Economic Liberties response to ISED Competition Act Consultation

The Honourable François-Philippe Champagne, P.C., M.P.
Minister of Innovation, Science and Industry
Government of Canada

In response to: Consultation on the future of competition policy in Canada

STATEMENT OF DENISE HEARN ON BEHALF OF THE AMERICAN ECONOMIC LIBERTIES PROJECT
via electronic filing

American Economic Liberties Project
2001 Pennsylvania Ave NW Suite 540
Washington DC 20006
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Table of Contents

1. Introduction

I, Denise Hearn, a Senior Fellow at the American Economic Liberties Project – and a Canadian – write in response to the request for submissions by the Government of Canada's consultation[1] and discussion paper[2] on the Future of Competition Policy in Canada. We applaud the Ministry of Innovation, Science and Economic Development Canada (ISED) for conducting this comprehensive and wholesale review of the Competition Act, and for providing an opportunity for public engagement.

For additional context, the American Economic Liberties Project (AELP) works to ensure America's system of commerce is structured to advance economic liberty, fair commerce, and a secure, inclusive democracy. AELP believes true economic liberty means entrepreneurs and businesses large and small succeed on the merits of their ideas and hard work; commerce empowers consumers, workers, farmers, and engineers instead of subjecting them to discrimination and abuse from financiers and monopolists; foreign trade arrangements support domestic security and democracy; and wealth is broadly distributed to support equitable political power.

As I have previously written,[3] this legislative review and consultation process is welcomed as:

1. Many of Canada's markets are highly concentrated, and Canada has been falling in global rankings on competitiveness and innovation;
2. There is a global movement to revisit competition policy's role in the organization of the political economy, and Canada is well positioned to update its competition policy regime to better serve the interests of Canadians; and
3. New market realities – such as digital platforms and the financialization of firms – necessitate updated approaches to competition law and enforcement.

A general note: While reforms to the Act are absolutely welcomed and crucial, they are insufficient alone to establish a comprehensive competition policy regime in Canada. Canada needs an all-of-government approach, similar to what has been undertaken in the United States under President Biden's Executive Order on Promoting Competition in the American Economy.[4] The order established a historic whole-of-government approach to competition policy, recognizing the wide-sweeping problem of consolidation across industries in the US, and established a White House Competition Council which includes the heads of many government

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[1] https://ised-isde.canada.ca/site/strategic-policy-sector/en/marketplace-framework-policy/competition-policy/consultation-future-competition-policy-canada

[2] https://ised-isde.canada.ca/site/strategic-policy-sector/en/marketplace-framework-policy/competition-policy/future-competition-policy-canada

[3] Submission to Senator Wetston consultation on *Examining the Canadian Competition Act in the Digital Era*: https://www.colindeacon.ca/s/american-economic-liberties-program.pdf

[4] https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/

agencies.[5] The Order catalyzed 72 initiatives by more than a dozen federal agencies, including a requirement for some agencies to report on how competition issues affect their industry. Canada should follow suit to institutionalize competition concerns across our federal policy agenda.

Additionally, a more significant role for provinces in aiding this all-of-government approach would be welcome, as Vass Bednar and I have previously written.[6] The US and Europe have a federated approach to competition policy – the US states have co-jurisdiction to enforce the antitrust laws, and in Europe the European Commission at the EU shares enforcement with National Competition Authorities at EU member states.

Canada takes a federalist approach to many policy priorities, whereby both the provinces and the federal government have a role to play in a particular domain, such as health or privacy. But competition regulation is distinctly federal. A role for the provinces, to complement the Competition Bureau's priority areas, has not been well-articulated, despite provinces having primary oversight of consumer protection and labour issues; issues that are complementary to competition concerns.

Additionally, competition policy intersects with many other areas of law and policy such as: privacy, data mobility, digital markets, consumer protection, labour, and monetary policy, to list a few. Reforms to the Competition Act are critical to ensure Canada's competition law is ready to meet 21st century challenges, but they cannot be relied upon alone to ensure Canada's economic dynamism, sustainability, and the future prospects for varied stakeholders. Our hope is that this welcomed consultation is part of a larger suite of reforms that the federal government helps catalyse on competition policy.

