

Intelligence MEMOS



From: Grant Bishop
To: The Hon. Navdeep Bains, Minister of Innovation, Science and Economic Development
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Re: Competition Bureau has toolkit to handle the digital age

At its April meeting, The C.D. Howe Institute's Competition Policy Council discussed whether Canada's competition policy toolkit is sufficient to address new forms of market power that may arise in the digital economy. The [Council](#) comprises top-ranked academics and practitioners active in the field of competition policy and provides analysis of emerging competition policy issues.

Governments worldwide are wrestling with public concerns about the perceived power and influence of companies like Google, Facebook and Amazon that provide digital platforms for searching, shopping and social media and collect extensive datasets about user activity. Last month, Canada's Innovation Minister launched the "Digital Charter" initiative to, in part, examine issues of market power and competition in the digital economy.

In the face of political appeals to directly regulate digital platforms, including a rewrite of antitrust rules, the consensus of the Council was that Canada's competition law continues to provide a robust framework for confronting new forms of anticompetitive behaviour that may arise in the digital economy. As well, policymakers must be cognizant of the sensitivities of business investment to regulatory uncertainty and avoid dampening fast-moving and highly dynamic competition "for the market" in the technology sector.

Policymakers should not assume that incumbents are invincible to upstart digital disruptors. Nonetheless, Council members agreed that Canada's pre-merger notification rules and framework for merger review are sufficient to safeguard against anticompetitive acquisitions even in the tech space.

Acquisitions that involve a target with domestic assets or sale revenues exceeding \$96 million are reported to the Competition Bureau, provided the parties collectively have Canadian assets or sales exceeding \$400 million. There may be acquisitions of potential disruptive entrants in digital sectors that do not trip these thresholds. However, this is the case in any industry, and the Bureau has always had the ability to challenge non-notifiable transactions.

Council members also generally agreed that the current legislative framework under the Competition Act can be used to counter abuse of dominance by digital, data-driven players. Council members observed that "what's old seems new," and competition law has been capable of adapting to new technology and forms of market power. Analysis of "essential facilities" in antitrust cases has been around since the 1912 St. Louis Railway case, and Canada's Competition Tribunal has already considered issues of platform competition and data access in a variety of cases.

However, even if the framework for competition law is up to the task, Canada needs more active competition law enforcement and greater case law to clarify the limits of the competition law framework. Good laws on the books are not effective if enforcement is weak. Previously, at its [October 2018 meeting](#), the Council pressed for the federal government to make the rigorous enforcement and promotion of competition law a higher priority. Since the 2015/16 federal budget, the Bureau's financial allocation has flat-lined at \$50 million while ISED's budget has doubled to nearly \$3 billion in 2019/20. If Ottawa is serious about ensuring rigorous competition in Canada, the Competition Bureau must be adequately resourced to do its job effectively.

Finally, Council members cautioned that competition law has limits. We should not risk competition law becoming a politicized vessel for directly addressing other policy concerns such as income inequality, data ownership or political influence. Other regulatory tools may be appropriate to achieve non-economic policy objectives or where persistent and demonstrable market failures impair economic efficiency.

(For a fuller report on the meeting click [here](#).)

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