

Unclassified

DAF/COMP/GF/WD(2009)32

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

13-Feb-2009

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Global Forum on Competition

COMPETITION POLICY, INDUSTRIAL POLICY AND NATIONAL CHAMPIONS

Contribution from Canada

-- Session I --

This contribution is submitted by Canada under session I of the Global Forum on Competition to be held on 19 and 20 February 2009.

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JT03259637

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THE ROLE OF COMPETITION POLICY IN THE CONTEXT OF A NATIONAL INDUSTRIAL POLICY

--Canada--

1. This paper provides an overview of Canada's competition and industrial policies as they could be said to relate to the debate on national champions. In particular, we consider the Canadian merger review analytical framework, and its interface with the public debate regarding domestic mergers. We also describe some of Canada's current industrial policies with respect to investment in certain Canadian businesses. Specifically, we discuss the current rules governing ownership restrictions in the airline and telecommunication industries.

National Champions

2. As elsewhere, Canadians want to see their companies achieve success on the world stage and become global leaders. 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 domestic consumers and businesses. Competition drives innovation, investment and, ultimately, the production of road-tested companies ready to compete in a rough and tumble world. This was management expert Michael Porter's observation many years ago and it remains valid today: "creating a dominant domestic competitor rarely results in international competitive advantage. Companies that do not face significant competition at home are less likely to succeed internationally."¹

3. Furthermore, as the Competition Bureau (the "Bureau") has observed:

Domestic monopolies or near-monopolies, meanwhile, harm not only the Canadian economy, but also individual businesses and consumers in Canada, who may be forced to pay higher prices for the goods and services of companies not facing domestic competition.²

The OECD's Assessment of Certain Industrial Policies and Ownership Restrictions in Canada

4. As in most countries, there is, in Canada, legislation that restricts ownership or investment in certain industries. In some cases, legislation places direct restrictions on foreign ownership to ensure that such businesses do not fall under the control of non-Canadians. In other cases, the restrictions limit the degree to which any investor may hold more than a prescribed percentage of the business in question.

5. In 2006 and 2007, the OECD undertook both country-specific studies and country-comparative studies³ assessing the openness of various economies to foreign direct investment. Among the conclusions of these studies was an opinion that the economic consequences of Canada's sector-specific policies

¹ See, for example, M. Porter, *The Competitive Advantage of Nations* (MacMillan Press, 1990) at 662.

² Canadian world-beaters? Not without competition, *Globe & Mail*, page B2, Sheridan Scott, January 21, 2008

³ See Organisation 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. See also Organisation 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>

restricting foreign investment have had significant negative implications for the productivity of the industry and the economic performance of the economy as a whole.

6. The OECD, in its studies, recognises 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 practices and state-of-the-art technologies. One conclusion of the OECD's study is that Canada could have increased its annual productivity growth rate between 1995-2003 by three quarters of one percent annually had it amended its regulations that restrained competition to conform to the least restrictive regulations of other OECD countries⁴. With respect to FDI restrictions, according to the OECD, 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 growth⁵.

Canada's Study of Competition and Foreign Direct Investment Policies

7. In response to the challenges Canada faces with respect to improving its overall competitive performance, in June, 2007 the federal government appointed a task force of leading business experts, the Competition Policy Review Panel, with the mandate to review Canada's competition policies and its framework for foreign investment policy and to make recommendations to the Government of Canada for making Canada more competitive in an increasingly global marketplace⁶. As part of its work, the Panel considered whether Canada's policies regarding merger review act as an impediment to the emergence of so-called Canadian national champions. As part of its public consultation process, third parties were invited to make submissions regarding this and a number of other issues affecting Canada's competitive performance internationally.

8. In their submissions, some parties raised specific concerns regarding the manner in which Canada applies the merger provisions in the case of domestic mergers, taking the view that the Bureau is impeding the growth of Canadian companies⁷.

9. In its final report, the Panel fully endorsed the benefits of competition and competitive markets and rejected government policies that legislate or otherwise protect Canadian control:

While we have many global success stories, Canada has also witnessed the loss of some of our most iconic firms. Our Panel was formed at a time when the debate over the hollowing out of Canada was at its peak. Indeed, we ourselves share the feelings of disappointment and loss when a notable Canadian firm is acquired by a foreign company.

In our consultation paper, we asked Canadians whether domestic control and ownership was important to Canada's economic prospects and our ability to create opportunity for Canadians.

