Future of Competition Policy in Canada

CANADIAN BAR ASSOCIATION
COMPETITION LAW AND FOREIGN INVESTMENT REVIEW SECTION

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PREFACE

The Canadian Bar Association is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the CBA Competition Law and Foreign Investment Review Section, with assistance from the Advocacy Department at the CBA office. The submission has been reviewed by the Law Reform Subcommittee and approved as a public statement of the CBA Competition Law and Foreign Investment Review Section.

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EXECUTIVE SUMMARY

The Canadian Bar Association's Competition Law and Foreign Investment Review Section (CBA Section) is pleased to comment on Innovation, Science and Economic Development Canada's Consultation Paper seeking input on proposals to modernize the Competition Act (Act) and related legislation.

Several key themes emerge from our submission.

First, we recognize that consumers and businesses prosper in a competitive and innovative marketplace. Vigorous competition promotes an efficient and adaptable economy and gives consumers competitive prices, innovative products and information to make informed purchasing decisions. The CBA Section believes it is important to ensure that the Act (and related legislation) is fully equipped to maintain and encourage competition in Canada.

Second, the Act is widely acknowledged as a framework law that applies across all sectors of the economy. We discourage sector-specific provisions and believe that the Act should remain a law of general application for all businesses and consumers in Canada.

Third, we encourage the Government to engage in further consultations once specific amendments are proposed to allow stakeholders to comment on the effective design and operation of these proposals. Many issues raised in the Consultation Paper are ideas and concepts that could be addressed in multiple ways. Stakeholder input on specific proposals will improve the legislative output.

The Competition Bureau has recently proposed a wide array of amendments that go beyond those contemplated in the Consultation Paper. We will offer additional comments on the detailed submissions of the Bureau. However, other stakeholders may not have the capacity to respond to what in some respects is a second consultation paper. Further consultations would ensure that all stakeholders are heard on the specific proposals that ISED determines should go forward.

We comment on the five areas identified in the Consultation Paper: merger review, competitor collaborations, unilateral conduct, deceptive marketing practices and administration and enforcement of the law.

1. Merger review

The CBA Section supports revision of the pre-merger notification rules to ensure they capture transactions of economic significance to Canada. This should be done by recalibrating the relevant thresholds to make them more targeted, not merely by expanding the scope of transactions subject to notification.

- The existing rules should be modified to include revenues into Canada and exclude exports from Canada that do not affect Canadian consumers, a modification that would be consistent with international best practices. The asset tests should be eliminated as book value of assets is not a good measure of a firm's market presence and can lead to notifiability of transactions in sectors where asset values are high but revenues – and thus competitive relevance – are relatively low.

- The Government should exempt categories of transactions (e.g., real estate acquisitions) that rarely, if ever, raise competition concerns and waste resources of the Bureau and parties that engage in M&A transactions.

- There should be a rigorous assessment of the extent to which the pre-merger notification rules and the Bureau's broad additional jurisdiction to review and challenge non-notifiable mergers result in the Bureau "missing" competitively significant transactions (e.g., of nascent competitors).

- Any amendment of the pre-merger notification provisions of the Act should be subject to a thorough merger-focussed consultation and process to deal effectively with the technical and practical complexities of these rules.

The one-year limitation period for all mergers (notifiable or not) should be retained. A one-year limitation period strikes the appropriate balance between the certainty the business community reasonably expects and the risk that small but harmful mergers could go undetected. If the limitation period is lengthened, it should be limited to non-notifiable transactions since one year is more than ample for the Bureau to assess a transaction that has been pre-notified. Any extension of the limitation period for non-notifiable transactions should be accompanied by a new voluntary notification option that would employ the same one-year limitation period applicable to notifiable transactions. Voluntary notification should not be subject to filing fees and should be streamlined.

It is unnecessary to lower the requirements for interim relief for mergers. The Tribunal already has broad jurisdiction under section 104 of the Act to grant any interim order it considers appropriate. The rules are comparable to those generally applicable in civil litigation. It is also unnecessary to revisit the framework for assessing competitive effects of mergers to include labour as a factor. Paragraph 93(h) of the Act already allows the Tribunal to consider "any other factor that is relevant to competition in a market that is or would be affected by the merger or proposed merger," which is broad enough to encompass labour markets.

The CBA Section has long supported the efficiencies defence on the basis that efficiencies lead to significant benefits for the Canadian economy by generating economies of scale, higher productivity and enhanced innovation. That said, if the Government decides to change the efficiencies defence, we offer constructive recommendations on how efficiencies could be considered as a relevant factor in assessing a merger transaction under the Act.

2. Competitor collaborations

For civil competitor collaboration provisions, the requirement for an agreement between competitors should not be relaxed. Modifying the existing provisions to remove the need for agreement would be a radical departure from Canadian competition law and policy. Moreover, horizontal conduct that occurs in the absence of an agreement is already adequately addressed under current civil provisions of the Act such as the abuse of dominance provision.

Mere "conscious parallelism" is ubiquitous and cannot be usefully or effectively addressed by competition law enforcement. The same principle should apply where the parallelism arises from algorithms. It is a well-established principle that the mere act of adopting a common course of conduct with awareness of the likely response of competitors (including the interaction of algorithms) is not sufficient to establish an agreement under the civil competitor collaboration provisions.

There is no need to expand the horizontal competitor collaboration provisions to capture vertical conduct. The vast majority of vertical conduct (i.e., competitor/supplier interactions) is not harmful and the Act already has many civil provisions specifically designed to address the types of vertical conduct that have the potential to be harmful (by dominant and non-dominant firms).

We caution against a broad expansion of buy-side collusion offences, beyond the controversial labour-related provisions recently added to the Act. There is little evidence of the need for enforcement with respect to harmful buy-side agreements (including no known enforcement by the Bureau under the prior criminal provisions which could have applied to buy-side collusion, or the current civil provisions which can apply to buy-side collusion). Unlike the cartel conduct covered by the conspiracy offence (price-fixing, market allocation and supply restriction agreements), buy-side agreements are not clearly harmful and in many scenarios are competitively neutral or even pro-competitive. The buying groups in which many small, medium and some larger businesses participate to achieve benefits of volume purchasing are one obvious example. As such, they are not appropriately considered per se illegal under the criminal provisions of the Act, which is intended to address "naked restraints" on competition with no redeeming benefits.

We urge the Government to address expressly the intersection of competition law and the pressing public interest of protecting the environment, including sustainable growth and climate change. We recommend amending the criminal conspiracy provisions of the Act to decriminalize legitimate collaborations directed at protecting the environment. We also recommend introducing a public interest override for protection of the environment in the civil provisions of the Act.

3. Unilateral conduct

In our view, an overly expansive approach to joint dominance risks chilling legitimate and pro-competitive or competitively neutral behaviour.

Bright line rules or presumptions for firms or platforms would be contrary to the overall framework of the legislation, which is meant to be broadly applicable to all industries and firms. With respect to the specific conduct discussed in the Consultation Paper as potentially ex ante problematic (self-preferencing or duplicating), there is no economic consensus that this conduct is inherently problematic. Case-by-case assessment is required, and the current abuse of dominance provisions provide a sound framework.

Instead, to the extent that certain conduct is identified as having a higher risk of causing anti-competitive effects, especially if undertaken by dominant firms or platforms, that conduct could be described in its allegedly anti-competitive form and added to the illustrative list of anti-competitive acts included in section 78. This would put businesses on notice that certain forms of behaviour may be subject to enhanced scrutiny or enforcement, while preserving the existing flexibility and industry-wide application of the abuse of dominance provisions ensuring that only conduct producing anti-competitive effects is penalized.

The intent to harm competition and the substantial lessening or prevention of competition elements should remain intact within the abuse of dominance framework. They play fundamental roles in differentiating between conduct that is abusive and anti-competitive, versus conduct that is aggressive and pro-competitive.

We believe that importing the vague concept of fairness into the Act is not a workable option. The concept of fairness is often used to refer to the notion that businesses should compete on a level playing field and that consumers should have access to fair and competitive markets. However, fairness is difficult to define statutorily in a precise and predictable way in the competition law analytical framework. For example, many firms perceive vigorous competition by a strong rival as unfair, but it may be highly beneficial to consumers and the economy.

While the CBA Section believes there is merit in the principle of consolidating certain unilateral conduct provisions in Part VIII of the Act into a single, clearer and more principles-based abuse of dominance provision, certain provisions are better kept separate (e.g., price maintenance) as they are not easily subsumed within the abuse of dominance framework.

4. Deceptive marketing practices

Deceptive marketing provisions of the Act are sufficiently broad to cover modern and evolving forms of commerce and market practices, including those in the Consultation Paper and others arising in the digital economy. Additional, detailed guidance from the Bureau on the application of the existing deceptive marketing provisions, in general, as well as how these provisions apply to modern marketing practices more specifically (including, without limitation, dark patterns, environmental advertising, native advertising, influencer marketing, online reviews, fine print disclosure, subscription traps, free trial offers and deception for the purpose of collecting consumer data), would be greatly beneficial.

5. Administration and enforcement of the law

We believe that potential expansion of the Bureau's decision-making powers through simplified information collection or a first-instance ability to authorize or prevent forms of conduct would require substantial changes to the Bureau's institutional design. Law enforcement agencies, such as the Bureau or the RCMP, generally do not have the ability to compel information without prior judicial authorization and do not have decision-making/adjudicative powers vis-à-vis the target of an investigation. Unlike the U.S. Federal Trade Commission or the European Commission, Canada does not have an integrated agency model for competition law enforcement. In such a model of regulatory governance, the agency would be responsible for both investigative and adjudicative functions within a particular regulatory area, but this would require substantial checks and balances and due process changes.

The views of CBA Section members vary considerably on the question of introducing a more robust framework for private enforcement of the non-cartel reviewable practices, including private rights of action for damage suffered. If the Government decides to further privatize competition law enforcement by providing damages to incentivize private litigation of conduct covered by the civil provisions of the Act, we submit that effective judicial and procedural safeguards (e.g. the existing leave requirement for private actions under Part VIII of the Act) will be important to mitigate against the potential for unmeritorious and abusive private litigation.

If the Government decides that the Bureau should be permitted to compel the production of information for the purpose of market studies (i.e., outside of the enforcement context), the Section submits that the Bureau's powers should be subject to oversight by the Competition Tribunal or courts in order to safeguard due process rights and avoid disproportional burdens for the persons from whom information is being compelled.

6. Conclusion

The CBA Section appreciates the opportunity to give our perspectives on the modernization of the Competition Act and we would be pleased to expand upon our views discussed in this submission. We look forward to an ongoing dialogue on these important subjects as the legal and policy development process unfolds.

I. INTRODUCTION

The Canadian Bar Association's Competition Law and Foreign Investment Review Section (CBA Section) is pleased to comment on Innovation, Science and Economic Development Canada's consultation on the future of competition policy in Canada.

The Canadian Bar Association is a national association representing over 37,000 jurists, including lawyers, notaries, law teachers, and students across Canada. We promote the rule of law, access to justice, effective law reform and offer expertise on how the law touches the lives of Canadians every day. The CBA Section comprises approximately 1,000 lawyers. It promotes greater awareness and understanding of legal and policy issues relating to competition law and foreign investment.

We reviewed the consultation scene setter *Making Competition Work for Canadians* and the discussion paper *The Future of Competition Policy in Canada* (Consultation Paper).

We offer the following comments to help inform the government's next steps, including potential legislative changes.

II. MERGER REVIEW

A. Revision of Pre-Merger Notification Rules to Better Capture Mergers of Interest

The Consultation Paper raises the possibility of revising the pre-merger notification rules to better capture mergers of interest and suggests that existing rules may be under or over inclusive. In other words, the suggestion is that the rules fail to capture types of transactions that could potentially raise competition concerns in Canada (e.g., pre-emptive acquisitions of innovative or disruptive firms, which often fall below the applicable financial thresholds) and capture types of transactions that are unlikely to raise competition concerns in Canada (e.g., sale to a completely new entrant that is notifiable due to the acquired company alone).

Since the introduction of Canada's pre-merger notification regime in 1986, there have been limited changes to the pre-merger notification rules. We agree that this is an opportune time to assess whether, and to what extent, changes are necessary and desirable to improve this regime.

However, given the multitude of complex and highly technical issues that arise, we believe that this is best accomplished through a merger-notification focused consultation and amendment process. This separate process should initially focus on identifying the types or classes of proposed transaction that are (1) not caught by the existing rules and are likely to raise competition concerns in Canada and (2) caught by the existing rules and are not likely to raise competition concerns in Canada.[1] A secondary task could include considering, at a high level, the strengths and weaknesses of the pre-merger notification regimes used elsewhere in the world with a view to determining whether, and to what extent, their adoption – in whole or in part – would improve Canada's pre-merger notification regime.

That said, recognizing the need to give input at this stage, we offer the following comments on the revision of the pre-merger notification rules.

1. Existing pre-merger notification rules capture many transactions unlikely to raise competition concerns

The pre-merger notification rules are intended to act as a screening mechanism or detection tool to identify transactions that are most likely to harm competition and that should be subject to pre-closing review by the Bureau. However, the existing pre-merger notification rules capture a large number of mergers that pose no competition concerns whatsoever.[2] While a well-designed merger notification regime will inevitably capture some transactions that raise no competition concerns, a few easily identifiable changes to the current notification regime would directly target and meaningfully reduce the over-inclusion, allowing the Bureau to allocate resources to mergers more likely to be of interest.

Accordingly, in addition to considering the types of potentially problematic transactions that the existing rules may be missing, it is equally important to identify and carve out the types of transactions that are unlikely to raise meaningful competition concerns in Canada.[3]

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1 See International Competition Network, ICN Recommended Practices for Merger Notification and Review Procedures at page 3: "[i]n establishing merger notification thresholds, each jurisdiction should seek to screen out transactions that are unlikely to result in appreciable competitive effects within its territory."

2 For example, based on the most recent available statistics, since FY 2017-18, there have been 1,182 merger reviews conducted by the Bureau, of which approximately 72% were designated as "non-complex." Of these 1,182 merger reviews, only 34 (or less than 3%) were concluded with issues. See Competition Bureau, Performance Measurement and Statistics Report 2022-2023.

3 See discussion below on the need for additional exemptions to the pre-merger notification rules.

For these transactions, the current notification regime imposes burdens and costs on merger parties with no corresponding public benefit. Even fast clearances impose timing delays on M&A transactions. It is virtually impossible to complete the review without incurring costs of at least $100,000 (usually much more). The time and resources devoted to processing the clearance of generally non-problematic transactions could be diverted to transactions that are more likely to harm competition.

