

April 29, 2024

Via email: peter.fonseca@parl.gc.ca; FINA@parl.gc.ca

Peter Fonseca, M.P.
Chair, Standing Committee on Finance
Sixth Floor, 131 Queen Street
House of Commons
Ottawa ON K1A 0A6

Dear Mr. Fonseca:

Re: Bill C-59, Fall Economic Statement Implementation Act, 2023

I am writing on behalf of the Canadian Bar Association's Competition Law and Foreign Investment Review Section (CBA Section) to comment on a specific recommendation¹ made by the Commissioner of Competition on March 1, 2024, regarding Bill C-59 and Canada's merger review laws under the *Competition Act*. While the Commissioner's recommendation has received attention, we do not believe it has been sufficiently scrutinized given its significance. We would welcome an opportunity to appear before your Committee to explain our concerns on these points of law and policy.

As indicated in our previous submissions², we welcome the current review of Canada's competition law framework. However, we have serious concerns with the Commissioner's recommendation to import U.S. structural presumptions based on concentration and market shares levels into the *Competition Act*.

We emphasize that these thresholds—recently revised by U.S. antitrust authorities—indicate an enforcement approach in *enforcement agency guidelines* but are *not part of any U.S. legislation*, or competition legislation in any other jurisdiction. Adopting the Commissioner's recommendation to import structural presumptions based on concentration and market shares levels into the *Competition Act* would not increase harmonization between Canadian and U.S. legislation. This is a misunderstanding that needs to be corrected.

¹ See Commissioner of Competition comments, [online](#).

² CBA Section submission on Bill C-59, *Fall Economic Statement Implementation Act*, 2023 (Feb 12, 2024), [online](#). See CBA Section submission on Bill C-56 — *Affordable Housing and Groceries Act* (Nov 23, 2023), [online](#). See CBA Section submission on Bill C-352 — *Lowering Prices for Canadians Act* (Feb 13, 2024), [online](#). See CBA Section Submission on Bill C-19 — Part 5, Division 15, *Budget Implementation Act*, 2022, No 1: *Competition Act* amendments, [online](#), (May 18, 2022).

As set out below, (i) insufficient evidence has been presented to support such a significant change to Canada's merger laws that would be out of step with our global peers, and (ii) structural presumptions, based on appropriate concentration or market share thresholds, can be developed and implemented by the Commissioner through amendments to the *Merger Enforcement Guidelines*.

Recommendation

1. Clauses 249 and 250 should not be amended to include structural presumption thresholds in sections 91 and 92 of the Competition Act. Any structural presumptions can be included in the Competition Bureau's Merger Enforcement Guidelines, and subsequently developed in jurisprudence (which is the case in the U.S.) rather than enshrined in legislation.

Insufficient evidence to support sound policy making

Insufficient evidence has been presented to your Committee to support structural presumptions based on specific concentration and market shares levels. Adopting the Commissioner's proposal would represent a major shift in merger enforcement review in Canada. Before proceeding, Parliament should be presented with sufficient evidence that:

- **The recently revised concentration and market share thresholds used in U.S. administrative guidelines are appropriate in light of the nature of Canada's economy.**

No evidence has been presented to support that importing thresholds from U.S. enforcement agency guidance is appropriate for the Canadian economy. A critical analysis is required regarding these thresholds, rather than merely importing thresholds that may apply in the U.S. (again, the U.S. has only introduced *guidelines*; it has not amended its legislation). Several preeminent economists have previously raised concerns about the U.S. Merger Guidelines that appear to treat aspects of market structure as intrinsically harmful, without regard to the magnitude of the risk that the transaction will be harmful to competition.³

- **The proposed thresholds capture an appropriate number of transactions and reliably indicate transactions that are likely to be anti-competitive.**

Canada should avoid adopting thresholds that, considering the Canadian economy, would result in a disproportionate number of parties to proposed transactions now having to rebut arbitrary presumptions. Based on the Commissioner's available statistics, what percentage of notified mergers would, under the U.S. concentration and market share thresholds, now bear the onus of rebutting the presumption?

At present, the Competition Bureau will not generally challenge a merger if the post-merger market share of the combined entity is less than 35 per cent. The Commissioner's proposal would declare any merger with a post-merger share of 30 per cent to be presumptively anti-competitive.

We recommend that your Committee seek an explanation for why a 30 per cent threshold is appropriate rather than a 35 per cent threshold (or another threshold for that matter). There must be data to demonstrate if the proposed thresholds capture an appropriate number of transactions and reliably indicate transactions that are likely to be anti-competitive. No such data has been provided to equip Parliament to make an informed policy choice.

- **The introduction of structural presumptions in the *Competition Act* will simplify merger review.**

Based on the experience of our members, this is not true. Rather, the introduction of structural presumptions based on concentration and market shares levels in the *Competition Act* will relieve the Commissioner of its mandate to review and challenge mergers that are anti-competitive.

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See Comments of Economists and Lawyers on the Draft Merger Guidelines, 2023, [online](#).

Instead, any merger that exceeds arbitrary concentration and market share threshold can be sent to the Competition Tribunal and it will be left to the Tribunal to decide whether the merger is anti-competitive.

We welcome discussion on structural presumptions, but the Commissioner's proposal raises questions that deserve appropriate analysis for informed evidence-based decision making.

1. Any structural presumption, based on appropriate concentration and market share thresholds, should be addressed in the *Merger Enforcement Guidelines*

Clause 249 proposes to repeal subsection 92(2), which currently provides that "the Tribunal shall not find that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially solely on the basis of evidence of concentration or market share".

This amendment would empower the Commissioner to modify its *Mergers Enforcement Guidelines* to introduce structural presumptions. This was reinforced by the testimony⁴ of a senior official with Innovation, Science and Economic Development Canada before your Committee on March 19, 2024:

Furthermore, with respect to mergers, the commissioner suggests setting a percentage by default and reversing the burden of proof there as well. Currently, the Competition Tribunal cannot prevent a merger solely on the basis of market share. In Bill C-59, the government removes this barrier, which would allow the tribunal to make intuitive presumptions if market share has become very high. Once again, the commissioner wants us to go further and set a percentage in the act. **To our knowledge, no other countries are doing that.** Bill C-59 is in line with what the United States is doing, which is allowing the courts and jurisprudence to evolve. **[Emphasis added]**

We believe your Committee should seek to understand why the inclusion of structural presumptions in the *Merger Enforcement Guidelines* would not achieve the same result, while allowing for flexibility to amend the thresholds as appropriate. Enforcement guidelines provide a much more flexible instrument for the Commissioner to, should he decide (as was recently done in the U.S.) modify the specific concentration and market share levels, and would harmonize Canadian merger review law with the U.S.

We welcome an opportunity to appear before your Committee to discuss our comments in greater detail.

Yours truly,

(original letter signed by Marc-Andre O'Rourke for Elisa Kathlena Kearney)

Elisa Kathlena Kearney
Chair, Competition Law and Foreign Investment Review Section

The CBA is a national association of 38,000 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 greater awareness and understanding of legal and policy issues relating to competition law and foreign investment. We do not advocate for a particular position or outcome and represent a diversity of opinions, but we understand the Competition Act and the enforcement of competition laws.

⁴ See testimony of Martin Simard, Senior Director, Corporate, Insolvency and Competition Directorate, Department of Industry [online](#).