Intelligence MEMOS

From: Edward Iacobucci

To: Competition Law Observers

Date: June 18, 2024

Re: **Burden of Proof Changes Bring Uncertainty to Competition Law**

After decades of not having much in the way of political salience or attention, competition law now is front page news, as worries about inflation, large technology firms and productivity have resulted in demands for competition law to fix it all.

Recently, a Competition Bureau **report** concluded competition has worsened. It adds that the results "show how essential it is to modernize Canada's competition law to respond to the realities of today's economy."

While the study is a useful contribution, I am skeptical about the relationship between competition trends and efforts to reform competition law.

Even if there were good evidence that competition has diminished in Canada, it does not follow that competition law reform is the appropriate remedy. The OECD ranks Canada near the worst internationally in establishing regulatory barriers to competition.

Moreover, even if there were problems with competition that relate to competition law specifically, it does not follow that law reform is appropriate. Rather, it could be that enforcement has been inadequate.

That being said, any legislation can be improved. I remain skeptical of the narrative that the law requires sweeping reform to address the digital economy or to reverse a strong, secular decline in competition caused by competition law, but I am not skeptical that there is room for improvement.

Which brings us to Bill C-59. It had its roots in the 2023 Fall Economic Statement, which proposed a variety of significant changes to competition law, and the bill, currently on the verge of passage in the Senate, is set to implement many of those proposals.

Many tend to strengthen the enforcement powers of the Bureau and make it easier for private actors to seek redress for allegedly anticompetitive behaviour. The government's efforts to date to support enforcement are generally sensible and welcome developments, as I **outline** in my recent C.D. Howe Institute Commentary.

There are also, however, more substantive changes, including amendments that move away from the bedrock principle that the burden rests with the Bureau to prove, on a balance of probabilities, that a merger or practice by a dominant firm is harmful to competition.

For example, the government proposes including market share thresholds in the statute that, if met, would presumptively deem a proposed merger to be anticompetitive, and the burden would then shift to the parties to prove the merger is competitively benign.

This is unfortunate. Market definition and corresponding market shares lack precision both in practice and conceptually – there is no "true" market definition to uncover, but rather it is a judgment-contingent construct that crudely reflects sources of competition. Moreover, concentration may or may not give rise to competition concerns. Sometimes fierce competition causes greater concentration as weaker firms wither.

To be sure, market definition and concentration are useful heuristics that are relevant indicators of risk of competitive harm; the Bureau's past reliance on thresholds in guidelines is appropriate. But rough and ready concentration thresholds ought not to be included in formal legislation, with potentially pivotal legal importance.

In addition, the government recently amended the Act to abolish the requirement of a substantial prevention or lessening of competition for a Tribunal order against a dominant firm in the abuse context; all that is necessary is to show a practice of anticompetitive acts. Anticompetitive acts, as defined in the case law and in a recent amendment of the *Competition Act*, do not require harm to *competition*, but rather may rest on harm to *competitors*. Indeed, according to case law, the acts may in fact be good for buyers and competition, yet nevertheless ought to be considered "anticompetitive acts" if they are intended to harm competitors.

It hardly needs saying that it is not good public policy for the *Competition Act* to discourage acts that benefit buyers and competition regardless of their impact on competitors.

Bill C-56, passed already, requires a competition test for there to be fines or damages for abuse of dominance. Given that finding an abuse of dominance without a competition test is not a good idea, not having fines or damages for abuse without a competition test is unobjectionable. But it reveals an internal inconsistency in the legislation.

If the government accepts in principle that damages and fines for socially harmful abuse of dominance are appropriate, and has concluded that a practice of anticompetitive acts creates social harms such that orders to cease and desist are appropriate, why would damages or fines not also be appropriate?

An adjudicator might conclude that the *Competition Act* would not explicitly authorize cease-and-desist orders against anticompetitive acts without some kind of implicit assumption that there is a competition problem associated with harms to competitors, and hence might not require much to find a substantial prevention or lessening of competition and to levy financial penalties even if conduct is benign.

While strengthening enforcement of sensible competition law is welcome, recent moves to lower the burden of proof in cases alleging anticompetitive conduct are unfortunate.

Edward Iacobucci is a C.D. Howe Institute Fellow-In-Residence, former dean of law and Toronto Stock Exchange Chair in Capital Markets at the University of Toronto.

*To send a comment or leave feedback, email us at **blog@cdhowe.org**.*

The views expressed here are those of the author. The C.D. Howe Institute does not take corporate positions on policy matters.