COMPETITION POLICY COUNCIL

COMMUNIQUÉ

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Undo Haste: Rushed Competition Act Reforms Warrant Further Examination

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On April 28th, the federal government introduced proposed legislative changes to the *Competition Act* via Bill C-19, the *Budget Implementation Act*, 2022, *No. 1* ("BIA"). These changes were previewed in a February 7, 2022, statement by Minister of Innovation, Science and Industry, François-Philippe Champagne, which recognized the critical role of the *Competition Act* in promoting dynamic and fair markets and identified potential ways to improve its operation. The changes proposed in the BIA include more clearly addressing "drip pricing," which attracts consumers with a low advertised price before various fees and taxes are added; tackling wage-fixing agreements; increasing access to justice for those injured by harmful conduct; modernizing the penalty regime to ensure it serves as a genuine deterrent against harmful business conduct; adapting the law to today's digital reality to better tackle emerging forms of harmful behaviour in the digital economy; and fixing loopholes.

In response, the C.D. Howe Institute Competition Policy Council ("Council") assembled to consider the proposed amendments to the *Competition Act* in the BIA. In a strong consensus, Council members opposed the process of introducing these changes via the BIA. While agreeing with Minister Champagne regarding the critical role of the *Competition Act* in promoting dynamic and fair markets, the Council does not think that such consequential changes to the legislation intended to improve its operation can, or should be, done without input from stakeholders. On some matters, the Council agrees with the direction of the changes, but there was a sense that consultation might have improved the outcome. On other matters, the Council consensus is that the proposed amendments will not improve the operation of the *Competition Act* and are without merit. On still other matters, the uncertainty the amendments will introduce could bring unintended consequences that need to be considered. In all cases, the Council is of the view that greater consultation before implementing the changes would, and still could, improve them to the betterment of Canadians and the Canadian economy.

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The Verdict: The government missed key opportunities to consult with the various constituencies affected by the legislation. The government should reconsider its approach on the *Competition Act* amendments through the BIA. This is the consensus of the C.D. Howe Institute Competition Policy Council at its meeting on May 16, 2022.[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.

Adapting the Law to Today's Digital Reality: Redefining "Anti-Competitive Act"

A major change to the *Competition Act* in the BIA is altering s.78(1) to define an anti-competitive act as meaning"…any act intended to have a predatory, exclusionary or disciplinary negative effect on a competitor, or to have an adverse effect on competition." Some Council members are of the view that previous interpretations of s.78 had led to an under-inclusive definition of "anti-competitive act" by specifying that such an act must have a harmful, predatory, exclusionary, or disciplinary impact on a competitor. The case law had excluded consideration of acts by a dominant firm that hurt competition, but did not hurt competitors. This differs from the *Competition Act*'s general focus on protecting the competitive environment, not competitors. It follows from such views that harm to a specific competitor is not a necessary condition for an action to have an anti-competitive effect and that the broadening of the provision with the proposed amendments is welcome.

However, some Council members believe that the proposed amendments will result in an over-inclusive definition of "anti-competitive act" by including any act intended to have an adverse effect on competition, capturing competition on the merits and resulting in unintended consequences for competition, innovation, and dynamism in the Canadian economy. Defining an anti-competitive act

1 The changes to the *Competition Act* in Bill C-19 are denoted using underlined text in this Communiqué.

as one that is intended to have an adverse effect on competition, including acts that are a selective response to an actual or potential competitor for the purpose of preventing the competitor's expansion in a market, is anticipated to create market uncertainty and chill competition. This risk is particularly magnified given the concurrent change to the legislation to allow private parties access to the Competition Tribunal ("Tribunal") for abuse of dominance claims. Some on the Council felt the amendment could have been better drafted to specify that an anti-competitive act must simply have the effect of preventing or lessening competition substantially in a market.

