THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

February 12, 2024

Via email: nffn@sen.parl.gc.ca

The Honourable Percy Mockler
Chair, Standing Senate Committee on National Finance
Senate of Canada
Ottawa ON K1A 0A4

Dear Senator Mockler:

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

I am writing on behalf of the Competition Law and Foreign Investment Review Section of the Canadian Bar Association (CBA Section) to comment on amendments to the *Competition Act* proposed in Bill C-59, *Fall Economic Statement Implementation Act, 2023*.

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.

Background

The *Competition Act* was recently amended when Bill C-56, *An Act to amend the Excise Tax Act and the Competition Act* received Royal Assent on December 15, 2023. Finance Canada announced[1] that those amendments to the *Competition Act* would stabilize prices by increasing competition, particularly in the grocery sector.

However, the *Competition Act* is a law of general application, and applies not just to the grocery sector. It applies "broadly across all markets in Canada."[2]

The CBA Section's exhaustive submission[3] on Bill C-56 made 12 balanced and thoughtful recommendations based on decades of practitioners' experience advising domestic and foreign

1 Department of Finance News Release, online.

2 See testimony of Samir Chhabra, Director General, Marketplace Framework Policy Branch, Innovation, Science and Economic Development Canada before House of Commons Finance Committee, November 20, 2023, online.

3 CBA Section Submission on Bill C-56, *Affordable Housing and Groceries Act* (November 2023), online.

businesses on competition law, across various sectors of the economy. Our recommendations were rooted in a desire for certainty, transparency and predictability to minimize cost on Canadian businesses.

We did not address Bill C-56's significant changes to sections 78 and 79 of the *Competition Act* (abuse of dominance) because those amendments were not in Bill C-56 when it was tabled. Those amendments were introduced at the last minute at a meeting of the House of Commons Finance Committee less than a week before the report stage was completed in the House and only one day before Bill C-59 was tabled.

Importance of parliamentary study and debate

While broad high-level public consultations[4] preceded the introduction of Bill C-56 and Bill C-59, there has been little debate on specific legislative proposals during the parliamentary process. For example, the Senate National Finance Committee complained that it was "afforded a very limited time to conduct its study of the bill" and "as a result, it was prevented from thoroughly studying the bill and properly performing its duties."[5]

The CBA Section expresses concern and disappointment that debate and review were unduly truncated during the study of Bill C-56.

We now urge Parliament to allow sufficient time for a thorough study of Bill C-59.

Bill C-59 will have important implications across the economy. Its proposed amendments must be considered in light of the sudden changes made to the *Competition Act* by C-56 to ensure a coherent and predictable enforcement framework.

The CBA Section commends the Marketplace Framework Policy Branch at Innovation, Science and Economic Development Canada for its efforts to amend Canada's competition law to produce positive outcomes for Canadians. Nevertheless, we urge Parliament to permit a more thorough debate on Bill C-59. We emphasize the importance of hearing from diverse perspectives, including the legal and business community.

Parliamentary debates and committee studies are essential because they inform eventual judicial interpretation of the resulting legislation. This is particularly relevant when new concepts are introduced in the statutory framework.[6]

Summary of Recommendations

Given that material changes to the *Competition Act* were added to Bill C-56 at the last minute (only one day before Bill C-59 was tabled), the CBA Section recommends the following amendments to Bill C-59:

1. Section 79(4.1) will only apply to conduct under section 78(1)(k) that has occurred one year after Bill C-59 receives Royal Assent.
2. Remove the Competition Tribunal's ability to order administrative monetary penalties (AMPs) or private disgorgement payment under section 90.1(1).

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4 CBA Section Submissions to Consultation on the Future of Competition Policy (March 2023) and (June 2023).

5 See Senate National Finance Committee Report on Bill C-56, online.

6 See for example, *Canada (Commissioner of Competition) v. Superior Propane Inc.* (C.A.), 2003 FCA 53 (CanLII), [2003] 3 FC 529 at para 75.

3. Alternatively, amend sections 90.1(1.3) and (10.1) so that AMPs and private payment for contraventions of section 90.1(1) can only be ordered if the Tribunal finds that a significant purpose of the agreement or arrangement, or any part of it, is to prevent or lessen competition in any market or, at a minimum, amend Bill C-59 to include a transition period making section 90.1(1.3) only applicable one year after Bill C-59 receives Royal Assent.
4. Clarify that AMPs or private disgorgement payment is not available for agreements that are reviewable as "mergers" under section 92 of the *Competition Act*.