⁴ Ibid, OECD's FDI Regulatory Restrictiveness Index: Revision and Extension to More Economies, p. 147

⁵ Ibid, OECD's FDI Regulatory Restrictiveness Index: Revision and Extension to More Economies p. 150

⁶ The Competition Policy Review Panel released a consultation paper in October 2007 and issued its final report, entitled "Compete to Win", in June 2008. The Panel's work is available through its website: <http://www.ic.gc.ca/eic/site/cprp-gepmc.nsf/eng/home>

⁷ See, for example, From Common Sense to Bold Ambition, Moving Canada Forward on the Global Stage, Canadian Council of Chief Executives, Submission to the Competition Policy Review Panel, January 2008, p. 17. "Even as the process of consolidation has accelerated globally, the application of Canadian competition policy has appeared to reflect a bias against domestic mergers and acquisitions. The inevitable result has been a series of foreign takeovers."

For our part, we believe that competitive, Canadian-based firms are important. We are steadfast in our belief that Canadian ownership of our firms is valuable. But we do not believe that the best way to ensure Canadian control is by legislating it or imposing other protections.

We believe that the best way to ensure we create and sustain new Canadian champions is by ensuring that our policies, laws and regulations are the right ones to facilitate growth. Given the right conditions, the dynamism, talent and ambition of Canadians will rise to the fore. We will have more Canadian firms competing globally. And winning globally⁸.

10. With regards to the Competition Act specifically, the Panel observed that it “is recognised internationally as both modern and flexible and, in the Panel’s view, it does not constitute an impediment to Canada’s overall competitiveness.”⁹ Addressing the specific issue of merger review, the Panel noted:

Merger review is a key activity conducted by the Competition Bureau that has a substantial impact on the competitiveness and scale of Canadian industry. Most transactions are reviewed on a timely basis as posing no competition concerns and very few transactions require merger remedies.

Overall, the Panel is satisfied that substantive merger provisions are generally modern, compatible with the laws of our major trading partners and appropriate for the Canadian economy.¹⁰

11. Included in the Panel’s recommendations were a number directed towards improving certain outmoded or ineffective provisions of the Competition Act. In the Fall of 2008, the Government of Canada announced its intention to proceed with legislation to modernise Canada’s competition and investment laws and implement many of the recommendations of the Competition Policy Review Panel. In legislation tabled in the House of Commons on February 6, 2009, the Government introduced a package of amendments to both the Competition Act and the Investment Canada Act.¹¹

The Interface between Competition Policy and National Industrial Policy

12. As noted above, during the Panel’s review, much of the debate about the ability of Canadian companies to emerge and succeed internationally centred on alleged deficiencies in Canada’s merger review regime. Of course, the Canadian Competition Act does not impede the emergence of national champions through superior competitive performance. With respect to merger transactions in Canada, the Bureau has a statutory obligation to review proposed merger transactions to ensure that the merger does not result in a substantial lessening or prevention of competition.

13. Like the antitrust merger review regimes of its major trading partners, Canada’s regime does not take the nationality of the merging parties into account. Rather, it examines whether Canadian consumers and businesses will continue to benefit from a competitive market if the merger is completed. This includes asking such questions as “Where can Canadian consumers or businesses turn in order to buy competing products?” and “Will Canadian consumers and businesses continue to benefit from a

⁸ Id Supranote 6, Compete to Win, p. 104.

⁹ Id Supranote 6, p. 53

¹⁰ Id Supranote 6, pp. 55-56

¹¹ Bill C-10, An Act to implement certain provisions of the budget tabled in Parliament on January 27, 2009 and related fiscal measures,
<http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=3656090&Language=e&Mode=1>

competitive market following the merger?” This is in contrast to the view that the merging companies often bring to the table, which naturally focuses on their immediate business interests; namely, how the merger will help the company develop and expand the markets for their products. That can include the enhancement of an ability to exercise market power - what the Bureau must ensure is not substantial.

14. As a result of the approach required by statute, a more thorough review will typically be necessary whenever a merger involves two parties, either foreign or domestic, that supply the same Canadian market(s), particularly if the market(s) are highly concentrated and difficult for new competitors to enter. The reality is that, because financial investors or foreign competitors entering Canadian markets may raise no competition issues (owing to the fact they do not participate in the target’s market(s) pre-merger), they can often benefit from an expedited review. The same is true for Canadian firms competing for an acquisition with foreign firms who may be more concentrated in the particular local markets affected. Finally, where the markets are continental or worldwide, rarely do any proposed mergers between even two very significant Canadian players raise concerns.

