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Competition in the Circular Economy – Note by Canada

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More documents related to this discussion can be found at https://www.oecd.org/competition/competition-in-the-circular-economy.htm

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1. Introduction

1. The Competition Bureau of Canada (the "Bureau") is pleased to present this contribution to the OECD's Competition Committee for the roundtable on competition in the circular economy.

2. The circular economy offers the advantage of maximizing the use of products in circulation in the economy and reducing the impact of certain economic activities on the environment.[1] This economy fosters new business models for both existing and new companies that want to provide alternative goods and services that are less damaging to the environment.[2]

3. As an independent agency responsible for enforcing Canada's *Competition Act* (the "Act"),[3] the Bureau ensures that Canadian businesses and consumers prosper in a competitive and innovative marketplace. The Bureau, led by the Commissioner of Competition, conducts the legislative mandate to promote and defend the benefits of competition in Canada. The Bureau investigates the conduct of cases in four main areas:

- abuse of dominance;
- anti-competitive mergers;
- price fixing; and
- deceptive marketing practices, including environmental claims that are false, misleading or not based on adequate and proper testing.

4. The Bureau also encourages government rules and regulations that foster competition. This contribution is based on the Bureau's experience in promoting competition[4] in the circular economy to Canadian policymakers.

5. In fact, like other governments around the world, Canadian governments at the federal, provincial and territorial levels are adopting policies and rules to support a

[1] Ekins, P., Domenech, T., Drummond, P., Bleischwitz, R., Hughes, N. and Lotti, L. (2019), "The Circular Economy: What, Why, How and Where", Background paper for an OECD/EC Workshop.

Ellen MacCarthur Foundation, Towards The Circular Economy Economic and business rationale for an accelerated transition.

[2] Ekins, P., Domenech, T., Drummond, P., Bleischwitz, R., Hughes, N. and Lotti, L. (2019), "The Circular Economy: What, Why, How and Where", Background paper for an OECD/EC Workshop.

[3] *Competition Act*, R.S.C., 1985, c. C-34.

[4] For cases involving enforcement of the *Competition Act* with environmental aspects, see the following cases: Keurig Canada Inc. (2022) regarding indications of the recyclability of K-Cup pods and the preparation of K-Cup pods for recycling programs, allegations that were false or misleading.

GFL Environmental Inc. (2021) related to the purchase of Terrapure Environmental Ltd. by GFL Environmental Inc., including the divestiture of activities involving industrial waste management services or oil recycling services.

Volkswagen Group Canada Inc. and Audi Canada Inc. (2018) regarding false or misleading statements regarding motor vehicle emissions.

transition to a circular economy. Some of these policies and rules involve structural changes.[5] For example, it is recognized that introducing a system of extended producer responsibility (EPR) may have an impact on competition between organizations providing services for the processing of collected materials.[6]

6. In this contribution, we share the Bureau's experience in promoting pro-competitive policies related to value-retention processes[7] (VRPs) and the lessons learned from the Competition and Green Growth Summit organized by the Bureau in September 2022.

2. Promoting competition in policies related to value-retention processes

7. Value-retention processes are recognized as important activities in the circular economy. They allow the value of a good in the economy to be retained beyond its useful life.[8]

8. As part of its program to achieve zero plastic waste, [9] the Government of Canada intends to encourage remanufacturing and other VRPs in Canada.[10]

[5] For example, the Canadian Council of Ministers of the Environment (CCME) consists of 14 federal, provincial and territorial ministers of the environment. It is an intergovernmental forum through which collective action on national and international environmental issues is taken. The CCME is involved in areas such as extended producer responsibility. See CCME (2009), Canada-wide Action Plan for Extended Producer Responsibility.

The CCME is also involved in the circular plastic economy. See CCME (2018) Canada-wide Strategy on Zero Plastic Waste and implementation through the Canada-wide Action Plan on Zero Plastic Waste (2019) and the Canada-wide Action Plan on Zero Plastic Waste (2020).

