Canadian Chamber of Commerce
Chambre de Commerce du Canada

Canadian Chamber Future of Business Centre
Centre de l'avenir des affaires de la Chambre de Commerce du Canada

June 2022

Competition Act Reform Interim Report

John Pecman, Fellow, Canadian Chamber Future of Business Centre

About us

The Canadian Chamber of Commerce is committed to enabling the future of business success. To advance progress on forward-looking public policy issues, the Canadian Chamber Future of Business Centre is our platform for placing these topics into the public debate.

This report has been authored by a fellow of the Canadian Chamber Future of Business Centre, with input from the Advisory Council. The report reflects the views of the author and does not necessarily reflect the views of the Advisory Council or the Canadian Chamber's members.

More information about the Canadian Chamber Future of Business Centre can be found online at https://chamber.ca/futureofbusinesscentre/.

Competition act reform interim report

As policymakers in the United States and Europe continue to explore reforms to their competition policy rules to respond to the surge in economic and consumer activity occurring in digital formats, there is increasing focus on competition policy reform in Canada. This includes a commitment by the federal government to review the Competition Act.

This report contributes to the public policy debate by identifying the key issues that will, and should, be considered as part of the Competition Act review. This iteration of the report will be subject to further consultation and input to shape a final report that will be delivered later this year.

Introduction

In 1889, Canada enacted what is recognized as the first competition statute of modern times, the *Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade*.[1] While Canada can claim to be a pioneer in competition law and take credit for expanding the role of competition policy with the introduction of a state-of-the-art *Competition Act* (the "Act") in 1986, it has not been in the global forefront in more recent times.

The last comprehensive study of Canada's competition law was conducted in 2008 by an eminent group of Canadian business leaders who released a report, titled "Compete to Win" which urged Canadians to "skate harder, shoot harder and keep our elbows up in the corners."[2] The underlying theme was that greater competition in the Canadian economy would "improve economic performance and provide Canadians with a higher standard of living." A number of the panel's recommendations to amend the Act to align Canadian merger review and cartel laws with those of the United States were implemented by the government in 2009. However, notably left out of the 2009 reforms was the panel's overarching recommendation for the government to maintain focus on competition regulation through the creation of a Canadian Competition Council, tasked to continually review the state of competition in Canada, and to make ongoing recommendations to government for further reform as necessary.

Growing populist concerns with corporate concentration, income inequality and privacy have recently triggered Canada's major trading partners to engage in significant study of market power by so-called Big Tech firms and to undertake revisions to their competition laws. For example, in Europe, the United States and elsewhere, there is active policy reform afoot driven by a revival of the "big is bad" mantra. These policy reforms seek to shift competition policy from traditional laissez-faire and consumer welfare enhancing goals to *ex ante* regulation by strengthening antitrust laws.

Canada's government announced in April, 2022[3] a first set of amendments to the Act through the *Budget Implementation Act* (BIA) without rigorous consultations[4]. These rushed amendments included: (i) the criminalization of wage-fixing and no-poach labour agreements, (ii) a significant increase to fines and monetary penalties, (iii) adding drip pricing to explicitly prohibited deceptive marketing practices, (iv) clarifying the scope of abuse of dominance and expanding private rights of action to abuse of dominance claims, and (v) the addition of considerations inspired from digital markets when assessing impacts on competition in regards to merger review and other reviewable practices. Previously, the minister of Innovation, Science and Industry ("ISED"), responsible for competition policy, had stated his intentions to carefully improve the Act through a two-step process while noting that "Canadians are rightly concerned about the rising cost of living, corporate concentration and a fair chance at participating in the economy." The Minister's

---

[1] Canadian Competition Law and Policy at the Centenary. R.Dobell, The Institute for Research and Public Policy R. S. Khemani and W.T Stanbury. Halifax. 1991.

[2] Government of Canada, Competition Policy Review Panel, Compete to Win
Final Report – June 2008, pg. v
https://publications.gc.ca/collections/collection_2008/ic/Iu173-1-2008E.pdf

[3] https://fin.canada.ca/drleg-apl/2022/nwmm-amvm-0422-bil.pdf

[4] Canadian Bar Association, Competition Law and Foreign Investment Review and Labour and Employment Sections, Letter to The Honourable Pamela Wallin (18 May 2022), available online at www.cba.org/CMSPages/GetFile.aspx?guid=b9ef53d3-24de-41d2-ab61-1e9ee134054a

second step suggested a “comprehensive modernization” study and consultations on the “role and functioning” of the Act with a view to fixing “shortcomings” that allow for harmful business conduct.

