THE CANADIAN BAR ASSOCIATION
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Via email: legreview-examenleg@fin.gc.ca

Manuel Dussault
Director General
Financial Institutions Division
Financial Sector Policy Branch
Department of Finance Canada
90 Elgin Street
Ottawa ON K1A 0G5

Dear Manuel Dussault:

Re: Strengthening Competition in the Financial Sector

We are writing on behalf of the Canadian Bar Association's Business Law and Competition Law and Foreign Investment Review Sections (CBA Sections) to comment on the Department of Finance's consultation on Strengthening Competition in the Financial Sector.

The Canadian Bar Association is a national association representing over 38,000 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 CBA Business Law Section's mandate covers the law governing corporate entities and includes securities regulation, commercial law and consumer law. The Competition Law and Foreign Investment Review Section promotes greater awareness and understanding of legal and policy issues relating to competition law and foreign investment.

We answer the "key questions for consideration" set out in the consultation and our comments focus on the application of the *Competition Act* to mergers and acquisitions (M&A) in the banking sector. Our comments do not consider the *Bank Act* or other legislation applicable to bank combinations.

Key Questions for Consideration

Question 1: What existing barriers do Canadian consumers face in accessing banking services? How could these barriers best be addressed within the scope of the acquisitions and mergers framework?

We believe banking services markets are competitive and that access to banking services is generally non-problematic for Canadians.

The Bank of Canada has found that "a large majority of Canadians have access to and use a range of payment methods […] and the typical consumer has access to cash, bank accounts, and debit and credit cards and does not face meaningful barriers to accessing financial services or payment methods." [1] While we acknowledge research by ACORN Canada indicating that 15% of Canadians are "underbanked" with 3% '"unbanked"[2] we believe that the *Competition Act* is well-structured to address access issues to the extent they arise "within the scope of the acquisitions and mergers framework."

As a practical matter, virtually all acquisitions in the banking sector are subject to mandatory reporting to the Competition Bureau. The *Competition Act* also permits the Competition Bureau to review small non-reportable M&A transactions. In other words, M&A transactions that could create barriers to accessing banking services will almost certainly come to the attention of the Competition Bureau, whether through mandatory reporting, stakeholder feedback, the Bureau's ongoing review of press releases and media, or voluntary notification filings by the parties to the transaction.

Substantively, the Competition Bureau can and does assess whether M&A transactions will have a negative impact on services Canadians receive from financial institutions. It regularly engages in robust reviews of M&A transactions in the banking sector. Recent examples include RBC/HSBC, Smith Financial/Home Capital and Connect First/Servus.

If the Competition Bureau were to identify competition law concerns in an M&A transaction, the *Competition Act* gives the Competition Tribunal broad remedial powers to address access or other substantive issues identified by the Bureau in its reviews. The Minister of Finance also has broad remedial powers to address competition or other public interest concerns arising from a transaction that requires the Minister's approval.

Question 2: What changes, if any, are required or desirable to the merger and acquisition review process for banks?

The *Competition Act* establishes a legal and principled framework to assess mergers that applies across industry sectors. It includes provisions that appropriately permit the Minister of Finance to take ultimate decision-making authority over bank mergers on public interest grounds. We generally support the desirability of public interest assessments in appropriate M&A transactions. However, we do not believe it necessary or desirable for the *Competition Act* to include substantive statutory provisions specific to banks (or other industries).[3]

The CBA Sections believe that the Competition Bureau's review of M&A transactions in the banking sector could be more efficient and effective. The current process is document and data heavy. It imposes considerable compliance costs on merging parties. It is also increasingly imposing costs on third parties that are active in the relevant markets but not involved in the M&A transaction.

The Competition Bureau routinely seeks extensive information from these parties to compile bespoke data sets for the purposes of their reviews. The massive amount of information collected by the Bureau results in reviews that extend over many months.

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1 Christopher S. Henry et al, Unmet Payment Needs and a Central Bank Digital Currency (Ottawa: Bank of Canada, 2023 Staff Discussion Paper - 2023-15) . See online.

2 See online.

3 Unless there is a public interest review, banks should not be required to comply with different or higher standards than other Canadian businesses. For example, section 49 of the *Competition Act*, which criminalises certain types of ordinary course agreements if they are between banks, is outdated and unnecessary in light of the 2009 amendments to section 45 of the *Competition Act*. It imposes significant criminal liability on banks. We recommend its repeal.

