COMPETITION POLICY COUNCIL

COMMUNIQUÉ

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# Structuring Success: Canada's Competition Act Must Remain Effects-based

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

The C.D. Howe Institute Competition Policy Council (the Council) met on Friday, October 13, 2023, to debate the calls for bright-line rules and presumptions, and whether such proposals are an appropriate approach to competition law enforcement that would effectively address issues of affordability and lagging productivity in Canada.

The tabling of a Private Member's Bill on September 18, 2023, by Jagmeet Singh, leader of the New Democratic Party, titled *Lowering Prices for Canadians Act*[1] brought this discussion into scope as it proposes bright-line tests and presumptions specifically in the context of Canada's merger review laws. A November 16, 2023, Motion in the House has proposed that during its consideration of Bill C-56, the *Affordable Housing and Groceries Act*, the Standing Committee on Finance expand the scope of the proposed changes to the *Competition Act* proposed in the bill to include revising the legal test for abuse of dominance.

**The Verdict:** The Standing Committee on Finance must exercise caution as it reviews the legal test for abuse of dominance. The majority of the Council continues to believe that competition law in Canada should remain effects-based. The removal of an effects-based analytical framework is more likely to protect competitors over the competitive process, which by its nature involves winners and losers, and is likely to deter pro-competitive conduct and chill innovation and investment in Canada. Given Canada's

1 On September 18, 2023, NDP leader Jagmeet Singh introduced Bill C-352, a Private Member's Bill which includes, among other amendments, proposals to introduce market-share thresholds into the merger review process of the *Competition Act* in the form of (1) presumptions of illegality, and (2) rebuttable presumptions of illegality and shifting burdens. The bill contemplates: a prohibition on mergers which result in a combined market share of 60 percent or more; a rebuttable prohibition on mergers which would result in a combined market share between 30 percent to 60 percent, unless the merging parties can demonstrate that the merger will be beneficial; and a rebuttable presumption against the merger where it will cause a significant increase in concentration or market share.

falling productivity[2] and the need to bolster competition in our economy, the majority of the Council is especially concerned with the costs of mistakenly condemning pro-competitive behaviour. Given the speed with which these amendments have come forward and the diversity of views on this topic as expressed during the consultation on the Future of Competition Policy in Canada, the Council is disappointed in the lack of consultation on the legislative proposals and debate on their implications.

## Future of Competition Policy in Canada Consultation

Following their deliberations regarding the consultation on the *Future of Competition Policy in Canada* in January 2023,[3] the majority of Council members concluded that competition law enforcement in Canada should remain focused on effects and continue to involve an ex post facto assessment rooted in economic evidence of harm or potential harm to competition.[4] The Council's majority position is consistent with "[m]ost businesses, their associations and law practitioners" who, according to the government's *What We Heard Report* released September 20, 2023, "were generally united in opposing the idea of bright-line tests over case-by-case analysis." Academics and economists also saw bright-line tests "as a recipe for over-correction and inefficient outcomes, as most targeted forms of behaviour are not inherently harmful…… There was concern about sacrificing real, short-term benefits to guard against more uncertain and distant harms. There was also a fear that hard rules or presumptions would ultimately be designed to protect competitors over the competitive process, which involves winners and losers."[5] Even among stakeholders, including consumer groups, who were more open to introducing bright-line rules and presumptions to various degrees, some called for "further studies or a carefully measured approach in designing the rules."[6]

2 OECD data reveal that Canadian productivity diminished by 9 percent between 2000 and 2022, falling to roughly 72 percent of that of the US.

3 The Future of Competition Policy in Canada consultation welcomed input on, among other points, "creating bright-line rules or presumptions for dominant firms or platforms, with respect to behaviour or acquisitions, as potentially a more effective or necessary approach, particularly if aligned with international counterparts and tailored to avoid over-correction."

4 Reforms to the Competition Act Must Be Evidence-Based and Homegrown, But They Are Only a Start to Promoting Competitiveness, Part II: The Pith and Substance of Reforms to Competition Policy in Canada (March 30, 2023).

