THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

June 5, 2024

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

The Honourable Senator Claude Carignan
Chair, Standing Senate Committee on National Finance
The Senate of Canada
Ottawa, ON K1A 0A4

Dear Senator:

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

I am writing on behalf of the Canadian Bar Association's Competition Law and Foreign Investment Review Section (Section) to comment on amendments made to Bill C-59 by the House Standing Committee on Finance (FINA) and adopted by the House of Commons since the Standing Senate Committee on National Finance concluded its pre-study of the Bill in April 2024.

In his Committee Report to the Senate of Canada, the Hon. Percy Mockler noted that this Senate Committee had limited time to study the set of amendments to the *Competition Act* introduced through Bill C-56. He expressed frustration at being "prevented from thoroughly studying the bill and properly performing its duties." Despite the pre-study of Bill C-59, this Committee has been placed in a similar situation with amendments to Bill C-59[1]. We also note that the House has adopted amendments to Bill C-59 in response to requests made by the Commissioner of Competition (Commissioner) that were not recommended by the policy experts at Innovation Science and Economic Development (ISED). The Section asks that the Committee take up its constitutional role as a chamber of sober second thought and bring necessary scrutiny to the proposed amendments to clauses in Bill C-59 dealing with Competition Act reform, principally provisions dealing with merger review.

The *Competition Act* is an important piece of framework legislation that impacts all sectors of the economy and businesses of all sizes. The amendments in Clause 249 are particularly problematic.

**Summary of Recommendations**

The CBA Section recommends the following amendments to Bill C-59:

1. The definition of "concentration index" in Clause 249(4), if retained, needs to be revised as the meaning ascribed to "concentration index" is not workable in practice nor is it consistent with the U.S. approach, as intended by FINA.

[1] See Senate National Finance Committee Report on Bill C-56, online.

2. If retained, Clause 249(3) and (5) should be amended to remove the specific reference to HHI and market share values in Clause 249(3). The values should be prescribed by regulation as contemplated in Clause 249(5).
3. If Clause 249 is retained, the transitional provision provided for in Clause 268 should be revised to cover Clauses 249(1.1) and (1.2) and (2). The Section supports the removal of Clause 249 (1) from the Bill.
4. Clause 254 should be revised to clarify that leave is not available for applications under section 90.1 that are mergers within the definition of section 91.
5. Clause 236 should be amended to delete any reference to "internationally recognized methodology," as such methodology does not currently exist.

**Concerns surrounding the introduction of structural presumptions**

Clause 249(2), as initially introduced by the government in First Reading, would repeal subsection 92(2) of the *Competition Act*, which does not permit the Competition Tribunal to find that a merger or proposed merger substantially prevents or lessens competition "solely on the basis of evidence of concentration or market share." In addition, Bill C-59 introduces in Clause 250(2) a new discretionary factor to section 93. This amendment would expressly permit the Competition Tribunal to consider effects from changes in concentration or market share brought about or likely to be brought about by the merger or proposed merger. These amendments empower the Commissioner to modify the Competition Bureau *Merger Enforcement Guidelines* to introduce structural presumptions in line with those in the U.S.

The Section continues to submit that the appropriate place to introduce concentration thresholds, consistent with approach in most other jurisdictions, is in the Competition Bureau's *Merger Enforcement Guidelines*[2]. Adopting structural presumptions based on concentration and market shares levels into the *Competition Act* itself, as now proposed in Clause 249(2), will neither harmonize Canadian law with U.S. law nor simplify the merger review process.