The recent government announcements were preceded and supplemented by important debate in Canada regarding the need for competition policy reform. The substantive debate began with the Commissioner of Competition calling for legislative amendments;[5] then two reports from the government Standing Committee on Industry Science and Technology[6] recommending specific amendments; a limited public consultation and commentary by Senator Howard Wetston[7] featuring Professor Edward Iacobucci’s[8] reform paper; amplified by the Competition Bureau’s regulatory reform ‘wish list’, submitted to Wetston’s public consultation;[9] and a progressive research paper by Vivic Research commissioned by ISED.[10]

---

[5] Speech from Matthew Boswell, Commissioner of Competition, Competition Bureau of Canada, “Canada needs more competition”, Canadian Bar Association Competition Law Fall Conference, Ottawa, October 20, 2021 https://www.canada.ca/en/competition-bureau/news/2021/10/canada-needs-more-competition.html

[6] Report of the Standing Committee on Industry and Technology, 44th PARLIAMENT, 1st SESSION
PROPOSED ACQUISITION OF SHAW COMMUNICATIONS BY ROGERS COMMUNICATIONS: BETTER TOGETHER?
Ottawa, MARCH 2022
https://www.ourcommons.ca/DocumentViewer/en/44-1/INDU/report-1/page-33

Report of the Standing Committee on Industry and Technology, 43rd PARLIAMENT, 2nd SESSION
WAGE FIXING IN CANADA: AND FAIRNESS IN THE GROCERY SECTOR, Ottawa, JUNE 2021
https://www.ourcommons.ca/DocumentViewer/en/43-2/INDU/report-6/

[7] http://howardwetston.sencanada.ca/media/51060/senator-wetston-commentary-en.pdf

[8] EDWARD M. IACOBUCCI, EXAMINING THE CANADIAN COMPETITION ACT IN THE DIGITAL ERA (2021), http://howardwetston.sencanada.ca/media/50752/examining-the-canadian-competition-act-in-the-digital-era-en-pdf.pdf.
Competition Consultation, SEN. HOWARD WETSTON, https://howardwetston.sencanada.ca/competition-consultation/.

[9] Submission by the Competition Bureau, Examining the Canadian Competition Act in the Digital Era, Ottawa, February 8, 2022
https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04621.html

[10] Vass Bednar, Ana Qarri, Robin Shaban via Vivic Research, Study of Competition Issues in Data-Driven Markets in Canada, Prepared for: the Ministry of Innovative, Science, and Economic Development, January 2022
https://vivicresearch.ca/PDFS/Competition-Data-Driven-Markets-Final-Report-2022.pdf

How much competition and policy reform does Canada need?

Canada's economic policy considerations have traditionally included supporting the competitiveness of domestic Canadian firms in the international market (and particularly as against the large United States economy) by occasionally tolerating local market power, foreign investment controls, industry co-operation, and protection of national firms in the name of building economies of scale. To that end, Canada's current law attempts to prioritize, for example, business efficiencies at the expense of consumer welfare considerations in merger review and with respect to the Act's competitor collaboration provisions. As noted by the Organisation for Economic Cooperation and Development (OECD), "[t]he desire to retain Canadian control in some sectors limits what competition policy can do to remedy problems, which leads to tolerating monopolies".[11]

That view has fallen out of favour and it is now recognized that a thriving export sector is better achieved through the strengthening of domestic competition. The distinguished Harvard business scholar Michael Porter has been a leading proponent of this perspective arguing that "a nation pays a double price" when domestic competition is limited: businesses will face less pressure to be competitive and will also suffer from lack of competitive pressure on their suppliers and distributors.[12] The 2021 OECD Structural Reform Priorities report on Canada highlighted competition and regulation as a priority. It specifically noted the need to reduce barriers to internal trade and barriers to entry for both domestic and foreign suppliers, and the need to enhance competition in network and service sectors.[13] Notably, in 2021, the OECD ranked Canada among the bottom five OECD member countries with respect to governance of state-owned enterprises, public procurement, barriers to service and network sectors and barriers to trade and investment.[14]

As noted by the OECD, Canada remains a relatively closed market with foreign investment barriers in key sectors that often prevent the timely changes essential to a modern, thriving economy. Moreover, many of these regulated sectors have oligopolistic market structures and are further insulated from competition by vertical integration. Government price control and other regulations that have been unshackled in other countries remain in a number of Canadian markets. These restraints on competition harm Canadian firms domestically as well as in the

---

[11] OECD REVIEWS OF REGULATORY REFORM, REGULATORY REFORM IN CANADA, THE ROLE OF COMPETITION POLICY IN REGULATORY REFORM, 2002
https://www.oecd.org/canada/27067414.pdf

