firms to grow to scale by achieving the efficiencies necessary to compete at home and abroad. It is applied through an independent, transparent legal process before the Competition Tribunal. Public interest merger reviews risk decisions that are not made with proper regard to evidence or sound economic principles.

- The complexity inherent in public interest analysis can run the risk of delay or even prevent potentially pro-competitive transactions. Moreover, where benefits are concentrated and costs are diffuse, it is possible for narrow groups that stand to benefit from public interest reviews to enrich themselves at the expense of others.

- The challenge facing the Panel is to recommend policies that will enhance the economic benefits flowing from an open economy and the benefits of deregulation, while resisting the call from some to retreat to protectionism for certain industries at the expense of Canadian business and individual consumers. Adopting policies that favour protectionism increase the opportunity and ability of firms in protected industries to exercise market power by raising or maintaining prices above competitive levels. The implication of such policies is that we are willing to sacrifice the global competitiveness of other Canadian industries that use the products or services produced by the so-called national champion.

- Where public interest merger reviews are deemed necessary, they should be based on clearly identified public interest criteria, conducted by an independent body in a transparent manner, based on fact and evidence (as opposed to argument and private interest) and based on a standard that requires public benefits to clearly outweigh any potential harm to competition that may result from the proposed transaction.

Merger Review Process

The purpose of merger review is to protect the economy from the significant anti-competitive effects, such as increased prices and reduced innovation that may result from a merger that substantially lessens competition. Economic welfare is enhanced when competition law enforcement agencies make the right decisions on mergers. Reaching the right decisions requires a merger review process that provides the reviewing agency with both the relevant information and sufficient time to analyze the merger.

In particular cases, such as where a potential acquirer may be bidding against other firms in an unsolicited bid process, the need for timeliness and certainty for the parties is crucial. The challenge in these cases is to provide sufficient time for a thorough review by the Bureau without unnecessarily disadvantaging the commercial position of any of the parties. The Bureau currently completes 90% of its merger reviews within 10 days of receiving a complete notification filing from the merging parties.

There are a number of mechanisms that assist parties in anticipating possible competition issues

that may arise during the course of a merger review by the Bureau. First, the jurisprudence from the Tribunal, along with the Bureau's *Merger Enforcement Guidelines*, *Merger Remedies Bulletin* and detailed case decisions published by way of technical backgrounders, provide the business community and their legal and economic advisors with substantial notice on when transactions are likely to raise competition concerns. In addition, parties are encouraged to approach the Bureau in advance to discuss confidentially their timing and the substantive competition issues that may arise as a result of a proposed merger. As the evidence from potentially affected customers, suppliers and competitors is a key source of information for the Bureau, it is essential that the Bureau be able to make market contacts prior to finalizing its views. Hence, the Bureau encourages parties to waive confidentiality at the earliest possible time to facilitate the completion of the Bureau’s investigation. The formal filing date for merger notification remains in the hands of the parties as does, to some extent, the timing of market contacts. Nonetheless, the Bureau takes every step to make its investigations transparent, to accommodate parties’ exigencies and to resolve matters without resort to litigation if at all possible.

Where a merger is likely to harm competition by increasing prices, or reducing supply or innovation, parties are encouraged to approach the Bureau with a “fix-it-first” proposal (where the parties agree to divest assets to an approved acquirer) prior to closing. Where necessary, appropriate remedies, such as divestitures, are the subject of negotiation between the Bureau and the acquiring party. Once the Bureau and the acquiring party agree upon remedies, the consent agreement process can allow the parties to close the transaction prior to the implementation of the remedies. As an alternative to litigation, this process provides timeliness and certainty for merging parties.

PART II - Sectoral Investment Regimes as Barriers to Entry

What changes, if any, are required to Canada's sectoral investment regimes to minimize or eliminate negative impacts on Canada's competitiveness?

What have been the impacts of these investment regimes on productivity and competitiveness in the specific sectors?

Are there alternative mechanisms that would achieve the non-economic policy objectives of the sector while also ensuring maximum competitiveness of firms operating in the sector?

