THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

January 14, 2022

Via E-mail: Howard.Wetston@sen.parl.gc.ca

The Honourable Howard Wetston, Senator, C.M., Q.C., LL.D
Room 316, East Block
Senate of Canada
Ottawa, ON K1A 0A4

Dear Senator Wetston:

Re: E*xamining the Canadian Competition Act in the Digital Era*

The Competition Law and Foreign Investment Review Section of the Canadian Bar Association (CBA Section) appreciates the invitation to participate in your consultation on the *Competition Act* (*Act*). We are pleased to present our preliminary views on the paper you commissioned from Professor Edward M. Iacobucci, "Examining the Canadian *Competition Act* in the Digital Era" (Iacobucci Paper).[1]

The Canadian Bar Association is a national association representing over 36,000 jurists, including lawyers, notaries, law teachers, and students across Canada. We promote the rule of law, access to justice, effective law reform and provide expertise on how the law touches the lives of Canadians every day. The CBA Section is comprised of approximately 1,000 lawyers interested in promoting a greater awareness and understanding of legal and policy issues relating to competition law and foreign investment.

We welcome public consideration of the *Act* and periodic assessments of whether reform is necessary. We hope that your initiative will start a comprehensive review that will rigorously examine the pros and cons of specific proposals and include all stakeholders, including those most directly impacted by Canadian competition law: consumers and businesses. The CBA Section also encourages applying a competition lens to broader public policy issues to encourage efficiency and innovation in the Canadian economy. However, we caution that wholesale change to the policy objectives of competition law requires significant debate and broad public consultations as these changes could significantly impact the Canadian economy.

While this letter focuses on several specific proposals in the Iacobucci Paper, we recognize that your consultation may also receive commentary on a wide range of other competition law and policy issues. As such, as an appendix to this letter, we prepared a summary of the CBA Section's previous positions on other competition law issues and proposals including market studies, penalties and fines, industry-specific provisions, and the role of public interest in competition reviews.

1 Edward M. Iacobucci, Examining the Canadian *Competition Act* in the Digital Era, September 27, 2021.

We hope this letter will help any consideration of potential legislative reform. However, we do not purport to survey all issues of interest to the CBA Section. Other issues of interest include the effectiveness of certain reviewable practices (refusals to deal, exclusive dealing and tied selling), merger notification thresholds and the role of the Competition Tribunal. We anticipate sharing our thoughts on these issues as part of broader discussions in the coming months.

The CBA Section believes that any competition law review should be rigorous, fact-based and include an examination of the public and private enforcement of the *Act*. In our view, *how* the legislation is enforced is just as critical to a well-functioning competition regime as the legislative framework itself. An assessment of the *Act* should consider the Competition Bureau's (Bureau) internal decision-making procedures and deployment of resources, the effectiveness of administrative and judicial decision-making processes, and the nature and extent of oversight of the Bureau. The review should also consider the role of private parties in detecting anticompetitive conduct and private party enforcement of the *Act* as a means of compensating parties that have suffered harm from anticompetitive behaviour.

1. Introduction

The CBA Section agrees with the Iacobucci Paper's overall assessment that the *Act* is largely fit for purpose. We specifically endorse the following conclusions:

- "[T]he Act as written is flexible enough to account for the additional anticompetitive threats that digital markets present";
- "Recognizing that, from an economic perspective, competition policy is limited in what it can do to require competitive conduct in settings where there is market power, and recognizing that digital markets will often include firms with market power, it may be appropriate for government to consider whether regulation of certain digital markets is warranted"; and
- "If competition policy were to take on a wide range of values as enforcement priorities […] the Bureau would be under institutional pressure to assume expertise in a wide range of areas".[2]

The foregoing notwithstanding, we believe several of the recommendations in the Iacobucci Paper merit further consideration and debate.