Government policy experts at ISED told representatives of this Committee on March 19, 2024:

> *Furthermore, with respect to mergers, the commissioner suggests setting a percentage by default and reversing the burden of proof there as well. Currently, the Competition Tribunal cannot prevent a merger solely on the basis of market share. In Bill C-59, the government removes this barrier, which would allow the tribunal to make intuitive presumptions if market share has become very high. Once again, the commissioner wants us to go further and set a percentage in the act.* ***To our knowledge, no other countries are doing that. [Emphasis added.]***

The flexible nature of enforcement guidelines is preferable to the fixed nature of statute.[3]

CBA Section submission on Bill C-59, Fall Economic Statement Implementation Act, 2023 (Feb 12, 2024)

Although the Section does not support the introduction of structural presumptions in the *Competition Act*, if retained, the Section recommends three amendments to Clause 249 to ensure it is workable in practice:

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2 CBA Section submission on Bill C-59, Fall Economic Statement Implementation Act, 2023 (Apr. 29, 2024), online

**Recommendation 1**

Clause 249(4), if retained, needs to be revised as the meaning ascribed to "concentration index" is not workable in practice nor is consistent with the U.S. approach, as intended by FINA. The Section recommends amending the definition of "concentration index" for Clause 249(4) to read as follows:

***Definition of concentration index***

*(4) In subsection (3), concentration index ~~means, in any relevant market, the sum of the squares of the market shares of the suppliers or customers~~* ***is calculated by squaring the market share of each firm competing in the relevant market and then summing the resulting numbers****.*

The Commissioner's brief to this Committee advocated for amendments to "set out specific, rebuttable presumptions for mergers aligned with the thresholds set out in the 2023 U.S. Merger Guidelines." However, the draft language proposed by the Commissioner and included in Bill C-59 (as amended) does not use the same definition as the 2023 U.S. Merger Guidelines. This may lead to confusion, as it refers to suppliers and customers in any relevant market, rather than the firms competing in the market. It is not clear which "suppliers" or "customers" are being referred to.

In contrast, the U.S. Merger Guidelines, which simply state that the "[U.S. agencies] generally measure concentration levels using the Herfindahl-Hirschman Index ("HHI")." Further, the U.S. DOJ describes the HHI as a "commonly accepted" measure of market concentration that is calculated by "squaring the market share of each firm competing in the market and then summing the resulting numbers".

To resolve potential discrepancies and to align the *Competition Act* more closely with U.S. Merger Guidelines, we recommend a simple drafting change to adopt the U.S. DOJ's approach to HHI in the definition of "concentration index."

**Recommendation 2**

Clauses 249(3) and (5) should be amended to remove the specific reference to HHI and market share values in Clause 249(3) and the values should be prescribed by regulation as contemplated in Clause 249(5). The Section recommends the following:

***Significant increase in concentration or market share***

*(3) A merger or proposed merger results or is likely to result in a significant increase in concentration or market share if, in any relevant market, as a result of the merger or proposed merger.*

*(a) the concentration index increases or is likely to increase by more than* ***a set value*** *~~100~~; and*

*(b) either*

*(i) the concentration index is or is likely to be more than* ***a set value*** *~~1,800~~, or*

*(ii) the market share of the parties to the merger or proposed merger is or is likely to be more than* ***a set value*** *~~30%~~.*

***Regulations — different values***

*(5) The Governor in Council ~~may~~* ***shall*** *by regulation prescribe ~~different~~ values* ***for*** *~~than those provided in~~ subsection (3).*

**Recommendation 3**

If Clause 249 is retained, the transitional provision provided for in Clause 268 should be revised to cover Clauses 249(1.1), (1.2) and (2). The Section supports the removal of Clause 249 (1) from the Bill.

Clause 249(1) of Bill C-59 changes the substantive merger remedy standard thus creating a fundamental disconnect between the legal standard for determining whether a merger raises concerns and the legal standard for remedying them. The Supreme Court of Canada opined in 1997 that the logical standard for assessing remedies should also address the "substantial" prevention or lessening of competition:

> *The evil to which the drafters of the Competition Act addressed themselves is substantial lessening of competition. See Competition Act, s. 92(1). It hardly needs arguing that the appropriate remedy for a substantial lessening of competition is to restore competition to the point at which it can no longer be said to be substantially less than it was before the merger*.

If Parliament nevertheless sees cit to amend the standard, it should include a transitional provision. Failure to provide such a provision for Clauses 249(1.1) and (1.2), while one exists for Clause 249(2), creates issues of fundamental unfairness to merging parties who entered agreements prior to the passage of Bill C-59.

