Competition Bureau Canada | Bureau de la concurrence Canada

March 1, 2024

Dear Mr. Chair and members of the House of Commons Standing Committee on Finance :

Dear Mr. Chair and members of the Senate Standing Committee on National Finance :

As Commissioner of Competition, I am writing to you concurrently as part of your respective studies into the subject matter of Bill C-59. I would like to express my support for the Competition Act (Act) amendments in C-59 and to provide some recommendations to further strengthen the bill.

I think we can all agree on the basics: Canada needs more competition. Competition is key to tackling our affordability challenges, improving consumer choice, and fostering stronger, more inclusive growth over the long term. And while the Act is just one tool to protect and promote greater competition in Canada, it is a foundational one and has been in need of modernization for some time.

Fortunately, the changes proposed in C-59, together with the recent reforms made in Bills C-19 and C-56, represent a generational upgrade in our competition law framework. I applaud the Government, Parliamentarians and citizens from across the country for their efforts in shaping this modernization process. It is the product of years of public and expert dialogue and parliamentary debate. The changes deliver on a significant number of the Competition Bureau's recommendations, and will help bring our competition regime in line with international best practice.[1]

As with any reform, there is always room for further improvement. We have identified a number of amendments to Bill C-59 that would, in our respectful view, strengthen what is already an important and significant piece of legislation. These recommendations are informed

[1] See our February 2022 submission to former Senator Howard Wetston's consultation on the Competition Act, and our March 2023 submission to the Government's consultation on the future of competition policy.

by our experience administering and enforcing the Act and the challenges that we encounter day-to-day. They are listed below, and outlined in more detail in the Annex to this letter. We would be pleased to provide further information to help you consider these recommendations.

Ultimately, we are committed to transparent, principled, and evidence-based enforcement of the Act for the benefit of all Canadians. Since the passage of Bills C-19 and C-56, we have been steadfast in our efforts to implement the new and improved tools we have been given. This includes new internationally-recognized guidance on wage-fixing and no-poaching agreements, a case currently being litigated at our Competition Tribunal under our new drip pricing provision, and a significant number of active investigations in priority sectors for Canadians. If Bill C-59 passes, we will take the same approach.

Thank you for the opportunity to provide this input and for the work your respective committees and members have done to promote competition in Canada.

Sincerely,

Matthew Boswell
Commissioner of Competition

List of Recommendations for Consideration

1. **Drip Pricing:** Amend Clauses 234-237 to close a potential loophole in the “drip pricing” provision and guard against the unintended proliferation of junk fees.

2. **Greenwashing**: Study whether the approach to greenwashing taken in Clause 236(1) could be expanded to cover all environmental claims made to promote a product or business interest.

3. **Ordinary Selling Price**: Amend Clause 236(2) so that sellers bear the burden of proving that discounts are genuine.

4. **Structural presumptions for mergers**: Amend Clauses 249-250 to enact rebuttable presumptions for mergers consistent with those set out in the U.S. Merger Guidelines.

5. **Remedial standard for mergers**: Amend Clause 249 to stipulate that the purpose of an order made against an anti-competitive merger is to preserve or restore the level of competition that would have prevailed without the merger.

6. **Environmental certificates**: Remove Clause 265 from Bill C-59 for further consideration in light of potentially significant unintended consequences.

Annex: Competition Bureau's Recommendations on Bill C-59

Recommendation 1 (Drip Pricing): Amend Clauses 234-237 to close a potential loophole in the "drip pricing" provision and guard against the unintended proliferation of junk fees.

"Drip pricing" is the deceptive practice of omitting mandatory fees from advertised prices, thereby misrepresenting the total cost of goods and services. It happens when a seller advertises a 'low' price to lure in customers only to add in mandatory fees prior to checkout. Drip pricing preys on consumer behavioural biases and limits informed decision-making, undermining market forces.

