Competition Policy Council

COMMUNIQUÉ

March 30, 2023

Part 1: Reforms to the *Competition Act* Must Be Evidence-Based and Homegrown, But They Are Only a Start to Promoting Competitiveness

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

On November 17, 2022, the federal government launched a long-awaited public consultation on the future of competition policy in Canada. As part of the consultation, the government released a discussion paper entitled *The Future of Competition Policy in Canada*, which covers a vast array of issues in Canadian competition law and possible policy responses. The government is seeking comments from stakeholders by March 31, 2023, which the C.D. Howe Institute's Competition Policy Council is pleased to provide.

This is the first of two Communiqués the Competition Policy Council intends to release in response to the government's consultation and discussion paper. The Competition Policy Council recognizes the importance of competition to Canada's prosperity, and has a deep breadth of experience and a unique understanding of the role that the *Competition Act*, the Competition Bureau, the Competition Tribunal and other courts play in fostering competition in Canada.

This Communiqué focuses on the wider themes of the consultation. These include emphasizing the need for caution before departing from established Canadian law and process. The government should not seek to mimic developments in competition law and policy in foreign jurisdictions that are still untested, and instead rely on evidence in demonstrating the need for change. The companion Communiqué tackles the substance in the consultation paper itself and proposals from the Competition Bureau.

More broadly, the Council believes that the consultation on competition policy must look beyond the *Competition Act*. As one Council member and other authors have argued, "Focusing the ongoing consultative process only on the provisions of the *Competition Act* is far too narrow given the realities

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of overregulation in Canada."[1] The consensus of the Council membership supports this view, as does evidence from the Organisation for Economic Co-operation and Development (OECD) that Canada is among the world's worst performers on barriers to domestic entry, foreign investment, and government involvement in business operations. In this regard, introducing bright line tests or prescribed *ex ante* rules for a small number of firms in certain sectors of the economy would increase regulation in Canada and would turn the Competition Bureau into a sector-specific regulator – a role that is not suited to Canadian competition law.

The Verdict: The consensus of the C.D. Howe Institute's Competition Policy Council is that, beyond the consultation paper, more work and further consultation on specific proposals for reform to the *Competition Act* will ensure the government's intention of promoting a competitive marketplace that favours prosperity and affordability for Canadians is properly reflected in legislation. Moreover, the consultation is only one step in a broader discussion on the future of competition policy in Canada, which should also look at other laws and policies that impact Canada's competitiveness such as supply management, and limits on foreign ownership in sectors, such as telecommunications and aviation.

The C.D. Howe Institute 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 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.

Canada's Competition Consultation

As part of its deliberations on January 23rd, 2023, the C.D. Howe Institute Competition Policy Council discussed the ideal process for, and scope of, the consultation on the future of competition policy in Canada, as well as a perceived reliance on international developments as a justification for reform of Canada's competition law framework.

1 See Goldman, Calvin, Larry Schwartz, Richard Taylor. 2023. "How Outdated Foreign Ownership Rules Hurt Competition in Telecom and Other Sectors." C.D. Howe Institute Intelligence Memo. March 10. Available online at: https://www.cdhowe.org/intelligence-memos/goldman-schwartz-taylor-how-outdated-foreign-ownership-rules-hurt-competition

The Roadmap of Reform

The federal government formally began the process of reviewing competition law and policy in Canada on February 7, 2022,with a 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.[2] This followed a consultation initiated by the Honourable Howard Wetston, a Council Member, in October 2021 that centered around 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*. The Senator's stated intention was "to determine whether Canada's competition policy framework, and the *Competition Act* in particular, remain appropriate in the digital age."

On April 28th, 2022, the federal government introduced legislative changes to the *Competition Act* via Bill C-19, the *Budget Implementation Act*, 2022, with no public consultation. These changes received royal assent on June 23, 2022. The consensus view of the Council, provided in its June 2022 Communiqué, remains that the government missed key opportunities to consult with the various constituencies affected by the legislation. The Council's principal position was that consultation would have improved the outcome of the legislative amendments and that the absence of consultation has resulted in a combination of amendments that could have been improved, unnecessary amendments, and uncertain amendments that could produce unintended consequences.