We would also like to make an epistemological point. Although competition policy has sought – under the consumer welfare standard – to make its enforcement 'scientific' and 'objective,' competition policy has always had allocative effects across the economy. Despite efforts to often portray this body of law and its enforcement as a primarily economic or even mathematical exercise, its application has never been neutral. The Act's purpose statement considers a range of objectives for stakeholder groups which, at times, may be at odds with one another. In this way, enforcers must always grapple with the way in which the application of the law benefits some stakeholder groups over others and take into account – at times – competing priorities.

For example, a more permissive merger review regime has – in some cases – led to economies of scale and scope which have benefited consumers. However, it has also produced other harms to stakeholders and economic dynamism. It is now well documented that concentrated industries lead to higher consumer prices, lower worker's wages, and harms to economic

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[5] https://www.whitehouse.gov/competition/

[6] ON360 Transition Briefings 2022 – Competition Policy: Should the Province Play a Larger Role? By Vass Bednar and Denise Hearn, August 2022. https://on360.ca/policy-papers/on360-transition-briefings-2022-competition-policy-should-the-province-play-a-larger-role/

democracy. In Canada, concentrated industries have led to falling and below OECD average entrepreneurship rates, low business dynamism, and stifled innovation.

This conflict is not to be shied away from; in fact, many other bodies of law do not designate a single, overarching goal that must unify its enforcement. Brightline rules about permissible or non-permissible conduct can allow for better enforcement, than when the Bureau must justify the law's enforcement against theorized harms and benefits to one stakeholder group.

In that spirit, calls to go slowly on reform efforts– or to retain a philosophical, rather than rules-based approach to competition – should be assessed against the many real-world consequences and harms of our existing enforcement regime.

2. Purpose Statement of the Act

The purpose of competition policy has always been contested, and evermore so today in the context of our complex and changing market realities. However, Canada's Competition Act contains within it, the recognition that multiple objectives can be accomplished under the mandate of the law, including the success of small and medium sized enterprises, the adaptiveness of the Canadian economy, and ensuring that consumers are provided with low prices as well as competitive product choices. These additional elements of the Act's mandate need to be re-emphasized and reinvigorated in its application and enforcement.

Other elements of the Act, such as the efficiencies defence and the business justification rule, supersede this multi-polity purpose statement by preferencing efficiency over other public goods. **While the language of the Purpose Statement may need updating – and we defer to Canadian law experts here – in principle any new language should aim to ensure that:**

1. **Markets are fair and competitive (and challenges significant concentrations of economic and financial power);**
2. **Markets allow the best ideas, products, and services to flourish, instead of rewarding abuses of market power or market gatekeeping; and that**
3. **Markets create widespread prosperity and opportunity for all Canadians.**

3. Merger Review

While much is made of reducing regulatory red tape to encourage procompetitive benefits, large firms increasingly act as de facto private regulators which set the terms of markets in undemocratic ways. Studies estimate that Canada could realise a 4-5% boost in productivity through pro-competitive regulatory reform and reduced barriers to entry.[7]

[7] https://cepr.org/voxeu/columns/impact-regulation-rent-creation-rent-sharing-and-total-factor-productivity

In this way, improved competition is not simply about the reduction or elimination of 'red tape,' but rather, ensuring that coherent and fair guardrails are in place to guide the market and firms. Merger review is the important first line of defence against undemocratic concentrations of economic and financial power which threaten Canada's dynamism, efficiency, and global competitiveness.[8]

3a. Blocking market power in its incipiency

Current US agency leadership have stated a desire to revive the "incipiency standard" of the Clayton Act,[9] meaning that concentration should be arrested in its incipiency before demonstrable harms from concentration have materialized. This translates to a bias towards action when a merger *may* lessen competition.

This is in alignment with a plain-text reading of the statutes and is closer to what Congress intended when drafting and instituting the laws. As the U.S. Supreme Court had interpreted the standard, it "requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future; this is what is meant when it is said that the amended § 7 was intended to arrest anticompetitive tendencies in their 'incipiency.'"[10]

Doha Mekki, the current Deputy Assistant Attorney General of the Antitrust Division, DOJ, recently said:

> "Congress says what it means and means what it says. We need to enforce the statute as Congress wrote it. Decades of Supreme Court precedent speak to the need to arrest concentration and trends towards concentration in their incipiency. In many cases… agencies and courts accurately identified a risk to competition, but did not act because they weren't sufficiently certain the harm would come to pass. But that is not the standard. Congress wrote a statute that applies whenever a merger "may" substantially lessen competition. It's an incipiency statute. Congress was concerned that, if we wait until the harm has actually come about, it would be too late. We cannot wait for evidence that harm is sure to exist. …Congress did not write a statute asking whether a substantial lessening of competition was "certain" or the "most likely" outcome. As long as that harm "may" occur, the merger violates the law and should be enjoined."

