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June 8, 2023

Via Email: competition-consultation-concurrence@ised-isde.gc.ca

SUBJECT: Canada's Consultation on the Future of Competition Policy in Canada

Dear Sir/Madam:

On behalf of the American Bar Association Antitrust Law and International Law Sections, we respectfully submit these comments in response to Canada's Consultation on the Future of Competition Policy in Canada.

The views expressed herein are being presented on behalf of the Sections of Antitrust Law and International Law. They have not been reviewed or approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

If you have any questions after reviewing this report, we would be happy to provide further comments.

Sincerely,

COMMENTS OF THE AMERICAN BAR ASSOCIATION'S ANTITRUST LAW SECTION AND INTERNATIONAL LAW SECTION ON THE GOVERNMENT OF CANADA'S CONSULTATION ON THE FUTURE OF COMPETITION POLICY IN CANADA

May 25, 2023

The views expressed herein are presented on behalf of the Sections of Antitrust Law and International Law. They have not been reviewed or approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

The Antitrust Law Section and the International Law Section (the "Sections") of the American Bar Association (the "ABA") respectfully submit these comments in response to the consultation paper "The Future of Competition Policy in Canada" (the "Consultation Paper") published by the Government of Canada (the "Government") in November 2022.[1]

The Antitrust Law Section is the world's largest professional organization for antitrust and competition law, trade regulation, consumer protection and data privacy as well as related aspects of economics. Section members, numbering over 9,000, come from all over the world and include attorneys and non-lawyers from private law firms, in-house counsel, non-profit organizations, consulting firms, federal and state government agencies, as well as judges, professors and law students. The Antitrust Law Section provides a broad variety of programs and publications concerning all facets of antitrust and the other listed fields. Numerous members of the Antitrust Law Section have extensive experience and expertise regarding similar laws of non-U.S. jurisdictions. For nearly thirty years, the Antitrust Law Section has provided input to enforcement agencies around the world conducting consultations on topics within the section's scope of expertise.[2]

The International Law Section ("ILS") focuses on international legal issues, the promotion of the rule of law, and the provision of legal education, policy, publishing, and practical assistance related to cross-border activity. Its members total approximately more than 11,000, including private practitioners, in-house counsel, attorneys in governmental and inter-government entities, and legal academics, and represent over 100 countries. The ILS's over fifty substantive committees cover competition law, trade law, and data privacy and data security law worldwide as well as areas of law that often intersect with these areas, such as mergers and acquisitions and joint ventures. Throughout its century of existence, the ILS has provided input to debates relating to international legal policy.[3] With respect to competition law and policy specifically, the ILS has provided input for decades to authorities around the world.

I. Executive Summary

The Sections commend the Government for its initiative to engage in a comprehensive review of Canada's competition regime to assess what works and what could be improved under the *Competition*

[1] Consultation documents are available at https://ised-isde.canada.ca/site/strategic-policy-sector/en/marketplace-framework-policy/competition-policy/future-competition-policy-canada.

[2] Past comments of the Antitrust Law Section are available online at https://www.americanbar.org/groups/antitrust_law/resources/comments_reports_amicus_briefs. The Antitrust Law Section positions expressed in this submission have been adopted by a majority of the Section's Council after debate reflecting the diversity of viewpoints among the Section's members.

[3] *About Section Policy*, AM. BAR ASS'N, https://www.americanbar.org/groups/international_law/policy/about.

Act ("Act").[4] Given the breadth of the Consultation Paper, the Sections have focused their comments on discrete topics in three areas: (1) Merger Review; (2) Unilateral Conduct; and (3) the Administration and Enforcement of the Law:

Merger Review

- The Sections consider that it would be desirable for Canada's post-closing merger review limitation period (currently one year) for below-threshold mergers to remain consistent with the majority of global enforcement regimes that allow competition agencies to exercise jurisdiction over non-reportable mergers. Because longer post-closing limitation periods for below threshold mergers increase uncertainty, we encourage the government to consider whether the potential for more effective enforcement from a longer limitation period would outweigh the negative effects of such uncertainty.

- To the extent that the Government plans on reforming Canada's merger notification rules, the Sections respectfully suggest that the simplest means for Canada to conform with global merger best practices as outlined by the International Competition Network ("ICN") and the Organisation for Economic Co-operation and Development ("OECD") would be to rely on thresholds based on turnover in Canada (or assets in Canada, if this alternate measure is retained), and remove the consideration of export revenues generated from Canadian assets. Revised thresholds that are based on sales to Canadian customers (or assets in Canada), rather than sales from Canadian assets, would promote greater convergence between Canada and other competition regimes from around the world with respect to merger thresholds.