It is well established that the economic consequences of Canada’s sectoral-specific policies restricting foreign investment have significant negative implications for the productivity of the industry and the economic performance of the economy as a whole. In this regard, the OECD has undertaken both country-specific studies and country-comparative studies assessing the openness of various economies to foreign direct investment. In a 2006 study, Canada was ranked 25th out of 29 countries when assessing the openness of our economy to direct foreign investment.[36] In another study, the OECD noted that:

> Competition-restraining product market regulations have an adverse effect on productivity as they slow the adoption of best-practice production techniques; this particularly harms countries that are far behind the technological frontier in some industries.
>
> Restrictive regulation retards the diffusion of new technology through at least two channels: it discourages investment in equipment that embodies the latest ICT, and reduces the diffusion of technology from abroad through foreign direct investment (FDI).[37]

The study recognizes the importance of FDI as a source for importing new technologies, management practices and sector specific know-how between countries. This, in turn, intensifies domestic competitive pressures by spurring domestic rivals to adopt best-of-breed practices and state-of-the-art technologies. One conclusion of the study is that Canada could have increased its annual productivity growth rate between 1995-2003 by three quarters of one percent annually if it had amended its regulations that restrained competition to conform to the least restrictive regulations of other OECD countries.[38] With respect to FDI restrictions, reducing them to the level that is the least restrictive of competition (of all jurisdictions studied) would increase employment and provide a strong impulse to labour productivity growth.[39]

The Bureau frequently considers the issue of investment restrictions in various sectors of Canada's economy, either as a consequence of its enforcement activities under the Act or in its role as an advocate of competition policy before various legislative and regulatory bodies.

When undertaking any competitive effects analysis under the Act, the Bureau considers not only evidence of concentration or market share, but other quantitative and qualitative factors relevant to competition that may have a bearing on the nature of competition in the market under examination. Among these factors, the one that is generally considered to be the most important is the presence of barriers to entry into a market for prospective competitors. Barriers to entry shelter existing firms from competition by impeding or preventing entry into the market by competing firms. Barriers can take many forms, ranging from regulatory restrictions to sunk costs that cannot be recovered. Of these different forms, regulatory restrictions (including tariff barriers, interprovincial trade barriers and regulatory control over entry) are the sole factor for which direct responsibility rests with government.

As noted, sectoral investment regimes and ownership restrictions such as those identified in the Panel's Consultation Paper constitute significant barriers to entry to many markets in Canada. They may also limit the options for Canadian based companies seeking new sources of investment capital or alternative purchasers and increase the cost of capital for businesses competing in these markets. By reducing the intensity of competition, they may also increase the costs for the businesses they supply, harm their competitiveness and increase costs for consumers. Investment restrictions have been identified as significant barriers to entry by the Bureau in merger reviews in such important industries as airlines, banking and telecommunications, all of which are major facilitators of commerce throughout our economy.[40]

As part of its advocacy function, the Bureau has, over time, urged the Government to consider

relaxing or removing ownership restrictions as a means of increasing the opportunities for new foreign based entry.[41] Two areas in which the Bureau has been active in seeking more liberalized investment regimes have been telecommunications and airlines. Together with financial services, these industries are extremely capital intensive and therefore, sustainable entry into those markets requires access to capital and financing at the lowest possible cost.

Airlines

The Bureau supports the reduction or elimination of foreign ownership restrictions on Canadian air carriers. There does not appear to be any compelling economic reason why the air transportation sector should continue to have such restrictions.

The Bureau recognizes that the elimination of all ownership restrictions may not be feasible under current bilateral air agreements that require domestic air carriers to be substantially owned and controlled by their government or home country nationals. Accordingly, as a first step, the Bureau supports increasing the limit on foreign ownership of voting shares in Canadian air carriers from the current 25 percent to 49.9 percent. The airline industry is capital-intensive. New entrants, as well as established players, would benefit from the greater access to foreign capital through liberalized ownership rules.

In respect of domestic routes, Canada should allow for wholly foreign owned carriers that only serve routes within Canada. Such an approach has been successfully adopted in Australia. Pursuant to such a policy, foreign carriers could draw upon their knowledge and expertise to establish new operations in Canada. Such "Canada-only carriers" could also generate greater feed traffic beyond the major international gateways thereby allowing international carriers to serve a greater number of routes to and from Canada.

Under this model, a specific type of 'Canada-only carrier' would be licensed to serve only domestic routes and could be up to 100 percent foreign-owned.[42] This model would fully comply with international obligations but allow greater access to foreign capital to finance Canadian airline operations. A Canada-only carrier would use Canadian crews, be required to comply with all Canadian laws and regulations and be subject to the same competitive conditions and input costs as any other Canadian carrier operating in the domestic market. At the same time, this would open the market to new entry, or the threat of new entry, which would allow consumers to benefit from more competitive markets. Accordingly, the Bureau recommends that the *Canada Transportation Act* be amended to allow for the licensing of Canada-only carriers, free of any Canadian ownership or control restrictions.

