

Market Studies and Competition Promotion in Canada

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On November 17, 2022, the Minister of Innovation, Science, and Industry launched a review of the *Competition Act* (Act) to identify ways to improve Canada's competition policy framework. The Minister is seeking Canadians' views on broader changes to the Act and "its enforcement framework, including changes that will help the Competition Bureau better protect consumers and the integrity of the marketplace."² The review is focused on key areas of the enforcement framework, including the scope of the Act, the enforcement methods used by the Competition Bureau (Bureau), and the corrective measures that can be applied under the Act. Supporting this review is an extensive discussion paper prepared by Innovation, Science, and Economic Development Canada.³

The role of the Bureau extends beyond pure law enforcement and includes the promotion and advocacy of competition in Canada.⁴ Among the issues to be considered in the Minister's review are the powers of the Bureau to conduct market studies, including its powers for gathering the information needed to conduct market studies. Our submission is focused on the role of market studies in the promotion and advocacy of competition in Canada.

Effective competition advocacy requires knowledge and insights gained through market studies. We believe that market studies exclusively focused on identifying the impact of regulation on competition and the relative efficiency of Canadian markets complement the Bureau's enforcement activities to achieve the objectives of the Act. This includes understanding the indirect impact of regulation on unregulated sectors of the economy. We encourage the expanded use of market studies to promote competition in Canada and support amendments to the Act that provide clearer statutory direction for the Bureau to independently conduct market studies and report the results to the public.

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Disclaimer: We provide these comments as private citizens, not as representatives of the organizations that conduct electricity market surveillance in either Alberta or Ontario.

² [Statement from Minister Champagne on the launch of the Competition Act review](#) (November 17, 2022).

³ [The Future of Competition Policy in Canada](#) (November 2022).

⁴ Sections 125 and 126 of the Act empower the Bureau to make representations and call evidence before federal (as of right) and provincial (with their consent) boards that oversee regulated industries to advocate for changes in market sectors. The Bureau relies on the general authority given under section 7 of the Act to conduct other forms of studies for competition advocacy.

To this end, we make four specific recommendations:

1. Explicit statutory direction to the Bureau to conduct market studies is preferable to managerial discretion;
2. Some degree of access to confidential information as required to conduct high-quality market studies should be provided to the Bureau;
3. Periodic economic analysis of the Bureau's enforcement and advocacy activities is important and should be reported to the public; and
4. The creation of a dedicated competition promotion agency is worth consideration.

In providing these comments we draw on our extensive experience in conducting statutorily mandated surveillance (oversight) of restructured electricity markets in Alberta and Ontario. The public reporting associated with these surveillance activities has parallels with the market studies that have been conducted by the Bureau in other industries.

Background

Market Studies in Other Jurisdictions

The use of market studies by competition law enforcement agencies is common in countries like Canada. Almost all national competition authorities within the Organisation for Economic Co-operation and Development (OECD) countries use some form of market study to advocate for competition.⁵ The OECD describes market studies as “a versatile tool for competition authorities to analyze whether there are competition problems in a sector, outside the context of a merger review or antitrust investigation.”⁶ Market studies are used by OECD authorities to advocate for change in sectors whose policies and regulatory frameworks unnecessarily restrict competition, to educate firms in evolving industries about certain kinds of business conduct that contravene competition law to prevent the emergence of anti-competitive conduct, and to correct misconceptions of consumers regarding the state of competition in a market. Market studies are also used to enhance a competition authority's knowledge of a specific sector. This knowledge that can be used to provide more effective enforcement of competition laws, assist in deterring uncompetitive conduct in the first instance, and increase compliance with competition law. Finally, market studies can be valuable tools for providing ex-post assessments of previous enforcement decisions.

In addition to national competition agencies, another example of a public agency preparing market studies is Australia's Productivity Commission. It is mandated to independently and transparently conduct research studies requested by the government, as well as self-initiated research and

⁵ OECD (2018), [Market Studies Guide for Competition Authorities](#).

⁶ Ibid., p. 7.

annual reporting on productivity, industry assistance, and regulation.⁷ In its 2008 report, the Competition Policy Review Panel proposed the creation of a comparable agency for Canada (to be called the Canadian Competitiveness Council) which would have assumed the Bureau's responsibility for promoting competition.⁸ This did not occur.