- The Sections respectfully submit that replacing the current transaction-size threshold with one based on sales into, in addition to sales in, Canada may suffice to enable the Bureau to investigate a broader range of potentially problematic transactions. If sector-specific thresholds are considered, the Sections encourage the Government to assess whether improved effectiveness of the merger control regime would outweigh the burdens resulting from such changes.

- The Sections consider that there are benefits to retaining the Act's "substantial prevention or lessening of competition" ("SPLC") merger review standard. This is a well-known, international standard with respect to which enforcers, practitioners, parties and judiciaries have decades of experience. There are risks to the public interest associated with a modification of this standard, including potential uncertainty that could chill innovation and investment. That said, the Sections acknowledge the debate in the U.S. and elsewhere about the appropriate substantive merger review standard. To the extent the Government chooses to revise the substantive standard, such as by adopting a balance of harms test, the Sections encourage the Government to provide as much certainty and predictability regarding the coverage and application of any new standard.

- The Sections support the analysis of the impact of a merger on buyer power in labor markets, taking into account labor mobility and alternative potential purchasers of the services supplied by merging parties' employees. The Sections agree that the institutional roles of federal and

[4] R.S.C. 1985, c. C-34, as amended.

provincial government departments, agencies and tribunals with specialized expertise and legal tools should be considered in determining how best to achieve appropriate worker protections.

Unilateral Conduct

- The Sections recognize that the types of unilateral conduct identified in the Consultation Paper, e.g., self-preferencing, can result in competitive harm, but also have the potential to be procompetitive. Ex-ante regimes that are specifically targeted at regulating digital players are in an early phase. To the extent the Government considers the introduction of blanket prohibitions, the Sections believe that they should be rooted in experience and harm to the competitive process.

- As the Government notes in its consultation, there is a patchwork of reviewable practices provisions under Part VIII of the Act, including refusals to deal under section 75, price maintenance under section 76, exclusive dealing under section 77 and abuse of dominance under section 79. The Consultation Paper further notes there have been suggestions for Canada to adopt "a singular, broadened unilateral conduct provision, more akin to the U.S. and Europe."[5] The Sections believe that a single, broadened unilateral conduct provision could simplify the assessment of most business practices' legality under Canadian competition law.

Administration and Enforcement of the Law

- Should the Government choose to provide the Bureau with powers to compel production of information without prior judicial review, including for market studies where there is no violation of the Act under investigation, the Sections suggest that parties should be afforded the ability to obtain expeditious and effective post-issuance review of such orders by a court or the Competition Tribunal.

- The Sections support the objective of the Bureau being able to provide greater certainty and clarity to the law without resorting to litigation. As further explained below, there may be ways to do so that do not necessarily involve granting the Bureau authority to act as a rule-maker or decision-maker at first instance, which is outside of its current institutional role. The Sections do not take a position on whether or not the Bureau should be granted authority to act as a rule-maker or decision-maker at first instance.

- There is little doubt that private and public antitrust enforcement are complementary tools for effective compliance with antitrust laws. Private litigation can complement public enforcement by strengthening deterrence, allowing for compensation to those affected by infringements, and by empowering plaintiffs to challenge anti-competitive behavior directly. However, the Sections understand that expansion of private damages litigation from criminal to civil violations would significantly alter the current civil enforcement landscape in Canada. The Sections also agree with the Bureau's observation that a broader civil enforcement system "would have to be designed to avoid unmeritorious or strategic litigation." To achieve this, the Sections suggest that the Canadian government carefully evaluate the legal framework and experience of countries that have attempted to design such a system.

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5 Consultation Paper at p. 38.

II. Comments on Merger Review

A. Extension of Post-Closing Limitation Period

The Consultation Paper seeks input on whether to extend the post-closing period during which non-notifiable mergers may be reviewed beyond the current time period of one year (with three years provided as a potential example), or by tying the post-closing limitation period to a voluntary notification process.[6] The Sections understand that the latter concept means that below-threshold mergers that are notified voluntarily would potentially be reviewable for up to one year post-closing, while below-threshold mergers that are not notified voluntarily would be reviewable for a longer period.

The Sections agree with the Government's recognition that many early-stage acquisitions can provide the initial incentive or capital investment needed to encourage new firms and ventures to innovate and to provide necessary funding for future innovative ventures and can allow for lower prices and for quicker scaled adoption by consumers of the target's innovative products and services.[7] Acquisitions of nascent competitors that fall below the merger notification thresholds can also raise competitive concerns in certain circumstances, e.g., when the relevant market is highly concentrated, the nascent competitor would likely become a significant competitive presence in the near term, and few (or no) other competitors or entrants are likely to become a significant competitive presence in the near term.

