COMPETITION POLICY COUNCIL

COMMUNIQUÉ

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Part II: The Pith and Substance of Reforms to Competition Policy in Canada

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

SUMMARY

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 titled "The Future of Competition Policy in Canada"[1] (hereafter, the "Discussion Paper") covering a vast array of policy issues in Canadian competition law. The government is seeking comment from stakeholders by March 31, 2023, which the C.D. Howe Institute's Competition Policy Council (the "Council") is pleased to provide.

This is the second of two Communiqués the Council has released in response to the government's consultation and Discussion Paper. The first Communiqué focused on recommendations for the consultation process and wider themes of the consultation, such as avoiding reliance on untested international developments in competition law and policy for making the case for reform of Canadian policy.[2] This companion Communiqué tackles the substance of many of the proposed reforms raised in the Discussion Paper, as well as in the submissions of the Competition Bureau (the "Bureau") to a prior consultation conducted by then-Senator Howard Wetston (the "Wetston Consultation"). Council members have been very engaged on the topic of the consultation, first meeting on January 23rd, 2023, to discuss the Discussion Paper and process of reform. Certain Council members reflected on the issues raised in the Discussion Paper and offered their individual views in C.D. Howe Intelligence Memos or

1 Innovation, Science and Economic Development Canada, "The Future of Competition Policy in Canada," November 22, 2022, online: https://ised-isde.canada.ca/site/strategic-policy-sector/sites/default/files/attachments/2022/The-Future-of-Competition-Policy-eng_0.pdf.

2 See https://www.cdhowe.org/council-reports/competition-act-reforms-must-be-evidence-based-and-homegrown-only-start

public opinion pieces noted within. Other Council members discussed the issues in panel discussion formats and participated in the C.D. Howe Institute's Executive Briefings and Webinars on the consultation. Council members also contributed directly to this text, offering their own views for other Council members to reflect on and respond to. The Council is a space for competing views and the views in response to the consultation amongst Council members have been varied.

The Verdict: The Discussion Paper offers numerous proposals for competition law and policy reform in Canada and for the *Competition Act*[3] (the "*Act*") in particular. The Council supports amendments to modernize the *Act* and its implementing institutions to better serve the public interest. There was healthy discussion and debate on the scope of modernization reforms. The consensus of the Council is that competition law in Canada should remain principles-based and effects-based, focused on identifying conduct (including acquisitions) that harms competition and consumers, and should not be rooted in structural presumptions or bright-line tests that may distort competitive outcomes by benefiting competitors. In this regard, the Council supports the government's resolve "to create a principled, evidenced-based approach to competition law, policy and practice that balances the need to encourage innovation and the need to ensure a level competitive playing field."[4] Consensus could not be reached on all of the issues raised in the Discussion Paper.

The 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.

ADMINISTRATION AND ENFORCEMENT OF THE LAW

Purpose of the Competition Act

The overarching question in the consultation is whether Canada's competition policy framework is fit for purpose. Policymakers in Canada and around the world are under pressure to address a broad

3 *Competition Act*, R.S.C., 1985, c. C-34, online: https://laws-lois.justice.gc.ca/eng/acts/c-34/FullText.html.

4 Discussion Paper, supra note 1 at pg. 56.

scope of social policy issues such as income inequality, privacy, and environmental protection. The pressure is being felt, too, by competition law agencies, as advocates for competition policy reform are seeking to expand the purpose of competition law to advance non-economic social policy objectives notwithstanding the often tenuous link between competition and these other goals.

The current goals of the *Act* are economic in nature, including the promotion of economic efficiency, expanding exports, supporting small- and medium-sized enterprises, and providing consumers with competitive prices and product choice. To many Council members, it would be a mistake to expand the already long list of objectives under the *Act* to advance non-economic social policy objectives. Introducing too many goals risks confusion in the application of the law; which goal will prevail when goals point in opposite directions? Expanding the purpose of competition law also invites results that do not sit well within competition law. For example, an anticompetitive merger that reduces output, and hence carbon emissions, may be welcome from an environmental perspective, even if it produces anticompetitive effects on the prices charged and products offered to Canadian consumers. Moreover, assigning disparate goals to competition law undermines competition law enforcement and challenges the independence of the institutions. With disparate policy goals, whose job is it to select which goal should prevail: policymakers, the Bureau, or the judiciary?

The Council's view is that the Bureau, the agency that enforces Canada's competition policy framework, should remain focused on its principal mandate of promoting competition and leave the task of advancing social policy objectives to others in government that have political accountability or the necessary policy tools and expertise available to them.

Institutional Design

Under the assumption that the objectives of the *Competition Act* have for the most part not changed, a position the Council endorses, the Discussion Paper focuses on how the substantive provisions of the law could be improved[5] to address the overarching question in the consultation about the effectiveness of Canada's competition policy framework, particularly when it comes to large digital platforms. The Discussion Paper poses the question of whether *ex ante* regulatory rules or mandatory codes of conduct would be a more effective policy instrument to hold global firms accountable.[6]

5 Discussion Paper, supra note 1, at pg. 12.

6 Discussion Paper, supra note 1, at pg. 49.

The Competition Policy Council has tackled the questions of whether competition law has the teeth to oversee the digital marketplace, arguing that that the Bureau largely already has the "toolkit" to handle big tech.[7] The Council argues that inherently difficult issues, ranging from understanding network effects, the economics of multi-sided platforms, economies of scale and others that many ascribe to the digital economy have clear analogies in existing practices. Other matters inherent to the digital economy, such as privacy, security and sovereignty have existing policy frameworks that are overseen by other enforcement agencies and institutions.[8] Hence, the federal government should be cautious in including them directly into the competition policy discussion, but should encourage greater information sharing both formal and informal linkages across government.