[12] Michael E Porter, "Competition and Antitrust: Toward a productivity-based approach to evaluating mergers and joint ventures" (2001) 46:4 The Antitrust Bulletin 919. ("When local rivalry is muted, a nation pays a double price. Not only will companies face less pressure to be productive, but the business environment for all local companies in the industry, their suppliers, and firms in related industries will become less productive. This demonstrates in particular the danger in arguments about the creation of 'national champions' in an industry in the home country in order to gain the scale to compete internationally. Unless a firm is forced to compete at home, it will usually quickly lose its competitiveness abroad. Local competition matters for productivity and productivity growth, even in industries whose geographic scope is global.")

[13] OECD Canada Economic Snapshot, Economic Forecast Summary (December 2021)
https://www.oecd.org/economy/canada-economic-snapshot/

[14] https://www.oecd.org/economy/surveys/Canada-2021-OECD-economic-survey-overview.pdf

global marketplace. Economists generally agree that public restraints to competition and trade can do much more harm to the economy than private restraints.[15]

Similar concerns were also flagged by the current Commissioner of Competition in a recent speech titled "Canada Needs More Competition,"[16] which highlighted the need for a competitive domestic economy to increase Canada's productivity and international competitiveness. This observation is exemplified by the fact that Canada is last in G7 GDP growth (based on the five-year average per capita GDP growth rate ending in 2019).[17] Canadian Senator Colin Deacon clearly summarized the current state of play by writing: *"I look forward to the day when the CEOs of Canada's biggest companies champion increased Made-in-Canada competition in their own industry sector as a tool to catalyze their company's growth and global competitiveness."* [18] That perspective recognizes that competition is not a zero-sum game: more competition stimulates productivity as well as demand—prospects that Canadian businesses should embrace.

Driven by globalization and international trade liberalization, the revised North American Free Trade Agreement/Canada-United States-Mexico Agreement (CUSMA) and the Canada-European Union Comprehensive Economic and Trade Agreement (CETA), and the growing general concern regarding rising corporate concentration and higher consumer prices, the time would appear right for Canada to more fully embrace the virtues of competition by strengthening its competition laws, in the digital platform sector and elsewhere.

---

[15] John Pecman, CANADIAN COMPETITION LAW REVIEW , UNLEASH CANADA'S COMPETITION WATCHDOG: IMPROVING THE EFFECTIVENESS AND ENSURING THE INDEPENDENCE OF CANADA'S COMPETITION BUREAU, September 2018 pp. 22-23
https://cbaapps.org/cba_cclr/search.aspx

[16] Competition Bureau Canada, "Canada needs more competition", Speech from Matthew Boswell, Commissioner of Competition, Canadian Bar Association Competition Law Fall Conference, October 20, 2021
https://www.canada.ca/en/competition-bureau/news/2021/10/canada-needs-more-competition.html

[17] Globe and Mail, article by JAMES BRADSHAW, ANDREW WILLIS"Ahead of 2022 federal budget, corporate Canada wants Ottawa to act on economic policy – not just talk about it", APRIL 1, 2022 UPDATED APRIL 7, 2022, *DATA SOURCE: RBC ECONOMICS RESEARCH*
https://www.theglobeandmail.com/business/article-the-big-rift-corporate-canada-wants-ottawa-to-focus-on-real-growth-not/

[18] https://www.linkedin.com/posts/senatorcolindeacon_ahead-of-2022-federal-budget-corporate-canada-activity-6916011666576916480-oAau?utm_source=linkedin_share&utm_medium=ios_app

Remaining Key Issues and Questions for Further Reforms

Many Canadian practitioners and experts argue that our competition law is largely fit for purpose while identifying some specific retooling to improve its effectiveness — especially speedier resolution of cases.

Others are advocating for a less measured approach to competition law reform. The progressive reformers in Canada are looking for more dramatic change in line with international competition policy developments, including those in the European Union (EU) (with the recent Digital Markets Act), the UK (through the Competition and Markets Authority (CMA) Digital Markets Unit's use of a digital market code of conduct), and the US (by way of adding Big Tech specific antitrust provisions to their legislation and by strengthening their enforcement posture). As noted above, in these jurisdictions, there appears to be a shift from the traditional case-by-case, economic analysis approach to *ex ante* regulation in combination with antitrust enforcement strengthened through the use of presumptions as opposed to analysis. We are also witnessing a resurgence of competition advocacy in the United States,[19] where the administration is taking a whole-of-government approach to develop and coordinate federal actions in support of a more competitive economy. In addition, competition authorities are being asked to include more social welfare considerations into competition analysis, such as, for example, democracy risk (eg. diversity of voices in media), privacy, income inequality, labour, and sustainability considerations.

