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## Bring on the Competition: Reforming Canada's *Competition Act*

### Twenty-second Report of the C.D. Howe Institute Competition Policy Council

The members of the C.D. Howe Institute's Competition Policy Council (the "Council") support the February 7, 2022, statement by the Minister of Innovation, Science and Industry, François-Philippe Champagne, (the "Minister") that "competition in the economy is a driving force behind innovation, efficiency and adaptability." The Council commends the Minister for his commitment to "*carefully evaluate potential ways*" to improve the operation of the *Competition Act* (the "Act") in recognition of the Act's critical role in promoting dynamic and fair markets. The Council also supports the government's intention articulated in Budget 2022 to consult broadly on the role and functioning of the Act and its enforcement regime. However, the Council cautions that rushed amendments to the Act without careful consideration and thoughtful debate could have unintended consequences for innovation, efficiency, and adaptability in the Canadian economy. Even perceived shortcomings in the Act may not easily be addressed without unintended consequences.

Any review of the Act should include a wide range of views by involving representatives of the legal and business communities, academics and economists, consumer advocates, labour, and other emerging voices and critical stakeholders.

The Council will convene a series of meetings over the coming months to support the Minister's efforts to carefully evaluate potential improvements to the Act. These meetings will consider ideas canvassed, and recommendations made, in response to the consultation initiated by the Honourable Howard Wetston, a Council Member, in October 2021. These will include, but will not be limited to, the views expressed by Professor Edward Iacobucci, also a Council Member and C.D. Howe Institute Competition Policy Scholar, in his paper, *Examining the Canadian Competition Act in the Digital Era* and the February 8, 2022, submission of the Competition Bureau ("the Bureau") to the Wetston consultation.



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The Act contains many important provisions of general application covering a wide range of business activities, including mergers, competitor collaborations, cartels, vertical restraints, abuse of dominance and deceptive marketing. Given the wide scope of the Act, over the coming months the Competition Policy Council will address proposed amendments in a series of separate meetings. Previously, in a context of rising interest in competition law and policy, the Council met on May 31, 2021, to reflect on the Council's prior positions over the last 10 years and again on August 12, 2021, to discuss and debate whether amendments are required to achieve the Act's purpose as stated in section 1.1.

The Competition Policy Council comprises top-ranked academics and practitioners active in the field of competition law and policy. The Council provides analysis of emerging competition policy issues. Elisa Kearney, Partner, Competition and Foreign Investment Review and Litigation at Davies Ward Phillips & Vineberg LLP, acts as chair. Benjamin Dachis, Associate Vice President of Public Affairs at the C.D. Howe Institute and Professor Edward Iacobucci, Competition Policy Scholar at the Institute, advise the program. The Council, whose members participate in their personal capacities, convenes a neutral forum to test competing visions and to share views on competition policy with practitioners, policymakers, and the public.

## **Previous and Forthcoming Competition Policy Council Views**

The Council has opined in the past on many of the themes raised by the Minister's February 7<sup>th</sup> announcement. A major component of the Minister's announcement was evaluating ways of "adapting the law to today's digital reality to better tackle emerging forms of harmful behaviour in the digital economy." After thoughtful reflection on the Council's positions over the last 10 years, the Council reiterates its [view from January 2021](#) that "policymakers should not jump to regulate digital platforms without showing that competition law cannot provide an adequate remedy for the alleged market failure caused by digital platforms."

The Minister also announced the intention of "increasing access to justice for those injured by harmful conduct." The Council has previously expressed support in its fall [2016 communiqué](#) and in its spring 2021 [meeting](#) of an expansion of private rights of action for the Act's abuse of dominance provisions, accompanied by leave for private access currently applicable to other private rights of action under Part VIII of the Act.

The Council has not debated the possibility of damages accompanying private rights of actions, and notes that this is an area worthy of discussion before amendments are proposed.

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While unable to reach a consensus, Council members have offered their own disparate views on the efficiencies defence, an important feature of the legislation that requires thoughtful consideration.<sup>1</sup>

The Council continues to underscore the critical importance of Bureau independence on enforcement decisions. However, in its [May 2021 meeting](#), the Council identified accountability as being of equal importance to independence. Many Council members suggested that Parliament should have greater visibility into resources used, and the outcomes produced, by the Bureau. For example, the Commissioner of Competition (“the Commissioner”) continues to call for formal market study powers yet, as the Council noted in its May 2017 [communiqué](#), the Commissioner “has not identified how previous market studies were systematically deficient or that information obtained voluntarily from market study participants was inadequate.”