The significance of this is that the agencies desire to revive a structural presumption against mergers which lessen competition because, "It is easier to measure competition than to predict

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[8] https://www.economicliberties.us/our-work/why-merger-policy-matters/#

[9] Section 7 of the 1914 Clayton Antitrust Act sought to prohibit such acquisitions with a standard for "incipient monopolization." It stated that no firm can acquire the stock or assets of another "where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition." (15 U.S.C. § 18).

[10] United States v. Philadelphia National Bank, 374 U.S. 321, 362 (1963), https://supreme.justia.com/cases/federal/us/374/321/.

competitive effects in a dynamic world, and that is more consistent with the framework that Congress set forth," as also stated by Mekki.

Canada would do well to emulate this approach because, as the Competition Bureau has stated, "merger review is the first line of defence in protecting competition in the Canadian economy."[11] **Blocking market power in its incipiency aligns with the Bureau's call to shift the burden of proof to merging parties when there may be a substantial lessening of competition, and a closer alignment with US enforcement policy on structural presumptions when certain conditions are met.**

3b. Address roll-ups and serial / creeping acquisitions

Roll-ups or creeping acquisitions – the intentional consolidation of fragmented industries through many small acquisitions – are increasingly common in Canada.

Many businesses that Canadians think are independent, are being acquired by both public and private companies in industries as diverse as funeral homes, insurance companies, third-party Amazon sellers, manufacturing firms, automotive parts and supply businesses, retirement homes, or veterinary and dental practices.[12]

Creeping acquisitions can not only aggregate a significant amount of market power without requiring any notification to the Bureau, but also can potentially stifle nascent competitors. The Bureau noted this in their 2022 submission to Senator Wetston by acknowledging that "The system does not require pre-merger notification for related transactions between the same or affiliated parties where each transaction is below threshold (such as a strategy of engaging in a "creeping acquisition"). Related acquisitions should be treated as one transaction under the pre-merger notification regime."

As Jeffrey M. Wilder, Acting Deputy Attorney General, Antitrust Division, U.S. Department of Justice said in 2019:

> "Consider the case of the serial acquirer, a firm that slowly grows its share through a series of small acquisitions until it accounts for a sizable share of the market. It is exceptionally hard to establish that any individual acquisition leads to a substantial lessening of competition under the Clayton Act. Yet when we step back and look at the totality of the evidence, it is clear that a focus on individual transactions makes for a very blurry snapshot of what is happening in the market… In [the] context [of serial acquisitions], with many acquisitions involving targets with market shares of 5-10%, we tend to miss what is happening in the market when we look at each transaction in isolation. We also struggle to identify which single transaction leads to a substantial

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[11] https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/promotion-and-advocacy/regulatory-adviceinterventions-competition-bureau/future-competition-policy-canada#sec-3

[12] https://policyoptions.irpp.org/magazines/november-2022/the-hidden-trend-reshaping-and-hurting-the-economy-serial-acquisitions/

reduction in competition. That same logic applies to the acquisition of start-ups operating outside a platform's core market."[13]

Harms from creeping acquisitions can include lower workers' wages, higher consumer prices, increased foreign ownership of Canadian businesses (instead of independent local ownership); potential negative effects on supply chain resiliency; and the lost competitiveness of small businesses. We provide recommendations on amended notification requirements below to address this growing trend.

3c. Remove restrictive time periods

In many cases, a roll-up strategy is a multi-year intentional strategy to consolidate market power which can, in some cases, bear immediate rewards for acquiring firms, but in many other instances, is a long-term strategy which materializes benefits over time.

For this reason, the Act should remove the one year time period following non-notifiable mergers for anti-competitive conduct to materialize. Additionally, given the record number of mergers and acquisitions in Canada in recent years, the Bureau should be given more than 30 days to review filed mergers.

3d. Consider the role of debt in merger analysis

The increased availability and high levels of debt financing for mergers, and serial acquisitions in particular, merits further investigation. Through acquisition facilities for serial acquirers and similar lending products, debt markets are not just enabling consolidation but preferencing scale. This is because the availability of these facilities, with less pressure on high leverage levels, enables serial acquirers to offer higher prices for acquisitions and to close transactions faster. This, in turn, provides a competitive advantage over other more local acquirers or independent entrepreneurs.