15. In the submissions to the Panel, there were two principal criticisms regarding the Bureau’s merger review process with respect to the issue of the emergence of national champions. The first was that geographic markets are defined too narrowly, given the global nature of the marketplace. The second was that the Bureau does not understand the need of merging parties to achieve the size necessary to compete internationally. In response, it is important to understand the Bureau’s role as set out in the Competition Act; namely, to ensure that Canadian businesses and consumers are able to benefit from a competitive marketplace, whether they buy from local, national or international companies.

i) The Relevant Geographic Markets Criticism:

Turning to the first criticism; namely that the Bureau puts some parties (particularly domestically-based merging parties) at a disadvantage because of its approach to defining geographic markets.

In this regard, the Bureau is diligent in approaching the issue of geographic market definition from a disciplined analytical perspective. To suggest the Bureau is insensitive to the fact many markets are broader than Canada ignores the facts. There are many examples where a merger has been cleared based on a geographic market that is broader than Canada, including mergers in the mining, steel, upstream oil and gas, and certain chemical industries. For example, in its review of Mittal Steel’s acquisition of Arcelor SA, the Bureau concluded that the market is larger than Canada – in that case, North American in scope. It is a question of evidence from the market in the specific case as to where, from an antitrust perspective, the contours of the geographic market should be drawn.

Similarly, as part of its assessment, Canada always accounts for the role of foreign competitors. For example, in the Bureau’s analysis of the Maytag/Whirlpool merger, foreign competition was an important and offsetting factor that would limit the ability of manufacturers to increase prices for Canadian consumers in an anticompetitive way. What the critics ignore is that, while a merger may involve firms that operate globally, it may raise concerns in local markets within Canada. For example, local upstream markets may raise issues notwithstanding the downstream market may be continental or even worldwide. A recent example where markets were local – in the sense of provincial - was the acquisition of ICI by Akzo Nobel. In that case, both the merging firms supplied paint and other products in various jurisdictions worldwide. However, owing to, among other things, strong local preferences and barriers resulting from loyalty programs, the Bureau was concerned that the merger would substantially lessen competition in Quebec, where the parties were two of the leading suppliers of paint. The remedy was confined to preserving

competition in Quebec by requiring the merging parties to divest of certain brands sold in Quebec.

ii) Scale Necessary to Compete – The Efficiency Criticism:

With respect to the second criticism, that the Bureau does not understand the need for parties to achieve the scale necessary to compete in the global marketplace, there are two principal responses. First, preferring local Canadian companies by allowing them to consolidate irrespective of the effect on Canadian consumers is contrary to the Bureau's mandate; in any event, the evidence is clear that companies not forced to compete at home do not thrive in global markets. Second, the Canadian Competition Act has an explicit statutory exception for transactions that are likely to generate gains in efficiency. 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. As such, Canada's merger provisions account for the positive effects of efficiencies arising out of such mergers.^{12 13} In this regard, Canada currently has one of the most receptive regimes internationally for the consideration of efficiency claims in merger review. Consequently, even in the small number of cases where it is found that the merger will lessen competition substantially, it is always open to the parties to argue that an anti-competitive transaction should be cleared in light of the efficiencies it will bring to the Canadian economy.

It is worth noting in this regard that the number of mergers that the Bureau challenges is very small. Moreover, the reasons the Bureau does not challenge the vast majority of mergers is owing to factors other than the efficiencies exception. Specifically, the Bureau concludes, following a rigorous and economic analysis, that no substantial lessening or prevention of competition is likely to result from the merger. This can be owing to, among other considerations, the fact that sufficient competition will remain in affected markets following the merger, or that low barriers to entry allow for sufficient potential competition, either of which will prevent the exercise of market power. Accordingly, while there is an explicit statutory efficiencies provision, to date few firms have needed to take advantage of this provision.¹⁴

¹² 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.

¹³ In general, the categories of efficiencies that will be considered include 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).

¹⁴ The Superior Propane case in 2003 (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.))) is the only case in which the Competition Tribunal and the courts have applied the efficiencies exception in the Competition Act. The efficiencies exception was first invoked in Canada (Director of Investigation and Research) v. Hillsdown Holdings (Canada) Ltd. (1992). In this case, the exception was moot, since the Competition Tribunal found that the merger did not substantially lessen or prevent competition. The exception 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.

