THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

April 28, 2021

Via email: INDU@parl.gc.ca

Sherry Romanado, M.P.
Chair, Standing Committee on Industry, Science and Technology
Sixth Floor, 131 Queen Street
House of Commons
Ottawa, ON K1A 0A6

Dear Ms. Romanado:

Re: Summary of CBA Views on Potential Competition Act Amendments

The Canadian Bar Association Competition Law and Foreign Investment Review Section (CBA Section) is pleased to comment on possible changes to the Competition Act (Act) as part of the Standing Committee on Industry, Science and Technology's study on competitiveness in Canada.

The Canadian Bar Association is a national association of 36,000 lawyers, Québec notaries, law teachers and students, with a mandate to promote improvements in the law and the administration of justice. The CBA Section promotes a greater awareness and understanding of legal and policy issues relating to competition law and foreign investment review. We meet regularly with the Competition Bureau and other government officials to discuss matters of mutual and ongoing interest.

Competitiveness in Canada Study

We have been following the Committee's study and witness testimony on various aspects of the Act. As the Committee completes its study, and as many witnesses have pointed to the experience of other jurisdictions, it is important to keep in mind that Canada has one of the most sophisticated competition law enforcement regimes in the world.

The Act applies generally to many industries and sectors of Canada's economy, and works well and without controversy in an overwhelming majority of cases. As such, changes to the Act premised on a particular event or issue can have significant unintended consequences. The Act is also designed to reflect Canadian-specific economic factors and policy objectives. A rush to amend the Act without proper deliberation, evidence and foresight, or an over-reliance on a mirroring approach to other jurisdictions (which may have distinct public policy objectives) risks undermining these objectives and creating unintended and potentially detrimental impacts.

Against this backdrop, this letter summarizes the CBA Section's position on a few issues raised during the Committee's recent hearings: enforcement regime in general, efficiencies, digital

economy, market studies, penalties and fines, and other elements. This is not intended to be a complete list of issues raised, or for which the CBA Section is able to offer constructive input. We would welcome a further opportunity to share our thoughts on any other topic.

Competition Act and Merger Enforcement

Competition law enforcement in Canada is thorough, balanced works well and without controversy in the vast majority of cases. The Act was extensively modernized in 2009, after a comprehensive review of Canada's competitiveness in the *Compete to Win* Report.[1] The report considered 155 submissions by a wide range of stakeholders and contained 65 recommendations.

With respect to mergers and acquisitions, the Act sets mandatory notification and review of all large M&A transactions. For complex mergers, the review is intense and the mandatory waiting period is generally several months before closing. The Bureau typically compels production of tens of thousands of internal company documents and data going back several years, which are reviewed by a large team of case officers, economists and lawyers to assess whether a transaction should be blocked or approved, either conditionally or unconditionally.

Aside from merger reviews, the Bureau has a range of tools for effective enforcement and compliance with the Act. These tools include formal and informal investigation, seeking authorization from a court on an *ex parte* basis to compel document production and testimony, and even powers for search-and-seizure investigations on companies whose conduct may be in question. The Bureau has a well-established history of promoting competition in accordance with the Act's objectives, working with other federal and provincial agencies and coordinating with international counterparts to achieve the objectives of the Act.

Disputes between businesses (including merging parties) and the Bureau are resolved by a specialized body, the Canadian Competition Tribunal. The Tribunal is an independent adjudicative body with special expertise in economics, business, and law. Its case are heard by federal court judges and lay members. The Tribunal ensures fairness and due process, in keeping with the objective of resolving disputes in a timely fashion and in accordance with the Act.

The Canadian competition law regime is comprehensive and highly sophisticated. The 2021 Federal Budget reinforces the regime by significantly increasing resources for the Bureau over the next five years.[2] In our view, it would not be prudent to rush to amend Canada's competition laws given the Bureau's ongoing work and the recently increased resources. The CBA Section suggests that an in-depth study would be appropriate only after the Bureau has been able to utilize its new resources and found that challenges in competition law enforcement remain.

