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Help Wanted: Priorities for a New Competition Commissioner **Fifteenth Report of the C.D. Howe Institute Competition Policy Council**

There's a major job vacancy coming soon in Ottawa: The Commissioner of Competition. The current Commissioner, John Pecman, will be retiring from his role as the head of the Competition Bureau this spring. This is a unique opportunity for the federal government to reflect on the performance of the Competition Bureau and articulate a set of priorities for the new Commissioner.

There should be two long-term priorities for the new Commissioner. The first is to improve the timeliness and efficiency of the Bureau's operations. The new Commissioner should conduct a review of the existing management structure and enforcement policies within the Bureau to improve the timeliness, efficiency, predictability and transparency of processes, specifically with respect to merger review and criminal enforcement. The second is to ensure that the new Commissioner vigorously pursues his or her mandate to act as an independent, strong and relevant public advocate for competition. This is the majority view of the C.D. Howe Institute's Competition Policy Council, which held its fifteenth meeting on April 24, 2018.

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.



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At Issue: What should be the long-term plan for the new Commissioner of Competition?

Background

The Commissioner of Competition leads the Competition Bureau, and is tasked with enforcing the *Competition Act*. John Pecman, the Commissioner since 2013, will be reaching the end of his five-year term shortly. The federal government has initiated a search for a new Commissioner, who will be appointed by the Governor in Council, on the recommendation of the Minister of Innovation, Science and Economic Development. The *Competition Act*, which sets out the Commissioner's powers in the investigation and enforcement of Canadian competition matters, provides the Commissioner with a great deal of enforcement independence and discretion. Because of the nature of Commissioner's role, the choice of Commissioner will have important consequences for the enforcement and development of Canadian competition policy.

The Council examined the question of priorities for the new Commissioner in its meeting on April 24th, 2018.

Priorities for Change

Council members raised a number of potential topics on which the new Commissioner should focus. Two themes emerged: one focused on internal reform, and one focused on external issues. The most critical priority for internal reform is to improve the efficiency and timeliness with which the Bureau handles cases, particularly for mergers and criminal matters. As for externally focused reform, the Council's conclusion was to ensure that the new Commissioner is an independent, strong and relevant public advocate for competition in Canada.

Improving the Efficiency of Reviews

The Council has previously voiced concerns with respect to delays in the Competition Bureau's investigatory and enforcement processes. In respect of merger reviews, the Council has stated in the past that "The process through which the Competition Bureau reviews transactions and ultimately determines whether to seek remedies can be done in a quicker, more transparent and more predictable manner."¹ The Bureau does approve the vast majority of mergers during a 30-day period set as its

1 <https://www.cdhowe.org/sites/default/files/attachments/other-research/pdf/Communique-CompetitionPolicyCoincil-Oct26-2017.pdf>.

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service standard, allowing parties to complete the transaction at that time. However, the Bureau often takes significantly longer to complete its reviews of more complex mergers. Similar issues arise with respect to other civil matters, such as investigations in abuse of dominance cases, as well as criminal matters. It is common for civil and criminal investigations by the Bureau to take several years before any conclusions are reached.

The harder question is how to fix this issue. It is not enough for a new Commissioner to simply seek to do more with the same, or even fewer, resources. Indeed, competition law enforcement, like other areas of the law, is facing increasing complexity and delays in the adjudication process. The new Commissioner must find ways to improve processes at the Bureau. In this regard, the majority of the Council members believed that the Commissioner should begin with an overall assessment of the Bureau's organizational structure, including the role of management and the review processes utilized by the Bureau. A number of Council members noted that the internal restructuring of the Bureau in 2015 reduced the role of senior management in the review of significant matters. As a result of this change, case review staff may not be empowered to deal with even basic issues, resulting in significant delay and inefficiency in the review process. The majority of the Council agreed that the new Commissioner should examine the current structure of the Bureau to ensure that senior managers remain engaged and involved in significant matters before the Bureau. Also, given that cartel enforcement and other criminal provisions of the *Act* are priorities, senior management at the Bureau should be engaged and aligned with the Public Prosecution Service of Canada in the development of prosecution-ready cases.