In addition, it is possible that the high levels of debt and the corresponding cost of interest payments put greater pressure on serial acquirers to raise prices or cut costs, especially in a rising interest rate environment. Depending on the market in question, past a certain level of debt, acquirers can only hope to recover their investment through anticompetitive price increases or wage suppression. **As a result, it's important that ISED consider how debt in general, and specifically the use of acquisition facilities, magnifies the potential for anti-competitive abuses.[14]**

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[13] Jeremy Wilder, "Potential Competition in Platform Markets, Department of Justice, June 10, 2019, https://www.justice.gov/opa/speech/file/1176236/download

[14] https://www.economicliberties.us/our-work/the-roll-up-economy/

3e. Amend notification requirements

The Bureau has recommended changes to pre-merger notification rules, and we are in broad agreement with these recommendations. In particular, we agree that pre-merger notification loopholes should be closed, and that "notification should be required for the acquisition of more than 20% (for public companies), 35% (for private companies) or 50% of any class of voting shares if the other thresholds are met. This would address the definition of "voting share" in subsection 108(1) that leaves room for the acquisition of up to 100% of important share classes without notification. That definition should also include any share to which votes may attach in the ordinary course of business."

3e.1 Notification requirements for serial acquirers / creeping acquisitions

In addition, we recommend that a new notification threshold – by number of transactions – be instituted. This would help provide transparency for regulators into the most rapidly acquisitive firms, regardless of the acquiring firm's current size or the size of the acquired firms. **Therefore, we recommend that firms who make more than six acquisitions in one calendar year—which equates to roughly one acquisition every other month—within the same sector or labour market, and in cases where the acquisition grants the acquiring firm a controlling interest, are required to report these acquisitions to the Bureau on an annual basis.**

However, enforcers should determine the appropriate number based on further review of Canadian-specific market analysis.

3f. Include non-price effects in merger analysis

As the Bureau has also recommended, "standards for evaluating a substantial lessening or prevention of competition should be recalibrated to focus on harm to the competitive process." This more closely aligns with US enforcers, who have championed a "Competitive Process Test" for evaluating competitive harms. This would also emulate other similar proposals like the Effective Competition Standard.[15]

Under these provisions, many simultaneous goals of competition policy can be accommodated, such as:

- Preserving competitive markets
- Protecting individual consumers, producers, and workers
- Preserving opportunities for competitors
- Promoting fundamental autonomy and wellbeing
- Dispersing private power which promotes a healthy democracy[16]

This contrasts with an unnecessary narrowing of competition policy's scope on efficiencies or price, which has been overly restrictive and sometimes out of step with market realities like

[15] https://www.jstor.org/stable/26892422

[16] https://www.ftc.gov/media/70123

digital platforms offering "free" products to consumers while aggregating previously unseen levels of market power.

Price effects are still very important, as increasingly companies use market power to raise consumer prices and also to extract price concessions from labour or smaller suppliers. Bu tin addition to price effects, enforcers should focus on harms such as monopsony effects on labour, quality of products and services, new firm exit and entry rates, effects on innovation, and abuses of dominance like unfair or coercive contract terms with counterparties.

In addition, moving away from market-share analysis tools such as the Herfindahl-Hirschman Index (HHI) or others is important, especially in cases of creeping acquisitions. Often roll-up strategies concentrate regional or local markets, or similar labour pools. Creeping acquisitions present a threat to competition that is not effectively captured by the structural presumptions of concentration measures, like HHI. These measures do not incorporate an analysis of the explicit business strategy of companies, which is often an intentional effort to consolidate disaggregated industries and aggregate market power.

We recommend that the law be accommodative of non-price effect analysis in merger review (and also in unilateral conduct cases).

3g. Remove the efficiencies defence

Economic efficiency is unsuitable as a north star for competition policy interpretation and enforcement, and the efficiencies defence exemptions to Mergers (96.1) and Agreements or Arrangements that Prevent or Lessen Competition Substantially (90.4) should be immediately overturned and removed from the Act.