An Ex Ante Regulatory Approach to Competition Law Enforcement

The introduction of *ex ante* rules into Canada's competition policy framework would transform the Bureau from a competition law enforcement agency to a sector-specific regulator, and would be a significant departure from the existing sector-neutral, principles-based approach to enforcement of the *Act*. There are numerous sector-specific regulators in Canada, such as the Canadian Radiotelevision and Telecommunications Commission (CRTC), the Office of the Privacy Commissioner (OPC), the Office of the Superintendent of Financial Institutions (OSFI), and the Financial Consumer Agency of Canada (FCAC), that enforce *ex ante* rules or mandatory codes of conduct. By contrast, the Bureau is not a regulator; the Bureau is an independent law enforcement agency.[9]

The consensus view of the Council, emphasized in the first Communiqué responding to the consultation, is that there are amendments that can be made to improve the effective enforcement of Canada's competition policy framework before resorting to a regulatory approach.[10] As a starting

7 See https://www.cdhowe.org/cpccommunique/competition-law-has-teeth-oversee-digital-marketplace-cd-howe-institute-competition-policy-council and https://www.cdhowe.org/cpc-communique/competition-bureau-already-has-%E2%80%9Ctoolkit%E2%80%9D-handlebig-tech-cd-howe-institute-competition-policy.

8 For a summary of the policy issues at stake, see Lynch, Kevin and Paul Deegan. 2023. "Competition is essential to dynamic capitalism and competitive economies" *The Hill Times*. April 3.

9 Discussion Paper, supra note 1, at pg. 13.

10 See Competition Policy Council. 2023. "Part 1: Reforms to the *Competition Act* Must Be Evidence-Based and Homegrown, But They Are Only a Start to Promoting Competitiveness." C.D. Howe Institute, March 30. Available online at https://www.cdhowe.org/public-policy-research/part-1-reforms-competition-act-must-be-evidence-based-and-homegrown-they-are

point, the Council supports the recent increase in the Bureau's budget by $96 million over a five year period, and $27.5 million per year thereafter, and would support even greater allocation of enforcement resources, if required, to ensure effective enforcement of the *Act*.[11] However, with enhanced powers and authority, comes greater responsibility. While the Council did not achieve consensus on specific measures to improve the *Act's* investigative procedures, a consensus was reached on the need for new, different, or enhanced accountability measures for the Bureau and the Commissioner of Competition ("Commissioner").

Accountability and Oversight

Enforcement decisions of the Commissioner, who is appointed by the Governor-in-Council, are not subject to ministerial review or approval. The Council supports and agrees that independence of the Bureau is important. However, many Council members believe that the Commissioner should be held accountable for his budgetary spending, as well as the Bureau's enforcement and advocacy actions. This could take many forms, including by way of regular reports to, and appearances before, Parliament; expanded annual reporting requirements that incorporate value-for-money audits; or even the creation of an ombudsperson role for civilian oversight, which would mirror other independent federal law enforcement agencies. Many Council members agreed that more *ex post* assessments of Bureau enforcement decisions (similar to a US FTC merger remedies study) would be a productive use of resources. Regardless of the method chosen, the Council recommends that to achieve the government's intended goal of more effective enforcement of competition law, greater duties of transparency and accountability should accompany any additional increases in funding or first instance decision-making authority (discussed further below).

Expansion of Investigative Powers and First Instance Decision Making

With respect to expanded investigative powers and first instance decision-making authority, Council reached a strong consensus view that the process for the Bureau to obtain a section 11 to compel the production of information – an *ex parte* hearing before a judge – is already streamlined, and that easing the burden on the Commissioner in the enforcement context raises issues of procedural fairness.

11 See Competition Policy Council. 2018. "Ottawa Should Re-Invigorate Competition Enforcement in Canada" C.D. Howe Institute. November 8. Available online at: https://www.cdhowe.org/cpc-communique/ottawa-should-re-invigorate-competition-enforcement-canada

Indeed, the necessity of the current section 11 process to protect parties from overly onerous document demands is evident from a 2008 Federal Court decision overturning the grant of a section 11 order after the parties raised concerns about the repetitive and onerous nature of the Bureau's demands.[12]

Council members also expressed concern with proposals in the Discussion Paper to grant "first-instance ability to authorize or prevent forms of conduct" to the Bureau.[13] The Bureau's existing powers to obtain interim relief – including "interim interim relief"[14] – are proportionate and amendments to ease the burden risks invalidation by courts. Courts have already declared parts of the *Act* granting the Bureau temporary first instance decision-making authority to be inoperative – specifically section 104.1, which had granted the Bureau the authority to issue a temporary order prohibiting a person operating a domestic air carrier service from doing anything that could, in the opinion of the Commissioner, constitute an anti-competitive act without hearing from the affected party. When the Commissioner issued such an order against Air Canada in 2000, Air Canada successfully challenged the constitutional validity of this power on the grounds that it violated due process by depriving it of its right to be heard by an impartial and independent adjudicative authority.[15]

The Council remains divided on the issue of whether the Bureau should be engaged in market studies. Some members continue to believe that market study powers are an important aspect of advocacy by the Bureau and recall that the Competition Policy Review Panel's 2008 report concluded that the lack of a formal ongoing process to undertake competition advocacy, including market studies, constitutes a "significant gap in Canadian competition policy."[16] Other Council members remain of the view that market studies are not effective in enhancing competition, and divert a portion of the Bureau's limited resources away from enforcement. Some Council members who support the use of market studies in principle were nevertheless of the view that the Bureau has the ability to conduct market studies under its general enforcement authority and, as the Council noted in its May 2017 Communiqué, the

12 See *Commissioner of Competition v. Labatt Brewing Company Limited*, 2008 FC 59, online: https://www.canlii.org/en/ca/fct/doc/2008/2008fc59/2008fc59.html.