2. Revenue in Canada should be primary factor in assessing whether notification is required

Virtually every country with a merger notification regime uses the parties' revenues (or "turnover") in the jurisdiction as the primary screening mechanism for merger control. The reason for choosing this measure is that revenue generated in a jurisdiction generally reflects the economic significance of the parties in that jurisdiction. The CBA Section agrees with the use of revenue as the primary screening mechanism for merger notification. However, Canada's current approach, which includes both import and export sales, should be reconsidered to better capture revenue of interest and eliminate unnecessary complexity.

First, unlike the "size-of-parties" threshold, the "size-of-target" threshold does not capture gross revenues *into* Canada. The current test requires that relevant revenues must be "generated from" Canadian assets. In other words, it does *not* capture import sales. Accordingly, the "size-of-target" threshold assumes the competitive insignificance of commercial activity occurring in Canada that originates outside of Canada.[4]

In our view, competition law should be agnostic as to where the sales originated. All sales made to customers in Canada by the target have an economic nexus to Canada and, as such, can affect competition in Canada. The Bureau has rightly stated that sales into Canada remain competitively important and may be relevant when assessing the effects of a proposed transaction in Canada, particularly in the digital economy where firms can have sales into Canada not derived from Canadian assets.[5] We therefore believe that the "size-of-target" threshold should include sales into Canada by the target.

Second, each of the "size-of-parties" threshold and the "size-of-target" threshold currently captures gross revenues *from* Canada. In other words, they capture export sales. Sales to

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4 See, for example, David Rosner, Canadian Competition Law Reform: A Diagnosis and Proposals for Reform of Canada's Ineffective Merger Notification Rules (February 2018) at page 10.

5 See Competition Bureau, Examining the Canadian Competition Act in the Digital Era (8 February 2022).

customers outside Canada do not fall within the scope of what the *Competition Act* (Act) is trying to protect, namely competition in Canada. We believe that each of the “size-of-parties” threshold and the “size-of-target” threshold should be revised to exclude sales *from* Canada by the merging firms.

Canada is an outlier internationally in using asset values as an alternative basis for requiring merger notification. Asset values themselves bear little relationship to competitive relevance, which is why most jurisdictions do not rely on them as part of their merger tests. They also result in disproportionate and inconsistent burdens placed on asset-intensive businesses. Real estate transactions are usually notifiable based on asset values even where revenue generation is very low, for example.

Similarly, accounting rules on the valuation of assets can result in inconsistent outcomes. If a firm develops IP internally, for example, the value of the IP may not be reflected on the firm’s balance sheet. If a firm buys IP, it typically would be reflected in its financial statements. As a result, a merger involving a company that developed its own IP may not be notifiable. A merger involving a company that acquired IP could be. There is no substantive reason why these two scenarios should be treated differently. More importantly, there is no reason to consider asset values at all where revenues are so low they do not meet the notification thresholds.

Although we do not favour international alignment simply to have the same approaches as other jurisdictions, removing or modifying the asset-value component of the merger notification test would be meritorious.

3. How to address potential competition issues

While revenue is often representative of the economic significance of merging parties, the CBA Section recognizes that, for certain transactions, such as those involving nascent competitors in the technology sector, current revenues may understate future competitive significance.

We considered whether additional or alternative tests, such as tests based on deal value, would be desirable. Any test designed to alert the Bureau to potential future competition concerns risks being materially under- or over-inclusive (e.g., a deal value test is itself inherently speculative). Simply because a buyer sees significant potential in a target (and places a high value on it) does not mean that the target will ever actually become a meaningful competitive presence in the marketplace. Conversely, many small businesses unexpectedly over-perform. Notification based on deal value would be a hit and miss affair, which we think inappropriate without further careful consideration.

We believe more work should be done in this area and that it would be desirable to assess the extent to which under-reporting of nascent competitor transactions is a significant practical concern. For example, it would be helpful to know how many of these sorts of transactions the Bureau (a) did not know about and (b) believes now that it ought to have stopped. Many of the well-known examples of such transactions involve acquisitions by a small number of well-known technology companies whose M&A activity is easy to monitor. Many of the transactions themselves had little or no direct nexus to Canada. Although we acknowledge the global debate on the subject, a Canada-specific analysis of this issue has, to our knowledge, yet to be undertaken.

4. Need for meaningful overlap in Canada

The current financial thresholds can be exceeded solely through the value of the assets or revenue of the target (or vendor in the case of an asset transaction) and its affiliates. This could capture transactions where a foreign purchaser and its affiliates do not have any assets or revenues in or into Canada.

This class of transactions should not be subject to mandatory pre-merger notification because, in the absence of competitive overlap in Canada, it is doubtful they would raise any competition concerns in Canada. Indeed, international commentators have recognized that as a reflection of best practice, many jurisdictions require significant local activities by at least two parties to the transaction for mandatory notification, since the likelihood of adverse effects from transactions in which only one party has a significant local presence is sufficiently remote to warrant pre-merger notification.[6]

This deficiency could be addressed by requiring, as an element of the assessment, that the purchaser and its affiliates have a material Canadian nexus. This could be accomplished by, for example, requiring that each of the purchaser and the target (or the vendor in the case of an asset transaction), along with their respective affiliates, have a specified level of assets in Canada or gross revenues from sales in or into Canada for the purposes of determining whether the "size-of-parties" threshold is exceeded.[7]

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6 See, for example, International Competition Network [ICN Recommended Practices for Merger Notification and Review Procedures]() at pages 3-4.

7 As noted above, the CBA Section is of the view that the "size-of-parties" threshold and the "size-of-target" threshold should be revised to exclude sales *from* Canada by the merging firms.

5. Creating additional exemptions to pre-merger notification rules

Exempting additional classes of non-problematic merger transactions from the application of the pre-merger notification provisions of the Act would increase the effectiveness and efficiency of the merger review process in Canada.[8] In this regard, the CBA Section is of the view that these exemptions should include, but need not be limited to, certain acquisitions of real estate (such as office, residential property and investment rental property assets) and acquisitions in the upstream oil and gas sector. Transactions in the real estate and upstream oil and gas sectors consistently make up a significant proportion of all mergers notified to the Bureau but only rarely (if ever) raise competition concerns.[9]

6. Relationship between pre-merger notification thresholds and information required

It is important to consider that the current merger notification and review process is burdensome for merging parties. Any lowering of existing thresholds, or changes that would result in the merger notification regime being applied to a broader scope of transactions, will result in that burden being applied to businesses smaller in size and potentially less able to bear the burden of unnecessary delays and information production requirements.

Accordingly, the CBA Section advocates for a careful examination of not only the relevant provisions of the Act, but also the merger review compliance burden to ensure appropriate checks and balances are in place. For example, if more M&A activity is caught in the net of government review, we believe the compliance burden on merger parties (in general) should be lower. Disclosure obligations in applications, filing forms and information requests (and filing fees) should be re-calibrated and critically re-assessed. In the absence of this re-calibration, the merger regime overall simply becomes more burdensome on all businesses. Although the interests of consumers are important, this must be balanced against the need to ensure that Canada is a desirable jurisdiction to carry on business activity. This issue is

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8 See for example, CBA Section submission on Competition Act Amendments – Bill C-10 at pages 11 and 12 and Section submission on Proposed Increase to Filing Fees for Merger Reviews at pages 3 and 4. The Bureau would continue to maintain jurisdiction to initiate a review over exempted merger transactions; merging parties would simply not be required to submit merger notifications in these cases. In the rare case where an exempted transaction may give result in a substantial lessening or prevention of competition, it will likely either be voluntarily notified to the Bureau (because merging parties will not want to take the risk of a post-closing investigation and remedial order), or it will be brought to the attention of the Bureau by concerned customers, suppliers or competitors. The risk that a truly problematic merger will go undetected is very small.

9 For example, transactions in these sectors accounted for about 29% of all mergers notified to the Bureau in FY 2019-20. See Competition Bureau, Merger Intelligence and Notification Unit – Update on Key Statistics 2019-2020.

especially acute in the merger area, where there is broad acknowledgement that the vast majority of M&A activity is beneficial or neutral from a competition perspective.

7. Specific values for notification thresholds

If our key suggested changes are implemented, there should also be room to "right size" the absolute dollar value of the notification thresholds. Removing the requirement to consider sales "from" Canada, removing the possibility of notification based on asset values and expanding the scope of exemptions should lower the number of non-problematic mergers notified each year to the Bureau. Adding the requirement to consider target sales "into" Canada will result in a higher number of transactions notified. In this context, it may be that the $400 million in revenue "party size" threshold should be lowered or increased and the $93 million in revenue "target size" threshold lowered or increased.

We suggest that merger parties be required to disclose revenues in notification forms and that after a sufficient period, the data be used to assess if the absolute values should be revised.

8. Merger notification filing fees

Requiring merging parties to pay a filing fee should be reconsidered given that filings are required by law and not voluntary requests for services. Although many jurisdictions have filing fees, they are not universal. For example, there are no fees in the European Union and other Canadian regimes do not require fees (notifications and applications under the *Investment Canada Act*). Merger review is not a benefit to merger parties but is in the public interest and is therefore more appropriately financed from general government revenue.

Filing fees are also effectively a tax on transactions that is regressive and weighs more heavily on smaller transactions. Parties to small non-problematic transactions must pay the same fee as parties to large problematic mergers. Assuming a filing fee is retained, this concern could be addressed by a tiered filing fee structure with fees varying according to the size of transaction. This has been considered by the Bureau and the bar before and we understand that the lack of data surrounding the size of transaction has been an impediment. If this data were required as proposed above, such a tiered structure could be established.

B. Extension Of Limitation Period for Non-Notifiable Mergers (e.g., Three Years) or Tying it to Voluntary Notification

Section 97 of the Act prevents the Commissioner from challenging a merger more than one year after it has been substantially completed. The Consultation Paper notes that harmful competitive effects may not become apparent in the first year after completion – something it suggests is "an increasingly likely scenario in the dynamic markets that typify the digital economy." The Consultation Paper seeks comments on whether the limitation period should be extended, at least for non-notifiable mergers.

The Act was extensively modernized in 2009, after a comprehensive review of Canada's competitiveness in the Compete to Win Report.[10] At that time, the limitation period for challenging completed mergers was reduced from three years to one year to reflect international norms and to "provide more certainty for the Canadian business community and international investors."[11] This rationale is also consistent with the "ICN Recommended Practices for Merger Notification and Review Procedures", which set out that a competition agency must be restricted in its ability "to exercise residual jurisdiction to a specified, limited period of time after the completion of a transaction and authorizing the parties to submit voluntary notifications to the competition authority."[12]

We recommend a one-year limitation period for notified mergers be retained. We also believe that a one-year limitation period for non-notifiable mergers strikes the appropriate balance between the certainty the business community desires and the risk that harmful mergers could go undetected.

If there is any change to the limitation period, the extended period should only apply to non-notified mergers. Specifically, if merger parties voluntarily notify these non-notifiable transactions, the one-year period should apply to them too. This voluntarily notification regime must give the business community a simple, efficient and cost-effective mechanism to alert the Bureau of non-notifiable transactions and should not include a waiting period during which the parties cannot close the transaction. The business community would be further incentivized to use such a mechanism if voluntary notifications are not subject to filing fees.

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10 Competition Policy Review Panel, Compete to Win (June 2008).

11 *Ibid*. at page 57.

12 International Competition Network ICN Recommended Practices for Merger Notification and Review Procedures at page 3. The ICN is a global network of competition agencies dedicated to competition policy and law with the mission to advance procedural and substantive convergence and facilitate cooperation. ICN members represent national and multi-national competition authorities. The ICN member agencies produce work products based on consensus in project-orientated working groups that are open to the participation of representatives from the business sector, consumer groups, academics and the legal and economic professions as non-governmental advisors (NGAs). Members and NGAs convene at annual conferences, workshops and virtual events. The ICN was founded in October 2001 and currently comprises 140 member agencies from 130 jurisdictions.

By analogy, the *Investment Canada Act* was amended in 2022 to allow foreign investors to voluntarily notify the government of investments that may raise national security concerns. If an investor avails itself of this voluntary regime, the government has 45 days to initiate a national security review. However, investments that are not notified using this voluntary regime can be reviewed on national security grounds for up to five years after the investment is completed. There is no prescribed filing fee for this voluntary notification regime.

C. Easing Conditions for Interim Relief When the Bureau is Challenging a Merger and Seeking an Injunction

The Act allows the Bureau to apply for interim injunctions preventing merging parties from closing a transaction following the expiry of the statutory waiting period. However, the Consultation Paper notes that "the increased complexity of mergers has made it challenging or impossible to review all of the … information, prepare court filings, obtain a hearing date, and complete the hearing all within the 30 [day waiting period], with the result that parties can still close – and potentially harm the market irreversibly – before the opportunity for interim relief even arises."

Considering these challenges, the Consultation Paper states that "[i]t is worth investigating whether a more practical mechanism could be put in place for short-term interim relief, from the time that the Commissioner declares an intent to seek an injunction pending a challenge, to the time the injunction is decided".

It is unnecessary to ease the conditions for interim relief when the Bureau is challenging a merger and seeking an injunction. As recently confirmed by the Federal Court of Appeal,[13] the Tribunal has broad jurisdiction under section 104 of the Act to grant any interim order it considers appropriate, including an "interim" injunction pending a decision on whether to grant interlocutory relief.[14]

The well-defined injunction standard of the Act is consistent with the standard in a wide variety of other legal contexts.[15] It has long been available to the Bureau for merger cases, including the lower bar for balance of convenience with respect to government action when it is able to demonstrate the likelihood of potential harm.[16] Any significant lessening or removal

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13 *Canada (Commissioner of Competition) v Secure Energy Services Inc.*, 2022 FCA 25 [*Secure*].

14 *Secure* at para 67.

15 See *RJR-MacDonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311.

16 See *Commissioner of Competition v Parkland Industries Ltd.*, CT-2015-003 (Comp. Trib.) [*Parkland*] at paras

of the current standard risks effectively making the Bureau the de facto investigator, prosecutor, judge and jury. In our view, simply because the Bureau is convinced a merger should be stopped does not mean it should be able to do so without judicial oversight.

