

THE HONOURABLE HOWARD WETSTON, C.M., Q.C.

SENATOR FOR ONTARIO



L'HONORABLE HOWARD WETSTON, C.M., C.R.

SÉNATEUR DE L'ONTARIO

October 27, 2021

Re: Consultation Invitation - *Examining the Canadian Competition Act in the Digital Era*

Dear Sir, Dear Madam,

In a continuing effort to ensure Canada has an effective and impactful competition law framework, I cordially invite you to participate in a consultation to promote additional dialogue on paths forward for Canadian competition law. This consultation is intended to inform future parliamentary consideration of the *Competition Act* in which I hope to engage.

Recent years have witnessed a major digital transformation in the economy. These developments have corresponded with a greater interest in competition policy, and commentators in Canada and around the world have debated the merits of competition law reform in numerous areas. Building on this attention and focus, this consultation is intended to determine whether Canada's competition policy framework, and the *Competition Act* in particular, remain appropriate in the digital age.

Since the passage of the *Competition Act* in 1986, competition policy has generally sought to promote economic welfare. Competition policy plays a critical role in promoting economic prosperity by facilitating greater efficiency, innovation and productivity. An effective *Competition Act* is vital in establishing the proverbial rules of the game in the Canadian market.

However, with the emergence of a series of digital platforms, questions have surfaced whether Canada's competition policy framework remains effective in this new economic environment. In an effort to respond to these questions and support this consultation, I commissioned an expert in the field of competition law, Professor Edward M. Iacobucci of the University of Toronto Faculty of Law, to prepare a discussion paper that examines whether digital markets have distinctive features that invite significant changes to our competition law.

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Examining the Canadian Competition Act in the Digital Era serves as a basis to gain an understanding of the strengths and shortcomings of existing competition policy in a number of areas. The consultation paper highlights a series of important subjects, focusing in particular on possible substantive amendments to the *Competition Act*. The paper is not, however, intended to limit the scope of the dialogue in consideration of potential advances in competition law.

The paper concludes that, overall, the *Competition Act* remains effective in addressing anti-competitive behaviour, although targeted amendments may be needed to address existing policy gaps. The paper notes that digital markets are prone to the emergence of firms with market power - the ability to set prices, quality or other conditions while being partially shielded from intense competitive pressure.

Also addressed is whether alternative objectives should be considered when deliberating matters related to competition policy. Professor Iacobucci states,

“there is little question matters such as privacy or economic equality are important societal objectives in a democratic society. However, competition policy may not be the appropriate policy instrument to promote those values when compared to the variety of policy tools available to governments.”

The paper includes a detailed discussion of the goal(s) of competition policy that should be reflected in the purpose clause of the *Competition Act*. In addition, Professor Iacobucci also highlights a series of competition law amendments on which further commentary would be welcome that include, but are not limited to, the following:

- Exploring the need to criminalize wage-fixing agreements
- Reconsidering the requirement that the Competition Bureau must quantify anti-competitive effects in litigation invoking the efficiencies defence
- The notion that a dominant firm could engage anti-competitive behaviour that lessens competition but has a positive effect on competitors
- An examination of a revised private right of action regime
- A review of Administrative Monetary Penalties (AMPs) applicable in abuse of dominance cases
- Alternatives approaches to addressing the impacts of digital markets being considered in other jurisdictions

Generally, the paper purposely does not concentrate on procedural issues in order to focus the discussion on substantive matters. I welcome reactions to the substantive recommendations, as well as proposals on any aspect of competition law, including procedure.

I am circulating the paper and an executive summary to initiate suggestions for paths forward for competition law in this country.

The deadline for submissions is **Wednesday, December 15, 2021 at 4 pm EDT** and may be sent to the following coordinates:

The Office of the Honourable Howard Wetston, C.M., Q.C., LL.D
Room 316, East Block
Senate of Canada
Ottawa, ON K1A 0A4
Howard.Wetston@sen.parl.gc.ca

Submissions received, including those made anonymously, during this consultation period will be made publicly available at a later date. Please send your comments to Howard.Wetston@sen.parl.gc.ca with the subject line: “SUBMISSION: *Examining the Canadian Competition Act in the Digital Era*”. Any questions related to this initiative should also be sent to this email address or by calling (613) 995-9197.

I want to thank you for your consideration of this request and look forward to reviewing your feedback.

Sincerely,

A handwritten signature in black ink, appearing to be 'HW', followed by a long, sweeping horizontal line that ends in a small hook.

The Honourable Howard Wetston, C.M., Q.C., LL.D
Senator (Ontario)