

# Intelligence MEMOS



From: Benjamin Dachis

To: The Hon. Francois-Philippe Champagne, Minister of Innovation, Science and Industry

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Re: CANADA'S COMPETITION POLICY REVIEW

Minister, you have travelled the world seeking investment into Canada. Now it is time to think about how our competition policy framework influences the decision of companies to invest in Canada. Would they have certainty on the legal tests they face on decisions to grow once here, such as via acquisition? Are there clear guidelines on what defines anti-competitive action? Can they rely on due process on enforcement action? Are the financial consequences clear? If the answers to those questions are “no”, they may [think twice](#) about your pitch. You should tackle these issues as part of your competition policy review.

Today's competition policy debate largely emanates from the market power of tech platforms. However, competition issues [affect all businesses](#). The government must write competition rules for all.

The C.D. Howe Institute's [Competition Policy Council](#) also cautions against developing *ex ante* rules for firms with strategic market status. This would turn the Competition Bureau into a sector-specific regulator – a role not suited to Canada's competition laws. The Council has repeatedly stated that [competition law has the teeth to oversee digital marketplace](#), and the [Bureau already has the “toolkit” to handle big tech](#). As former Commissioner of Competition John Pecman and others have argued, competition law is not the best place for [tackling big tech](#).

This debate goes to the very [purpose](#), [principles](#), and [positions](#) of key players on [competition policy](#). If the government tries to address two or more problems (economic efficiency and myriad other goals such as [environmental considerations](#), equity, etc.) with one policy tool – competition law enforcement – it will [fail at achieving](#) either.

Merger policy is the area of most concern for many investors you'll be courting. Companies will want [certainty](#) that their mergers will not be re-litigated many years after consummation. They also need to have logically [consistent](#) rules on how best to remedy the harms from any proposed merger.

Some current or former Council members [endorse](#) major change to the economic efficiency defence in mergers. Others counsel [none](#). An approach proposed by [Edward Iacobucci, Cal Goldman and others](#) offers a middle ground, which eases the evidentiary burden on the Bureau

Clarity on the legal [tests](#) that the Bureau applies to company behaviour is important, including in difficult to tackle areas such as [nascent](#) competitors and [winner-take-all](#) markets. Some changes may be beneficial, for example, on removing inherently ambiguous requirements to determine a business's [intent](#) when the outcome and process is anti-competitive, provided a firm is afforded an opportunity to provide business justifications for its conduct.

The Council has endorsed a role [for private remedies in the Competition Act](#). The government should seek changes on damages in private remedies, but be mindful of the rise of [class actions](#). The government should be [cautious](#) in adopting certain elements of US-style treble damages for private action, for example. [Australia](#) offers a model to consider for enabling wider, but controlled, access to private enforcement. Canada's legal principles of requiring the losers of litigation paying the legal costs of the winner may discourage meritless private action but do not address the potential for private parties to file claims in an effort to extract settlements in lieu of costly litigation. Retaining the judicial leave requirement to commence litigation addresses this concern. If private action becomes more frequent that may, among other important reasons, [necessitate](#) reform of the Competition Tribunal.

Potential costs to firms matter. The potential monetary risk that companies now face from newly expanded [distortive administrative monetary penalties](#) may be punitive, unconstitutional and may [violate trade laws](#). Companies will look twice at those. You should reconsider those changes from last year.

The Bureau must improve its [detection of illegal cartels](#) while also not deterring [pro-competitive competitor collaboration](#). This is particularly important in landing the details of how best to [fight wage-fixing agreements](#).

The Council believes that your consultation on competition policy must look beyond the *Competition Act*. Canada is among the [world's worst performers](#) on barriers to domestic entry, [foreign investment](#), and government involvement in business operations. The Council has repeatedly called for [removing restrictions on foreign ownership in telecoms](#) and [other barriers to competition](#). By definition, changes on ownership limits would attract the foreign investors you are trying to attract while [benefiting regular Canadians](#). Tackling anti-competitive conduct protected by [governments from competition enforcement](#) (which opens a [back-door](#) route to cartels) and removing barriers to [entry](#) in [regulated professions](#) and [sectors](#) will put consumers first.

Finally, and before you grant any additional powers to the Bureau, both the Council and former Commissioner of Competition George Addy [have repeatedly](#) called for [greater oversight of the Competition Bureau](#). The government should also put in place significant safeguards if it gives the [Competition Bureau power to compel information for market studies](#). One type of study some on the Council would prioritize are retrospective studies of past enforcement action and remedies to generate lessons to be learned for future enforcement, as opposed to speculative market studies.

Your review of Canada's competition policy affects all businesses. From tech firms to grocery stores. Large businesses to small. Domestic incumbents to potential foreign investors. How you conduct the review will be a signal to all of them about what kind of business climate they face in Canada. A transparent and consultative process of reform and getting to clear legislation (that you share with experts before introducing to Parliament) that reflects a focus on Canadian economic growth is how you can get more companies to say “yes” to investing in Canada the next time you ask them.

*Benjamin Dachis is Associate Vice President of Public Affairs at the C.D. Howe Institute.*

*To send a comment or leave feedback, email us at [blog@cdhowe.org](mailto:blog@cdhowe.org).*

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