The CBA Section acknowledges it may not always be easy for the Bureau to digest voluminous materials received from merging parties in response to a supplementary information request (SIR) when preparing an application for interim relief and satisfying the "balance of convenience test." However, as the Tribunal noted in *Secure*, one solution could be for the Commissioner to "reduce the amount of information that is sought in a SIR and that then needs to be assessed within a very short period of time."[17] Based on our experience since the *Secure* decision, the Bureau has not reduced the amount of information sought in SIRs.

In addition, the Tribunal has made clear it will not "delve too deeply into the merits of the case" at the interim injunction stage.[18]

The Commissioner can and does routinely quantify alleged anti-competitive effects arising from mergers, and the Commissioner does not have the burden of precisely calculating the alleged anti-competitive harm that would result from a proposed merger. With modern econometric techniques and other tools at the Bureau's disposal, the Commissioner should be able to expeditiously provide at least a rough sense of the magnitude of such harm – even in complex efficiencies cases – to satisfy the balance of convenience test. To lessen the requirement would weaken the checks and balances on the Commissioner's power necessary to ensure procedural fairness to merging parties.

D. Changes to the Efficiencies Defence (e.g., Restricting its Application to Circumstances Where Consumers or Suppliers Would not be Harmed by the Merger)

Section 96 of the Act, commonly known as the efficiencies defence, states that the Tribunal cannot make a remedial order where it finds that the efficiencies likely to arise from a merger are greater than, and will offset, the anti-competitive effects of the merger.

107 and 108: "… [the Commissioner] is presumed to act in the public interest" and "[s]ignificant weight should be given to these public interest considerations by the Tribunal".

17 *Canada (Commissioner of Competition) v Secure Energy Services Inc. and Tervita Corporation*, 2021 Comp Trib 4 at para 59.

18 *Parkland* at para 74.

The efficiencies defence has been subject to significant debate over the years, with some commentators arguing that the Act is one of the most economically sophisticated competition laws in the world largely due to the efficiencies defence[19] and others arguing that it leads to adverse impacts on consumers without necessarily generating any of the intended benefits for Canadian firms in global markets.[20] Due in part to this debate, the Canadian government will examine possible reform of the efficiencies defence, with possible ways forward running the gamut from reforming aspects of the defence to its abolishment.

The CBA Section has long supported the efficiencies defence[21] on the basis that efficiencies lead to significant benefits for the Canadian economy by generating economies of scale, higher productivity and enhanced innovation. That said, to the extent that the government is committed to making changes to the efficiencies defence, we offer constructive considerations and recommendations on the implementation of several proposed changes in Appendix A.

It is important to keep discussions about the efficiencies defence in context as possible reforms are considered. More specifically, only a small number of transactions have actually been cleared based on the efficiencies defence.[22] Moreover, the Tribunal did not find it necessary to consider efficiencies in the recent Rogers/Shaw decision;[23] the Tribunal found the merging parties had failed to meet the high burden of proving efficiencies in the recent P&H decision, giving their efficiencies claims zero weight despite finding that the merger would likely lead to some efficiencies;[24] and the Tribunal found that the merging parties did not meet the requirements of the efficiencies defence in the recent *Secure/Tervita* decision, after

19 See, for example, Brian A. Facey, Navin Joneja and David Dueck, Efficiencies Exception: Let's Keep It (17 February 2022).

20 See, for example, Innovation, Science and Economic Development Canada, The Future of Competition Policy in Canada (17 November 2022) at page 25.

21 See, for example, CBA Section submission on Examining the Canadian Competition Act in the Digital Era (January 2022) at 4-5; CBA Section submission on Summary of CBA Views on Potential Competition Act Amendments (April 2021) at 2-3; CBA Section submission on Model Mergers Timing Agreement (October 2019); Practical Guide to Efficiencies Analysis in Merger Reviews (May 2018); and CBA Section submission on Competition Policy Review Panel Consultations (January 2008) at 9-11.

22 Michael Kilby, Competition Act Amendments: A Data-Driven Perspective (August 23, 2022); and Michael Kilby and Lawson A.W. Hunter, The Role of the Efficiencies Defence in Canadian Competition Law: A Closer Look (December 22, 2022), originally published in *The Globe and Mail, Report on Business* section.

23 *Canada (Commissioner of Competition) v Rogers Communications Inc and Shaw Communications Inc*, 2023 Comp Trib 1 at para 400.

24 *Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*, 2022 Comp Trib 18 [P&H] at paras 8 and 729.

determining that Secure failed to meet its burden regarding (i) its claimed cost savings pertaining to facility rationalizations and (ii) some of its claimed "corporate cost savings."[25]

E. Revisiting Standard for a Merger Remedy (e.g., to Better Protect Against Prospective Competitive Harm or to Better Account for Effects on Labour Markets)

The Tribunal can order remedies where it finds that a merger prevents or lessens, or is likely to prevent or lessen, competition substantially. The Consultation Paper suggests there are challenges in applying this longstanding threshold and raises the possibility of revising it to better protect against prospective competitive harm and better account for effects on labour markets.

1. Better protection against prospective competitive harm

While the Consultation Paper does not recommend a particular framework or standard, it does refer to proposals that have been suggested in other jurisdictions. For example, the Consultation Paper references proposals in the UK, Australia and US that consider alternative approaches to assessing competitive harm.

The proposals in these other jurisdictions are just that – proposals that have not yet been implemented. In contrast, the current legal standard for merger intervention in Canada is a well-known, international standard with which enforcers, practitioners, parties and judiciaries have decades of experience. Over time, judiciaries have developed jurisprudence giving meaning to competition terminology and concepts, which has guided and enabled strong merger enforcement and given merging parties clarity and business certainty.

The Bureau has had a mixed record of success in merger litigation. That alone is not a cause for concern. We should not strive for a system of legal rules designed to ensure that the government always wins. We should strive for a system with appropriate checks and balances and judicial oversight.

The current requirement that the Bureau must establish a "substantial lessening of competition" on a "balance of probabilities" standard is not an unreasonable one; it is effectively the global norm. The recent P&H case was dismissed because the Tribunal found

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[25] *Canada (Commissioner of Competition) v Secure Energy Services Inc*, 2023 Comp Trib 02.

that the Bureau erred with respect to its conclusions on facts, law and economics, not because of unusual or burdensome legal standards.

A shift away from well-established substantive standards for assessing mergers would introduce significant uncertainty into the merger review process. It could allow the Bureau to challenge mergers as "anti-competitive" based on speculative theoretical harms rather than based on objective and robust evidence of likely real-world effects. This shift would create substantial uncertainty in the business community on which transactions will be approved. This uncertainty would likely lead to a chilling effect on legitimate, pro-competitive and pro-consumer merger activity.

2. Better account for effects on labour markets

The CBA Section disagrees with the proposal to modify section 1.1 of the Act (the purpose clause) to identify distributional fairness as goal of Canadian competition policy. As Professor Edward Iacobucci observed, such a proposal: "has many disadvantages relative to a focus on efficiency … [as] it perpetuates uncertainty, and legal indeterminacy, leaving fundamental policy questions up to the discretion of the Bureau and Tribunal"; "would require the Bureau and Tribunal to be expert in all policy values that may relate to competition policy enforcement"; and "invites indeterminacy and asks a great deal of competition law and its institutions."[26]

We do not believe there is a need to add a specific factor relating to labour markets to section 93 of the Act. Paragraph 93(h) of the Act already allows the Tribunal to consider "any other factor that is relevant to competition in a market that is or would be affected by the merger or proposed merger", including the effect that a merger may have on upstream suppliers, including suppliers of labour. In fact, monopsony power (i.e., market power when purchasing), which is relevant when considering the effect that a merger may have on labour markets, is discussed in both the Bureau's Merger Enforcement Guidelines[27] and the Tribunal's recent decision in P&H.[28] We acknowledge Marcel Boyer's observation that "competition authorities

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26 See Edward M. Iacobucci, Examining the Canadian *Competition Act* in the Digital Era (27 September 2021) at pages 61-62. See also Zirjan Derwa, Examining the Canadian Competition Act in the Digital Era (1 February 2022).

27 See Part 9 of the *Merger Enforcement Guidelines*.

28 2022 Comp Trib 18 at paras 211 to 213.

… appear to have conducted much fewer examinations of the effects of mergers … in labour markets."[29] However, nothing in the Act prevents the Bureau from doing so.

It is important to establish appropriate limits on the use of antitrust law to scrutinize labour markets. Canada has established specific, separate legal frameworks and authorities to address concerns within and among labour markets (e.g., provincial and territorial Ministries of Labour). These authorities often have greater authority and more precise means to address labour market concerns. For example, federal, provincial and territorial laws already address employee pay, including minimum wage and severance. In addition, in late 2021, the Ontario government introduced a ban on non-compete clauses in employment agreements.[30] Over-expansion of antitrust law into labour market considerations could lead to unnecessary conflicts and inconsistencies with these other frameworks and authorities.

III. UNILATERAL CONDUCT

A. Better Defining Dominance or Joint Dominance to Address Situations of de Facto Dominant Behaviour, Such as Through the Actions of Firms That may not be Unmistakably Dominant on Their own, but Which Together Exert Substantial Anti-Competitive Influence on the Market

1. Overly expansive approach to Joint Dominance risks chilling legitimate and pro-competitive behaviour

The Consultation Paper asks if changes to the abuse of dominance provisions are needed to address the market behaviour of firms that are not dominant.

As a starting point, the abuse of dominance provisions do provide a framework – on the basis of joint dominance – for enforcement action to address the conduct of firms that are not individually dominant. Accordingly, the principal issue is whether the abuse of dominance provisions should be amended to better define and potentially expand when the conduct of two or more firms in a market should be actionable under the abuse of dominance provisions.

As one possibility, the Consultation Paper points to the use of the phrase "widespread in the market" in other unilateral conduct provisions of the Act (i.e., sections 77 addressing tied

[29] See Marcel Boyer, Comments on Competition Policy and Labour Markets (December 2021, revised February 2022) at page 13.

[30] See *Working for Workers Act, 2021*, SO 2021, c 35 - Bill 27 at Part XV.1.

selling, exclusive dealing and market restrictions and section 81 addressing delivered pricing) as a basis for the potential definition and expansion.

The scope of "joint dominance" has been the subject of extensive commentary and debate, including when the Bureau updates draft guidelines on the abuse of dominance provisions. Each time, after much debate and discussion, it was determined that caution is warranted in this area to avoid chilling legitimate and often pro-competitive parallel marketplace conduct.

While the Bureau's guidance leaves open that a wide scope of activity could potentially render independent firms as jointly dominant, its guidance clearly states that "similar or parallel conduct by firms is insufficient, on its own, for the Bureau to consider those firms to hold a jointly dominant position."[31]

A concept of joint dominance that clearly requires more than parallel activity should be retained.

First, the provisions of the Act using the phrase "widespread in a market" apply to a narrow scope of conduct. By contrast, the abuse of dominance provisions cover a wide range of behaviour, with the result that a broader scope of market activity is potentially affected. Capturing as potentially objectionable conduct that is simply "widespread in the market" suggests the intention is to capture conduct that merely involves competitors responding to each other in a similar manner. In other words, the concept of "widespread in the market" may be read to mean "similar or parallel conduct by firms." Parallel conduct can be legitimate and pro-competitive in many circumstances and should not as a general matter be discouraged.

Second, the premise of the abuse of dominance provision is that firms that have attained a dominant market position should be constrained in how aggressively they are permitted to compete if their conduct is substantially lessening or preventing competition in the marketplace. Competitors that have not attained a position of market power are not (and should not be) similarly constrained precisely because behaviour that could be objectionable by a dominant firm may actually not harm competition when undertaken by a smaller firm seeking to enter or expand into a market.

Third, expanding the concept of joint dominance to capture participants in a market who are engaging in similar conduct could discourage small players in narrow or concentrated markets

[31] Competition Bureau, Abuse of Dominance Enforcement Guidelines, March 7, 2019 at section 49.

from adopting standardized industry practices that are pro-competitive. For example, consider a market where an efficiency-enhancing standard has been adopted that both large incumbents and small entrants follow. An expansive definition of joint dominance could discourage or even prevent such beneficial standardization, which would result in reduced economic efficiency.

Fourth, while conduct subject to assessment under the abuse of dominance provision is subject to evaluation based on market impact, this analysis is very difficult for a market participant to undertake prospectively. The inherent risk in deciding to engage in market activity before its effects can be known with any degree of certainty is compounded by the significant consequences of being wrong under the abuse provision (namely AMPs).

The orders available to the Tribunal under sections 77 and 81 (the latter has never been enforced) are remedial in nature and do not provide for the possibility of AMPs. It is problematic to import a laxer standard for joint dominance (widespread in a market) to a provision (section 79) where parties could be liable for substantial financial penalties that, as result of the *Budget Implementation Act, 2022, No. 1* (BIA Amendments, formerly Bill C-19, now S.C. 2022, c. 10), could be as high as 3% of a party's annual worldwide gross revenues. Facing the possibility of major penalties from parallel conduct that is considered abusive, there is a real risk that firms, especially smaller firms with limited resources, would err on the side of caution and avoid engaging in competitive behaviour simply out of concern that others in the marketplace are engaged in the same activity.

2. Application of amps should be revisited if definition of joint dominance is expanded

To the extent that the definition of joint dominance is expanded, the risk of AMPs for such conduct should also be appropriately reduced or clarified. We agree with footnote 90 of the Consultation Paper stating that "[i]n the event that a test for dominance were relaxed, the application of penalties could be tailored as necessary."

Further, there remains no guidance from the Bureau on the amended abuse of dominance provisions and the availability of AMPs. The absence of guidance is a source of uncertainty for stakeholders and it urgently required given the significantly increased potential liability following the BIA Amendments.

3. Crafting simpler test for a remedial order, including revisiting the relevance of intent or competitive effects

It is imperative to view the abuse of dominance provisions (sections 78 and 79) holistically and in conjunction with recent changes made to these provisions in the BIA Amendments.

The CBA Section previously noted that a review and detailed discussions on reforming the abuse of dominance provisions would be in order and that overbroad or hasty changes could have serious negative implications for commercial certainty, potentially pro-competitive conduct and ultimately, economic growth.[32]

We commented on three reforms to the abuse of dominance provisions recommended in the Iacobucci Paper:

a) specifying that conduct that harms competition generally would be problematic;

b) clarifying the relationship between paragraphs 79(1)(b) and 79(1)(c); and

c) increasing the quantum of AMPs that could be levied by the Tribunal.[33]

These were ultimately implemented in the BIA Amendments.

