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May 28, 2021

Via Email

The Hon. Sherry Romanado
Standing Committee on Industry, Science and Technology
House of Commons
131 Queen Street
Ottawa ON K1A 0A6

Attention: Committee Clerk

Dear Madam Chair and Honourable Committee Members:

Re: Competitiveness in Canada – Competition Act Considerations

We are writing to the Standing Committee on Industry, Science and Technology (the "**Committee**") in connection with its *Competitiveness in Canada* study, and in particular in respect of its consideration of whether amendments to the *Competition Act* (the "**Act**") are needed. We welcome the opportunity to provide our views on this very important subject. Together, we have decades of experience advising clients on the application of the Act to their commercial agreements, conduct and mergers.[1] Through these experiences, we have identified, first hand, a number of areas where the Act is in need of amendment and modernization. While we are members of one of Canada's leading competition practices, we are submitting this letter to the Committee in our personal capacity as interested and concerned Canadian residents.[2] The views expressed in this letter are neither necessarily those of our law firm nor our clients.

Simply stated, the civil provisions of the Act, namely Part VIII and Part IX – which govern, among other things, competitor collaborations, vertical agreements, unilateral and joint conduct and mergers – are no longer fit to achieve the stated purposes of the Act.[3] Our concerns and our suggestions for reform of the Act fall within the following four categories:

- *Structural*: Changes to the structure of Part VIII to ensure that the Act targets the full spectrum of anti-competitive conduct and communicates a clear expectation of pro-competitive behaviour.

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[1] The authors' credentials can be found in Appendix A to this submission.

[2] The authors would like to acknowledge and thank our colleague, Gideon Kwinter, an associate in the Competition/Antitrust & Foreign Investment Group of McCarthy Tétrault LLP, for his invaluable assistance with the preparation of this letter.

[3] That is, "to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices." *See Competition Act* at section 1.1.

- *Detection*: Enhanced detection capabilities to increase the likelihood that the Competition Bureau (the "**Bureau**") will become aware of anti-competitive agreements, conduct and mergers – which in turn will lead to a more efficient allocation of Bureau resources and facilitate better and more comprehensive enforcement of the Act.

- *Enhanced Risks Associated with Non-Compliance:* More meaningful consequences for non-compliance with Part VIII are necessary to deter anti-competitive conduct.

- *Enforcement and Administration:* Expanded enforcement rights and greater transparency will facilitate more effective administration of Part VIII of the Act.

Our proposals for reform in each of these areas are detailed below and summarized in Appendix B to this submission.

We encourage the Committee to take a critical eye to avenues for competition law reform, as a comprehensive and effectively enforced Act is in the best interests of all stakeholders, including consumers and the business community as a whole.

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1. Stronger and Simplified Part VIII of the Act

Part VIII of the Act has at least two critical shortcomings.

First, by design, Part VIII does not prohibit anti-competitive conduct. Rather, all conduct covered under Part VIII, even conduct that is anti-competitive, is permissible unless and until an application is made to the Competition Tribunal (the "**Tribunal**") and the Tribunal, after determining that the conduct is anti-competitive within the meaning of the relevant provision, issues an order prohibiting the conduct (or ordering other permitted relief). While Part VIII must be calibrated to avoid a chilling effect on acceptable competitive conduct, the current structure of Part VIII goes too far.

Statutory language is instrumental in establishing community norms. A stronger Part VIII – one that explicitly prohibits engaging in anti-competitive agreements, conduct and mergers – will communicate Canada's commitment to competition law enforcement and better incentivize a competition compliance culture within the Canadian business community.[4] Furthermore, prohibiting anti-competitive conduct is consistent with amendments we further propose below for enhancing the possible consequences for engaging in conduct that is contrary to Part VIII. It is critical that the pith and substance of Part VIII set a clear expectation for competitive conduct in compliance with the Act.

Second, the structure of Part VIII should be simplified by expanding the scope of section 90.1 and repealing section 77:

- Section 90.1 currently covers only agreements (or arrangements) "between persons two or more of whom are competitors". This means that, even if the Tribunal were to determine that an agreement is likely to prevent or lessen competition substantially in a market, the Tribunal could not issue an order unless it also determines that the agreement is between (actual or potential) competitors – a significant limitation on the application of section 90.1. The anti-competitive effect of the agreement should be the animating concern for section 90.1; it should be immaterial whether the parties are competitors. For example, it is important that anti-competitive vertical agreements be brought within the ambit of section 90.1.[5]

  The elimination of the "competitor" requirement would ease enforcement by making the application of section 90.1 simpler and more effects-driven; would improve compliance incentives by allowing market participants to focus only on the potential effects of their agreements; and would further align competition law in Canada with the laws of significant

[4] This amendment would not alter the substantive elements of a given provision but rather would state that a person or persons must not engage in the conduct covered by that provision.

[5] For completeness, note that the Bureau's *Competitor Collaboration Guidelines* acknowledge that a vertical agreement can be subject to section 90.1 in the narrow circumstances where anti-competitive conduct involves the limited circumstance in which "… a supplier …. compete[s] with a customer in respect of the product that is being supplied." *See Competitor Collaboration Guidelines* (2021) at 18, online (pdf): https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CB-BC-CCGs-Eng.pdf/$file/CB-BC-CCGs-Eng.pdf.

trade partners, such as the United States and the European Union, which have simpler prohibitions against anti-competitive agreements similar to our proposal.[6]

- Section 77 of the Act addresses three categories of vertical conduct: exclusive dealing, market restriction and tied selling. All three categories of conduct are narrowly defined as conduct effectively or implicitly imposed by an upstream "supplier of a product" on a downstream "customer" of that product, presumably reflecting a presumption that only upstream suppliers are sufficiently concentrated to exercise anti-competitive market power. As such, section 77 does not capture restrictive conduct imposed by a customer on its supplier (i.e., monopsony behaviour), notwithstanding that customer concentration is a reality in at least some segments of the economy. In our view, all restrictive vertical agreements, whether imposed by a supplier on a customer or by a customer on a supplier, that satisfy the competitive effects condition set out at section 77 should be prohibited.