2. Buy-Side and Wage-Fixing / No-Poach Agreements

The Iacobucci Paper argues that buy-side agreements (particularly wage-fixing and no-poach agreements), are inefficient in the same way as price-fixing and non-compete agreements, have "perverse distributive properties", and that section 45 of the *Act* should be amended to apply to buy-side agreements.[3]

In 2009, after comprehensive consultations by the federal government and many stakeholders including the Bureau, Parliament intentionally excluded buy-side agreements from section 45. The 2009 amendments were the result of nearly a decade of consultation aimed at narrowing the categories of conduct that attract criminal liability to those which are *per se* anticompetitive (*i.e.*, that can have no procompetitive effect). Including buy-side agreements between competitors in section 45 was considered at length during these consultations, and deliberately rejected in favour of treating them as a reviewable practice where competitive effects can be assessed.

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2 Iacobucci Paper at pp. 22, 25 and 57.

3 See Iacobucci Paper at pp. 26 to 27.

In its *Competitor Collaboration Guidelines*, the Bureau itself recognizes that buy-side agreements can be procompetitive:

> The Bureau recognizes that small- and medium-sized firms often enter into joint purchasing agreements to achieve discounts similar to those obtained by larger competitors. Such agreements can be pro-competitive and are not deserving of condemnation without a detailed inquiry into their actual competitive effects.
>
> […]
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> A joint purchasing arrangement is an agreement between firms to purchase all or some of their requirements for a product from one or more suppliers. Such arrangements are often pro-competitive, as they permit firms to combine their purchases to achieve greater discounts from suppliers, and share delivery and distribution costs.[4]

Without an in-depth analysis of the possibility that buy-side agreements can be procompetitive, the Iacobucci Paper concludes that "s. 45 of the Act ought to be amended to apply to buy-side agreements."[5]

In other words, the paper's view is that all such agreements should be criminalised, regardless of whether their impact on competition and economic efficiency is negative, neutral or positive. The Iacobucci Paper cites cases where buy-side arrangements *could* have anticompetitive effects. We agree that such agreements *could* be anticompetitive. (That supports the existing structure of the *Act* pursuant to which competitive effects of buy-side agreements need to be assessed.) To make the case for criminality, the question is whether such conduct is *always* anticompetitive. That question is not answered in the Iacobucci Paper.

Although the Iacobucci Paper proposes to criminalise all buy-side agreements, the discussion focuses on wage-fixing and no-poach agreements. While such agreements can have distributive effects in labour markets, resulting in lower pay or restrictions on employment opportunities, it is not the case that all such agreements can be presumed to be anticompetitive or that they give rise to inefficiencies and reductions in economic welfare. To cite one of many possible examples, a no-poach agreement in the franchise context between competing franchisees within the same brand can be procompetitive, by giving incentives for employers to invest in training employees, knowing they will not be poached by rival franchisees. A *per se* criminal prohibition of wage-fixing and no-poach agreements would prohibit such procompetitive conduct.

The CBA Section believes that the reviewable practice provision in section 90.1 is an appropriate framework to examine buy-side agreements. This section is specifically designed to enable the Commissioner of Competition to take enforcement action and obtain remedies against competitor agreements that lead to a substantial lessening or prevention of competition. This allows a nuanced and fact-specific evaluation of the effects of specific agreements, which is preferable to the blunt instrument of a *per se* criminal offence. To date, the Bureau has made minimal use of the currently available mechanism for dealing with wage-fixing, no-poach or other buy-side agreements.

To the extent that concerns about no-poach and wage-fixing agreements are primarily animated by the desire for worker protection, those distributive concerns are likely more appropriately addressed through laws and regulations on employment standards. For example, federal and provincial laws already address employee pay, including minimum wages and severance; and the Ontario government

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4 Competition Bureau, *Competitor Collaboration Guidelines*, May 6, 2021 at sections 2.4.1 (endnote 16) and 3.7.5.