Market Studies Conducted by the Competition Bureau

The issue of market studies conducted by the Bureau is not new. Since 2008, this has included studies of grocery store competition, digital health care, the financial services sector, and generic drugs.⁹

In response to this consultation, the Bureau provided an extensive set of recommendations, including the need for formal market study powers, the independent authority to commence a market study, the requirements to publish terms of reference, formal information-gathering powers, confidentiality safeguards, the authority to publish reports related to market studies, and response requirements for government entities subject to recommendations.¹⁰

Whether the Bureau should conduct market studies outside of inquiries¹¹ and the Bureau's information-gathering powers in this respect was the subject of a 2017 report of the C.D. Howe Institute's Competition Policy Council¹² and a 2019 C.D. Howe Intelligence Memo.¹³ The 2017 report indicated that a majority of the members of the C.D. Howe Institute's Competition Policy Council did not believe the Bureau should have such information-gathering powers, while the 2019 memo argued that these powers are needed.

Market Studies in Restructured Electricity Markets

In Alberta and Ontario, as in all restructured electricity markets, the creation of a market included the creation of a specialized market surveillance (oversight) agency with a mandate to ensure that the markets function competitively and efficiently. These agencies monitor for and evaluate a broad array of competitive and efficiency issues, including:

- market power and its potential abuse;

⁷ [About - Productivity Commission \(pc.gov.au\)](#).

⁸ [Compete to Win](#) (June 2008). Regarding the proposed Canadian Competitiveness Council, see recommendations 16 and 60 through 65.

⁹ For a comprehensive list of public market studies, see [Competition Bureau: Reports and studies](#). Historical examples from the former Restrictive Trade Practices Commission (RTPC) include inquiries into the petroleum and telecommunications markets. As noted in relation to recommendation 2, learnings from the experience of the RTPC can and should help guide how market studies would be conducted today.

¹⁰ [Submission by the Competition Bureau re: The future of competition policy in Canada](#) (March 15, 2023).

¹¹ See section 10 of the Act.

¹² [Competition Bureau should not have power to compel information for market studies](#) (May 4, 2017).

¹³ James Mancini, [Market Studies: Time for Canada's Competition Policy Framework to Catch Up](#) (January 10, 2019).

- market manipulation (i.e., the exploitation of flaws in market rules or the use of fraud to influence market outcomes);
- market design performance (i.e., determining whether the design of the market, the market rules, and market procedures provide efficient incentives for market participants and lead to efficient market outcomes); and
- operational performance (i.e., assessing whether the operation of the system is consistent with its reliability needs and efficient market performance).

The surveillance agencies report their findings along with recommendations for remedial action where applicable to the appropriate regulatory authority and / or the public. The content of these reports tends to involve highly technical economic analysis. Given the opacity of these markets, external assessment of their structure and performance is extremely difficult. Some high quality external assessments may be infeasible due to the lack of public data.

Given that the agencies have access to confidential information, restrictions of various forms exist on the level of data that is permitted in public reporting. Regarding enforcement, some surveillance agencies are mandated to conduct regulatory enforcement activities (e.g., Alberta and Australia), and some are not (e.g., Ontario and the U.S.).¹⁴

There is no common structure to electricity surveillance agencies, either in Canada or elsewhere in the world. However, there are common characteristics, including:

- independence of surveillance functions from market participants and the electricity market operator;
- budget and resource stability;
- a standing professional staff competent to consider competition and efficiency concepts; and
- access to non-public market data.

Regarding non-public data, this includes data used by the electricity system operator in the computation of the market outcomes, including electricity generators' supply offers (bids) and their operating characteristics, technical characteristics of the system (e.g., transmission limits), system reliability requirements (e.g., operating reserve requirements), among other data. It also includes peripheral information such as contracts between market participants or between participants and the system operator, trading of financial products on exchanges, and other relevant data. Furthermore, most surveillance agencies (including the ones in Alberta and

¹⁴ The organization of enforcement functions, if any, are beyond the scope of this submission.