  The vast majority of conduct covered by section 77 is already captured by the existing section 79 (abuse of a dominant position), and the conduct not already covered by section 79 would be captured by an expanded section 90.1 as described in our recommendation above.[7] Accordingly, once the scope of section 90.1 is expanded, Part VIII can be simplified by repealing section 77 and relying on sections 79 and 90.1 to cover the conduct that was otherwise captured under section 77.[8]

2. Increased Detection Capabilities

The Bureau cannot investigate conduct of which it is not aware. Accordingly, improving the structure of Part VIII will be effective only if the appropriate tools are put in place to allow the Bureau to better identify potentially anti-competitive commercial agreements, conduct and mergers.

(a) Commercial Agreements and Unilateral Conduct

A significant challenge to the Bureau's potential enforcement of Part VIII starts with the absence of meaningful detection mechanisms for identifying anti-competitive conduct.

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[6] For example, in the United States, section 1 of the *Sherman Act* broadly provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." Similarly, article 101 of the *Treaty on the Functioning of the European Union* provides that "[t]he following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market…" Clarity is provided to the conduct captured by these regimes in the United States by a well developed body of case law and in the European Union by the inclusion of indicative conduct in article 101 (similarly, in Canada, both sections 45 and 78 of the Act identify types of conduct to which the criminal conspiracy and civil abuse of dominance provisions apply, respectively).

[7] To the extent concerns remain that some of the conduct covered by section 77 would be lost, section 78 could be amended by expanding the enumerated list of anti-competitive practices addressable under section 79.

[8] At present, section 77 is also unique from sections 79 and 90.1 of the Act in that it can be enforced by private parties (with leave of the Tribunal) and not only by the Commissioner of Competition (the "**Commissioner**"). As such, the expansion of private enforcement rights under Part VIII (as proposed below in this submission) is an important adjunct to the repeal of section 77.

As it currently stands, detection relies principally upon third party complaints or tangential unrelated investigations (for example, the Bureau's 2014 investigation of Loblaw Companies Limited's conduct under section 79 stemmed from its review of Loblaw's proposed acquisition of Shoppers Drug Mart[9]), press reports or other public sources. The limited effectiveness of the Bureau's existing approach is evident from the rarity of Bureau enforcement action.

While the Bureau does not publicize all of its conduct investigations, its publicly-reported statistics reflect a small number of investigations – and still fewer applications brought before the Tribunal – in respect of the provisions of Part VIII outside of section 92 (which we discuss separately below).[10] Accordingly, in the context of instituting reforms, the Committee should seek to improve detection mechanisms which, in turn, will lead to more comprehensive enforcement of the Act.

While press reports, unrelated investigations and third party complaints can be a valuable source of information to the Bureau, they are not the most efficient source of information about potentially anti-competitive conduct. Rather, the firm or firms that are best aware of agreements and conduct that could be anti-competitive are those engaging in (or considering whether to engage in) the behaviour. While we do not propose a mandatory notification system – the volume of agreements and conduct potentially captured by such a regime would render a mandatory notification system infeasible – the Committee should consider whether a system can be developed that would encourage parties to voluntarily notify their conduct and agreements to the Bureau where there is a reasonable prospect that such conduct or agreements could be anti-competitive.[11]

A voluntary notification system would need to rely on appropriate 'carrots' and 'sticks' to encourage notification in appropriate circumstances. Meaningful adverse consequences for engaging in behaviour contrary to Part VIII of the Act would represent the most effective 'stick'. This is addressed further in section 3 below. However, other tools also must be deployed to incentivize effective use of the voluntary notification regime. For example:

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[9] For a description of the background to what lead the Bureau to investigate Loblaw, see the following position statement from the Bureau: *Competition Bureau statement regarding its inquiry into alleged anti-competitive conduct by Loblaw Companies Limited* (November 21, 2017), online: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04310.html.

[10] Since 2014, the Bureau's Monopolistic Practices Enforcement Branch has commenced only 56 investigations or compliance assessments (note that this number applies to all of Part VIII, other than mergers, as statistics are not provided for investigations under particular sections of Part VIII), opened only 17 formal inquiries under section 10 of the Act, obtained only four Tribunal orders and registered only eight consent agreements with the Tribunal. *See Competition Bureau Performance Measurement & Statistics Report 2020-21* (2020), online: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04567.html#sec02.

[11] Section 124.1 of the Act currently sets out provision for a binding written opinion by the Commissioner in respect of conduct covered by the Act. While this system may form a basis for a voluntary notification (in particular, the information requirements set out in the *Fees and Service Standards Handbook* provide a helpful guide for the information required to submit a complete notification), the written opinion system as it currently exists lacks an appropriate balance of 'carrots' and 'sticks' to incentivize its use. In particular, an opinion does not grant immunity from enforcement action (an opinion that is binding on the Commissioner is not binding on other parties (e.g. where private enforcement is available)), service standards are lengthy, and the filing fee is low. *See*, *Competition Bureau – All About Written Opinions* (2015), online: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03179.html#sec04; *Competition Bureau Fees and Service Standards Handbook for Written Opinions* (2018), online: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04358.html. This is reflected by the small number of written opinions typically completed each year (less than 15 in each of the last three years). *See Competition Bureau Performance Measurement & Statistics Report 2020-21* (2020), online: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04567.html.

- Prior notification should exempt parties from costly adverse consequences otherwise available to remedy anti-competitive conduct.
- The Bureau should establish reasonable service standards within which parties can expect the Bureau to complete its review of voluntarily notified matters.[12]
- To discourage parties from notifying benign matters as a costless risk mitigation strategy, a reasonable filing fee and pre-implementation waiting period should be established. As the notification process would be voluntary, this would not represent an added cost or burden on commercial conduct since it would be the parties' decision whether to engage with the Bureau.

An appropriately balanced notification regime will assist the Bureau in becoming aware of potentially anti-competitive conduct and negotiating an appropriate resolution in advance of such conduct being implemented.

(b) Mandatory Merger Notification

Part IX of the Act already prescribes a detection tool applicable to mergers. However, the structure of Part IX has remained largely unchanged since its adoption in 1986. As the global and Canadian economies have changed vastly since that time, the criteria in place for identifying those transactions that are most likely to raise competition concerns, and thus should be screened by the Bureau before closing, are no longer appropriate. Rather, Part IX in its current form both fails to adequately capture likely problematic mergers and subjects a large number of plainly benign transactions to needless notification and review.

A review of the top 30 Canadian public M&A transactions (by deal size) over the past five years,[13] suggests that, on average, only approximately 51% of the largest Canadian public M&A deals are subject to pre-merger notification. Given that public companies are generally larger than private companies, it stands to reason that a much smaller percentage of the largest private company transactions are subject to mandatory notification. This does not even account for the plethora of global (foreign-to-foreign) transactions that have an impact in Canada but fall below or outside of the Part IX thresholds.