13 Discussion Paper, supra note 1, at pg. 55.

14 See *Commissioner of Competition v. Secure Energy Services Inc. and Tervita Corporation*, 2022 FCA 25, online: https://www.canlii.org/en/ca/fca/doc/2022/2022fca25/2022fca25.html.

15 See Air Canada v. Canada (Attorney General), 2003 CanLII 32929 (QC CA), online: https://www.canlii.org/fr/qc/qcca/doc/2003/2003canlii32929/2003canlii32929.html.

16 Government of Canada, Competition Policy Review Panel, "Compete to Win: Final Report June 2008," June 26, 2008, online: https://publications.gc.ca/collections/collection_2008/ic/Iu173-1-2008E.pdf, at pg. 98.

Commissioner "has not identified how previous market studies were systematically deficient or that information obtained voluntarily from market study participants was inadequate."[17] Many Council members are concerned about the ability of a law enforcement agency to compel market participants to provide information that may subsequently be used for the purposes of enforcing the *Act*, with one member making the analogy to a police force compelling local citizens to provide information for a study on local crime.

A general consensus was reached that the use of any market study power must be reserved for appropriate cases and should incorporate procedural safeguards and accountability measures. Suggestions for procedural safeguards and accountability measures include having specific budget requests for market studies approved by Treasury; having the terms of reference for any market study approved by a Parliamentary committee; and having judicial oversight on the scope of any documentary production.

Private Access

In addition to investigative powers, Council members agree that how cases are initiated is also an important consideration for effective enforcement of competition law. In this regard, the Council has long argued for reforms to private access for enforcement of the *Act*. In its fall 2016 Communiqué on the topic of private rights of action,[18] the Council suggested that the government should cautiously expand the kinds of anti-competitive acts that private parties – and not just the Commissioner – can take legal action against in Canada to include abuses of dominance. Council members in favour of expanding private litigation believe that the merits of expanding enforcement of the Act outweigh the potential downsides of allowing private actions, particularly if appropriate safeguards such as the leave requirement are maintained – a position the Council reached again in its spring 2021 meeting.

The Council supports the amendments in the 2022 budget implementation legislation (the "BIA Amendments") to supplement public enforcement and hold firms more accountable by allowing private parties to bring cases before the Tribunal for abuse of dominance.

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17 C.D. Howe Institute Competition Policy Council, "Thirteenth Report: Competition Bureau Should Not Have Power to Compel Information for Market Studies," May 4, 2017, online: https://www.cdhowe.org/sites/default/files/attachments/other-research/pdf/Communique_2017_0501_CPC.pdf, at pg. 1.

18 C.D. Howe Institute Competition Policy Council, "Damage Control: Abuse of Dominance and the State of Private Remedies in the Competition Act," October 20, 2016, online: https://www.cdhowe.org/cpc-communique/damage-control-abuse-dominance-and-state-private-remedies-competition-act.

Some Council members believe that the significant increase in fines for abuse of dominance introduced by the BIA Amendments risks creating "private sheriffs" where competitor-driven complaints may result in the Tribunal levying disproportionate fines against parties, leading to risks of over-deterrence. However, the majority opinion among the Council is that the BIA Amendments failed to provide adequate incentives for private parties to bring cases forward. The general consensus of the Council is that properly incentivizing private access to the Tribunal (with safeguards against vexatious and frivolous litigation) would help both in enforcing the *Act* and in generating greater case law and guidance regarding the application of the *Act* for the Bureau, the legal community, and businesses. Former Council member Peter Glossop argued in a June 2022 C.D. Howe Institute Intelligence Memo that "there is no compelling reason to deny a private firm full compensation for anti-competitive harms suffered because of an abuse of dominance."[19] Many Council members agree that the right of a private party to seek an administrative monetary penalty should be substituted with a right to claim damages in line with the formula in section 36 of the *Act*. There are also strong arguments for disputes between competitors being settled using their own resources, freeing up Bureau resources for other priority cases. While views diverged on the appropriate safeguards to introduce into Canada's system of private access, the consensus view remains that treble damages are not appropriate. Glossop and others argue that meritless cases are discouraged because a losing party is liable to pay costs to the successful party in the Canadian court system, other Council members believe that other safeguards are required to protect against strategic litigation intended to extract settlement.

MERGER REVIEW

The Discussion Paper raises the risks of excess corporate consolidation and of reviewing too few mergers or doing too little to prevent anti-competitive activity and discusses potential areas of improvement, from enhanced pre-merger notification and detection, through limitations on the Bureau's ability to act (such as conditions on interim relief and the remedial standard), to the defences available to merging firms (such as the efficiencies defence).