The Competition Bureau itself recognizes in its Abuse of Dominance Enforcement Guidelines that "it is often challenging to distinguish anti-competitive conduct from aggressive competition on the merits, as in many cases the goal of aggressive competition is to marginalize rivals or eliminate them from a market. The Competition Bureau recognizes that firms may acquire a dominant position by simply out-competing their rivals; for example, by offering higher quality products to consumers at a lower price. In these cases, sanctioning firms for simply being dominant would undermine incentives to innovate, outperform rivals and engage in vigorous competition. Such vigorous competition is the sort of competitive dynamic that the *Competition Act* is designed to preserve and, where possible, enhance, as it ultimately leads to a more efficient allocation of resources."[2] Council members agree that any change to the abuse of dominance provisions deserves consideration and debate during consultations on the review of the *Competition Act* that is underway.[3]

Modernizing the Penalty Regime: AMPs

There was a consensus among the Council that the provisions intended to modernize the penalty regime by expanding administrative monetary penalties ("AMPs") are particularly problematic.

The changes proposed in the BIA result in corporations now facing AMPs in both misleading advertising and abuse of dominance cases of three times the value of the benefit derived … or, if that amount cannot be reasonably determined, 3% of … annual worldwide gross revenues.

2 https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04420.html

3 https://www.canada.ca/en/innovation-science-economic-development/news/2022/03/minister-of-innovation-science-and-industry-reaffirms-that-competitiveness-is-central-to-a-vibrant-telecommunications-sector.html

The Council has previously pointed to the constitutional issue that arises if AMPs are penal in nature or consequence. Canadian case law indicates that if an AMP is penal rather than a deterrent, then it is effectively a criminal penalty, and the alleged offender must be tried in accordance with the due process requirements of section 11 of the *Canadian Charter of Rights and Freedoms*. Neither the misleading advertising nor the abuse of dominance provisions that attract these significant penalties are criminal offences, such that the impugned conduct need only be demonstrated to a "balance of probabilities" standard of proof. On this understanding of the case law, if the AMP is effectively criminal given its punitive character, then the various constitutional protections available to the defendant include a higher, "beyond a reasonable doubt," standard of proof. The increased fines to be set on global revenues of a firm that are not directly related to the harms of the practice greatly raises the likelihood that the fines could be found unconstitutional – the penalties could easily be in the billions of dollars for large corporations. Council members also noted this provision may also not be compliant with Canada's trade agreements.

Independent of the constitutional and legal questions, the Council raised concerns that the scale of these potential fines risks deterring companies from adopting practices that may be beneficial to the Canadian economy. Companies with innovative products and new pricing models may not be able to anticipate, at the outset of their activities, whether their conduct would be considered an abuse. With such large potential penalties that are not based on the harm of the practice, there is a risk of over-deterrence and firms may shy away from practices that may be beneficial for Canadians. In addition, some Council members felt these potential fines raise reputational risks for Canada as not being supportive of foreign direct investment, given that fines will be disproportionately large for foreign multinationals.

Some on the Council also expressed concern that the risks of over-deterrence are magnified by the changes in the BIA to allow private parties access to the Tribunal to make a complaint about abuse of dominance. Although private litigants do not have the ability to receive damages, defendants in a privately brought abuse of dominance case will face a potential large fine that will be paid to the government. Some on the Council believe that this goes well beyond the appropriate role for private litigation, and risks creating 'private sheriffs' where competitor-driven complaints before the Tribunal may result in government levying disproportionate fines against parties.

Tackling Wage-Fixing Agreements

Another category of amendments in the BIA are ones that Council members believe are directionally appropriate but, as drafted, create enormous uncertainty for business and risk creating years of costly litigation.

Foremost among these changes are those on wage fixing. The BIA expands the criminal conspiracy offence under s.45 of the *Competition Act*, which makes certain conduct *per se*[4] illegal and comes with up to 14 years in jail and a fine with no set limit. The new provision states: "Every person who is an employer commits an offence who, with another employer who is not affiliated with that person, conspires, agrees or arranges

(a) to fix, maintain, decrease or control salaries, wages or terms and conditions of employment; or
(b) to not solicit or hire each other's employees."

There are sound legal and economic reasons to forbid wage fixing and no-poach agreements.[5] Price-fixing and wage fixing are economically similar. However, some Council members are concerned that the language of the new amendment is overly broad and creates great uncertainty. For example, terms and conditions of employment are often governed by agreed-upon industry standards, which is in the interest of the labour force. The amendments create uncertainty for labour standards. There is uncertainty about whether the term "employee" captures all categories of workers. There is no definition of employer and employee in the *Competition Act*. Given the changing nature of employment as well as the varying provincial definitions of employee-employer relationships, the proposed amendments would benefit from proper consultation with employment law experts.

