HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

OTTAWA
09 August 2024

Case ID: 1586838

Mr. Matthew Boswell
Commissioner of Competition
Competition Bureau
Place du Portage I
50 Victoria Street, Room C-114
Gatineau, QC K1A 0C9

Dear Mr. Boswell:

We note with dismay your launch of a ‘public consultation’ on the amendments to the Competition Act, which were promulgated as part of Bill C-59 *Fall Economic Statement Implementation Act, 2023*.

The purpose of this letter is not to debate the misuse of ‘omnibus’ legislation by this government in advancing half-baked concepts that run up against the test of reality. Rather, it is to seek the guidelines of the input for your consultations, and to provide feedback regarding the gaps in the legislation, and the proper method of addressing these gaps in a democratic country with an accountable and responsible government.

To begin, we acknowledge and support your mandate to issue enforcement guidelines, bulletins, and policies to provide further clarification and interpretation of Canada’s laws and regulations designed to ensure a competitive marketplace. It is our view that for you to do this effectively requires well defined legislation from Parliament along with rigorous debate in the House to guide legislative intent as well as domestic and international jurisprudence to assist in defining your guidance. In the absence of well-defined legislation Parliamentary debate and jurisprudence the Competition Commissioner does not have the necessary tools to issue legitimate opinions. In fact, in doing so, the Commissioner moves beyond your mandate into the realm of legislator.

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In our opinion, it is not the purview of an appointed Commissioner to ascertain the intent of Parliament in pursuing legislation; indeed, future interpretations of legislative intent, undertaken by judiciary and administrative bodies, will look to the will of Parliament in passing legislation. The notion of passing off undefined concepts to a Commission is not a democratic process, and lacks the transparency that citizens of a democracy require. Those that are impacted by the changes in legislation, and the definitions included therein, are owed the process – through Parliament – of speaking to legislative amendments. Doing otherwise usurps Parliament's role.

BillC-59's provisions concerning "greenwashing" are not defined in this legislation. There was no Parliamentary debate on this concept contained in the Bill, leaving the intent of Parliament unknown. Canada's courts have not provided any judicial rulings to help define this concept as laid out in this poorly drafted section of the Bill. And there appears to be not internationally recognized legislative or treaty definition of such a concept.

You will note that business organizations representing the bulk of Canada's economy provided input to the amendments put forth with respect to the *Competition Act* in a joint letter to the Minister of Innovation, Science and Industry (copy attached). This input was provided before ad hoc amendments referring to non-existent concepts such as '*an internationally recognized methodology*' were added to this part of the omnibus bill, thus preventing businesses most impacted with no ability to express concerns or perspectives with this amendment. One of the clear assertions made is that the amendments to the Act would lessen competition – which should clearly not be the aim of the Commission.

We would be remiss in not stating that the Commission has no ability or part to play in defining such legally undefined and non-existent concepts. At this point, this is 'guesswork' on the part of the Commission. Canadians expect and deserve more in the development of the statutes that govern us. This puts the Commissioner in an untenable position of trying to determine the unexpressed intent of Parliament.

The process for bringing forth new legal arrangements and definitions as to our governance exists without your insertion. That process is clearly through the House of Commons Standing Committees, in this case, the Standing Committee on Finance. There is no more open and transparent forum for Canadians to witness the process of amending our statutes, or for those affected by these amendments to give input that will enlighten the process and the potential outcome of any legislative amendments – whether that be positive or negative, it will be transparent. As noted, those hearings are also where our judiciary and administrative bodies (even yours) would look to ascertain the intent of Parliament in bringing forth changes to legislation. You cannot short-circuit this process without future consequences.

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Your 'public consultation' begs clarity in many respects:

- You can access the input from affected organizations that were given short shrift through the omnibus legislative process. Will you address how these amendments to the prior legislation risk eroding competition in Canada?
- In your 'wide range of perspectives' that you seek, will you be giving consideration to the potentially self-serving input of organizations that will profit from the changes – at great cost to those impacted, and Canadian society, as a whole?
- How do you propose to provide definitional clarity to non-defined terms in the legislation? Indeed, is this even in your purview?
- Given the ever-changing landscape on the offshoring of emissions, the more fullsome analysis of scope inclusion in emissions, the various interpretations of each of these inputs in the analysis, and the degree of funded 'lawfare' that is rampantly opportunistic and completely parasitic on our societal outcomes, how do you propose to provide guidance on what may or may not be included in these equations? Business cannot proceed until they understand the currently undefined inputs.
- Given the disclosure standards moving forward through Financial Reporting & Assurance Standards Canada (FRAS) on Canadian Sustainability Disclosure Standards, how do you propose to reconcile the requirements being developed by this group, to be enforced on Canadian issuers, with the nebulous concepts that have been thrust upon your Commission by poorly-written and amended legislation that may impugn parties governed by FRAS, particularly with the trifecta of 'reverse onus' provisions, increased private right of access to the Competition Tribunal, and an undefined and non-existent 'internationally recognized methodology'?