The Bureau has laid out an extensive case for its removal, and other groups[17] have also advocated for this change. The C.D. Howe's Competition Council agrees that the efficiencies defence should be revisited.[18] Previous Competition Commissioner John Pecman has stated, "the efficiencies defence is bad for business and bad for consumers. It is also out of line with the approach being taken by many of our country's major trading partners."[19]

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[17] "Competition Law for a Fair Economy: Submission of the Canadian Anti-Monopoly Project (CAMP) to the consultation on the future of competition policy in Canada" March 2023, https://www.antimonopoly.ca/competition-act-consultation-submission. And "Robin Shaban, Reforming the Competition Act: Suggested Changes to Enhance Competitiveness and Equity of the Canadian Economy, Vivic Research, April 29, 2021. https://vivicresearch.ca/assets/PDFS/INDU-Committee-Submission-April-29-2021.pdf "

[18] Distilled Wisdom: Council Members Agree on the Most-Needed Competition Reforms for the Next Government, Competition Policy council — CD Howe Institute, September 9, 2021, https://www.cdhowe.org/sites/default/files/attachments/communiques/mixed/Communique_2021_0909_CPC.pdf

[19] John Pecman, "Populism, Public Interest and Competition," speech to C.D. Howe Institute, April 27, 2018, https://www.canada.ca/en/competition-bureau/news/2018/05/john-pecman-commissioner-of-competition---populism-public-interest-and-competition.html

The efficiencies defence provisions, added to the Act in 1986, are no longer fit for purpose in today's market realities. "Efficiency gains" can sometimes come at the expense of employment, where jobs are made redundant following an acquisition. In particular, smaller companies, affected by roll-ups and addons, can expect 4.4% of jobs to disappear within the first two years of a leveraged buyout transaction.[20] And, moreover, efficiency gains that were supposed to lead to lower prices for consumers have often failed to materialise. John Kwoka, a US economist and antitrust expert, analysed over 3000 US mergers and found that in mergers that led to six or fewer significant competitors, prices rose in nearly 95% of cases. And on average, post-merger prices increased 4.3%.[21] While similar analysis has not been done in Canada, it is likely to be a shared cross-border trend.

Not only is it necessary to remove the efficiencies defence from the Act, but it is incumbent upon enforcers and the competition policy establishment to move beyond economic efficiency – as interpreted through price theory alone – as the highest aim of the law. It should be one of many factors considered. Canada's law and enforcement regime should instead focus on the abuse of dominance by incumbent players to preserve the ability for market participants to compete on the merits, on fair terms.

4. Competitor Collaborations

The issue of how to view competitor collaborations is increasingly important. A growing movement, dubbed 'green antitrust' seeks to allow competitor collaborations which restrict competition, in some cases even in instances of coordinated price movements, output restrictions, or otherwise typically *per se* illegal behaviour. The rationale is to make competition policy more accommodative to national and global green goals like net zero and staying below 1.5 C degrees of warming under the Paris Agreement.

While these are lofty goals, and competition policy does have real-world effects on the environment, competition authorities should treat calls for legal exemptions or safe harbors with some skepticism. The Bureau's updated Competitor Collaboration guidelines[22] helpfully clarified what kinds of collaborations are permissible under the law without any specific mention of sustainability-related carve-outs.

In our view, better ways of incorporating sustainability concerns into the administration of competition law are:

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[20] Eileen Appelbaum, "Lobbying Arm of Private Equity Industry Pays E&Y for Misleading Report on PE's Economic Contributions," Center for Economic and Policy Research, October 23, 2019, https://cepr.net/lobbying-arm-of-private-equity-industry-pays-e-y-for-misleading-report-on-pe-s-economic-contributions/.

[21] John Kwoka, "U.S. antitrust and competition policy amid the new merger wave," Washington Center for Equitable Growth, July 27, 2017, http://equitablegrowth.org/report/u-s-merger-policy-amid-the-new-merger-wave/.

[22] https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/publications/competitor-collaboration-guidelines

1) Including green considerations as part of innovation and product quality concerns during merger analysis;
2) Considering the role of "green killer acquisitions" which delay more sustainable products or services from reaching the market or becoming viable competitors against incumbents.
3) Enforcing against illegal restraints of trade or cartel behavior which may stifle the adoption of greener products.[23]
4) Ensuring key industries related to transition, including agriculture, energy provision, urban retrofitting, transportation, mining, and others operate on fair and competitive terms.