Meanwhile, Part IX captures a significant number of mergers that do not raise substantive competition issues. More than 70% of mergers subject to notification over the past three years have been designated by the Bureau as "non-complex."[14] Stated differently, over the past three years, the Bureau has devoted valuable resources to reviewing 471 mergers that were "readily

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[12] The Bureau currently has in place non-binding service standards in connection with certain matters. *See Competition Bureau Fees and Service Standards Handbook for Mergers and Merger-Related Matters* (2018), online: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04358.html; *Competition Bureau Fee and Service Standards Handbook for Written Opinions* (2020), online: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04526.html.

[13] Based on a review of the publicly available transaction agreements (i.e., whether or not compliance with Part IX of the Act was a condition to closing) for the 30 largest transactions involving Canadian targets listed on the TSX or TSX-V by publicly reported deal size (exclusive of net debt).

[14] *See Merger Intelligence and Notification Unit – Update on Key Statistics 2019-2020* (2020), online: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04549.html.

identifiable by the clear absence of competition issues."[15] This suggests that the thresholds are not appropriately calibrated towards detection of the most potentially problematic mergers.

It is time to reform Part IX of the Act, not for the purpose of catching more, fewer or the same number of mergers, but for the purpose of creating a more effective screening tool for potentially anti-competitive mergers while limiting the burden on merging parties' whose transactions presumptively are not likely to raise competition concerns. As part of this process, the Bureau should study the transactions that were notifiable but which raised no competition concerns to determine whether there are any common facts or attributes that should inform the Part IX threshold tests, including whether the exemptions from notification listed in section 111 of the Act should be expanded.

From our own experience, we believe there are at least three overarching weaknesses in the existing mandatory merger notification regime:

- ***Arbitrary Limitation to Targets with Canadian Operations or Assets.***

Part IX sets out a combined size of parties threshold (section 109) and a size of target threshold[16] (section 110) based on the book value of assets and gross revenues from sales.

The limitations of this approach are reflected in the size of target (section 110) threshold. *First*, section 110 requires the target to have operations (i.e., premises and personnel employed in connection with the business) in Canada.[17] Thus, all mergers in which the target only sells goods or services into Canada, but does not itself have a physical presence in Canada, are eliminated from pre-merger notification under Part IX. *Second*, the revenues taken into account for the size of target threshold are restricted to those generated by Canadian assets. This excludes all sales "into" Canada, unless those sales have a connection to some assets in Canada.[18]

In a globalized economy, there is no sensible basis to require the target to have Canadian operations.[19] Both price and non-price elements of competition in Canadian markets are

[15] *Competition Bureau Fees and Service Standards Handbook for Mergers and Merger-Related Matters* (2018) at 3.2.2, online: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04358.html#s3_2_2.

[16] This threshold is commonly referred to as the "size of transaction" threshold. However, since the threshold is based on the revenues and assets of the target rather than on the value of the transaction, for the purposes of this submission we shall refer to it as the "size of target" threshold.

[17] In particular: (i) in the case of an asset transaction, the purchaser must be acquiring assets in Canada "of an operating business" (subsection 110(2)); (ii) in the case of an equity transaction, the target must, directly or indirectly, "carr(y) on an operating business" (subsections 110(3) and (6)); (iii) in the case of a corporate amalgamation, the continuing corporation must "carry(y) on an operating business" (subsection. 110(4)); and (iv) in the case of the formation of a non-corporate joint venture, at least one of the joint venture partners must be contributing assets "that form all or part of an operating business" (subsection 110(5)). An "operating business" is defined as "a business undertaking in Canada to which employees employed in connection with the undertaking ordinarily report for work" (subsection 108(1)). *See also* P*re-Merger Notification Interpretation Guideline Number 1: Definition of "Operating Business" (Section 108 of the Act)* (2011), online: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03358.html.

[18] The one exception is in respect of amalgamations, for which the threshold requires an examination of sales "in, from or into Canada" from at least two of the parties to the transaction (*see* subsection 110(4.1)).

[19] This is especially the case given the deep coordination that takes place between the Bureau and many other competition agencies across the world. In particular, a possible reason to have restricted merger notification to only those mergers where the target has a direct or indirect presence in Canada, or only to those where the target has substantial sales in or from Canada, could be out of a concern that the Bureau could not seek a remedy outside

impacted by the total amount of supply into the market, whether that supply originates from Canada or elsewhere.[20] Nonetheless, a transaction where the target does not operate from premises in Canada or does not have significant assets or revenues in Canada (regardless of whether the company is a major supplier into Canada) will not be captured by the notification regime and therefore is much less likely to receive scrutiny by the Bureau, regardless of potential anti-competitive effects on customers and consumers in Canada.

There is no sound economic reason for this exclusion.[21] Rather, it reflects the fact that the thresholds were developed when products consumed by Canadians were largely manufactured in – or supplied by the producer from a location in – Canada, and predate Canada's membership in the World Trade Organization, the North American Free Trade Agreement (now the United States-Mexico-Canada Agreement) and various other free trade agreements. However, in today's increasingly globalized economy, there is a deep integration of supply chains between Canada and its trade partners. As total manufacturing in Canada declines, supply chains across countries integrate and intangible products and services (e.g., digital products and internet-based services) play an increasingly important role in the Canadian economy, merger review should likewise shift to focus on potential effects on Canadian consumers, irrespective of the location of the target's operations.[22]

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of Canada to solve a competition concern in Canada, and thus the size of target threshold was calibrated only in respect of sales that originate in or from Canada. This has not proven to be the case. The Bureau has, in certain cases, sought the divestiture of assets outside of Canada (e.g., see the scope of remedy obtained by the Bureau in *Holcim/Lafarge*¸ online: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03919.html), and in many cases it has coordinated the scope of remedies with foreign agencies, often times agreeing that a foreign remedy will satisfy the Bureau's competition concerns in Canada (e.g., see the remedies in *Thermo Fisher Scientific*, online: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03639.html, and in *Harris Corporation/L3 Technologies*, online: https://www.canada.ca/en/competition-bureau/news/2019/06/competition-bureau-will-not-oppose-merger-between-defence-contractors-harris-corporation-and-l3-technologies.html). Essentially, by excluding sales "into" Canada in the size of target threshold, the Bureau – and thus by extension, the Government of Canada – has been outsourcing competition investigations and enforcement in respect of those mergers where the target does not have sufficient (if any) sales in or from Canada to trigger Part IX but where competition in Canada likely will be substantially prevented or lessened as a result of a target's sales into Canada. This outsourcing is happening even though such foreign competition authorities are not actually assessing either competitive effects in Canada or determining whether a proposed remedy addresses the competition issues arising from the merger in Canada.