In June 2022, new subsections were added to the deceptive marketing provisions of the Act to explicitly recognize drip pricing as a deceptive practice. The relevant subsections (ss. 52(1.3) and 74.01(1.1)) are currently worded as follows:

> For greater certainty, the making of a representation of a price that is not attainable due to fixed obligatory charges or fees constitutes a false or misleading representation, <u>unless the obligatory charges or fees represent only an amount imposed by or under an Act of Parliament or the legislature of a province</u>. (emphasis added)

The exception (underlined above) for government-imposed fees was put in place so that businesses could omit sales taxes or similar government surcharges from advertised prices without it being deemed deceptive. However, the Bureau has learned that some businesses are interpreting the exception more broadly, viewing it as permission to pass general regulatory costs or business taxes onto consumers as dripped fees. A business might, for instance, take a general industry levy they incur and pass that along to consumers in the form of a mandatory 'transaction fee', concocted to avoid disclosing it in the advertised price, and argue that they fit within the letter of the exception.

It is possible that the Competition Tribunal and courts will interpret the exception in a way that protects consumers from these unexpected charges, which violate the spirit of the provision. It is also possible that such practices could contravene our general deceptive marketing provisions even if they do not fit within the letter of our drip pricing provision. Nevertheless, we think that our drip pricing provision could be clarified to guard against the proliferation of these junk fees and avoid unnecessary litigation.

Clauses 234 and 237 add reference to drip pricing in the criminal and civil anti-spam provisions of the Act, correcting an oversight from the 2022 amendments. While the Bureau welcomes this change, we recommend building on this by closing the potential interpretive loophole discussed above. One option would be to make minor amendments throughout Clauses 234-237 so that the drip pricing provision would read (in all of the sections of the Act where it is found):

> For greater certainty, the making of a representation of a price that is not attainable due to fixed obligatory charges or fees constitutes a false or misleading representation, unless the obligatory charges or fees represent only an amount imposed **<u>on a purchaser of the product referred to in subsection (1)</u>** by or under an Act of Parliament or the legislature of a province.

This would align with the approach to "government charges" in a similar drip pricing rule proposed by the U.S. Federal Trade Commission, which "covers only fees or charges imposed by the government on consumers and does not encompass fees or charges that the government imposes on a business and that the business chooses to pass on to consumers."

Recommendation 2 (Greenwashing): Study whether the approach to greenwashing taken in Clause 236(1) could be expanded to cover all environmental claims made to promote a product or business interest.

When companies make environmental claims to promote a product or business interest, they should be able to back them up. Bogus claims are false or misleading and undermine competition on the merits.

Clause 236(1) adds a new provision to the deceptive marketing provisions of the Act to help address certain types of false or misleading environmental claims. It specifies that claims about a "product's benefits for protecting the environment or mitigating the environmental and ecological effects of climate change" must be "based on an adequate and proper test". Importantly, the burden of proof would fall on the person making the representation, making it a type of 'reverse onus' provision.

While we welcome this new tool to address certain forms of "greenwashing", in our view, it may prove to be a limited change that is more in the vein of clarifying the law than expanding it. This is consistent with the views expressed by various commentators, including environmental advocacy groups (see below). Notably, there is already a similar reverse onus provision of the Act dealing with product performance claims (para 74.01(1)(b)). That provision prohibits making a claim about "the performance, efficacy or length of life of a product that is not based on an adequate and proper test" and would likely capture some of the same claims captured under this new provision.

The reality is that a significant portion of the greenwashing complaints the Bureau receives do not involve claims about products, but rather more general or forward-looking environmental claims about a business or brand as a whole (e.g. claims about being "net zero" or "carbon neutral by 2030"). These more general claims to promote a business interest can also be false or misleading, and may be captured by our general deceptive market provisions. However, these claims are not reverse onus, and it can be challenging for the Bureau to prove that they are false or misleading in a material respect. While these more general claims may not be amenable to 'testing' like product performance claims, business should at least be able to *substantiate* them if challenged.

Accordingly, while we support the initial steps made in Clause 236(1), we recommend studying whether the reverse onus approach to greenwashing claims could eventually be expanded to require that all environmental claims made to promote a product or business interest be supported by adequate and proper substantiation.