5 Iacobucci Paper at p. 27.

recently proposed a ban on non-compete clauses in employment agreements.[6] Federal and provincial ministries of labour, among other agencies, have more expertise and experience than the Bureau and the Competition Tribunal in regulating employer-employee relations. Moreover, proposals to amend the *Act* to specifically address wage-fixing and no-poach agreements raise a constitutional question on whether the federal government has the jurisdiction to legislate on labour matters, an area that is generally under provincial jurisdiction pursuant to section 92 of the *Constitution Act, 1867*.[7]

3. Efficiencies Defence

The Iacobucci Paper argues that the *Act* should be amended to abolish the requirement that the Bureau quantify anticompetitive effects if the merging parties invoke the efficiencies defence under section 96 (the Efficiencies Defence).[8]

This approach risks making the application of the Efficiencies Defence less objective, and creates uncertainty for merging parties when determining the case they must meet. The proposal also ignores the fact that, in practice, the Bureau can (and does) quantify anticompetitive effects in merger cases. The Bureau has extensive information gathering tools at its disposal. Parliament conferred these enforcement powers to the Bureau to enable it to give objective (*i.e.*, quantifiable) evidence that the anticompetitive effects of a merger outweigh its economic efficiency benefits if seeking to challenge a merger before the Competition Tribunal. This is consistent with the economic underpinnings of the *Act* and established jurisprudence from the Competition Tribunal to the Supreme Court of Canada.[9]

Indeed, the current law as expressed by the Supreme Court in *Tervita* provides that anticompetitive effects and efficiencies should be quantified where it is possible to do so, and that qualitative effects and efficiencies should also be taken into account.[10] It is in the interests of business certainty and predictability that the Bureau be required to put forward quantitative evidence estimating the anticompetitive harm that would result from a merger, demonstrating that the merger is a net negative to the Canadian economy, if it is to ask the Competition Tribunal for the intrusive remedy of blocking or unwinding all or part of a merger.[11]

The CBA Section would not be in favour of amendments that limit the application of the Efficiencies Defence without careful study. The Efficiencies Defence enables a consideration of each merger (or competitor agreement, although it has not yet been applied in that context) on its merits to determine if the proven benefits on productivity and innovation outweigh potential reductions in economic welfare resulting from reduced competition. Efficiencies can lead to significant benefits for the Canadian

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6 See Bill 27, *Working for Workers Act, 2021*, 2nd Seuss, 42nd Leg, Ontario, 2021 (assented to 2 December 2021), SO 2021, c 35.

7 30 & 31 Vict, c 3 (UK).

8 See Iacobucci paper at p. 29.

9 As the Competition Tribunal observed in the recent *Secure* case: "With the assistance of staff in the Competition Bureau and outside experts, the Commissioner should be able to provide at least rough estimates, supported by evidence, of (i) the range of price effects that are likely to result from the merger; (ii) a range of plausible elasticities; (iii) a "ballpark" estimate of the deadweight loss; and (iv), where applicable, a basic sense of the extent to which non-price effects are likely to result from the merger. This is particularly so where, as here, the Bureau has extensive information from previous cases upon which he can build." See: *Canada (Commissioner of Competition)* v *Secure Energy Services Inc*, 2021 Comp Trib 7 (CT-2021-002) at para 121. See also *Tervita Corp. v Canada (Commissioner of Competition)*, 2015 SCC 3 (*Tervita*).

10 See *Tervita* at para 147.

11 See Brian Facey and David Dueck, "Canada's Efficiency Defence: Why Ignoring Section 96 Does More Harm Than Good for Economic Efficiency and Innovation" 32:1 *Canadian Competition Law Review* 33 at p. 35.

economy by generating cost savings, increased economies of scale and innovation. We have previously expressed the view that the Efficiencies Defence is "appropriate for Canada's economy, that it is illustrative of the importance of economic efficiency as an underpinning of the *Competition Act*, and that it represents an example of Canadian leadership in the competition law area."[12]

4. Abuse of Dominance

The Iacobucci Paper proposes to amend the *Act*'s abuse of dominance sections to remove the requirement that an anticompetitive act have a negative effect on a competitor[13] and states that "the maximum AMP [Administrative Monetary Penalty] for abusing dominance should be considerably higher than $10 million."[14]

We believe that a re-evaluation of section 79 of the *Act* would be timely because of its importance to competition issues in the digital economy in addition to its role and core element of competition law applicable to all sectors. While there are mixed views within the CBA Section on the necessity of any substantive change, there is agreement that any specific proposals require considerable study because of their potential broad consequences on the Canadian economy.