The Iacobucci Paper also cautioned against lowering the threshold tests for abuse of dominance,[34] a view with which the CBA Section agrees.

On potential revisions to lower the abuse of dominance threshold tests, in our view:

- Intent Should Remain

'Intent' as contemplated by paragraph 79(1)(b) should remain as an element of the abuse of dominance test for at least three reasons:

a) removing the requirement for proving intent would needlessly increase commercial uncertainty,

b) case law has already determined that intent can be subjective or objective (i.e., reasonably foreseeable), so it is a well-defined and understood burden,[35]

c) while commercial actors can control their behaviour, they cannot necessarily control or always foresee economic outcomes.

32 CBA Section submission on Potential Amendments to the Competition Act (March 2022) at pp. 1-2, and CBA Section submission on Examining the Canadian Competition Act in the Digital Era (January 2022) at p. 5.

33 CBA submission on Examining the Canadian Competition Act in the Digital Era (January 2022) at pp. 5-6.

34 Examining the Canadian Competition Act in the Digital Era, Edward Iacobucci, September 27, 2021, at p. 39.

35 Canada (Commissioner of Competition) v. Canada Pipe Co., 2006 FCA 233 at para 67.

The requirement that the Bureau or private litigants demonstrate on balance that a party (either subjectively or objectively[36]) intended to harm a competitor or competition is critical to the proper functioning of the abuse of dominance regime. The Consultation Paper states that showing the link between conduct and anti-competitive effects can be difficult, even with the benefit of hindsight. Requiring firms to accurately undertake this analysis upfront, and then, regardless of intent, subjecting them to potentially significant AMPs if they are wrong, is not a workable approach and would needlessly chill conduct that is not anti-competitive.

- There Should be Intent to Harm Competition

The BIA Amendments revised the definition of "anti-competitive acts" (section 78) to include an act intended to have an adverse effect on competition. This addition should be interpreted to mean an act intended to harm competition (rather than a competitor), consistent with existing case law. As noted above, commercial actors can only control their own behaviour and it would be unreasonable to expect them to accurately (and cost effectively) predict with a high degree of certainty the potential economic effects of all actions. We are looking forward to a revised version of the Bureau's Abuse of Dominance Guidelines describing their enforcement approach given the recent BIA Amendments.

- SLPC Should Remain

We recognize that proving a substantial lessening or prevention of competition on a balance of probabilities can be challenging. However, this is not a deficiency. The standard for intervention in private, commercial activity should be a high one. This is especially true considering the significantly increased AMPs for abuse of dominance and the fact that private parties can now bring applications before the Tribunal under the abuse of dominance provisions. We agree with the Iacobucci Paper reasoning against lowering the current threshold tests for a substantial lessening or prevention of competition. Specifically, assessing levels of risk of anti-competitive harm is far from an exact science. There are challenging, practical questions about assessable differences between "appreciable risk of competitive harm," "an adverse effect on competition," "may substantially lessen competition" and "likely to substantially lessen competition."

Determining whether conduct is likely to have anti-competitive, pro-competitive or benign effects in a market is a difficult, fact-intensive exercise. Amending the abuse of dominance test thresholds to remove or weaken intent or lower the threshold for anti-competitive harm would make businesses' ability to assess compliance unduly burdensome, costly and uncertain. Moreover, there is no clear evidence that sweeping changes are necessary. The absence of significant enforcement of abuse of dominance is not itself a sign that the legislation is

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36 In this context, objective intent means that persons are assumed to intend the reasonably foreseeable consequences of their actions.

deficient. Rather, it may well signify that the vast majority of economic conduct is not anti-competitive.[37]

The June 2022 changes to the abuse of dominance provisions in the BIA Amendments may well result in significant enforcement changes or outcomes. That remains to be seen, as no cases have been brought under the amended provisions. We recommend that time be given to test the recently amended abuse of dominance provisions before further amendments are implemented.

B. Creating Bright Line Rules or Presumptions for Dominant Firms or Platforms, With Respect to Behaviour or Acquisitions, as Potentially a more Effective or Necessary Approach, Particularly if Aligned With International Counterparts and Tailored to Avoid over-Correction

1. Bright line rules would be contrary to framework of the Act

The Consultation Paper considers the possibility of implementing bright line rules governing the behaviour of certain dominant firms or platforms. Specific rules for particular firms or industries would be contrary to the framework of the legislation, which is meant to be broadly applicable to all industries and firms. Further, this approach contradicts the proposal (discussed below) to consolidate the unilateral conduct provisions into a single, principles-based provision.

The Act differentiates between marketplace conduct that is per se anti-competitive (such as cartel behaviour) and conduct that could be anti-competitive, pro-competitive or benign depending on the facts. For the specific conduct that the Consultation Paper mentions as potentially ex ante problematic (self-preferencing or duplicating), there is no economic consensus that such conduct is inherently problematic. Indeed, there is economic evidence that self-preferencing is, in many circumstances, beneficial for consumers.[38] The Iacobucci Paper summarizes this perspective as follows: “it would be economically ill-informed to conclude that self-preferencing is categorially bad for consumers and therefore ought to be banned.”[39]

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[37] Examining the Canadian Competition Act in the Digital Era, Edward Iacobucci, September 27, 2021 at p. 40.

[38] Anthony Niblett and Daniel Sokol, Up to the Task: Why Canadians Don’t Need Sweeping Changes to Competition Policy to Handle Big Tech, November 2021, at p. 16-17.

[39] Examining the Canadian Competition Act in the Digital Era, Edward Iacobucci, September 27, 2021 at p. 43.

The Consultation Paper notes that certain other jurisdictions have implemented or are considering implementing ex ante rules for 'gatekeeper' firms – most notably the EU with its *Digital Markets Act* (DMA). However, the DMA is not motivated by antitrust principles or objectives. Its primary purpose is "fostering Europe's key political objective of digital sovereignty."[40]

Further, the foundation of the DMA rests on the (increasingly dubious) notion that the digital economy can somehow be separated categorically from the rest of the economy when in fact much of the mainstream economy is digitized. The DMA and other international proposals for ex ante rules governing market behaviour are contrary to the general application of antitrust principles to a wide variety of industries in a market economy. Indeed, the Bureau has acknowledged the success of applying antitrust principles to diverse industries and markets. Antitrust principles and laws can be applied in a flexible manner to address the unique challenges and characteristics of emerging issues such as big data and digital markets.[41]

To the extent that certain conduct has been identified as having a higher risk of causing anti-competitive effects, especially if undertaken by dominant firms or platforms, the conduct could be described in its allegedly anti-competitive form and added to the illustrative list of acts included in section 78. This would put businesses on notice that certain forms of behaviour may be subject to enhanced scrutiny or enforcement, while preserving the existing flexibility and industry-wide application of the abuse of dominance provisions ensuring that only conduct that produces anti-competitive effects is penalized.

C. Condensing Various Unilateral Conduct Provisions Into a Single, Principles-Based Abuse of Dominance or Market Power Provision. Alternatively, the Unilateral Conduct Provisions Outside of Abuse of Dominance Could be Repositioned for Different Objectives of the Act, Such as a Fairness in the Marketplace.

1. Importing the concept of fairness into the Act is not a workable option

Importing the concept of "fairness in the marketplace" into the Act is not a workable option.

Fairness is often used to refer to the notion that businesses should compete on a level playing field, and consumers should have access to fair and competitive markets. However, the concept

40 See EESC Europa Digital Services Act and Digital Markets Act.

41 Competition Bureau, Big data and innovation: key themes for competition policy in Canada, February 19, 2018.

of fairness is difficult to define statutorily in a way that is precise and predictable within the competition law analytical framework.

The concept of fairness is unworkable and vague because it is difficult to determine what conduct or practices are unfair. Further, what may be considered fair in one industry or context may not be viewed as fair in another. The notion of fairness is inherently subjective.

As a result, the competition law framework tends to focus on more objective factors, such as the impact of conduct on the competitive process and consumers (e.g., prices, level of service, innovation), rather than trying to address the concept of fairness directly.

2. Consolidation, in principle, can be helpful but certain separate provisions continue to serve a useful function

We support, in principle, consolidating certain unilateral conduct provisions in Part VIII of the Act into a single, clearer and more principles-based abuse of dominance provision. In particular, provisions such as exclusive dealing, tied selling and market restriction fit well in the abuse of dominance framework. However, if the desire is to continue the application of the exclusive dealing and tied selling provisions to conduct that is widespread in the market, it would be appropriate to retain these as separate provisions not subject to AMPs.

We support maintaining as separate provisions in Part VIII of the Act, section 75 (refusal to deal) and section 76 (price maintenance) because the subject matter of section 75 and 76 is less clearly subsumed in the abuse of dominance framework.

In our view, section 81 of the Act (delivered pricing) should be repealed because it has never been enforced and, from an economic perspective, has no basis in modern competition legislation. This provision pertains to delivered pricing specifically but supports, more generally, a condemnation of price discrimination, which is now only rarely objectionable under the Act.

3. Revisit treatment of AMPs in BIA Amendments

Pursuant to the BIA Amendments, private parties are now permitted to seek leave to apply to the Tribunal for a remedy arising from an alleged abuse of dominance, including AMPs. The amendment does not permit the Tribunal to order that an AMP be paid to the private applicant in the event the Tribunal finds that the respondent abused its dominant position. Rather, the amendments only allow the Tribunal to order the respondent to pay the AMP to the Canadian government (who is not a party to the litigation).

As discussed in our comments in Part VI, Administration and Enforcement of the Act, some members of the CBA Section believe that in the case of an abuse application brought by a private party, if the Tribunal finds that the respondent abused its dominant position in a private application, the Tribunal should be permitted to order that financial relief (by way of damages) should be paid to the private applicant. Other members of the CBA Section are concerned that reviewable practices such as abuse should not allow damages as such conduct is lawful, ordinary course conduct until the Tribunal condemns it following a competitive impact analysis and that allowing for damages may chill neutral or pro-competitive behaviour.

IV. COMPETITOR COLLABORATIONS

A. Deeming or Inferring Agreements More Easily for Certain Forms of Civilly Reviewable Conduct, Such as Through Algorithmic Activity, Especially Given the Difficulty of Applying Concepts Like "Agreement" and "Intent" in the Age of AI

The Consultation Paper invites comment on the possibility of deeming or inferring agreements more easily for certain forms of civilly reviewable conduct, such as through algorithmic activity. The Consultation Paper notes that "[t]he argument has been made that the introduction of algorithms may necessitate a shift toward addressing more tacit forms of collusion" and asks whether "it [should] matter whether a discrete meeting of the minds can be clearly established."

The CBA Section is of the view that, in the context of algorithms or otherwise, it should be necessary to clearly establish a discrete "meeting of the minds."

1. Deeming or inferring agreements with respect to algorithmic activity

We agree that algorithmically-facilitated tacit coordination[42] among firms could have anti-competitive effects. However, improperly calibrated actions taken in response to algorithmic activity – that could be too broad, too punitive or too early in their development – would lead to unintended negative outcomes, including reduced incentives for investment and innovation, which would ultimately harm consumers.

At the most basic level, "an algorithm is a sequence of rules that should be performed in an exact order to carry out a certain task".[43] This is a broad definition and requires the

[42] With respect to *explicit* collusion, where competitors agree to fix prices using an algorithm, it is clear that either the criminal conspiracy or civil competitor collaboration provisions of the Act would apply.

[43] OECD (2017), OECD Algorithms and Collusion Competition Policy in the Digital Age at 8.

Government to carefully consider its approach to govern the use or behaviours of algorithms. Many uses of algorithms will not facilitate coordination among firms, or otherwise lead to anti-competitive effects. Even when considering a narrow category of algorithms, such as algorithms leveraging artificial intelligence or machine learning, which could, theoretically, result in parallel conduct, the Government should avoid making entire categories of algorithms or uses of algorithms illegal.

For example, personalized pricing algorithms, which "analyze consumer preferences to determine a personalized price for a particular good or service",[44] are a potential source of price discrimination as well as a potential mechanism for coordination. They are acknowledged as having the potential for pro-competitive effects (e.g., opening up opportunities for consumers who, without personalized pricing, would be excluded from a market – price discrimination generally enhances economic output and consumption).[45] An overly broad approach risks the loss of these benefits to competition and consumers.

Algorithms that rely on market data,[46] that generates new data which is in turn used by the similar algorithms of competitors – without an agreement between firms – are best understood as a form of conscious parallelism.

The Competitor Collaboration Guidelines state that "the Bureau does not consider that the mere act of adopting a common course of conduct with awareness of the likely response of competitors, commonly referred to as "conscious parallelism", is sufficient to establish an agreement for the purpose of section 90.1."[47]

Weakening the concept of an agreement (e.g., by deeming or inferring agreements for algorithmic activity) to capture any and all responses by different firms' algorithms to each other could result in all instances of conscious parallelism involving algorithmic activity (regardless of intent or effects) potentially being caught by section 90.1 of the Act. This over-enforcement would likely lead to reduced innovation and investment in algorithmic technology, harming both competition and consumers. Moreover, it is not clear why conscious

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44 ABA Section of Antitrust Law (2018), Algorithms: Challenges and Opportunities for Antitrust Compliance at 7

45 Vivic Research (2022), Study of Competition Issues in Data-Driven Markets in Canada, at 47-49

46 This could include "real-time processing of marketplace factors, automated tracking of supply chains, and collection of massive amounts of data on consumer preferences." See Coglianese, Cary and Lai, Alicia, "Antitrust by Algorithm" (2022). Faculty Scholarship at Penn Law. 2755. Antitrust by Algorithm article at 4.

47 Competition Bureau, *Competitor Collaboration Guidelines* at section 3.2.

parallelism in the context of algorithms should be viewed differently from other instances of conscious parallelism.

Criminal liability for tacit algorithmic collusion, as described in the Consultation Paper, would be even more problematic. The Act clearly and appropriately states that an agreement – whether explicit or implicit – must be proved beyond a reasonable doubt. Weakening this requirement where there are criminal consequences for the accused parties, would raise a number of concerns, including under section 7 of the *Charter of Rights and Freedoms*.[48]

Canada is not alone in considering these issues. The US, EU, OECD[49] and others have published papers and considered cases on the competition implications of artificial intelligence and algorithms. However, cases in other jurisdictions involving collusive behaviour by way of pricing algorithms continue to require an agreement between human actors to fix prices.[50,51] As such, the proposals under consideration – which could potentially subject inadvertent or unilateral behaviour to enforcement action under the Act – are without precedent and would set Canada apart from the global consensus on how to address the competition issues that may arise with algorithms.