The Bureau also supports cabotage. Cabotage refers to the right of a foreign carrier to operate within the domestic borders of another country. Canada, like most countries, does not permit cabotage. This prohibits, for example, a carrier like Air France serving the Paris-Toronto route, from picking up additional passengers in Toronto and continuing a flight service to Vancouver. Permitting foreign air carriers to provide services between points in Canada has the potential to further promote competition on routes within Canada.

While Canada has to date insisted on reciprocity as a condition of opening the Canadian airline market to foreign competition, the public interest in airline competition goes beyond the interests of existing domestic market participants to include the economy generally and important industries, such as tourism. The Bureau recognizes that there is an important policy question of whether rights of establishment or cabotage should be granted only on a reciprocal basis. Based on competition grounds, a strong case exists supporting the implementation of such measures unilaterally.

Telecommunications

In 1987, when the Government first placed foreign ownership restrictions on facilities-based telecommunications carriers, the restrictions were seen as a means of harmonizing Canadian policy with that of other countries, and to ensure national sovereignty, security and economic, social and cultural well-being. However, ten years later, Canada and many countries belonging to the World Trade Organization adopted the Agreement on Basic Telecommunications (ABT) to liberalize trade and investment in basic telecommunications services. Under the ABT, many countries have reduced or eliminated their foreign ownership restrictions (e.g., France, Germany, the U.K.), concluding that the benefits of increasing access to foreign capital outweigh the implicit costs of any associated loss in sovereignty. Canada is one of a small and declining number of OECD countries that still place explicit foreign investment restrictions on domestic telecommunications.[43]

In 2006, the Telecommunications Policy Review Panel (the TPRP) recommended that restrictions on foreign investment in telecommunications service providers be liberalized.[44] This position was supported by many of the parties that participated in the TPRP's review. Similarly, the OECD has urged Canada to eliminate foreign ownership restrictions in telecommunications[45] and pointed out the negative effects of foreign investment restrictions on the cost of capital and on competition more generally. In particular, the OECD has cautioned that the restrictions "...impact negatively on the development of competition in Canada in that they effectively limit investment in the sector, increase the cost of capital and can delay the diffusion of new technology…"[46] The OECD found that "...new entrants have to rely on debt rather than equity financing and they are limited in their ability to access foreign equity capital. Foreign ownership restrictions also reduce the demand for Canadian shares and impact on their price. Improved access to foreign equity capital would help in meeting Canadian objectives of enhancing competition and meeting the government's goal of 'connectedness'...".[47]

Foreign ownership restrictions on facilities-based telecommunications carriers are no longer necessary to harmonize Canadian policy with that of our global trading partners. By limiting potential entry in the telecommunications markets, Canada's foreign investment restrictions reduce the competitive discipline that the threat of entry can provide. Moreover, these restrictions slow the realization of the benefits to open competition for consumers and business supplied by these markets. Telecom is a key enabler in many other sectors of the economy and as such, its impact on innovation and competitiveness is seen nationwide.

Finally, with respect to companies that previously only distributed broadcast signals but can now

take advantage of technical advances to enter into competition with facilities-based telecommunications carriers, the foreign investment levels for these corporations should be consistent with those applicable to the telecommunications carriers. Regardless of technology, all carriers should enjoy the same access to capital and be bound by the same ownership rules. This approach will ensure that broadcasting distribution undertakings are not placed at an unfair competitive disadvantage vis-à-vis telecommunications companies, given that both compete in high-speed access and telephony.

Other Sectors

The Panel has asked for views on the merits of reducing or eliminating the current investment restrictions for other sectors of the economy, including broadcasting, cultural industries, uranium production and financial services. As in the airline or telecommunications sectors, such restrictions act as significant barriers to entry and limit the potential for the emergence of new competition.

Other organizations have highlighted the consequences for competition and the economy as a whole of pursuing policies that restrict investment in specific sectors. For example, most recently the International Monetary Fund commented on the implications of Canada’s current regulations regarding ownership in the financial services sector.