Our comments on the Iacobucci Paper's abuse proposals must therefore be viewed as identifying issues we believe should be considered as part of a broader debate as opposed to expressing a firm view. The CBA Section is interested in engaging in further discussions with stakeholders on the abuse of dominance proposals.

If further consideration is given to the Iacobucci Paper proposals, we believe that the impact of these changes must include consideration of business compliance and legal certainty. The CBA Section's views can be summarised as follows:

- Assessing in advance the competitive impact of a range of business strategies and actions is inherently difficult. It is fact-intensive and can be an economically and legally complex exercise. In practice, many businesses comply with section 79 by ensuring that their conduct is not predatory, exclusionary or disciplinary. In doing so, businesses and their legal advisors rely on jurisprudence clarifying the scope of the anticompetitive act requirement in section 79. Removing this element of the abuse of dominance provision, which the Iacobucci Paper recommends, would make compliance assessments enormously difficult. Section 79 would become a freestanding provision that makes any action by a firm that has a dominant position open to enforcement activity if there are likely anticompetitive effects.

  All other provisions in the *Act* specify potentially problematic conduct, such as a merger, an agreement with a competitor, tied selling or a refusal to deal. The amendment proposed in the Iacobucci Paper could have serious chilling effects on aggressive procompetitive conduct that is highly beneficial to the Canadian economy. While competition could be lessened by conduct that is not engaged in for the purpose of predatory, exclusionary or disciplinary impacts on competitors, it is not clear that such conduct is widespread or sufficiently problematic to warrant a change to section 79 that would make a business' assessment of compliance very challenging.

- A material difference between section 79 and other reviewable practices that have a substantial lessening of competition (SLC) test is that businesses can be subject to significant penalties for section 79 contraventions, penalties that the Iacobucci Paper believes should be increased. The CBA Section believes that if businesses will be liable for significant financial penalties, the legal standard they are being asked to comply with must be clear. That would not be the case if the

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12 See Appendix A and CBA Competition Law Section Submission re Competition Policy Review Panel Consultations (January 2008) at p. 9.

13 See Iacobucci Paper at pp. 34 to 35.

14 See Iacobucci Paper at p. 38.

Iacobucci Paper recommendations are followed. Although there may be ways to amend the *Act* and maintain legal certainty, for example by introducing a scheme of notification or binding case-specific advisory opinions, those alternatives have not been proposed and involve a host of complexities that would also have to be considered.

- The Iacobucci Paper states that the prospect of a $10 million AMP is not sufficient deterrence for some companies. We believe that additional analysis is required to assess the extent to which fines (or the prospect of fines) impact commercial decision-making. On one hand, substantial fines in jurisdictions such as the European Union (a much larger market) do not always have a prophylactic effect. On the other hand, for many Canadian businesses, even dominant businesses, the prospect of a $10 million AMP may be viewed as a significant, potentially business-ending, fine. In other words, increasing fines to target large global companies could have an inadvertent chilling effect on the business activities of domestic companies, which may pull back from engaging in aggressive but legitimate competitive behaviour. The Bureau's enforcement history shows that there are relatively few cases that warrant remedial action for abuse of a dominant position, which may be consistent with the existing AMP regime incentivizing a high degree of compliance by companies operating in Canada.
- In addition, as noted above, if there are to be fines, whatever the quantum, the law should be clear so businesses can assess *ex ante* and relatively easily determine whether a proposed conduct is compliant with the legislation. Other sections in the *Act* that contemplate the possibility of significant fines, such as the conspiracy offence (section 45) and the bid-rigging offence (section 47), target narrow conduct that is clearly defined in the legislation (which would not be the case with section 79 if the Iacobucci Paper proposals were enacted).