Pre-Merger Filing Thresholds

The Council supports "the revision of pre-merger notification rules to better capture mergers of interest"[20] and calls for a holistic approach to calibrating the scope of transactions caught by the pre-

19 Glossop, Peter. 2022. "Damages for Abuse of Dominance: A Necessary Reform." C.D. Howe Intittute Intelligence Memo. June 21. Available online at: https://www.cdhowe.org/intelligence-memos/peter-glossop-damages-abuse-dominance-necessary-reform

20 Discussion Paper, *supra* note 1, at pg. 29.

merger notification regime, acknowledging that the vast majority of transactions are not problematic but problematic transactions may not be caught by the current system. The Council recommends that any amendment should focus on identifying better, not merely more, transactions to be notifiable to the Bureau.

Council members agreed that careful study should be given to whether the monetary thresholds are at the appropriate level to capture transactions most likely to raise competition concerns and act as a deterrent to anti-competitive mergers.

Proposals made by certain Council members to address over-reporting include, but are not limited to: (i) removing the asset threshold from the notification test (though not all Council members agreed on this, as some Council members were able to identify high-asset value transactions that raised issues where the revenues were less than the asset values); (ii) excluding transactions where the purchaser (together with its affiliates) does not have a presence in the Canadian market; and (iii) eliminating vendors from the size of parties threshold where the vendor is divesting its entire interest in the business.

Many Council members argued that as total manufacturing in Canada declines, supply chains across countries integrate, and intangible products and services (e.g., digital products and internet-based services) play an increasingly important role in the Canadian economy, merger review should likewise shift to focus on potential effects on Canadian consumers, irrespective of the location of the target's operations. Council members debated the merits of an amendment to the current pre-merger notification regime whereby (a) mergers in which the target only sells goods or services into Canada, but does not itself have assets in Canada, are not subject to pre-merger notification and (b) the revenues taken into account for the size of transaction threshold are restricted to those generated by Canadian assets. Council members who supported an amendment said that it could be accomplished by including sales "into" Canada in the Size of Transaction threshold test at section 110 of the *Act*, similar to the test used in section 109. Another Council member argued that the financial metrics on which the thresholds are based are themselves outdated, and that additional thresholds could be considered that are likely to capture firms that have a significant anticipated future market position, such as by adopting an alternative enterprise value threshold test.[21]

21 An enterprise value threshold would embed a transaction's purchase price and may thereby capture the value of the business beyond its existing assets and revenues. The Council member recognizes, however, that unless an enterprise value test could be devised to capture foreign-based targets that have a significant potential connection to Canada without being cast so broadly as to catch transactions that have no or limited connection to Canada, it may be that an enterprise value test would be appropriate only for Canadian targets. This could severely limit the effectiveness of an enterprise value test at capturing possible prevention of competition transactions.

Certain Council members argued in response that not giving the Bureau jurisdiction to review acquisitions on the basis of sales into Canada alone is justified because of the inability to enforce a remedy absent assets in Canada and that such cases would likely be addressed by enforcement in other jurisdictions.[22]

Many Council members support the use of exemptions from pre-merger notification for sectors such as real estate, upstream oil and gas, and certain financial services transactions that rarely give rise to competitive concerns, as a method to better calibrate the set of transactions subject to pre-merger notification. However, other Council members, while supporting consideration of further exemptions, stated that exemptions must be closely considered and carefully drafted to avoid being overly inclusive. Council members have numerous other suggestions for reform to better capture mergers of interest, including introducing aggregation rules and the application of the pre-merger notification provisions to non-corporate joint ventures and joint acquisitions by a special purpose vehicle where no shareholder holds more than a 50 percent interest. Given the technical nature of pre-merger notification, the Council recommends that the government strike a Bureau-bar working group to advise on technical amendments.

Limitation Periods

The Discussion Paper seeks views on extending the limitation period in which the Bureau can challenge all mergers from one year to three years post-implementation, or extending the limitation period for non-notifiable mergers, or tying it to voluntary notification.[23]

Council members agreed that addressing the current weaknesses of Part IX of the *Act* will go a long way to rebalancing the merger notification regime. One Council member recommends pairing modernization of the pre-merger notification thresholds with amendments that enhance the Bureau's ability to identify potentially problematic non-notifiable mergers. More specifically, the Council member recommends that the limitation period to challenge non-notifiable mergers be extended to three years but not longer,

22 One member argued that this view is inconsistent with the Bureau's past practice. The Bureau has, in certain cases, sought the divestiture of assets outside of Canada (e.g., see the scope of remedy obtained by the Bureau in *Holcim/Lafarge*, online: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03919.html), and in many cases it has coordinated the scope of remedies with foreign agencies, often times agreeing that a foreign remedy will satisfy the Bureau's competition concerns in Canada (e.g., see the remedies in *Thermo Fisher Scientific*, online: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03639.html, and in *Harris Corporation/L3 Technologies*, online: https://www.canada.ca/en/competition-bureau/news/2019/06/competition-bureau-will-not-oppose-merger-between-defence-contractors-harris-corporation-and-l3-technologies.html).

23 Discussion Paper, *supra* note 1, at pg. 29.

since lengthening the period between when a merger is closed and when it is investigated and challenged decreases the certainty that the merger is the cause of any anti-competitive conduct identified in a market. Three years would apply unless the transaction has been voluntarily notified to the Bureau prior to closing, in which case, the one-year limitation period should continue to apply.

