



January 17, 2025

Via email: MS-consultation-EM-cb-bc@cb-bc.gc.ca

Commissioner Matthew Boswell
Competition Bureau
50 Victoria Street
Gatineau, Quebec K1A 0C9

Dear Commissioner Boswell:

Re: Public Consultation on the Competition Bureau's Revised Market Studies Information Bulletin

The Competition Law and Foreign Investment Review Section of the Canadian Bar Association (“**CBA Section**”) welcomes the opportunity to provide comments on the revised *Market Studies Information Bulletin* (“**Revised Bulletin**”) issued for consultation by the Competition Bureau (“**Bureau**”) on October 23, 2024.¹ The Revised Bulletin seeks to replace the previous Bureau bulletin on market studies dated September 19, 2018 (the “**Prior Bulletin**”).² The Revised Bulletin follows the passage of the *Affordable Housing and Groceries Act*³ on December 15, 2023 (“**Bill C-56**”) and the resulting addition of a new framework and new Bureau information-gathering powers for market studies (the “Market Studies Amendments”).

The Canadian Bar Association is a national association representing over 40,000 jurists, including lawyers, notaries, law teachers and students across Canada. We promote the rule of law, access to justice, effective law reform and improvements to the administration of justice. The CBA Section comprises of approximately 1,000 lawyers and promotes greater awareness and understanding of legal and policy issues relating to competition law and foreign investment.⁴

¹ See Competition Bureau, *Market Studies Information Bulletin* (October 23, 2024), [online](#) and Competition Bureau, “Competition Bureau seeks feedback on the new guidance for market studies” (October 23, 2024), News Release, [online](#).

² Competition Bureau, *Market Studies Information Bulletin* (September 19, 2018), [online](#).

³ Bill C-56, *An Act to amend the Excise Tax Act and the Competition Act*, 1st Sess, 44th Parl, 2023.

⁴ For additional information about the CBA, Who-We-Are/About-us, [online](#). For further information about the CBA Section, Competition-Law [online](#).

For the reasons set out below, the CBA Section recommends that the Bureau amend the Revised Bulletin to:

1. indicate that the Bureau will make best efforts to work with relevant stakeholders to: identify voluntary solutions for information gathering; that the Bureau will only use the compulsory powers where necessary; and that the Bureau will afford information targets the opportunity to participate in the section 11 process (Section I.1 below);
2. provide additional detail on how the Bureau will make information requests to market participants when conducting a market study (Section I.2 below);
3. revert to certain language from the Prior Bulletin that emphasizes setting appropriate guardrails for the types of information the Bureau will seek (Section I.3 below);
4. clarify the due process safeguards that the Bureau will follow (Section I.4 below); and
5. provide additional confidentiality assurances (Section I.5 below).

The Market Studies Consultation

The CBA Section commends the Bureau for providing updated guidance for stakeholders about how market studies will be conducted following the Market Studies Amendments. As noted in the Revised Bulletin, market studies are tools used by the Bureau to examine the state of competition in a specific industry. The insights gained in a market study enable the Bureau to make evidence-based recommendations to regulators and policymakers and inform the Bureau's enforcement and advocacy work.

The Revised Bulletin confirms that a market study is not an enforcement tool and does not allow the Bureau to seek penalties or legal remedies through the courts or from the Competition Tribunal. Instead, a market study analyzes competition within an industry without targeting specific businesses for wrongdoing. However, if evidence of unlawful conduct is discovered during a market study, the Bureau can initiate a formal investigation and take appropriate enforcement action.

Before the Market Studies Amendments, the Bureau primarily relied on publicly available information and voluntary participation from stakeholders to gather data for market studies. It collected data from public sources like research papers and reports by regulators, industry associations, and academics, as well as public filings and financial documents like annual reports, statistical information, and survey data. The Bureau also identified relevant stakeholders, such as government bodies, market participants, industry associations, and consumer groups, and sought their perspectives through information requests, interviews, written submissions, roundtables, and workshops. The Bureau also occasionally engaged external experts to provide specialized insights.