[6] OECD (2016), Extended Producer Responsibility: Updated Guidance for Efficient Waste Management, section 4.1.2.

[7] Value Retention Processes (VRPs) include remanufacturing, refurbishment, repair and reuse. They are generally divided into two broad categories: full useful life and partial useful life VRPs.

Full useful life VRPs are used at the end of a good's full useful life. They are carried out in a factory and extend the good's life by at least the same length as the initial one. These VRPs include remanufacturing and full refurbishment.

Partial life VRPs are used before the end of the expected life due to product failure or a change of user. They are carried out away from a factory and partially extend the life of a good. These VRPs include refurbishment, repair and reuse.

United Nations' Environment Programme's International Resource Panel (IRP) (2018). Re-defining Value — The Manufacturing Revolution. Remanufacturing, Refurbishment, Repair and Direct Reuse in the Circular Economy, point 3.

[8] ECCC. Retaining product value in a circular economy.

[9] CCME (2018). Strategy on Zero Plastic Waste and its implementation through the Canada-wide Action Plan on Zero Plastic Waste (2019) and the Canada-wide Action Plan on Zero Plastic Waste (2020).

[10] Environment and Climate Change Canada (ECCC). Retaining product value in a circular economy.

9. In fact, although VRPs are already contributing to the Canadian economy, [11] their development faces a range of obstacles, including those related to competition.

10. In 2018, the United Nations' Environment Programme's International Resource Panel (IRP) stressed that the desire of original equipment manufacturers (OEMs) to prevent competition for VRP goods and third parties that use VRPs is one of the key factors that impede the growth of VRPs.[12]

11. In a study conducted for the federal department of the environment (Environment and Climate Change Canada or ECCC), VRPs in six sectors were analyzed for their environmental, social and economic impact in Canada.[13] This study identified the obstacles to the growth of VRPs and various possible approaches to reduce these barriers. The study noted that barriers to greater participation by independent firms[14] in VRPs include access to information and spare parts.[15] [16]

12. Such barriers may prevent or delay the entry or expansion of independent firms into VRP activities, which limits consumer choice. In this context, the Bureau encourages measures to increase competition between independent firms and OEMs in VRPs while respecting the legitimate business interests of OEMs.

13. In its response to ECCC's public consultation on the socio-economic and environmental study of the Canadian remanufacturing sector and other value-retention processes, the Bureau explained that measures to reduce the barriers to entry by firms and increase competition in the after-sales services market would provide consumers with more choice and lower prices.[17]

[11] In 2019, VRPs contributed approximately CDN$56 billion to the Canadian economy and supported more than 371,000 direct jobs in Canada. ECCC. Towards a circular economy: value-retention processes.

[12] IRP (2018). Re-defining Value — The Manufacturing Revolution. Remanufacturing, Refurbishment, Repair and Direct Reuse in the Circular Economy, point 3.

[13] The sectors analyzed in depth are: aerospace, automobile, electronic, household devices, heavy/off-road equipment, and furniture. Socio-economic and environmental study of the Canadian remanufacturing sector and other value-retention processes in the context of a circular economy. Prepared for Environment and Climate Change Canada by Oakdene Hollins and Dillon, point 1.3.

[14] By independent firms, we mean companies that are not affiliated with OEMs.

[15] Socio-economic and environmental study of the Canadian remanufacturing sector and other value-retention processes in the context of a circular economy. Prepared for Environment and Climate Change Canada by Oakdene Hollins and Dillon, pages 47 and 75.

[16] In addition to these obstacles, the report notes that independent firms may be disadvantaged regarding the supply of basic materials needed for the VRP. In some cases, independent firms must deploy additional resources to locate and deliver materials essential to VRP activities. Socio-economic and environmental study of the Canadian remanufacturing sector and other value-retention processes in the context of a circular economy. Prepared for Environment and Climate Change Canada by Oakdene Hollins and Dillon, page 125.

[17] Competition Bureau (2021). Competition Bureau submission to the consultation on the socio-economic and environmental study on remanufacturing and other value-retention processes in Canada.