Relevant public commentary:

- "Notably, this provision only appears to apply to environmental statements regarding a product. It does not appear, on a plain reading, to apply to more general environmental representations (i.e. such as those relating to the environmental goals of a company or the sustainable nature of its operations)." (Fasken, Dec. 1, 2023)

- "The provision should… [b]e extended to apply to non-product statements, like a company's net zero commitments and plans. These types of commitments and plans should be supported with modeling…" (Ecojustice and Canadian Association of Physicians for the Environment, Dec. 1, 2023)

- “While there was no uncertainty as to whether an Environmental Benefits Claim was already captured in the legislation (since the Bureau has pursued a number of cases already under the civil deceptive marketing provisions), the proposed amendments do clarify for advertisers that statements about the environmental benefits of a product will generally be assessed in the same way as Performance Claims...” (McCarthy Tétrault, Jan. 29, 2024)

Recommendation 3 (Ordinary Selling Price): Amend Clause 236(2) so that sellers bear the burden of proving that discounts are genuine.

Fake discounts are another common deceptive marketing practice. Businesses may promote a price as being a discount when, in fact, the advertised price is just the ordinary price of the product. This conduct is prohibited under the ordinary selling price (“OSP”) provisions of the Act (ss. 74.01(2) and 74.01(3)).

Currently the Bureau bears the burden of proving that discount claims are false or misleading. This means that if a seller makes a claim like “$50 off, regular price $100” we would have to obtain the data and run the numbers to verify whether the claim is truthful or not, and be prepared to prove it in court, which can be a hefty burden. In our view, this is not the most efficient approach given that the company is the one making the savings claim based on its own sales history and is best-positioned to back it up if it is challenged.

Clause 236(2) makes some minor changes to the English version of ss.74.01(3) to address an inconsistency with the French version and clarify interpretation. While the Bureau welcomes this change, we recommend that further amendments be made to reverse the burden of proof under the OSP provisions, consistent with our February 2022 and March 2023 submissions. There are different ways this could be formulated, but one idea would be to amend ss.74.01(3) as follows:

> **(3)** A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, makes a representation to the public as to the price at which a product or like products have been, are or will be ordinarily supplied by the person making the representation ~~where~~ **unless** that person, having regard to the nature of the product and the relevant geographic market, **the proof of which lies on that person**
>
> **(a)** has ~~not~~ sold a substantial volume of the product at that price or a higher price within a reasonable period of time before or after the making of the representation, as the case may be; ~~and~~ **or**
>
> **(b)** has ~~not~~ offered the product at that price or a higher price in good faith for a substantial period of time recently before or immediately after the making of the representation, as the case may be.

Recommendation 4 (Structural presumptions for mergers): Amend Clauses 249-250 to enact rebuttable presumptions for mergers consistent with those set out in the U.S. Merger Guidelines.

Mergers involving large players in highly concentrated markets pose a greater risk to competition than mergers involving small players in fragmented markets. Anyone can understand that moving from 3 to 2 options is worse than moving from 10 to 9 from a competition perspective.

Our U.S. counterparts leverage this basic insight in the form of rebuttable "structural presumptions" for mergers.[2] Where the U.S. agencies can prove that a merger will increase market share or concentration above certain thresholds (described below), the merger is presumed to be anti-competitive and the burden shifts to the merging parties to rebut that presumption. Parties can rebut the presumption by showing, for example, that barriers to entry in the market are low, or that there are other countervailing factors that will prevent anti-competitive harm. The higher the parties are above the threshold, the stronger the evidence needs to be to rebut the presumption, so it operates like a 'sliding scale'.

Structural presumptions make sense for a risk-based analysis like merger review. They provide a guidepost for the analysis and more efficiently allocate burdens of proof while still allowing for a full assessment of relevant factors. They can also provide a useful signal to firms and their advisors about transactions that are likely to raise significant concerns and may not be worth pursuing, saving time and resources for everyone.

Currently, subsection 92(2) of the Act expressly prevents the Tribunal from presuming that a merger is anti-competitive based on evidence of market share or concentration alone. Counterintuitively, even if the Bureau can establish that a merger would totally eliminate competition by creating a monopoly, the Tribunal would need more evidence to find that it substantially lessens or prevents competition.

Clauses 249 and 250 would repeal subsection 92(2) and add market share or concentration to the list of discretionary factors that the Tribunal may consider in evaluating a merger. Ultimately, this is a welcome change, but a relatively modest one. It does not establish any burden-shifting presumptions for mergers. It merely opens the door for the Tribunal to place greater weight on market share evidence than it has to date. While it is possible that U.S.-style structural presumptions could emerge through case law, there is no guarantee that they would.

