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# Toughening Canada's Competitiveness

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## Toughening Canada's Competitiveness<sup>1</sup>

Canadian Chamber of Commerce – The Future of Competition Policy Final Draft Report<sup>2</sup>

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*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.*

*The Centre's reports are produced by external fellows at arm's length, separately from the Canadian Chamber's consensus-based policy committee process. The views expressed in this paper are those of the fellow.*

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<sup>1</sup> This final report follows a Competition Act Reform Interim Report - <https://chamber.ca/wp-content/uploads/2022/06/Competition-Act-Reform-Interim-Report-Canadian-Chamber-Future-of-Business-Centre.pdf> which highlighted Canada's need to strengthen competition policy and laid the groundwork for consultations with external stakeholders of the Canadian Chamber of Commerce.

<sup>2</sup> This report benefitted from many insightful comments and contributions from the Canadian Chamber of Commerce Advisory Council for the Competition Policy Reform project <https://chamber.ca/futureofbusinesscentre/> and valuable editing assistance from Robin Spillette.



Robust competition, a key pillar to international competitiveness, is fundamental to a well-functioning economy.<sup>3</sup> The economic literature suggests that healthy competition has positive effects on a firm's productivity and efficiency.<sup>4</sup> Earlier this year, the former Minister of Finance, Bill Morneau, said "[t]here is no real sense of urgency in Ottawa about our lack of competitiveness ... it's not that this is one of the big problems facing Canada's economy, it's that this is our fundamental problem. Nothing else is solvable if we don't put this issue first."<sup>5</sup> Similarly, the Commissioner of Competition (Commissioner), Matthew Boswell, in a recent speech titled "Canada Needs More Competition" highlighted the need for a competitive domestic economy to increase Canada's productivity and international competitiveness.<sup>6</sup> Studies demonstrate that the productivity of a country is a function of the competitive intensity of its economy. Economists agree that governing competition is as important to sustainable economic growth as other macroeconomic policies.<sup>7</sup>

## Competition Law Framework and Enforcement

The *Competition Act* (Act) is an economic framework of general application designed to preserve and enhance the competitive process. It is a law that generally applies to all companies and industries, but is not intended to protect competitors from healthy competition. The purpose of the Act is to ensure that market forces work to create efficient businesses with incentives to innovate and that consumers benefit from lower prices and better products and services. The Act prohibits a range of business activities that may undermine the operation of competitive markets. The Commissioner, through the Competition Bureau, uses its investigative and enforcement authority to combat, among other things, price-fixing cartels, anti-competitive mergers, dominant firms that abuse their market power and misleading advertising and other deceptive marketing practices. While a limited number of behaviors are *per se* illegal under the Act, most provisions of the Act require evidence of competitive harm before remedies are made available under the law. Canada's competition law is grounded in, and relies on, the well-established economic theory that open, unregulated markets are the most effective means of allocating resources, promoting efficiency, improving productivity, spurring innovation and increasing economic growth.

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<sup>3</sup> Unleash Canada's Competition Watchdog: Improving the Effectiveness and Ensuring the Independence of Canada's Competition Bureau, Canadian Competition Law Review, 2018, John Pecman, pg. 7, [https://cbaapps.org/cba\\_cclr/search.aspx?\\_gl=1\\*1vgrbp3\\*\\_ga\\*MjA3OTYzMjcyOS4xNjY2MDI3NTM5\\*\\_ga\\_YTMHKDEBK2\\*MTY2ODAyNzUyOC40LjEuMTY2ODAyNzgwNS4wLjAuMA](https://cbaapps.org/cba_cclr/search.aspx?_gl=1*1vgrbp3*_ga*MjA3OTYzMjcyOS4xNjY2MDI3NTM5*_ga_YTMHKDEBK2*MTY2ODAyNzUyOC40LjEuMTY2ODAyNzgwNS4wLjAuMA)