Some Council members spoke in favour of the logic of extending limitation periods for all mergers, especially as a substitute for other, more distortive, recommendations such as a lower standard for intervention or the introduction of structural presumptions and burden shifting, as discussed below. However, several Council members raised concerns that calls for extended limitation periods were in reaction to transactions that posed no problems when they were completed, but with hindsight became viewed as problematic years later as the relevant markets evolved, potentially conflating effects in the market with effects of specific transactions.

Modifying the Legal Test and Remedy Standard

The Discussion Paper raises a number of proposals to address the possible substantive challenges to applying the merger provision's competitive effects test to acquisitions in fast-moving digital markets. These include introducing a more flexible definition of likelihood such as "an appreciable risk of materially lessening competition," reversing the burden of proof, introducing presumptions for already dominant firms, and special tests for platforms.[24]

Council members expressed a range of views on these proposals. There was little support for introducing a more flexible definition of likelihood. Similarly, Council members believe that changing the standard to a "balance of harms approach" would create legal uncertainty. Many Council members pointed to the information asymmetry that exists between the merging parties and the Bureau, as the Bureau has statutory powers to compel information from third-party market participants through its use of section 11 orders; without access to the same information, structural presumptions and reversed onus will be difficult for the merging parties to respond to. If bright-line tests or rebuttable presumptions are introduced, the consensus view of the Council is that the due process rights of merging parties would have to be protected by giving the merging parties access to the information collected by the Bureau during the section 11 process.

24 Discussion Paper, *supra* note 1, at pg. 21-23..

Some Council members expressed scepticism on the benefit of structural presumptions noting that rebuttable presumptions are already present within the Bureau's merger enforcement practice.[25]

Council members more supportive of the introduction of rebuttable presumptions noted that presumptions could assist the Bureau in capturing marginal mergers in highly concentrated industries while preserving its enforcement resources. However, others pointed out that introducing presumptions would merely shift the debate and analysis (and associated enforcement resources) to market definition.

To address concerns about market concentration, the Bureau has recommended that the standard for remedy proposals be changed from restoring competition to a level that is not substantially less than it was before the merger to restoring competition to the level that would have prevailed but for the merger.[26] There was a strong consensus that Council members opposed changes to the standard as set out by the Supreme Court of Canada in Canada *(Director of Investigation and Research) v Southam Inc.*[27] The importance of neutrality was emphasized by several Council members, with concerns raised that the Bureau's recommendations would result in different treatment between transactions that produce the same outcome.[28] The example provided by one Council member was the acquisition of a company with five factories. Under the Bureau's recommendation, the acquisition of two of the five factories – with the Bureau finding no lessening of competition – would be treated differently from an acquisition of the company as a whole with a divestiture of three factories to a third party.

Council members also challenged the lack of empirical evidence supporting the recommendation that the remedial standard required revision to address anti-competitive effects from mergers. The Council encourages the government to give the Bureau resources to engage in a retrospective merger remedies

25 See Competition Bureau, "Merger Enforcement Guidelines," October 6, 2011, online: https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/publications/merger-enforcement-guidelines, at section 1.7.

26 Competition Bureau, "The Future of Competition Policy in Canada: Submission by the Competition Bureau," March 15, 2023, online: https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/promotion-and-advocacy/regulatory-adviceinterventions-competition-bureau/future-competition-policy-canada, at section 1.6.

27 *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 SCR 748, online: https://www.canlii.org/en/ca/scc/doc/1997/1997canlii385/1997canlii385.html.

28 See Iacobucci, Edward. 2023. "The Competition Bureau's Misguided Approach to Merger Remedies." C.D. Howe Institute Intelligence Memo. March 15, online: https://www.cdhowe.org/intelligence-memos/edward-iacobucci-competition-bureaus-misguided-approach-merger-remedies-0

study before revising the remedial standard.[29] The Bureau has only conducted one merger remedies study, published in August 2011, which covered mergers from 1995 to 2005.[30]

Efficiencies Defence

Council members support the importance of efficiencies in merger analysis and generally agree that the consultation is an opportunity for Canada to reconsider its approach to the efficiencies defence, which applies if cost savings in a merger outweigh negative impacts on competition.[31] In its spring 2015 Communiqué, the Council was of the view that the ultimate implications of the Supreme Court's analytical approach to efficiencies set out in *Tervita Corp. v. Canada (Commissioner of Competition)*[32] ("Tervita") were uncertain, especially the emphasis placed on quantification of efficiency considerations, but would be tested in subsequent cases. Since then, many members of the Council believe the efficiencies defence has become an accounting exercise requiring extensive resources. There was some – although not universal – support during the spring 2021 meeting of the Council for a statutory amendment that rejects the quantification requirement set out in Tervita permitting that even marginal efficiencies could salvage an otherwise anti-competitive merger, despite evidence of qualitative effects.

There was, however, no consensus reached by the Council on substantive changes to the efficiency defence to improve its effectiveness, whether considering efficiencies within the competitive effects test rather than as a full defence, shifting the elements or procedure required for establishing or contesting efficiencies, weighting the factors differently or fully adopting a consumer surplus standard in line with the United States and other foreign jurisdictions, or increasing the role of unquantified evidence. There was little support amongst Council members for limiting the application of the defence only to mergers or markets with certain characteristics.

