

Bill to amend the Competition Act introduced in Parliament

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Authors: [Shuli Rodal](#), [Michelle Lally](#), [Kaeleigh Kuzma](#), [Alysha Pannu](#), [Chelsea Rubin](#), [Zach Rudge](#)

On September 21, 2023, Deputy Prime Minister and Minister of Finance Chrystia Freeland introduced [Bill C-56](#), the *Affordable Housing and Groceries Act*, which includes the proposed amendments to the *Competition Act* (Act) the government announced earlier this month, as discussed in our earlier [Osler Update](#).

Proposed amendments

While Bill C-56 is positioned as the government's effort to address unaffordable housing and high grocery prices, the proposed amendments to the Act will impact Canada's competition laws more broadly and have important implications for companies doing business in Canada. The proposed amendments — namely, the introduction of a formal market studies power, the expansion of the civil collaborations provision and the repeal of the efficiencies defence for mergers — are each discussed below.

Market or industry inquiry

The amendments would permit the Minister of Innovation, Science and Industry (Minister) to direct the Commissioner of Competition (Commissioner) to conduct a market inquiry if the Minister believes it is in the public interest to do so, regardless of whether the Commissioner believes that actionable anti-competitive conduct is occurring or has occurred. Once a market inquiry has commenced, the Commissioner would be empowered to utilize the compulsory information gathering powers in section 11 of the Act. These powers include court-authorized orders for oral examinations and production of documents or records under oath.

The court application process required for a section 11 order provides a measure of discipline on the scope of an information order. However, responding to a formal inquiry and production and examination order under section 11 of the Act is burdensome and costly for respondents, not only in terms of resources but also business disruption and reputational impact. Bill C-56 proposes to mitigate such concerns by mandating a multi-step process before a market inquiry can be commenced, which includes the following checks and balances:

- The Minister must consult the Commissioner to assess the practical viability of an inquiry.
- Once the Minister directs the Commissioner to conduct a market inquiry, the Commissioner then prepares draft terms of reference to be published online for a public consultation period of at least 15 days. Bill C-56 requires the Commissioner to take into

account any comments received from the public when developing the final terms of reference. The Commissioner then submits the terms of reference for the Minister's approval and, if approved, publishes the final terms of reference online.

- Once the final terms of reference are published, the Commissioner has 18 months, subject to an extension of up to three months at the Minister's discretion, to conduct the market inquiry and prepare a report.
- Prior to publication of the report, the Commissioner must circulate a full or partial draft report to every person who was compelled to participate in the inquiry. Such persons have three working days from receipt of the draft report to identify concerns regarding inaccurate or confidential information. Following this, the Commissioner must make the report available online.

Expansion of section 90.1 to include collaborations between non-competitors

Section 90.1 of the Act is a civil provision and is currently limited to addressing agreements or arrangements that involve at least two competitors — whether existing or proposed — that prevent or lessen, or are likely to prevent or lessen, competition substantially in a market. Bill C-56 would expand this provision to apply to arrangements involving only parties who do not compete with each other (referred to as "non-competitors") if a "significant purpose" of the arrangement or agreement is to prevent or lessen competition.

Bill C-56 does not propose other changes to section 90.1 that would expand the scope of remedies or enforcement rights. Mandatory remedies under section 90.1 are limited to prohibition orders. An order requiring a person to take certain action can also be made, but only if that person and the Commissioner consent to do so. Monetary penalties are not available. Further, this provision is enforced exclusively by the Commissioner; there is no private right of action.

In terms of the types of agreements that would be addressable under the expanded section 90.1, the Competition Bureau's (Bureau) [grocery market study report](#) published in June 2023 discussed the practice of grocery retailers requiring restrictive covenants in agreements with landlords to prevent the landlord from renting retail space to competitors. Bill C-56 is presumably intended to apply to such agreements through the new "non-competitors" application, but would also likely apply to other agreements between non-competitors that contain restrictive covenants and other forms of non-compete clauses which necessarily have, to some degree, the purpose of limiting competition.

The analytical assessment that would be applied under the expanded provision is uncertain. In many circumstances, the commercial rationale for restrictive covenants and other clauses affecting competition will be clear and pro-competitive (e.g., encouraging new investment or protecting an existing investment). However, the language of the new provision does not expressly contemplate an examination of whether the intent to restrict competition was commercially justifiable in the circumstances. This leaves pro-competitive arguments to be considered as part of the complex assessment of whether a substantial prevention or lessening of competition has occurred or is likely to occur, which requires an analysis of numerous factors, including market definition, market shares, the likelihood of entry and expansion and other market dynamics. The proposed amendment therefore introduces potential commercial uncertainty for parties considering ordinary commercial protections for investments they may wish to make.

The proposed amendment will come into force one year following the day Bill C-56 receives

Royal Assent. If the amendment is enacted, it would be incumbent on the Bureau to provide updated guidance on the intended application of section 90.1 before the new provision takes effect. At present, the application of section 90.1 is addressed in the Bureau's Competitor Collaboration Guidelines, which cover only competitor agreements and arrangements.

Repeal of the efficiencies defence for mergers

Bill C-56 repeals the efficiencies defence in entirety. Unique to Canada, the efficiencies defence allows a transaction that is found to substantially prevent or lessen competition to proceed where the efficiencies that would be lost if an order is made outweigh the anti-competitive effects. Its removal would follow the Bureau's long history of calling for its elimination and aligns Canada with merger review regimes around the world.

Once the amendment is in force, the efficiencies defence would continue to apply to any proposed transaction that was notified to the Bureau before the day the amendments come into effect, and to any merger completed before that day.

Next steps for Bill C-56 and the *Competition Act*

The first reading of Bill C-56 in the House of Commons occurred on September 21, 2023, and debate at the second reading is ongoing as of the date of this Update. Once completed, this will be followed by referral to a committee (the Standing Committee on Industry and Technology) for consideration and a report stage which allows members to propose amendments to the contents. Bill C-56 would then undergo a third reading in the House of Commons and, if passed by the House of Commons, be sent to the Senate. Following receipt of Royal Assent, the amendments to the Act will immediately come into force, except for the amendment to section 90.1, which will come into force one year later.

Bill C-56 was introduced as part of the government's ongoing review and reform of the Act, which commenced in 2022. This bill reflects some, but not all, of the changes discussed in the Bureau's consultation process. The government has promised further reforms in the coming months, so stay tuned. The Ministry of Innovation, Science and Economic Development's [summary of findings](#) from its public consultation of the Act, which may inform the coming amendments, was published on September 20, 2023.

For questions regarding the amendments to the Act or any inquiries relating to Canada's competition law regime, please contact the members of Osler's [Competition and Foreign Investment Group](#).