> In Canada's full-service banking system, the rule that major banks be widely held guards against takeovers (including from abroad), thereby preventing potential competitors from entering the market on a large scale through the acquisition of existing networks. This lack of contestability has led to low-risk balance sheets and high returns on equity, but has limited incentives for financial innovation and for serving higher risk borrowers, including high-growth small- and medium-sized enterprises. In the mission's view, reducing barriers to acquisition of large banks, including by foreign entities, would foster contestability and innovation in the financial system.[48]

As it examines these types of restrictions in any sector of the economy, the Panel must balance the necessity and benefits of any such restrictions against the negative consequences for competition both within that sector and across the economy.

PART III - Increased reliance on Competition in Regulation and Policy

Is the modernization of Canada's competition and investment laws sufficient for successfully attracting foreign direct investment in Canada? What other priorities and policy issues should governments address?

What further could be done in Canada to promote an ongoing review of Canadian competition, investment and productivity performance aimed at Canada's sustained competitiveness?

The modernization of the *Competiton Act* and *Investment Canada Act*, while important, are not enough to ensure Canada's sustained competitveness nor attract increased investment. As Ulf Boge, the former chair of the International Competition Network, noted:

> Acting against infringements of competition by companies remains without doubt our key task. But to effectively protect competition requires more. The battle against state-imposed restrictions of competition is no less important if competition is to develop freely.[49]

Recognizing the importance of competition as a driver of productivity and competitiveness, a number of leading jurisdictions around the world are ensuring that their competition agencies have modern laws and resources to effectively deal with anti-competitive business practices. In addition, they recognize that government laws and policies have a major impact on the ability of their firms to compete. As a result, other jurisdictions both:

- integrate competition principles into government law and policy development to ensure that they do not unnecessarily restrict competition or harm business' ability to compete; and,
- establish mechanisms for reviewing and eliminating existing regulations that harm competition and competitiveness unnecessarily.

The challenge for government legislators and policy makers is to ensure that regulatory measures strike the best possible balance between what they have been designed to achieve and their cost. Recognizing this challenge, a number of jurisdictions, including Australia, the United Kingdom, the United States and the European Union, have implemented mechanisms to ensure that competition will be limited by government policy or regulation only where warranted.[50] These countries have adopted, in various degrees, processes that require law and policy makers to rely on market forces whenever possible and when intervention is necessary, to choose options that are the least harmful to competition.

Australia is currently the centre of international best practices in this area. Economic policies adopted in the early 1990's have helped to boost the productivity per worker in the Australian economy from 85% of Canada's in 1995 to almost equal to ours by 2006. A major contributing factor to the country's performance over this period has been competition reforms instituted under the country's national policy. Under this policy, much of the country's legislation and regulation was reviewed for the purpose of eliminating unwarranted and unnecessary restrictions on competition. A study conducted by the Australia Productivity Commission in 2005 conservatively estimated that pro-competitive reforms implemented since the introduction of the country's national competition policy had increased productivity by 2.5% with further improvements anticipated.[51] While Canada and Australia's productivity levels are now roughly similar, Australia has initiated a further round of productivity reforms which are anticipated to increase Australia's productivity by a further 2%.[52]

Australia recently reinvigorated the consideration of competition issues in the development of

new legislation by instituting a strengthened framework for competition assessment as part of improvments made to the country's legislation and policy development process. Key elements of the Australian competition assessment framework include the following:

- a strong national commitment to the consideration of competition in the development of legislation and policy;
- departments and agencies proposing legislation and policies must examine them early to determine whether they are likely to have signficant effects on competition.[53] Where such effects are found to be likely, a competition assessment must be performed;
- summaries of competition assessments must be included in public documents supporting legislative or policy proposals;
- under the country's national competition policy, all restrictions of competition must be shown to be warranted and the least restrictive needed to achieve other policy goals and measures. Proposals that harm competition must be outweighed by a wider public interest. If this is not the case, the proposal may only go forward with the approval and signature of the Prime Minister or the Treasurer (*i.e.,* the equivalent to the Minister of Finance) and is subject to a two year review; and,
- competition assessments are subject to review by an independent expert agency that serves as a gatekeeper for Cabinet level consideration of matters.[54]

In Canada, besides the advocacy role of the Commissioner of Competition, there is currently no formalized mechanism through which the potentially significant impacts on competition of proposed laws can be reviewed.

The implementation of a similar approach in Canada can be expected to provide major benefits for government policy. In particular, it would help ensure that competition issues are given systematic and adequate consideration in relation to other policy objectives, that restrictions of competition are kept to the minimum needed to achieve other policy goals and that the competitive effects of proposed market interventions are made public. The adoption of a competition assessment process would likely result in increased productivity and more competitive markets in Canada.

