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Distilled Wisdom: Council Members Agree on the Most-Needed Competition Reforms for the Next Government

Twenty-first Report of the C. D. Howe Institute Competition Policy Council

With Canada's next government likely to consider reforms to the *Competition Act*, the C.D. Howe Institute's Competition Policy Council convened its twenty-first meeting to review the past 10 years of the Council's work and identify the most critical areas of competition policy reform.

The meeting was set against a context of rising interest in competition policy. Despite its economic importance, competition policy often gets less political attention in Canada than other economic policy matters. However, competition law and policy has recently been elevated to the main stage of the Canadian policy debate. Budget 2021 was the first major move of the federal government to respond to the added interest in competition law and policy, with an increase in the Competition Bureau's budget. This attention, including discussion of *Competition Act* matters at hearings of the House of Commons Standing Committee on Industry, Science and Technology in April 2021, brings opportunity for positive reform, but also potential risk if the government makes changes that run counter to the interest of Canadians and the Canadian economy.

Recurring issues that continue to have the support of the Competition Policy Council in 2021 are: (i) providing for the budget and enforcement independence of the Bureau, while enhancing oversight, transparency, and accountability; (ii) an expansion of private rights of access that allow private parties to launch actions rather than solely the Commissioner of Competition; and (iii) the need to better articulate the "efficiencies defence," which considers efficiencies versus anti-competitive effects in merger control. The next federal government should consider these issues in any legislative reform to the *Act*.



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These are the views expressed by the C.D. Howe Institute's Competition Policy Council, which held its twenty-first meeting on May 31, 2021, to discuss what amendments the government should consider to the *Competition Act*.

The Competition Policy Council comprises top-ranked academics and practitioners active in the field of competition law and policy. The Council provides analysis of emerging competition policy issues. Elisa Kearney, Partner, Competition and Foreign Investment Review and Litigation at Davies Ward Phillips & Vineberg LLP, acts as chair. Benjamin Dachis, Director of Public Affairs at the C.D. Howe Institute and Professor Edward Iacobucci, Competition Policy Scholar at the Institute, advise the program. The Council, whose members participate in their personal capacities, convenes a neutral forum to test competing visions and to share views on competition policy with practitioners, policymakers, and the public.

At Issue: Over 10 years, the C.D. Howe Institute's Competition Policy Council has issued over 20 communiqués. As the next federal government is expected to consider amendments to the *Competition Act*, the Council considered what elements from past recommendations the government should prioritize.

In the past, the Council has debated a wide range of issues that the government is likely to consider such as:

- Is there a [need for greater oversight of the Competition Bureau](#), and should [Ottawa re-invigorate competition enforcement in Canada](#) or give the [Competition Bureau power to compel information for market studies](#)?
- Does the [Competition Bureau's merger review need improvement](#), and does the stronger role of [quantitative evidence in mergers require amendments to adapt to the efficiencies defense](#)?
- What is the right role of [private remedies in the Competition Act](#), in light of the rise of [class actions and indirect purchasers in competition law](#) and the [distortive power of administrative monetary penalties](#). What other amendments are needed in the [abuse of dominance sections of the Competition Act](#)?¹

1 The Competition Policy Council has also tackled the questions of whether competition law has the teeth to oversee the digital marketplace, and if the Bureau already has the “toolkit” to handle big tech. Given the recentness of these communiqués, the Council decided not to revisit these questions explicitly. See <https://www.cdhowe.org/cpc-communicue/competition-law-has-teeth-oversee-digital-marketplace-cd-howe-institute-competition-policy-council> and <https://www.cdhowe.org/cpc-communicue/competition-bureau-already-has-%E2%80%9Ctoolkit%E2%80%9D-handle-big-tech-cd-howe-institute-competition-policy>.

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Organizational Structure and Expansion of Powers of the Competition Bureau

The Council first reconsidered structural questions related to the Bureau's budget, governance, and powers to conduct market studies.

The Competition Bureau's Budget and Oversight

In fall of 2018, the Council argued that the Bureau must receive adequate resources to fulfil its mandate. In particular, the Council submitted that the Bureau should have a dedicated budget allocation to ensure it is not crowded out by other priorities of the Innovation, Science and Economic Development (ISED) department.