[20] The Act recognizes that this is the case, as it explicitly provides that, when undertaking a competitive effects assessment, the Tribunal must consider "the extent to which foreign products or foreign competitors provide or are likely to provide effective competition to the businesses of the parties to the merger or proposed merger". *See* paragraph 93(a) of the Act.

[21] These unprincipled requirements can also lead to irrational outcomes on the basis of deal structure. For example, if a company (Company A) that operates in Canada proposes to acquire a company that does not operate in Canada (Company B), but is a significant supplier into Canada (such that it would exceed the section 110 threshold if its revenues were in, rather than into Canada), that transaction will not be notifiable as it will not result in the acquisition of an operating business. However, if Company B were to acquire Company A, that transaction – which would have the same competitive effect on the relevant market – would be subject to notification if the relevant financial thresholds are met. A separate example would be a situation where a target which has both sales in Canada (from its Canadian manufacturing operations) and sales into Canada (from its foreign manufacturing operations) would have to take into account only the sales made from its Canadian manufacturing operations in the size of target threshold rather than the gross revenues from its total supply of products in Canada.

[22] The Federal Court has confirmed that the Tribunal has jurisdiction over agreements that result in effects in Canada, even where the agreement is entered into outside of Canada. *See Rakuten Kobo Inc. v. Canada (Commissioner of Competition)*, 2018 FC 64 at para. 122.

- ***Lacunae for Certain Transaction Structures.***

Whether a merger is subject to Part IX should not depend on its structure, particularly where this allows for creative structuring to avoid notification.[23] Three examples of this are:

- *Combined Asset and Equity Deals*: Section 110 sets out different size of target threshold tests that apply independently to each of five prescribed classes of transactions. Thus, in the case of a transaction structured as a combination of assets and shares (e.g., where the seller is selling the shares of certain of its Canadian subsidiaries and selling the assets of other Canadian subsidiaries) the asset acquisition and the share acquisition are considered separately. This means that notification is required only if either the asset acquisition or the share acquisition exceeds the relevant financial threshold. As result, a notification will not be required even if the aggregate value of assets in Canada, or gross revenues generated from the Canadian assets, of the business being acquired exceeds the relevant threshold.

- *Non-Corporate Joint Ventures*: A non-corporate joint venture, referred to as a "combination" in section 110, that exceeds the threshold under subsection 110(5) is exempt from notification where the conditions set out at section 112 of the Act apply. In our experience, the conditions set out in section 112 are met in respect of the formation of virtually every, if not every, non-corporate joint venture. This cannot have been the drafters' intention, having included section 110(5) as a category of notifiable transaction in the first place. Furthermore, even if it had been intended that the formation of non-corporate joint ventures would be exempt from notification, there is no reason to treat the formation of non-corporate and corporate joint ventures differently: both have the same potential effect on competition in a market. Yet, parties may be able to avoid notification under Part IX merely by organizing their business combination through a non-corporate joint venture rather than through a corporate joint venture.

- *Joint Acquisitions*: The size of parties threshold at section 109 of the Act covers the parties to the transaction together with their "affiliates". By virtue of the definitions of affiliation and control under subsections 2(2) and 2(4) of the Act, respectively, affiliation effectively requires a greater than 50% interest. This means that in the case of a 50-50 joint venture where the joint venture partners establish a special purpose vehicle to undertake the transaction, neither joint venture partner is taken into account in the calculation of the size of parties threshold. This is a significant limitation to catching a fairly common transaction structure. In the case of the formation of a joint venture, it may be appropriate to consider within the notification thresholds any joint venture partner that will have a significant interest in the joint venture entity.

In our view, there is no reason why the above constructions have been implemented in the Act, or why they should continue to apply.

- ***Outdated Threshold Metrics.***

The financial metrics for determining whether a transaction is subject to pre-merger notification under Part IX of the Act are limited to the book value of assets and revenues.

[23] Note that Part IX does not set out an anti-avoidance rule.

While both are relevant to identifying transactions that could possibly "lessen" competition, assets and revenues are not sensible metrics for capturing mergers that could potentially "prevent" competition from emerging firms (which at present have minimal assets and no or limited revenues). This leaves a wide blind spot for acquisitions of likely future significant competitors, which are, for example, common in the biotechnology and digital economy sectors. Additional thresholds could be considered that are likely to capture firms that have a significant anticipated future market position, such as by adopting an alternative enterprise value threshold test.[24]

Separately, we recommend that careful study be given to whether the monetary thresholds are at the appropriate level. Calibrating the monetary thresholds at the appropriate level is critical to increase the likelihood that transactions most likely to raise competition concerns are subject to review and to act as a deterrent to anti-competitive mergers.[25] As it stands, while the tests are not identical, the monetary thresholds under Part IX of the Act are considerably higher than those in the United States under the *Hart-Scott-Rodino Antitrust Improvements Act of 1976* ("**HSR**"), in particular, after taking into account the relative difference in size of the Canadian and U.S. economies.[26]

Just as it is appropriate to consider whether the monetary thresholds are set too high, it is also important to examine whether there are any categories of assets or revenues that are irrelevant to an effort to screen for possibly anti-competitive mergers. There are at least two categories of assets and revenues that should be excluded for this reason. *First*, where a vendor is divesting its entire interest in a business, its financial position is not relevant to whether the acquiring entity will be able to exercise market power post-merger. Therefore, its assets should not be captured in the "size of parties" threshold under section 109, as they are

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[24] An enterprise value threshold would embed a transaction's purchase price and may thereby capture the value of the business beyond its existing assets and revenues. We recognize, however, that unless an enterprise value test could be devised to capture foreign based targets that have a significant potential connection to Canada without being cast so broadly as to catch transactions that have no or limited connection to Canada, it may be that an enterprise value test would be appropriate only for Canadian targets. This could severely limit the effectiveness of an enterprise value test at catching possible prevention of competition transactions within its web. As part of our proposed review of notifiable transactions, consideration should be given to whether any additional criteria can be implemented to capture appropriate transactions without being over-inclusive.