14. The Bureau also invited governments to adopt pro-competitive policies in the repair sector. This sector drew the attention of Canadian authorities at both the federal[18] and provincial[19] levels regarding the "right to repair."[20] Canadian consumers also are in favour of measures that promote the right to repair.[21]

15. In 2019, the Province of Quebec's *Office de la protection du consommateur* carried out a public consultation on the durability and repairability of goods. In its submission in response to this consultation, the Bureau encouraged measures to ensure that the tools, manuals and spare parts necessary for both diagnosing and repairing goods are available.[22]

16. The Bureau also encouraged measures that promote better consumer information on relevant aspects of goods, such as a good's minimum operational life. Information like this should be always provided before purchase and accessible to the consumer.[23]

17. In 2021, Innovation, Science and Economic Development Canada (ISED) carried out a public consultation on a modern copyright framework for artificial intelligence and the Internet of Things.[24] During this consultation, ISED indicated that the Government of Canada is considering whether changes to Canada's technological protection measure (TPM) framework [25] are needed to facilitate the repair of devices on the Internet of Things (IoT), which are characterized by the fact that they embedded with software.[26]

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[18] Letters of mandate from the Prime Minister of Canada to ministers of Innovation and the Environment.

Bill C-272, An Act to amend the Copyright Act (diagnosis, maintenance or repair).

Bill C-244, An Act to Amend the Copyright Act (diagnosis, maintenance or repair).

[19] Legislative Assembly of Ontario. *Bill 72, Consumer Protection Amendment Act (Right to Repair Electronic Products), 2019*.

National Assembly of Quebec. Bill 197, An Act to amend the Consumer Protection Act to fight planned obsolescence and assert the right to repair goods.

[20] The "right to repair" is intended to seek legislative and regulatory amendments that would make it easier to have devices, particularly electronic ones, repaired by repairers other than those belonging to the manufacturer's network of repairers for such devices. For example, see Chelsea Kemp (2023), Right to repair front and centre at Canada's largest indoor farm show; Clemence Delfils (2022), Appareils électroniques et électroménagers - Pour un droit à la réparation (French only); and Lisa Xing (2019), Why a non-profit is pressing for 'right to repair' legislation in Canada.

[21] In a survey by iFixit and OpenMedia, 75 percent of respondents indicated that they were in favour of right-to-repair legislation. OpenMedia (2019), Right to repair: National online omnibus survey.

[22] Competition Bureau (2020). Summary of the brief presented to the Office of Consumer Protection on the durability and reparability of goods.

[23] Competition Bureau (2020). Summary of the brief presented to the Office of Consumer Protection on the durability and reparability of goods.

[24] Innovation, Science and Economic Development Canada. *A Consultation on a Modern Copyright Framework for Artificial Intelligence and the Internet of Things*.

[25] There is a wide variety of technologies used as TPMs to protect copyrighted works, such as software. These measures are often classified according to their function, namely technological protection measures that control *access* to works and those that control the *use* of works.

[26] Innovation, Science and Economic Development Canada. *A Consultation on a Modern Copyright Framework for Artificial Intelligence and the Internet of Things*. *Point 3.2*.

18. TPMs are devices that prevent unauthorized third parties, including the device's owner and independent repairers, from accessing data contained in the embedded software. Such data include troubleshooting data that can be used to read and interpret failure codes. These data are necessary for repair activities.[27] TPMs can also prevent the proper installation of third-party parts.[28]

19. In its submission in response to ISED's public consultation, the Bureau explained that the Canadian TPM framework raises challenges not contemplated at the time they were introduced, including competition-related challenges. Such measures may restrict legitimate activities that do not infringe on copyright, such as repairs and interoperability. Such restrictions may have a deterrent effect on competition and innovation.[29]

20. The Bureau supported the amendment of provisions in the *Copyright Act* on TPMs to introduce explicit exceptions regarding repairs.[30] An exception to facilitate repairs would apply to the owners of IoT devices and independent services companies that bypass TPMs to troubleshoot, maintain or repair IoT devices without infringing on copyright.[31]