The government's commitment in its spring 2021 budget to increase the Bureau's budget by 50 percent is a step forward, which the Council applauds. In the Council's spring 2021 meeting, members suggested further steps to ensure budgetary independence of the Bureau and insulate competition enforcement from other varying political priorities. One approach some members of the Council advocated was an automatic increase in the budget of the Bureau with economic growth.

In past communiqués, the majority of Council members did not support removing the Bureau from ISED. Instead, they emphasized the value of the Bureau having a seat at the table and remaining "inside the tent" on federal government policy. At the same time, Council members underscored the critical importance of Bureau independence on enforcement decisions. In its spring 2021 meeting, many Council members suggested that if the Bureau had a specific budgetary allocation (as do certain entities under other departments, such as the Canadian Environmental Assessment Agency, or the Public Health Agency), Parliament would have greater visibility as to the resource inputs used by the Bureau and the outcomes from its work. This would also provide oversight from Members of Parliament – something that many Council members endorsed again in their spring 2021 meeting.

Having the Commissioner appear before Parliament with a budgetary ask and to justify the Bureau's use and allocation of funds would provide oversight of taxpayer resources, without direct control over the specific enforcement decisions of the Commissioner. Remaining inside ISED will give the Bureau a seat at the table in broader policymaking during the recovery from the COVID-19 crisis.

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Market Studies

Competition enforcement agencies in many countries have the ability to compel private entities to provide information for a market study. The Bureau and others have suggested that the Bureau should have similar powers.²

In its spring [2017 communiqué](#), the Council discussed whether the Bureau should have additional market- study powers and the majority consensus was that the Bureau should not be given the ability to compel Canadian business to produce information for use in a market study. Such investigatory orders could result in significant costs for Canadian businesses. Council members were also of the view that the Competition Bureau has not identified how information obtained voluntarily from market study participants was inadequate or why previous market studies were systematically deficient, so as to justify the potentially significant costs and burdens arising from investigatory orders.

In its most recent discussion, the Council members concluded that the evidence has not changed in favour of granting the Bureau greater market-study powers. Comparisons to international competition authorities that have extensive market-study powers is not a sufficient case for extending similar powers to the Competition Bureau. The majority consensus of the Competition Policy Council is that market studies are not likely to be effective in enhancing competition, and they would divert significant portions of the Bureau’s limited resources away from investigating and litigating cases that directly tackle anti-competitive conduct and help clarify interpretation of competition law.

The Efficiencies Defence

In January of 2015, the Supreme Court of Canada issued a decision, *Tervita*,³ with major implications for merger analysis⁴ in competition law and policy. The ruling raised the evidentiary standard and placed a strong onus on the Commissioner of Competition to present all quantitative evidence

2 “Competition Bureau: Innovating to Succeed.” Remarks by John Pecman, Commissioner of Competition, Canadian Bar Association’s Competition Law Spring Forum (Toronto, Ontario) May 19, 2016, available at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04090.html> and “The State of Competition Policy in Canada: Towards an Agenda for Reform in a Digital Era” Vass Bednar and Robin Shaban April 21, 2021, available at: <https://www.mediatechdemocracy.com/work/the-state-of-competition-policy-in-canada>.

3 *Tervita Corp. v. Canada* (Commissioner of Competition).

4 During its Spring 2021 meeting, some members of the Council raised, but the group did not have a fulsome discussion on, other improvements to mergers policy, such as with respect to the applicable thresholds, limitation periods (at least with respect to non-notifiable deals) and process.

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possible when challenging proposed mergers that may lessen or prevent competition. Section 92(1) of the *Competition Act* empowers the Commissioner of Competition to challenge a merger, at the Competition Tribunal, if it “prevents or lessens, or is likely to prevent or lessen, competition substantially.” Where the Commissioner is able to prove that a merger is likely to prevent or lessen competition substantially, the Tribunal may make a remedial order in relation to the merger, unless the merging parties can establish the efficiencies defence available under section 96 of the *Act*.