[25] Professor Wollmann has undertaken interesting research (based on the U.S. dialysis industry) that shows the adverse effects that result from a high merger notification threshold. He points out that it is false to assume that only "large" mergers can raise competition issues, because there can be numerous factors relevant to determining what constitutes "large", which may vary by industry (e.g., some industries may have a market size of billions of dollars and others may have a market size of only a few million dollars) or geographic area of sales (e.g., market size is greatly impacted by whether sales are global, national, regional or even local). A merger notification regime serves as a deterrence to parties contemplating anti-competitive mergers so adverse consequences can result when threshold are set too high, thereby encouraging "stealth" mergers with deleterious effects that can proceed largely undetected. *See* Thomas G. Wollmann (2020), *How to Get Away with Merger: Stealth Consolidation and its Real Effects on US Healthcare*, National Bureau of Economic Research, NBER Working Paper Series, Working Paper 27274, online: https://www.nber.org/system/files/working_papers/w27274/w27274.pdf.

[26] The HSR prescribes a threshold, for 2021, of US$92 million, for the size-of-transaction test, and a lower threshold of US$18.4 million for assets or sales of one party and a higher threshold of US$184 million of sales or assets of another party, for the size-of-person test. In absolute terms the test is less than the combined test applicable under sections 109 and 110 of the Act and, bearing in mind that the U.S. economy is over 10 times the size of the Canadian economy (as measured by GDP), the HSR threshold is considerably less than the threshold applicable to under Part IX of the Act.

under the current regime.[27] *Second*, assets and revenues associated with inter-company transactions (which are currently only excluded where their inclusion would result in double-counting), should be excluded, since a party's ability to exercise market power post-merger would be separate from its relationship with its affiliates.[28]

Another class of transaction that should be excluded from notification under Part IX is the situation where a purchaser has no or a *de minimis* connection to Canada, either in terms of assets in Canada or gross revenues from sales in, from or into Canada. The size of parties threshold is a combined parties test that can be satisfied by the target alone (so that a sufficiently large target can trigger a filing even though the purchaser has no presence in Canada).[29] Including within the size of parties threshold a requirement that the purchaser must have a specified minimum level of either assets in Canada or gross revenues in, from or into Canada would rectify this anomalous result. This concept is already captured in the test for amalgamations at subsection 110(4.1), but in our view, should be extended to all classes of transaction (whether through incorporation of a similar concept into section 109, or into the other subsections of section 110).

(c) Non-Notifiable Mergers

While addressing the current weaknesses of Part IX will go a long way to rebalancing the merger notification regime, reforming thresholds and removing loopholes will still fail to capture some problematic mergers. For this reason, it is important to pair these structural reforms with amendments that enhance the Bureau's ability to identify potentially problematic non-notifiable mergers. This can be achieved by (a) encouraging voluntary notification, for example by establishing significant adverse consequences in connection with implementing a merger that prevents or lessens competition substantially (this recommendation is discussed further in section 3, below), and (b) extending the applicable limitation period for challenging non-notified transactions (i.e., non-notifiable transactions that have not been voluntarily notified to the Bureau), to ensure that the Bureau has sufficient time to learn about the merger, undertake an investigation and, where appropriate, initiate an application within the limitation period.[30]

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[27] This also includes the situation where the vendor is acquiring an interest in the purchaser, since that would be a separate notifiable transaction in the event that the relevant thresholds under sections 109 and 110(3) were satisfied.

[28] The treatment of inter-affiliate assets and revenues is addressed by the Bureau in its *Pre-merger Notification Interpretation Guideline Number 14: Duplication Arising From Transactions Between Affiliates*, online: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03717.html.

[29] While it also can be satisfied by the purchaser alone, by virtue of the application of section 110, a transaction will not be subject to pre-merger notification unless the target has a significant connection to Canada.

[30] For this same reason (i.e., ensuring that the Bureau has sufficient ability to identify and investigate problematic mergers), we feel it is important to comment on one of the recommendations made by Vivic Research to the Committee with which we strongly disagree. As part of making Canadian competition laws more efficient, Vivic Research recommends that the Bureau do away with the process of issuing advance ruling certificates ("**ARC**") and no action letters ("**NAL**") because, in their view, it imposes too significant an administrative burden on the Bureau as it assesses whether to issue an ARC or NAL; instead, Vivic Research recommends that Canada adopt the U.S. style process whereby no comfort is provided to the merging parties at the end of the waiting period. Vivic Research claims that if the Bureau follows the US process, it would create "efficiencies by reducing the amount of in-depth analysis officers undertake on mergers that are likely not to raise competition issues". With respect, such a change to the merger notification and review process likely would have dramatic, unintended adverse consequences that would result in a substantial decline in the quality of the information that parties make available to the Bureau. In particular, in return for an ARC or NAL, the merging parties provide the Bureau with a substantial

Unlike the other provisions of Part VIII, the provision relating to anti-competitive mergers (section 92) has a very short one year limitation period; specifically, the Bureau is barred from making an application before the Tribunal to challenge a merger more than one year after its substantial completion.[31]

The merger limitation period had been three years (similar to conduct covered under the abuse of dominance provision[32]) until 2009 when the supplementary information request ("**SIR**") process was introduced into the Act. The theory was that, by giving the Bureau enhanced investigative powers through the SIR process, the Bureau would be better able to complete its assessment within a shorter period of time. Accordingly, as a *quid pro quo* for giving the Bureau the power to issue a SIR, which imposes a significant burden on the merging parties, the limitation period was reduced from three years to one year. This is a sensible compromise for mergers that are notified to the Bureau under Part IX. However, since the limitation period applies based on when the Bureau brings an application to the Tribunal to challenge a merger (rather than when it initiates an investigation or goes on inquiry), the one-year period unnecessarily restricts the Bureau in the case of non-notifiable mergers, given the amount of time the Bureau requires between initiating an investigation and bringing an application.[33]

We therefore recommend that the limitation period to challenge non-notifiable mergers be extended to three years, unless the transaction has been voluntarily notified to the Bureau prior to closing (in which case, a one year limitation period should continue to apply). The potential cost associated with the Bureau failing to challenge an anti-competitive merger is too high to not recommend such reforms.[34]

