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Competition Bureau Should not Have Power to Compel Information for Market Studies

Thirteenth Report of the C.D. Howe Institute Competition Policy Council

The Competition Bureau occasionally conducts studies to better understand industries and identify areas where changes to market structures may secure greater benefits through competition. Such market studies may include recommendations, such as proposals for regulatory reform or changes in the conduct of industry participants. In conducting such studies, the Bureau generally relies on publicly available information, data purchased from independent providers and information voluntarily provided by participants.

In recent comments, the Commissioner of Competition has advocated that the Competition Bureau could benefit from additional powers to conduct market studies. In particular, the Commissioner stated that “the Bureau does not have the expressed legal authority to use market studies” and “unlike the Bureau, [foreign] agencies have access to formal investigative powers to compel information from regulators and companies.”¹ A majority of Council members agreed that the Bureau should not have the ability to obtain orders to compel Canadian business to produce information for use in a market study. Such investigatory orders could result in significant costs for Canadian businesses. Council members were also of the view that the Competition Bureau has not identified how previous market studies were systematically deficient or that information obtained voluntarily from market study participants was inadequate so as to justify the potentially significant costs arising from investigatory orders.

More broadly, the Council was divided on the basic issue of whether the Competition Bureau should be engaged in market studies at all. Certain members of the Council felt that market studies were not effective in enhancing competition and divert a portion of the Bureau’s limited resources away from

1 “Competition Bureau: Innovating to Succeed.” Remarks by John Pecman, Commissioner of Competition, Canadian Bar Association’s Competition Law Spring Forum (Toronto, Ontario) May 19, 2016, available at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04090.html>



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enforcement. Other Council members believe that market studies are an important aspect of advocacy by the Competition Bureau (particularly in highly regulated industries) and assist the Bureau in understanding market structures. Those Council members supporting the use of market studies were of the view that the Bureau had the ability to conduct market studies under its general authority. However, if an express legislative power to conduct market studies was required, the consensus view of Council members was that this power should not include the ability to compel information and that there should be limits on the scope and length of any studies. This is the majority view of the C.D. Howe Institute's Competition Policy Council, which held its thirteenth meeting on April 17, 2017.

The Competition Policy Council comprises top-ranked academics and practitioners active in the field of competition policy. The Council, co-chaired by Benjamin Dachis, Associate Director, Research, at the C.D. Howe Institute and Adam Fanaki, Partner, Competition and Foreign Investment Review and Litigation at Davies, Ward, Phillips & Vineberg LLP, provides analysis of emerging competition policy issues. Professor Edward Iacobucci, Dean at the University of Toronto Faculty of Law and Competition Policy Scholar at the Institute, advises 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.

At Issue: Are market inquiries an appropriate tool for Canada's Competition Bureau?

Background

Prior to 1986, the Competition Bureau had broad formal powers to conduct research inquiries of various industries. However, the amendments to the *Competition Act* in 1986 significantly reduced the Competition Bureau's explicit powers to conduct such inquiries. Sections 125 and 126 of the *Competition Act* grant the Commissioner of Competition the authority to call evidence and appear upon invitation or his own initiative before federal, also upon ministerial direction in this case, and provincial boards that supervise regulated industries in order to advocate for changes in market sectors. For other forms of market studies, the Bureau relies on the general authority given to it in section 7 of the *Competition Act* on enforcement and administration of the *Act*. The Bureau has conducted numerous market studies relating to a range of industries. However, the Council understands that the authority of the Commissioner to undertake market studies in the absence of explicit legislative authority has been questioned.

In the majority of countries surveyed by the Organisation for Economic Co-operation and Development (OECD) competition authorities have an explicit authority to conduct market studies. Among countries that responded to a 2016 study on market studies,² 68 percent have bodies with the explicit authority

2 "The Role of Market Studies as a Tool to Promote Competition." Background Note by the Secretariat (1-2 December 2016), available at: [https://one.oecd.org/document/DAF/COMP/GF\(2016\)4/en/pdf](https://one.oecd.org/document/DAF/COMP/GF(2016)4/en/pdf).

