THE CANADIAN BAR ASSOCIATION
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Via email: banc@sen.parl.gc.ca

The Honourable Pamela Wallin, O.C., S.O.M.
Chair, Standing Senate Committee on Banking, Trade and Commerce
Senate of Canada
Ottawa, ON K1A 0A4

Dear Senator Wallin:

Re: Bill C-19, Part 5, Division 15: *Budget Implementation Act, Competition Act* amendments

The Competition Law and Foreign Investment Review and Labour and Employment Sections of the Canadian Bar Association (collectively, the CBA Sections) appreciate the opportunity to comment on the *Competition Act* amendments in, Part 5, Division 15 of Bill C-19, *Budget Implementation Act, 2022, No. 1* (BIA).

The Canadian Bar Association is a national association representing over 36,000 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 Competition Law and Foreign Investment Review comprises approximately 1,000 lawyers that promote greater awareness and understanding of legal and policy issues relating to competition law and foreign investment. The Labour and Employment Section examines labour relations, trade unions, boards and tribunals, employment standards, collective agreements and arbitration of labour disputes from all sides – management, union and neutrals. The Labour and Employment Section comments only on the new criminal offence for employers.

BIA not appropriate for Competition Act amendments

The Competition Law and Foreign Investment Review Section states at the outset that the proposed amendments to the *Competition Act* should not be in the BIA. There is no urgency and the proposed changes are not related to the Government's budget nor its implementation. Given the central role of the *Competition Act* in the Canadian economy, meaningful and thorough consultations with all relevant stakeholders are necessary to ensure the underlying policy objectives are achieved. The BIA study in Parliament does not allow enough time for stakeholders to share their input and ensure the amendments are appropriate.

For example, the following amendments proposed in the BIA are far from uncontroversial and raise serious concerns requiring careful consideration:

(i) new unclear and over-broad criminal offences with penalties of up to 14 years imprisonment for commercial activity

(ii) massive increases in maximum fines for abuse of dominance and misleading advertising that go well beyond the concept of an "administrative monetary penalty"

(iii) incentivizing competitors to become "private sheriffs" by enabling them to seek these penalties against firms with stronger market position that compete aggressively

(iv) unclear drip pricing sections

(v) changes to the merger notification rules that create uncertainty for parties engaging in transactions without analyzing the need, benefits and costs of the changes.

We understand the Government has planned further consultations on other potential amendments to the *Competition Act* to ensure it is fit for purpose in a complex and changing economic environment. We urge the Government to defer the proposed amendments to the *Competition Act* in the BIA. Instead, they should be part of the upcoming and broader consultation so they can be properly studied and refined.

Alternatively, we recommend the following:

- the amendments come into force after a one-year delay (to align with the BIA's recognition that a one-year delay is necessary for the proposed wage-fixing criminal offence), and
- even if the amendments are enacted, the Senate Committee ask the Government to include these amendments in the upcoming consultation to enable revisions and improvements.

Comments on proposed changes to the Competition Act

While we reiterate our concerns that the proposed amendments to the *Competition Act* should not be in the BIA, we offer the following comments.

New Criminal Offence for Employers

The CBA Sections have several concerns with proposed s. 45(1.1) that would introduce a criminal offence for wage-fixing and no-poach agreements between employers.

First, the proposed offence is not limited to employers that are actual or potential competitors in any labour market. Without limiting the proposed offence to competing employers, it is at odds with the purpose of the *Competition Act*, which is to protect against conduct that could lessen or prevent competition. The offence could apply when there is clearly no impact on competition – which cannot have been the intention for an offence in the *Competition Act*.

Second, the proposed offence seems both over- and under-inclusive.

- The proposed wage-fixing offence will apply to agreements regarding "terms and conditions of employment." This phrase is extraordinarily broad and ambiguous. Employers routinely have discussions on employment conditions that are competitively benign or even potentially beneficial to employees. For example, discussions can be held on appropriate health and safety protocols for managing COVID risks. Agreements on these matters could potentially be criminal offences under the proposed amendments as they affect "conditions of employment."
- The amendments seem under-inclusive, to the extent that they only apply to "employees" and not contractors or self-employed individuals.

Third, the proposed changes do not clearly achieve the apparent objective of aligning Canadian competition law with U.S. antitrust law, which is unsettled and evolving. In the recent *United States v. Davita Inc.* case, for example, the court concluded that only "naked" non-solicitation agreements or no-hire agreements that allocate the market deserve automatic prohibition.[1] On its face, the proposed new Canadian offence would be out of sync with (and harsher) than the U.S. approach.
Including a criminal offence for wage-fixing and no-poach agreements under s. 45 would also have significant consequences. For example, it raises the possibility of class actions under s. 36 of the *Competition Act* and the risk that businesses become ineligible for public contracts (*i.e.*, "debarment") under the federal Integrity Regime and debarment regime in Quebec. Including these amendments in the BIA does not allow adequate time to carefully consider these collateral impacts and determine the best way to address no-poach and wage fixing conduct.

More generally, s. 90.1 of the *Competition Act* already applies to agreements between employers on wages, non-solicitation or other elements of competition. We are not aware of the Competition Bureau attempting to take enforcement action under these existing powers, or any impediments that would prevent it from doing so. A non-criminal enforcement track for collaborations between employers is an important option that deserves consideration and stakeholder input.

Administrative Monetary Penalties

The BIA proposes to increase the amount of administrative monetary penalties (AMPs) for deceptive marketing practices and abuse of dominance. Currently, the maximum AMP is $10 million for a first contravention and $15 million for subsequent contraventions. The BIA states that businesses could face AMPs of up to (i) three times the value of the benefit derived from the conduct at issue; or (ii) if the value of the benefit cannot be reasonably determined, 3% of annual worldwide gross revenues (likely to be punitively higher than the benefit-based calculation).