European competition authorities have moved swiftly in the last two years, to produce more accommodative policies. One of the most significant legislative changes was the Austrian Cartel Act, which was amended in 2021 to include a sustainability-related exemption to protect "cooperation for the purpose of an eco-sustainable or climate-neutral economy from the cartel prohibition." And recently the UK's Competition and Markets Authority, released some of the most aggressive draft guidelines for sustainability agreements of any jurisdiction.[24]

These include guidelines on collaborations which restrict competition but will be exempted from legal action if the sustainability benefits outweigh the anti-competitive harms.[25] The CMA has taken the most permissive approach to climate change-related agreements, specifically, and it has also shifted its posture to create an 'open door' policy so that firms can bring their proposed agreements forward and receive additional advice or guidance from the agency. In these instances, the agency will not issue fines for agreements that were discussed with them ahead of time, and which did not raise competition concerns.[26] In our view, this is too permissive and leaves enforcers hamstrung in instances of illegal conduct.

Some want the UK's guidance to go even further, by issuing block exemptions for sustainability agreements altogether,[27] or to provide similar exemptions for biodiversity agreements. And some have raised the possibility of amending the law to specifically mention sustainability agreements. Given that more than one-third (702) of the world's largest publicly traded

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[23] As was the case in the 2021 European Commission case against car manufacturers Daimler, BMW, and the Volkswagen group. The car manufacturers colluded on technical development in the area of nitrogen oxide cleaning by possessing the technology to reduce harmful emissions beyond what was legally required under European Union emission standards, but for over five years, colluded to avoid competition in this area.

[24] https://www.gov.uk/government/consultations/draft-guidance-on-environmental-sustainability-agreements

[25] https://impact.economist.com/sustainability/resilience-and-adaptation/can-we-protect-the-environment-and-keep-the-benefits-of-competition

[26] Similarly, in March 2022, the EU Commission issued draft guidelines on the assessment of horizontal cooperation agreements, including a chapter on sustainability which recognises that horizontal cooperation, particularly with respect to innovation, is essential for the green transition. The agency has asked specifically for feedback on: "When and how can sustainability benefits deriving from an agreement that restricts competition be measured and possibly outweigh the harm on competition deriving from the same agreement?" Their draft guidelines are set to come into effect on June 30, 2023. The EU has also issued a "soft safe harbor" for sustainability standards, encouraging companies to come to them for further clarification.

[27] https://www.mondaq.com/uk/antitrust-eu-competition-/1294740/cma-signals-more-flexibility-for-sustainability-agreements--back-to-the-future

companies now have net zero targets,[28] theoretically, sustainability-related agreements could encompass the entirety of a firm's business strategy.

While sustainability-related competitor collaborations are worthy of further debate and investigation, Canada's competition policy should more carefully consider the potential tension points and drawbacks of the European approach.

For example, one tension point arises where the use of the collective buyer power of dominant firms to exert sustainability pressure throughout the supply chain (such as using less toxic material inputs or reducing slave labor) could have real benefits to the environment and society. However, if this buyer power is used as a way to externalize sustainability costs onto smaller suppliers without adequately compensating them, it may be a way of squeezing the margins of suppliers to produce higher margins for dominant firms.

Increasingly, dominant firms act as gatekeepers between producers and consumers, charging high tolls. This can be especially true with digital 'platforms.' For example: the majority of Amazon's revenue now comes from fees it imposes on its 3rd party sellers, not from AWS or any other business line. And Amazon instituted a 5% "fuel and inflation" surcharge on suppliers during the pandemic and is unlikely to rescind it once macroeconomic conditions change.

Dominant retailers can also exert price pressure on suppliers, forcing wholesalers and manufacturers to give them preferential pricing that is lower than what smaller, independent retailers have to pay – even in instances where there are no cost savings in distribution or production from large volumes.

Dominant retailers can use their buyer power to give special treatment to other large suppliers in the way of loyalty discounts, rebates, bundled discounts, and exclusive dealing agreements. These kinds of contract terms can make it more difficult for smaller producers to gain a foothold.[29] Competition policy generally sees these as procompetitive, but if a dominant firm abuses their market position to the detriment of consumers and suppliers, they can be held liable.[30] Some have argued that small, atomistic sellers – including small businesses, farmers, ranchers, fishermen, professionals, and athletes – are more vulnerable to buyer power abuses than consumers.[31]

Buyer power can be a double-edged sword, as retailers – in theory – could exert demands on suppliers to engage in more sustainable processes, or only stock more sustainable products. Indeed, not only unilateral buyer power but group purchasing by competitor firms is one of the oft-cited examples of how companies want to contribute to more sustainable supply chains.