While we welcome these steps, our February 2022 and March 2023 submissions called for a more definitive reform in this area. We recommend that Clauses 249-250 be amended to set out specific, rebuttable presumptions for mergers aligned with the thresholds set out in the 2023 U.S. Merger Guidelines. The U.S. Merger Guidelines set out two different structural thresholds, one based on levels and changes in concentration as measured by the Herfindahl-Hirschman Index (HHI)[3] and another based on the merged firm's market share. These are summarized in the table below, taken directly from page 7 of the U.S. Merger Guidelines:

[2] Germany also uses rebuttable structural presumptions in mergers and unilateral conduct cases, and these are written directly into their law. The Australian Government is consulting on an even more stringent approach that would put the burden on merging parties, in all cases, to satisfy their competition authority or Tribunal that the merger is not anti-competitive (i.e. not merely cases where a structural presumption is triggered).

[3] The HHI is a common index used in industrial organization. It is calculated by summing up the squares of market shares in the market. The HHI ranges from near 0 (in the case of very large number of small firms) to 10,000 (in the case of a monopoly). For example, a market with 8 equally-sized competitors would have an HHI of 1,250 ($8 \times 12.5^2 = 1,250$). If the same market had 3 firms with 30% share and 5 firms with 2% share, the HHI would be 2,720 ($3 \times 30^2 + 5 \times 2^2 = 2,720$). While both markets have eight firms, the HHI captures the fact that the second market is significantly more concentrated and thus, all else equal, would pose a greater risk of competition concern.

Indicator	Threshold for Structural Presumption
Post-merger HHI	Market HHI greater than 1,800 AND Change in HHI greater than 100
Merged Firm's Market Share	Share greater than 30% AND Change in HHI greater than 100

These thresholds reflect U.S. case law and the risk of competitive harm suggested by market structure. Triggering either of them is sufficient to make a merger presumptively illegal under the U.S. framework. They were recently invoked by the U.S. Federal Trade Commission in its challenge of a high-profile grocery merger.

To illustrate how this would work in a specific case in Canada, consider the market shares advanced by Rogers' expert and accepted by the Tribunal in the Rogers-Shaw case, set out in the table below (taken from paragraph 222 of the Tribunal's decision):

Province	Rogers	Shaw Mobile	Freedom	Bell	Telus
Alberta	19.4%	6.8%	7.0%	19.7%	47.1%
British Columbia	33.6%	6.5%	6.7%	15.0%	38.2%

Prior to the merger, Shaw Mobile and Freedom were owned by Shaw. Absent any divestitures, Rogers would have acquired both brands. As set out in the table below, the post-merger HHIs would have been well above 1,800, with changes in HHI well above 100, in both Alberta and British Columbia. As a result, the transaction would have been (strongly) presumptively illegal under the U.S. framework.[4] The merging parties would have had an incentive to offer significant remedies at an early stage of the review, or else not proceed with the transaction. This is not how it played out in Canada.

Province	HHI Pre-Merger	HHI Post-Merger	Change in HHI
Alberta	3,173	3,709	535
British Columbia	2,987	3,874	887

In fact, even accounting for the divestiture of Freedom to Videotron, formalized by Rogers after the transaction was challenged, the post-merger HHIs and changes in HHIs would have been above U.S. thresholds, as shown in the table below. In other words, even with the remedy ultimately proposed by Rogers, the deal would have been presumptively illegal under the U.S. framework. The burden would have been on the parties to bring evidence to rebut the presumption. This is not how it played out in Canada.

[4] The transaction would have also triggered the presumption based on the merged firm's market share as Rogers' post-merger market share would have exceeded 30% in both provinces with a change in HHI well above 100.