In *Tervita*, the Supreme Court created a two-part test requiring that the quantitative merger efficiencies be compared against the quantitative anti-competitive effects. In the first test, if the quantitative anticompetitive effects outweigh the quantitative merger efficiencies, the defence will not apply. *Tervita* places an onus on the merging parties to satisfy the Tribunal on a balance of probabilities that the defence applies. The merging parties must provide extensive quantitative evidence of cognizable productive, allocative, and dynamic (innovative) efficiencies likely to arise from the merger that would be lost if the remedial order were made. The second part of the test involves balancing qualitative efficiencies against the qualitative anti-competitive effects. However, the court held that anticompetitive effects from the merger that can be quantified should be quantified, even as estimates, and failure to estimate a quantum of the anti-competitive effects that are measurable will result in the Tribunal giving such effects zero weight. The goal of the efficiencies defence is to allow mergers (and competitor collaborations and specialization agreements) that result in a net increase in the efficient allocation of resources in the Canadian economy, after this balancing exercise has taken place.⁵

In its spring 2015 communiqué, the Council was of the view that the ultimate implications of the Supreme Court’s analytical approach to efficiencies set out in *Tervita* are uncertain, especially its quantification requirement, and will be tested in subsequent cases. Since then, many members of the Council believe the efficiencies defence has become an accounting exercise that narrowly considers the tractable questions of static efficiency but makes it difficult for the Commissioner to challenge mergers on the basis of the harder-to-quantify dynamic effects that mergers may have on the economy. These dynamic factors are perhaps especially relevant in the digital economy.

Given the rarity of cases, there was some, although not universal, support during the spring 2021 meeting for a statutory amendment that rejects the quantification requirement set out in *Tervita*. There was no consensus in the Council on substantive changes to the efficiency defence, whether retaining the

5 See, for example, “Canada’s Efficiency Defence: Why Ignoring Section 96 Does More Harm Than Good for Economic Efficiency and Innovation” by Brian Facey and David Dueck, *Canadian Competition Law Review*, 2019 and “Promoting Innovation and Efficiency by Streamlining Competition Reviews” by Brian Facey and Joshua Krane, C.D. Howe Institute E-Brief, 2017.

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status quo reliance on balancing weights, adopting a total welfare test, or requiring that efficiencies must also benefit consumers, in line with the standard in the United States and other foreign jurisdictions. Other members believe that the efficiencies defence is working well and is an important aspect of Canada's framework legislation designed to ensure that in those rare instances where it is necessary, companies are able to merge, or collaborate to improve the overall efficiency and adaptability of the Canadian economy.

Private Action, Damages, and Penalties for Abuse of Dominance

The overarching concern of the Competition Policy Council, both [in past communiqués](#) and in its spring 2021 meeting, is the dearth of litigated cases in Canada. Cases both directly enforce the law and clarify its application for others in the economy. If there is little case law to guide businesses, they are subject to uncertainty about how the law will be interpreted and enforced based on enforcement priorities of the Commissioner of the day. Even with an expanded budget for the Bureau, an overwhelming majority of Council members believe that competition enforcement for the current abuse of dominance provisions (section 79 of the *Competition Act*) should be expanded to private parties.

Private Rights of Action

Enforcement of Canada's *Competition Act* is primarily the domain of the Commissioner of Competition, who brings cases on behalf of the public before the Competition Tribunal or the courts. In particular, the *Act* grants the Commissioner of Competition sole authority to bring cases under s. 79 (abuse of a dominant position) and s. 90.1 (agreements that prevent or less competition). These sections arguably capture the most important exercises of the abuse of market power. In these important cases, the Commissioner's role as a gatekeeper means that private parties do not have direct access to the Tribunal to plead their grievances, but are forced to rely on the Commissioner to act on their behalf.

To be clear, some parts of the *Act* do permit private parties to bring certain cases before courts or the Tribunal. Most notably, the *Act* has since 1976 permitted private parties to seek compensation in the courts for losses or damages suffered due to conduct prohibited under the criminal provisions of the *Act* (including price fixing conspiracies and bid-rigging). This has led to frequent class action suits seeking damages, usually following execution of a search warrant or "dawn raid," or guilty pleas to price fixing in a related criminal or international case.

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Since 2002, private parties have also been able to bring cases under some, but not all, of the reviewable conduct provisions in the *Act*, namely s. 75 (refusal to deal), s. 77 (exclusive dealing, tied selling, and market restriction), and, as of 2009, s. 76 (price maintenance). These cases are permitted only if the Competition Tribunal first grants the party leave to bring an application before the Tribunal. The *Act* currently provides applicants in these cases with only injunctive relief. That is, successful lawsuits under s.75 and s.76 can only result in a respondent stopping its conduct, without compensation to the applicant (an award of damages).

