

February 16, 2024
Standing Senate Committee on National Finance
The Senate of Canada
Ottawa, Ontario
Canada, K1A 0A4
nffn@sen.parl.gc.ca

RE: SUBMISSION ON BILL C-59 - FALL ECONOMIC STATEMENT IMPLEMENTATION ACT, 2023

Dear Senate Committee,

The Retail Council of Canada (RCC) is grateful for the opportunity to provide written feedback to the Standing Committee on Finance as part of your study of the Fall Economic Statement Implementation Act, 2023 (Bill C-59). RCC appreciates the importance of a robust, innovative, and evolving regulatory regime that supports and responds to the priorities of the day. Policymakers have the important role of adapting significant regulatory regimes, like tax and competition, while balancing the legitimate concerns of stakeholders and ensuring that legislative changes do not unintentionally harm the Canadian economy and result in counter-productive consequences. In the end, strong businesses and a strong economy serve us all and we share an interest in ensuring legislative changes grow the economic pie for all Canadians and protect the legitimate interests of all stakeholders.

We emphasize the importance of taking the time to review the significant changes proposed by Bill C-59 thoroughly. Some of the proposals could have far-reaching and unintended effects on retailers and related companies, resulting in negative outcomes for the broader Canadian economy. The proposed Digital Services Tax (DST) poses significant challenges, particularly if implemented retroactively. Our members are also concerned that some of the proposed amendments to the Competition Act will have unintended, counter-productive consequences.

Given the speed with which Bill C-56 passed late last year, we trust that the government and parliamentarians will now allow for meaningful consultation on the more expansive changes proposed in Bill C-59. In that spirit, we submit the following comments for the Committee's consideration. These comments address the DST as well as the proposed amendments to the Competition Act that would expand private rights of action, clarify rules regarding drip pricing, add a right to repair and introduce retroactive enforcement against previously legal non-competitor collaborations.

Canadian retail in 2024

Retail today comprises online, in-store and hybrid shopping for physical goods by consumers. The Retail Council represents Canadian retailers and related companies, collectively comprising an

important engine of the economy and operating more than 54,000 physical storefronts across Canada as well as online retail. Retailers contribute 5.3% of Canada's GDP and employ 11.3% of Canada's workforce, over 2 million people. Canada's retailers sold \$778 billion overall and \$490 billion in core retail (minus gas and auto) in 2022. According to Statistics Canada, retail e-commerce accounts for 5.8% of total retail trade, a figure that RCC believes understates the full extent of e-commerce. ⁱ

Looking ahead into 2024, the overall health of the Canadian economy seems uncertain. As a result, retailers are cautious, as high interest rates and increased costs of living impact consumer budgets. Labour shortages and recruiting skilled staff also continue to be top concerns for the retail industry and its role as a key Canadian employer. ⁱⁱ

The Digital Services Tax Act

The new Digital Services Tax (DST) proposed in C-59 would apply a 3% tax rate to certain types of digital revenue earned by an organization that passes two prescribed revenue thresholds: (a) global ownership group revenue of EUR750M and (b) Canadian in-scope digital services revenue of CAD20M.

We suggest the federal government stop moving forward with its unilateral DST and, to the extent that the DST does move forward, strongly urge the government to remove the retroactive nature of the tax. We urge the government instead to commit to working with international partners on a multilateral solution to international taxation. The DST, especially if applied retroactively, could have broader than intended consequences on the Canadian retail ecosystem, potentially chilling entrepreneurial innovation. Multiple RCC members would be directly subject to the tax. Small, medium and even large retailers who engage digital service providers would end up exposed to more expensive costs of inputs due to the DST's impact on those service providers. Consumer prices are going to feel upward pressure from these increased input costs, during a time when Canadian families are already struggling to cope with cost of living and affordability is top of mind.

In addition to these concerns, the DST would impose significant administrative burden, raise a double taxation concern and, particularly if it is applied retroactively, would also undermine business confidence in the regulatory certainty of Canada's marketplace. It also poses a significant risk of trade tensions and retaliatory U.S. trade tariffs, particularly as the U.S. enters a period of political transition. In the event such tariffs occur, RCC is concerned they would disproportionately affect Canadian retailers, and thus Canadian consumers. They would likely be levied on American-manufactured raw materials like steel and other inputs, driving up costs along the Canadian supply chain and putting added pressure on consumer wallets.

Amendment recommendation: If FINA does not choose to remove the proposal entirely from C-59, we suggest that DST regulations within the bill be modified to ensure DST is a go-forward tax only.

Under section 6 of the proposed *Digital Services Tax Regulations* (Canada), the current drafting is as follows; “For the purpose of the description of B in subsection 10(2) of the Act, the rate prescribed in respect of a taxpayer is 3%.” We propose that the rate of 3% be changed to 0%, to fully eliminate the retroactive aspect of the proposed *Digital Services Tax Act*. Specifically:

- “For the purpose of the description of B in subsection 10(2) of the Act, the rate prescribed in respect of a taxpayer is ~~3%~~0%.”