<sup>4</sup> <https://www.bruegel.org/blog-post/why-competition-policy-matters-growth>

<sup>5</sup> <https://www.politico.com/news/2022/06/01/morneau-critiques-trudeau-government-policies-00036606>

<sup>6</sup> 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>)

<sup>7</sup> The Power of Productivity-Wealth, Poverty and the Threat to Global Stability, William W. Lewis, University of Chicago Press, 2004. <https://academic.oup.com/chicago-scholarship-online/book/20045?login=false>



## Recent Competition Act Reforms

In June 2022, without consultation from industry or civil society, the government rushed significant amendments to the Act through the *Budget Implementation Act*. These amendments were seeking to address concerns about market concentration, amongst others, while maintaining the fundamental principles underlying the Act. The key features of the new amendments included: increased fines and penalties, criminally prohibiting wage-fixing and no-poaching agreements between employers, allowing private access to the Competition Tribunal for abuse of dominance cases, expanding the list of factors to determine an impact on competition, expressly prohibiting drip pricing and new merger-notification anti-avoidance provisions. Although far from perfect, these amendments are a start towards “modernizing” the Act. Further amendments to the Act are expected which may fundamentally reshape competition policy in Canada.

## The State of Competition

As competition affects everyone, both buyers and sellers alike, how competition policy is administered by the government is extremely important and has wide ranging consequences. The emergence of new economic trends which are transforming our society are the catalyst for significant changes to the Act. Specifically, Canada’s long-standing policy support of market concentration and national champions in a number of sectors is now in the spotlight as the creation of some “winner take all markets” through digital transformation and technological innovation is highlighting the concern that excessive market concentration can threaten the welfare of businesses, both large and small, and can leave consumers with higher prices, less choice, reduced product quality and diminished innovation.

## International Competition Policy Response and Necessary Caution

The response in other jurisdictions to similar transformative economic trends has been a call for significant competition policy reform, including the U.S. President Joe Biden’s Executive Order on Promoting Competition in the American Economy<sup>8</sup>, and developments and proposed legislative competition law reform in the U.S., E.U., U.K. and Australia, among others, targeting alleged dominant digital platforms. Many of these proposed and enacted reforms introduce regulations, an anathema to free market competition, to tame the alleged market power of larger digital firms with the goal of making “the digital sector fairer and contestable”.<sup>9</sup> These sorts of sector specific regulations may also have unintended consequences, including dampening innovation, increased prices and decreased investment in the digital sector. For example, a recent study by the NBER<sup>10</sup>

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<sup>8</sup> <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/07/09/remarks-by-president-biden-at-signing-of-an-executive-order-promoting-competition-in-the-american-economy/>

<sup>9</sup> [https://competition-policy.ec.europa.eu/sectors/ict/dma\\_en](https://competition-policy.ec.europa.eu/sectors/ict/dma_en)

<sup>10</sup> “GDPR and the lost generation of innovative apps”, Jansen et al., National Bureau of Economic Research working paper series, Cambridge, MA, May 2022

[https://www.nber.org/system/files/working\\_papers/w30028/w30028.pdf](https://www.nber.org/system/files/working_papers/w30028/w30028.pdf)



of Europe's new data protection law (GDPR) - with its laudable policy goal of restricting the use of personal information by business - found that the GDPR has had the collateral effect of slowing innovation. This is a lesson, it seems, that caution should be exercised before hastily following the economic experiments of regulatory intervention for a substantial portion of the digital economy. It would appear that the mirroring of full text legislation from other jurisdictions has its pitfalls. Another recent academic study demonstrates that a lack of digital literacy by consumers can dampen policy proposals in achieving their aims of protecting, restoring or generating effective competition in digital markets.<sup>11</sup> It is therefore recommended that Canada wait and see if the new digital sector regulations imposed abroad have the desired outcome of leveling the playing field or, at the very least, Canada could embark on a study of its own before making any proposal with respect to digital sector regulation which would be a significant departure from Canada's current legislative framework. Moreover, as many of the first phase amendments to the Act pertained to digital market considerations<sup>12</sup>, it will take some time to determine if these more moderate, made-in-Canada changes were in fact more appropriate and reasonably sufficient.

