

Intelligence MEMOS



From: Joshua Krane and James Musgrove
To: Innovation Minister François-Phillippe Champagne
Date: May 10, 2021
Re: **COMPETITION ACT CHANGES: PROCEED WITH CAUTION**

Canada enjoys a modern and robust competition law regime suited for an open-market, trading economy. It includes an extensive toolkit of powers for the Competition Bureau to investigate and address anti-competitive conduct, including mergers.

Still, some changes could strengthen Canada's competition law regime. The biggest improvement would not come from legislative change however, but giving the Bureau the staff and financial means to enforce current laws. We are pleased to see that call answered in the recent Federal Budget.

We comment on three possible changes to the *Competition Act*: (i) criminalizing wage-fixing and no-poach agreements, (ii) giving the Bureau subpoena powers in support of market studies and (iii) giving the Bureau the power to assess effectiveness of merger remedies. We discuss each in turn, and then return to the issue of Bureau resources.

1 Wage-fixing and No-poach Agreements

The Commissioner of Competition has stated that the criminal price-fixing provisions of the *Competition Act* do not apply to wage-fixing or no-poach agreements between competing employers. By contrast, the US Department of Justice has started resorting to criminal prosecutions in connection with these agreements.

A targeted amendment to the *Competition Act* could help ensure a competitive wage market. However, any legislative changes should not be drafted so broadly as to criminalize other forms of collective purchasing agreements, which are well recognized as a way that small and mid-sized enterprises can achieve scale efficiencies to compete more effectively.

2 Market Studies

The *Competition Act* does not give the Bureau powers to compel the production of information in support of broad market studies or steps to restructure markets, although it can use such powers in order to conduct inquiries and bring proceedings. This is consistent with the structure of the *Competition Act*, which established the Bureau/Commissioner as a law enforcer. The Bureau is not designed to perform the role of broad market studies, nor should it. The Canadian economy will be better off if the Bureau directs its resources to its designed purpose – enforcement activities, rather than market studies.

Market studies conducted under Canada's previous competition law regime were lengthy and costly affairs that produced little in the way of economic benefits to Canada. The Bureau will achieve much more useful and productive results for Canadians through vigorous enforcement efforts.

3 Merger Remedy Effectiveness

The Commissioner has also asked for the power to study the effectiveness of remedies following the conclusion of a merger review. It is important to ensure that merger remedies, when imposed, are effective, both to improve such remedies in the future and provide evidence as to when and where remedies are not appropriate. Consequently, we favour providing such mechanisms, but would encourage that data reporting mechanisms be negotiated in consent agreements. It is also important that these powers be carefully defined to prevent a second attack on a merger once a remedy is in place, and instead are solely focused on information needed to determine which remedies have proved successful. As a practical matter, parties will simply not agree to settle without a guarantee of finality.

The same can be said about extending the one-year limitation period to challenge a merger. Extending the limitation period will only create uncertainty without any upside to Canadians because as a practical matter, so few mergers are challenged and even fewer are challenged after closing.

That is not to say that a firm's post-merger conduct should not be challenged. If the Commissioner has reason to believe a merger has allowed a company to take measures to prevent or lessen competition substantially, the Commissioner can seek a remedy from the Competition Tribunal to restore competition under the existing abuse of dominance provisions.

4 Bureau Funding

As noted at the outset, the single most effective measure to improve competition law enforcement in Canada would be to ensure that the Bureau is appropriately resourced. We applaud the Government of Canada's announcement in the 2021 budget of \$96 million over five years. The Bureau's current [budget](#), in nominal dollars, has been flat for a decade, at approximately \$50 million.

At the same time as the Bureau's budget has been falling, the issues with which it contends have become more complex, and the volume of data involved even in simple cases has multiplied exponentially – 100 terabytes of data in one recent [case](#). The firms the Bureau investigates have become larger and better resourced. The Bureau is adapting to new technologies and has stressed the importance of developing and using digital detection tools to pursue new and complex conduct in the digital economy.

We hope the Bureau will use this increased funding to support its core mission of enforcing the *Competition Act* for the benefit of all Canadians.

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