As discussion and debate over legislative reform continues, the Council emphasizes the need to consider not only whether Canada’s competition legislation is “fit for purpose” and remains the most effective tool it can be, but also whether our institutions (i.e., the Bureau and the Competition Tribunal (“Tribunal”)) are themselves “fit for purpose.”

Council members as well as other academics and experts will be exploring these themes through C.D. Howe Institute *Intelligence Memos* in the coming months to assist the government as it considers legislative amendments.

## The Purpose Clause

The ongoing debate in competition policy stems in large part from academic literature and commentary arguing that increasing concentration is causing income disparity, stagnating growth, a reduction in productivity and product choices, and an absence of competitive prices. In recognition of the sustained push, both domestically and internationally, to reinvigorate competition law as a policy tool to address

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1 The efficiency defence in section 96 of the *Competition Act* enables an anti-competitive merger to proceed if the efficiencies it generates are greater than and offset its anti-competitive effects. For the cases against and for keeping it, see: Peter Glossop, Peter, 2022. “[Efficiency Defence: Let’s Lose It.](#)” C.D. Howe Institute Intelligence Memo. February 17; Brian Facey, Navin Joneja, and David Dueck. 2022. “[Efficiencies Exception: Let’s Keep It.](#)” C.D. Howe Institute Intelligence Memo. February 16. For a case for revising the efficiency defence, see Calvin Goldman, Richard Taylor, Nicholas Cartel, and Larry Schwartz. 2022. “[Proposed Revision of the Efficiency Defence for Mergers in Canada’s Competition Act.](#)” A Submission to Senator Howard Wetston with respect to Examining the Canadian Competition Act in the Digital Era. April 6.

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perceived ills in the 21<sup>st</sup> century digital economy, the Council's August 2021 meeting addressed fundamental questions such as: What is competition law? What is its purpose? Would the purpose clause of the Act benefit from revision and, if so, how?

The first section of the *Competition Act* Section 1.1. outlines the overall objective of Canadian competition law. It states:

The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

### *Small and Medium-Sized Enterprises and the Competition Act*

For an economy like Canada's, policymakers recognize that small and medium-sized enterprises ("SMEs") can play a major role in delivering growth that is more inclusive and the benefits of which are shared more broadly. SMEs that grow in terms of employees, turnover, profitability, or market share can contribute significantly to increases in employment, wages and income levels, and innovation. There is a question, however, whether promoting SMEs is valuable as an end in itself, or rather if it is valuable because competition from SMEs may (but may not) improve economic efficiency. In the view of Council members, the Act's primary purpose in practice has been to promote the efficiency and adaptability of the Canadian economy. It follows that the broad consensus of the Council was that the purpose of the Act in ensuring that SMEs have an equitable opportunity to participate in the economy is in recognition of the fact that SMEs can have a pro-competitive effect in the economy, not that the purpose is to protect SMEs for their own sake.

### *Use of the Competition Act to Achieve Broader Public Policy Goals*

Following general alignment among Council members that the Act's overarching purpose is the efficiency of the Canadian economy, the Council debated whether competition law and policy should be used to achieve other policy objectives. The general consensus of the Council was that the Commissioner, the Bureau, and the Tribunal are ill-placed to make policy decisions that are more appropriately left for publicly accountable elected officials. Multiple policy objectives will require the Bureau to make trade-offs – an inherently political process better left to accountable government. Many Council members believed that other policy tools outside of competition are the most effective and direct tool for addressing specific problems. Inequality, for example, is best addressed with Canada's fiscally driven tax and transfer system, as are environmental goals by environmental policies.

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Some Council members expressed support for the inclusion of a broader public interest exemption that would permit the Governor in Council to suspend or make exceptions to the Act if other important public policy objectives took priority. This discussion is an extension of one detailed in the Council's May 27, [2020 communiqué](#) regarding public interest exemptions related to the COVID-19 pandemic. In that communiqué, certain Council members noted that there has been support from some corners for a ministerial "public interest" exemption to collaborations that could otherwise trigger the cartel provisions of the Act. This support echoed an April 9, 2020, [letter published](#) by the Canadian Bar Association, Section of Competition Law, which made similar recommendations. Other Council members endorsed a time-limited legislative empowerment of the Bureau to authorize specific agreements between competitors. However, a majority of Council members opposed the introduction of a public interest exemption on the basis that such an exemption would create an unpredictable, politically driven override that would undermine competition enforcement generally and the focus on competitive intensity and market efficiency.