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29 C.D. Howe Institute Competition Policy Council, "Thirteenth Report: Competition Bureau Should not Have Power to Compel Information for Market Studies," May 4, 2017, online: https://www.cdhowe.org/sites/default/files/attachments/other-research/pdf/Communique_2017_0501_CPC.pdf, at pg. 4

30 Competition Bureau, "Competition Bureau Merger Remedies Study Summary," August 11, 2011, online: https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/publications/competition-bureau-merger-remedies-study-summary.

31 C.D. Howe Institute Competition Policy Council, "The Impact Of The Supreme Court's New "Quantitative Evidence" Ruling On Business Mergers," June 10, 2015, online: https://www.cdhowe.org/cpc-communique/impact-supreme-courts-new-%E2%80%9Cquantitative-evidence%E2%80%9D-ruling-business-mergers.

32 *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, online: https://www.canlii.org/en/ca/scc/doc/2015/2015scc3/2015scc3.html

Some members of the Council continue to believe that the efficiencies defence is an important aspect of Canada's framework legislation, designed to permit a merger in rare instances where there is an increase in the efficiency of the Canadian economy, whether by lower costs or increased output, that outweighs harm from reduced competition or higher prices.

UNILATERAL CONDUCT/ABUSE OF DOMINANCE

The Discussion Paper raises questions about the efficacy of Canadian competition law enforcement in the event of anti-competitive conduct by dominant platforms in the digital economy, acknowledging, however, that their size and success is due in part to "innovation and producing compelling goods and services."[33] Despite this, the Discussion Paper notes a concern remains that the size achieved may have anti-competitive consequences, making the *Act's* abuse of dominance legal tests ripe for re-examination.

The Council rejects the premise that big is necessarily bad and encourages the government to examine the evidentiary basis for reform. Nevertheless, Council members discussed: crafting a simpler test for a remedial order, including revisiting the relevance of intent and/or competitive effects; creating bright-line rules or presumptions for dominant firms or platforms; and condensing the various unilateral conduct provisions into a single, principles-based abuse of dominance provision. There is very little support amongst Council members for designing unilateral conduct provisions outside of abuse of dominance to address "fairness in the marketplace." The Council is of the view that competition law enforcement should remain focused on protecting competition; not protecting competitors.

With the exception of *per se* criminal provisions to address hard-core cartel conduct, competition law enforcement in Canada involves *ex post facto* assessment rooted in economic evidence of harm or potential harm to competition. Council members continue to support such an approach.

The Council has been calling on the government to amend the legislation on abuse of dominance to protect against harm to competition in general, rather than harm against particular competitors as had been interpreted by the courts since 2016.[34] The BIA Amendments broadened the definition of an "anti-competitive act" for the purposes of abuse of dominance to ensure that it includes intended harm directed toward competition itself, addressing prior judicial interpretations that many felt unduly

33 Discussion Paper, supra note 1, at pp. 30-31.

34 C.D. Howe Institute Competition Policy Council. 2016. "A New Competition Act for a New Federal Government," April 28, 2016, online: https://www.cdhowe.org/sites/default/files/attachments/other-research/pdf/Communique_April_26_2016.pdf

narrowed the scope of the provision. The BIA Amendments also added new considerations for the Tribunal when weighing applications for abuse of dominance to explicitly recognize emerging features of the digital economy such as non-price competition, consumer privacy, and barriers to entry such as network effects. Many on the Council believe that these amendments, combined with the private rights of action for abuse of dominance, will result in more effective enforcement. It is the view of the Council that crafting a simpler test for a remedial order such as "conduct capable of having anti-competitive effects" or "conduct where there is an appreciable risk of competitive harm" is not necessary for effective enforcement of the *Act* and could have unintended consequences.

Specific Council members have addressed important issues such as the relevance of "intent" and the meaning of "substantial lessening of competition" in their personal capacity. They cover important issues that bear emphasizing. For example, Professor Edward Iacobucci in his September 2021 paper, "Examining the Canadian *Competition Act* in the Digital Era" supported removing the intent requirement from section 79(b) of the *Act* and relying on demonstration of anti-competitive effect.[35] The same view is shared by Tim Brennan, who has argued that "a focus on intent is largely irrelevant, likely to reduce competition, and unduly raises the bar for bringing cases that would benefit the Canadian public."[36]

Recognizing the inherent difficulty in moving quickly to prohibit conduct that may have an anti-competitive effect, given the time needed to investigate and adjudicate cases with complex factual determinations, some Council members encouraged the government to consider what additional tools may be available to streamline investigations and resolutions, while ensuring important due process and rights of defence. For example, Council members considered the addition of alternative dispute resolution and final offer arbitration in the toolkit of possible competition law remedies.

Council members emphasized that enforcement based on structural presumptions and bright line tests may, just like enforcement that moves too slowly, also result in irreversible anti-competitive market outcomes. False positives (i.e., over-enforcement) and false negatives (i.e., under-enforcement) both

35 Edward M. Iacobucci, "Examining the Canadian Competition Act in the Digital Era," September 27, 2021, online: https://sencanada.ca/media/368377/examining-the-canadian-competition-act-in-the-digital-era-en-pdf.pdf, pp. 37-38.

