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To: Canadians Concerned about Competition

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Re: CAN ANTITRUST LAWS ASSIST WITH THE ECONOMIC RECOVERY?

Antitrust enforcers have said they need to remain vigilant to protect consumers and assist with the recovery during the COVID-19 pandemic and economic downturn. Does the strict enforcement of competition laws stimulate a quick economic recovery, or would a more flexible approach in distressed sectors better serve the economy?

Vigorous antitrust enforcement worldwide protects competition and ensures a dynamic of creative destruction, promoting economically efficient allocation of scarce resources, higher quality products, relentless innovation and lower prices. However, during an economic crisis, markets can face disruptions that may impair efficient adjustments of production and prices, resulting in politically unacceptable distributional outcomes and causing longer-term “scarring” for the economy. In the present circumstances, policymakers must reflect on whether competition is truly [vital to manage the impacts of the crisis and create the best environment for economic recovery](#).

First, we note that, for antitrust enforcement, the 2008 financial crisis was “business as usual”. The 2008 financial crisis differed from the COVID-19 crisis in cause (i.e., liquidity), effects (primarily a financial shock to demand rather than widespread constraints on real activities) and scale (i.e., the size of the economic contraction). Unlike the 2008 crisis, the economic impacts of the pandemic prompted various countries’ competition agencies to loosen their rules.

Notably, agencies emphasize that any temporary flexibility does not mean relaxing enforcement against “cartel” conduct, such as price fixing, limiting quantities or allocating markets. However, agencies have signaled that they will allow competitors to cooperate temporarily to alleviate shortages and ensure the continuity of supply of essential products, such as personal protective equipment and COVID-19 medications. Examples include:

- Permission for exceptional derogations from the European Union’s competition rules for the milk, live plants and flowers, and potatoes sectors in order to support the agri-food sector;
- A temporary exemption from Norway’s Competition Act to allow two major domestic airlines (SAS and Norwegian) to collaborate on route offerings; and
- Expedited exemptions by the Australian Competition and Consumer Authority for the Australian Banking Association to permit banks to collaborate on implementing a small business relief package.

Should Canada’s Competition Bureau allow similar flexibility for non-essential sectors impacted by the pandemic?

The crisis has devastated firms in the travel, tourism, entertainment, and hospitality sectors. The plunge in demand means an unprecedented extent of excess capacity in these sectors. Markets typically respond to excess capacity through consolidation or collaboration. Otherwise, insolvent companies will cease operations, increasing market concentration among the remaining players.

As the global economy teeters on the brink of a prolonged depression, competition agencies will face pressure for more flexible and speedy approaches to aid with the economic recovery. The Commissioner can also exercise the appropriate discretion that serve in the public interest. As well, the [OECD anticipates](#) a growing conflict between government subsidization for businesses and competition law enforcement.

Competition law principles developed for “normal” circumstances may be less suited where supply and demand is severely disrupted and industrial supports by governments worldwide have distorted market forces. As noted by US [economist Carl Shapiro](#), “antitrust analysis must always reflect market realities, including financial distress at the industry and/or firm level.” In particular, competition enforcement assumes that markets are in stable equilibrium at or near full employment. As an example, data from the pre-pandemic marketplace will not be a reliable benchmark for comparing prices or output levels. Relaxing traditional antitrust enforcement in troubled markets is reasonable where a country is grappling with the more important problems of product shortages, business liquidity and unemployment.

Unlike certain other countries, Canada’s *Competition Act* does not permit a more flexible approach to mergers or competitor collaborations which result in a substantial lessening or prevention of competition. The shortcoming was the subject of an [April letter](#) from the Canadian Bar Association to the Minister of Innovation, Science and Industry. This letter recommended an amendment to allow the Minister to exempt certain competitor collaborations and mergers from the application of the *Competition Act* on public interest grounds.

Nonetheless, the Commissioner [has some latitude](#) to permit certain anticompetitive mergers and collaborations in distressed markets. Specifically, the efficiencies defence allows mergers and competitor collaborations where the resulting efficiencies (e.g., the reduction of excess capacity in a depressed sector) outweighs the reduction in competition. A “failing firm” defence is also available when a company appears on the verge of closure and lacks other potential acquirers. For example, in 1999 the Competition Bureau permitted Air Canada to merge with Canadian Airlines following an expedited merger review and failing firm analysis. In this case, expeditiously permitting a merger to monopoly in the distressed airline sector was preferable to the liquidation of Canadian Airlines.

To expedite recovery and restructuring of distressed sectors, we recommend the Competition Bureau:

- Clarify and streamline its approach to failing firm claims;
- Use hold-separate arrangements for mergers that do not clearly meet the [failing firm](#) or efficiency defences;
- Adopt a broader approach to defining markets (and assessing market share);
- Forgo econometric analysis when pre-pandemic pricing is obviously inconsistent with present conditions (e.g., airlines sector);
- Increase receptiveness to efficiency arguments (e.g., default of no section 11 hearings for distressed sectors);
- Consider broader economic impacts of a merger or collaboration.
- Creatively structure remedies, including behavioral solutions (e.g., no price increases for both passenger travel and cargo delivery beyond those related to operating costs.) where appropriate; and
- Publish comprehensive advisory opinions.

Following the 2008 financial crisis, competition agencies grappled with the consequences of a severe recession for global trade and competition policy. The scale of the COVID-19 crisis increases the urgency and importance of these implications. As the global economy navigates uncertain seas, competition authorities must reflect on how their enforcement can support recovery.

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