As the Revised Bulletin explains, the Bureau still plans to rely on the above-mentioned public sources and voluntary disclosure when conducting market studies. However, a significant outcome of the Market Studies Amendments is that the Commissioner of Competition ("**Commissioner**"), either at his own initiative or at the direction of the Minister, can begin an inquiry into the state of competition in a specific market or industry under subsections 10.1(1) and 10.1(2) of the *Competition Act* (the "**Act**"). This change will allow the Bureau to seek a court order compelling stakeholders to provide specific records, data, or oral and written responses under section 11 of the Act to aid its analysis for a market study. This compulsory information-gathering power had previously only been available for inquiries commenced in the context of enforcement actions against market participants. The Bureau intends to follow the same practices and jurisprudence developed for section 11 applications in the enforcement context when conducting market studies.

Context for Compulsory Powers for Market Studies

As noted above, the availability of section 11 orders under the Market Studies Amendments provides an additional tool for the Bureau to use to ensure it can obtain all relevant information in a market study. In a 2018 speech, then Commissioner Pecman noted:

For the Bureau to effectively advocate competition for Canadian consumers, it needs formal powers to conduct market studies. That includes the power to compel information to perform the studies.

Canada's lack of formal market study powers falls below international standards. In a recent survey by the OECD, 68% of the competition agencies had specific powers to undertake market studies. In fact, just a couple of weeks ago, New Zealand took the first steps toward providing its competition authority with formal powers to conduct market studies without the need to identify specific anticompetitive conduct. This includes compulsory information-gathering powers.

Having formal market study powers would allow the Bureau to more robustly study and make recommendations regarding issues that currently cause substantial economic harm to Canadian consumers and businesses.⁵

Further to this point, in the Bureau's final market study prior to the Market Studies Amendments that examined the retail grocery market, the Bureau's report described its challenges in obtaining information that would have greatly assisted it in conducting its study:

The Bureau is not able to disclose the specific information it was provided owing to the confidentiality requirements of the Competition Act. However, in general, the Bureau can say that the level of cooperation varied significantly and was not fulsome. In many instances, the Bureau was not able to obtain complete and precise financial data, despite its repeated requests.

The Bureau's inability to compel information as part of this study has further highlighted the need for formal information-gathering powers. That is why the Bureau continues to advocate for legislative changes to improve the Competition Act in this area. Such changes would improve our ability to conduct market studies and protect and promote competition for Canadians in all sectors of the economy, including the agri-food sector.⁶

Granting authority to mandate information disclosure during market studies addresses the Bureau's longstanding issue of obtaining sensitive data previously unavailable through voluntary requests.

CBA Section Recommendations

1. **The Bureau Should Clarify that it will not use Section 11 Orders Unless Necessary and Afford Information Targets an Opportunity to Participate in the Section 11 Process.**

The CBA Section recognizes that Section 11 orders can be a useful evidence-gathering tool for the Bureau to utilize at appropriate times during market studies. However, compliance with section 11 orders is generally very burdensome and costly. Businesses are regularly called upon to cooperate with law enforcement and often respond to compulsory processes. Responding to these requests, including responding to section 11 orders, is often a highly complex undertaking requiring

⁵ John Pecman (Commissioner of Competition), "Building Antitrust with Trust", Speech at the Canadian Bar Association Spring Conference (May 10, 2018, Toronto), [online](#).

⁶ Competition Bureau, "Competition Bureau Retail Grocery Market Study Report" (June 27, 2023), [online](#).

significant effort from multiple internal and external parties, especially where specifications request "all records" responses. Canadian businesses of all sizes — including small and medium-sized businesses — must devote significant resources to address these requests.

At any given time, a firm that may be targeted with a broad order for producing data and records relevant to competition could have millions of potentially responsive records in the normal course of business across multiple systems and databases managed in different formats by different groups of personnel. Indeed, even a carefully drafted information request could generate millions of potentially responsive records. At a minimum, dedicated information technology specialists, legal and compliance professionals, relevant business lines, and senior executives with leadership oversight would need to be engaged to review potentially relevant data and records. It is also increasingly common that external competition law counsel and data management service providers (for example, legal technology providers and forensics, e-discovery, and document review specialists) are retained to handle the necessary search, review, production, and certification processes.