36 See Brennan, Tim. 2023. "Should "Intent" be a Consideration in Competition Law?" C.D. Howe Institute Intelligence Memo. March 9. Available at https://www.cdhowe.org/intelligence-memos/tim-brennan-should-intent-be-consideration-competition-law.

have negative repercussions on the economy and on Canadians. The Council does not agree that recent legislative proposals and reforms abroad (e.g., the European Union's *Digital Markets Act*), which appear to be more concerned with marketplace fairness and protecting competitors than with competition, would be appropriate for Canada. Bright line rules against self-preferencing, in which a dominant firm favours its own downstream products and thereby hurts competitors – but not necessarily competition – reflect this tendency. Given that many forms of unilateral conduct enhance competition or are competitively benign, the majority view of the Council is that it is in the interests of a dynamic, innovative, and competitive economy that the abuse of dominance provisions, whatever their ultimate form, remain focused on effects.

Condensing Unilateral Conduct Provisions

The Council has previously considered the merits of consolidating various civil provisions dealing with single firm conduct (refusal to deal (section 75); resale price maintenance (section 76); exclusive dealing, tied selling and market restrictions (section 77); and abuse of dominance provision (section 79)) into a single provision. Each of these sections addresses conduct that can be pro-competitive, competitively benign, or anti-competitive, depending on the facts. Nevertheless, different conduct is subject to different thresholds for determining harm (such as adverse effect on competition or substantial lessening of competition), procedural routes (private access for certain provisions and not others), and potential remedies (including administrative monetary penalties (AMPs) for abuse of dominance, but only prohibition orders for other provisions), creating complexity and uncertainty for businesses trying to comply with the *Act*.

In its spring 2016 meeting,[37] there were differing views over the legislative consolidation of the general abuse provision and other, specific, reviewable practices:

The Case For Consolidating Reviewable Practices

A number of Council members would support some or all of the three specific reviewable practices (sections 75, 76, and 77) being subsumed under the more general section 79 – with significant support for consolidating section 77 in particular – on the basis that different standards increase the risk that cases may be brought by the Commissioner under a given provision to gain a strategic advantage.

37 C.D. Howe Institute Competition Policy Council. 2015. "A New Competition Act for a New Federal Government," April 28, 2016, online: https://www.cdhowe.org/sites/default/files/attachments/other-research/pdf/Communique_April_26_2016.pdf

A single threshold would also create more consistency within the *Act*. For example, consolidating section 77 into 79 would also capture restrictive covenants imposed by a customer on its supplier (i.e., monopsony behaviour) which it does not today. One Council member argued that the conduct not already covered by section 79 should be captured by an expanded section 90.1, as discussed below.[38]

The Case Against Consolidating Reviewable Practices

However, a number of Council members felt that amendments should seek to improve clarity instead of merely amending the *Act* for the sake of symmetry, and favoured retaining the specific provisions for refusals to deal and price maintenance with lower thresholds for harm but no AMPs, particularly given the cumulative jurisprudence that already exists. Some Council members expressed concern that eliminating specific provisions on price maintenance would put Canada too far afield of competition practices globally with others noting that Canada's price maintenance provisions were already different than our main trading partner.

COMPETITOR COLLABORATIONS

The Discussion Paper considers measures to improve the effective enforcement of both per se criminal offences for "hard core" cartel activity as well as civil competitor collaborations, including making it easier to infer an agreement and examining past conduct in the civil context, and reintroducing buy-side collusion – beyond the BIA Amendments – to the criminal bucket.[39]

One particularly concerning proposal in the Discussion Paper questioned whether concepts such as "agreement" and "intent" should continue to apply when considering the actions of machine learning algorithms, and referring to fundamental principles of criminal law such as *mens rea* as "evidentiary obstacles" to Bureau investigations.[40] As with all criminal law enforcement actions due process is of paramount importance, with the enforcer obligated to demonstrate all elements of the offence beyond a reasonable doubt. The introduction of inferences or presumptions of intent to address algorithmic behaviour would be inappropriate in the criminal context.

38 To the extent that concerns remain that some of the conduct covered by section 77 would be lost, the Council member suggests that section 78 could be amended by expanding the enumerated list of anti-competitive practices addressable under section 79.

39 Discussion Paper, *supra* note 1, at pg. 46.

40 *Ibid*. at pg. 42.

It is well-established that buy-side coordination can have positive impacts on competition by allowing smaller players to align purchases, reduce transaction costs, promote efficiency, and improve outcomes for consumers. There was consensus at the Council that expansion of the criminal conspiracy provisions to capture buy-side collusion, beyond existing provisions addressing naked wage-fixing and no-poaching agreements, is unnecessary and duplicative. The Council continues to believe that "criminal law is too blunt an instrument to deal with agreements between competitors that do not fall into the hard core cartel category."[41]

Given the relatively low success rate the Bureau has had in detecting, investigating, and ultimately prosecuting hard core cartels, some Council members believe that the *Act's* criminal cartel provisions should be complemented by civil provisions, as is done for deceptive marketing. This would allow the Bureau to elect whether to pursue the conduct criminally or civilly.

The Council discussed a number of ways that enforcement of the civil competitor collaboration provisions could be improved, as explained below.

Harmful Collaboration Between Firms that are Not Direct Competitors

Section 90.1 currently covers only agreements or arrangements "between persons two or more of whom are competitors."[42] The Discussion Paper questions this limit to horizontal agreements, and acknowledges that it puts Canada offside of international practice.[43] It also notes that this limitation has the potential to limit Bureau visibility and oversight for anti-competitive vertical behaviour – with calling out patent litigation settlements as an area of particular concern.[44]

One Council member argued that the elimination of the "competitor" requirement would (i) ease enforcement by making the application of section 90.1 simpler and more effects-driven; (ii) improve compliance incentives by allowing market participants to focus only on the potential effects of their

41 "Compete To Win," *supra* note 13, at pg. 59.

