

Intelligence MEMOS



From: Benjamin Dachis and Adam Fanaki
To: Competition Policy makers
Date: November 2, 2017
Re: **IMPROVING MERGER REVIEWS IN CANADA**

The C.D. Howe Institute's [Competition Policy Council](#) met this month to discuss the state of competition policy in Canada.

The Competition Act provides for reviews of mergers by the Commissioner of Competition, the head of the Competition Bureau, to determine whether such transactions are likely to prevent or lessen competition substantially. Merger reviews by the bureau are taking longer now than in the past, although part of the delay may be due to matters outside of the bureau's control.

Nevertheless, the majority of the Council agreed that much could be done to expedite the bureau's process in reviewing the vast majority of mergers that do not raise any material competition concerns. Similarly, for more complex mergers, the Council concluded that the bureau can improve its review process, particularly with respect to the transparency, consistency, and predictability in conducting such reviews.

Many Council members thought the Bureau frequently engages in extensive reviews of mergers that clearly do not raise any competition issues. Most on the Council agreed that the problem of delays for the review of non-complex cases results in the misallocation of limited resources to cases that the bureau should not be investigating in the first place.

Most Council members agreed that the bureau should look to meet more often, and earlier, with merging parties to discuss the scope of their initial concerns for complex mergers. The Council also reached a consensus that the bureau should provide a position statement to the parties articulating the concerns and economic theories that the bureau has identified and will pursue as it continues to examine the transaction.

Among the issues addressed was improving the role of the Competition Tribunal in merger proceedings. Currently, companies can rarely delay mergers for the extended period required to complete a fully litigated proceeding before the Tribunal. Because of the length of time required to fully litigate merger cases, the Competition Policy Council felt that the Competition Commissioner often becomes the *de facto* decision-maker on merger review cases.

Most Council members agreed that it would be beneficial for merging parties to be able to litigate challenges before the Competition Tribunal under an expedited schedule. One proposal is to have merger cases resolved through an expedited proceeding using a timeline and process similar to preliminary injunctions in the United States. Alternatively, some Council members suggested that the standard for issuing interlocutory injunctions under section 104 of the Competition Act be amended to require the tribunal to determine whether the commissioner would have a likelihood of success on the merits, as opposed to only finding that there is a serious issue to be tried at this stage.

Another area of discussion among Council members was the need for potential reforms to the tribunal itself. Some Council members believe the tribunal should be abolished entirely, replaced by simply having cases heard before the Federal Court. Others thought that a specialized tribunal was sensible and recognized that it has engaged in recent measures directed at reducing the length of contested proceedings, such as by facilitating early mediation of contested cases, engaging in active case management, reducing schedules for hearings and considering other potential reforms. Regardless of the exact restructuring, most on the Council agreed that the tribunal should continue to explore options to promote timeliness in contested proceedings.

Both the bureau and the government should consider the potential reforms outlined above, such as greater transparency and improved case selection by the bureau, to improve the efficiency, consistency, and predictability of the Canadian merger review process.

Benjamin Dachis is Associate Director of Research at the C.D. Howe Institute, and Adam Fanaki is Partner, Competition and Foreign Investment Review and Litigation at Davies, Ward, Phillips & Vineberg LLP. They are co-chairs of the Competition Policy Council.

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