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Watching the Watchmen: The Need for Greater Oversight of the Competition Bureau

Tenth Report of the C.D. Howe Institute Competition Policy Council

The federal government should create an independent oversight body for Canada's Competition Bureau to periodically evaluate the Bureau's performance and help define its strategic objectives. As well, the Bureau should improve public reporting of its activities and their economic impacts. The Bureau's annual reports should be published more promptly and move beyond activity-based reporting to measuring indicators of the economic benefits from enforcement.

This is the consensus view of the C.D. Howe Institute's Competition Policy Council, which held its tenth meeting on October 22, 2015.

The Competition Policy Council comprises top-ranked academics and practitioners active in the field of competition policy. The Council, chaired by Benjamin Dachis, Senior Policy Analyst at the C.D. Howe Institute, provides analysis of emerging competition policy issues. Professor Edward Iacobucci, Dean at the University of Toronto Faculty of Law and Competition Policy Scholar at the Institute, advises the Council, along with Grant Bishop, Fellow-in-Residence, and Aaron Jacobs, Researcher, both of the C.D. Howe Institute. 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: Is Canada's Competition Bureau properly defining its objectives and measuring its performance?



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Background

Canada's *Competition Act* frames competition not as an end in itself but as a means "to promote the efficiency and adaptability of the Canadian economy."¹ It is clear that competition enforcement serves an important economic purpose. However, in measuring their own performance, enforcement agencies like Canada's Competition Bureau tend to focus on "inputs" (e.g., staff resources) and "outputs" (e.g., cases litigated) rather than "outcomes." An economic measure of outcomes – something the Bureau currently does not fully do – could include, for example, the benefits to the economy from minimizing price distortions and enhancing allocative efficiency and productivity.

The international antitrust community is increasingly attentive to performance measurement and its use for strategic planning and prioritization by enforcement agencies.² Coherent performance measurement may help agencies to allocate resources efficiently and encourages appropriate long-term investments in agency capabilities.³ For example, an agency can ascertain the effectiveness of its activities by retrospectively evaluating economic impacts in particular cases, both successful challenges and those cases that it lost or decided not to pursue. The analysis can involve both the static impacts in a given market and the dynamic impacts from deterrence/jurisprudential developments. As well, disclosure of performance metrics by an agency encourages peer review of the agency's effectiveness.

The Global Competition Review produces an annual rating of global enforcement agencies. The Review examines their transparency, stability and procedural fairness based on practitioner perspectives. According to the Global Competition Review, Canada's Competition Bureau currently underperforms some of its international peers, including significant trading partners.⁴

In tracking its own performance, the Bureau's annual reports and strategic plans focus primarily on measures of its activity and resolution of particular matters (e.g., information requests, cases litigated,

1 *Competition Act*, R.S.C. 1985, c. C-34, s.1.1.

2 See, for example, International Competition Network. "ICN Agency Effectiveness Working Group 2015-2018 Work Plan." Available online at: <http://www.internationalcompetitionnetwork.org/working-groups/current/agency-effectiveness.aspx>; OECD Competition Council. 2012. "Evaluation of competition enforcement and advocacy activities." Available online at: <http://www.oecd.org/daf/competition/evaluationofcompetitioninterventions.htm>; and OECD. 2014. "Guide for assessing the impact of competition authorities' activities." Available online at: <http://www.oecd.org/daf/competition/guide-impact-assessment-competition-activities.htm>.

3 Kovacic, William E., Hugh M. Hollman, and Patricia Grant. 2011. "How Does Your Competition Agency Measure Up?" *European Competition Journal* 7(1): 25.

4 Global Competition Review. 2015. "Rating Enforcement 2015." Available online at: <http://globalcompetitionreview.com/rating-enforcement>.

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finances imposed). As part of its departmental reporting to Parliament, the Bureau, through Industry Canada, discloses an aggregate estimate for Canadian consumers' "dollar savings" that result from the Bureau's enforcement activities.⁵ However, the Bureau does not publish underlying estimates of economic impacts of specific enforcement activities or resolved cases or how it reaches such a dollar savings amount. Nor does it explain how its estimates of benefits might inform its strategic planning or help to prioritize enforcement activities.