Amendments to the Competition Act

The Competition Act is a critical piece of Canada’s economic framework and changes to this Act have enduring and far-reaching consequences. While well intentioned, RCC believes that some of the proposed amendments in Bill C-59 would harm consumers and businesses alike. Some of these proposals would raise business costs to the detriment of the economy and consumers, while also reducing the level of regulatory checks and balances that Canadians value.

Ensuring Responsible Expansion of Private Rights of Action

C-59 expands and creates new private rights of action for certain conduct before the Competition Tribunal. It also lowers the leave test to bring actions forward and introduces monetary disgorgement orders for private litigants to be distributed by the Tribunal to the applicant and any other person affected.

While increasing the rights of parties to privately seek recourse for Competition Act violations is laudable, RCC is concerned that the proposed amendments inappropriately weaken checks and balances that can protect innocent parties, big and small, from the excesses of the legal system. This new and expanded private enforcement framework would lead to an uptick in frivolous lawsuits, as it is akin to a class action without appropriate procedural guardrails.ⁱⁱⁱ

If they are not subject to appropriate checks and balances, the proposed changes could raise costs among our members without much substantive impact on improving competition or protecting consumers. RCC is concerned that weakened checks and balances preventing private actions from having to meet a substantive threshold for leave could encourage tactical litigation where the intent is to harm businesses and competitors rather than to launch legitimate claims. The proposed regime permits unsubstantiated claims to proceed unchecked, again harming innocent parties and competition by incentivizing frivolous litigation.

Amendment recommendation: We suggest Bill C-59 be amended to add safeguards to prevent frivolous private actions, as suggested by the Canadian Chamber of Commerce’s proposed amendments to Bill C-59’s “granting leave” provisions.

Ensuring reflection of regulatory regimes in drip pricing language

C-59 amends sections 52.01 and 74.011 of the Competition Act, adding the following language: [\[1\]](#) “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 by or under an Act of Parliament or the legislature of a province.”

Across Canada, environmental fees, sometimes called eco-fees, are a component of circular economy programs in which retailers and related companies must participate. Given that these fees arise in the context of protecting the environment, we do not believe that they should be equated with the sort of hidden “junk fees” the drip pricing provisions exist in spirit to prevent. We suggest the following language change to the drip pricing amendments in C-59, and would be happy to further explore this area with policymakers:

- 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 **or permitted** by or under a **government regulatory regime**.

The same change should also be made to the existing drip pricing language in subsections 52(1.3) and 74.01(1.1) of the Competition Act.

Ensuring a reasonable right to repair

Bill C-59 creates a new right to repair in the Competition Act: it prevents companies from refusing to provide to third parties the “means of diagnosis and repair,” where the person is substantially affected in the whole or part of their business, as long as no trade secrets are disclosed.

In spirit, RCC is supportive of a healthy competitive marketplace that promotes consumer choice in product repair. We note that some retailers may themselves be the manufacturers and suppliers of products they then sell to consumers, and that some retailers may also offer repair services. RCC therefore suggests that the imposition of reasonable standards should be allowed to protect consumers from the risk of faulty third-party repair. We would be happy to explore right to repair more broadly with policymakers.

We recommend amending section 75 of the Competition Act to include a new provision:

- **(2.2) Nothing in this section is to be interpreted to prevent reasonable standards to protect individuals from faulty third-party repair.**

Recognizing legal and legitimate agreements and arrangements between non-competing parties

Section 90.1 of the *Competition Act*, as amended by Bill C-56, has expanded to capture collaboration arrangements between non-competitors where a “significant purpose of the agreement or arrangement or any part of it is to prevent or lessen competition.” For example, the new provision now potentially captures a wider range of simple agreements between a supplier and retailer.

While the new law as of C-56 passing helpfully gives parties one year to bring existing agreements into compliance, RCC is concerned with the proposed amendment in Bill C-59 to retroactively apply section 90.1 “in respect of an agreement or arrangement that has been terminated less than three years ago.” We suggest it be made clear that this three-year retroactive limitation period will not apply to non-competitor agreements that were terminated prior to the proposed C-59 amendments coming into effect. Were C-59’s retroactive limitation period indeed to apply in this way, we believe that interpretation would have significant unintended consequences because (i) those agreements and arrangements were lawful before Bill C-56 was passed; and (ii) parties to terminated agreements do not have the opportunity to retroactively bring such agreements into compliance. This leaves innocent parties, who complied with the law at the time of their agreement or arrangement, retroactively vulnerable to private action or enforcement by the Competition Bureau. In addition to this unfairness, this retroactivity would risk undermining business confidence in the regulatory certainty of Canada’s marketplace.