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amount of information that is not required by the *Notifiable Transactions Regulations* in the formal notification in order to explain to the Bureau the reasons why, in the merging parties' view, an ARC or NAL should be issued. This provides the Bureau officers with fundamentally important information to undertake their review. This information is typically not provided by merging parties under the U.S. HSR process, and, as a result, the Bureau officers often have far more robust information than do the competition authorities in the U.S. With respect, Vivic Research is overstating the burden on the Bureau officers from having to issue an ARC or NAL, as evidenced by the fact that, on average, it takes the Bureau approximately 11 days and 36 days to complete its review of non-complex and complex mergers, respectively. *See Merger Intelligence and Notification Unit – Update on Key Statistics 2019-2020* (2020), online: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04549.html. Furthermore, as the Bureau does not issue its reasons for why it has determined to issue an ARC or NAL, but rather supplies the merging parties' with a standard-form email confirming the specific comfort being provided to the parties, we do not understand the nature of the added administrative burden imposed by the ARC/NAL process since, ultimately, the Bureau has to decide in every case whether or not the notified merger raises substantive concerns; removing the ARC/NAL process would not eliminate that "burden".

[31] Section 97.

[32] Subsection 79(6) provides that no application can be made under section 79 in respect of conduct that has been ceased more than three years prior.

[33] The Bureau typically depends upon the voluntary production of information and cooperation from the parties in order to advance its investigation, which contributes to the amount of time required for the Bureau to reach the application stage.

[34] To this point, the Bureau's ability to rely on *ex post* enforcement of an anti-competitive merger under the abuse of dominance provision in section 79 of the Act is limited by the fact that section 79, unlike the dominance laws of certain other jurisdictions outside of Canada, does not apply to so-called exploitative abuses, such as excessive prices. *See,* e.g.*, Canada (Commissioner of Competition) v Canada Pipe Co.*, 2006 FCA 233. Thus, while the Bureau can challenge a merger on the basis that it will be likely to result in materially higher prices (or reduced quality or variety of products, loss of innovation and so forth), should the merger be concluded and the merged firm charge higher prices, assuming the limitation period for a challenge under section 92 (mergers) has expired, the Bureau likely could not bring an application to challenge such behaviour as an abuse of dominance under

3. Meaningful Adverse Consequences to Deter Anti-competitive Behaviour

Increased detection capabilities, including, in particular, incentivizing voluntary notification, must be paired with meaningful adverse consequences for engaging in conduct that is contrary to Part VIII of the Act. Absent a big enough 'stick', no 'carrot' will be sufficient to stimulate compliance with the Act. Part VIII currently provides for limited potential consequences, which are insufficient for motivating compliance, encouraging private enforcement and rectifying anti-competitive harm.[35] The Act must be reformed to provide a broader range of strengthened adverse consequences for engaging in conduct that could be the subject-matter of an order under Part VIII. While we do not recommend specific tools in this regard, below we provide examples of certain tools that are already available for certain conduct under the Act and which this Committee could consider.

One way to encourage compliance is through the imposition of an AMP to all conduct covered under Part VIII, instead of the current framework whereby it is available only in respect of conduct covered by section 79 (abuse of dominant position). The quantum of the AMP would need to be increased to a level that can incentivize compliance – potentially one set on a proportional basis, such as a percentage of annual revenue or, in the case of a merger, deal value.[36] Of course, any such approach must remain within the constitutional bounds so that the AMP is not a disguised fine.[37] Rather, the purpose of any AMP adopted for conduct under Part VIII must be to encourage positive behaviour and to ensure a level playing field among all businesses in a market.

As an alternative (or in addition) to an AMP, compliance also can be encouraged through the availability of monetary remedies for breaches of conduct under Part VIII, or at least for both abuse of dominance (section 79) and anti-competitive competitor collaborations (section 90.1).[38] This could include a right given to private parties to claim damages, which is discussed further in section 4 below, and/or the ability for the Tribunal to make a restitution order (either on application by the Commissioner or a private party).[39] Ultimately, if a party or parties are found to have

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section 79 of the Act. Even certain exclusionary abuses engaged in by a merged firm post-merger may not be subject to *ex post* enforcement given the limiting language of certain exclusionary conduct described in section 78 of the Act. In particular, although not yet interpreted by the Tribunal, it is possible that, by virtue of the limiting language in paragraph 78(e) of the Act, the scope of the abuse of denying access to a scarce facility or resource to a competitor is greatly limited because section 78 says that the conduct must be "with the object of withholding the facilities or resources from a market" (emphasis added). It is still to be seen how far the essential facilities doctrine will be applied in Canada under section 79 of the Act.

[35] With the exception of abuse of dominance under section 79 of the Act, which allows the Tribunal to impose an administrative monetary penalty (an "**AMP**"), there is no direct adverse monetary consequence for engaging in anti-competitive conduct covered under Part VIII. As a practical matter, this provides very little incentive to any firm (or group of firms, in the case of joint conduct or agreement) to refrain from acting anti-competitively. Simply stated, the possibility of a prohibition order by the Tribunal provides little incentive not to engage in anti-competitive conduct, particularly given that the firm or firms can enjoy the economic benefits of anti-competitive conduct during the period prior to the order.

[36] For example, the *Digital Charter Implementation Act, 2020* , which is intended to establish new private sector privacy laws, includes a maximum penalty for non-compliance of the greater of $10 million and 3% of the offending organization's gross global revenues.

[37] *See*, e.g., *Guindon v Canada,* 2015 SCC 41.

[38] An AMP is payable to the government, and is akin to a regulatory fine. In contrast, monetary remedies are payable as compensation to those that have suffered damages as result of unlawful conduct.

[39] The Act currently allows for restitution in connection with certain deceptive marketing practices under Part VII.1. Specifically, where, on application by the Commissioner, a court determines that a person has engaged in specified conduct, subsection 74.1(1) allows the court to order that person to "pay an amount, not exceeding the total of the

engaged in anti-competitive conduct, such party or parties should not be entitled to retain any earned monopoly profits. Again, this is to be distinguished from a penalty, and, thus we do not recommend that either treble damages or punitive damages be available for conduct determined to be contrary to Part VIII.