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to conduct market studies, and in a further 26 percent, including Canada, they conduct market studies under their general powers. Canada is the only G8 member that does not grant an express market study authority to its competition authority. For example, the US Federal Trade Commission, although not the Department of Justice, has wide authority to conduct studies and research. The UK Competition and Markets Authority has among the most extensive powers, with powers to conduct research studies, but also to do investigations that allow it to recommend to the government remedies to address any findings of adverse effects on competition.³

The Competition Bureau does not have the ability to compel private entities to provide information for a market study. Approximately 63 percent of OECD respondents have the ability to impose sanctions on firms that do not provide information for such studies. According to the OECD study, the majority of competition authorities around the world also have the ability to use the information collected during market studies in subsequent enforcement actions, either in all cases or with some conditions.

The Council members concluded that differences between the Canadian *Competition Act* and the market study regimes in certain jurisdictions did not alone provide a sufficient argument for enhanced market study powers in Canada, such as the ability to seek investigatory orders. Rather, such amendments would need to be justified based on a review of the effectiveness of the Canadian regime.

Market Studies in Canada

The Council laid out three questions the government should assess in evaluating any request for enhanced market study powers: (i) Should the Competition Bureau conduct market studies and relatedly, whether the *Competition Act* should be amended to include an explicit legal authority to conduct market studies; (ii) Should the Competition Bureau have the ability to seek orders to compel industry participants to produce documents and data as part of a market study; and (iii) If so, should there be any limitations on the use of information compelled from participants, such as in enforcement actions by the Competition Bureau? One issue permeating these discussions was the need to consider what supervisory and accountability mechanisms should be put in place if market study powers were extended beyond their current form.

Should the Bureau Conduct Market Studies? The Case For and Against

The Council spent the most time discussing, and was most divided on, the fundamental question of whether the Competition Bureau, on its own initiative, should be engaged in market studies and, if so, whether the *Competition Act* required an explicit power for the Bureau to conduct market studies.

³ The Competition and Markets Authority is currently changing the way it conducts such studies. See Competition and Markets Authority “CMA proposes market investigation changes” (March 6, 2017) available at: <https://www.gov.uk/government/news/cma-proposes-market-investigation-changes>

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The view in favour of market studies: Council members in favour of market studies argued that the Bureau could be an important advocate for the role of competition in fostering a stronger economy. Such studies can also be useful in measuring the adverse welfare impact, and in pointing out the distributional consequences, of anti-competitive government policies, such as supply management, internal trade and local requirements for government purchases. The competition effects of regulation can be complex and thorough studies from the Bureau would be useful in presenting the case for competition.

One Council member felt that a better-informed Bureau through market studies would also be a more effective advocate for competition policy within other parts of the Canadian government. Further, some Council members felt that advocacy studies may be more effective and less burdensome in many cases than enforcement action.

Even among those Council members that supported market studies, many did not believe that an amendment to the *Competition Act* is required to include an explicit market study power. The Competition Bureau has conducted numerous market studies to date, including an ongoing market study into technology-led innovation in the Canadian financial services sector. However, if an explicit authority to conduct market studies was required, such an amendment should include restrictions on the use of market studies, such as limitations on the length and scope of such studies and procedural rules to ensure due process requirements are included.

The view opposed to market studies: A number of Council members were concerned that market studies amount to a waste of limited Bureau resources. These Council members felt that the size of the benefits would be uncertain while the costs of Bureau resources and of businesses in reacting to Bureau studies could be sizeable. A finding that a market is uncompetitive is not obviously useful for any particular regulatory or enforcement issue. On the other hand, if there is a concern about a regulatory or enforcement question, the regulators or the Bureau, as enforcement agencies, can investigate the potential specific effects of the regulation or the enforcement issue and not undertake a broad market study. Council members felt that the Bureau's economic research would be better spent on retrospective studies of past enforcement action and lessons to be learned in that context, as opposed to speculative market studies.