This Council meeting asked:

- How should the Bureau measure its performance (i.e., goals and metrics)?
- How should performance measurement inform the Bureau's strategy?
- How should the Bureau involve consumers, the business community and competition experts in defining the Bureau's objectives and evaluating its performance?
- To what degree should the Bureau disclose performance measures?

Enhancing Bureau Accountability

The Council members agreed that the Bureau's current public reporting of its goals and activities is insufficient. The Bureau's strategic plan does not define verifiable objectives on which the Bureau could report its own performance. However, Council members identified challenges and risks in defining quantifiable performance goals. In part because of these difficulties, there was a consensus recommendation that the Bureau would benefit from a periodic review of its strategic planning and performance by an independent assessment body consisting of a group of knowledgeable individuals, who would define key indicators and assess the Bureau's overall performance.

Inadequacy of Planning and Reporting

A majority of Council members agreed that verifiable goals for, and retrospective reviews of, the Bureau's performance were desirable – at least in principle – but currently lacking. Some members pointed to the Bureau's 2015-2018 strategic plan,⁶ observing the lack of measureable objectives in that document. They emphasized that commitments to "seek appropriate remedies for cartels" or

5 Industry Canada. 2014. "Departmental Performance Report for the Period ending March 31, 2014." Available online at: <http://www.ic.gc.ca/eic/site/017.nsf/eng/07470.html#comp-law>.

6 Competition Bureau. 2015. "2015–2018 Strategic Vision." June. Available online at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03934.html>.

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to “empower Canadians to make informed decisions” do not provide a basis for meaningful *ex post* performance evaluation.

Council members also noted that the Bureau does not prioritize public reporting on its own performance. The annual report for the Competition Bureau’s fiscal year ending March 31, 2014, has still not been published (i.e., there is no annual report more than 18 months after the year-end). Some members were similarly critical of the quality of metrics reported in the Bureau’s last published annual report.⁷ They noted that indicators like “terabytes” of digital information seized, number of downloads of *The Little Black Book of Scams*, and number of speeches by the Commissioner of Competition are of limited value in assessing the impact of the Bureau’s activities. Even data on the number of information requests and complaints, or the total fines imposed, give minimal information regarding the effectiveness of the Bureau’s selection, management and resolution of cases. Council members agreed that reporting statistics to show that an agency is busy does not provide meaningful insight into whether it is delivering value for the economy.

Some members emphasized that verifiable goals would allow stakeholders (government, businesses and consumers) to understand the value created by competition enforcement. Verifiable goals are useful for holding the Bureau accountable for its own expenditures as well as the compliance costs for businesses resulting from competition law enforcement. The strategic planning published by the UK Competition Markets Authority provides an example of setting and reporting on verifiable goals. Specifically, that Authority, working with its oversight board, commits to reporting on goals such as “delivery of a target of direct financial benefits to consumers of at least ten times its relevant costs to the taxpayer,” “evaluation of the impact of at least two cases,” and “comparisons of performance over time and against appropriate international benchmarks.”⁸

Difficulties Defining Outcome Metrics

Council members agreed that one key value created by competition enforcement is economic efficiency. There was consensus that moving towards measurement of outcomes, including measures of economic

7 Competition Bureau. 2014. “Annual Report of the Commissioner of Competition for the Year Ending March 31, 2013.” November. Available online at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03706.html>. A recent Bureau initiative to provide quarterly statistics is also largely a measure of activity, not economic outcomes. See here: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03784.html>.

8 Competition Markets Authority. 2015. “Competition and Markets Authority Annual Plan 2015 to 2016.” March 24. Available online at: <https://www.gov.uk/government/publications/competition-and-markets-authority-annual-plan-2015-to-2016>.

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efficiency, was conceptually desirable. However, many members were sceptical that the Bureau could define quantifiable objectives in a meaningful way without risking unintended consequences. Certain Council members cautioned that any chosen metrics might distort behaviour (i.e., the Bureau would perform to the indicator). Council members were concerned that a narrow focus on quantifiable measures can lead to behaviour affecting performance metrics, such as re-classifying merger “complexity” categories to improve review-timing metrics.

Most Council members agreed that a fundamental problem for outcome measurement is estimating counterfactuals for *ex post* assessments of economic impacts. Such an outcome measure might be, for instance, measuring the impacts of a disallowed merger. Council members agreed that it would be difficult to make such measures consistently and accurately.