## Calls for Reform

This final report will devote its efforts to addressing likely areas of further reform to the Act based on the current competition policy debate and the reform wish list of the Competition Bureau<sup>13</sup> submitted to the Wetston consultations.<sup>14</sup> Long before the recent calls by reformists to strengthen Canada's competition policy, the OECD had been advocating for Canada to strengthen the contribution of competition policy to regulatory reform and market openness, including an enhanced advocacy role for the Competition Bureau<sup>15</sup>. More recently, the OECD has recommended that Canada reduce barriers to internal trade<sup>16</sup> and barriers to entry for both

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<sup>11</sup> A WEB OF PARADOXES: EMPIRICAL EVIDENCE ON ONLINE PLATFORM USERS AND IMPLICATIONS FOR COMPETITION AND REGULATION IN DIGITAL MARKETS, Pinar Akman, 16 (2) Virginia Law and Business Review 217 (2022)

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3835280](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3835280)

<sup>12</sup> Amendments which will directly affect anti-competitive conduct in digital markets include: i) the significant increase in fines and penalties, ii) an expanded list of factors to determine an impact on competition such as network effects, effects on non-price competition, extent of change and innovation, and the entrenchment of leading incumbents' market position, iii) clarifying an anti-competitive act for abuse of dominance to include an adverse impact on competition, iv) adding discriminatory responses by a dominant player to make it more difficult for a competitor to participate effectively in a market as an anti-competitive act, and v) allowing private access to the Competition Tribunal for abuse of dominance cases.

<sup>13</sup> 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>

<sup>14</sup> <https://sencanada.ca/media/368379/letter-pdf.pdf>

<sup>15</sup> <https://www.oecd.org/canada/27067414.pdf>

<sup>16</sup> Deloitte, The case of liberalizing interprovincial trade in Canada, Prepared for the Working Group on Interprovincial Trade Barriers, Nov. 2021.

<https://www2.deloitte.com/content/dam/Deloitte/ca/Documents/finance/ca-en-the-case-for-liberalizing-interprovincial-trade-in-canada-aoda.pdf> Estimates suggest that removing non-geographic trade barriers in



domestic and foreign suppliers,<sup>17</sup><sup>18</sup> as well as enhance competition in the network and service sectors.<sup>19</sup> The business community in Canada also sees Canada's excessive regulatory burden as creating a competitive disadvantage. It is estimated that nearly 25% of Canada's economy is protected from competition.<sup>20</sup> While this report will focus on specific recommendations to strengthen the Act, it would be remiss not to highlight the need to create an independent Competitiveness Council in Canada which would review current regulations to ensure they were not hampering competition and advocate for policies and smarter regulations that would improve Canada's competitiveness internationally, as recommended in 2008 by the Competition Policy Review Panel.<sup>21</sup>

## Purpose of the Competition Act

Competition authorities and policymakers are under pressure to aid in improving social policy issues, such as income equality, privacy and environment protection, which are not currently expressed goals of the Act. 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. Reformers are seeking to expand the list of objectives under the Act to include socially responsible sustainable growth purposes notwithstanding the challenges in demonstrating how adding social policy objectives will promote competition. Government institutions have been designed to capitalize on the power of specialization and have been afforded distinct tools and developed expertise in their policy areas. For example, the Canadian Intellectual Property Office (CIPO), primarily responsible for issuing patents in Canada, has no policy tools to deal with other social policy objectives. There would be a large opportunity cost to society for CIPO to begin concentrating on data protection issues, for example, rather than promoting innovation through the issuance of patents in Canada. Likewise, the Competition Bureau should be focused on its principle mandate of promoting the competitive process and leave the task of advancing social values to others in government that have the necessary policy tools and expertise available to them. The Competition Bureau currently uses its enforcement and advocacy discretion to support government policy initiatives which would appear to be the more appropriate method of expanding the reach of their competition promotion mission. The external stakeholders of the Canadian Chamber of

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Canada such as interprovincial restrictions on labour mobility and provincially differentiated regulations in business services, transportation and warehousing could increase GDP by 3% for a five-year period.