To be clear, some of these perspectives envision a fundamental transformation of competition policy and enforcement in Canada.

Before further changes are made to the Act, it is strongly recommended that the ISED minister follow through with the proposed comprehensive consultation. A complete study of the suggested amendments akin to the government-initiated 2008 "Compete to Win" report is necessary to formulate an evidence- based, inclusive competition policy and to minimize any unintended consequences that amendments to the Act may have on innovation, efficiency, and investment in the Canadian economy.

Any "second step" amendments beyond those proposed in the BIA would likely have a profound impact on business, particularly for large companies operating in the digital economy. Based on the Canadian policy debate, the following are the key "second step" issues the government will likely be evaluating:

[19] https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/

1) A revision to the purpose clause of the Act

Competition authorities and policymakers are under pressure to cure social ills. The current goals of the Act are economic in nature, including the promotion of economic efficiency, expanding exports, supporting small- and medium-sized enterprises and providing consumers with competitive prices and product choice.

Key questions in this regard include:

i. Should our competition law address greater "fairness" objectives and promote social goals such as a specific level of privacy, environmental protection and income inequality? If so, how should competition law work with standalone laws that govern these objectives?
ii. Do the current principles, premised on sound economic analysis, remain the appropriate yardstick for competition law enforcement? (In other words, should we continue to define anti-competitive conduct by harms to both allocative efficiency and the rise of prices of products above competitive levels or the diminishment of quality)
iii. How much competition can Canada support given our small size relative to the United States and other major trading partners?
iv. Is a general public interest override by the minister to all Competition Bureau decisions with respect to mergers and competitor collaborations necessary (e.g. currently only for banking and transportation sector combinations)?

2) Strengthen Merger Control

For purposes of tackling the alleged excessive market power of Big Tech firms, competition authorities are strengthening merger control enforcement. Among the competition problems being addressed by policy reform and enforcement discretion are dominant firm acquisitions of nascent competitors, which may have the effect of eliminating a competitor that could have challenged the dominant firm but for the acquisition. Moreover, in Canada, the merger provisions of the Act attempt to balance the negative effects of anti-competitive mergers with the potential positive effects of business efficiencies. Owing to efficiency goals, the Act uniquely contains an efficiency exception for anti-competitive mergers known as the "efficiency defence".

Key questions in this regard include:

i. Should the efficiency defence be revised to allow for more challenges to anti-competitive mergers?
ii. Is it necessary to lower the burden to measure harmful effects for emerging competitor acquisitions in the digital economy?
iii. Should structural presumptions (e.g. using Herfindahl-Hirschman Index (HHI) indicators) be used for digital economy mergers and those mergers where significant efficiency claims are made?

3) Strengthen Abuse of Dominance provisions

The Act currently recognizes that businesses can gain market share and can legitimately become "big" through the competitive process. However, when a dominant firm takes advantage of its size by engaging in conduct that harms competition, the Act provides for remedies to restore competition to the market. The unique features of data-driven digital markets can mask conduct that may be designed to eliminate competition especially with regard to emerging competitors.

Key questions in this regard include:

i. Is there a need for special rules or prohibitions for the digital economy (such as a dedicated gatekeeper, self-preferencing, or serial emerging-competitor acquisitions provisions)?
ii. Does the growing competition oversight of the digital economy in larger jurisdictions create spillover effects that reduce the urgency or need to significantly reform Canada's competition law?
iii. Should more efficient, speedier dispute-resolution mechanisms, including less onerous interim injunctions and arbitrations, be made available particularly for fast-moving and dynamic digital markets?
iv. Could a code of conduct for the digital economy based on a review of business models and understanding of the competitive landscape be adopted to avoid inflexible regulations?

4) Bolster anti-cartel tools

It is widely accepted that cartels, including bid-rigging cartels, have no redeeming features. They are therefore treated as the most egregious offenders under the Act. Despite amendments in 2009 to make cartels *per se* illegal, the Competition Bureau's enforcement record has been poor, owing to a decline in immunity applicants and challenges with the criminal prosecution regime. The one-two punch of historic levels of public procurement and rising inflation makes effective anti-cartel detection, investigation and adjudication more important than ever.