Compliance with Part VIII of the Act is critical in light of the real and substantial costs to consumers – and to the Canadian economy more broadly – that can arise from anti-competitive conduct. At the same time, it is equally important that the Act not serve as a deterrent to commercial agreements, unilateral conduct and mergers that are not anti-competitive. Unfortunately, competition law compliance is not always straight-forward. Many factors go into assessing the likely effect of a commercial agreement, conduct or a merger on competition. This assessment often involves economic assumptions and predictions. In many cases, it is made even more difficult because it is predicated on third party information and behaviour (e.g. competitors' actual sales data and competitive plans), to which the party or parties considering an agreement, course of conduct or merger do not have access. In most cases, the Bureau is best placed to assess the likely or actual effect of a commercial agreement, conduct or merger on competition because of its power to collect information from third parties, either on a voluntary basis or through the various information collection powers available to it under the Act.

Bearing this in mind, any enhanced consequences should be paired with a statutory exemption from such consequences where a firm or firms provide notification to the Bureau of proposed conduct before implementation so that the Bureau is able to engage in proactive assessment of potential effects and, if needed, impose a proactive remedy (in accordance with the enforcement powers currently available to the Tribunal under each provision of Part VIII). In this respect, as long as the Bureau is made aware of the commercial agreement, conduct or merger, and thus can investigate it and decide whether to challenge it before the Tribunal (or enter into a consent agreement with the proponent(s)), the firm or firms should not face adverse consequences, including not being subject to AMPs, beyond those currently available under Part VIII if it should later be determined that the impugned agreement, conduct or merger prevents or lessens competition substantially.[40]

4. Closing the Enforcement Gap

The above reforms will have limited effect without strong administration and vigorous enforcement of the Act. There are at least two changes that should be made to allow for more effective enforcement and administration:

(a) Expanded Private Enforcement

We welcome the recent announcement that the Bureau's budget will be expanded over the coming years. Ensuring that the Bureau has a budget that will allow it to hire the staff and leverage the technological resources that it needs to enforce the Act is critical to the achievement of the Act's objectives and to establish a compliance culture among Canadian businesses.

amounts paid to the person for the products in respect of which the conduct was engaged in, to be distributed among the persons to whom the products were sold…in any manner that the court considers appropriate."

[40] To be clear, even where a party or parties notify the Bureau, the Bureau still should be entitled to apply to the Tribunal for a prohibition order if it turns out that the agreement, conduct or merger prevents or lessens competition substantially.

However, vigorous enforcement by a dedicated competition agency is only one piece of the enforcement puzzle. Even with an expanded budget, the Bureau will not be able to address every potential competition violation that may cross its path. Accordingly, the Committee should consider recommending the expansion of the ability of private parties to apply for an order under Part VIII (other than in respect of mergers given their time sensitive nature), and to seek monetary damages, restitution and injunctive relief, all before the Tribunal.

At present, in almost all cases, the Bureau is either the only party that has the authority to apply to the Tribunal or is the most likely party to do so. Amending the Act to allow for rights of private enforcement before the Tribunal will dramatically increase the capacity for Part VIII enforcement. To preserve efficiency in the enforcement system, private rights should not be absolute – the Committee should also consider limitations such as excluding certain Part VIII actions (e.g., mergers[41]) from private enforcement, and/or preventing actions in cases where conduct has been notified to and/or reviewed by the Bureau.[42]

(b) Enhanced Transparency

Although not a statutory reform, in our view the Bureau must improve the transparency of its decision making. To its credit, the Bureau has issued comprehensive enforcement guidelines, and remains committed to updating them as the Bureau's approach changes in response to jurisprudence or market developments. However, the Bureau should devote more resources to issuing backgrounders and position statements that explain its assessment of both completed investigations and "no names" interpretation requests from private parties under Part VIII.[43] Such guidance provides insight as to how the Bureau is likely to approach similar agreements, conduct and mergers in future cases and, although not binding on the Tribunal, improves the overall predictability of competition law enforcement in Canada. Of course, this must be done in a manner that protects confidential, competitively sensitive information.[44]

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[41] Private enforcement should not be made available with respect to Part VIII's merger provisions in light of the time sensitive nature of business transactions. Unfounded private actions, even when brought in good faith, may cause irreparable prejudice to the merger parties as a result of delay. There is also a risk that self-interested third-parties aware of the essence of time for mergers may take advantage of a private right of action to interfere in a merger for their own ulterior motives. In any event, the implementation of an effective merger notification regime (pursuant to proposals set out above in this submission) will facilitate effective merger enforcement by the Bureau.

[42] In connection with this recommendation, the Committee should examine the existing leave requirement for private actions before the Tribunal. While an effective leave requirement in our view is vital to ensuring that only meritorious cases are brought to the Tribunal, the Committee should consider whether the existing test sets the standard for evidence-gathering too high for even good-faith private litigants, who lack the Bureau's statutory power to develop evidence in advance of litigation.

[43] As a model, the Bureau could look to the U.S. Federal Trade Commission's register of informal interpretations of the U.S. pre-merger notification rules. *See* https://www.ftc.gov/enforcement/premerger-notification-program/informal-interpretations.

[44] To date, the Bureau has been able to issue backgrounders and position statements without revealing competitively sensitive information, so we do not see this as a barrier to the Bureau providing increased information to the business community and legal profession on its analytic approach and determinations under Part VIII of the Act. Moreover, enhanced transparency on the Bureau's decision making would be consistent with the extensive decision reporting practices of other competition law authorities, such as those in the European Union and United Kingdom.

A strong competition enforcement regime is both pro-business and pro-consumer. Businesses fuel innovation; they employ our citizens; they directly and indirectly contribute revenues to the public purse. What businesses need to succeed are clear, predictable and transparent rules that are followed by the entire business community and that ensure that the conditions for competition exist. Businesses depend on effective competition law enforcement to ensure that they can purchase inputs from a competitive upstream market, sell their outputs in a competitive downstream market and expect that their rivals will compete in a fair manner. Consumers too benefit from a competitive market, one that delivers products and services at competitive prices; where companies compete to provide the highest quality of products and services and innovate to provide new and better products and services. Simply stated, effective competition law is fundamental to both businesses and consumers.

In our view, the *Competition Act* requires a thorough review and holistic reform to ensure robust detection and enforcement of competition law violations and the creation of a greater culture of compliance in Canada. The *Competition Act* was introduced in 1986, in a dramatically different world from the one in which we live and do business today. Reforms to Parts VIII and IX of the *Competition Act* are long overdue. Our recommendations are intended to provide the Committee with a framework for its review of potential *Competition Act* reforms to increase the level of competitiveness in Canada.

We appreciate the opportunity to provide our views to the Committee and would be pleased to discuss them further if desired. Please do not hesitate to contact us.