The Competition Law and Foreign Investment Review Section believes that any attempt to connect an AMP for deceptive marketing conduct or an abuse of dominant position to the benefit derived or the overall revenues received, should be limited to benefits and revenues in Canada. There is no rationale or policy basis for considering benefits arising or sales made outside Canada when determining an appropriate penalty for conduct occurring in Canada.

The use of a "cap" based on worldwide revenues also discriminates against foreign-owned firms. The apparent lack of "national treatment" afforded to foreign companies may be inconsistent with Canada's obligations under international trade agreements.

Abuse of Dominance

The proposed amendments would allow the Competition Tribunal to impose AMPs for abuse of dominance if the applicant is the Commissioner of Competition or a private litigant.

The Competition Law and Foreign Investment Review Section believes that AMPs should only be imposed in abuse of dominance cases commenced by the Commissioner, the official responsible for enforcing the Act in the public interest. We are not aware of any regulatory contexts where public penalties have been privately enforced.[2]

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1 *United States v. Davita Inc.*, CRIMINAL 1:21-cr-00229-RBJ (D. Colo. Jan. 28, 2022)

2 The possibility exists in the securities regulatory context, where private parties can theoretically seek to have an AMP through a public interest order made under s. 127(1)(9) of the Securities Act (Ontario). However, the imposition of an AMP has not been specifically considered by the Ontario Securities Commission.

As a practical matter, the threat of AMPs will give private applicants (usually competitors of a firm that is competing aggressively) excessive leverage in negotiating settlements before or during litigation. The new AMPs calculation would increase the "moral hazard" concern that competitors will use the threats of private litigation and large penalty awards to deter conduct by rivals that may be pro-competitive and beneficial to Canadian consumers.

We are also concerned that the proposed substantive amendments on abuse of dominance may be over-broad and carry unintended consequences. They state that acts intended to adversely impact competition may constitute abuse of dominance. This could include a competitive response to a rival expanding in a market, even though that response may benefit consumers. These amendments may have the unintended consequence of softening competition on the merits. For example, businesses with a significant market share may be deterred from introducing innovative products benefitting consumers when doing so in response to competition from smaller rivals.

We understand that the upcoming consultations may include aspects of abuse of dominance. As such, to ensure an integrated approach (rather than piecemeal) to this fundamental part of the *Competition Act*, we reiterate our request to defer these changes and study them more carefully.

Drip Pricing

The BIA seeks to incorporate "drip pricing" into deceptive marketing provisions in the *Competition Act*. The proposal to restrict price representations that are "not attainable" due to "fixed obligatory charges or fees" leaves a high degree of uncertainty about what is actually considered misleading. For example:

- What is an acceptable way of representing the "attainable" price? Will it be acceptable to use disclaimers indicating that additional fees will apply, and will it make a difference if the amount of those fees is disclosed too?
- What is the intended meaning of "fixed"? There are many products sold with accompanying obligatory fees, like delivery fees, but that are variable rather than fixed in amount.

The Competition Law and Foreign Investment Review Section is concerned that these new sections will have the effect of prohibiting, and potentially criminalizing, conduct that is not misleading. Again, proper consultation would lead to appropriately tailored measures.

Mergers

The Competition Law and Foreign Investment Review Section is concerned with the proposals for addressing anti-avoidance and hostile acquisitions.

With respect to the anti-avoidance provision (new s. 113.1 of the *Competition Act*), it is uncertain how the Commissioner would be able to establish that a transaction was "designed" to avoid the application of the Act. As a practical matter, transactions are ordinarily designed to achieve multiple objectives. For example, if a transaction structure is designed to achieve tax savings and avoid notification obligations, would the new law require the selection of a sub-optimal tax structure instead?

If the underlying concern is that the Commissioner should be notified of some types of transaction structures, then notification should be required for those transactions. Several of these technical revisions have been identified by competition lawyers and the Competition Bureau and they could serve as the starting point for development of well-designed and unambiguous measures.

We are also concerned that the new sections dealing with hostile transactions could make the review and completion of mergers more difficult or impossible in certain circumstances. Specifically, the

Competition Act currently requires non-cooperating parties to submit relevant materials in a wide range of circumstances – allowing the Commissioner to proceed with reviews and buyers to complete transactions. Proposed s. 114(3) would restrict the application of these sections to situations where the notifying party has made an "unsolicited or hostile take-over bid." However, this is not the only situation where these rules are required to compel cooperation. Under the new rules, for example, a corporation could refuse to file its application materials where one of its minority shareholders wants to sell its shares. There is no sound policy reason why an uncooperative party should be able to use a regulatory loophole to block a commercial transaction or why the Commissioner should not be able to obtain the required information to commence a review.

Closing comments

We welcome the current debate on modernizing the *Competition Act*. However, the proposed amendments should not be considered in the BIA. Given the nature of these changes, meaningful and thorough consultations with relevant stakeholders are necessary. The proposed amendments to the *Competition Act* in the BIA should be deferred and included in the broader consultation so they can be properly studied and refined.

Yours truly,

(original letter signed by Marc-Andre O'Rourke for Omar Wakil and Valerie Dixon)

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Cc: Senator Percy P. Mockler, Chair, Standing Senate Committee on National Finance
The Honourable François-Philippe Champagne, P.C, M.P., Minister of Innovation, Science and Industry
The Honourable Howard Wetston, Senator, C.M., Q.C., LL.D
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