COMPETITION POLICY COUNCIL

COMMUNIQUÉ

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A New *Competition Act* for a New Federal Government

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

The new federal government should revamp parts of the *Competition Act* to address gaps in the legislation. The first priority: make the aim of the legislation on abuse of dominance be to protect against harm to competition in general, rather than harm against particular competitors. Harm to competition in general can occur without harm to particular competitors, in the view of the majority of the Council. The tension between the law on abuse of dominance as written in the *Act* and as interpreted by the Competition Tribunal and the courts creates uncertainty for firms; uncertainty which can raise the cost of doing business, and chill healthy competitive rivalry. The federal government should also give careful consideration, noting the considerable potential pitfalls, to allowing private parties greater direct access to the Competition Tribunal for civil litigation. This is the consensus view of the C.D. Howe Institute's Competition Policy Council, which held its eleventh meeting on April 18, 2016.

The Competition Policy Council comprises top-ranked academics and practitioners active in the field of competition policy. The Council, co-chaired by Benjamin Dachis, Associate Director, Research, at the C.D. Howe Institute and Adam Fanaki, Partner, Competition and Foreign Investment Review and Litigation at Davies, Ward, Phillips & Vineberg LLP, 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 program, along with Aaron Jacobs, Researcher, at 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 a legislative update of the *Competition Act* needed to remove redundant provisions, address gaps and better focus the *Act*? Since the 2009 amendments to the *Act*, litigation and other enforcement activities have provided useful experience with the new and reformed provisions. What are the most important priorities for amendments to the *Act*?

Council members would like to thank Omar Wakil and Marina Chernenko of the Competition and Foreign Investment Review Group at Torys LLP for providing a briefing note on potential amendments to the *Competition Act*.

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Background

It has been more than five years since the last round of significant amendments to the *Competition Act*. The 2009 reforms made major changes to a number of provisions in the *Act*, including the creation of section 90.1 for civil prosecution of anti-competitive agreements between competitors, and the liberalization of resale price maintenance to be no longer per se, or automatically, illegal. However, the reforms did not materially alter the abuse of dominance provisions found in sections 78 and 79 of the *Act*.

The *Act* now contains four civil provisions that deal with the conduct of a single firm. These provisions on reviewable practices relate to a refusal to deal (section 75),[1] resale price maintenance (section 76),[2] and exclusive dealing, tied selling and market restrictions (section 77).[3] There is also a broader abuse of dominance provision (section 79) that is intended to apply to various forms of anticompetitive behaviour by dominant firms or groups of firms.

In canvassing Council members about their top legislative priorities for potential reforms to the *Act*, most focused on amendments to provisions that were not substantially reformed in the 2009 amendments, such as the abuse of dominance provision. The other priority identified by the Council members was for the government to debate – not necessarily pursue – increased rights of private access for complainants to the Tribunal. Other matters were identified as possible worthy of legislative attention, but with less consensus. For example, there was disagreement whether refusals to deal (section 75) and price maintenance (section 76) should be repealed in favour of an amended abuse provision in section 79.

1 The Competition Bureau makes it clear that there is no absolute obligation on any business to supply to, or buy a product from, another business. However, under certain circumstances, and when the refusal to deal is having or is likely to have an adverse effect on competition, section 75 of the *Competition Act* may apply. See http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03801.html.

2 According to the Competition Bureau, price maintenance under the *Act* occurs when a person influences upward or discourages the reduction of another person's selling or advertised prices by means of a threat, promise or agreement, or when a person refuses to supply another person or otherwise discriminates against them because of their low pricing policy, in each case with the result that competition in a market is likely to be adversely affected. See http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03787.html.

3 The Competition Bureau states that: "Exclusive dealing occurs when a supplier requires or induces a customer to deal only, or mostly, in certain products. Tied-selling exists when a supplier, as a condition of supplying a particular product, requires or induces a customer to buy a second product. It may also occur when the supplier prevents the customer from using a second product with the supplied product. Market restriction occurs when a supplier requires the customer to sell the specified products in a defined market, for example by penalizing the customer for selling outside that defined market." See: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00111.html.

Abuse of Dominance and Harm to Competitors Sections

The feature in most urgent need of reform, according to a clear majority of Council members, is the current focus of section 79 (and as interpreted by the courts) on harm to "competitors" as a necessary element of abuse of dominance, as opposed to simply harm to "competition."[4] At present, case law has interpreted section 79 to require an anticompetitive abuse of dominance to involve a predatory, exclusionary or disciplinary effect on a competitor, in addition to harm to competition. However, harm to a specific competitor is neither a necessary nor sufficient condition for an action to have an anti-competitive effect and differs from the *Act's* general focus on the competitive environment.

Practices that harm competition but are not specifically directed at competitors or are even beneficial to competitors – perhaps by softening price competition among rivals – may, therefore, escape scrutiny under the current section 79. This leaves a gap in the legislation that the majority of the Council recommends the government address with a legislative clarification. Specifically, the law should clarify that an abuse of dominance under section 79 that lessens competition substantially may arise from conduct that is not directed at harming a competitor.

However, there was some debate among Council members as to whether the current case law truly requires that an anticompetitive act harms competitors. This uncertainty emerges from different interpretations of the most recent ruling by the Federal Court of Appeal in the Competition Bureau's case against the Toronto Real Estate Board, which is now currently back in front of the Competition Tribunal. One Council member argued that an amendment to the abuse of dominance provisions is required to eliminate this uncertainty. Such an amendment would simply codify that an anticompetitive practice is conduct by a dominant firm that reduces competitive discipline on the exercise of market power.

