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A Step Too Far: Enshrining Structural Presumptions Governing Mergers in the *Competition Act* is Not Good for Canada's Competitiveness

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Competition law reform is proceeding in Canada in a piecemeal fashion involving three different bills. Bill C-56, *An Act to amend the Excise Tax Act and the Competition Act*, received Royal Assent on December 15, 2023. Bill C-59, *The Fall Economic Statement Implementation Act*, is currently at Second Reading in the House of Commons. Bill C-56 implements, and Bill C-59 would implement, a significant overhaul of Canada's *Competition Act*. With respect to mergers, Bill C-56 repealed the efficiencies defence[1] and Bill C-59 will modify the merger notification thresholds and would give the Competition Bureau a longer period to address anti-competitive mergers that are not pre-notified to the Competition Bureau. Bill C-59 also proposes to modify how market concentration is taken into account.

A private member's bill, Bill C-352, *Lowering Prices for Canadians Act*, tabled on September 18, 2023, by Jagmeet Singh, leader of the New Democratic Party, and referred to the House Standing Committee on Industry and Technology on February 7, 2024, brought into scope the discussion of bright-line rules and presumptions in the context of merger review. Amongst other things, Bill C-352 includes proposals to introduce (1) irrebuttable presumptions of illegality and (2) rebuttable presumptions of illegality based on market-share thresholds into the merger review process of Canada's *Competition Act*.[2] Unlike the proposals in Bill C-352, neither Bill C-56 nor Bill C-59 contain bright-line rules or structural presumptions. The C.D. Howe Institute Competition Policy Council (Council) discussed the use of bright-line rules and structural presumptions in Canada's competition law framework.

1 The efficiencies defence allowed mergers with anti-competitive effects to otherwise proceed if the merger created sufficient efficiencies such as cost savings for the merging parties to outweigh the anti-competitive effects of the merger.

2 Bill C-352 contemplates: a prohibition on mergers which result in a combined market share of 60 percent or more; a rebuttable prohibition on mergers which would result in a combined market share between 30 percent and 60 percent, if the merging parties can demonstrate that the merger will be beneficial; and a rebuttable presumption where the merger will cause a significant increase in concentration or market share.

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Bright-line rules set out clearly, and without exception, whether certain behaviours are prohibited or allowed. Presumptions assign the burden of proof. Unlike a bright-line rule, a party can meet their burden – overcome the presumption – with evidence and analysis. During the Standing Senate Committee on National Finance's brief deliberations on Bill C-56, the Commissioner of Competition continued to advocate for structural presumptions on mergers, referring to an active debate in Australia about changing its law and a mindset that he is seeing around the world.[3] Bill C-352, if adopted, would require the Competition Tribunal to make an order to dissolve or prohibit mergers that result in an excessive combined market share, on the basis of market share alone. The amendments in Bill C-59 would permit, but do not require, the same outcome.

The Verdict: A principled, effects-based approach to competition law is anchored in the belief that large firms are not intrinsically harmful absent negative effects and that excessive government intervention in the economy is likely to cause more harm than good.[4] Structural tests, especially bright-line rules, presume too strongly that the structure of the market determines outcomes, rather than recognizing a much more complicated relationship between structure and outcome, including the fact that intensely competitive, successful firms may grow in market share. The majority of Council members believe that Canada's competition legislation should remain effects-based and does not support the introduction of structural presumptions in Canada's competition law statute.

Embrace An Effects-based Analysis In Legislation

Bright-line rules that prohibit a merger based on market share alone are inconsistent with an effects-based competition regime. Currently, section 92(2) of the *Competition Act* explicitly states that the Tribunal cannot find that a merger is likely to result in a substantial prevention or lessening of competition solely based on evidence of concentration or market share. This provision will be repealed if Bill C-59 receives Royal Assent. The Competition Bureau has expressed the view that this is "a

3 Commissioner's remarks to the Senate Standing Committee on National Finance during its consideration of Bill C-56, December 13, 2023, available at: https://sencanada.ca/en/Content/Sen/Committee/441/NFFN/56553-E. The Council notes that the Australian Competition and Consumer Commission's proposal to reverse the onus of proof, requiring merging parties to prove on a balance of probabilities that the merger is unlikely to result in a substantial lessening of competition is out of step with other jurisdictions such as the US, EU and the UK, where the competition agency holds the burden of proving competition concerns.