Certain Council members noted that *ex post* assessments of Bureau performance could also face a selection bias problem. If market participants perceive a competition agency as effective, that perception will deter straightforward cases from ever coming forward. In that case, an effective agency’s active caseload will involve resource-intensive, time-consuming, and tough-to-resolve cases. That would mean an effective Bureau would look to be performing poorly on measures of caseload. In contrast, if parties perceived that competition enforcement was weak, the Bureau’s docket would involve cases for conduct that would not have occurred if the parties had a clear understanding of boundaries. On this measure, the Bureau would look to be clearing many cases quickly. The consensus among the Council members was that measures of Bureau activity were insufficient measures of performance.

Better Oversight for the Bureau

Given the questions about quantitatively measuring Bureau performance retrospectively, the consensus among Council members was that the Bureau would benefit from a periodic review of its strategic planning and performance by an independent assessment body. This is particularly true given the Bureau’s *de facto* role as final decision-maker in many situations, especially in merger cases.⁹ Such oversight should involve evaluation of the Bureau’s allocation of resources across its enforcement, merger review and advocacy functions. Among the benefits of such a review is the ability to account for

9 Iacobucci, Edward, and Michael Trebilcock. 2011. “Critical Reflections on The Institutional Design of Canadian Competition Policy.” *Canadian Competition Law Review* 24(1): 39.

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the benefits of competition enforcement that are not readily quantifiable, such as enhancing innovation, promoting compliance with competition law and advancing jurisprudence. An external review panel will be able to consider both quantitative and qualitative factors in making recommendations regarding the Bureau's priorities and strategies. Such an oversight body would enhance accountability even in the face of difficulties in generating verifiable quantitative benchmarks. An oversight body should be politically independent, with its membership appointed based on skillset or suitability to represent key stakeholders. Such a group need not be lawyers and economists.

For example, some Council members pointed to the problem of how to assess the Bureau's recent string of major case losses. Was it the result of bad luck? Tough cases? Or was there some kind of systemic issue in the Bureau's management of litigation? These systemic issues are the type of issues that would benefit from external oversight to objectively scrutinize the Bureau's performance.

The governance structure of the UK Competition Markets Authority provides an example for such oversight. In particular, the Competition Markets Authority is legislatively required to report to an oversight board – which is established by statute – on performance, establishing its overall strategic direction and demonstrating it has made appropriate use of public funds.¹⁰

Better Transparency

There was general consensus that Competition Bureau decisions should be more transparent. The Competition Bureau, to its credit, has undertaken a number of initiatives that are directed at increasing transparency, such as in more numerous Guidelines and creating an Action Plan on Transparency.¹¹ However, a majority of Council members agreed that the Bureau should enhance the disclosure contained in its published reasons for decisions. More transparent reporting would include the Bureau's reasoning for a decision, its analysis of the market in question (e.g., market size and share, and identified barriers to entry) and information about its investigatory processes and timelines (e.g., in merger cases, timing of notification, supplementary information requests, and resolution in a given matter) as well as measures of the economic impact of the case. Again, members underscored the importance of reasons to provide guidance to the market and accountability for the Bureau. Guidance

10 See: Competition Markets Authority. "Our Governance." Available online: <https://www.gov.uk/government/organisations/competition-and-markets-authority/about/our-governance>; and *Enterprise and Regulatory Reform Act 2013*, (U.K.) 2013 c. 24, Sch. 4.

11 See: Competition Bureau, "Enforcement Guidelines". Available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00168.html; and "Enhancing Transparency". Available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_03568.html.

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and accountability are particularly important in mergers where jurisprudence is limited and the Bureau is the *de facto* final decision-maker.

Certain Council members cautioned that a heightened requirement for reasons might perversely intensify the Bureau's investigation and merger reviews (e.g., the Bureau would be more sensitive since the reasons would be publicly scrutinized). However, the consensus was that rigorous disclosure of reasons for decisions ensures the Bureau's accountability for its decisions and provides crucial guidance for market participants.

Conclusions

The consensus among Council members was that the Bureau needs meaningful strategic planning, better transparency and more effective oversight. Foremost, it needs an oversight body to ensure the Bureau annually identifies strategic objectives and to scrutinize the Bureau's performance. The Bureau should publicly publish both regular performance reports and enhanced disclosure of its reasons for decisions in particular matters.

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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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