PART IV – Conclusions

Canada's competitive position in the global economy is driven by a broad range of legislative, policy and regulatory initiatives that directly and indirectly affect the competitiveness of all sectors of the Canadian economy. The Panel's mandate provides it with the ability to review the wide range of important issues that are central to Canada's ability to continue as a leader in the global economy.

The Bureau recognizes that there are broader public policy objectives beyond competition that must be considered when governments develop programs and policies. However, to the greatest extent possible, Canada should resist policies that insulate Canadian industries from competition. Rather, barriers to competition should be identified (whether private or government-imposed), assessed and, wherever possible, eliminated. Priority should be given to assessing, in a more rigorous and systematic manner, the impact of existing and proposed legislation and regulation on competition on an ongoing basis and removing regulatory barriers wherever possible.

[1] Department of Finance Canada, *Advantage Canada Building a Strong Economy for Canadians* (2006) at 81, online: http://www.fin.gc.ca/ec2006/pdf/plane.pdf

[2] See, for example, W.W. Lewis, *The Power of Productivity: Wealth, Poverty and the Threat to Global Stability* (University of Chicago Press, 2005).

[3] Centre for the Study of Living Standards *Competitive Intensity as Driver of Innovation and Productivity Growth: A Synthesis of the Literature* (October 4, 2007) Report Prepared by the Centre for the Study of Living Standards for the Competition Bureau.

[4] *Supra* note 1 at 78.

[5] R.S.C. 1985, c. C-34, as amended, section 1.1.

[6] Ontario Institute for Competitiveness and Prosperity, *Institute releases Sixth Working Paper, "Reinventing innovation and commercialization policy in Ontario*." (2004) Press Release, October 7, 2004, online: http://204.15.35.174/index.php/media/press_releases/institute_releases_sixth_working_paper/

[7] Roger Martin and James Milway *Canadians Can be World-beaters, If Only We Were Not So Sheltered*, Embassy, Canada's Foreign Policy Newsweekly, July 19, 2007, p. 1, online: http://www.competeprosper.ca/index.php/about/in_the_news/

[8] *Supra*, note 2 at 13

[9] Organisation for Economic Cooperation and Development (OECD), *Reviews of Regulatory Reform: Canada, Maintaining Leadership Through Innovation* (2002), and OECD Directorate for Financial and Enterprise Affairs Competition Committee, "Canada - Report on Competition Law and Institutions" (2004) DAF/COMP (2005) 4 (18 January 2005).

[10] Canada, House of Commons, Report of the Standing Committee on Industry, Science and Technology, *A Plan to Modernize Canada's Competition Regime* 37th Parliament, 1st Session (April 2002) at 109.

[11] See: *Criminal Antitrust Enforcement*, a joint address by Anne Bingaman and Gary Spratling before the Criminal Antitrust Law and Procedure Workshop, ABA Section of Antitrust Law, Hyatt Regency Hotel, Dallas, Texas on February 23, 1995, online: http://www.usdoj.gov/atr/public/speeches/0103.htm

[12] See: Organisation for Economic Cooperation and Development (OECD), "Hard Core Cartels" (2000) at 5 and 11, online: http://www.oecd.org/dataoecd/39/63/2752129.pdf

[13] J. M. Connor & R. H. Lande, *How High Do Cartels Raise Prices? Implications for Optimal Cartel Fines* (2005) 80 TUL. L. REV. 513 at 540–541; *see also* Comments of the American Bar Association, Section of Antitrust Law, on the Proposed Amendments to the Antitrust Recommendations of the United States Sentencing Guidelines, at 21 (Mar. 2005). For instance, the ABA notes that in *FTC v. Mylan*, the alleged overcharge was 1900 percent to 3200 percent. Had that case been prosecuted criminally, a fine based on a 10 percent overcharge and 10 percent deadweight loss would have been well below the estimated harm. *See FTC v. Mylan Labs., Inc.*, Amended Complaint, at ¶ 29, Civ. No. 1:98CV03114 (D.D.C. Feb. 8, 1999).