This affects all Canadian business – from our resource producers, to agriculture, manufacturing, services, tourism – indeed, our Crown corporations and other government entities. The impact of this uncertainty is massive. This is not an extension of the successful and laudable actions your office has taken against clearly misleading environmental assertions – against Keurig and against Volkswagen – both of which were deliberate attempts to mislead the public.

In that regard, we think it would be prudent for you to seek guidance – not through your own semi-opaque process – but through the lens of a parliamentary committee. The vast and undefined changes to the legislation that you oversee as Commissioner is too impactful to be given a half-measure of input. Future decisions on how this new legislation will be applied require this transparency of purpose and potential outcomes. These hearings should be publicly available and open to all input. Canadians deserve no less.

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In conclusion, we strongly urge you to refer this matter back to Parliament. It is Parliamentarians who should define the law, not an appointed Commission. The democratic process demands that these undefined concepts and amendments be thoroughly examined and defined by our elected representatives, ensuring transparency and accountability. This is not a task for a Commission to undertake in isolation. We believe that the gravity of the situation and the potential impact on all sectors of Canadian business necessitate this course of action.

We trust that you will take our concerns into consideration and act in the best interests of all Canadians. Thank you for your attention to this matter.

Yours sincerely,

ORIGINAL SIGNED BY

Rick Perkins, M.P.
South Shore – St. Margarets
Shadow Minister for Innovation, Science and Industry

ORIGINAL SIGNED BY

Greg McLean, M.P.
Calgary Centre

Enclosure (1)

Canadian Chamber of Commerce | Chambre de Commerce du Canada

On February 12, 2024, together with a coalition of prominent Canadian business organizations — including the Business Council of Canada, Canadian Life and Health Insurance Association, Canadian Manufacturers & Exporters, Canadian Marketing Association, and Retail Council of Canada — we sent a joint letter to Minister Champagne expressing our concerns about recent changes to Canada's competition laws.

RE: Course correction needed on competition policy

Dear Minister Champagne,

We represent Canadian businesses that compete every day with each other and with companies around the world. Together, our members employ millions of Canadians from a wide range of sectors that contribute billions to Canada's economy. We believe in open and competitive markets that are underpinned by transparent and predictable rules. Unfortunately, your government's recent efforts to modernize Canada's competition laws jeopardize the foundation on which we operate.

Canada's business community recognizes the need to modernize our country's decades-old Competition Act to ensure it remains relevant in a rapidly evolving economy. Strong and robust competition laws are critical to providing consumers with competitive prices and product choices, ensuring that small and medium-sized businesses have an equitable opportunity to participate in the economy, and expanding opportunities for Canadian participation in world markets.

That's why we and more than 130 other stakeholders – including small and large businesses, labour organizations, and consumer groups – engaged in the formal process established by your government in late 2022 to comprehensively review the Act.

The result of that consultation process – a "What We Heard" report – was released in late 2023, concluding with these words: "Thanks to the broad and thoughtful participation in this public consultation, the government now feels it is appropriately equipped to develop well-calibrated proposals for Parliamentary consideration."

We were therefore surprised and disappointed that, just hours after releasing the consultation paper, your government opted not to develop "well-calibrated proposals for Parliamentary consideration" through a stand-alone competition bill.

Instead, without notice, consultation, or meaningful debate in Parliament, you chose to rush through several major changes to the Act via an omnibus bill – Bill C-56. Weeks later, you introduced an additional round of consequential changes to the Act through a second omnibus bill – Bill C-59 – also without notice and consultation.

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We are writing to express serious concerns with your decision to make important changes to the Act in such an unprecedented manner.

The Competition Act establishes one of Canada's most important regulatory regimes. As the legal framework providing the rules by which all businesses operate in the economy, any changes to the Act can have far-reaching consequences.

For example, Bill C-59 includes proposals to increase private rights of access to the Competition Tribunal, expand the scope of the civil competitor collaboration provisions to apply to past conduct, and allow the Tribunal to conclude that a merger is likely to prevent or lessen competition substantially, solely based on evidence of concentration or market share.

These proposed changes will have a major impact on the economy and must be thoroughly studied and debated by Parliament, along with their intended and unintended consequences. For instance, Parliament should ensure that an expanded right of private access is not used by businesses to hamstring their rivals with frivolous lawsuits rather than competing on merit. However, being an omnibus bill, such rigorous review is unlikely to occur.

By limiting notice, consultation and debate, the government's approach to reforming the Act introduces uncertainty and instability into competitive markets. It risks undermining competition between Canadian companies here at home, while also hampering foreign investment from abroad. Few companies, foreign or domestic, will seek to make significant investments in a country that changes its laws so arbitrarily and capriciously.

We urge the government to go back to the drawing board. The government should remove the proposed Competition Act changes in Bill C-59 and recommit to its promised stakeholder consultation process to ensure a modernized Act truly benefits all Canadians.

Business Council of Canada

Canadian Chamber of Commerce

Canadian Life and Health Insurance Association

Canadian Manufacturers & Exporters

Canadian Marketing Association

Retail Council of Canada