Intelligence MEMOS

From: George N. Addy and Calvin Goldman

To: Canadian Businesses

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Re: **Four flaws in Ottawa's New Competition Framework**

If you own or run a business and if you are concerned about your commercially sensitive information you need to speak up now. The federal government's new *Competition Act* amendments could result in that information being disclosed to competitors. And you'll have no say in the process.

Tucked in among the amendments that Bill C-56 inserts into the *Excise Tax Act* and the *Competition Act* are provisions dealing with market studies. The current Commissioner of Competition has been lobbying for unilateral powers to initiate and compel production of materials to the Bureau for purposes of undertaking market studies. Thankfully, the government has not provided such unilateral powers. Market studies will only be undertaken at the direction of the Minister of Innovation, Science and Economic Development.

But at least four critical flaws remain in the process being advanced: First, the Commissioner has sole authority to determine what information provided to the Bureau will be considered commercially confidential. Second, the Commissioner may share any information obtained, including commercially sensitive material, with other competition authorities, including foreign competition authorities if he thinks it is necessary for the administration or enforcement of the *Competition Act*. Third, businesses targeted by court orders requiring production of information, induding commercially insensitive information, have no right to participate in the court proceeding seeking the order, which will typically order the production of significant volumes of information at a significant cost to the target firm. Fourth, there is no appeal process envisioned for someone who has provided commercially sensitive information to challenge its sharing.

The issue is not theoretical.

Consider the following: A Canadian firm is competing in a market where one of its competitors is a state-owned enterprise. The Canadian firm – with no right to participate in the proceedings – has been ordered to produce commercially sensitive material to the Competition Bureau and its concerns about confidentiality have been dismissed by the Commissioner. During the market study or subsequently, the Commissioner, relying on his view of what is necessary for "the administration and enforcement" of the *Act*, unilaterally decides to share the material with the competition agency of that foreign country. How likely do you think it is that the information won't be passed on to the state-owned competitor? And make no mistake, many countries like Russia, China, France, Singapore, to name but a few, have competition agencies as well as have state-owned firms competing in the marketplace. Interestingly, and probably for exactly this reason, most agencies around the world are not allowed to share information with foreign agencies without a waiver from the party providing the information.

By way of background a Commissioner wears two hats. When acting as an enforcer the Commissioner exercises independent discretion in the enforcement and administration of the *Competition Act*. In other words, if the Commissioner suspects that the cartel provisions, misleading advertising provisions or other provisions of the *Act* prohibiting specified conduct have been breached, he has the authority to initiate an investigation and launch appropriate criminal or civil proceedings. However, when undertaking market studies the Commissioner serves as a resource to the government and policy makers by bringing a competition policy perspective to the debate. In that capacity the Commissioner is not exercising independent enforcement authority but is rather serving as an expert resource available to government and those considering various policy or legislative initiatives.

A "market study" is a review undertaken by the Competition Bureau to learn more about a particular sector. It is not undertaken in the context of any specific enforcement action. It's part of the Commissioner's competition policy advisory role. To date, market studies undertaken have relied on voluntary production of information from firms and relevant parties. Bill C-56 introduces a new section 10.1 to the *Competition Act* making participation mandatory. The minister, currently François-Philippe Champagne, can direct the Commissioner to undertake a market study. The minister sets out a framework after consulting with the Commissioner and if the minister directs the initiation of a market study, terms of reference are prepared and made available for public comment. Final terms of reference, once approved, are published and made widely available. Once those are published the Commissioner is obliged to complete and deliver the study within 18 months unless the Minister grants a three-month extension. Strangely, for some unexplainable reason, after the Commissioner has been working for 18 to 21 months, parties who have provided information get only three days from when the draft report is sent to them (not received by them) to comment before its public release.

Ministerial direction on market studies is a good thing. It ensures transparency and accountability. What is missing in Bill C-56 is transparency and accountability for what the Commissioner does once the study is initiated. Affected parties have no opportunity to challenge the breadth of the information being requested, that hearing is *ex parte* – "without the other party" present. Those affected have no right to meaningfully participate in the determination of what is commercially sensitive information. And they have no right to meaningfully participate in any determination of what information can be shared by the Competition Bureau.

The law needs to stipulate that parties who will be the targets of a mandatory order have the right to fully participate at the hearing of the Commissioner's application. No *ex parte* applications. Potential targets need to be there. They need to have the right to speak to all relevant issues including the scope of information being sought, timing for remittance of information, as well as designation and use of commercially sensitive information. And the information provided to the Commissioner should not be disclosed to foreign agencies without a waiver from the information provider.

Businesses of all sizes need to make their objections known quickly and firmly.

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