[14] The OECD Council concerning Effective Action Against Hard Core Cartels noted that "Member countries should ensure that their competition laws effectively halt and deter hard core cartels." SeeOrganisation for Economic Cooperation and Development (OECD), *Recommendation of the Council concerning Effective Action Against Hard Core Cartels* (1998), online: http://webdomino1.oecd.org/horizontal/oecdacts.nsf/linkto/C(98)35)

[15] *Ibid.*

[16] T. L. Friedman, *The World is Flat, A Brief History of the Twenty-first Century*, (Farrar, Straus and Giroux, 2005) at 181

[17] Federal Trade Commission and US Department of Justice, *Antitrust Guidelines for Collaborations Among Competitors* (April 2000) at 1, online: http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf

[18] European Commission, *Guidelines on the Applicability of Article 81 of the EC Treaty to Horizontal Cooperation*(2001/C3/02), at para. 3, online: http://www.hartpublishing.co.uk/updates/Korah/app-agree.pdf

[19] See, for example, Al Gourley (MacLeod Dixon), *A Report on Canada's Conspiracy Law: 1889-2001 and Beyond* (August 2001) (the "Gourley Report") at footnote 31, where Gourley states: "[t]here is no doubt that Canadian businesses have incurred significant expenditures for legal advice directly attributable to the uncertainty of our conspiracy law. They have suffered from the inability of counsel to give them clear directions on the treatment under our Competition Act of joint ventures, strategic alliances, ancillary restraints and other matters, as well as the cost of retaining counsel to draft and review such agreements so as to ensure that the pro-competitive intentions will be made manifest and obvious to a reader." See also McCarthy Tetrault, *Proposed Amendments to Section 45 of the Competition Act* (August 2001) (the "McCarthy Tetrault Report") at 11-12, where it states: "[o]n the basis of our experience, we are convinced that a large number of pro-competitive arrangements, which otherwise present some antitrust risk, do not proceed because counsel cannot give an unqualified opinion that there is no risk of criminal prosecution." The Gourley Report and the McCarthy Tetreault Report were independent expert reports commissioned by the Bureau in 2001. The Gourley Report is available at http://strategis.ic.gc.ca/pics/ct/gourleyrep.pdf. The McCarthy Tetreault Report is available at http://strategis.ic.gc.ca/pics/ct/tetrault.pdf.

[20] The Supreme Court of Canada has confirmed that in a prosecution under section 45, "counterbalancing efficiency gains … lie … outside of the inquiry". *R. v. Nova Scotia Pharmaceuticals Society*, [1992] 2 S.C.R. 606 at 647.

[21] J.T. Kennish, *The Treatment of Strategic Alliances under the Competition Act* (Annual Conference of the Canadian Bar Association, Montreal, 30 September 1994 _[unpublished] at 19, cited in McCarthy Tetrault, "Proposed Amendments to Section 45 of the Competition Act" (August 2001) at 11, footnote 28.

[22] *Supra* note 10 at 11 and 61.

[23] The only other jurisdiction with an explicit efficiencies exception or defence (a mechanism whereby the promise of efficiency gains can be put forward as cause to disregard the anti-competitive effects of a merger) is South Africa. Most other jurisdictions consider efficiencies as one factor among many in evaluating mergers. In these countries, increased efficiency can be put forward as one factor favouring a merger but not as an overruling objection to all other factors. Such jurisdictions include the European Union, the United States, Japan, Mexico and Norway. Some jurisdictions have a hybrid approach. Australia, for example, treats efficiency gains as a factor in evaluating mergers. Australian law also provides, however, for granting immunity to mergers that are found to generate a net public benefit. In the United Kingdom, efficiency gains are treated as a factor in merger review. There is also provision to assess benefits to consumers separately and this can operate as an efficiencies defence. Germany also has a unique special authorization process that allows mergers that benefit the economy as a whole. This process is reserved for exceptional cases based on non-competition grounds. See: Competition Bureau, *Report of the Advisory Panel on Efficiencies* (August 2005) at 44-48, [hereinafter *Report of the Adivsory Panel*] online: http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/01954e.html.

[24] Competition Bureau, *The Merger Enforcement Guidelines* (September 2004), online: http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/vwapj/2004%20MEGs.Final.pdf/$file/2004%20MEGs.Final.pdf

[25] Section 93 of the *Competition Act* describes the types of factors that the Bureau considers when reviewing a merger. These factors include such things as the importance of foreign products or competitors in Canada; whether a business or part of the business is failing; barriers to entry into a market; the extent to which effective competition remains in the market; whether the merger results in the removal of a vigorous and effective competitor; and, the nature and extent of change and innovation in a relevant market.