<sup>17</sup> Fraser Institute, "Walled from Competition, Measuring Protected Industries in Canada", by Vincent Geloso, 2019 <https://www.fraserinstitute.org/sites/default/files/walled-from-competition-measuring-protected-industries-in-canada.pdf>

<sup>18</sup> <https://www.trade.gov/country-commercial-guides/canada-trade-barriers> Barriers to foreign suppliers includes foreign investment and ownership restrictions, high tariffs for certain products, selling restrictions to the federal government procurement, and import licensing requirements.

<sup>19</sup> <https://www.oecd.org/economy/canada-economic-snapshot/>

<sup>20</sup> Fraser Institute, *ibid*, pg. i

<sup>21</sup> Canada, Competition Policy Review Panel, *Compete to Win: Final Report June 2008*, (Ottawa: Industry Canada, 2008). [https://publications.gc.ca/collections/collection\\_2008/ic/lu173-1-2008E.pdf](https://publications.gc.ca/collections/collection_2008/ic/lu173-1-2008E.pdf) pg. 102



Commerce with whom I met during consultations unanimously agreed that the Competition Bureau should remain in their existing competition policy lane.

## Merger Control 2.0

Critics argue that digital transformation has made it more difficult for traditional competition policy tools to apply in data platforms and zero price exchanges of data for value. Data-driven markets however, are not a completely new phenomenon. Firms have been collecting and using data for a very long time (e.g. transaction store data, loyalty cards), and competition law has been able to account for competition for data (see TREB<sup>22</sup> and Google/Fitbit<sup>23</sup>). Competition laws require better tools and must be more nimble in order to encourage greater digital marketplace competition, beginning with more effective merger control laws.

The acquisition of nascent competitors by dominant firms and the efficiency exception for anti-competitive mergers are the most targeted issues for reform. The primary challenge with respect to nascent competitor acquisitions is the difficulty of proving the merger is likely to have anti-competitive effects without engaging in speculation. However, rather than amending the legislation to enable the Competition Bureau to better deal with these potentially anti-competitive mergers, incremental changes should be considered, such as adopting alternative market definitions or closely considering the merging parties' incentives or potential to innovate after the merger. As for the efficiency exception, in "winner-take-all" data markets featuring network effects which enhance efficiencies during consolidation, it is virtually impossible for the Competition Bureau to halt an anti-competitive merger by dominant digital platform companies. This is a golden opportunity for Canada to reconsider its approach to the efficiency exception which permits reductions in competition in exchange for static and short-run fixed cost savings for the merging parties, which may or may not come to fruition. Furthermore, the implementation of the efficiency exemption requires the quantification of a trade-off that can be difficult to evaluate and ignores harmful non-price effects from a merger. It is also unclear that the accepted cost-savings in the analysis actually improves efficiency of the merging parties in the *long-run* or the competitiveness of domestic firms.<sup>24</sup> While efficiencies considerations should remain a pro-competitive factor to be considered during merger review, new economic activity derived from a merger such as a rise in investment, dynamic efficiencies, research and development and exports from Canada should also be added as considerations.

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<sup>22</sup> The Competition Tribunal found the Toronto Real Estate Board restrictions relating to access and use of real estate data resulted in a substantial adverse impact on innovation, quality and range of residential real estate brokerage services. The Commissioner of Competition v The Toronto Real Estate Board, 2016 Comp. Trib. 7 [TREB]: <https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/462979/index.do>. Decision confirmed on appeal..