4 On November 28, 2023, the Council published a Communique encouraging policymakers to adopt an effects-based approach to competition law urging the Standing Committee on Finance to exercise caution as it reviews the legal test for abuse of dominance.

minimum initial step towards a structural presumption" that "would permit, but not require, the Tribunal to adopt structural presumptions" and "most likely result in the Tribunal placing greater weight on evidence of high market share and concentration than it has to date."[5]

The Competition Bureau believes there is a need for a more definitive reform in this area and that policymakers should go further and legislate a structural presumption with defined thresholds.[6] The main reason for creating a presumption that fact A corresponds to fact B is the high probability that if A occurs, B will follow in almost all cases, therefore reducing regulatory costs without significantly increasing error costs.[7]

However, the majority of Council members believe that this incorrectly presupposes that there exists a strong analytical link between mergers above the presumption threshold and anticompetitive effects. This link is not always there. The argument against bright-line market share thresholds in the *Competition Act*, which Bill C-352 would create, is even stronger. To reject a merger on the basis of a 60 percent market share alone would, amongst other things, put far too much weight on the determination of the appropriate borders of the market, would improperly ignore the extent to which vigorous and ongoing competition created the 60 percent market share, and would improperly ignore highly relevant indicators of competitive performance such as barriers to entry.

A majority of Council members noted that large firms in some industries can be efficient and innovative, providing lower-cost services to consumers by taking advantage of economies of scale and providing consumer benefit through network effects. There is broad agreement among Council members that "most mergers are pro-competitive, or at least competitively neutral."[8] The Commissioner himself emphasized this at the Standing Senate Committee on National Finance where he stated "the vast majority of mergers … review[ed] at the Bureau are not problematic. In fact, they're beneficial and [the Competition Bureau] wave[s] them through in five or seven days after looking at them quickly."

5 See Submission by the Competition Bureau to The Future of Competition Policy in Canada, March 15, 2023.

6 Id. More recently, the Competition Bureau has reemphasized the need for the introduction of structural presumptions in the *Competition Act* and that it will continue to advocate as such. See remarks by Anthony Durocher, Deputy Commissioner, Competition Promotion Branch at the INDU Committee, February 26, 2024.

7 Safe Harbours and Legal Presumptions in Competition Law: OECD Background Note, 2017.

8 US DOJ Antitrust Division, Remarks by AG Delrahim (2018), available at: https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-2018-global-antitrust.

Only eight contested merger cases have ever been heard by the Tribunal under section 92, namely: *Southam* (1992), *Hillsdown* (1992), *Superior Propane* (2000), *Canadian Waste* (2001), *CCS/Tervita* (2012), *Parrish & Heimbecker* (2022), *Secure Energy* (2022) and *Rogers/Shaw* (2022). Seven of those eight contested cases included challenges to mergers involving concentration levels that created or preserved market shares above 60 percent. Indeed, four of these merger challenges involved mergers to monopolies or near monopolies. However, in undertaking an effects-based analysis, the courts ordered remedies in respect of only two cases. Council members note that this demonstrates the need for our legislation to remain effects based.[9]

Council members considered whether introducing rebuttable presumptions in the Act would simplify merger review and be beneficial for all parties concerned – Canadian consumers and businesses, and judicial and Competition Bureau resources. It is tempting to conclude that presumptions will simplify our merger review regime; however Council members caution that the introduction of presumptions will not achieve this result. Every merger analysis requires an assessment of the market to determine concentration, which is a complex, contentious and costly exercise. If the starting point for courts is a presumption in merger cases, parties will increasingly argue that the market definition is too narrow, in addition to demonstrating that the merger will not lead to anticompetitive effects.[10]

Additionally, some Council members noted that unlike the Competition Bureau, merging parties lack the ability to gather information from other market participants making it more difficult in practise to prove a negative, i.e. that a merger would not result in a substantial lessening or prevention of competition. Under section 11(1) of the Act, the Commissioner has always had the ability to make an *ex parte* application to the court or Tribunal for the production of documents or other information from any party under investigation. In 2009, Parliament expanded the Competition Bureau's information-gathering tools with the introduction of the Supplementary Information Request process that allows the Bureau to gather additional documents and data from merging parties during its review. With a combination of powerful information gathering tools, the burden rightly lies with the Competition Bureau to establish a prima facie case, following which the burden shifts to the parties to rebut the case.

Beyond Bright Lines – A Structural Presumption in Agency Guidance

Council members recognize that market share and concentration levels are meaningful, not in any absolute way, but as an indicator that must be coupled with non-structural evidence on a case-by-case basis. Market shares may serve as an initial screen to suggest a greater need for a thorough investigation,

9 Even with repeal of the efficiencies defense, it is not clear the outcome would have been any different.

10 Ginsburg and Wright, Philadelphia National Bank: Bad Economics, Bad Law, Good Riddance, 2016.

but are not, by themselves, analytically probative or conclusive. Internationally recommended best practices note that jurisdictions that use market concentration and market shares as a tool to presume competitive harm should "ensure that such presumptions may be overcome or confirmed by a detailed review of market conditions."[11] Economists have also argued that market structure matters in merger policy when it is an indicator of the risk that firms will have the ability and incentive to lessen competition by exercising market power post-merger (or an enhanced ability and incentive to do so), to the detriment of trading partners (buyers or sellers) in the relevant market.[12]