Province	HHI Pre-Merger	HHI Post-Merger (with Divestiture)	Change in HHI (with Divestiture)
Alberta	3,173	3,342	169
British Columbia	2,987	3,337	350

In our view, adopting a structural presumption would strengthen merger review in Canada. We note that Private Member's Bill C-352 proposes a reform in this direction. However, we are concerned that C-352, as currently drafted, does not provide sufficient flexibility and risks capturing mergers that are not problematic from a competition perspective.[5] From our perspective, the ideal approach would be a middle ground between C-59 and C-352. Aligning with the time-tested U.S. approach, along the lines we have recommended, would increase predictability while also facilitating cooperation and convergence between our respective enforcement agencies in cross-border merger reviews.[6]

In terms of how this could be implemented legislatively, we would suggest adding a definition for HHI in section 91 of the Act, preserving the existing definition of merger in that section, revising 92(2) and adding a new subsection 92(2.1), as follows:

> **91** Definitions – In sections 92 to 100,
>
> ***HHI*** means, in any relevant market, the sum of the squares of the market shares of the suppliers or customers; and
>
> ***merger*** means the acquisition or establishment, direct or indirect, by one or more persons, whether by purchase or lease of shares or assets, by amalgamation or by combination or otherwise, of control over or significant interest in the whole or a part of a business of a competitor, supplier, customer or other person.
>
> **92 (2)** A merger or proposed merger results, or is likely to result, in a significant increase in concentration if, in any relevant market, as a result of the merger or proposed merger,
>
> **a)** the HHI increases or would likely increase by more than 100, and
> **b)** either
> **i)** the HHI is or would likely be more than 1,800, or

[5] For example, Bill C-352 would prohibit any merger resulting in a combined market share above 60%, however, there is no requirement that there be any competitive overlap between the merging parties or any increase in market share due to the merger. This means that a business that has 60% market share in a small local market, could be totally barred from making any acquisition in any line of business or geography in Canada whatsoever, or from being acquired by anyone, regardless of the circumstances. As worded, it could theoretically prohibit a monopoly from divesting <u>down</u> to 60% share. In contrast, the U.S.-style presumptions that we recommend would, in all cases, be subject to rebuttal by the merging parties allowing for a full assessment of relevant factors. It would also take into account not only the level of concentration, but the <u>increase</u> brought about by the merger.
[6] The U.S. thresholds also capture potentially problematic mergers that C-352 misses. For example, under C-352 a merger is presumptively anti-competitive if it results in a combined market share between 30% and 60%; whereas, the U.S. HHI thresholds can be triggered even where the merging parties have a combined share less than 30% but where the market is otherwise highly concentrated.

> **ii)** the market share of the parties to the merger or proposed merger exceeds or would likely exceed 30%.
>
> **(2.1)** A significant increase in concentration is *prima facie* proof that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially.

Additionally, we recommend amending Clause 250 so that the new discretionary factor for market share and concentration under section 93 of the Act reads:

> **(g.4)** ~~any effect from~~ the change in concentration or market share that the merger or proposed merger has brought about or is likely to bring about;

This would clarify that an increase in concentration or market share brought about by a merger is *itself* relevant evidence that the Tribunal can consider in evaluating whether a merger is anti-competitive.

Recommendation 5 (Remedial standard for mergers): Amend Clause 249 to stipulate that the purpose of an order made against an anti-competitive merger is to preserve or restore the level of competition that would have prevailed without the merger.

Bill C-59 does not address the standard for merger remedies under the Act, which remains weak by international standards. Specifically, the Supreme Court of Canada has held that remedies for anti-competitive mergers need only "restore competition to the point at which it can no longer be said to be substantially less than it was before the merger" and, moreover, that we should favour the "least intrusive" remedy that meets this standard. The emphasis, therefore, is on finding a remedy that makes the harm from anti-competitive mergers less bad, or more tolerable, rather than preserving the state of competition. And even then, the Tribunal has discretion not to order a remedy at all – section 92 only says the Tribunal "may" make various orders if it finds that a merger is anti-competitive.

As explained in the Bureau's February 2022 and March 2023 submissions, most jurisdictions seek remedies that fully prevent the harm from anti-competitive mergers. This makes sense. Anti-competitive mergers generally occur in concentrated markets where there is limited competition and little prospect of new entry in the future such that the affected markets are unlikely to 'self-correct'. Merger control should seek to preserve the level of competition in these markets as much as possible rather than allow it to be eroded through ant-competitive consolidation that is only partially remedied.