Government has recognized transition periods help address compliance risk and uncertainty for businesses

The CBA Section appreciates the government's effort to address compliance risk and uncertainty for Canadian businesses by including a one-year transition period in Bill C-59, where expanded rights of private action (including private parties' ability to obtain payment) would take effect one year after Bill C-59 receives Royal Assent.

Bill C-56 also includes a one-year transition before the amendments to the civil anti-competitive collaboration provisions (section 90.1(1.1)) come into force.

A one-year transition was also included for the June 2022 amendments to section 45 of the *Competition Act* (in Bill C-19, *Budget Implementation Act, 2022, No. 1)* to capture certain agreements between employers.

It is surprising and unfortunate that significant and late stage amendments to Bill C-56 that revised the legal test for abuse of dominance – a cornerstone of our competition law – and introduced a new, uncertain and undefined legal standard did not benefit from a transition period and are now in force.

Businesses "directly or indirectly imposing excessive and unfair selling prices" intended to have a predatory, exclusionary or disciplinary negative effect on a competitor, or to have an adverse effect on competition may immediately be subject to action by the Commissioner of Competition or a private party under a revised legal standard for abuse of dominance and at risk of increased monetary penalties[7] if the conduct has had or is having the effect of preventing or lessening competition substantially.

The term "excessive and unfair selling prices" is undefined, and no similar concept is found in the *Competition Act*.

Transition periods give the Competition Bureau time to publish guidance and businesses time to assess their conduct and ensure it is in compliance with the new legislation. In fact, the Commissioner of Competition told the House of Commons Finance Committee that the Competition Bureau is "keenly aware of the importance of predictability" for Canadian businesses and the Bureau "will take care to ensure that its approach going forward with respect to [the application of the proposed amendments] is communicated clearly and transparently to businesses and stakeholders alike."[8]

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7 New penalties are up to $25,000,000 or three times the value of the benefit derived or, if that amount cannot be determined, 3% of the person's annual worldwide gross revenues.

8 Commissioner of Competition statement to the House of Commons Standing Committee on Finance (November 27, 2023), online.

The Competition Bureau recently concluded a public consultation on revised draft guidelines on the abuse of dominance to address 2022 *Competition Act* amendments. However, these revised draft guidelines are now substantially outdated and must be revised again to reflect the changes in Bill C-56 and give clarity and predictability to businesses. We look forward to participating in the public consultations on future guidelines.

Clarify that private disgorgement payments for excessive pricing will only apply to conduct one year after Bill C-59 receives Royal Assent

The CBA Section commends the government for introducing a transition period for the application of the private rights to action proposed in Bill C-59. However, if Bill C-59 is implemented, pricing practices engaged in by businesses today may also be subject to private action for payment one year following the enactment of Bill C-59.

The CBA Section recommends amending Bill C-59 to clarify that private disgorgement payments for conduct under section 78(1)(k) will only apply to conduct one year after Bill C-59 receives Royal Assent.

This will afford the Bureau time to issue guidance on "excessive and unfair pricing" and enable businesses to obtain legal advice to adjust their practices rather than rush to change their behaviour for fear of recourse in a future private action.

Reconsider monetary penalties applicable to civil competitor collaboration provisions to ensure a cohesive enforcement framework

In addition to prohibition orders and other remedies currently available on consent for conduct contrary to section 90.1, Bill C-59 proposes to give the Competition Tribunal the ability to impose administrative monetary penalties (AMPs) of up to the greater of $10 million for the first order (and $15 million for each subsequent order) and three times the value of the benefit derived from the agreement (or if that amount cannot be reasonably determined, 3% of the person's annual worldwide gross revenues) as well as the ability for private parties to obtain disgorgement payment.

Given the amendments to the abuse of dominance provisions in Bill C-56, introduced one day before Bill C-59 was tabled, the CBA Section asks Parliament to question whether it is appropriate for Bill C-59 to include AMPs and private payment for contraventions of section 90.1(1).

Section 90.1 of the *Competition* Act was intended to serve effectively as a no-fault provision, enabling injunctive action where agreements between competitors substantially prevent or lessen competition but are not criminal in nature under section 45.