Returning to the theme of economic efficiency as the overarching purpose of the Act and the Act's role in promoting dynamic and fair markets in the digital economy, the Council is concerned with some of the recommendations in the Bureau's submission to the Wetston consultation. Up to this point, the Bureau could be applauded for taking a measured approach to proposed reforms. For example, early in Commissioner Matthew Boswell's tenure, the Bureau convened a Data Forum to address digital platforms, new approaches to regulation, data portability, and privacy. The overarching theme of the Data Forum was the need for appropriate regulation only where necessary because overregulation or poorly designed regulation distorts the market and interferes with creativity, and innovation.

## Conclusion

The Council looks forward to participating in rigorous debate and discussion to ensure the Act and our institutions are fit for purpose in the digital economy. Fulfilling that purpose remains vital to maintaining and encouraging competition in Canada, furthering a broad range of economic objectives that promote the efficiency and adaptability of the Canadian economy, and encouraging innovation and growth.

The C.D. Howe Institute's Competition Policy Council will tackle a number of specific issues in coming communiqués that respond to the Competition Bureau's suggested amendments, which include:

- introducing structural presumptions in merger review;
- lowering the Commissioner's burden to challenge any prevention of competition in acquisitions of, and conduct affecting, emerging competitors in the digital economy;

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- increasing the remedial standard to preserve the pre-merger state of competition rather than addressing the substantial prevention or lessening of competition;
- extending the limitation period in section 97 from one to three years;
- introducing administrative monetary penalties for civilly reviewable competitor collaborations; and
- adding buy-side agreements to the Act's criminal provisions after they were explicitly carved out in the last amendments to the Act.

## Members of the C.D. Howe Institute Competition Policy Council

Members of the Council participate in their personal capacities, and the views collectively expressed do not represent those of any individual, institution or client.

- **George N. Addy**, Senior Counsel, Davies Ward Phillips & Vineberg LLP. Director of Investigation and Research, Competition Bureau, 1993-1996.
- **Melanie Aitken**, Managing Principal, Washington, Bennett Jones LLP. Commissioner of Competition, Competition Bureau, 2009-2012.\*
- **Marcel Boyer**, Research Fellow, C.D. Howe Institute. Professor Emeritus of Industrial Economics, Université de Montréal, and Fellow of CIRANO.
- **Tim Brennan**, International Fellow, C.D. Howe Institute. Professor of Public Policy and Economics, University of Maryland Baltimore County. T.D. MacDonald Chair of Industrial Economics, Competition Bureau, 2006.
- **Neil Campbell**, Co-Chair, Competition and International Trade Law, McMillan LLP.
- **Erika M. Douglas**, Assistant Professor of Law, Temple University, Beasley School of Law.\*
- **Renée Duplantis**, Principal, The Brattle Group. T.D. MacDonald Chair of Industrial Economics, Competition Bureau, 2014.\*
- **Brian Facey**, Partner and former Chair of Competition, Antitrust & Foreign Investment Group, Blake, Cassels & Graydon LLP. \*#
- **Calvin S. Goldman, Q.C.** The Law Office of Calvin Goldman, Q.C., Director of Investigation and Research, Competition Bureau, 1986-1989.
- **Jason Gudofsky**, Partner, Head of the Competition/Antitrust & Foreign Investment Group, McCarthy Tétrault LLP.\*
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- **John Pecman**, Senior Business Advisor in the Antitrust/Competition & Marketing Group at Fasken. Commissioner of Competition, Competition Bureau Canada, 2013-2018.\*
- **Margaret Sanderson**, Vice President, Practice Leader of Antitrust & Competition Economics, Charles River Associates.\*
- **The Hon. Konrad von Finckenstein**, Senior Fellow, C.D. Howe Institute. Commissioner of Competition, Competition Bureau, 1997-2003.\*
- **Omar Wakil**, Partner, Competition and Antitrust, Torys LLP.
- **Roger Ware**, Professor of Economics, Queen's University. T.D. MacDonald Chair of Industrial Economics, Competition Bureau, 1993-1994.\*
- **The Hon. Howard Wetston**, Senior Fellow, C.D. Howe Institute. Senator for Ontario since 2016. Director of Investigations and Research, Competition Bureau, 1989-1993.
- **Ralph A. Winter**, Canada Research Chair in Business Economics and Public Policy, Sauder School of Business, University of British Columbia.

#Brian Facey was a member of the Competition Policy Council until February 2022. Navin Joneja and Michelle Lally joined the Competition Policy Council in February 2022.

\*Not in attendance at the August 12, 2021 meeting.