16. In its submission to the Competition Policy Review Panel, the Bureau recommended that Canada's position regarding the interface between merger review and the evolution of national champions be as follows:

- The efficiencies exception in the Competition Act provides a mechanism through which firms can grow to an efficient scale, even at the expense of competition in Canada. This approach requires that firms that are proposing an otherwise harmful merger bring forward credible and convincing evidence of the anticipated efficiency gains, rather than relying solely on arguments.
- Although the existing Canadian 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.
- In contrast, the introduction of a broad-based public interest test as part of any merger review process risks the possibility that decisions will not be made with proper regard to evidence or sound economic principles. The complexity inherent in public interest analysis can run the risk of greater delay and could 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 for any government is to adopt 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 other domestic businesses 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 to sacrifice the global competitiveness of any other domestic industry that rely upon 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). Furthermore, the weighing of this evidence should be based on a standard that requires public benefits to clearly outweigh any potential harm to competition that may result from the proposed transaction.

Specific Sectoral Restrictions in Canada

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

18. When undertaking any competitive effects analysis under the Act, among the factors the Bureau considers is the presence of barriers to entry into a market for prospective competitors. Barriers can take

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 p. 21, footnote 3, online: http://www.competitionbureau.gc.ca/epic/site/cb_bc.nsf/en/01954e.html.

many forms, ranging from regulatory restrictions, including sectoral restrictions, to sunk costs that cannot be recovered. As was noted in the Competition Policy Review Panel's final report, sectoral investment regimes and ownership restrictions constitute barriers to entry to many markets in Canada.¹⁵

Airlines

19. The Canada Transportation Act¹⁶ provides that each Canadian airline must be at least 75% owned or otherwise controlled by Canadians, and that only a Canadian may obtain a licence to operate. "Canadian" is defined as:

a Canadian citizen or a permanent resident within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act, a government in Canada or an agent of such a government or a corporation or other entity that is incorporated or formed under the laws of Canada or a province, that is controlled in fact by Canadians and of which at least seventy-five per cent, or such lesser percentage as the Governor in Council may by regulation specify, of the voting interests are owned and controlled by Canadians.¹⁷

20. In addition, the Air Canada Public Participation Act¹⁸ requires that Air Canada's articles of continuance:

contain provisions imposing constraints on the issue, transfer and ownership, including joint ownership, of voting shares of the Corporation to prevent non-residents from holding, beneficially owning or controlling, directly or indirectly, otherwise than by way of security only, in the aggregate voting shares to which are attached more than 25%, or any higher percentage that the Governor in Council may by regulation specify, of the votes that may ordinarily be cast to elect directors of the Corporation, other than votes that may be so cast by or on behalf of the Minister.¹⁹

21. In Canada, the presence of foreign ownership restrictions was a significant factor in the restructuring of the Canadian airline industry in 1999. As a result of these restrictions, Air Canada emerged as the only viable acquirer of Canadian Airlines and became the largest domestic carrier in the immediate period following the merger, although it subsequently sought bankruptcy protection to restructure its operations. Nonetheless, the restrictions have not prevented the emergence of WestJet as a second national carrier.

22. As the Bureau noted in its submission to the Competition Policy Review Panel, it supports a number of measures that would result in the reduction or elimination of foreign ownership restrictions on Canadian air carriers²⁰. There does not appear to be any compelling economic reason why the air transportation sector should continue to have such restrictions. The Bureau recognises that the elimination of all ownership restrictions may not be feasible under current bilateral air agreements that require

¹⁵ See, for example, the Panel's comments noted above, *supra*note 8.

¹⁶ S.C. 1996, c. 10

¹⁷ *Id.*, s. 55(1).

¹⁸ R.S.C. 1985, c. C-35 (4th Supp.).

¹⁹ *Idem*, s. 6(1)(b).

²⁰ Submission to the Competition Policy Review Panel by the Commissioner of Competition, January 11, 2008, p.13. [http://www.ic.gc.ca/eic/site/cprp-gepmc.nsf/vwapj/commissioner_competition_bureau.pdf/\\$FILE/commissioner_competition_bureau.pdf](http://www.ic.gc.ca/eic/site/cprp-gepmc.nsf/vwapj/commissioner_competition_bureau.pdf/$FILE/commissioner_competition_bureau.pdf)

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 liberalised ownership rules.

23. In respect of domestic routes, the Bureau has also voiced its support for permitting the entry of 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.

24. 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 such as 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.

25. As part of its review, the Competition Policy Review Panel commented on the issues surrounding ownership restrictions in the airline industry and recommended that the Minister of Transport increase the limit on foreign ownership to 49% of voting equity, on a reciprocal basis, through bilateral negotiations with other countries. The Panel also recommended that the Minister indicate whether he would be willing to accept foreign-owned Canadian-incorporated domestic air carriers by December, 2009. The Panel urged the Minister to complete an Open Skies agreement with the European Union as soon as possible.²¹ In that regard, Canada recently concluded negotiations with the European Union (EU) on a comprehensive air transport agreement that will open access to all 27 Member States for Canadian carriers and all points in Canada for EU carriers. We anticipate that consumers and air dependant industries will benefit from the additional flexibility provided by this new agreement.