The CBA Section has previously stated[9] that it agrees that the Competition Tribunal should have the ability to make orders that are necessary to restore competition when a prohibition order under section 90.1 would be insufficient to remedy a likely substantial lessening or prevention of competition. However, since anti-competitive intent is not an element of section 90.1(1), our view is that there is no basis for significant AMPs as a remedy, particularly where the legislation is clear that the purpose is to promote practices that are in conformity with the *Competition Act* and not to punish. In formulating the new test for section 79, Bill C-56 deliberately preserved all three parts of the legal test – dominance, intent and market effect – before AMPs could be ordered (and Bill C-59 mirrors these requirements for private disgorgement payment), leaving injunctive action as a remedy where only two elements of the test are met.

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9 CBA Section Submission to the Consultation on the Future of Competition Policy (June 2023).

However, section 90.1(1) does not include the same restriction on the award of financial penalties and private disgorgement payment that Parliament saw fit to include for abuse of dominance. A firm in a dominant position may be subjected to AMPs or private disgorgement payment under section 90.1 but not under section 79 for the same conduct.

To ensure a coherent and predictable enforcement framework, the CBA Section recommends amending sections 90.1(1.3) and (10.1) so that AMPs and private payment for contraventions of section 90.1(1) can only be ordered if the Tribunal finds that a significant purpose of the agreement or arrangement, or any part of it, is to prevent or lessen competition in any market.

Alternatively, we recommend amending section 90.1(1.3) to come into force one year after Bill C-59 receives Royal Assent (not immediately on Royal Assent).

The Competition Bureau will need time to prepare guidance on these expanded provisions with new implications for businesses. And businesses should be afforded the requisite time to ensure compliance with the benefit of guidance, before being subject to high penalties (which are not meant to be punitive in nature).

A transition period will not adversely impact the Competition Bureau's ability to protect competition in a market with respect to civil collaborations since the Tribunal would continue to have the ability to issue a prohibition order (i.e. an order prohibiting the conduct).

Another reason to question whether it is appropriate for Bill C-59 to include AMPs and private payment for contraventions of section 90.1(1) is to ensure a predictable and cohesive enforcement framework with respect to mergers. Unlike cartel conduct, which is regarded as unequivocally problematic and is subject to both criminal penalties and private damages actions, the focus of section 90.1 is, like mergers, the identification of the competitive effects and the remedying of such effects (whether horizontal or vertical). AMPs and private rights of action have never been part of the merger enforcement framework.

Given the broad wording of sections 90.1(1) and (1.1) there is potential overlap between agreements captured by those provisions and "mergers" as defined in section 91 of the *Competition Act*, for which there is a separate enforcement framework.

It would be inappropriate, and out of step with global practice on merger review, for AMPs to be potentially levied on parties to a bona fide merger transaction. In addition, the government's consultation did not contemplate, and the CBA Section does not support, the possibility of private litigation (or damages) for merger transactions.

Should Parliament not reconsider the appropriateness of monetary penalties applicable to civil competitor collaboration provisions**,** we urge the government to clarify that the possibility of AMPs and private actions for damages are not available for agreements that are reviewable as "mergers" under the *Competition Act*.

Conclusion and Summary of Recommendations

Given that material changes to the *Competition Act* were added to Bill C-56 at the last minute (only one day before Bill C-59 was tabled), the CBA Section recommends the following amendments to Bill C-59:

1. Section 79(4.1) will only apply to conduct under section 78(1)(k) that has occurred one year after Bill C-59 receives Royal Assent.

2. Remove the Competition Tribunal's ability to order administrative monetary penalties (AMPs) or private disgorgement payment under section 90.1(1).

   Alternatively, amend sections 90.1(1.3) and (10.1) so that AMPs and private payment for contraventions of section 90.1(1) can only be ordered if the Tribunal finds that a significant purpose of the agreement or arrangement, or any part of it, is to prevent or lessen competition in any market or, at a minimum, amend Bill C-59 to include a transition period making section 90.1(1.3) only applicable one year after Bill C-59 receives Royal Assent.

3. Clarify that AMPs or private disgorgement payment is not available for agreements that are reviewable as "mergers" under section 92 of the *Competition Act*.

The CBA Section appreciates the opportunity to share our views and we would be pleased to offer further assistance as needed, including by appearing before your Committee.

Yours truly,

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

Elisa Kathlena Kearney
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cc. The Honourable Chrystia Freeland
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