There is broad agreement among Council members that any structural presumptions are better placed in the Competition Bureau's guidelines, rather than enshrined in legislation. At present, Part 5 of the Competition Bureau's *Merger Enforcement Guidelines* examines the relationship between market shares and concentration and states that the Commissioner will generally not challenge a merger on the basis of a concern related to the unilateral exercise of market power if the post-merger market share of the merged firm would be less than 35 percent, or on the basis of a concern related to the coordinated exercise of market power when the post-merger market share accounted for by the four largest firms in the market would be less than 65 percent, orthe post-merger market share of the merged firm would be less than 10 percent.[13] However, "mergers that give rise to market shares or concentration that exceed these thresholds are not necessarily anti-competitive. Under these circumstances, the Competition Bureau examines various factors to determine whether such mergers would likely create, maintain, or enhance market power, and thereby prevent or lessen competition substantially."[14]

The Competition Bureau may choose to amend its *Merger Enforcement Guidelines*, particularly if case law evolves following repeal of section 92(2) of the Act. The Competition Bureau has recommended structural presumption "thresholds could be based on the levels of post-merger concentration or market share, and the changes in those levels brought about by the merger, taking inspiration from thresholds outlined in the US' Horizontal Merger Guidelines or US case law."[15] However, the Council notes that several economists raised concerns about those guidelines in the draft US Horizontal Merger

11 International Competition Network, "Recommended Practices for Merger Analysis, 2018," available at: https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_RPsforMergerAnalysis.pdf.

12 See Comments of Economists and Lawyers on the Draft Merger Guidelines, 2023.

13 Competition Bureau, Merger Enforcement Guidelines (October 6, 2011), section 5.9.

14 *Supra note* 6, section 5.10.

15 See Submission by the Competition Bureau to The Future of Competition Policy in Canada, March 15, 2023.

Guidelines that specifically appear to treat aspects of market structure as intrinsically harmful, without regard to the magnitude of the risk that the transaction will enhance the exercise of market power.[16] Others have questioned whether the updated guidelines are representative of jurisprudential thinking since the structural presumption in horizontal merger cases set forth in *Philadelphia National Bank*[17] and have commented that US courts routinely decline to apply a presumption of illegality and require case-specific evidence instead.[18] Some economists have found a theoretical and an empirical basis for focusing solely on the change in the Herfindahl-Hirschman Index and ignoring its level.[19] The majority of Council recommends that the Bureau proceed with the creation of any presumptions in its guidance with caution, and consult widely on its proposed approach, consistent with "a long-standing tradition that [the Bureau is] very much committed to where [the Bureau] provide[s] draft guidance to the stakeholders of the Competition Bureau"[20] for feedback.

Creating a "likely to be challenged" market concentration presumption in guidelines, rather than the statute, would not be objectionable. Including the presumption in guidelines may reasonably create some deterrence by increasing the prospects that concentrative mergers will likely be subject to a challenge, which is itself costly, but will not shift legal burdens in a manner that fails to reflect the ambiguity of market share implications for competitive performance. The Council supports the use of presumptions in enforcement guidance to provide transparency and a degree of predictability about the Competition Bureau's enforcement approach for merging parties. Such transparency and predictability can result in earlier resolutions of complex mergers, or an increase in consent agreements. In the last three fiscal years (April 1, 2020 - March 31, 2023), the Competition Bureau reported that eight proposed mergers have been abandoned by merging parties after being informed that the transaction raises issues under the Act.[21]

16 See Comments of Economists and Lawyers on the Draft Merger Guidelines, 2023.

17 374 U.S. 321 (1963).

18 See also Joshua Wright: Courts Make Legal Presumptions, Not the Agencies. Wright argues that there is precedent from the Supreme Court stating explicitly that legal presumptions are disfavored in antitrust cases, combined with specific examples of the Court rejecting agency requests for favorable legal presumptions.

19 See Nocke, Volker, and Michael D. Whinston. "Concentration thresholds for horizontal mergers." *American Economic Review* 112, no. 6 (2022): 1915-1948.

20 Commissioner's remarks to the Senate Standing Committee on National Finance during its consideration of Bill C-56, December 13, 2023.

21 See the Bureau's 2022-2023 "Performance and Statistics Report," Table 3.2.2.

Conclusion

The Council commends the government for adopting amendments that are consistent with Canada's historical effects-based merger review regime, and as reflected in other jurisdictions globally. However, being out in front and prohibiting mergers based on bright-line tests or enshrining structural presumptions into our legislation would not be advisable for Canada's competitiveness.

Members of the Council participate in their personal capacities, and the views collectively expressed do not represent those of any individual, institution or client.

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