The CBA Section, therefore, recommends that the Bureau clarify that it will not use section 11 orders as the primary tool for information collection in market studies. It is important to remember that market studies are typically focused on government or regulatory barriers to competition. Even when they require a study of firms' business practices, they are studies of how an industry generally operates. The level of forensic detail needed to litigate an enforcement action that seeks significant remedies and may be fully defended by a firm under investigation is not required to study an industry and make competition policy recommendations. The Revised Bulletin should clarify that the Bureau will make its best efforts to work with relevant stakeholders to identify reasonable and voluntary solutions that are not overly burdensome to obtain the necessary information that the Bureau desires to complete its market studies.

In the CBA Section's view, the Bureau's new compulsory powers should only be imposed in circumstances where they are needed to advance the specific goals of a market study, and alternative less-burdensome solutions have proven ineffective. In most cases, the ability of the Bureau to obtain a section 11 order if necessary is likely to motivate cooperative responses to voluntary requests (in a manner that was not experienced historically in the absence of this power).

Further, concerning the section 11 process itself, the Revised Bulletin should clarify that the Bureau will not oppose any requests by targets of information to participate and appear in any section 11 proceedings commenced by the Commissioner. In the CBA Section's view, given that the market studies' process is not an adversarial process comparable to an inquiry under section 10 of the Act, the Bureau should not oppose the appearance of any target party at a section 11 proceeding.

2. The Revised Bulletin Should Include Additional Guidance on How the Bureau will Request Information from Private Parties

The CBA Section suggests that the Revised Bulletin should provide clarifying details regarding how the Bureau will seek to gather information from private parties, including:

- the circumstances under which the Bureau will consider seeking voluntary versus compulsory participation from third parties in order to advance a market study;
- the factors the Bureau will consider in establishing deadlines for voluntary and compulsory responses;
- the scope of pre- and post-issuance dialogue for section 11 orders; and
- detailed guidelines for parties and their advisors about working with the Bureau to avoid overly costly and burdensome requests.

3. The Revised Bulletin Should Address Concerns Regarding Scope, Reasonableness, and Proportionality

While the CBA Section appreciates that the Bureau seeks to achieve an appropriate balance on the facts of every specific situation, it believes that the Bureau can and should provide meaningful guidance on how it will address the risk of overbroad information requests. The Bureau was historically more explicit about the importance of canvassing public sources and minimizing costs.

The excerpts included in the table below illustrate the differences in approach between the Prior Bulletin and the Revised Bulletin. The CBA Section encourages the Bureau to re-adopt its previous approach as outlined in the Prior Bulletin for information gathering in market studies. It is specifically concerned by the removal of the prior guidance that day-to-day records and communications will not generally be sought.

Excerpts from the Prior Bulletin (2018)	Excerpts from Revised Bulletin (2024 draft)
The Bureau will generally begin by collecting as much information as possible from publicly available sources. ⁷	We normally begin by collecting information from public sources. ⁸
The Bureau tries to minimize the cost for stakeholders to respond to information requests or otherwise participate in a market study. During meetings with stakeholders, the Bureau will discuss the nature and accessibility of any relevant information sought (e.g., volume of information, time periods covered by a potential information request, etc.). The Bureau may also explore alternate ways of sourcing relevant information. ⁹	The Bureau may request specific information or an interview depending on the stakeholder. This can take place either in person or remotely. We may also publish broader calls for papers and welcome anyone with relevant information to contribute. We are mindful of the costs of these activities. We try to balance the costs with the benefits of a stakeholder participating. ¹⁰
The Bureau will not generally seek day-to-day business records or communications, such as e-mails. ¹¹	During meetings with stakeholders, we will discuss the type of information we are seeking and how easy it is to access. For example, how much information exists? What time periods does our information request cover? And are there other ways we can source relevant information? ¹²

4. Due Process Safeguards

Section 4 of the Revised Bulletin notes that the Bureau may use a market study as a basis for enforcement, including "paying closer attention to a sector, revising its approach to an issue, and opening a specific investigation."

⁷ *Market Studies Information Bulletin, supra* note 2 at General Methodology for Market Studies

⁸ *Market Studies Information Bulletin, supra* note 2 at General Methodology for Market Studies

⁹ *Market Studies Information Bulletin, supra* note 2 at General Methodology for Market Studies

¹⁰ *Market Studies Bulletin, supra* note 1, at section III, How do we obtain and use information, including confidential information?