Ontario) have the legislative authority to compel the production of data or information from market participants or the system operator.

In our view, independent market surveillance and monitoring agencies perform a vital and necessary function in market oversight of electricity markets; they are an important means to evaluate market developments and to identify and deter anti-competitive conduct.¹⁵

Recommendations regarding Market Studies for Competition Promotion

Substantial and sustained effort is required to understand highly regulated markets, both from the perspective of promoting competition and conducting enforcement activities, including general deterrence. While analysis of these markets by non-dedicated agencies is important, the promotion of competition and the deterrence of anti-competitive conduct are public interest objectives that may differ from private interests, including firms, academics, and think tanks. Properly resourced and mandated independent public agencies can help in this respect.

1. *Explicit statutory direction to the Bureau to conduct market studies is preferable to managerial discretion*

A sustained focus on conducting market studies requires direction, prioritization, and dedicated funding. While there is clear authority for the Bureau to conduct market studies at present, whether they are prioritized, or conducted at all, is a managerial decision that is highly dependent on the person appointed Commissioner. We are of the view that explicit statutory direction to conduct market studies is preferable to managerial discretion on the part of the Commissioner.

2. *Some degree of access to confidential information as required to conduct high-quality market studies should be provided to the Bureau*

Some degree of access to confidential information is required for high-quality market studies to be conducted and meaningful recommendations developed. This applies to studies conducted by the Bureau and others, including academics and think tanks. In markets or situations where confidential information is required to undertake meaningful analysis, public agencies are in the appropriate position to undertake this work.

Based in part on learnings from the experience of the former Restrictive Trade Practices Commission, appropriate controls on inquiries and the use of the resulting information can be developed, such as a requirement for public consultation on the specific markets to be studied, requirements to publish terms of reference, regulated time limits, and confidentially safeguards.¹⁶

¹⁵ See [Federal Energy Regulation Commission Order No. 760](#) (April 12, 2012), which reflects the support of this view.

¹⁶ Some of these elements were recommended by the Bureau itself in its March 15, 2023, submission to this consultation and others were not.

3. *Periodic economic analysis of the Bureau's enforcement and advocacy activities is important and should be reported to the public*

The Bureau undertakes a wide variety of activities to carry out its mandate, including but not limited to enforcement in respect of past conduct, assessment of the potential implications of proposed mergers, and competition advocacy. Economic analysis plays a fundamental role in decision-making with respect to these activities. We are of the view that economic analysis of these decisions is important and would, over time, assist policymakers and the public to make better decisions about a wide variety of issues, including in public consultations such as this.

What we propose is not additional public reporting on the nature of the Bureau's activities. Instead, we mean studies, including market studies, that focus on understanding the consequences for economic efficiency of the Bureau's activities. For example, this could include analysis of the efficiency implications of mergers that occurred or were prevented, remedies agreed or ordered, and whether advocacy efforts resulted in more efficient economic regulation.

While there is a conflict of interest associated with the Bureau assessing its own work, it is likely that some degree of access to confidential information would be required to undertake this work. As a result, the Bureau may nonetheless be well-situated to undertake these efforts. A factor that offsets this conflict is that the public reporting of the analysis can be assessed by qualified outsiders such as academics, think tanks, and the public. While analysis by outsiders is already possible, it has not been plentiful due to, among other reasons, information confidentiality, resource limitations, and absent individual incentives.

4. *The creation of a dedicated competition promotion agency is worth consideration*

An alternative to tasking the Bureau with competition promotion would be to establish a new independent agency mandated to conduct market studies, engage in other activities to promote competition in Canada, and conduct economic analysis of the Bureau's enforcement and advocacy activities. A new agency would be particularly useful if legal issues related to the use of information for enforcement activities obtained in the course of conducting market studies prove insurmountable. As noted above, recommendations along these lines have been made in Canada before and such agencies exist in other countries and markets.

However, while there would be a clear focus on competition promotion, there would be drawbacks compared to mandating this work be conducted by the Bureau. Most important among these are the loss of the Bureau's depth of knowledge obtained from past inquiries, the opportunity for Bureau staff to develop knowledge and understanding that could later be applied in explicit enforcement matters, and the general deterrence that this can provide.