[26] The test used by the Bureau is whether a substantial lessening or prevention of competition will result from the merger. This refers to the ability of the merged parties to exercise market power, which is generally viewed as the ability to profitably raise price or otherwise restrict competition without fear of competitive reaction. The test extends beyond pricing and can include such non-monetary aspects of competition as restricting output, quality, variety, service, advertising, innovation and other dimensions of competition. Therefore, raising price may also mean reducing these other non-monetary dimensions of competition.

[27] In general, the categories of efficiencies that will be considered include allocative efficiency (the degree to which resources available to society are allocated to their most valuable use); technical (productive) efficiency (the creation of a given volume of output at the lowest possible resource cost); and dynamic efficiency (the optimal introduction of new products and production processes over time).

[28] Canada, Economic Council of Canada, *Interim Report on Competition Policy* (Ottawa: Queen's Printer, 1969).

[29] *Canada (The Commissioner of Competition) v. Superior Propane Inc.*, [2003] 3 F.C. 529 (C.A.), aff'g (2002), 18 C.P.R. (4th) 417 (Comp. Trib.) (redetermination decision following [2001] 3 F.C. 185 (C.A.), rev'g (2000), 7 C.P.R. (4th) 385 (Comp. Trib.)).

[30] The two most common ones are the 'consumer surplus' standard and the 'total surplus' standard. Under the consumer surplus standard, a merger that is expected to increase prices would only be approved if the resource savings resulting from the merger were larger than the deadweight loss to the economy plus the transfer of income from consumers to producers resulting from the price increase. The consumer surplus standard treats transfers of income from consumers to producers as an anti-competitive effect of the merger. Under the total surplus standard, a merger that is expected to increase prices would be approved if the resource savings resulting from the merger were larger than the deadweight loss to the economy. Under this standard, transfers of income from consumers to producers are considered neutral, i.e., they are not considered as an anti-competitive effect of the merger. The balancing weights approach can be thought of as attempting to bridge the consumer surplus and total surplus standards. Under this approach, a merger would be allowed on a similar basis to using a total surplus standard. However, some portion of the income transfer between consumers and producers may also have to be offset based on an assessment of the marginal utilities of income across affected groups. For example, if an anti-competitive merger affects a lower income group of consumers who have few or no alternatives, that harm to consumers would be given greater weight in the trade-off analysis. Part 8 of the Bureau's 2004 Merger Enforcement Guidelines contains a detailed discussion of the Bureau's approach to the section 96 efficiency exception. *Supra* note 24 at 31-38.

[31]The efficiencies defence was first invoked in *Canada (Director of Investigation and Research) v. Hillsdown Holdings (Canada) Ltd.* (1992). In this case, the defence was moot, since the Competition Tribunal found that the merger did not substantially lessen or prevent competition. The defence has also been mentioned (but not applied) in four other Tribunal cases, namely: *Canada (Director of Investigation and Research) v. Air Canada* (1988)(the Tribunal observed that section 96 had to be interpreted in light of section 1.1); *Canada (Director of Investigation and Research) v. Imperial Oil Limited* (1989) (the Tribunal commented on the quantum of claimed efficiency gains); *Director of Investigation and Research v. Canadian Pacific Ltd.* (1997) (request for particulars relating to efficiencies); and, *Commissioner of Competition v. Canadian Waste Services Holdings Inc.* (2001) (efficiency arguments rejected as speculative at the remedy stage). See Competition Bureau, *Treatment of Efficiencies in the Competition Act: Consultation Paper* (September 2004) at 2, online: http://www.ic.gc.ca/epic/site/cb-bc.nsf/en/01602e.html. See also, *Report of the Advisory Panel, supra* note 23 at 21, footnote 3, online: http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/01954e.html.

[32] For instance, while the Advisory Panel on Efficiencies supported maintenance of the efficiencies defence, it indicated that it "is not satisfied with the current standard, resulting from the Superior Propane case, for weighing efficiency gains against anti-competitive effects. [...] [M]any view this standard as cumbersome and unpredictable...[a]pplying the balancing weights standard is highly complex, since it requires the Competition Tribunal and the Competition Bureau to determine whether there are any adverse effects of the redistribution of wealth resulting from a merger." Ultimately, the Advisory Panel suggested that "there should be a clear, predictable and politically acceptable standard that the Tribunal applies when weighing efficiency gains against anti-competitive effects." See *Report of the Advisory Panel, supra* note 23 at 54.

[33] M. Porter, *The Competitive Advantage of Nations* (MacMillan Press, 1990) at 662.

[34] *Supra* note 2 at 103.