The Sections note that customers, competitors and other market participants currently have one year from the closing of the transaction in which to identify concerns raised by a non-notifiable transaction and during which the Bureau can commence a challenge to obtain a remedy. This one-year period seeks to strike a balance between public enforcement and private legal certainty interests.

Limitation periods for the review of below-threshold mergers provide certainty to merging parties (and other market participants). The ICN Recommended Practices for Merger Notification and Review[8] state that:

> [w]hen a jurisdiction maintains residual jurisdiction, it should take steps to address the desire of the parties to the transaction for certainty. Such steps may include restricting the competition authority's ability to exercise residual jurisdiction to a specified, limited period of time after the completion of a transaction and authorizing the parties to submit voluntary notifications to the competition authority.

In 2016, the OECD counted nine countries with residual jurisdiction, noting that "[a]s a rule, the period for review under an authority's residual jurisdiction is limited, usually to one year or less."[9] The U.S. is an outlier in this respect, with no formal limitation period for challenging mergers, although challenges

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6 Consultation Paper at p. 29.

7 Consultation Paper at p. 20.

8 INT'L COMPETITION NETWORK, ICN RECOMMENDED PRACTICES FOR MERGER NOTIFICATION AND REVIEW PROCEDURES (2018) at II.A.3, at p. 3, available at www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf ("ICN Recommended Practices").

9 OECD Competition Comm., *Local Nexus and Jurisdictional Thresholds in Merger Control – Background Paper by the Secretariat*, at ¶ 64, DAF/COMP/WP3(2016)4 (Mar. 10, 2016), available at www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2016)4&docLanguage=En.

of transactions significantly after they have closed are rare.[10]The EU Commission has recently issued guidance indicating that it would generally find it inappropriate to investigate if more than 6 months have elapsed after a transaction has closed.[11]

Given general international support for limited time periods for post-closing review, the Sections consider that Canada's current one-year limitation period is consistent with the majority of global enforcement regimes. If a longer limitation period (for example, two or three years) is adopted, the Sections suggest that the Government consider whether it should be reserved for non-notifiable transactions that are not voluntarily notified. The Sections agree that encouraging voluntary filings for transactions that do not reach mandatory filing thresholds allows parties to non-reportable mergers to obtain legal certainty, while bringing potentially problematic transactions to the attention of the enforcement agency.

B. Revisions to the Notification Thresholds

In addition to or as an alternative method for addressing acquisitions of nascent competitors that do not require notification, the Consultation Paper identifies the possibility of revising the pre-merger notification rules to "better capture mergers of interest." It notes that the formula for calculating notification thresholds has not been altered since 2009, with the "size of transaction" threshold being indexed to GDP growth, and the "size of parties" threshold being held constant. It also observes that the current thresholds can result in foreign mergers that affect a great deal of commerce in Canada not requiring notification, while a sale of a large Canadian company to a new entrant could require notification based on the size of the target alone.[12]

The Sections consider that the best practices set out in the ICN Recommended Practices and in the Recommendation of the OECD Council on Merger Review ("OECD Recommendation") provide a useful guidepost for the design of notification thresholds.[13] In particular, thresholds should be objectively based with a significant nexus to the reviewing jurisdiction. More specifically, thresholds based on revenues (or "turnover") of at least two parties to a transaction that reflect sales to customers in a country are common in merger notification regimes around the world.[14] Use of this type of threshold reduces uncertainty about notification obligations as well as compliance burdens for both parties and agencies. Moreover, adopting thresholds requiring that at least two merging parties have a certain turnover in Canada (or assets in Canada, if this alternate measure is retained) will reduce burdens on merging parties and Bureau resources by eliminating filings where there is no competitive overlap.

To the extent that the Government plans on reforming the merger notification rules, the Sections respectfully suggest that the simplest means for Canada to conform with global merger regimes would be to rely on thresholds based on turnover in Canada (or assets in Canada, if this alternate measure is

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10 The U.S. Federal Trade Commission's recent Meta case is an exception. See www.ftc.gov/legal-library/browse/cases-proceedings/191-0134-facebook-inc-ftc-v.

11 https://ec.europa.eu/competition/consultations/2021_merger_control/guidance_article_22_referrals.pdf.

12 Consultation Paper at p. 25.

13 OECD, Recommendation of the OECD Council on Merger Review (2005), available online at www.oecd.org/daf/competition/mergers/40537528.pdf ("OECD Recommendation").

