Opinion: Vigorous enforcement, not studies, are what Canada's competition laws need

We should not rush to give the Competition Bureau new powers to study and intervene in markets

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A statue of justice is seen outside Vancouver's law courts in an undated photo. PHOTO BY MARK VAN MANEN/POSTMEDIA NEWS

By Joshua Krane, Mark Opashinov and William Wu

The topic of competition law reform is back on the government's agenda. In several recent speeches, Canada's Commissioner of Competition has noted that the Competition Bureau's powers to study the behaviour of markets and fix apparent market failures is presently very

limited. In an opinion put forward in this paper last week, Vass Bednar and Robin Shaban argued that these limitations in Canada's current competition laws put Canada at a disadvantage. During the April 7 House of Commons Industry Committee hearings, the commissioner also suggested that Canada's competition laws are not designed for the "data-driven economy" and reform may be needed.

While recent attention on Big Tech's outsized impact on the economy has highlighted perceived gaps in Canada's competition laws, our competition laws are robust — but should be more actively enforced. If history is any guide, giving new powers to the Competition Bureau to study and potentially push for the restructuring of markets would be a mistake.

The Restrictive Trade Practices Commission, established under Canada's prior competition law, had the power to conduct market studies. Those market studies led to multi-year investigations into industries perceived to be the giants of the day — most famously the petroleum inquiry — but produced few economically positive outcomes. The petroleum inquiry fiasco was a meaningful contributor to the abolition of the market study power under Canada's current competition laws. The petroleum inquiry ran for many years, cost the government millions and the industry many millions more — with no tangible result. If the government needs to take quick action to stop abuses of market power, a market study doesn't do the trick.

If the government needs to take quick action … a market study doesn't do the trick

Parliament, in its wisdom, understood this. The determination when the old commission was abolished was that actual enforcement against specific actions of particular companies was a better use of resources than broad investigations of market sectors.

There are other reasons why we should not rush to give the Competition Bureau new powers to study and intervene in markets.

As a matter of principle, super-charging the bureau's market study powers runs contrary to the very philosophy on which the Competition Act is grounded. Markets deliver the best outcomes provided anti-competitive conduct is prevented. It is for this reason that the Competition Act provides the bureau with immense power to enforce the law against anti-competitive actions, including seeking very large fines. This is a feature of the Competition Act, not a bug.

Second, the bureau lacks the institutional experience, expertise and resources to examine markets and push to restructure them, nor was it designed for that role. The basic presumption of the Competition Act is that markets, not regulators, determine effective outcomes — when companies abide by the rules.

Many markets are highly dynamic. Any bureau study would necessarily capture a snapshot of such a market at a moment in time. That snapshot might adequately capture the "right now" of a given market but it's unlikely to capture the nuanced interplay of market dynamics into the future — and the further into the future one looks, the blurrier that snapshot gets. That is why targeted and vigorous enforcement makes for better policy. For instance, enforcement action in the real estate industry broadened consumer access to "sold" prices giving brokerages with an online presence a better chance to compete.

The dynamic nature of markets is also a challenge with enforcement of competition law but at least enforcement against particular conduct of a particular company has a specific focus; studying an entire industry to argue for a reset of the rules of the game is a much more ambitious undertaking. Those rules could become obsolete, and rigid, soon after they are established, and could become obstacles to effective competition in dynamic industries.

Active and vigorous enforcement, not study, is the key to delivering on the promise of the Competition Act: to maintain and encourage competition in Canada, to promote the efficiency and adaptability of our economy, to expand opportunities for Canadian participation in world markets and to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy.

Active and vigorous enforcement, not study, is the key

But as of last summer, when the bureau released updated statistics, it had only a dozen active abuse of dominance investigations on the go. The bureau hasn't brought an abuse of dominance case before the Competition Tribunal in five years. A vigorous and active enforcer should be bringing cases not only to restore competition, but also to deter dominant firms in other markets from engaging in anti-competitive conduct.

As the government considers policies to make Canada more competitive domestically and internationally, amending the Competition Act to enhance the bureau's market study powers should not be on its agenda. Rather, the government should make clear that its priority is to see our competition laws enforced to their fullest extent. Instead of giving the Competition Bureau new market study and remedy powers, the government should consider how it can properly resource the bureau to invigorate enforcement of existing competition law.

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