<sup>23</sup> The European Commission's decision to approve Google's acquisition of Fitbit, a maker of fitness trackers and smartwatches. The Commission approved the deal in December 2020, with behavioural remedies binding on Google. [https://ec.europa.eu/competition/mergers/cases1/202120/m9660\\_3314\\_3.pdf](https://ec.europa.eu/competition/mergers/cases1/202120/m9660_3314_3.pdf)

<sup>24</sup> Chiasson, Matthew and Johnson, Paul A., Canada's (In)efficiency Defence: Why Section 96 May Do More Harm Than Good for Economic Efficiency and Innovation (November 30, 2018). Available at SSRN: <https://ssrn.com/abstract=3293790> or <http://dx.doi.org/10.2139/ssrn.3293790>



During stakeholder consultations, a constant theme was the asymmetry in the current merger review process, where the *de facto* decision maker, the Competition Bureau, is also lead inquisitor of the review. Merging parties generally avoid triggering conflict or litigation before the Competition Tribunal by challenging onerous Supplementary Information Request (SIR) requirements or any overreaching remedial demands by the Competition Bureau as time is of the essence. Lengthy delays caused by engagement before the courts can be fatal to a proposed merger. Greater transparency and engagement by the Competition Bureau during the merger review process as well as judicial oversight of the SIR compulsory information gathering powers afforded the Competition Bureau would correct for any procedural fairness deficits in current merger reviews of likely anti-competitive transactions.

### **Digital Markets Dominance Enforcement Requires Greater Velocity, Not Regulation**

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. Some recent legislative proposals and reforms abroad (e.g. EU Digital Markets Act) appear to protect competitors, not competition in the name of marketplace fairness. The requirement on some companies in the EU to facilitate their competitors through regulation would be contrary to the concept of competitive neutrality, a foundational underpinning of anti-trust laws.<sup>25</sup> The recent phase one changes to the Act will likely assist the Competition Bureau in unmasking anti-competitive behaviour in digital platform markets and should be given time to determine if they are fit for purpose. That being said, competition enforcement investigations and adjudication are complex and take a great deal of time to complete, in part to ensure procedural fairness and rights of defence. Technologies and markets are dynamic and evolve rapidly, requiring the Competition Bureau to take immediate remedial action to minimize competitive harm and for its work to remain relevant. The Competition Bureau should be given new tools, for example, streamlined injunction powers, which will allow it to dispose of cases in a more expeditious manner.<sup>26</sup> This recommendation is informed by the Competition Bureau’s success with alternative dispute resolutions such as the use of mediation before the Competition Tribunal. Additional resolution tools, such as final offer arbitration, which appears to be an effective and

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<sup>25</sup> Are Competition Officials Abandoning Competition Principles, *Journal of European Competition Law and Practice*, 2022, Maureen K. Ohlhausen and John M. Taladay, <https://academic.oup.com/jeclap/advance-article/doi/10.1093/jeclap/lpac033/6628802>

<sup>26</sup> The injunction requirements should not require the Bureau to estimate the competitive effects of a merger or an abusive practice at the early stages of an investigation and could rather require a prima facie test which would ease the Bureau’s burden. In the [Commissioner of Competition v. Secure Energy Services Inc](#) “...the Tribunal concluded that the Bureau had an obligation to provide a “ballpark” estimate, in dollars, of the harm to the economy at the injunction stage. The Tribunal concluded that it required this estimate to weigh against the evidence of harm Secure would suffer due to the delayed realization of the claimed efficiencies.” From 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>)



timely method of resolving disputes by the CRTC further to the Vertical Integration Code, could also be considered by the Competition Tribunal. During Canadian Chamber stakeholder consultation, the lack of any time limits on the duration of Competition Bureau investigations was noted as a source of procedural unfairness which raised the burden on business' costs of competition law enforcement.