As referenced above, Clause 268 creates a transitional provision for the proposed new concentration thresholds in clause 249(2). However, no such provision has been applied to the new remedy standard introduced in clause 249(1). This may be an oversight, given FINA's limited discussion and debate around these issues. There is no principled basis to distinguish between these two amendments, as both could have signicicant implications on transactions that have recently closed or are currently under review by the Competition Bureau.

The Section recommends that the following simple adjustment to the transitional provision in Clause 268 be made:

> *268 S~~ubs~~ection 92~~(2)~~ of the Competition Act, as that ~~sub~~section read before the day on which ~~sub~~section 249~~(2)~~ comes into force, continues to apply after that day in respect of a proposed transaction that was the subject of a notiAication provided under section 114 of that Act before that day or to a merger that is substantially completed before that day.*

**Penalties and private rights of action should not apply to mergers**

**Recommendation 4**

Clause 254 should be revised to clarify that leave is not available for applications under section 90.1 that are mergers within the definition of section 91.

ISED's September 2023 Consultation Paper expressly stated that "the Government is considering allowing private parties to seek compensation for damage suffered from civilly reviewable (non-merger) conduct under the Act." The Section understood from the outset of the Government process for considering potential amendments to the *Competition Act* that penalties or private litigation would not be made available for merger transactions. However, the drafting of Bill C-59 creates uncertainty about whether the amendments introducing administrative monetary penalties and private rights of action for disgorgement for agreements subject to section 90.1 would potentially apply to mergers (provided that the Commissioner does not have an active or settled inquiry with respect to the merger at the time a private party applies for leave).

The latter approach would be inconsistent with the separate and comprehensive regulatory regime for mergers that is administered exclusively by the Commissioner. This regime includes statutory filing requirements and fees, processes for information and document production, as well as no-close waiting periods, and a formal adjudication process applicable to both notifiable and non-notifiable mergers.

Mergers are common commercial transactions that significantly contribute to the efficiency of capital markets and the productivity of Canada's economy. As in most international jurisdictions, the focus of merger review is to identify and remedy anti-competitive transactions rather than to penalize the parties involved or to encourage litigation that may be driven by private strategic motives to disrupt transactions in the capital markets.

**Methodology for ESG-related disclosure or claims**

**Recommendation 5**

Clause 236 should be amended to delete any reference to "internationally recognized methodology", as such methodology does not currently exist.

We draw to this Committee's attention additional amendment to Bill C-59 made by FINA that internal ISED government policy experts did not support. Clause 236 amends the proposed "greenwashing" provisions to capture environmental claims relating to the "benefits of a business or business activity," requiring these claims be based on "adequate and proper substantiation in accordance with internationally recognized methodology."

The Section does not understand there to be an "internationally recognized methodology" for ESG-related disclosure or claims as guidance and/or regulatory approaches differ between countries. The existing standard of "adequate and proper substantiation" in the *Competition Act* is well understood and offers the flexibility to evolve with any emerging international methodologies.

The Section recommends that the following simple adjustment be made to Clause 236**:**

236 (1) Subsection 74.01(1) of the Act is amended by striking out "or" at the end of paragraph

(b) and by adding the following after that paragraph:

…

(b.2) makes a representation to the public with respect to the benefits of a business or business activity for protecting or restoring the environment or mitigating the environmental and ecological causes or effects of climate change that is not based on adequate and proper substantiation ~~in accordance with internationally recognized methodology~~, **the** proof of which lies on the person making the representation; or

We remain at this Committee's disposal to answer any questions.

Yours truly,

*(original letter signed by Yves Faguy for Elisa Kearney)*

Elisa Kearney
Chair, Competition Law and Foreign Investment Review Section

*The Canadian Bar Association 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 Section promotes greater awareness and understanding of legal and policy issues relating to competition law and foreign investment. We do not advocate for a particular position or outcome and represent a diversity of opinions, but we understand the Competition Act and the enforcement of competition laws.*