14 As the Government likely is aware, the U.S. emphasizes the size of the transaction and, in some cases, the size of the persons involved in a transaction to determine reportability. Its Hart-Scott-Rodino ("HSR") filing regime also features a complex set of filing exemptions. The Sections' discussion of ICN and OECD recommendations should not be interpreted as criticism of the U.S. HSR system, which has developed over several decades and is applied by specialized agency staff and private practitioners, who process more than 2,000 filings each year and evaluate an even greater number of transactions for potential reportability.

retained). The consideration of export revenues generated from Canadian assets appears less relevant, given that Canadian customers are impacted by sales made in and into Canada. This suggested revision would promote greater convergence between Canada and other competition regimes from around the world with respect to merger thresholds.

It appears that the Government also may be considering the introduction of sector-specific merger thresholds that would apply solely to transactions involving the digital economy, or alternative thresholds that would apply to acquisitions of nascent competitors that do not have significant revenues.[15]

In developing merger notification thresholds, it is important for the thresholds to be sufficiently clear and predictable to ensure that businesses and their advisors as well as competition authorities can determine whether they are exceeded. International best practice promotes the use of clear and objective criteria to identify whether a merger requires notification.[16] Sector-specific thresholds can raise questions with respect to clarity, uncertainty, costs and disputes for transaction parties and the Bureau. If sector-specific thresholds are considered, the Sections encourage the Government to assess whether improved effectiveness of the merger control regime would outweigh the burdens resulting from such changes from the existing system.

The Sections respectfully suggest that replacing the current transaction-size threshold with one based on sales into, in addition to sales in, Canada may suffice to enable the Bureau to investigate a broader range of potentially problematic transactions with a nexus to Canada, noting that the Bureau also has jurisdiction to review any below-threshold transaction that may raise competition concerns. If the Government wants to introduce alternative thresholds based on transaction value, we recommend that the Government carefully evaluate the legal framework and experience of countries where such thresholds are in place either standing alone (U.S.) or in conjunction with other thresholds (e.g., Germany and Austria).

C. Revising the Anticompetitive Effects Test for Certain Acquisitions

The Consultation Paper discusses the current requirement that the Bureau show, on balance of probabilities, that harm to competition would likely be substantial and likely to happen within a discernable time frame, raising the question of whether this will be effective in protecting against competitively harmful acquisitions of innovative or disruptive firms. The two most significant potential reforms mentioned in the Consultation Paper are: (a) a "balance of harms approach" and/or a relaxed definition of likelihood, and (b) reversing the burden of proof in certain instances, in an effort to address anticompetitive mergers in their incipiency.[17]

The Sections understand that the "balance of harms" approach would weigh both the likelihood and magnitude of potential harm. The rationale for the balance of harms approach is similar to other proposals that would alter the "likelihood" requirement in some way. These types of proposals would allow the Bureau to challenge proposed transactions where it is not clear, at the time of review, that harm to competition is "likely" to occur.

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15 Consultation Paper at p. 21.

16 ICN Recommended Practices at II.D & E and OECD Recommendation at I.A.2.2.

17 Consultation Paper at pp. 21-23.

The Sections consider that there are benefits to retaining the Act's "substantial prevention or lessening of competition" merger review standard. This is a well-known international standard with respect to which enforcers, practitioners, parties and judiciaries have decades of experience.[18] The Sections consider that there are risks to the public interest associated with a modification of the existing standard, including that it may take many years to clarify how a new standard will be interpreted and applied. On the other hand, there may be offsetting benefits that favor a change. Regardless, the Government should carefully weigh the costs and benefits of changing this standard.

The Sections suggest that it would be prudent to study the potential costs and benefits before adopting any alternative standard. To the extent the Government chooses to revise the substantive standard, such as by adopting a balance of harms test, the Sections encourage the Government to provide as much certainty and predictability as possible regarding which transactions will be subject to that standard.