### **Cartel Enforcement Requires More Flexibility**

It is widely accepted that cartels, including bid-rigging cartels, are the most egregious offence under the Act. Despite amendments in 2009 to make cartels *per se* illegal and the expectation that the Bureau would more aggressively pursue conspiracies against the public, the 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 now than ever. Cartel offences are criminal rather than civilly reviewable and therefore have a higher burden of proof. With a view to improving the Competition Bureau's record of success, the Act's criminal anti-cartel track could be complemented by civil reviewable provisions, as is the case in Australia and in the treatment of deceptive marketing practices in Canada. Moreover, the Bureau's Whistleblower program<sup>27</sup> could be improved to increase the level of cartel detection.

### **Canada Needs Better Sector Market Studies**

The report by the Competition Policy Review Panel in 2008 concluded that the lack of a formal ongoing process to undertake competition advocacy, including market studies, constitutes the "most significant gap in Canadian competition policy".<sup>28</sup> Market studies are the primary method by which the Competition Bureau advocates with governments and regulators for greater competition, including by, for example, identifying reforms to sectors with unnecessary restrictions on competition or conducting *ex post* assessments of Competition Bureau enforcement decisions (e.g. U.S. FTC merger remedies study). There are currently no express provisions in the Act that specifically empower the Competition Bureau to undertake sector market studies or provide power to compel information for these studies. Market studies are a versatile competition tool designed to shed light and improve the understanding of economic sectors by the Competition Bureau.<sup>29</sup> However, as they can also be burdensome to businesses, they must be reserved for appropriate cases and incorporate procedural safeguards.

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<sup>27</sup> <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02819.html>

<sup>28</sup> Canada, Competition Policy Review Panel, *Compete to Win: Final Report* June 2008, (Ottawa: Industry Canada, 2008) [https://publications.gc.ca/collections/collection\\_2008/ic/lu173-1-2008E.pdf](https://publications.gc.ca/collections/collection_2008/ic/lu173-1-2008E.pdf)

<sup>29</sup> Canada Looks at Revising its Competition Act, Tom Ross, Competition Policy International, April 2022, <https://www.competitionpolicyinternational.com/canada-looks-at-revising-its-competition-act/>



## Private Actions are Half Baked

The June amendments to the Act now allow private parties to bring legal actions to the Competition Tribunal for allegations of abuse of dominance. However, the amendments fail to provide adequate incentives for private parties to bring anti-competitive cases forward themselves, as the Competition Tribunal is not permitted to award damages to successful plaintiffs. Allowing and properly incentivizing private access to the Competition Tribunal (with safeguards against vexatious and frivolous litigation), including the possibility of class action, would provide an added deterrent against anti-competitive behaviour in the Canadian economy. This would also generate greater case law and guidance regarding the application of the Act for the Competition Bureau, the legal community and businesses. Furthermore, it would have the added benefit of alleviating budget pressure on the Competition Bureau, which would allow it to pursue other priority cases, in addition to a selection of those brought by private parties.

## Unleash the Competition Watchdog and Invest in Digital Market Expertise

The Competition Bureau is not fully independent from the Department of Innovation, Science and Economic Development (ISED). The Deputy Minister of ISED has administrative and budgetary control over the Bureau, including sign-off on all executive hires by the Competition Bureau. As the Commissioner is appointed by the Governor-in-Council and enforcement-related decisions are not subject to ministerial review or approval, the Competition Bureau has a degree of functional autonomy from ISED and positions itself as an independent law enforcement agency. 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. There is broad international consensus that competition authorities should be independent from the executive branch of government, and especially from a country's industry department to deter political interference with their law enforcement and advocacy mandate.<sup>30</sup> By creating a truly independent Competition Bureau, similar to the Office of the Privacy Commissioner, the Competition Bureau's resources and its competition advocacy voice would be better safeguarded from "flavour of the month" government distractions.