In its [fall 2016 communiqué](#) on the topic of private rights of action, the Council suggested that the federal government should cautiously expand the kinds of anti-competitive acts that private parties – and not just the Commissioner of Competition – can take legal action against in Canada to include abuses of dominance. Council members in favour of expanding private litigation believed that the merits of expanding enforcement of the *Act* outweighed the potential downsides of allowing private actions, particularly if appropriate safeguards such as the leave requirement are maintained. The limited expansion of private action in the past did not lead to a flood of cases – a position the Council reached again in its spring 2021 meeting. The Council overwhelmingly believes that a wider range of enforcers will help both in enforcing the *Competition Act* and in clarifying the application of the law for others. Finally, there is a strong case for disputes between two competitors being settled using their own resources, not taxpayer dollars.

Council members make the recommendation on the expansion of private access to abuse of dominance based on the current structure of the *Competition Act*. However, expanding private rights of action while changing other related elements of the *Act* may have unintended consequences. Members supported maintaining a requirement that private actions only go ahead upon receiving leave from the Competition Tribunal.⁶

Damages and Administrative Monetary Penalties

In its spring 2021 meeting, the Council recognized that there would be limited incentive for private parties to pursue private actions if they only had access to injunctive relief and did not have the opportunity to recover damages. Accordingly, many members supported expanding damages to civil

⁶ The Council did not discuss private actions related to deceptive marketing practices or other potentially worthy expansions of private rights of action. There is currently a right of action to recover damages for breaches of the criminal misleading advertising offence, but not the other more specific reviewable practices in Part VII.1 of the *Act*.

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actions in non-criminal cases under the *Act*. In Canada, actual damages are available in civil actions for breaches of the criminal prohibitions of the *Act*, such as price-fixing. In past [Council communiqués](#), there was a consensus on the Council that treble damages, which exist for plaintiffs in the United States, should not be introduced in Canada. The Council continues to believe that treble damages are not appropriate.

Another question arising in relation to section 79 of the *Act* is the size of administrative monetary penalties (AMPs) that can be sought by the Commissioner from businesses which have contravened the abuse of dominance provisions. In its spring 2021 meeting, there was little support for increasing AMPs.

One concern that Council members continue to have with large AMPs is that AMPs are typically imposed for conduct that is clearly unlawful, as opposed to conduct where harm is rooted in an economic analysis and requires distinguishing between aggressive pro-competitive conduct (which should be encouraged) versus abusive anti-competitive conduct. Some Council members expressed the view that subjecting firms to large AMPs for potentially anti-competitive conduct would chill innovative and pro-competitive behaviour. However, other members continue to contend that large AMPs are appropriate as a deterrence mechanism for abuses of a dominant position.

Conclusion

The rising interest in competition law and policy in Canada tracks what is happening in the United States and globally, particularly in relation to digital economy issues. After thoughtful consideration of the Council's positions over the last 10 years, the Competition Policy Council reached the following consensus:

1. The Council commends the government for increasing the Competition Bureau's budget. Going forward, the government should consider creating a separate budget within the ISED budget, with the Commissioner, not the Minister, accountable to Parliament. A separate budget submission led by the Commissioner would provide increased transparency and provide Parliament and the public more insight into the Commissioner's enforcement priority setting and use of taxpayer funds.
2. The Bureau should remain a functional part of ISED to have a voice and provide insight and recommendations on relevant matters of broader economic and public policy.
3. The government should not grant the Commissioner formal market-study powers. Instead, the Council believes the Bureau should direct its additional resources to more enforcement.
4. Most Council members believe that the efficiencies defence for mergers has become difficult for the Bureau and merging parties to deal with as a result of the formalistic requirements

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imposed in the *Tervita* decision. However, there was no consensus on whether the government should seek to address the issues through amendments or leave matters for further development through jurisprudence.

5. The Council strongly supports an expansion of private rights of action for the abuse of dominance provisions in the *Competition Act*, accompanied by the leave requirement currently applicable to other private actions under Part VIII of the *Act*. Many Council members are in favour of adding damages to increase the incentive for private plaintiffs to pursue such litigation.

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Members of the Council participate in their personal capacities, and the views collectively expressed do not represent those of any individual, institution or client.

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*Not in attendance at the May 31, 2021 meeting.