Consolidating Reviewable Practices

There were differing views over the legislative consolidation of the general abuse provision and other, specific, reviewable practices.

The Case for Consolidating Reviewable Practices: A number of members would support some or all of the three situation-specific reviewable practices sections (75, 76, and 77) being subsumed under the more general section 79. One of the major concerns with these four sections is that they are subject

4 See Ralph A. Winter. 2014. "The Gap in Canadian Competition Law Following Canada Pipe." *Canadian Competition Law Review* 293.

to different thresholds for determining harm (adverse effect on competition or substantial lessening of competition), procedural routes (private access for certain provisions and not others) and potential remedies (administrative monetary penalties for abuse of dominance, but not other provisions).[5]

These different standards increase the risk that cases may be brought by the Commissioner under a given provision for the Competition Bureau to gain a strategic advantage. Conduct deserving of a remedy may also escape scrutiny as a result of being initiated under the wrong provision. A single threshold might also reduce the costly uncertainty that businesses face when setting up their businesses practices and would create consistency within the *Act*.

The Case against Consolidating Reviewable Practices: However, a number of Council members felt that retaining the specific provisions for refusals to deal and price maintenance would improve certainty because the cumulative jurisprudence around some of the sections is useful. They argued that amendments should seek to improve clarity instead of merely amending the *Act* for the sake of symmetry. Some Council members thought that the government should do more to assess the treatment of vertical restraints before deciding to pursue amendments to the *Act*. There was also considerable debate among Council members on whether the special treatment of price maintenance, as opposed to general abuse of dominance, is justified. Some Council members expressed concern that eliminating specific provisions on price maintenance would put Canada too far afield of competition practices globally.

Broadening Private Access in the *Competition Act*

The second issue that many Council members raised was the prospect of an expanded role for private action under the reviewable practices provisions of the *Act*. At present, private parties may seek leave to commence proceedings before the Competition Tribunal under sections 75 (refusal to deal), section 76 (price maintenance) and 77 (exclusive dealing, tied selling and market restriction), but not for the more general section 79 (abuse of dominance). Many Council members felt that private action could potentially alleviate the widespread feeling that abuse of dominance is being under-enforced in Canada. Council members also pointed out that, at the time of the original 2002 reforms that enabled limited private access, there were concerns that any allowance for private action before the Tribunal would result in "opening the floodgates." This had clearly not come to pass.

5 Firm behaviour on refusal to deal and resale price maintenance is subject to the test of requiring a likely adverse effect on competition. This is a lower standard than what applies to exclusive dealing or abuse of dominance, which requires demonstrating a substantial prevention or lessening of competition. Administrative monetary penalties apply in the case of abuse of dominance, but not in some other types of single firm behaviour.

A majority of the Council members felt that private rights of access should expand under the legislation, but there was no agreement on the precise parameters of this reform. The Bureau should addresss this topic, but with considerable caution. Many supported an amendment to the *Competition Act* to open up section 79 to private parties. Some supported allowing private parties to seek not only injunctions, but also damages. Council members largely agreed that broadened private access must not remove the need for applicants to apply for leave to commence a suit – that is, they cannot bring suit unilaterally without approval from the Tribunal – as doing so has been essential to ending early those cases without merit. In addition, there was a general consensus that expanded rights of private action to include the possibility of class actions may be problematic. One member did make the point that private action is typically brought by an aggrieved competitor, which may be in conflict with the fact that cases ought to be judged on their larger impact on competition (as this *Communique* suggests).

Other, Lower Priority Reforms Needed

The *Competition Act* has numerous provisions that are of broad application, and many groups and organizations likely have other priorities for reforms. Council members all pointed to additional areas worthy of consideration for legislative reform, but there was no clear consensus that these should be priorities for the new government. Many on the Council believe the government should also investigate further the potential for reforms to the criminal sections, such as section 47 of the *Act*, which covers bid-rigging and is in many ways duplicative of the broader section 45 (which covers competitor conspiracies more generally).[6] Similarly, section 49, which only covers agreements between federal financial institutions, may also be redundant.

Some Council members also felt that reforms may be necessary to increase transparency and stakeholder participation in the consent order process. A few Council members suggested potential reforms to the *Act* as they relate to the Bureau conducting market studies, issuing advisory opinions, reconsidering efficiencies, creating a Canadian Competitiveness Council to undertake studies of the Canadian economy in place of the Bureau, and narrowing the purpose clause of the *Act* to explicitly consider total economic welfare only. These suggestions generated much discussion but few points of consensus among Council members as to whether they are priorities for reform.

6 For more details, see Omar Wakil and Marina Chernenko. 2015. "Bid-Rigging Enforcement without a Bid- Rigging Provision: A Proposal for the Repeal of Section 47 of the *Competition Act*." *Canadian Competition Law Review* 28 (1 & 2): 160-177.

Conclusions

Each member of the Competition Policy Council could surely enumerate a large number of features of the *Act* which he or she wished to see amended. However, generating a broad consensus on what the new government should see as its legislative priorities in competition law is always a more difficult task. The clear majority view is that the focus should be on reform of the abuse of dominance provision to distinguish between harm to competitors versus harm to competition. It is also time to give greater consideration, with the government working with practitioners, on what the boundaries should be on an expanded role for the right of private action in the civil provisions.

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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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