Importantly, there are questions of whether the government made the right choice in relying on criminal enforcement as the instrument to address wage-fixing and no-poaching agreements. Criminal cases will have a heavy burden of proof. An alternative approach the government could have considered was to amend s.90.1 to expand its application and force against wage-fixing conduct. Indeed, "buy side agreements" that substantially lessen or prevent competition are already covered by s.90.1. Whether or not criminal law is the right instrument for wage-fixing as it is for price-fixing could have been more thoroughly considered in a more open and extended legislative process.

4 This legal definition means that the action need not be shown to have harmed competition, the mere proving of such an agreement is sufficient grounds for enforcement.

5 See https://www.cdhowe.org/intelligence-memos/peter-glossop-%E2%80%93-new-approach-wage-fixing-and-anti-poaching-employer-deals

Because the government itself chose not to consult widely, or explain its intention with this legislation through parliamentary debate, legal practitioners have little guidance on the application of this law. The Council was disappointed that the government did not make specific amendments, and other matters, the subject of more extensive consultation beyond what a single parliamentary committee or a single Senator like Senator Howard Wetston could manage on general topics. There is upside in improving and clarifying the law, and no significant downside in waiting to further consult with potentially affected businesses, employees, and consumers. Indeed, the limited downside to waiting is particularly true on the wage-fixing proposals because the amendments as proposed only take effect one year from passage.

Uncertainty and Privacy

While the amendments introduce uncertainty on several dimensions, Council members expressed particular concern about the factors that the Tribunal will be asked to expressly consider as preventing or lessening competition when weighing the effect of a merger, agreement, or market conduct. One such factor that the amendments identify is the effect on price or non-price competition, including quality, choice or consumer privacy. The identification of privacy as a specific characteristic of non-price competition, separate from product quality, raised particular questions from some Council members. If privacy is distinct from product quality, what does this mean about the objectives of competition law? Will competition law cases – mergers, for example – turn on a privacy issue even if competition issues are otherwise unproblematic? Once again, the amendment would have benefited from consultation.

Conclusion: The Need to Rethink Amendments in the BIA

Council members raised other issues as well. For example, a proposed amendment to give the courts extra-territorial jurisdiction to order the production of records of a person outside Canada raises significant questions about enforceability. This Communiqué, in other words, is incomplete in canvassing all the potential objections to all the provisions that would have benefitted from stakeholder input. Again, the issue underlying all the substantive problems the Council has identified is the process the government has pursued; that is, pushing these consequential amendments through a budget bill. The changes raise many questions.

The problems of the BIA are reminiscent of similar process concerns that accompanied the legislative changes to the *Competition Act* in 2009 via the budget process. The removal of buy-side agreements from criminal scrutiny was perhaps an unintended consequence of the rushed 2009 amendments. Some of the proposed amendments in the BIA reflect legislative fixes to that flawed process. Yet, the

government is once again following the same flawed process. Many Council members argue that the inevitable result is an over-correction, the need for legislative amendments again in the future and, more importantly, failure to achieve the government's objective of improving the operation of the *Competition Act*.

The Council could not reach consensus on how the government could respond to these concerns. Some Council members recommend that the government amend the BIA at Parliamentary Committee, remove the changes to the *Competition Act* from the bill, and instead propose these changes as part of separate legislation that can be properly studied and debated and appropriately amended. These proposed changes can then be seen in concert with other proposed changes that would come as part of a prompt second stage of *Competition Act* reviews.

Recognizing that budget bills are difficult to stop midstream, others on the Council suggested that, as part of the promised review of the *Competition Act*, the government should appoint a panel of experts to examine the proposed changes, as well as other possible amendments. Such a panel should have terms of reference with a prompt timeline for review of less than a year and clear guidance to examine whether the already proposed changes, and other possible changes, are in the best interest of Canadians and the Canadian economy. Such a panel should also address other critical issues in competition, such as the treatment of efficiencies in merger reviews, and confer extensively with stakeholders. Other proposals for seeking out further consultation include waiting to proclaim into force all relevant amendments until consultations have concluded.

Regardless of exactly how the government elects to proceed, there was a strong consensus at the Council that the process thus far has been inappropriate and that any of the alternate approaches would result in a better outcome for Canadians.

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

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*Not in attendance on May 16, 2022.