Focusing in on Specific Proposals

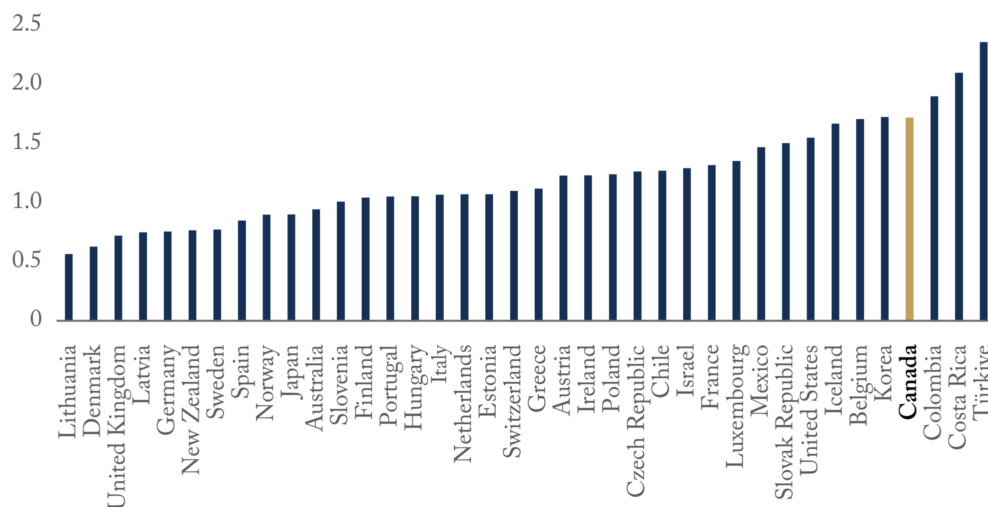
The consensus of the Council in this Communiqué is that the Consultation should not be the end of the conversation the government has on competition policy reform. There must be further discussion of, and consultations on, the particulars of reform. The government must continue to consult publicly in a timely fashion on the specific details of proposed changes to the *Competition Act*, including draft legislation. The details of legislative reform are essential to their effectiveness, and a process that again fails to invite comment on specifics would be an unnecessary mistake.

Expanding the Competition Conversation

In addition, the Council also achieved consensus on the conclusion that the conversation on competition must be broader than the *Competition Act* itself. Some of the issues raised in the Discussion

2 See https://www.canada.ca/en/innovation-science-economic-development/news/2022/02/minister-champagne-maintains-the-competition-acts-merger-notification-threshold-to-support-a-dynamic-fair-and-resilient-economy.html

Figure 1: OECD Barriers to Domestic and Foreign Entry Measure, 2018



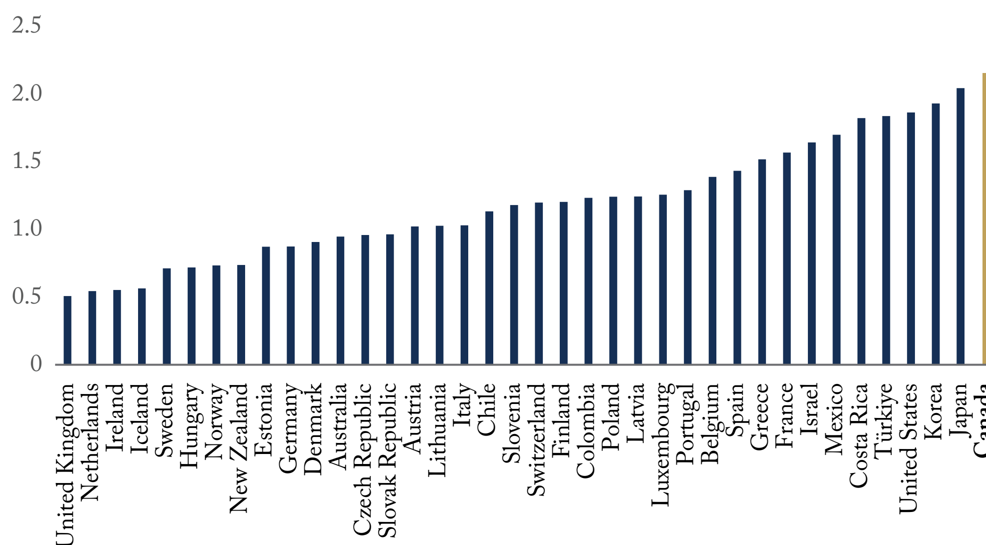
Source: https://www.oecd.org/economy/reform/indicators-of-product-market-regulation/

Paper are items the government cannot remedy by amendments to the *Act*. The government must acknowledge the role of other policy decisions on the state of competition in Canada. It may be time to consult broadly with Canadians on government policies impacting Canadian competitiveness and examine the structural effect of sector-specific, standalone legislation outside of the *Competition Act*.