Yours truly,

Jason Gudofsky Kate McNeece

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Appendix A
About the Authors

Jason Gudofsky: Jason is a partner in McCarthy Tétrault LLP's Toronto office and Chair of the firm's Competition/Antitrust & Foreign Investment Group. He has been recognized by all of the leading ranking guides as a top Canadian competition lawyer, including being ranked in Band 1 of Chambers & Partners, and as being one of North America's competition law "Thought Leaders" by Who's Who Legal. Jason has assisted clients in many of the largest and most complex national and global M&A transactions, as well as in numerous investigations under the *Competition Act*. Jason has spoken at conferences organized by the Canadian Bar Association, the American Bar Association and the International Bar Association and has been an active member and contributor of policy work to these associations, including being the former chair of the Reviewable Matters/Unilateral Conduct Committee and former vice-chair of the International Competition & Trade Law Committee, of the CBA Competition Law Section. He is also co-chair of the Global Competition Review's Annual Antitrust Law Leader's Forum. Jason has published numerous articles in leading Canadian and international journals in the areas of competition law. Jason was admitted to the Ontario Bar in 1998. He received his Postgraduate Diploma in EC Competition Law from the University of London, King's College in 2004. He also received his MES in 1997 from York University, his LL.B. from Osgoode Hall Law School in 1996 and his BA in 1992 from the University of Western Ontario. Jason's bio is available here: https://www.mccarthy.ca/en/people/jason-gudofsky.

Kate McNeece: Kate is partner in McCarthy Tétrault LLP's Competition/Antitrust & Foreign Investment Group. She is currently the chair of the Reviewable Matters Committee of the CBA Competition Law Section, and serves as a member of the Steering Committee of the International Antitrust Law Committee of the ABA Section of International Law, in which role she edits the Committee's Year in Review publication. Kate is a frequent writer and speaker on competition law topics, and has served as an adjunct professor of competition law at Osgoode Hall Law School. Kate received her JD from Columbia Law School, where she was a James Kent Scholar, and holds a degree in economics from Yale University. Kate's bio is available here: https://www.mccarthy.ca/en/people/kate-mcneece.

Appendix B
Summary of Recommendations

1. Stronger and Simplified Part VIII of the Act

- The Committee should propose amendments to Part VIII of the Act to explicitly prohibit all conduct covered under Part VIII.

- The Committee should review the structure of sections 77 and 90.1 holistically, and recommend amendments to the Act to expand section 90.1 to cover all agreements and arrangements that prevent or lessen, or are likely to prevent or lessen, competition substantially in a market. The requirement that agreements or arrangements must be between competitors should be removed from section 90.1.

- Section 77 should be repealed.[45]

2. Increased Detection Capabilities

- Detection mechanisms are fundamental to a properly functioning competition law. Simply stated, a comprehensive competition regime and a committed and capable enforcement agency are meaningless if mechanisms are not put in place to facilitate the Bureau becoming aware of conduct and agreements that could be the subject matter of an order under Part VIII of the Act. It is thus imperative that the Committee recommend that the Act be amended to:

  - Encourage voluntary notifications to the Bureau in respect of conduct and agreements that could raise competition concerns but are not mandatorily reportable. This system would need to be calibrated in such a manner so as to encourage notification of potentially problematic matters while dissuading competitively benign agreements, conduct and mergers from being reported. This could be accomplished by, for example:

    - Bolstering the potential risks associated with engaging in non-notified anti-competitive commercial agreements, conduct and mergers.

    - Exempting voluntarily notified commercial agreements, conduct and mergers from otherwise available consequences.

    - Implementing a waiting period and filing fee in connection with voluntarily notified commercial agreements, conduct and mergers.

    - Establishing a reasonable service standard within which the Bureau will complete its review of voluntarily notified matters.

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[45] If not repealed, then section 77 should be amended to cover not only restrictions by upstream suppliers on their downstream customers, but also such restrictions by downstream customers no their upstream suppliers.

  - Bolster Part IX to catch more mergers that could raise competition concerns while, at the same time, reducing the number of mergers caught under Part IX that are highly unlikely to raise competition concerns. Amendments could include:
    - Including sales "into" Canada and eliminating the "operating business" requirement in the size of target threshold test under section 110 of the Act.
    - Eliminating arbitrary distinctions based on deal structure.
    - Eliminating the vendor from the size of parties threshold under section 109 where the vendor is selling its entire interest in the target.
    - Requiring a minimum level of participation in the Canadian market by the purchaser.
    - Eliminating assets and revenues associated with inter-company transactions from the threshold analysis.
    - Examining whether the monetary thresholds in Part IX are at the correct level.
    - Considering whether to add an alternative monetary threshold based on a metric other than an examination of revenues and assets.
  - Enhance the Bureau's ability to identify potentially problematic non-notifiable mergers. This can be achieved both through the tools proposed above for encouraging voluntary notification to the Bureau more generally and by extending the limitation period applicable to mergers that are not notified to the Bureau (either pursuant to Part IX or on a voluntary basis) to three years.

3. Meaningful Adverse Consequences to Deter Anti-competitive Behaviour

- The Committee should recommend amendments to expand and strengthen the consequences available for breaches of Part VIII. In particular, the Committee should consider whether to recommend the adoption of certain or all of the following consequences:
  - The availability of an AMP for all conduct covered under Part VIII at a sufficient quantum to effectively incentivize compliance.
  - Monetary remedies, such as damages and restitution, for breaches of the abuse of dominance (section 79) and anti-competitive competitor collaboration (section 90.1) provisions of Part VIII (or, for breaches of Part VIII more generally).
- In keeping with the regulatory nature of Part VIII and the need to avoid discouraging commercial agreements, unilateral conduct and mergers that are not anti-competitive, the Committee should recommend that:

  - The consequences under Part VIII (as amended) should not be punitive (e.g., treble and punitive damages should not be available).

  - Any enhanced consequences should include an exemption for commercial agreements, unilateral conduct and mergers that have been pre-notified to the Bureau.

4. Closing the Enforcement Gap

- The Committee should propose amendments that allow for increased private enforcement of Part VIII, subject to appropriate limitations (e.g., private enforcement should not be available with respect to mergers; a leave requirement should be maintained but the Committee should consider whether the current requirement is appropriately calibrated to incentivize meritorious applications).

- The Committee should recommend that the Bureau remain committed to transparency, and in particular commit additional resources to creating backgrounders and position statements on concluded investigations and enforcement decisions.