The Act may not be the appropriate legislation to address algorithmic activity. The Consultation Paper notes legislation currently before Parliament that would create the position of AI and Data Commissioner, as well as a complementary framework for algorithmic oversight. Coordination issues are one aspect of a broader set of concerns with algorithms that may be

48 Section 7 of the *Charter* reads: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

49 The OECD Secretariat has stated that, in dealing with tacit collusion concerns that may arise from algorithmic pricing, "any policy change should be progressive and approached with caution, carefully weighing the benefits of tackling collusion against the costs of over-enforcement" (OECD, Algorithms and Collusion, Competition Policy in the Digital Age, June 2017 at p.4). In the 2017 OECD roundtable on the subject, both the US DOJ and FTC took the position that existing antitrust laws [which are generally similar to Canadian counterparts in the Act] were flexible enough and capable to capture any possible restriction of competition through algorithms (OECD, Summary of Discussion of the Roundtable on Algorithms and Collusion, June 2017 at pp. 6-7).

50 See US DOJ (2015) Former E-Commerce Executive Charged with Price Fixing in the Antitrust Division's First Online Marketplace Prosecution. This requirement can also be clearly seen in the US, where former acting FTC chair Maureen Ohlhausen likened algorithms to a pair of binoculars used to see a competitor's posted prices to inform one's own prices, stating "we don't use the antitrust laws to police firms' abilities to understand the markets they operate in or to optimize prices" (Charles McConnell (2017), "FTC commissioners diverge on algorithms." Likewise, the US DOJ noted in 2017 that "the implementation of pricing policies by one firm's employees is unilateral conduct (whether it factors in the prices of competitors or not) and is not actionable under Section 1 of the Sherman Act without evidence establishing an agreement with another firm over the purpose or effect of a pricing algorithm." (US DOJ (2017) Algorithms and Collusion - Note by the United States, at para 6).

51 See UK CMA (2016) "Decision of the Competition and Markets Authority, Online sales of posters and frames, Case 50223."

better addressed by a dedicated entity with the necessary expertise in artificial intelligence and algorithms. Once that legislation is implemented, it would be useful for the Bureau and the AI and Data Commissioner to explore how enforcement can work most effectively.

2. Deeming or inferring agreements in horizontal conduct generally

Aside from the specific discussion of deeming or inferring agreements through algorithmic activity, the Consultation Paper also suggests there exist deficiencies in addressing horizontal conduct that occurs in the absence of an agreement.

In our view, this suggestion should be viewed with a high degree of caution. As discussed above, horizontal conduct in the absence of an agreement (i.e., conscious parallelism or tacit collusion) is not illegal in Canada or in any other major jurisdiction. Modifying the existing civil competitor collaboration provisions to do away with the need for agreement and, in so doing, including conscious parallelism within their scope, would not only be a radical departure from existing Canadian competition law and policy, it would also be inconsistent with the similar laws of our major trading partners. It would also unnecessarily interfere with or chill pro-competitive conduct (i.e., responding to market conduct of competitors).

Moreover, horizontal conduct that occurs in the absence of an agreement is already adequately addressed under the Act. For example, section 79 (abuse of dominance) explicitly contemplates joint dominance and does not require the existence of an agreement to address situations where there has been a joint exercise of market power. Collectively, sections 45, 90.1 and 79 apply to most forms of joint conduct that could be of concern. There is no demonstrated need to subject other types of joint conduct (which may be competitively benign or pro-competitive) to potential enforcement under the civil competitor collaboration provisions of the Act.

B. Broadening and/or Strengthening the Act's Civil Competitor Collaboration Provisions to Discourage more Intentional Forms of Anti-Competitive Conduct, Including Through Examining Past Conduct and Introducing Monetary Penalties

The Consultation Paper invites comments on the possibility of broadening the Act's civil competitor collaboration provisions to include the review of past conduct. The Consultation Paper states that "[f]irms may be well aware that their anti-competitive behaviour would be remediable under the civil provisions of the legislation, but so long as the Act cannot examine past behaviour or impose penalties, they may be incentivized to cross the line until required to stop". However, we believe that the temporality of section 90.1 is intentional and should remain so.

Much like the merger provisions of the Act, section 90.1 is remedial in nature and necessarily forward looking. Unless and until the Tribunal has determined that an agreement will in fact lead to, or be likely to lead to, a substantial lessening or prevention of competition, the agreements are presumed to be lawful. Further, many competitor collaborations could be achieved by way of either an agreement (which would be potentially reviewable under section 90.1) or a merger. Expanding section 90.1 to penalize past conduct might, in some cases, simply encourage firms to undertake collaborations via mergers, rather than agreements, and would have little substantive impact.

Harm occurring from past conduct is already adequately considered in the Act. For instance, section 45 criminalizes hard core conduct (including past agreements) and section 79 (abuse of dominance) deals with past and current instances of anti-competitive conduct by dominant firms, including joint dominance. The sanctions for contravention of sections 45 and 79 appropriately address "past harm."

Also, section 90.1 has been subject to minimal enforcement.[52] This suggests there is limited harmful conduct that needs to be addressed under section 90.1 – past or otherwise. It is unclear why the Act requires amendment to address past conduct, when the Bureau has hardly ever identified situations where there is a need to address harm from these types of collaborations.

C. Making Collaborations That Harm Competition Civilly Reviewable Even if not Made Between Direct Competitors

The Consultation Paper suggests that section 90.1 could also be expanded to encompass vertical conduct, noting that the current laws' "limitation generally falls outside the norm of international practice," citing US and Australian statutes. This suggestion should not be accepted, as it fails to consider several relevant factors.

First, "vertical conduct" captures all supplier/customer relationships and, as such, captures many ordinary course business transactions. Vertical conduct rarely leads to anti-competitive

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52 *Rakuten Kobo Inc. v. The Commissioner of Competition*, 2016 Comp. Trib. 11; see also *The Commissioner of Competition v Air Canada, United Continental Holdings Inc., United Airlines Inc. and Continental Airlines Inc.*, 2011 Comp. Trib. 4.

outcomes. The Government should avoid overly broad provisions that create undue compliance burdens on companies with respect to ordinary course business activity.

Second, section 90.1 is designed to act as the counterpart to section 45, to deal with horizontal agreements that are not "hard-core" agreements to fix price, allocate markets or restrict output, but in some circumstances could result in an anti-competitive exercise of market power, and in other circumstances could be competitively benign or even pro-competitive. Amending section 90.1 to apply to conduct that is not between competitors would undermine the Act's intended structure.

Finally, and perhaps most importantly, the Act contains numerous civil provisions designed to address the specific situations where vertical conduct is potentially harmful – applicable to both dominant and non-dominant firm conduct. Section 79 (abuse of dominance) is particularly broad (even more so following the BIA amendments, and applies to a wide range of predatory, disciplinary, and/or exclusionary anti-competitive conduct, as well as conduct that is intended to harm competition more generally.

Other provisions that capture vertical conduct include section 76 (price maintenance), which addresses the most common forms of vertical agreements among participants in distribution chains, and sections 75 (refusal to deal) and 77 (exclusive dealing, tied selling and market restriction). The Commissioner has not brought cases under either section 75 or 77 in many years and rarely brings cases under section 76. Given the broad range of existing provisions at the Commissioner's disposal to address vertical conduct, it is unclear what harmful conduct the proposed expansion of section 90.1 to include non-horizontal competitor collaborations is intended to capture, that is not already adequately captured under the Act. The likely result of such an amendment would be to add confusion, overlap and compliance burdens.

D. Introducing Mandatory Notification or a Voluntary Clearance Process for Certain Potentially Problematic Types of Agreement

The Consultation Paper invites comments on the possibility of "[i]ntroducing mandatory notification or a voluntary clearance process for certain potentially problematic types of agreement".[53] As discussed in more detail below, the existing voluntary notification process

53 Consultation Paper, *supra* note 42, at Part VI.

needs to be improved. A new mandatory notification/clearance process is not required and would impose more bureaucratic requirements on Canadian businesses of all sizes.

First, the Act already has a process for the voluntary notification of such agreements in section 124.1. Consequently, there is no need to amend the Act to address voluntary clearance.

Section 124.1 of the Act states that parties may voluntarily notify and request "Commissioner Opinions" from the Bureau about the legality of proposed conduct. To the extent that the Government is considering adding a "voluntary clearance process" for certain types of agreements, it would duplicate the section 124.1 regime, as such agreements can already be notified by parties under section 124.1, and parties can seek the Bureau's position on the legality of those agreements (i.e., seek clearance).

Indeed, the Bureau has published detailed guidelines on the section 124.1 regime, including the types of information required of notifying parties to obtain a Commissioner's Opinion, the timeframe in which the opinion will be given and the fees payable for issuing an opinion.[54]

That said, the advisory opinion process has been little used by practitioners in recent years. The main reason is the Bureau's reluctance to issue meaningful opinions that assist market participants in assessing competition risk. To address concerns about the operation of section 124.1, we recommend amending this existing provision or improving the process and guidance as necessary, rather than introducing a new, duplicative provision, for which new guidance and processes would need to be developed.

Any amendment should preserve the existing voluntary nature of advisory opinions but should require the Bureau to render an opinion on whether or not proposed conduct is problematic. (At present, the Bureau will typically confirm only whether conduct is jurisdictionally within the scope of a section of the Act. The Bureau does not give a view on whether specific conduct would contravene a provision of the Act).

We also believe that the administration of the Act would be improved if the scheme of "references to the Tribunal" established by section 124.2 were expanded to include private parties. At present, the Commissioner has control over whether any application is made to the Tribunal for a "determination" of a "question of law, jurisdiction, practice or procedure." In

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54 See Competition Bureau, *Competition Bureau Fee and Service Standards Handbook for Written Opinions*, April 7, 2020.

many cases, uncertainties regarding these issues could be resolved dispositively through a reference application initiated by a private party to the Tribunal.

The Consultation Paper raises the possibility of requiring notification or instituting a voluntary clearance mechanism for patent litigation settlement agreements in the pharmaceutical industry. As noted above, while there is no separate notification regime for patent litigation settlements specifically, the agreements can be voluntarily notified by the parties under section 124.1 of the Act, and the improvements to that mechanism recommended above could make it more useful for these types of agreements as well. In addition, with significant competition compliance guidance for generic suppliers and brand manufacturers in the Intellectual Property Enforcement Guidelines, the need for a voluntary clearance process is not clear and such a process may be impractical from a timing perspective.[55] The need to make notifications of patent litigation settlement agreements mandatory is also questionable given that the Bureau already has visibility into such agreements through monitoring Federal Court dockets to determine when pharmaceutical patent litigants discontinue litigation.[56]

Sectoral regulation (i.e., a specific notification regime for patent litigation settlement agreements) does not properly fit within the scope of the Act. Specific rules for particular industries would be contrary to the overall framework of the legislation, which is meant to be broadly applicable to all industries and firms. For example, there are also patent litigation settlements in industries beyond the pharmaceutical industries that could have an impact on competition. The Act should remain of broad and of general application.

E. Reintroducing Buy-Side Collusion – Beyond Labour-Related Coordination – Into the Act's Criminal Conspiracy Provision, or Considering a Civil Per Se Approach to it

1. Buy-side collusion should not be reintroduced as a criminal offence

The Consultation Paper invites comment on the possibility of "reintroducing buy-side collusion – beyond only labour coordination – into the Act's criminal conspiracy provision…".[57] As described further below, we believe that such a change is unnecessary and counterproductive.

55 Settlements of PMNOC patent litigation often occur at the 11th hour in a 24-month statutory period.

56 The Bureau can also request updates from Health Canada on corresponding drug submissions relevant to litigation. See Competition Bureau, *Competition Bureau statement regarding its proactive monitoring of potentially anticompetitive patent litigation settlement agreements between branded and generic drug manufacturers* (20 May 2022).

57 Consultation Paper, *supra* note 42, at Part VI.

First, the history of the criminal conspiracy provisions in the Act give important insight on why buy-side conspiracies were excluded from the per se illegality of section 45. The Consultation Paper notes that "buy-side agreements (including with respect to labour) were formerly under the purview of s. 45."[58]

The former paragraph 45(1)(c), which the Consultation Paper is referring to, had an extremely broad ambit covering agreements or arrangements to "prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance on persons or property (emphasis added)." The reference to "purchase" in the former paragraph 45(1)(c) could indeed have applied to agreements or arrangements among buyers. However, to our knowledge, not a single buy-side enforcement action was ever brought under the former paragraph 45(1)(c).

In 2009, after years of consideration of possible reforms to the Act, the Government made an explicit policy decision to remove buy-side agreements from the ambit of the criminal conspiracy provisions of the Act at the same time that it removed the competitive effects test. This decision should not be reversed without understanding that buy-side agreements are not universally anti-competitive.

The well-accepted reason that buy-side coordination is no longer addressed by the criminal offences in the Act is that the conduct is often not harmful and, indeed, may in many instances be beneficial. The Bureau itself has previously acknowledged that "criminal law is too blunt an instrument to deal with agreements between competitors that do not fall into the 'hardcore' cartel category".[59] As such, buy-side agreements are not appropriately considered under section 45, which is intended to capture "naked restraints" on competition which are clearly harmful and have no redeeming virtues whatsoever (and for this reason, there is no requirement to demonstrate anti-competitive harm).

As the Consultation Paper acknowledges, "[b]uy-side coordination, by contrast, presents different incentives for participants and more economic ambiguity, as such activity may be seen to reduce costs, increase efficiency and deliver consumer benefit."[60] It is well-recognized that joint purchasing conduct (one particularly common form of buy-side coordination) can reduce

58 *Ibid*.

59 Government of Canada, Competition Policy Review Panel "Compete to Win: Final Report – June 2008" (June 26, 2008).

60 *Ibid.*

transactional costs, increase efficiencies and allow smaller players to compete more vigorously against larger players by pooling their purchases.