Telecommunications

26. Canada continues to have foreign ownership restrictions on domestic telecommunications undertakings. In that sector, non-Canadians cannot directly own more than 20% of a Canadian telecommunications carrier and not more than 33.3% of a holding company that owns a Canadian carrier. As a result, the combined limit on foreign direct and indirect investment in a Canadian telecommunications carrier is capped at 46.7%. The Telecommunications Act²² provides that only a Canadian carrier that is a Canadian-owned and controlled corporation incorporated or continued under the laws of Canada or a province may own or operate a transmission facility to provide telecommunications services to the public.²³ A corporation is Canadian-owned and controlled if: (i) not less than 80% of the members of its board of directors are individual Canadians; (ii) Canadians beneficially own, directly or indirectly, in the aggregate and otherwise than by way of security, not less than 80% of the corporation’s issued and outstanding voting shares; and (iii) the corporation is not otherwise controlled by persons that are not

²¹ Id Supranote 6, Recommendations 7, 8 & 9, p. 42

²² S.C. 1993, c. 38.

²³ Id., s. 16(1).

Canadians²⁴. A Canadian is defined in the Canadian Telecommunications Common Carrier Ownership and Control Regulations²⁵ as follows:

- a Canadian citizen or permanent resident;
- a corporation without share capital where a majority of its directors or officers are appointed or designated by a federal or provincial government;
- a corporation in which Canadians beneficially own and control, in the aggregate and otherwise than by way of security, not less than two-thirds of the issued and outstanding voting shares, and which is not otherwise controlled by non-Canadians;
- a trust in which Canadians have not less than two-thirds of the beneficial interest and of which a majority of the trustees are Canadian; and
- a partnership in which Canadian partners beneficially own and control not less than two third of the beneficial interest and which is not otherwise controlled by non-Canadians.²⁶

27. In 2006, an expert panel struck by the government to study Canada's telecommunications policies and regulatory framework, the Telecommunications Policy Review Panel (the TPRP), recommended that restrictions on foreign investment in telecommunications service providers be liberalised²⁷. 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 telecommunications²⁸ and has argued the negative effects of foreign investment restrictions on the cost of capital and on competition more generally.

28. In the Bureau's view, foreign ownership restrictions on facilities-based telecommunications carriers are no longer necessary to harmonise 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 realisation 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.

29. 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, it is the Bureau's view that 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

²⁴ Id., s. 16(3).

²⁵ SOR/94-667.

²⁶ Id., s. 2.

²⁷ 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>. The TPRP was formed in April, 2005 with the mandate to conduct a review of Canada's telecommunications policy and regulatory framework and made recommendations on how to make it a model of 21st century regulation. It issued its Final Report in March, 2006.

²⁸ Id. supranote 6, p. 8.

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.

30. The Competition Policy Review Panel adopted the earlier recommendation from the TPRP noted above, namely, that the federal government should adopt a two-phased approach to foreign participation in the telecommunications and broadcast industry. In the first phase, according to the Panel recommendation, the Minister of Industry should amend the Telecommunications Act to allow foreign companies to establish a new telecommunications business in Canada or to acquire an existing telecommunications company with a market share of up to 10 percent of the telecommunications market in Canada. In the second phase, following a review of broadcasting and cultural policies including foreign investment, telecommunications and broadcasting foreign investment restrictions should be liberalised in a manner that is competitively neutral for telecommunications and broadcasting companies.²⁹

Conclusion

31. Champion companies should emerge as the result of their superior competitive performance and market forces. There are significant risks of picking and promoting particular firms 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. Moreover, protecting domestic firms from foreign competition or other preferential treatment is harmful to the productivity of the domestic economy and the competitiveness of Canadian industries that, in many cases, depend on these firms for essential inputs into their businesses. In that regard, the Government of Canada has stated that “[i]n Canada, we must ensure that we have strong and effective regulations to protect people and enhance our quality of life, while minimising regulations that are unnecessary or that put Canada at a significant competitive disadvantage.”³⁰

²⁹ Id. supranote 6, Recommendation 11 at p. 49.

³⁰ Department of Finance Canada, *Advantage Canada Building a Strong Economy for Canadians* (2006) at 78, online: <http://www.fin.gc.ca/ec2006/pdf/plane.pdf>