5. Conclusion

Many proposals for legislative change, in the Iacobucci Paper and elsewhere, are advanced based on selective examples of potentially harmful effects or superficial references to developments occurring in other jurisdictions. Many of these examples involve "Big Tech." These examples may be legitimately troubling and justify further study. However, they are not a sufficient reason to change framework legislation. Such change should only occur after an empirical assessment of need and an evaluation of impact across the economy generally. If there is a demonstrable need to address concerns in the digital economy or other specific sectors, change should also only occur after an evaluation of whether the appropriate response is amendment to the *Act* as opposed to another policy approach. In the digital sector, this should involve consideration of the pros and cons of industry-specific regulation.

In our view, targeted and specific regulation outside of the *Act* for markets whose structure may, in exceptional circumstances, warrant modification to protect customers from specific behaviours should be preferred instead of amending the *Act*, which is framework legislation applying to all industries. The latter approach creates a significant risk of unintended consequences for the vast array of industries not presenting such issues.

We appreciate your initiative to promote the public consideration of competition law issues and would welcome the opportunity to discuss our views further. We look forward to continuing our dialogue on potential changes to the *Act*.

Yours truly,

(original letter signed by Marc-André O'Rourke for Omar Wakil)

Omar Wakil
Chair, CBA Competition Law and Foreign Investment Review Section

APPENDIX

Summary of Prior CBA Section Views

1. Market Studies

The CBA Section believes the Act already confers on the Competition Bureau limited powers to conduct market studies and that any market study conducted by the Bureau should fall within the scope of its statutory mandate. The Bureau should not be given increased powers to study markets where there is no indication that the Act has been contravened.

The CBA Section's view is based in part on the Bureau's role and expertise as a law enforcement agency. An emphasis on market studies may draw its resources away from enforcement efforts. More generally, the Bureau should not be involved in policy development – and market studies can blur the line between the Bureau's role as a law enforcement agency and policy development or industry regulation. Also, market studies create significant burdens on parties that have not contravened the Act (e.g., responding to mandatory information requests) and process issues (e.g., treatment of confidential information).

The market study power in the Act's predecessor (the *Combines Investigation Act*) was not carried forward in the *Competition Act* in 1986. That was due, at least in part, to the expense and questionable utility of the Restrictive Trade Practices Commission's inquiries, including the five-year inquiry into the petroleum industry (in the 1980s, this inquiry involved 200 days of hearings, evidence from over 200 witnesses, more than 1,800 exhibits and 50,000 pages of transcripts and was preceded by an eight-year inquiry by the Director of Investigation and Research.)

Market studies may also lead to serious conflicts and due process issues if they are used as "fishing expeditions" to gather information on potential contraventions of the Act.[15]

2. Efficiencies Defence

The CBA Section is not in favour of amendments that would limit application of the efficiencies defence. The efficiencies defence enables a consideration of each competitor agreement or merger on its merits to determine if the proven benefits on productivity and innovation outweigh potential costs resulting from reduced competition.

Efficiencies can lead to significant benefits for our economy by generating cost savings, increased economies of scale and innovation. The CBA Section has stated that the efficiencies defence is "appropriate for Canada's economy, that it is illustrative of the importance of economic efficiency as an underpinning of the *Competition Act*, and that it represents an example of Canadian leadership in the competition law area."[16] The CBA Section has also opposed proposals imposing a heavy burden on merging parties trying to assert the efficiencies defence.[17]

3. Penalties and Fines

The CBA Section has objected to the imposition of monetary penalties for any reviewable practice.[18] Adding AMPs to the injunctive remedies and remedial orders already available under the Act is

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15 CBA Section submissions: Market Studies Information Bulletin (June 2018), Bill C-452 (Competition Act amendments) (September 2010), Competition Policy Review Panel Consultation Paper (January 2008) at p. 5, and Bureau Discussion Paper on Options for Amending the Competition Act (October 2003) at pp. 69-78.