Leading antitrust scholar Herbert Hovenkamp (whom the Consultation Paper cites as an authority[61]) explains that "many joint buying agreements are efficient because they reduce transaction costs and enable smaller purchasers to obtain some of the buying advantage that accrue to larger buyers."[62] Similarly, US antitrust law, including authority from the US Supreme Court, has acknowledged the pro-competitive nature of such agreements.[63] Many Canadian businesses, including many small and medium–sized businesses, participate in buying groups that allow them to benefit substantially from volume-based group purchasing.

The benefits of buy-side agreements are considerable and assist in "[ensuring] that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy", which is one of the stated purposes of the Act.[64]

Second, it is not clear that there is existing harmful conduct not captured by the Act, and that would be addressed by reintroducing buy-side collusion generally into the Act's criminal conspiracy provision. Currently, buy-side agreements fall within the scope of section 90.1 of the Act. As such, the Bureau already can address buy-side agreements of any type between competitors that are harmful. However, there were no buy-side cases brought under section 90.1 of the Act (and, as noted above, no buy-side cases brought under the old section 45). This begs the question of what harmful conduct exists that needs to be addressed by broadening the criminal conspiracy provisions of the Act.

Recognizing the beneficial aspects that some buy-side coordination may generate, and taking into account the absence of any buy-side enforcement by the Bureau, we believe that the 2010

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61 *See* Consultation Paper, *supra* note 42, at fn 65, 116.

62 H. Hovenkamp, Federal Antitrust Policy: The Law of Competition and Its Practice, 3rd ed., at 158.

63 See, *e.g.*, *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985), at 295: "Wholesale purchasing cooperatives such as Northwest are not a form of concerted activity characteristically likely to result in predominantly anticompetitive effects. Rather, such cooperative arrangements would seem to be "designed to increase economic efficiency and render markets more, rather than less, competitive." *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.,* at 441 U.S. 20: "The arrangement permits the participating retailers to achieve economies of scale in both the purchase and warehousing of wholesale supplies, and also ensures ready access to a stock of goods that might otherwise be unavailable on short notice. The cost savings and order-filling guarantees enable smaller retailers to reduce prices and maintain their retail stock so as to compete more effectively with larger retailers."

64 *Competition Act*, *supra* note 50, at s. 1.1.

legislative design remains sound and no further legislative reform is required for buy-side conduct.

However, if the Government forms the opinion that further buy-side agreements should be (re)introduced under the criminal conspiracy provisions of the Act, careful consideration should be given to the specific types of agreements sought to be addressed (as was done for sell-side conduct in 2010) and whether per se illegality is appropriate for all such agreements.

In our view, the most prudent course of action would be to assess the impact of the new no-poaching and wage-fixing offences (each a type of buy-side agreement), which were included in the BIA Amendments (and which have not yet entered into force), before considering any further amendments regarding buy-side agreements.

2. BIA Amendments on no-poach and wage-fixing agreements

The Consultation Paper notes that, while the BIA Amendments have been enacted, the Government fully expects and welcomes discussion on ways of improving or reinforcing them within the wider conversation on reform. The CBA Section appreciates this opportunity to make a few observations about new provisions applying to wage-fixing and no-poach agreements.

The introduction of subsection 45(1.1) is problematic for a number of reasons, including, but not limited to, those set out above on why the criminal conspiracy provisions should not be extended to include buy-side agreements more generally. However, assuming the Government intends to maintain the new subsection 45(1.1), explicit exemptions from the criminal conspiracy provision should be considered for certain ordinary course agreements that do not necessarily harm competition. This would create certainty for businesses and would reduce compliance burdens for ordinary course business conduct, while still allowing the Bureau to consider these exempt agreements under section 90.1 in the event that they do, in fact, lead to a substantial prevention or lessening of competition.

The CBA Section is also concerned that the new section will inhibit pro-competitive or competitively neutral agreements that benefit employees. For example, during the recent COVID pandemic, employers routinely exchanged views on improving workplace health and safety protocols. The purposes and effect was to de-risk workplaces for returning employees. These discussions will in most cases not proceed in the future given the criminal prohibition on agreements affecting “terms and conditions” of employment (and reinforced by the Bureau’s draft guidance that "sharing sensitive employment information or taking steps to monitor … employment practices, may be sufficient to prove that an agreement").[65]

We therefore believe that exemptions from subsection 45(1.1) for specific types of agreements should be added, including, for example, exemptions for agreements or arrangements involving the exchange of health and safety information, policies, programs or statistical information.

F. Other Competitor Collaboration Issues

In addition to topics on which the Consultation Paper invited discussion, we share our views on a number of related issues, including (i) subsection 49(1) of the Act, and (ii) potential for an "environmental" defence for competitor collaborations.

Subsection 49(1) of the Act

The CBA Section believes that subsection 49(1) of the Act should be repealed. The treatment of federal financial institutions (FFI) under subsection 49(1) is inconsistent with the treatment of all other firms in all other sectors. This sector-specific approach does not properly fit in the scope of the Act, which is a framework law of general application to all industries and firms.[66]

By way of background, section 49 is a criminal offence prohibiting agreements or arrangements specifically between FFIs with respect to, among other things, the rate of interest on deposits, the rate of interest or charges on loans, and the amount or kind of any charge for a service provided to a customer. The general criminal conspiracy provision, section 45, expressly carves out FFIs described in subsection 49(1) from its application. Subsection 49(1) was previously in the federal *Bank Act* prior to migrating to the Act in 1986. Notably, in 1986, the criminal conspiracy provisions of the Act still required evidence that competition was "unduly" lessened or prevented, and the introduction of subsection 49(1) created a distinct per se offence for FFIs which did not require a negative impact on competition test. However, the 2009 amendments made all agreements between competitors to fix prices, allocate markets or restrict supply per se illegal (i.e., no competition test), regardless of the industry sector.

Following the 2009 amendments, the need for section 49 is unclear, and in our view the failure to repeal section 49 as part of the 2009 conspiracy law amendments was a legislative oversight. Notably, since its migration to the Act, there have been no reported decisions under

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65 See Competition Bureau Draft Enforcement Guidance on Wage-fixing and-No-poaching-agreements

66 For instance, airline-specific provisions of the Act were repealed as part of the 2009 amendments.

section 49, and it only merits a cursory mention in the Competitor Collaboration Guidelines.[67] This strongly suggests that it is either of limited utility or not an enforcement priority.

Moreover, the conduct prohibited by subsection 49(1) is effectively redundant having regard to the general conspiracy offence in section 45 and the competitor agreements reviewable practice in section 90.1 of the Act. However, the absence of an ancillary restraints defence (ARD) or lessening of competition test (as exist in sections 45 and 90.1, respectively) means that FFIs are burdened with restrictions that do not apply to others, including provincial financial institutions or unregulated financial institutions. There is no apparent reason why FFIs should be ineligible to invoke an ARD or to have non-cartel-like conduct prohibited without regard to the competitive effects test that applies to all other market participants.

The CBA Section believes that repealing section 49 (and the corresponding carve out in section 45) would not affect the ability of the Bureau to address agreements or arrangements between FFIs under the Act, would reduce the unnecessary compliance burden on FFIs, and would be more consistent with the Act as a statute of general application.

Sustainability and Environmental Protection Defence

Canada and other countries have identified sustainable development and climate change as long-term global policy priorities.[68] The Government has expressed its commitments to these priorities through, among other things, policies and plans that illustrate the importance of the private sector's involvement, as nation-wide and global objectives in these areas cannot be achieved by governments alone.[69]

We urge the Government to address expressly the intersection of competition policy and the pressing public interest in protecting the environment, including in the context of sustainable growth and climate change. Section 45 of the Act should be amended to decriminalize legitimate collaborations directed at protecting the environment and a public interest override for protection of the environment should be introduced in the civil provisions of the Act.

In recent times, there has been significant interest and initiatives amongst policy makers, enforcers and various constituencies in Canada and elsewhere in the interaction between

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67 *Competitor Collaboration Guidelines*, *supra* note 47.

68 See e.g., *Paris Agreement*, 12 December 2015, UN Doc FCCC/CP/2015/10/Add.1, 55 ILM 740 (entered into force 4 November 2016).

69 See e.g. *Towards Canada's 2030 Agenda National Strategy, Government of Canada* (last modified 15 July 2019); *A Healthy Environment and Healthy Economy: Canada's strengthened climate plan to create jobs and support people, communities and the planet* (last modified 8 April 2021).

competition policy and sustainability. In September 2022, the Bureau hosted The Competition and Green Growth Summit.[70] The OECD has studied the subject.[71] Governments and agencies in Europe,[72] the UK[73], the Netherlands,[74] Greece,[75] Austria[76] and Japan[77] have published or consulted on guidelines and exemptions for conduct directed to sustainability and climate change broadly and in respect of particular sectors.

In our view, the Government itself should take the opportunity to consult on and tackle directly the balancing of its priorities with respect to the environment and the competition enforcement framework. This important subject cannot be left to an enforcement agency such as the Bureau, that lacks the mandate and authority to override competition laws in favour of sustainability objectives or consider factors not supported by the legislation.[78] In simple terms, competition law should not get in the way of private actors pursuing environmental objectives in a legitimate manner.

In theory, while the ancillary restraint defence (ARD) could potentially be used by private actors pursuing environmental objectives as part of a larger collaboration which is considered legitimate, in many cases the ARD would not be sufficient. The environmental collaboration may not be ancillary to any broader legitimate agreement, in which case the ARD could not apply. (For example, an agreement amongst competitors to phase out plastic packaging would

70 Government of Canada, *The Competition and Green Growth Summit* (20 September 2022).

71 OECD, *Environmental Considerations in Competition Enforcement*.

72 See, for example, European Commission, *Sustainability agreements in agriculture – consultation on draft guidelines on antitrust exclusion* (10 January 2023). The European Commission and certain member states have considered measures in view of the overarching European Green Deal.

73 In March 2022, the UK Competition and Markets Authority published Environmental sustainability and the UK competition and consumer regimes: CMA advice to the Government.

74 Netherlands Authority for Consumers and Market Guidelines Sustainability Agreements - opportunities within competition law (Second Draft, January 2021).

75 The Hellenic Competition Commission recognized the need to better synchronize competition laws and sustainability.

76 On 1 June 2022, the Austrian Federal Competition Authority released draft Sustainability Guidelines with respect to a new sustainability exemption in § 2 paragraph 1 of the *Austrian Cartel Act.*

77 On 13 January 2023, Japan's Fair Trade Commission opened a consultation on draft Guidelines Concerning the Activities of Enterprises, etc. Toward the Realization of a Green Society under the Antimonopoly Act.

78 Without legislative amendments allowing exceptions to antitrust laws, enforcers' hands are tied. Although the Biden administration has prioritized the fight against climate change, US FTC chair Khan testified to a Senate committee that there was no ESG exemption from antitrust laws and ESG considerations can never "rescue an illegal deal." In the same hearing, Assistant Attorney General Kanter agreed with "the sentiment that collusion is anticompetitive" and "the underlying sentiment that when firms have substantial power and they use that power to achieve anticompetitive ends, that should be actionable under the antitrust laws." Senate Judiciary Committee, Subcommittee on Competition Policy, Antitrust, and Consumer Rights, Hearing, Oversight of Federal Enforcement of the Antitrust Laws (September 20, 2022).

be a naked restraint and not benefit from the ARD because it is not ancillary to a broader agreement.)

Substantively, we recognize that the process of competition generally leads to more efficient production and supply of products. Accordingly, the promotion of competition through competition laws is an important tool to secure efficiency in the production of products involved in the repair, management or protection of the environment.

However, there are situations where it may be necessary or salutary for competitors to cooperate in environmental initiatives. These collaborations may result in short-term concessions to competition which on balance serve the broad public interest and align with long-term policy goals. Further, cooperation on environmental initiatives may be more efficient than relying on unilateral actions by individual firms, as unilateral action is incremental and risks putting first-mover firms in competitively vulnerable positions against lagging firms who continue using less sustainable practices that may be more cost-effective in the short-term or that do not account for negative externalities on the environment.

The following are a few examples of collaborations across industries or between competing firms which may serve the broad public interest and align with long-term public policy goals in sustainable development and client change:[79]

- Agreements to phase out certain types of products, product attributes or production processes that are environmentally damaging;
- Agreements to use only certain types of new materials or production processes that are more sustainable or that reduce emissions and waste;
- Agreements to establish environment-related standards, coordinate on reducing environmentally harmful substances, or allocate or share the costs of environmental protection measures; and
- Joint ventures and strategic alliances to develop and supply more environmentally-friendly products, or products made through more environmentally-friendly processes.

Currently, firms and individuals who engage in such collaborations risk significant criminal penalties under subsection 45(1) or orders under section 90.1 or other civil provisions of the

[79] See also Dr. A. Neil Campbell and Sarah Stirling-Moffet, "Removing Competition Law Impediments To Agreements That Promote Sustainability: A Proposal For Two Simple Amendments To The Competition Act" (14 January 2022) [proposal submitted to the Office of the Honourable Howard Weston]; International Chamber of Commerce, available online: When Chilling Contributes to Warming: How Competition Policy Acts as a Barrier to Climate Action (November 2022).

Act including competition class actions for damages by private parties. Given the high stakes, firms often implement compliance programs which prohibit communications with competitors regarding commercially sensitive subjects. The effect is the Act chills not only competitor collaborations which may improve sustainability, but also the very communications about business practices to explore solutions to the challenges posed by climate change. Reforms are needed to promote and not disincentivize positive collaboration.

Notably, prior to the 2009 amendments, the Act contained an environmental defence to the conspiracy offence: "45(3) Subject to subsection (4), in a prosecution under subsection (1), the court shall not convict the accused if the conspiracy, combination, agreement or arrangement relates only to one or more of the following: … (j) measures to protect the environment."[80]

Section 45 should be amended to reintroduce a defence for good faith agreements reasonably necessary and directly related to maintain or improve sustainable growth or to protect the environment, as it is neither necessary nor appropriate to condemn such conduct with criminal sanction.

The ARD in subsection 45(4), which was introduced as part of the 2009 amendments, is not sufficient to address the problem.[81] While the ARD might save certain collaborations directed to environmental protection, it is too narrow. The very premise of some competitor collaboration may involve the short-term lessening, prevention or control production (which contravene section 45(1)(c), and as such, could not be saved by the ARD) to promote long-term sustainability. In other words, some competitor collaborations regarding the environment are not pursuant to broader or separate agreements. That could include agreements to protect the environment or promote sustainability through phasing out products, changing production processes, or setting environmental standards that govern control of production or supply.