¹¹ *Market Studies Bulletin, supra* note 1, at section III, How do we obtain and use information, including confidential information?

¹² *Market Studies Bulletin, supra* note 1, at section III, How do we obtain and use information, including confidential information?

The CBA Section understands that Parliament did not impose specific restrictions on the use of information gathered in a market study in subsequent enforcement proceedings under the criminal or civil provisions of the Act. However, the CBA Section believes that due process issues may arise and that existing jurisprudence may be relevant to the Bureau's actions in these situations. In particular:

- If, when obtaining information from a party in the context of a market study, the Bureau discovers information that causes the Bureau to believe that an inquiry under section 10 of the Act should be commenced against that party, the Revised Bulletin should confirm that the Bureau will immediately cease seeking information from that party pursuant to the market study and any section 11 order issued for purposes of the market study.¹³ The Revised Bulletin should add that the Bureau will advise a target of an investigation opened based on information obtained from a market study as soon as the investigation is open to allow the target to safeguard its rights with respect, among others, to information obtained by the Bureau as part of the market study.
- Similarly, the Revised Bulletin should confirm that the Bureau will not seek to collect information from a party in a market study, including through a section 11 order, in circumstances where the Bureau intends to (or where it is reasonably probable that the Bureau will) commence an enforcement inquiry against that party under section 10 of the Act.

5. Confidentiality

Part III of the Revised Bulletin asks, "[h]ow do we obtain and use information, including confidential information?" The Bureau confirms that the policies described in its 2013 *Bulletin on the Communication of Confidential Information Under the Competition Act*¹⁴ will apply to information the Bureau receives during market studies.¹⁵ In particular, the Revised Bulletin confirms that the Bureau maintains confidentiality, including when it communicates with stakeholders or the public and with information produced as part of the market study. The Revised Bulletin also confirms that the Bureau will protect the interests and identities of individual stakeholders when publishing its reports, including by aggregating or combining information so that precise details cannot be traced back to specific parties. The CBA Section appreciates the Bulletin's reaffirmation of the Bureau's longstanding commitment to the protection of confidential information and stresses the importance of Bureau consultation with relevant stakeholders regarding confidentiality before the Bureau publishes its reports.

Further, given the breadth of circumstances where the Bureau has the discretion to communicate confidential information and the Bureau's new information-gathering powers to compel information relevant to market studies, additional assurances and guidance would be welcome in order to uphold market participants' confidence in how their information will be used.

¹³ Pursuant to the decision of the Supreme Court in *R v Jarvis*, 2002 SCC 73 at para 88, once the predominant purpose of an inquiry relates to penal liability, it will be incumbent on the Bureau to cease its use of its market study power as the matter will have become one that "engages the adversarial relationship between the taxpayer [here, the target of the criminal inquiry] and the state".

¹⁴ Competition Bureau, *Information Bulletin on the Communication of Confidential Information Under the Competition Act*, September 30, 2013, [online](#) ("Confidentiality Bulletin")

¹⁵ The CBA Section commented on the draft information bulletin leading to the 2013 Bulletin on the Communication of Confidential Information Under the Competition Act, including the Bureau's interpretation of section 29 of the Act, which is reproduced for ease of reference. Competition Bureau Information Bulletin: Communication during Inquiries: National Competition Law Section, Canadian Bar Association, December 2013, [online](#).

In particular, the Revised Bulletin asserts that the Bureau's use of confidential information to administer and enforce the Act "may extend to matters beyond the market study."¹⁶ In the CBA Section's view, the Bureau should provide clearer guidance on the extent to which such use of information may be extended. The Revised Bulletin already mentions that confidential information obtained as part of market studies may be used to open specific investigations, and this extract should more specifically refer to potential enforcement activity. Alternatively, the Revised Bulletin should be explicit on the *categories* of other matters in which the Bureau may use confidential information to administer and enforce the Act when the confidential information was collected in the context of a market study.

Yours truly,

(original letter signed by Noel Corriveau for Neil Campbell)

Neil Campbell|
Chair, Competition Law and Foreign Investment Review Section

¹⁶ *Market Studies Bulletin*, *supra* note 1, section III. How we treat confidential information.