Based on public information, the review in RBC/HSBC took nine months; Smith Financial/Home Capital took five months and Connect First/Servus has taken seven months to date and is ongoing. (This is in comparison to the Bureau's review of the Scotia/ING transaction in 2012 which closed within three months of the parties signing the transaction agreement.)

These extended reviews seem excessive and unnecessary for an industry that is generally competitive and one that (i) files significant information that is available publicly including information about markets and market shares and (ii) more generally has extensive ordinary course information about markets and market shares.

We believe the Bureau should re-calibrate its approach to assessing M&A transactions to evaluate transactions more efficiently and effectively. This could be done, for example, by limiting the information requests made of merger parties and industry participants.

We encourage the Competition Bureau to continue to issue statements following the review of significant bank or FI-related transactions that explain their approach and conclusions with respect to market definition and other assessment factors under section 93 of the *Competition Act*. This was done following the proposed bank mergers of the 1990s, as well as the recent HSBC/RBC transaction. Transparency and predictability in enforcement are important and allow stakeholders to understand how the Bureau reaches decisions.

What new considerations should be included in a review of a merger or acquisition under the *Bank Act*?

While the CBA Competition Law and Foreign Investment Review Section does not have views on *Bank Act*-related matters, it is worth noting that the *Competition Act* was recently amended to remove the efficiencies defence and to explicitly permit the Competition Bureau and Competition Tribunal to consider factors such as network effects in assessing M&A transactions.

Given the removal of the efficiencies defence in the *Competition Act*, we encourage the government to consider the role of efficiencies considerations in the *Bank Act* (e.g., as a factor in any public interest assessment decision-making).

What are the range of appropriate remedies that should be considered to address any competition or concentration concerns?

The Competition Bureau has a stated preference for structural remedies to address competition law concerns. In our view, more weight should be given to the possibility of behavioural (conduct) remedies addressing potential concerns. This is particularly relevant for regulated industries, such as banking, where a specialised regulator could be charged with monitoring compliance.

How can federal agencies and authorities better cooperate and share information during reviews of Canadian bank mergers and acquisitions?

In the experience of the Competition Law and Foreign Investment Review Section members, there seems to be limited interaction between the Competition Bureau and other relevant federal agencies regarding banking M&A.

We are of the view that more coordination between the agencies where there are concurrent regulatory reviews taking place for a transaction, particularly relating to process and timing considerations (e.g., expected timing for completing a review and status and findings), would be productive and prevent process-driven delays in each agency's review.

Substantively, although each agency has a different mandate and area of focus, the Competition Bureau may benefit from the institutional knowledge of Canada's federal and provincial financial institution regulators. The Competition Bureau is not a specialised industry regulator and its knowledge and understanding of the banking sector could be greatly enhanced by allowing the Bureau to "tap into" OSFI and Department of Finance (or other provincial regulators) expertise may help expedite its assessments.

Question 3: Should the government formalize a ban on mergers between large banks, and if so, how?

From a competition law perspective, all M&A activity should be assessed on a case-by-case basis with an effects-based analysis. Competition law enforcement should be principles-based and sector neutral.

The *Competition Act* and *Bank Act* can (and have been) used to stop mergers the government did not think were appropriate, such as the proposed combinations of RBC/BMO and TD/CIBC in the 1990s.

History has demonstrated that the current regime provides the government with adequate remedial powers, including a blocking power. A blanket ban could have the unintended effect of banning transactions that are beneficial to Canadians.

What would be an ideal threshold size for such a ban?

A ban is not appropriate. Assessments of competitive effects are complex, nuanced and case specific. They cannot be reduced to market shares or other simplistic metrics. This is particularly true in banking, where there are many product lines over which market shares vary, sometimes at a local level. A ban, which would inevitably have to be based on some sort of broad metric without assessing specific facts, could lead to over enforcement, and block transactions that are beneficial to Canadians.

Question 4: Should the government consider measures that would limit how large banks can grow through acquisitions, and if so, how?

No. See our comments above. We believe the *Competition Act* is well-calibrated to ensure that a merger will not be permitted if the resulting bank would have the ability to exercise market power in an anti-competitive manner.

Should there be limits to acquisitions of financial institutions by domestic systemically important banks or global systemically important banks?

We have no views on this matter from a competition law perspective, which we believe is a prudential, not competition-related issue. The decision to impose or not impose limits on acquisitions of financial institutions by domestic systemically important banks or their global counterparts should be driven by non-competition factors such as risk to financial stability.

Should there be limits to banks' ability to acquire other financial institutions if their combined market share of a certain product exceeds a set threshold? If so, how should those thresholds be set and implemented? What should the remedies be?