One potential solution could be to amend the ARD to confirm that it applies where the broader or separate agreement relates to protection of the environment or sustainability (i.e., whether

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80 Subsection 45(4) said that subsection (3) did not apply if the conspiracy, combination, agreement or arrangement had lessened or was likely to lessen competition unduly in respect of one or more of prices, the quantity or quality of production, markets or customers, or channels or methods of distribution, or if the conspiracy, combination, agreement or arrangement had restricted or was likely to restrict any person from entering into or expanding a business in a trade, industry or profession.

81 The ARD exempts from section 45(1) agreements that the accused is able to demonstrate are ancillary to a broader or separate agreement that includes the same parties and is both directly related to and reasonably necessary to give effect to the objective of the broader or separate agreement, provided that the broader or separate agreement considered alone does not contravene section 45(1). The ARD makes no reference to the environment or sustainability.

or not this broader or separate agreement contravenes section 45(1)). By placing the burden of proof on the parties to the collaboration, the defence would strike an appropriate balance to encourage parties towards documenting legitimate environmental and sustainability collaborations.

The CBA Section also recommends that the Government amend the civil provisions of the Act to allow the Tribunal to take into account environmental considerations, including in section 90.1, section 79 (abuse of dominance) and the merger review provisions. Amending sections 90.1 and 79 would ensure that environmental concerns are taken into account when assessing the competitive effects of agreements or arrangements that prevent or lessen competition substantially or when assessing the potential positive environmental impacts of dominant firms' conduct. Additionally, with mergers, it may be the case that otherwise anti-competitive mergers lead to significant environmental benefits. For the same reasons as above, environmental impacts should be included as considerations in these contexts as well. We recognize that consideration of environmental issues, and the balancing of these issues against economic concerns, may not be properly situated within the scope of the Act, nor the expertise or mandate of the Bureau. As a result, it may be that the applicable Minister and not the Bureau should exercise these exemption powers, as balancing these disparate and competing issues is better considered as part of a public interest review overseen by the Government.

The Act contemplates the possibility of Ministers exempting certain agreements and mergers in certain industries on public interest grounds. This model could be adopted, with appropriate modifications, for environmental issues. For example, as noted above, for arrangements between federal transportation undertakings, the Minister of Transport undertakes a public interest review, as these arrangements raise larger issues that are outside of the scope of competition law, and which may potentially override any potential harm to competition. The Bureau, as an enforcement agency, may not be well suited to carry out public interest assessments, which require a balancing of policy considerations best left to elected officials.

V. DECEPTIVE MARKETING

A. Consider Adopting Additional Enforcement Tools Suited for Modern Forms of Commerce, Given the Nature and Ubiquity of Digital Advertising (E.G., Further Amendments to Better Define False or Misleading Conduct, Such as the 2022 Drip Pricing Amendments)

The Consultation Paper invites comments on the possibility of adopting additional enforcement tools suited for modern forms of commerce, including amendments to better define specific types of deceptive marketing.

In our view, the Act is sufficiently broad to cover the modern forms of commerce discussed in the Consultation Paper. As a result, it is unnecessary to amend the Act for this purpose. It would be preferrable for the Bureau to issue guidelines tailored to specific forms of marketing practices. These guidelines would support effective enforcement of the Act by providing valuable and much needed transparency on how the Bureau interprets and applies the existing provisions in the Act in today's ever-changing digital economy.

The Act can already suitably address each marketing practices identified in the Consultation Paper. Paragraph 74.01(1)(a) of the Act contains a general prohibition against making false or misleading representations to the public for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest. This broadly worded section applies to a wide range of marketing practices, including, without limitation, native advertising, influencer marketing, online reviews, fine print disclosure, subscription traps, free trial offers and deception for the purpose of collecting consumer data[82] – each identified in the Consultation Paper.

Currently, the Bureau has given limited guidance on the application of section 74.01 and Part VII.1 of the Act in general. Among other things, the Bureau has prepared a few short, high-level webpages,[83] as well as five volumes of its Deceptive Marketing Practices Digest. These digests offer high-level discussions for business audiences on specific discrete issues. Ensuring robust,

82 See, for example, Competition Bureau of Canada, *Misleading representations and deceptive marketing practices*.

83 See, for example, Competition Bureau of Canada, *False or Misleading Representations and Deceptive Marketing Practices*, *Misleading Representations and Deceptive Marketing practices*, and *Advertising Dos and Don'ts*.

technical guidelines for section 74.01 of the Act will accomplish many of the regulatory aims of the Government and the Bureau.

These guidelines can be an effective tool to amplify and clarify the existing provisions of the Act, including how they apply to novel marketing practices in the digital economy, such as those identified in the Consultation Paper. The Bureau has given clearer and more detailed guidance in a few specific areas of deceptive marketing, such as on ordinary price claims under subsections 74.01(2) and 74.01(3) of the Act.[84] We recommend that similar detailed guidance be given on the remainder of section 74.01.

All new guidelines should outline how the marketing practices provisions apply to the conduct in question, including how the general impression test and test for materiality would be applied in each case. New guidelines should use real-world examples to assist businesses navigate evolving marketing techniques and include a discussion of the potential penalties and consequences arising from a violation of the marketing practices provisions.

In addition to guidance on the marketing practices in the Consultation Paper, guidance should be given on the following:

> Dark Patterns: We recommend that the Bureau clearly define what deceptive marketing practices constitute a "dark commercial pattern". The Organisation for Economic Co-operation and Development (OECD) published guidance and defines dark commercial patterns as "business practices employing elements of digital choice architecture, in particular in online user interfaces, that subvert or impair consumer autonomy, decision-making or choice".[85] The US Federal Trade Commission (US FTC) also published guidance on these matters.[86]
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> Environmental Advertising: The increasing demand for environmentally conscious products has resulted in a market saturated with environmental claims. While creating a stand-alone offence for these claims is unnecessary given the broad applicability of paragraph 74.01(1)(a) of the Act, further guidance in this area is warranted.

On November 4, 2020, the Bureau archived its prior detailed guidance on environmental claims, noting:

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84 See for example, Competition Bureau of Canada, *Ordinary Price Claims* (16 October 2009).

85 Examples of dark commercial patterns include obstruction (such as making it hard to cancel a service), sneaking (such as adding non-optional charges to a transaction at its final stage), and urgency (such as using countdown timer indicating the expiry of a deal). Dark Commercial Patterns, OECD Digital Economy Papers, October 2022, No. 336.

86 Federal Trade Commission, *Enforcement Policy Statement Regarding Negative Option Marketing*, November 4, 2021.

> The Guide may not reflect the Bureau's current policies or practices and does not reflect the latest standards and evolving environmental concerns. The guide will remain available for reference, research and recordkeeping purposes, but it will not be altered or updated as of the date of archiving.

Since then, the Bureau has given only limited guidance on environmental claims.[87] The CBA Section recommends the Bureau issue updated and comprehensive guidance as soon as possible to explain its approach to environmental claims under paragraph 74.01(1)(a) of the Act. Extensive environmental claims guidance has been developed in many jurisdictions, including the US [88] and the UK.[89]

We also recommend clarifying the Act. Our proposed legislative changes will give clarity and consistency to companies and advertisers and, for sections 74.01(3) and 74.01(4), the proposed changes would make the sections consistent with the Bureau's existing guidance:

- Amendments to section 74.02 of the Act: Many global regulators have issued guidelines on influencer marketing. Section 74.02 of the Act is a unique provision which expressly addresses testimonials. However, it is imprecisely worded and would benefit from clearer language as well as additional discussion of the Bureau's current enforcement practices on influencer marketing and native advertising (see, for example, the Bureau's December 2019 press release about 100 warning letters issued to influencers and the companies that use them).[90]

- Amendments to subsections 74.01(3) and 74.01(4) of Act: The CBA Section recommends that these be amended by replacing the word "and" with "or" between sub-paragraphs (a) and (b) of each section. It has long been understood as a practical matter – and the Bureau's own guidelines confirm – that advertisers need to meet either the volume test OR the time test to substantiate a regular/ordinary price, not both.

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87 See, for instance, Competition Bureau of Canada, *Environmental Claims and Greenwashing* (December 2, 2021), *Be on the Lookout for Greenwashing*, (January 26, 2022).

88 Federal Trade Commission, Code of Federal Regulations, Part 260 – *Guides for the Use of Environmental Marketing Claims*, 77 FR 62124, October 11, 2012.

89 Competition & Markets Authority, *CMA Guidance on environmental claims on goods and services*, September 20 2021.

90 Competition Bureau Canada, *Influencer marketing: businesses and influencers must be transparent when advertising on social media*, December 19, 2019.

VI. ADMINISTRATION AND ENFORCEMENT OF THE ACT

A. Making the Administration of the Law and Enforcement Before the Tribunal or Courts More Efficient and Responsive (Public or Private), Without Unreasonably Compromising Procedural Fairness.

1. Expansion of bureau's powers would need significant institutional redesign of bureau

The Consultation Paper raises the possibility of expanding the Bureau's powers on information-collection and decision-making authority and contrasts the Bureau's existing enforcement powers to its international counterparts, such as the US FTC and the European Commission (EC). While international convergence on competition enforcement is laudable, there are significant differences in institutional design between the Bureau and other competition agencies (including the US FTC and the EC). These institutional design differences inform the enforcement powers conferred to these agencies.

The US FTC and EC institutional design follows an integrated agency model, where the agency investigates, prosecutes and adjudicates internally at first instance.[91] In contrast, the Bureau, like the US Department of Justice (US DOJ), is institutionally designed as a law enforcement agency operating within an adversarial judicial process.

As a law enforcement agency, the Bureau investigates potentially anti-competitive conduct (colloquially, operating as the "competition police"). For civil matters, the Bureau has a dual role: investigator and prosecutor before the Tribunal or the civil courts. For criminal matters, the Bureau only operates as an investigator that may make recommendations to the Public Prosecution Service of Canada (PPSC). For criminal matters, the PPSC has the jurisdiction to lay changes and prosecute competition offences before the courts.

The institutional context must be recognized when considering whether to expand the Bureau's already significant powers. Law enforcement agencies in adversarial systems, like the RCMP in the Canadian criminal justice system, generally do not have the ability to compel information without prior judicial authorization and do not have decision-making/adjudicative powers vis-à-vis the target of an investigation.

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91 The Design of Competition Law Institutions, Global Norms, Local Choices, Edited by Eleanor M. Fox and Michael J. Trebilcock (United Kingdom, Oxford University Press, 2013) at pages 335 and 391.

Expanding the Bureau's first-instance decision-making powers should involve significant changes to current institutional design to ensure appropriate checks on the exercise of these powers, such as the creation of an integrated agency model.

An integrated agency model is a model of regulatory governance where an agency is responsible for both investigative and adjudicative functions in a particular regulatory area. For example, the US FTC has an integrated model, meaning that it is responsible for both investigating potential violations of competition and consumer protection laws, as well as adjudicating cases and making final determinations.

The US FTC's Bureau of Competition is responsible for investigating potential antitrust violations, while the Bureau of Consumer Protection is responsible for investigating potential consumer protection violations. The agency's Administrative Law Judges are responsible for conducting hearings and making initial determinations in cases brought by the agency, while the Commission itself (composed of five commissioners appointed by the President and confirmed by the Senate), is responsible for making final determinations.

We believe that any expansion of the Bureau's decision-making powers requires careful examination of the Bureau's institutional design. Significant changes require proper standalone consultation with relevant experts (including former Commissioners) to ensure adequate checks and balances and a due process.

2. Information-collection should involve prior judicial authorization

The Consultation Paper raises the possibility of simplifying the Bureau's information-collection process and raises the possibility of allowing the Bureau to compel and collect information without the need for prior judicial authorization.[92]

The Bureau's ability to administer and enforce the Act depends, in part, on its ability to gather evidence. Ensuring the Bureau can effectively gather evidence is critical to its ability to fulfil its enforcement mandate under the Act. That said, the Bureau's evidence-gathering powers – particularly any enhancement of these powers – must be balanced against the due process rights of persons from whom evidence is compelled, particularly since complying with Bureau production orders is frequently time-intensive and costly.

[92] As noted in the Consultation Paper, "the Bureau [currently] must seek authorization to compel any form of information other than a supplementary information request in merger review."

This is particularly so when information is required from third-party market participants who are not the subject of an investigation. This balance is best achieved through the existing requirement that evidence-gathering powers be subject to prior judicial authorization. Prior judicial authorization reinforces the Bureau's role as a law enforcement agency, which is akin to other law enforcement agencies (e.g., RCMP) that require judicial authorization to obtain search warrants.

The Bureau already has wide-reaching evidence-gathering powers, including the production or seizing of records and things,[93] production of written returns of information (written answers to questions, under oath),[94] compelled oral testimony,[95] search warrants,[96] and wiretaps.[97] It is now common for the Bureau to use section 11 orders to compel oral testimony and the production of records, data and written returns in inquires arising under the reviewable practices provisions, such as the abuse of dominance and merger provisions, from both the parties subject to such inquiries and third-party market participants.

The test the Bureau must satisfy to obtain a section 11 court order is not onerous. The Bureau need only satisfy a two-part test: (i) an inquiry is made under section 10 of the Act; and (ii) the person against whom an order is sought has or is likely to have information relevant to the inquiry made under section 10 of the Act. The Bureau has never failed to satisfy these elements on an application for a section 11 order.

A judge has the residual discretion to grant a section 11 order even when the two requirements are met.[98] This discretion may be exercised where a judge determines that the inquiry was not commenced in good faith, that the section 11 application constitutes an abuse of process or that the information sought is excessive, disproportionate or unnecessarily burdensome.[99]

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93 Section 11(1)(b), *Competition Act.*

94 Section 11(1)(c), *Competition Act*.

95 Section 11(1)(a), *Competition Act*.

96 Section 15, *Competition Act*.

97 Part VI, *Criminal Code*.

98 *Canada (Commissioner of Competition) v Air Canada* (2000), 8 CPR (4th) 372 at paras 2 and 31 (FCTD); *Canada (Commissioner of Competition) v Pearson Canada Inc*, 2014 FC 376 (CanLII), [2015] 3 FCR 3 at para 39 and appendix 1. The court's power is permissive in nature, providing that "the judge may order." See also *Interpretation Act*, RSC 1985, c I-21, s 11.