16 CBA Section submission on Competition Policy Review Panel Consultation Paper (January 2008) at p. 7.

17 CBA Section submission on Draft Model Mergers Timing Agreement (October 2019) at pp. 1-2.

18 CBA Section submission on C-23 (Competition Act Amendments) (March 2002) at p. 6.

inconsistent with its structure and purpose, as reviewable practices are presumptively lawful and prohibited only where it is established that they are likely to have a significant anticompetitive effect. This design was adopted to foster aggressive, pro-consumer competitive conduct.[19]

It is difficult to assess *ex ante* if a conduct is significantly anticompetitive in a marketplace. This type of assessment usually requires information from many marketplace participants (which is usually unavailable to the parties engaging in that practice) and sophisticated economic analysis. For these reasons, AMPs were not historically part of the Act and reviewable conduct was instead addressed through various injunctive and other remedial orders.

Moreover, after-the-fact sanctions can have a chilling effect because many Canadian businesses will err on the side of caution and not engage in otherwise procompetitive, innovative conduct that could possibly be viewed as risky.

4. Industry-Specific Provisions

The Act is meant to be a law of general application for virtually all businesses in Canada.[20] Industry-specific provisions within the Act that create different competition rules for different industries is generally unnecessary, inefficient and invites counterproductive disputes about which participants are subject to more or less restrictive rules. It may also undermine support for general competition rules applicable to all economic actors. As noted above, targeted and specific regulation outside of the Act for markets whose structure may, in exceptional circumstances, warrant modification to protect customers from specific behaviours should be preferred to amending the Act.

In the CBA Section's view, the Act should be activities-based and neutral on the identity of the party engaging in that activity – otherwise it can put "regulated" businesses at a competitive disadvantage compared to other marketplace participants. For example, section 49 of the Act imposes serious criminal liability for federal financial institutions engaging in conduct that would not be illegal for other market participants. The CBA Section believes it is unreasonable to apply a different and higher standard for federal financial institutions than for other businesses engaging in the same conduct.[21] The CBA Section has also opposed different competition rules for the airline, telecommunications, transportation and retail gasoline industries.[22]

Absent exceptional circumstances, industry-specific rules should be avoided. The Act establishes an appropriate framework to address concerns about the effects of mergers, competitor agreements and market power abuses on competition in all industries.

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19 CBA Section submission on Competition Policy Review Panel Consultation Paper (January 2008) at pp. 5-6, CBA Section submission on Bureau Discussion Paper on Options for Amending the Competition Act (October 2003) at pp. 10-13, CBA Section submission on Bill C-23 (Competition Act Amendments) (March 2002) at pp. 6-7, CBA Section submissions on Bill C-41 (Proposed Amendments to the Competition Act) (April 2007) at p. 2, and CBA Section submission on C-19 (Competition Act Amendments) (December 2004) at pp. 4-7.

20 CBA Section submission on Competition Policy Review Panel Consultation Paper (January 2008) at page 6, CBA Section submission on Bill C-23 (Competition Act Amendments) (March 2002) at pp. 5-6, CBA Section submission on Bill C-41 (Proposed Amendments to the Competition Act) (April 2007) at p. 2, and CBA Section submission on C-19 (Competition Act Amendments) (December 2004) at p. 2.

21 CBA Section submission on Draft Revised Competitor Collaboration Guidelines (October 2020) at pp. 9-10.

22 CBA Section submission on Competition Policy Review Panel Consultation Paper (January 2008) at p. 6, CBA Section submission on Bill C-23 (Competition Act Amendments) (March 2002) at pp. 5-6, CBA Section submissions on Bill C-41 (Proposed Amendments to the Competition Act) (April 2007) at p. 2, and CBA Section submission on C-19 (Competition Act Amendments) (December 2004) at p. 2.

5. Role of Public Interest in Competition Reviews

The CBA Section has supported an amendment that allows certain mergers and agreements between competitors to be exempt from the application of the Act on public interest grounds in exceptional circumstances such as the COVID-19 pandemic.[23]

The CBA Section believes that the Minister of ISED (or another elected public official) and not the Commissioner of Competition, should exercise these exemption powers. Public interest assessments, which require a balancing of policy considerations, are best left to elected officials and not an enforcement agency like the Bureau with its narrow range of expertise and focus.

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23 CBA Section Submission on COVID-19 and Urgent Competition Act Amendments (April 2020)