No. See comments above.

Question 5: How can the federal government's commitment to deliver Consumer-Driven Banking, also known as open banking, support competition in the financial sector?

Consumer-driven banking is expected to give established financial institutions the ability to further leverage their brand and customer base to enhance their product and service offerings, which may help them to become more competitive domestically and internationally.

For new financial services entrants and smaller players, increased access to data is expected to enhance the ability to grow and scale business quickly, leading to enhanced competition.

In all cases, consumer-driven banking is expected to lead to more innovative and personalized services and product offerings, both within the banking sector and in other sectors such as insurance. For instance, consumer-directed finance could allow for the sharing of customer data between insurers which may help insurance companies develop more personalized offerings or identify potential fraud.

That said, we strongly believe that "supporting" industry players is not the role of competition law. Competition law is designed to ensure competitive markets, not pre-determine specific outcomes. We recognise that the government may seek certain specific outcomes for prudential or other non-competition reasons. That is not the role of competition law and should not be a factor in any Competition Bureau assessment of a proposed combination.

Question 6: Could the framework better ensure a more level playing field for all participants to support competition?

The *Competition Act* is well calibrated to address potential anti-competitive conduct that could affect "level playing field" concerns. This includes the recent and significant amendments to *Competition Act* dealing with anti-competitive agreements and abusive conduct by dominant industry participants. The predecessor provisions in the *Competition Act* can (and have been) used to ensure fair competition in the FI industry (e.g., the "Interac" case mandating fair access to the Interac system).

Should large banks be required or incentivized to offer third-party products and services?

Mandating banks to offer third party products would likely have unintended consequences. Moreover, it could conflict with provincial regulation and impose significant liability or compliance costs on banks required to offer products that they do not stand behind.

It may act as a disincentive to competition if banks decide simply not to engage in certain activities when doing so would require them to offer third party products. In an industry that is currently competitive, products and services that consumers want will be made available through one channel or another. We reiterate that competition law is about ensuring a competitive process not a specific outcome.

Question 7: Should there be a regular public report on concentration and competition in Canada's banking sector? What would be important areas to consider in such a report?

We do not think there is a demonstrated need for regular public reports on concentration and are concerned that they would, in practice, impose burdensome compliance costs on businesses.

If a decision is made to proceed with regular public reports, we do not think the Competition Bureau should be involved. Recent amendments permit the Competition Bureau to conduct market studies on competition in different industry sectors. However, in our view, the purpose of that amendment was not to require regular or recurring reports (by the Bureau) on an industry. The Bureau should not be viewed as having any sort of special responsibility for a particular industry sector.

Question 8: What other measures, if any, should the government take to address factors that affect competition such as market concentration, barriers to entry and expansion, regulatory burdens, switching costs, and the conditions facilitating coordinated behaviour in the banking sector?

We believe that all these factors are already part of the *Competition Act*'s enforcement framework including via recent and proposed amendments.

What is the role of provinces in supporting more competition in the financial sector and are there issues that should be addressed with better coordination and collaboration?

We do not have views on this question that are different to those expressed elsewhere in this submission.

Question 9: What measures to encourage competition could also support the creation of new jobs, and the protection of existing jobs, in the Canadian financial sector?

Competition law enforcement - where appropriate - will help ensure a competitive environment in which businesses can operate to the benefit of Canadian consumers. It is not designed to create or protect jobs.

It is not the role of competition law to require banks to maintain certain employment levels (or create new jobs). We recognise that employment impacts may be a relevant factor in the Minister of Finance's public interest assessment of bank transactions, as they were in the RBC/HSBC transaction.

However, from a competition law perspective, employment-maintenance commitments could have negative impacts on the cost and quality of services offered to Canadians. This is particularly true in a rapidly changing technological environment, where the adoption of innovative new technologies could allow banks to offer better and more affordable services. Adoption of such technologies may mean fewer (better) jobs, but higher-quality products and services for Canadians. Employment mandates could act as an impediment to adopting these new technologies.

To the extent there are negative competitive impacts on labour as a result of M&A activity or collusive conduct between banks, recent amendments to the *Competition Act* address these potential concerns.

What could be the potential implications for the Canadian financial sector workforce from your suggestions to the above questions?

See above.

Conclusion

Thank you for the opportunity to comment on the Department of Finance's consultation on Strengthening Competition in the Financial Sector. We trust our comments are helpful and would be pleased to offer further clarification.

Yours truly,

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

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