99 *Canada (Commissioner of Competition) v Pearson Canada Inc*, 2014 FC 376 (CanLII), [2015] 3 FCR 3 at paras 39-42, 44; *Canada (National Revenue) v RBC Life Insurance Company*, 2013 FCA 50 at para 36; *Canada (Commissioner of Competition) v Labatt Brewing Co*, 2008 FC 59 at paras 50-52.

Absent these rare circumstances, the Bureau's requests for judicial authorization are granted. Therefore, we question the necessity for the Bureau to have evidence-gathering powers that do not require prior judicial authorization. The ability of a court to determine that a section 11 order contains excessive, disproportionate or unnecessarily burdensome requirements is an important incentive for the Bureau to design orders that avoid such inappropriate elements.

If the Government decides that the Bureau should have expanded evidence-gathering powers without the need for prior judicial authorization, concerns about potential overreach, proportionality, irrelevancy and abuse of investigative powers would need to be addressed in some other manner. For example, the parties subjected to these powers could be given the ability to obtain an expeditious and effective post-issuance review of the Bureau's exercise of its power by the Tribunal or a court, including the scope of records, data and other information sought by the Bureau. The prospect of review, even if post-issuance, is necessary to ensure due process and that the Bureau's information demands are proportional and reasonable.

Other international frameworks offer helpful guidance. For example, in the US the FTC can issue civil investigative demands (CIDs) for investigations of possible antitrust violations. The recipient of a CID can seek to quash or limit the CID by petitioning the FTC through a formal administrative process.[100] The US DOJ may also issue CIDs pursuant to the *Antitrust Civil Process Act* (ACPA). After the USDOJ issues a CID, the recipient can contact the US DOJ and negotiate compliance with the CID. The recipient can also petition a federal court to modify or set aside the CID. The recipient can challenge the CID on the grounds that it does not comply with the ACPA or that it violates a constitutional or legal right of the recipient.[101]

In addition, the Bureau should, as it currently does for section 11 orders, commit to engage in both a pre-application and post-service dialogue with respondents to any potential expanded evidence-gathering powers.[102]

100 Federal Trade Commission, *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, (revised May 2021).

101 15 USC 34 § 1314.

102 Competition Bureau of Canada, *Review of s. 11 of the Competition Act* (August 12, 2008).

3. Bureau's power to authorize or prevent forms of conduct without resort to the courts should not be expanded

We appreciate that giving the Bureau the power to authorize or prevent forms of conduct without commencing litigation would permit more expeditious action by the Bureau. However, if granted, these powers would involve an institutional redesign of the Bureau.

As noted above, the Bureau is institutionally designed as a law enforcement agency operating in an adversarial judicial process. Affording the Bureau decision-making authority found in other institutional frameworks, such as the integrated agency models used by the US FTC and the EC, is fundamentally inconsistent with the Bureau's current institutional framework. Any significant expansion of the Bureau's powers would have to involve substantial institutional overhaul, such as the creation of an integrated agency model.

4. Private rights of actions for damage suffered

The Consultation Paper raises the possibility of introducing a more robust framework for private enforcement, encompassing either increased "private access" to the Tribunal or increased "private rights of action" to provincial and federal courts for damages, including damages arising from conduct contravening the civil provisions in:

- Part VIII of the Act (Rule of Reason Provisions)[103], which include provisions on abuse of dominance, refusal to deal and exclusive dealing, tied selling and market restrictions and civil competitor collaborations; and
- Part VII.1 of the Act (Deceptive Marketing Provisions), which include civil provisions on false or misleading representations, performance claims and ordinary price claims.

Contextually, the Act has always provided for dual public and private enforcement, focused on criminal behaviour. Public enforcement has traditionally focused on deterrence. In contrast, private enforcement has traditionally focused on corrective justice, empowering persons who have suffered loss or damage as a result of anti-competitive conduct to seek legal redress. The impact of private enforcement, however, transcends corrective justice. It complements public enforcement by extending to the broader public interest of deterrence.[104] Given the scarcity of public resources that can be devoted to public enforcement, the use of private resources to

103 A "rule of reason" analysis in this context involves a consideration of the competitive effects of the impugned conduct.

104 *General Motors of Canada Ltd v City National Leasing Ltd*, [1989] 1 SCR 641; *Shah v LG Chem, Ltd*, 2017 ONSC 2586 at para 22

enforce anti-competitive conduct has been viewed as attractive in respect of criminal behaviour.

The views of CBA Section members vary considerably on expanding the ability for private parties to seek damages in the courts.

On one hand, allowing private parties to seek damages for conduct that contravenes the civil provisions (currently permitted for conduct contravening the criminal provisions) is seen as potentially supplementing government enforcement in resource-intensive matters across a broader range of conduct as well as acting as a further deterrent of anti-competitive behaviour. It is also seen as granting private parties who have suffered loss or damage as a result of anti-competitive conduct a right to seek compensation that is currently not available for any non-criminal provision of the Act. In this regard, some note that Canada's current approach under the Act is not in line with international counterparts, such as the US, EU, UK, Australia and China, which permit private parties to bring private rights of action for damages for civil matters.[105]

On the other hand, some CBA Section members are concerned about the potential for unmeritorious strategic and frivolous litigation from private parties who, unlike the Bureau, do not have an obligation to act in the public interest. This concern is particularly acute for unilateral conduct under Part VIII of the Act (the Rule of Reason Provisions). Unlike criminal conduct which is per se illegal under the Act, unilateral conduct under Part VIII of the Act is not inherently anti-competitive. Conceptually, such unilateral conduct is presumed to be ordinary, lawful business practices subject to a competitive effects analysis. Only occasionally will such unilateral conduct be considered anti-competitive in certain circumstances (e.g., where a major supplier or dominant firm engages in behaviour that excludes its competitors).

In fact, conduct under the Rule of Reason Provisions is frequently considered pro-competitive and not inherently harmful. It has historically been left for the Bureau – which has the expertise and is presumed to be acting in the public interest – to enforce these provisions. On this basis, some note that private rights of action to recover damages should not be expanded to the Rule of Reason Provisions of the Act as such claims could deter legitimate neutral or pro-competitive conduct. Concerns have also been raised about the challenges of allowing private actions on complex competitive effects issues (as contrasted with per se illegal cartel conduct)

[105] When discussing civil matters in this context, we are not including mergers, where it is not suggested that any private rights of action be introduced.

before generalist provincial courts that do not generally have the deep economic and business expertise of the Tribunal.

Among those concerned about expanding private rights of action for civil matters, there is less concern with expanding private rights of action for conduct that contravenes the Deceptive Marketing Provisions. This is because the analytical framework for the Deceptive Marketing Provisions resembles a per se analysis akin to an analysis under the criminal provisions in the Act, in that there is no requirement to prove anti-competitive effects or that any consumer was actually misled; the harm is deemed to arise from the conduct itself (there is already a private right of action to recover damages under the criminal misleading advertising offence.)[106]

If the Government decides that private rights of action to recover damages should be introduced for the Deceptive Marketing Provisions or the Rule of Reason Provisions, effective judicial or procedural safeguards would need to be implemented to mitigate against potential abuse of the private enforcement process. For example, consideration should be given to imposing the same leave requirement before a claim for damages could be brought that is currently in place for private applications before the Tribunal for those Rule of Reason Provisions where private rights of action are currently permitted.

B. Pursuing a Reasonable Path with Respect to the Collection of Information Outside of the Enforcement Context, Such as for the Purpose of Market Studies, Taking Both Public Value and Private Burden Into Account

1. Information collection outside the enforcement context should be subject to judicial oversight

If the Government decides that the Bureau should be permitted to compel the production of information outside the enforcement context, such as for market studies, the Bureau's powers should be balanced against the due process rights of those from whom information is compelled. In addition, because these orders could be intrusive, time-intensive and costly (in the range of hundreds of thousands to seven figures) for parties to comply with, they should be subject to prior judicial authorization on their scope, relevance, proportionality and timelines. Further, for similar reasons discussed above, parties subject to these orders should have the opportunity to initiate a post-issuance review by the Tribunal or a court.

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106 Sections 36 and 52, *Competition Act.*

Prior judicial authorization would mitigate against concerns over overreach, proportionality and potential abuse of investigative powers, including use of a market study to gather evidence for enforcement of the Act without following the requirements for inquiries under the Act.[107] Similarly, the right to a post-issuance review would afford concerned parties the opportunity, for example, to ensure that the scope of the Bureau's market study mandate is not exceeded and information demands are relevant and proportional.

107 The Restrictive Trade Practices Commission, established under Canada's prior competition law, had the power to conduct market studies. For a discussion of the concerns that led to abolition of the market study power under the Act, see J. Krane, M. Opashinov and W. Wu, *Vigorous enforcement, not studies, are what Canada's competition laws need*, National Post, April 13, 2021.

APPENDIX A - PROPOSALS FOR AMENDMENT TO THE EFFICIENCIES DEFENCE

A. Proposal 1: A Consumer Welfare Standard Restricting Efficiencies to a Factor in Merger Revie

The Bureau has proposed limiting efficiencies to "a factor that may be considered in assessing a merger", consistent with the so-called "consumer welfare standard" of Canada's major trading partners that do not allow mergers resulting in net transfers from buyers to sellers.[108] For the reasons discussed in this and prior CBA submissions, we are not convinced that this change is necessary. In addition, we note three potential drawbacks that should be carefully considered before adopting this approach:

1. It would be inconsistent with the recognition of efficiencies as the paramount goal of the merger provisions of the Act.[109]
2. It would inherently disregard the long-term productivity benefits from fixed cost savings. While variable costs, not fixed costs, drive pricing decisions that affect consumers,[110] fixed cost savings are, nevertheless, an important contributor to the overall productivity of the Canadian economy and the welfare of all Canadians.
3. It would inherently ignore gains to the total economic welfare and productivity of the Canadian economy from variable cost savings that do not directly increase consumer welfare.[111] However, such benefits have the potential to significantly outweigh the anti-competitive effects from a merger.[112]
4. If not implemented correctly, reducing efficiencies to simply a factor in a merger review could inadvertently disregard them entirely under Canadian law. The test under section 92 of the Act focuses on whether a merger will give parties increased market power, which is the "ability" to raise prices (or adversely affect quality or

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108 Competition Bureau, Examining the Canadian Competition Act in the Digital Era (February 8, 2022).

109 See, for example, Tervita Corp. v. Canada (Commissioner of Competition), 2015 SCC 3 at para 2, Canada (Commissioner of Competition) v. Superior Propane Inc., [2001] 3 F.C. 185 at para. 110 and Canada (Commissioner of Competition) v Superior Propane Inc., 2002 Comp. Trib. 16 at para 80 and 215, aff'd 2003 FCA No. 53.

110 Brian Facey and Cassandra Brown, Competition and Antitrust Laws in Canada: Mergers, Joint Ventures and Competitor Collaborations (2017) at 287-289.

111 See, for example, CBA Competition Law Section, Practical Guide to Efficiencies Analysis in Merger Reviews (May 2018) at 5 (with the light blue and light green areas of the chart denoting increases in economic surplus from variable cost savings that would be ignored under a consumer welfare standard).

112 M. Trebilcock et al., The Law and Economics of Canadian Competition Policy (2002) at 151.

other dimensions of competition).[113] While efficiencies may generate strong economic incentives to lower prices (or improve quality), they generally do not affect parties' market power or consequent "ability" to raise prices. Simply adding efficiencies as a factor under section 93 of the Act would create an internal inconsistency within section 93.

If the Canadian government nevertheless wishes to limit efficiencies to a factor in merger review, we recommend doing so through careful drafting that considers the implications of existing jurisprudence by:

- Keeping efficiencies in a separate, standalone provision from section 92 and section 93 of the Act. As explained above, efficiencies generally do not affect parties' market power or consequent "ability" to raise prices, which is the focus of section 92 (and related factors in section 93). A standalone provision would be necessary in our view to properly set out how efficiencies are to be assessed in merger review in connection with the section 92 framework.
- Adopting a clear and predictable consumer welfare standard for the treatment of efficiencies. Clarity and predictability are important for parties who are planning and negotiating mergers. In addition, it is important to clearly set out how efficiencies are to be taken into account in connection with the existing jurisprudence on section 92 of the Act. This could be done by making it clear that there shall be no substantial prevention or lessening of competition under section 92 where efficiency gains are likely to offset harm to consumers (or, in a monopsony context, producers).

B. Proposal 2: Limiting the Commissioner's Burden of Proof Relating to Section 96 of the Act

Some commentators have proposed amendments to the Act that would limit the Commissioner's burden of proof under section 96. Some propose an amendment that the Commissioner need not rely on quantitative evidence under section 96 to establish a probable substantial lessening or prevention of competition from a merger.[114] Others propose an amendment that the merging parties should bear the burden of proving every element of section 96, including the quantification of any anti-competitive effects.[115] Both proposals are a reaction to the Supreme Court of Canada decision in *Tervita*, which gave no weight to any anti-

113 *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3 at paras 44-45.

114 Edward M. Iacobucci, Examining the Canadian Competition Act in the Digital Era (September 27, 2021) at 33.

115 Calvin Goldman et. al, Proposed Revision of the Efficiency Defence for Mergers in Canada's Competition Act (May 4, 2022).

competitive effects under section 96 because the Commissioner had failed to quantify evidence that was quantifiable.[116]

The CBA Section has previously set out its view that removing a requirement for the Commissioner to quantify anti-competitive effects "risks making the application of the Efficiencies Defence less objective, and creates uncertainty for merging parties when determining the case they must meet."[117] It is not unreasonable to require the Bureau to put forward objective evidence of alleged anti-competitive harm (which it can and regularly does quantify for merger cases) if it is to ask the Tribunal for the intrusive remedy of blocking or unwinding all or part of a merger.[118]

It is also unclear how it would work in practice to require merging parties to quantify anti-competitive effects in the first instance. The Bureau has extensive powers to gather information and data from third parties to quantify anti-competitive effects, but merging parties have no such ability. Moreover, the Bureau is incentivized to fully quantify any anti-competitive effects, but merging parties are not.

If the Canadian government nevertheless wishes to limit the Commissioner's burden of proof under section 96, we recommend adding a subparagraph under section 96 providing that anti-competitive effects are not to be given zero weight under section 96 solely on the basis that they have not been quantified. This would effectively limit the Commissioner's burden while also leaving scope for the quantification of anti-competitive effects to be considered (which should be encouraged).

116 *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3 at paras 128-140.

117 CBA Section submission Examining the Canadian Competition Act in the Digital Era (January 2022) at 4.

118 *Ibid.*