Council members questioned whether the Bureau is the best-placed organization to conduct market studies. Although the Bureau has the expertise in analysing competition, other parts of the federal government are potentially better suited to research that has a direct connection to policy development, which the Bureau does not do. For example, the Ministry of Innovation, Science and Economic Development, through which the Bureau reports to Parliament has extensive research capabilities. Other parts of government, such as the Canadian International Trade Tribunal or the Canadian Radio-television and Telecommunications Commission already have, or could be given more, specific market studies powers in their areas of expertise. Likewise, governments and regulators can invite the Commissioner to come

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forward with information as part of a consultation. Finally, private organisations and academics already have the ability to do market studies that the Bureau may duplicate if given formal powers.

These concerns with a return to market studies with formal investigatory powers were expressed by reference to the costs incurred in a past market study. It was conducted by the Restrictive Trade Practices Commission, commencing in 1981, of the Canadian gasoline industry, which in various forms lasted about a decade. That study consumed enormous public and private resources, with no end benefit to consumers. There is a risk that the Competition Bureau would be encouraged to conduct market studies for political as opposed to competition issues, resulting in a diversion of the Bureau's limited resources. For example, the US Federal Trade Commission has faced repeated requests to devote resources to the study of gasoline pricing, rather than areas with greater competition concerns.

In response to these arguments, other Council members pointed out that the Competition Bureau can be most useful in regulatory hearings if it has a comprehensive market study to present. If the Bureau is limited to responding only to immediate requests, some Council members felt that it would have the limited ability only to present a theoretical case on competition principles, rather than difficult-to-gather facts about Canadian markets that would be most persuasive in regulatory hearings.

Should the Bureau Have the Power to Compel Evidence?

There was a clear majority among Council members that the Bureau should not have the power to seek investigatory orders to compel information for any market studies. Council members believed that such investigatory orders could prove costly for Canadian businesses. Unlike an inquiry into specific conduct, a market study could include issues relating to entire industries, resulting in broad and burdensome investigatory orders. There are also concerns with respect to the use of information required under an investigatory order and its impact on due process. One Council member made the analogy that the Competition Bureau compelling information for the purposes of study is similar to a police force compelling local citizens to provide information for a study on local crime. These citizens would rightly be concerned about the government's ability to compel such information, and how it may be used by an enforcement agency.

The Council's concerns about compelling information ranged from the question of due process to broader questions about the accountability and oversight of the Bureau. Some members of the Council have concerns about the perceived lack of oversight of the Bureau for its existing powers, and expanding those powers could only worsen an existing issue.

In any event, Council members were also of the view that the Competition Bureau has not identified how previous market studies were deficient or that information obtained voluntarily from market study

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participants were inadequate. The Bureau has conducted a number of market studies to date by relying on information that is supplied on a voluntary basis, by the use of experts and access to public sources of information. Even in jurisdictions that have the ability to compel the production of information (such as the US Federal Trade Commission and Australian Competition and Consumer Commissioner), authorities largely rely on voluntary responses from participants. Overall, the Council members were not aware of evidence that the ability to compel the production of information is necessary to effectively conduct market studies.

Limitations on the Use of Evidence from, and the Scope of, Market Studies

Concerns about the use of information and the scope of studies are closely tied to the previous question. If the Bureau is not given the power to compel private entities to provide information, there are fewer concerns regarding the use of data that is voluntarily supplied by participants or information obtained from public sources.

Conclusion

There was support among some Council members for the continued use of market studies, including, if necessary, an express power to conduct market studies of limited scope and length as long as this express power was not accompanied with any formal powers to require information from private entities. Even such a compromise solution was not the favoured solution of many Council members, who suggested that market studies are best left to other organizations, both within and outside government. More generally, Council members felt the Bureau should answer questions such as the reasons for, and benefits of, an inquiry power, the potential outcomes of studies, and what the Bureau and government would do about the results of a study before seeking any additional powers to conduct studies.

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Members of the C.D. Howe Institute Competition Policy Council

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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