42 *Competition Act*, *supra* note 2, at section 90.1.

43 Discussion Paper, *supra* note 1, at pg. 43.

44 *Ibid*. at pp. 43-44.

agreements; and (iii) further align competition law in Canada with the laws of significant trade partners, such as the United States and the European Union, which have simpler prohibitions against anti-competitive agreements.[45]

Other Council members believe there is not a clear case for the application of section 90.1 to vertical agreements, and that the pro-competitive benefits of vertical integration make the extension of the application of the law unnecessary.

Deterring Competitor Collaboration With Stricter Penalties

Some Council members are of the view that the imposition of an AMP with respect to the competitor collaboration provisions would improve the *Act's* effectiveness. Other Council members cautioned against the imposition of AMPs for agreements that are generally considered presumptively legal.

The Discussion Paper also proposes to expand the scope of civil enforcement to prior conduct, in addition to ongoing and future conduct which is already caught. The Discussion Paper raises the concern that the inability to capture past behaviour could incentivize continuation of the behaviour until forced to stop. Discussion Paper notes that the current approach "is consistent with the civil approach to protect markets rather than discipline its actors."[46] The expansion of s. 90.1 to past conduct, together with the ability toimpose AMPs, could be considered punitive. The Council recommends that the government consider other ways to encourage compliance.

For example, Council members discussed the availability of private rights of action for anti-competitive competitor collaborations, whereby third parties could seek damages and/or the ability for the Tribunal to make a restitution order.[47] Ultimately, if a party or parties are found to have engaged in anti-

45 For example, in the United States, section 1 of the *Sherman Act* broadly provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." Similarly, article 101 of the *Treaty on the Functioning of the European Union* provides that "[t]he following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market…"

46 Discussion Paper, *supra* note 1, at pg. 43.

47 The *Act* currently allows for restitution in connection with certain deceptive marketing practices under Part VII.1. Specifically, where, on application by the Commissioner, a court determines that a person has engaged in specified conduct, subsection 74.1(1) allows the court to order that person to "pay an amount, not exceeding the total of the amounts paid to the person for the products in respect of which the conduct was engaged in, to be distributed among the persons to whom the products were sold…in any manner that the court considers appropriate."

competitive conduct, such party or parties should not be entitled to retain any earned profits derived through their anti-competitive conduct.

Unfortunately, competition law compliance is not always straight-forward. Many factors go into assessing the likely effect of a commercial agreement on competition. In most cases, the Bureau is best placed to assess the likely or actual effect of a commercial agreement on competition because of its power to collect information from third parties, either on a voluntary basis or through the various information collection powers available to it under the *Act*.

Council members also discussed a voluntary notification system that would provide a statutory exemption from AMPs where a firm (or firms) notifies the Bureau of proposed conduct (under any section of Part VIII of the *Act*, including competitor collaborations) before implementation. This would allow the Bureau to engage in a proactive assessment of potential effects and, if needed, impose a proactive remedy (in accordance with the enforcement powers currently available to the Tribunal). As a result, the firm (or firms) would not face adverse consequences, other than the imposition of a prohibition order (as is currently provided for under Part VIII), if it were later determined that the impugned agreement prevents or lessens competition substantially.[48]

To encourage participation, a prior notification regime should exempt parties from AMPs that might otherwise be available to remedy anti-competitive conduct, and the Bureau should establish reasonable service standards within which parties can expect the Bureau to complete its review of voluntarily notified matters.[49] This would provide parties with both the incentive to take advantage of the regime, and the certainty and clarity to rely on it. To mitigate against companies filing notifications for benign matters, which could unduly burden the Bureau's resources, a reasonable filing fee should be established as part of the regime.

48 To be clear, it is the Council member's view that even where a firm (or firms) notify the Bureau, the Bureau should still be entitled to apply to the Tribunal for a prohibition order if it turns out that the agreement prevents or lessens competition substantially.

49 The Bureau currently has in place non-binding service standards in connection with certain matters. See *Competition Bureau Fees and Service Standards Handbook for Mergers and Merger-Related Matters* (2018), online: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04358.html; *Competition Bureau Fee and Service Standards Handbook for Written Opinions* (2020), online: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04526.html.

However, many Council members are of the view that the advisory opinions provision contained in s.124.1 already provides for a voluntary notification system, which is currently ineffective and underutilized. Rather than introduce a new regime, these members argued that the Commissioner should be obliged to issue an advisory opinions (i.e., change "the Commissioner may" to "the Commissioner shall") within a reasonable statutory deadline.

Council members agreed that it is important that the *Act* not serve as a deterrent to commercial agreements that are not anti-competitive. It will be important for the government to strike the right balance.

CONCLUSION

The federal government's review of Canada's competition policy framework affects all businesses. As the Competition Policy Council emphasized in its first Communiqué responding to the Discussion Paper, how the government conducts the review will be a signal of what kind of legal and regulatory climate businesses face in Canada. Similarly, amendments made in an effort to improve the effectiveness of the *Act* could inadvertently chill innovation and distort competition. The government recognizes this in its desire to create a principled, evidenced-based approach to competition law, policy and practice that balances the need to encourage innovation and the need to ensure a level competitive playing field. The many issues that this second Communiqué addresses showcases the extent to which there is much to consider in trying to achieve the desired balance. The Council looks forward to further discussion with the government.

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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