

SEPTEMBER 19, 2023

Canadian Government Announces “First Set” of *Competition Act* Reforms

Authors: [Anita Banicevic](#) and [Charles Tingley](#)

In a recent [press release](#), Canada’s Prime Minister announced a “first set” of proposed changes to the *Competition Act*, with additional “comprehensive legislative reforms” to follow in the coming months. While the federal government launched a consultation process on *Competition Act* reform in the fall of 2022, the changes announced on September 14 appear to have been hastily included among a number of government initiatives designed to lower prices and “make life more affordable” for Canadians. The press release did not provide details that would assist in understanding the full scope of the proposals.

In addition to foreshadowing additional future reforms, the Prime Minister announced the following specific legislative amendments to the *Competition Act*.

Market Study Powers Are Coming

The Competition Bureau will be given formal powers to compel market participants to produce information and records in response to “market studies” conducted by the Bureau. To examine the state of competition in an industry or market, the Bureau has undertaken market studies into a variety of sectors, including digital healthcare, broadband services, fintech, generic drugs, self-regulated professions and the grocery industry. However, the Bureau has long complained about the lack of formal powers to compel market participants to produce information and documents. To be clear, the Bureau already has the power under the *Competition Act* to obtain court orders compelling the production of information and data if it has reason to believe that any *Competition Act* provision is being breached or if it has received a formal complaint. The new market study powers, however, appear intended to require information to be produced by market participants even where the Bureau has not identified any likely grounds for remedial action under the *Competition Act*.

Although the government views these powers as necessary to “modernize our competition environment,” the costs of market studies (even without compulsory information-gathering tools) have often gone unaddressed. It is also unclear whether the new market study powers would come with any judicial oversight. Currently, there is some judicial oversight where the Bureau seeks *ex parte* orders for production of information by relying on a reason to believe the law has been breached. A material level of judicial oversight will be critical to ensure that the costs and breadth of future market studies are not unnecessarily burdensome, especially if it is contemplated that demands to produce information in connection with market studies may be issued without prior notice to targets of such demands and without an opportunity to make submissions before a neutral arbiter.

The Bureau has suggested that the relative quality and completeness of the voluntary responses it received during its recent Grocery Market Study support the need for formal information-gathering powers. However, the [Grocery Market Study](#) also underscores the need for judicial oversight of the Bureau’s investigative powers. In that study, which the Bureau conducted from October 2022 to June 2023, the Bureau focused only on the retail end of the grocery sector and appears to have asked many stakeholders for very substantial volumes of information.

Efficiencies Defence to Be Repealed

The controversial “efficiencies defence” is to be removed from the *Competition Act*. Long complained of by the Bureau, the efficiencies defence has become a lightning rod in the call for legislative reform.

The reality, however, is that the number of cases in which the efficiencies defence has successfully been argued is exceptionally small; in fact, the most recent attempts to rely upon efficiencies in contested mergers have been unsuccessful. Further, none of the recent grocery related transactions appear to have relied on the application of the efficiencies defence so any connection to the grocery sector is unclear.

It remains to be seen whether, after the efficiencies defence is repealed, efficiencies will continue to be considered one of the factors to be taken into account when evaluating the overall competitive effects of a merger, in keeping with the approach taken in other jurisdictions.

Further Powers to Act Against “Collaborations” That Stifle Competition

The press release also refers to empowering “the Bureau to take action against collaborations that stifle competition and consumer choice, in particular situations where large grocers prevent smaller competitors from establishing operations nearby.”

Given that the Bureau’s Grocery Market Study called out the use of restrictive covenants in leases or deeds in the grocery sector, presumably the press release is referring to those practices. However, it remains to be seen whether the scope of this amendment is intended to extend beyond such covenants (as suggested by the general reference to “collaborations”). Further, while the press release refers to this extension of the Act in connection with the grocery sector, any extension could have broad application to collaborations beyond the grocery industry.

In addition to these measures, in the press release the government calls on “major grocery store chains to stabilize grocery prices in the near term,” with the prospect of special tax measures (among other possible tools) being imposed if grocers are unable to come up with a plan to stabilize prices before Canadian Thanksgiving (October 9). However, the likely impact of such measures is far from clear, particularly given that the entire grocery supply chain (including segments subject to heavy “supply management” regulation) affects the ultimate price of consumer grocery products.

Next Steps

Overall, while the Prime Minister’s announcement includes many other government initiatives that are described as “fighting for the middle class,” it is unclear how the legislative reforms identified to date will reduce prices or increase competition. In fact, these additional powers come with costs that will inevitably have to be paid out of the pockets of businesses or ultimately consumers. Canadian businesses should keep an eye out for legislation to implement this first step to reforming the *Competition Act*, particularly for new restrictions on collaborations that are considered to stifle competition.

Beyond that, stakeholders will be watching and waiting for the full scope of the forthcoming “comprehensive reforms” to become clear after Parliament resumes this week. Given that the last set of amendments to the *Competition Act* were included with the legislation implementing the federal budget in 2022, and thus subject to no consultation or discussion, it remains to be seen whether consideration and consultation will similarly be short-circuited for either the first set of amendments or more comprehensive reform.

Key Contacts: [John Bodrug](#), [Anita Banicevic](#), [Charles Tingley](#) and [Elisa K. Kearney](#)