There has been long-standing concern by some legal practitioners and stakeholders that there has been a lack of sufficient enforcement resources allocated to the Competition Bureau.<sup>31</sup> Last year the government increased the Bureau budget<sup>32</sup> by \$96 million dollars for the next 5 years and \$27.5 million per year ongoing to add to their existing capacity and to equip them with necessary digital tools. In addition to developing in-house digital expertise, it is important that the

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<sup>30</sup> Unleash the Competition Watchdog, *ibid*, pp. 8-9.

<sup>31</sup> "Distilled Wisdom: Council Members Agree on the Most Needed Reforms for the Next Government, CD Howe Institute, Competition Policy Council, Sept. 2021

[https://www.cdhowe.org/sites/default/files/attachments/communiqués/mixed/Communique\\_2021\\_0909\\_CPC.pdf](https://www.cdhowe.org/sites/default/files/attachments/communiqués/mixed/Communique_2021_0909_CPC.pdf)

<sup>32</sup> <https://www.canada.ca/en/competition-bureau/news/2021/10/canada-needs-more-competition.html>



Bureau work with other domestic enforcement agencies responsible for digital market oversight to enhance coordination and exchange best practices. On the question of accountability, the Commissioner should be held accountable for his budget spending as well as the Competition Bureau's enforcement and advocacy actions by way of an appearance before a parliamentary committee.

## Recent Amendments Require Fine Tuning

Finally, there is little question that no-poach and wage-fixing agreements can adversely affect wages or benefits for employees, result in reduced output in downstream product markets and negatively affect competition. However, there is significant debate as to whether there may also be redeeming virtues or pro-competitive justifications for these types of agreements. For example, some have suggested that these types of no-poach and wage-fixing agreements could, at least in certain circumstances, incentivize investment in human capital, protect know-how, protect intellectual and quasi-intellectual property rights, result in lower prices for end-use customers and lead to greater labour market stability for both low and highly-skilled workers.<sup>33</sup> It is widely recognized, including in Canada, that *per se* illegality should be reserved for 'naked restraints' on competition that lack any redeeming virtue and 'are so likely to harm competition and to have no pro-competitive benefits that they are deserving of prosecution without a detailed inquiry into their actual competitive effects'.<sup>34</sup> Parliament should more closely study the effects of these labour agreements to determine whether they are truly deserving of criminal sanction.

The recent amendments expand the definition of anti-competitive act in the context of abuse of dominance to also capture conduct intended to "have an adverse effect on competition" or "a selective or discriminatory response to an actual or potential competitor", including nascent competitors. It will be important to obtain further clarification by way of clarifying amendments or the issuance of enforcement guidelines to business to clearly delineate what competitive responses in the market are acceptable and which are not. As the amendment is currently framed, an adverse effect on competition could technically include any competitive action on the merits made by a firm including a price reduction.

## The Bottom Line

Canada's competition law framework is generally fit for purpose with its reliance on sound economic analysis and evidence. Before sweeping changes are made to existing competition principles, policymakers must be certain they will not do more harm than good on core fundamentals, such as the market's natural selection of winners and losers through the

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<sup>33</sup> No-poach and Wage-fixing Agreements – a Canadian Perspective, John Pecman, Chris Margison and Robin Spillette, *Competition Law International*, June 2021, Vol. 17, Issue 1, pp. 49-77

<https://heinonline.org/HOL/LandingPage?handle=hein.journals/cmpetion17&div=10&id=&page=>

<sup>34</sup> Competition Bureau, *Competitor Collaboration Guidelines* (Competition Bureau, 23 December 2009)

<https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04582.html>



introduction of sector specific regulations. Can the current legislation use a further tune-up to improve its effectiveness owing to the digital transformation of the economy and to our lagging international competitiveness? Indeed it can! The Act was designed in 1986 to preserve and enhance the process of competition, but with an eye to enabling larger firms with cost advantages of scale and scope to improve their international fortitude. Businesses today appear to be more focused on being lean and nimble. It is now widely recognized that a thriving export sector is better achieved through the strengthening of domestic competition. The following are recommendations for the strengthening of Canada's competition law and our competitiveness on the global stage.