5 ISED, Future of Canada's Competition Policy Consultation: What We Heard Report, section 6, Unilateral Conduct (2022).

6 *Id.*

## Embrace an Effects-based Analysis

Historically, competition law across jurisdictions has moved towards a less formalistic approach, changing focus from the type and form of business practices to examining whether such practices have demonstrable anti-competitive effects.[7] In the United States, the courts evaluate the anti-competitive effects of the conduct to determine whether there has been a monopolization offence.[8] The European Commission is similarly "committed to an effects based enforcement of Article 102 TFEU" and the Union Courts have "endorsed the main elements of an effects-based approach to exclusionary conduct by dominant undertakings."[9]

The majority of Council members strongly agrees with the sentiment expressed by the Competition Bureau in 2018 that competition law enforcement "must strike the right balance between taking steps to prevent behaviour that truly harms competition and over-enforcement that chills innovation and dynamic competition. Equally important, competition law and policy should continue to rely on market forces to lead to beneficial outcomes, not regulate prices or other outcomes."[10]

The majority of Council members recognize the importance of designing optimal rules for competition law enforcement. Rules "may lead to "false positives" (i.e., finding an infringement when a business practice does not harm competition), or to "false negatives" (i.e., not finding an infringement when a business practice harms competition)."[11] However, the majority of the Council believes that the cost of false positives is especially harmful and would be higher than that of false negatives in our current economic climate.

The importance of the effects part of the abuse of dominance test cannot be overstated. There are enumerated anti-competitive acts in section 78 that can have either a pro-competitive or anti-competitive effect depending on the facts. For example, the use of fighting brands to discipline competition (a lower-priced offering launched by a company to take on specific competitors that are attempting to under-price them) is listed as an anti-competitive act in section 78. The intent of this practice may not differ, whether the effect is pro-competitive or anti-competitive. The determination of whether this type of conduct contravenes the Act will turn on whether the effects are pro-competitive or anti-competitive. Without the effects test, vigorous competition in the marketplace may be caught as well.

7 In 2017, Australia amended its abuse of dominance test to include a competitive effects test.

8 Federal Trade Commission, Monopolization Defined.

9 European Commission, Competition policy brief (March 2023).

10 See, Competition Bureau, Big data and innovation: key themes for competition policy in Canada (February 2018).

11 Safe Harbours and Legal Presumptions in Competition Law: OECD Background Note, (2017).

Individual Council members have previously addressed "intent" in the test of abuse of dominance. Professor Edward Iacobucci in his September 2021 paper, "Examining the Canadian *Competition Act* in the Digital Era" suggested combining sections 79(1)(b) and 79(1)(c) to allow the Tribunal to make an order where a dominant firm is engaging in a practice that prevents or substantially lessens competition in an attempt to negate the formalistic and strained interpretation the courts have given to section 79.[12] Tim Brennan 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" though of course intent may be relevant to determining whether the effects are anti-competitive.[13]

The Competition Bureau has recommended revising the legal test for abuse of a dominant position to move from a three-part test (i.e., dominance, anti-competitive intent, anti-competitive effects) to a two-part test where the Commissioner could obtain an order by establishing that: (i) a firm is dominant; and (ii) the firm engaged in a practice with either anti-competitive intent or effect.[14] The majority of the Council does not support the Bureau's either-or approach, given concerns around the de-emphasis of effects. 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."[15]

The motion that expands the scope of Bill C-56 instructs the Standing Committee on Finance to consider "revis[ing] the legal test for abuse of a dominant position prohibition order to be sufficiently met if the Tribunal finds that a dominant player has engaged in either a practice of anti-competitive acts or conduct other than superior competitive performance that had, is having or is likely to have the effect of preventing or lessening competition substantially in a relevant market."[16] While the specific legislative language is yet to be tabled, members of the Council strongly encourages the Committee to retain the effects part of the test for reasons outlined above. Some members of the Council would

12 Edward M. Iacobucci, "Examining the Canadian Competition Act in the Digital Era," (September 27, 2021), online, pp. 37-38.

13 See Brennan, Tim. 2023. "Should "Intent" be a Consideration in Competition Law?" C.D. Howe Institute Intelligence Memo. (March 9).