Key questions in this regard include:

i. Should the Act's criminal anti-cartel track be complemented by civil reviewable provisions as is the case with deceptive marketing practices (eg. could improve enforcement of tacit collusion)?
ii. Should government procurement authorities be required to produce bidding information on request from the Competition Bureau and to use independent bid certificates in the tendering process?
iii. Are modifications required to the private action provisions respecting criminal offences to make the Competition Bureau's immunity program more attractive?
iv. Is it necessary to establish a standalone "whistleblower" program that would operate as its own office within the Competition Bureau, and that would provide significant financial rewards to whistleblowers who provide information and meet certain eligibility requirements? (This program could mirror the Ontario Securities Commission's Office of the Whistleblower, which is a fully-resourced office within the OSC that handles allegations of securities violations.)
v. Should all buyer-side agreements between competitors (not just wage-fixing and no-poach agreements) be included in the criminal conspiracy provision?

5) Express market study authority

Market studies are an essential tool for competition authorities to analyze whether there are unnecessary restrictions on competition in an industry sector and to identify needed reforms in policy or regulatory framework. These studies are also valuable for conducting an *ex post* assessment of the effectiveness of an authorities' enforcement decisions. Most authorities have the power to issue mandatory information requests to businesses for purposes of conducting a robust market study.

Key questions in this regard include:

i. Should the Competition Bureau or a Canadian Competition Council-type body be granted some form of power to conduct market studies?
ii. If so, what kind of powers should the competition advocacy body be granted? (eg. types of studies, ability to compel information, influence on government policy decision-making, ability to make regulations)
iii. Could information gathered during a market study be used in follow-on enforcement investigations?

6) Restructure the institutional design of the Competition Bureau

There is broad international consensus that competition authorities should be independent from the executive branch of government to deter political interference with their law enforcement and advocacy mandate. The Competition Bureau is currently administered by ISED, Canada's Industry department, which is charged with implementing the government's industrial policy. ISED's mission to foster a growing, competitive and knowledge-based Canadian economy often promotes national champions at the expense of competition in conflict with the mandate of the Competition Bureau.

Key questions in this regard include:

i. Does the Competition Bureau need a stronger voice to advocate for competition (ie. should it be better insulated from the Industry department)?
ii. Should a Canadian Competition Council or equivalent competitiveness body be formed that could continually review the state of competition in Canada, and make recommendations for future policy reform as necessary?
iii. Does the Competition Bureau require additional resources, digital expertise and technology or budgetary oversight to improve its effectiveness?[20]
iv. What form should Competition Bureau cooperation with other sector regulators take to address emerging digital economy competition and consumer protection issues? (including Office of the Privacy Commissioner, Canadian Radio-television and Telecommunications Commission (CRTC), ISED, Finance, provincial departments and any new 'digital office')

7) Improve private access to the Competition Tribunal

In providing the Tribunal the ability to impose damages, there would be an added deterrent against anti-competitive conduct. This would also generate more case law, which would act as guidance for the Competition Bureau, and the legal and business community. Damages awards would also have the added benefit of freeing up Competition Bureau resources by creating a viable alternative to public enforcement and allow the Competition Bureau to focus on cases that harm the competitive process rather than disputes between competitors. Without damage rights, there is little incentive for private parties to self-resolve competition disputes.

Key questions in this regard include:

i. Should the Competition Tribunal be granted the authority to impose damage awards where appropriate?
ii. Should the Competition Tribunal impose stringent leave requirements for access to private action in order to reduce the number of frivolous, vexatious or strategically motivated applications?

[20] The Competition Bureau will receive an additional $96 million dollars over the next 5 years and $27.5 million per year ongoing. https://www.canada.ca/en/competition-bureau/news/2021/10/canada-needs-more-competition.html

8) Review amendments from the Budget Implementation Act process

There are serious concerns with the proposed amendments to the Competition Act in the BIA which should be deferred and included in the broader consultation so they can be properly studied and refined. Four of the most problematic amendments include: (1) a new, unclear and over-broad criminalization of wage-fixing and no-poach agreements among unaffiliated employers; (2) the massive increase of administrative monetary penalties for abuse of dominance and misleading advertising; and (3) the addition of broad restrictions and vague definitional criteria for abuse of dominance which could inadvertently chill competition; and (4) unclear drip pricing sections.

Key questions in this regard include:

i. Should the government defer the BIA amendments and include them in the broader consultation for appropriate study and refinement?
ii. Are there other problematic BIA amendments that need to be refined?
iii. What specific changes should be made to the BIA amendments?

Canadian Chamber of Commerce
Chambre de Commerce du Canada

Canadian Chamber Future of Business Centre
Centre de l'avenir des affaires de la Chambre de Commerce du Canada