## List of Recommendations:

### 1. Create a Competitiveness Council

- The Council would advise cabinet on policies to improve Canada's competitiveness including advocating for more competition and less regulation in markets –e.g. barriers to internal trade, and to foreign investment and ownership, occupational licensing restrictions, government monopolies and procurement, and sectors protected from competition by regulation. The Council could be empowered with the ability to instruct the Competition Bureau to undertake sector market studies to inform their reports and recommendations.

### 2. No revisions to the existing purpose of the Competition Act are necessary

- The Government of Canada should retain the current regulatory purpose and design of the Act.
- Develop a formal review process of the Act every five years to keep it current and relevant.

### 3. Improving merger control

- Reform section 96, the efficiency exemption, treating the expected efficiencies from a proposed merger as a factor to be considered rather than an exemption.
- Add other explicit pro-competitive factors to be considered regarding the prevention or lessening of competition based on new economic activity in Canada derived from a merger, such as investment, dynamic efficiencies, research and development, and exports from Canada.
- Retain existing legal presumptions, the standards to measure harm and the economics-based approach to competition assessment for all economic sectors.
- Require the Competition Bureau to provide merging parties with comprehensive 'State of Play' updates during set intervals of a merger review.
- Create judiciary oversight procedure of Supplementary Information Requests akin to section 11 compulsory orders.

### 4. Limit further expansion of the scope of Abuse of Dominance Provisions

- Test the effectiveness of the June amendments before considering the need for further changes.
- Provide more efficient and timelier dispute-resolution mechanisms, including fast-track interim injunctions and arbitration tools, particularly for fast-moving digital markets cases.
- Add rights of defence protection (i.e. statutory limitation) which would limit Competition Bureau investigations to a one year period.



## 5. Bolster anti-cartel tools

- Expand the competitor collaboration provision, section 90.1 of the Act, to enable the Competition Bureau to enforce price-fixing offences as a civilly reviewable matter and to impose significant administrative monetary penalties.
- Establish a stand-alone “whistleblower” program that would provide significant financial rewards to whistleblowers who supply information and meet certain eligibility requirements (e.g. Ontario Securities Commission Whistleblower Program).

## 6. Provide express market study authority

- Provide the Competition Bureau with market study powers requiring pre-issuance review and sign-off by the Competition Tribunal.

## 7. Improve private access to the Competition Tribunal

- Permit the Competition Tribunal to award damages in private action proceedings (section 75, 76, 77 and 79).

## 8. Increase the independence, accountability and digital market expertise of the Commissioner

- Safeguard Competition Bureau resources and provide it with a stronger voice to advocate for competition by creating it as a truly independent law enforcement agency (e.g. Office of the Privacy Commissioner).
- Properly resource the Competition Bureau through a specific budget allocation requiring the Commissioner to appear before Parliament to provide greater transparency on the Competition Bureau’s use and allocation of funds.
- Establish a federal digital regulators working group akin to the UK Digital Regulators Cooperation Forum to develop a coordinated digital regulatory approach. The working group could include the Office of the Privacy Commissioner, the Canadian Radio-Television and Telecommunications Commission, the Superintendent of Financial Institutions and the Competition Bureau.

## 9. Refine certain recent amendments from the *Budget Implementation Act*

- As buy-side agreements can have net economic benefits, wage-fixing and no-poach agreements should not necessarily be condemned as a *per se* criminal offence; rather, these agreements might better be treated as reviewable matters under the Act assessed on a case-by-case, competitive effects basis.
- Clarify the new definition of an “anti-competitive” act under the abuse of dominance provisions, which now states “or have an adverse impact on competition” to ensure it does not capture a competitive response which has neither anti-competitive intent or effect.