Canada has historically fared poorly in product market regulation measures conducted by the OECD, which assess the distortion of competitive markets by government policy. Among other OECD countries, only Colombia, Costa Rica and Turkey score worse in their level of barriers to domestic and foreign entry (Figure 1).[3] Canada scores particularly poorly on this metric that summarizes the administrative burden on start-ups, barriers in services and network sectors, and barriers to trade and

3 Colombia and Costa Rica were not members of the OECD in 2018 when this survey was conducted. That would place Canada second last among OECD countries at the time of the survey, behind only Turkey.

Figure 2: OECD Measure of Government Involvement in Business Operations, 2018



Source: https://www.oecd.org/economy/reform/indicators-of-product-market-regulation/

foreign investment. On a related metric of the extent of government involvement in business operations – which covers the extent of price controls, regulations, and rules governing public procurement – Canada ranks last among OECD countries (Figure 2).

Foreign ownership restrictions are one significant type of sector-specific legislation in Canada. The Council notes that these limits apply in numerous areas, ranging from telecommunications, transportation, financial services, and others. Government limitations on entry affect postal services, supply-managed agriculture, and energy policy. Limitations on trade and mobility between provinces restrict entry by professionals and trades. In all these areas, government policies restrict competition and raise prices.

The conversation on competition policy should also extend to the provincial level by assessing the competitive effect of provincial regulations. For example, at a time of allegations of insufficient price competition in Canadian grocery retailing, and about the inadequacies of Canadian competition law to address these speculative concerns, governments have not yet turned their attention to anticompetitive

supply management in Canadian agricultural markets. A number of Council members pointed to ideas and recommendations from the 2007-2008 Competition Policy Review Panel, many of which have not been implemented.

Adapting International Approaches to Canada

There was a consensus among Council members that the impetus to import international approaches to Canada with a view to harmonizing competition law globally would be a misstep. There is still great debate and no consensus on the benefits of the reforms that have been introduced or proposed in foreign jurisdictions. Indeed, the *European Digital Markets Act* will not come fully into force until 2024 and legislative amendments have yet to be passed in the United States. Companies and practitioners in foreign jurisdictions still do not have a full understanding of the impact of recent amendments and Canada has the opportunity to learn from experiences elsewhere.

Council members recognized that a thoughtful evaluation of approaches in foreign jurisdictions applied to the specific facts and circumstances of the Canadian economy and our legal and judicial frameworks could result in reform and the adoption of best practices from elsewhere. However, Council members emphasized that such a conclusion can only be reached after examining the evidentiary basis for the need for reform, specifically identifying the problem in Canada that the legislative proposal would be trying to solve and crafting a solution within Canada's existing framework that works for the specific facts and circumstances of our economy.

Many Council members recognized the value of harmony in competition law and enforcement around the world and the role played by the Competition Bureau as an advocate on the international stage for the importance of competition law and policy. However, Canada should not abandon its principles-based, rather than rule-based, approach to competition law in the name of harmonization. For one thing, whether conduct is anticompetitive will typically depend on specific circumstances, and *ex ante* rulemaking will inevitably be based on assumptions and presumptions that are prone to false positives and false negatives. For another, fundamental principles of justice imbedded in our legal and judicial traditions differ from those in many foreign jurisdictions. *Ex ante* regulation, such as that being adopted in the European Commission, is rooted in civil rather than common law traditions. Outside of specific federally regulated sectors, *ex ante* regulation is not consistent with the common law approach. Proposals, such as those in the United Kingdom,[4] to develop *ex ante* rules for a small number of firms

4 These proposals have yet to be enshrined in legislation in the United Kingdom, as of March 2023.

with strategic market status are contrary to the principles-based approach to enforcement of the *Competition Act* and would turn the Bureau from a competition law enforcement agency to a sector-specific regulator.[5]

Bring on the Competition Reform Discussion

The C.D. Howe Institute Competition Policy Council welcomes the opportunity to consult with the government and other stakeholders on the future of competition policy in Canada and more specifically, on potential reforms to the *Competition Act*. However, process matters. The government must base future amendments to the *Competition Act* on a fulsome consultation on specific policy changes and legislative proposals. Moreover, the government should root all proposed changes to the *Act* in evidence demonstrating a need for change and not depart from established Canadian law and process simply by relying on untested developments in foreign jurisdictions with different legal traditions. Finally, the government should undertake a broader consultation on competition policy and the factors that impact the competitiveness of the Canadian economy.

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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- ***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 Emeritus, 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.

5 See https://www.gov.uk/government/collections/digital-markets-unit

- **Renée Duplantis**, Principal, The Brattle Group. T.D. MacDonald Chair of Industrial Economics, Competition Bureau, 2014.
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*Not in attendance on January 23, 2023.