14 Competition Bureau, Submission to the Future of Competition Policy in Canada consultation, section 2.1.

15 Competition Bureau, Abuse of Dominance Guidelines.

16 See https://apps.ourcommons.ca/ParlDataWidgets/en/motion/12716377.

support picking up on the Bureau's proposal of burden-shifting, while retaining the effects part of the test.[17]

At a bird's eye view, the majority of Council members believe that removal of the effects-based test signals to parties that our laws reflect a preference for over enforcement. Some may characterize this approach as having a deterrent effect on anti-competitive conduct; however Council members emphasize the dangers of over-inclusive enforcement which can limit pro-competitive conduct that is much needed to unlock benefits for Canadians and boost competition in the economy.

## The Perils of Over-regulation

The perils of over-regulation are well known.[18] According to the OECD, Canada's regulatory environment is ranked among the least favourable to product market competition.[19] Similarly, the OECD found Canada to be one of the most restrictive countries for Foreign Direct Investment (FDI) amongst OECD peers in the OECD Regulatory Restrictiveness FDI Index. The United States was found to be approximately half as restrictive as Canada.[20] Canada's position on the World Bank's *Ease of Doing Business* ranking has fallen drastically, from fourth in the world in 2006 to 22nd in 2019. In May 2018, the Canadian Chamber of Commerce released a report that concluded, "Canada's regulatory system is smothering business in Canada, thanks to a growing mix of complex, costly, and overlapping rules from all levels of government.[21] Over-regulation stifles innovation. Canada is the only G7 country that "produces less innovation outputs relative to its level of innovation investments."[22]

## More Effective Enforcement of the *Competition Act*

The majority of Council members do not support an approach to competition law enforcement that is too permissive and risks permitting conduct that is harmful to competition and Canadian consumers. A message to the business community that anti-competitive conduct will not be tolerated in Canada can

17 *Supra* note 13. One of the options the Bureau has proposed is retaining the three-part test and introducing an element of burden-shifting – if the Commissioner proved that a dominant firm engaged in a practice with anti-competitive intent the burden then could shift to the dominant firm to prove that the conduct was not capable of substantially harming competition.

18 See Deloitte, Making regulation a competitive advantage.

19 OECD, Indicators of Product Market Regulation (2019).

20 OECD, The OECD Regulatory Restrictiveness FDI Index (2018).

21 Canadian Chamber of Commerce, Death by 130,000 Cuts: Improving Canada's Regulatory Competitiveness (May 2018).

22 Global Innovation Index, Canada (2022).

be delivered through enhanced and more effective enforcement of the current, effects-based tests for harm under the *Competition Act,* and further bolstered with the Bureau's compliance initiatives as well as enhanced ability for private parties to bring their own enforcement actions.

Members observed that much has been done to strengthen enforcement by the Bureau. The Bureau has previously noted that "important amendments to the *Competition Act* became law on June 23, 2022, strengthening the Bureau's ability to protect Canadian consumers, businesses and workers from anti-competitive conduct."[23] The Bureau has recently been given the budget[24] and has the information gathering tools to do so. The Bureau continues to grow the "new Digital Enforcement and Intelligence Branch which aims to be an early warning system for potential competition issues at all stages, from providing early intelligence to monitoring remedies after investigations."[25]

## Conclusion

Preserving an effects-based legal test for an abuse of dominant position will give the Bureau what it needs to protect Canadians without deterring pro-competitive conduct and chilling innovation and investment in Canada. It will also provide firms with the requisite certainty that optimal enforcement decisions will be made as a result of a robust evaluation of the legal and factual issues that arise on a case-by-case basis, with a consistent application of the legal framework.

23 Submission from Canada, G7 Compendium of approaches to improving competition in digital markets, (November 8, 2023). See also Guide to the 2022 amendments to the Competition Act (2022).

24 In 2021, the Government of Canada committed to increasing the Competition Bureau's budget by $96 million over five years, and $27.5 million ongoing thereafter, to enhance the Bureau's enforcement capacity and ensure it is equipped with the necessary digital tools for today's economy. See Message from the Commissioner, 2022-2023 Annual Plan: Competition, recovery and growth.

25 See, Submission from Canada, G7 Compendium of approaches to improving competition in digital markets, (November 8, 2023).

**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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