Conclusion

RCC is appreciative of the hard work of policymakers to ensure that Canadian laws and regulations evolve with the economy and protect all stakeholders. RCC recognizes the important role of consultations throughout the legislative and democratic process to ensure proposed laws promote their intended effect and mitigate the risks of unintended consequences. To reiterate, RCC and our members have significant concerns that these highlighted issues will have unintended effects on the economy by increasing business uncertainty and costs, harming the economically important retail industry during an already unstable economic time, and ultimately hurting consumers and the economy at large. We would be happy to provide further comment or follow up upon request.

Sincerely,

Kate Skipton
Senior Policy Analyst
Retail Council of Canada
647 296 7032

kskipton@retailcouncil.org

CC: Peter Fonseca, Chair of the Standing Committee on Finance (House of Commons), Member of Parliament (Mississauga East – Cooksville)

Jasraj Singh Hallan, Vice Chair of the Standing Committee on Finance (House of Commons), Member of Parliament (Calgary Forest Lawn)

Gabriel Ste-Marie, Vice Chair of the Standing Committee on Finance (House of Commons), Member of Parliament (Joliette)

Yvan Baker, Member of Parliament (Etobicoke Centre)

Daniel Blaikie, Member of Parliament (Elmwood-Transcona)

Adam Chambers, Member of Parliament (Simcoe North)

Julie Dzerowicz, Member of Parliament (Davenport)

Philip Lawrence, Member of Parliament (Northumberland—Peterborough South)

Marty Morantz, Member of Parliament (Charleswood—St. James—Assiniboia—Headingley)

Joanne Thompson, Member of Parliament (St. John's East, Newfoundland and Labrador)

Patrick Weiler, Member of Parliament (West Vancouver—Sunshine Coast—Sea to Sky Country)

The Honourable Chrystia Freeland, Deputy Prime Minister and Minister of Finance

The Honourable François-Philippe Champagne, Minister of Innovation, Science and Industry

The Honourable Rechie Valdez, Minister of Small Business

Rachel Bendayan, Parliamentary Secretary to the Deputy Prime Minister and Minister of Finance

Ryan Turnbull, Parliamentary Secretary to the Minister of Innovation, Science and Industry

Bryan May, Parliamentary Secretary to the Minister of Small Business

Chris Forbes, Deputy Minister Department of Finance

Simon Kennedy, Deputy Minister, Innovation, Science and Economic Development Canada

About Retail Council of Canada

Retail is Canada's largest private-sector employer with over 2 million Canadians working in our industry. The sector annually generates over \$90 billion in worker compensation and \$490B in core retail sales (excluding vehicles and gasoline) (2022). Retail Council of Canada (RCC) members represent more than two-thirds of core retail sales in the country. RCC is a not-for-profit industry-funded association that represents small, medium, and large retail businesses in every community across the country. As the Voice of Retail™ in Canada, we proudly represent more than 54,000 storefronts in all retail formats, including department, grocery, specialty, discount, independent retailers, online merchants and quick service restaurants.

ⁱ For e-commerce, see Statistics Canada, *Retail Trade, November 2023*, <https://www150.statcan.gc.ca/n1/daily-quotidien/240119/dq240119a-eng.htm> and *Canadian e-commerce: measuring domestic vs. cross-border e-commerce*. Released Nov 22, 2019 <https://www150.statcan.gc.ca/n1/pub/11-627-m/11-627-m2019067-eng.htm>. RCC is aware that the StatCan e-commerce statistic does not capture all retail online sales. We understand that it excludes online purchases from foreign companies shipped directly to consumers across the border and may not include a full tally of product sales on some Canada-based 3rd party marketplace retail platforms. See also Statistics Canada, *Online shopping during the Covid-19 pandemic*. <https://www150.statcan.gc.ca/n1/en/pub/11-627-m/11-627-m2020088-eng.pdf?st=-7cb274A> Other retail statistics are from late 2023-early 2024 numbers on the RCC Retail Pulse Dashboard, <https://www.retailcouncil.org/retail-pulse-dashboard-overview/>.

ⁱⁱ Recruiting skilled labour, labour shortage as top retail obstacles: Statistics Canada. Table 33-10-0690-01 *Most challenging obstacle expected by the business or organization over the next three months, third quarter of 2023*. <https://www150.statcan.gc.ca/t1/tbl1/en/cv.action?pid=3310069001> We note that RCC's membership includes retail businesses from across the digital innovation spectrum as well as businesses in the wider retail ecosystem, such as service providers and quick-service restaurants, who are often similarly impacted by labour and talent issues.

ⁱⁱⁱ Class action proceedings in Canada include class certification, a court-supervised settlement approval process, class-wide release for defendants, and court approval of plaintiffs' legal fees, <https://www.bennettjones.com/Blogs-Section/Federal-Government-to-Significantly-Overhaul-the-Competition-Act>; for more information see also <https://www.mccarthy.ca/en/insights/articles/gradually-then-suddenly-significant-competition-law-reform-arrives-canada>