Efficiencies

Efficiencies lead to significant benefits for the Canadian economy by generating economies of scale, higher productivity and enhanced innovation. For these reasons, economic efficiency is a primary objective of the Act.[3]

The efficiencies defences in sections 90.1 and 96 of the Act allow for a balanced approach where certain agreements or mergers can be assessed on their own merits to determine if gains in

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

2 Canada, Budget 2021: A Recovery Plan for Jobs, Growth, and Resilience (19 April 2021) at "4.4: A Fair and Competitive Marketplace."

3 *Competition Act*, RSC 1985, c C-34, s 1.1 (purpose clause).

productivity and innovation outweigh the potential costs from reduced competition. The CBA Section believes that the efficiencies defence is "appropriate for Canada's economy [and] is illustrative of the importance of economic efficiencies as an underpinning of the *Competition Act*."[4] It is short-sighted to characterize the defence as favouring businesses over consumers or restricting the Bureau's ability to protect consumers. Efficiencies-based agreements and mergers increase productivity and innovation, which benefits the Canadian economy and consumers. One of the core mandates of the Minister of Innovation, Science and Industry is to support innovative ecosystems to help businesses scale-up.[5]

The merits of the defence were discussed in the *Compete to Win* Report when Parliament last considered revising the Act in 2009. Notably, industry consolidation and certain levels of concentration were considered inevitable in Canada's economy and, absent insurmountable barriers to entry, were not incompatible with vigorous competition. Canada's competition laws aim to prevent anti-competitive conduct rather than industry consolidation itself.[6] Along these lines, there is "no compelling need to change" the efficiencies defence and "the achievements of efficiencies through mergers is sufficiently important for the Canadian economy" that the Bureau should place a greater emphasis on efficiencies when reviewing mergers.[7] Ultimately, the efficiencies defence was not only retained but expanded.

Recent portrayals of the efficiencies defence as a widely-used, easily accessible tool favouring merging parties are inaccurate and incomplete. Of the thousands of mergers that have taken place under the Act, only a small number have been cleared in reliance on the efficiencies defence.[8] Efficiencies claims are rigorously analyzed by the Bureau and are difficult to prove, with the benefits of a merger (e.g., innovation and productivity) difficult to quantify or assess at the start of the transaction. Finally, if there is any question about whether the anticompetitive effects outweigh the efficiencies, the Bureau has recourse to the independent Tribunal to determine if a merger should proceed.

In today's highly competitive global economy, it seems counterintuitive to question legislation aimed at rewarding efficiency, productivity and innovation. As such, the CBA Section is not in favour of amendments that would limit the application of the efficiencies defences or impose a heavier burden on parties seeking to assert the defences.

Digital Economy

Policy makers and government officials in virtually every advanced economy – not just Canada – are grappling with the difficult challenges of the digital economy and the ubiquity of data collecting devices, intensified by our increasing reliance on the internet in our everyday lives.

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4 CBA Section submission on Competition Policy Review Panel Consultation Paper at p. 7.

5 Canada, Office of the Prime Minister, "Minister of Innovation, Science and Industry Mandate Letter" (13 December 2019); Canada, Office of the Prime Minister, "Minister of Innovation, Science and Industry Supplementary Mandate Letter" (15 January 2021).

6 Competition Policy Review Panel, *supra* note 1 at 54.

7 *Ibid* at 56.

8 See Canadian National Railway/H&R Transport (2019); Superior/CanWest (2017); Superior/Canexus (2016); Chemtrade/Canexus (2016); First Air/Calm Air (2015); Tervita/Complete Environmental (2011); Superior Propane/ICG Propane (1998).

Canadian competition policy is not playing catch-up. The digital economy is a centerpiece of the Bureau's Strategic Vision and the Commissioner of Competition has described the Bureau as "at the forefront of the digital economy."[9] As recently as 2018, the Bureau has studied the suitability of the Act for this new digital economy and found that "there is little evidence that a new approach to competition policy is needed."[10] The Bureau is currently reviewing the Act at the request of the Minister of Innovation, Science and Industry to determine if the Act is fit for purpose in the digital economy.[11] The Bureau is also actively adapting to the digital economy - it appointed a Chief Digital Enforcement Officer in 2019 and hosted a Digital Enforcement Summit in 2020.

Concerns about the digital economy are in many ways related to consumers' privacy rights, not competition law. Concerns about the collection, use and dissemination of personal information and data by large technology companies are being addressed in the proposed reforms to Canada's privacy law in Bill C-11, the *Digital Charter Implementation Act*.