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[28] https://zerotracker.net/insights/pr-net-zero-stocktake-2022

[29] https://hbr.org/2022/02/how-an-old-u-s-antitrust-law-could-foster-a-fairer-retail-sector

[30] https://academic.oup.com/antitrust/article-abstract/4/2/345/2196287?login=false

[31] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1754748

Another example is price fixing. Firms are asking for exemptions for collusion on price, if agreements are in the interest of sustainability. They claim they are subject to first mover disadvantages when instituting new products or when investing in new technologies or processes that are more expensive, and when there is no consumer willingness to pay. While competition policy may need to evolve to allow for new discussions on how to pay for long-ignored market externalities, it must hold this in tension with the potential that firms may continue to try and externalize these costs onto the public or smaller market actors.

The first-mover disadvantage arguments also fail to take market power into consideration. It is possible in industries that are already highly concentrated, that dominant firms are unlikely to experience first mover disadvantages, as they already have a high degree of pricing power and can exercise close price coordination among rival firms (aka: price following or "conscious parallelism").

For these reasons, competitor collaborations exemptions – even for purported sustainability benefits – should be viewed with some skepticism. In a similar vein, some European academics have raised concerns about "cartel greenwashing"[32] and the head of the French competition authority has warned of "sustainability-driven market concentration."

For these reasons, we are in favor of:

- **Making collaborations that harm competition civilly reviewable even if not made between direct competitors.**
- **Introducing mandatory notification or a voluntary clearance process for certain potentially problematic types of agreement.**
- **Treating buy-side cartels the same as supply-side cartels under the Act.**
- **Removing the efficiencies defence for competitor collaborations from Section 90.1.**
- **Putting the burden of proof on companies to justify any purported sustainability gains from restrictions of competition and ensuring that claimed benefits do not become an evolution of the 'efficiencies defence.'**

5. Administration and Enforcement

5a. Market studies and the power to compel information

The Bureau should be granted formal market study powers and the ability to compel information from businesses under the revised law. This would allow the Bureau to investigate critical market shifts, such as historic, coordinated price rises in certain industries,[33] and to also understand changing market dynamics as Canada seeks to meet its Paris Agreement net zero targets.

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[32] Maarten P Shinkel https://www.promarket.org/2021/03/26/green-antitrust-why-would-restricting-competition-induce-sustainability-efforts/

[33] https://www.canada.ca/en/competition-bureau/news/2022/10/competition-bureau-to-study-competition-in-canadas-grocery-sector.html

For example, global agencies are using their market power studies to investigate new, critical industries for the energy transition. In the US, the FTC can use its capabilities under section 6(b) of the FTC Act to conduct studies on critical new markets related to the transition to ensure they operate on competitive terms. More than 200 rooftop solar companies and advocacy organizations requested that the FTC use their market study powers to investigate utilities companies which they claimed were stymying commercial and residential retrofitting attempts.

In the UK, Sarah Cardell, the Competition and Markets Authority's Chief Executive, said the following in a January 2023 speech referring to the EV charging industry: "How will this market develop? Strong competition and the right regulatory framework will be required, and that's why we conducted a market study into EV charging, which led to a set of recommendations on how governments can enable the market to work more effectively, now and in the future. That's not a diversion from the work of a competition authority. It's a core part of doing our job." The French competition authority has also recently opened market studies on EV charging infrastructure and land passenger travel.

The Bureau should be regularly conducting horizon-scanning exercises to anticipate anti-competitive concerns in critical industries related to energy transition and sustainability (deep sea mining for rare earth minerals, heat pumps, EV charging stations, and others). **The Bureau critically needs the ability to conduct formal market studies, to compel information, and to make their findings public by releasing reports when areas of interest to the preservation of competitive markets and to long-term Canadian interests are identified.**

6. Conclusion

There are many detailed recommendations being discussed in this consultation that we have not covered here, including the substantially important unilateral conduct and abuse of dominance revisions. We have added a few of our thoughts here to encourage the adoption of – what we view as – some of the critical elements of these legislative reforms. However, omission of additional elements does not signify that we view other areas as any less important.

Thank you for the opportunity to contribute to this consultation.

Denise Hearn
Senior Fellow, American Economic Liberties Project