Accordingly, we recommend that Clause 249 be amended to provide that the purpose of merger remedies ordered under s.92 is to preserve or restore the level of competition that would have existed without the merger, consistent with international best practice. This could be accomplished by adding the following text to the relevant portions of paragraphs 92(1)(e) and (f) of the Act:

> **(e)** in the case of a completed merger, **<u>in order to restore the level of competition that would have prevailed absent the merger,</u>** order any party to the merger or any other person [...]
>
> **(f)** in the case of a proposed merger, **<u>in order to preserve the level of competition that would prevail absent the merger,</u>** make an order directed against any party to the proposed merger or any other person [...]

> **(A)** prohibiting the person against whom the order is directed, should the merger or part thereof be completed, from doing any act or thing the prohibition of which the Tribunal determines to be necessary to ensure that the merger or part thereof does not prevent or lessen competition ~~substantially~~, or [...]

Recommendation 6 (Environmental certificates): Remove Clause 265 from Bill C-59 for further consideration in light of potentially significant unintended consequences.

Clause 265 creates a new "certificate" mechanism that would, among other things, allow the Commissioner to immunize potentially unlawful agreements under the Act provided they are for the purpose of protecting the environment and do not lessen or prevent competition substantially.

We believe that this provision is well-intentioned. However, we are not convinced that it is necessary, and we are concerned about potentially significant unintended consequences. Our strong preference would be to remove Clause 265 from the bill so that it can be analysed further.

First, regarding necessity, we understand that this provision is intended for businesses who want to collaborate in good faith for an environmental purpose, but are worried about the risk of contravening the Act, particularly the criminal cartel provisions of the Act. We do not know how many businesses find themselves in this position or what sorts of collaborations are potentially being frustrated.[7] Regardless, there are numerous ways that businesses can collaborate for environmental or other purposes in conformity with the Act and the Bureau has published extensive guidelines to provide certainty for businesses and their advisors. The conspiracy provisions, notably, already provide a defence for "desirable business transactions or collaborations [that] require explicit restraints on competition to make them efficient, or even possible" (the Ancillary Restraints Defence). There is also a written opinion program under the Act that businesses can use to seek clarity on whether the Act would apply to proposed conduct. While environmental protection is an important global priority, we are not aware of other countries adopting an environmental certificate mechanism under their competition laws, providing further indication that it is probably not needed.

Second, and more fundamentally, the criminal cartel provisions of the Act are focused on the most egregious violations of competition law. They apply to hard-core conduct like price-fixing, that is so likely to harm competition and to have no pro-competitive benefits that it is deserving of prosecution without a detailed inquiry into its actual competitive effects. The conspiracy provisions were amended in 2010 to reflect this. Notably, the Federal Court has described cartel conduct as "analogous to fraud and theft" and "nothing less than an assault on our open market economy". It seems very unlikely that businesses would have to resort to such conduct to protect the environment. Nevertheless, the certificate process would have the Commissioner potentially authorize such conduct following the sort of detailed economic inquiry that the 2010 amendments removed. This sends a confusing signal about the seriousness of cartel conduct to the marketplace, and could potentially undermine how courts view this conduct in Canada.

[7] In the Bureau's experience, there are frequently calls for public interest carve-outs or exceptions to the Act that are not necessary in practice. For example, in response to concern that the conspiracy provisions of the Act might frustrate *bona fide* business collaborations needed to respond to the COVID-19 pandemic, the Bureau voluntarily offered to provide rapid informal guidance on proposals; however, it received no requests under this program.

Third, while we hope that most would engage this mechanism in good faith, there is a risk that some could try to abuse this new process to get immunity for problematic conduct. For example, businesses could provide inaccurate information or withhold material facts, or mischaracterize the nature of their proposed agreement or arrangement to make it seem more benign than it really is. Or they could obtain a certificate and then not comply with the terms we impose and hope to fly under the radar.

Fourth, even if there is no abuse in the process, circumstances can change and market conditions can evolve. In order to have a certificate varied or revoked to address material changes, the Commissioner would have to bring an application to the Tribunal and meet the high bar of proving that the agreement is substantially lessening or preventing competition. By contrast, written opinions under the Act are only "binding for so long as the material facts on which the opinion was based remain substantially unchanged" (ss.124.1(2)) meaning that they are automatically voided if there are significant changes.

Given the above, our strong preference would be to remove Clause 265 from the bill so that it can be studied more carefully. We would welcome an opportunity to engage in further discussion if necessary.