These issues are complex and often test the boundaries of competition law and policy. Careful, thoughtful study is warranted to ensure that proposed changes do not inadvertently stymie innovation and competitive behaviour.

Market Studies

The CBA Section believes that the Bureau should not be given increased powers to study markets where there is no indication that the Act has been contravened. The Bureau is a law enforcement agency, and an emphasis on market studies may draw its resources away from enforcement efforts. Market studies also impose significant burdens on parties that have not contravened the Act and may lead to significant conflicts and due process issues if they are used as "fishing expeditions" to gather information on potential contraventions of the Act.[12]

Penalties and Fines

The CBA Section does not support the imposition of administrative monetary penalties for reviewable practices.[13] The Act's current approach to reviewable practices was adopted to foster aggressive, pro-consumer competitive conduct, as reviewable practices are presumptively lawful and prohibited only where it is established that they are likely to have a significant anti-competitive effect.[14] Moreover, after-the-fact sanctions can have a chilling effect because many Canadian businesses will err on the side of caution and not engage in otherwise pro-competitive, innovative

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9 Canada, Competition Bureau, "Competition in the digital age: The Competition Bureau's Strategic Vision for 2020-2024" (11 February 2020).

10 Canada, Competition Bureau, "Big data and innovation: key themes for competition policy in Canada" (19 February 2018).

11 Canada, Innovation, Science and Economic Development, "Letter from Minister of Innovation, Science and Economic Development to the Commissioner of Competition" (21 May 2019).

12 CBA Section submission on Market Studies Information Bulletin; CBA Section submission on Bill C-425 (Competition Act amendments); CBA Section submission on Competition Policy Review Panel Consultation Paper at 5; CBA Section submission on Bureau Discussion Paper on Options for Amending the Competition Act at 69-78.

13 CBA Section Submission on Bill C-23 (Competition Act Amendments) at 6.

14 CBA Section submission on Competition Policy Review Panel Consultation Paper at pp. 5-6, CBA Section submission on Bureau Discussion Paper on Options for Amending the Competition Act at pp. 10-13, CBA Section submission on Bill C-23 (Competition Act Amendments) at pp. 6-7. CBA Section submissions on Bill C-41 (Proposed Amendments to the Competition Act) at p. 2 and CBA Section submission on C-19 (Competition Act Amendments) at pp. 4-7.

conduct that could possibly be viewed as risky. We believe reviewable conduct is best addressed through injunctive remedies and remedial orders.

Other Aspects of the Act under Consideration

Several other aspects of the Act discussed during the Committee's hearings were considered in the *Compete to Win* Report. These include: the limitation period for the Bureau to contest completed mergers, private litigation for the Act's abuse of dominance provisions, penalties for anti-competitive conduct, and wage-fixing agreements. The Competition Policy Review Panel and Parliament considered these aspects of the Act and either amended them or concluded change was not necessary or desirable.

- *Limitation periods.* The limitation period for challenging completed mergers was reduced from three years to one to reflect international norms and to "provide more certainty for the Canadian business community and international investors."[15]

- *Private Actions for Abuse of Dominance.* Both private actions for abuse of dominance and empowering the Competition Tribunal to award damages were dismissed on the basis that these changes would promote "unmeritorious litigation between competitors that would not enhance the competitiveness of Canadian industry or markets."[16]

- *Buy-Side Agreements.* Buy-side agreements (including those covering wages) were decriminalized because "criminal law is too blunt an instrument to deal with agreements between competitors that do not fall into the 'hardcore' cartel category"[17] and the Act should only sanction such agreements where they harm competition, which is not always the case.

These concerns continue to be relevant today, and, to the extent changes to these aspects of the Act are considered, the CBA Section recommends a thorough canvassing of all relevant factors.

The CBA Section appreciates the opportunity to contribute to the Committee's deliberations on potential changes to the Act and looks forward to contributing to this important area of public policy in whatever manner is constructive.

Yours truly,

(original letter signed by Marc-Andre O'Rourke for Navin Joneja)

Navin Joneja
Chair, Competition Law and Foreign Investment Review Section

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15 Competition Policy Review Panel, *supra* note 1 at 57.

16 *Ibid* at 59.

17 *Ibid* at 59.