[35] Remarks of Deborah Platt Majoras, U.S. Federal Trade Commission Chairman, *National Champions: I Don't Even Think it Sounds Good* Munich, Germany, March 26, 2007 Online: http://www.ftc.gov/speeches/majoras/070326munich.pdf

[36] Organization of Economic Cooperation and Development (OECD), *OECD's FDI Regulatory Restrictiveness Index: Revision and Extension to More Economies*, OECD Working Papers on International Investment, Paris, 2006, online at: http://www.oecd.org/dataoecd/4/36/37818075.pdf

[37] Organization of Economic Cooperation and Development (OECD), *Economic Policy Reforms Going for Growth 2007*, Paris, 2007, p. 144, available for purchase online at: http://www.oecd.org/document/8/0,3343,en_2649_37443_37882632_1_1_1_37443,00.html

[38] *Ibid,* at 147.

[39] *Ibid,* at 150.

[40] See for example, the Competition Bureau's Technical Backgrounder - *Acquisition of Microcell Telecommunications Inc. by Rogers Wireless Communications Inc.*, 2005, online: http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/00257e.html; Reasons and Order of the Competition Tribunal, D.I.R. v. Air Canada (1993), 49 C.P.R. (3d) 7 (C.T.); Letter from the Commissioner to the Royal Bank and the Bank of Montreal and the letter from the Commissioner to the CIBC and the TD Bank regarding their proposed mergers, December, 1998, online: http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/01600e.html.

[41] Generally, the Bureau's advocacy approach to foreign ownership restrictions has revolved around the following questions:

1. What was the original public policy objective for restricting foreign investment in the first place?
2. Is the rationale still relevant?
3. If so, what is the cost / benefit of maintaining such restrictions?
4. Are there alternative means of attaining the public policy objective, such as regulation that, for example, are less restrictive of competition?

See, for example, the Bureau's Submission to the Canada Transportation Act Review Panel, November, 2001and the Commissioner's letter to The Honourable David Collenette regarding the potential restructuring of the Canadian airline industry, online: http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/01885e.html

[42] See Bureau's Submission to the Canada Transportation Act Review Panel, November, 2001.

[43] The Telecommunications Policy Review Panel, *Telecommunications Policy Review Panel, Final Report*, (Ottawa: Publishing and Depository Services Public Works and Government Services Canada, 2006) at 11-25. Online: http://www.telecomreview.ca/epic/site/tprp-gecrt.nsf/en/rx00073e.html

[44] *Ibid.* at 11-25.

[45] *Supra*, note 37 at 8. Online: http://www.oecd.org/dataoecd/48/22/38088884.pdf

[46] OECD Reviews of Regulatory Reform, "Regulatory reform in Canada from transition to new regulation challenges, Regulatory Reform in the Telecommunications Industry" 2002, at 18. Online: http://www.oecd.org/dataoecd/48/28/1960562.pdf

[47] *Ibid.* at 18.

[48] International Monetary Fund, *Canada—2008 Article IV Consultation, Preliminary Conclusions of the IMF Mission* December 17, 2007, Online: http://www.imf.org/external/np/ms/2007/121707.htm

[49] Ulf Böge, Speech to the 2004 Competition Forum in Seoul, Korea.

[50] Australia's experience is particularly noteworthy. In the mid-1990s, Australia's three levels of government agreed to a program of competition policy reform called the National Competition Policy which resulted in comprehensive pro-competition reforms at the national and state levels, among other things identifying 1,800 laws with a potential impact on competition in various sectors to review and then either amend or eliminate. In just a few years, Australia substantially improved its economic performance, becoming one of the OECD's top-performing economies with an average growth rate of more than three percent since 2000 and the lowest unemployment rates since the 1970s.

[51] See Productivity Commission 2005, *Review of National Competition Policy Reforms*, Report No. 33, Canberra, Online: http://www.pc.gov.au/__data/assets/pdf_file/0016/46033/ncp.pdf.

[52] Productivity Commission 2006, Potential Benefits of the National Reform Agenda, Report to the Council of Australian Governments, Canberra. http://www.pc.gov.au/research/commissionresearch/nationalreformagenda

[53] To detect competition issues, departments and agencies are required to consider proposals in relation to 3 filter questions that form part of the Toolkit for Competition Assessment developed with the OECD based on various countries' experience in conducting competition assessments.

[54] The Commission also considers proposals in relation other policy development criteria determined by the Australian government.