THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

February 13, 2024

Via email: INDU@parl.gc.ca

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

Dear Joël Lightbound:

Re: Bill C-352, Lowering Prices for Canadians Act

I am writing on behalf of the Competition Law and Foreign Investment Review Section of the Canadian Bar Association (CBA Section) to comment on Bill C-352, *Lowering Prices for Canadians Act.*

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 review.

Competition law reform is proceeding in Canada in a piecemeal fashion. Bill C-352 must be examined in light of the significant amendments that have recently been implemented by the enactment of Bill C-56, the *Affordable Housing and Groceries Act* on December 15, 2023 and proposed amendments in Bill C-59, the *Fall Economic Statement Implementation Act* (currently at second reading in the House of Commons).

Ongoing Competition Law Reform and Overlapping Amendments

Several elements of Bill C-352 have already been addressed as they were incorporated in Bill C-56 during amendments at committee and are therefore no longer required.

The significant amendments to the *Competition Act* in Bill C-56 include market study powers for the Commissioner of Competition, repeal of the efficiencies exceptions for anti-competitive mergers and collaborations, revisions to the legal test for abuse of dominance and amendment to the legal test addressing business collaborations with an anti-competitive purpose and increased financial penalties.

The proposed amendments in Bill C-59 would modify the merger notification thresholds and give the Competition Bureau a longer period to challenge mergers that are not notified to the Bureau and alter

how market concentration is taken into account in merger review. Bill C-59 also includes an anti-reprisal provision, addresses right to repair and would allow administrative monetary penalties to be sought for anticompetitive collaborations and expands private rights of action to recover financial compensation to cover a broader range of practices.

Structural Presumptions in Merger Review

The most significant amendments proposed by Bill C-352 (that did not form part of Bill C-56) – the introduction of bright line rules and presumptions for merger review in sections 8 and 9 – are addressed in Bill C-59.

The CBA Section believes that such bright line tests are not appropriate and, in any event. further amendment is not required in light of the changes proposed in Bill C-59.

Section 92(2) of the *Competition Act* states that the Competition Tribunal cannot find that a merger is likely to result in a substantial prevention or lessening of competition solely on the basis of evidence of concentration or market share. This will be repealed once Bill C-59 receives Royal Assent.

The Competition Bureau has said that the repeal of section 92(2) is "a minimum initial step towards a structural presumption" that "would permit, but not require, the Tribunal to adopt structural presumptions" and "most likely result in the Tribunal placing greater weight on evidence of high market share and concentration than it has to date."[1]

Bill C-352 would *require* the Competition Tribunal to make an order to dissolve or prohibit mergers on the basis of a combined market share that is deemed to be excessive. This amendment would establish arbitrary and inflexible rules that do not allow actual anti-competitive effects to be considered for combined shares above 60% and impose a "substantial pro-competitive outcomes" reverse onus for any situations where the combined market shares are between 30-60%. Moreover, the proposed rules do not take into account or differentiate between any level of increased concentration (e.g., the rules would apply even if the acquired target has a share of less than 1%).

Competition and antitrust laws globally recognize that an assessment of market power and anticompetitive effects is highly contextual, and that it would be inappropriate to fetter a court's ability to conduct a legal analysis of market power and anticompetitive effects based on the facts and evidence before it, by focussing narrowly instead on the merging parties' share of a relevant antitrust market (which itself involves a complex conceptual determination).

In our view, the amendments proposed in section 8 of Bill C-352 go too far and are inconsistent with an effects-based competition regime. The amendments in Bill C-59 *permit*, but do not *require*, the same outcome.

We would welcome an opportunity to appear before your Committee to explain in greater detail the scope of the proposed amendments in Bill C-352 and their impact on Canada's merger review regime.

Yours truly,

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

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

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[1] See Competition Bureau Submission to The Future of Competition Policy in Canada, March 15, 2023.