



Toughening Canada's Competitiveness¹

Canadian Chamber of Commerce – The Future of Competition Policy Final Draft Report²

October 18, 2022, Prepared for Stakeholder Consultations

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Robust competition, a key pillar to international competitiveness, is fundamental to a well-functioning economy.³ The economic literature suggests that healthy competition has positive effects on a firm's productivity and efficiency.⁴ 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."⁵ 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.⁶ 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.⁷

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.

³ 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_YTMHKD_EBK2*MTY2ODAyNzUyOC40LjEuMTY2ODAyNzgwNS4wLjAuMA

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

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



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



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.¹¹



domestic and foreign suppliers,¹⁷¹⁸ as well as enhance competition in the network and service sectors.¹⁹ 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.²⁰ 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.²¹

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





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.²⁵ 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,



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.



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.

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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



5. Bolster anti-cartel tools

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