The majority of the Council agreed that much could be done to expedite the Bureau's substantive review processes, particularly in merger review. The vast majority of mergers do not raise any material competition concerns and should be resolved in a timelier manner. In previous Council meetings, the group found that the Bureau is sometimes engaging in extensive reviews, such as contacting numerous customers and suppliers, in respect of mergers that clearly do not raise any competition issues. Although the Council acknowledges that the Bureau must do some due diligence on even non-complex matters, in areas where the Bureau has significant experience, such as with acquisitions in the retail sector, the Bureau should be able to quickly identify any local market issues that may exist and conclude reviews expeditiously where no such issues exist. The Council concluded that the Bureau can improve its transparency, consistency and predictability in conducting merger reviews, particularly for more complex mergers.² Although certain of these changes are underway with the Bureau, the new Commissioner should recognize and prioritize such initiatives.

2 Ibid.

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An Advocate for Competition

There was a clear consensus among Council members that the new Commissioner should be a more active advocate within government circles and externally for the role of competition in fostering a stronger economy in Canada. The government has recognized that “[t]here is a need for competition advocacy in Canada to advance a competition-friendly regulatory environment and bolster awareness of competition issues and their impact on the day-to-day lives of citizens.”³ The *Competition Act* empowers the Commissioner to advocate for greater competition in Canada, and the members of the Council believe that the Commissioner must be a strong and public advocate for competition with respect to the full range of potentially anticompetitive conduct in Canada, including with respect to government policies and legislation that may distort competition.

Advocacy for competition can take a variety of forms. One important venue for the Commissioner’s competition advocacy is public submissions to federal, provincial or municipal governments regarding regulations or policies that may impair competition. For example, in 2014, the Commissioner made a submission to the City of Toronto as part of its Taxicab Industry Review in which the Commissioner advocated for regulations that facilitate entry in the taxi industry through innovative operating models and encouraged the City to avoid restrictions on competition that are broader than necessary.⁴ More broadly, in 2016, the Competition Bureau issued a paper entitled “Balancing Regulation and Competition” recommending that regulators across the federal, provincial and municipal levels in Canada should fully consider competition principles before enacting regulations.⁵ These and other competition promotion activities, such as the Bureau’s publications on big data⁶ and FinTech,⁷ are examples of the Commissioner’s positive role as the public advocate for competition in Canada and should be continued and intensified.

While recognizing the Competition Bureau’s ongoing commitment to advocacy, the Council believes that the Commissioner should be free to publicly comment on potentially anticompetitive conduct, including legislation and policies that are proposed by federal, provincial or municipal governments. In recent years, the Council believes that the Commissioner’s relevance as a public advocate for competition in Canada has declined. The Commissioner should have the ability to advocate against

3 https://www.ic.gc.ca/eic/site/ae-ve.nsf/eng/h_03856.html

4 <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03667.html>

5 <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04141.html>

6 <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04304.html>

7 <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04315.html>

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the full range of conduct that may distort competition in Canada, even where such efforts may contradict the policies pursued by other government agencies. As the Competition Bureau recognized in “Balancing Regulation and Competition,” such actions will help to “enable the forces of competition to ensure that the Canadian economy continues to deliver the highest quality goods and services at the lowest prices.”⁸ The government itself should encourage this kind of advocacy and seek to appoint a Commissioner who is prepared to take an active role in public debate.

Conclusion

The search for a new Commissioner of Competition represents an opportunity for the government to review its commitment to a competitive marketplace and the role of the Competition Bureau in realizing that commitment for all Canadians. The government should look to bring on a Commissioner who will focus on improving the efficiency of the Bureau’s main functions and act as a strong public advocate for competition throughout the Canadian economy.

8 Ibid.

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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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