21. The perception of consumers and their decision to repair their devices is an essential element in the development of the repair sector.[32] In 2022, the Bureau launched a consumer information campaign on the right to repair and its potential pro-competitive advantages.[33]

3. Deepening knowledge and strengthening cooperation on competition and green growth

22. In September 2022, the Bureau held the Competition and Green Growth Summit (the "Summit") to better understand the relationship between competition policy and sustainability goals, and also to learn more from its peers.[34]

23. Taking action against climate change and to promote greener growth requires profound changes in consumption and waste management patterns. These changes seem to have already been started by some public decision-makers, as well as private organizations and consumers in Canada and around the world.

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[27] Ian R. Kerr, Ph. D., Alana Maurushat and Christian S. Tacit (2002-2003), Technical Protection Measures: Tilting At Copyright's Windmill.

[28] Ian R. Kerr, Ph. D., Alana Maurushat and Christian S. Tacit (2002-2003), Technical Protection Measures: Tilting At Copyright's Windmill. In Canada, the *Copyright Act* prohibits the circumventions of TPMs, with certain exceptions that do not include repair activities. See sections 41 *et sequentes* of the *Copyright Act*, R.S.C. 1985, c. C-42.

[29] Competition Bureau (2021). Competition Bureau Submission to the Consultation on a Modern Copyright Framework for Artificial Intelligence and the Internet of Things.

[30] Competition Bureau (2021). Competition Bureau Submission to the Consultation on a Modern Copyright Framework for Artificial Intelligence and the Internet of Things.

[31] Competition Bureau (2021). Competition Bureau Submission to the Consultation on a Modern Copyright Framework for Artificial Intelligence and the Internet of Things.

[32] In a survey by iFixit and OpenMedia, it was revealed that the more people are informed about the right to repair, the more they support the right to repair. OpenMedia (2019), Right to repair: National online omnibus survey. See also St. Godard, J-A, Lavalley, S. (2022). Landscape Review of Repairability in Canada. Canadian Standards Association, Toronto, ON, point 3.2.

[33] Competition Bureau. Learn about Right to Repair.

[34] Competition Bureau. The Competition and Green Growth Summit.

24. The Summit brought together experts from the legal, academic and business communities, as well as representatives from the public sector and foreign competition authorities.[35]

25. The discussions focused on issues such as:

- How do markets evolve because of the way governments, businesses and consumers are responding to climate change?
- How effective are competition authorities' tools to support the move to a greener economy?

26. In an increasingly green economy, what trade policies and trends should competition authorities pay attention to? Participants at the Summit agreed that competitive markets are key to the transition to a greener economy. This change has already begun and will continue. Competition law and policy are but a few of the many tools available to build a greener economy. Tools such as laws or regulations not related to competition could be better used to shape markets.

27. From the perspective of competition advocacy, it was mentioned that competition authorities and public decisionmakers must work together to develop laws and regulations that help sustainability efforts. By working together, competition authorities and public decisionmakers can avoid inadvertently harming competition.

4. Conclusion

28. The circular economy will continue to be part of Canadian public decisionmakers' agenda, given the importance of climate change as an area of interest in Canada and around the world. For example, the framework for extended producer responsibility remains relevant in Canada. Canadian provinces and territories that have adopted an extended producer responsibility regime are working to refine it and, in some cases, expand it to new goods. Some provinces and territories, such as Alberta and Yukon, which do not have such regimes, are working to develop their extended producer responsibility regimes.[36]

29. The Bureau will continue to participate in the transition to a greener economy by assisting Canadian public decisionmakers in developing pro-competitive rules and policies that govern the circular economy, and also by continuing to enforce the Act.

[35] Competition Bureau. News release.

[36] Gowling WLG (2022), Canadian Product Stewardship And EPR: A Review Of 2021 And Beyond.

Yukon, Learn about Extended Producer Responsibility. Alberta, Regulated Extended Producer Responsibility Systems.