D. Merger Effects on Workers: Buyer Power

The Consultation Paper asks whether the standard for a merger remedy should be changed to better account for effects on labor markets. It points out that "labour [effects] could arise in the evaluation of competitive effects, namely as to whether mergers may result in distortions to the labour market, even if there are no harmful competitive effects downstream (*i.e.*, an exercise of monopsonistic power rather than monopolistic power)."[19]

In the U.S., the 2010 Horizontal Merger Guidelines, which are currently under review, state that "[t]o evaluate whether a merger is likely to enhance market power on the buying side of the market, the Agencies employ essentially the framework …for evaluating whether a merger is likely to enhance market power on the selling side of the market,"[20] In the U.S., the antitrust laws apply to mergers affecting upstream markets, including labor markets. While there have been relatively few cases addressing such issues, the decision of the U.S. District Court in the recent *Penguin Random House/Simon & Schuster* book publishing case is a recent illustration of how this approach is applied. The court focused on the harm to authors of anticipated top-selling books without analysis as to whether there would be harm to the customers buying those books.[21]

The Sections support an analysis that considers labor mobility and alternative potential purchasers of the services supplied by merging parties' employees.[22] The framework for analysis of a substantial lessening or prevention of competition may already provide the scope to address a merger's effect on upstream suppliers of services. An amendment to the *Merger Enforcement Guidelines'* treatment of buy-

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18 The Sections note that in the U.S. there is debate among policymakers and lawmakers about whether to change this standard.

19 Consultation Paper at p. 28.

20 DOJ and FTC, *Horizontal Merger Guidelines*, Aug. 19, 2010, available at www.justice.gov/atr/horizontal-merger-guidelines-08192010 at p. 32.

21 *United States v. Bertelsmann SE*, No. CV 21-2886-FYP, 2022 WL 16949715 (D.D.C. Nov. 15, 2022).

22 See also Comments of the American Bar Association Antitrust Law Section on the DOJ/FTC Merger Guidelines Request for Information (April 14, 2022) at p. 9, available at www.americanbar.org/content/dam/aba/publications/antitrust/comments-reports-briefs/2022/at-comments-on-dojftc-merger-guidelines.pdf.

side markets, to specifically identify "including labour," may be useful to address any uncertainty about whether the Bureau would apply this approach for the provision of labor services.

E. Merger Effects on Workers: Efficiencies

The Consultation Paper briefly raises the question of whether effects on labor should have a more prominent role in merger analysis beyond the existing legal frameworks for addressing competitive effects and efficiencies.[23]

The Sections agree with the indications in the Consultation Paper that this involves broad economic and social policy considerations. For example, as the Consultation Paper notes, from an economic perspective, "creative destruction," which allows resources, including workers, to be redeployed can be a factor in the growth of the economy.[24] The monopsony competitive effects issue discussed above is within the purview of competition law enforcers' existing legal frameworks and expertise. Other federal and provincial government departments, agencies and tribunals also have important roles and expertise related to labor issues.

III. Comments on Unilateral Conduct

A. Creating Bright Line Rules or Presumptions for Dominant Firms or Platforms for Certain Business Practices

The Consultation Paper states that the Government is considering "creating bright line rules or presumptions for dominant firms or platforms, with respect to behaviour or acquisitions…"[25] In particular, the Paper states "the requirement for the Commissioner to prove that the anti-competitive practice is resulting in, or likely to cause, a [SPLC] may be unduly strict," and that an alternative approach the Government intends to examine "would involve showing only that conduct is *capable* of having anti-competitive effects, or *has as its very object* an anti-competitive outcome, regardless of whether it is achieved."[26] The Consultation Paper further makes references to the current European Union ("EU") law that recognizes some circumstances where forms of exclusionary conduct are presumptively unlawful, and it references an "appreciable risk" of competitive harm in the U.S. Senate proposal aimed at dominant American firms.[27]

Existing ex-ante regimes that are specifically targeted at regulating digital players are in an early phase. In addition, while global competitors active in digital markets may replicate their business models globally, potential antitrust concerns raised by business practices may be different from one jurisdiction to another as a result of factors such as the existence of large local competitors, local barriers to entry, consumer preferences, etc.

To the extent the Government considers the introduction of blanket prohibitions, the Sections believe that they should be rooted in experience and harm to the competitive process. For example, those concerned with self-preferencing correctly recognize that this conduct can, in certain circumstances, be

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23 Consultation Paper at pp. 27-29.

24 See Marcel Boyer, *Comments on Competition Policy and Labour Markets*, CIRANO, July 26, 2022, at pp. 29-36.

25 Consultation Paper at p. 39.

26 Consultation Paper at pp. 36-37.

27 Consultation Paper at p. 37.

anticompetitive and reduce welfare.[28] However, legal authorities and economic scholars lack a consistent definition or shared understanding of what self-preferencing entails. In some cases where conduct is characterized as self-preferencing, it may not be anticompetitive or harm consumer welfare. For example, owners of platforms that sell products on their platforms alongside those of third parties (known as "dual-mode intermediation") may also create consumer benefits through increased product diversity, efficiency, and competition.[29]

While further research is needed, the available findings suggest that self-preferencing is not always harmful to competition and may be beneficial in certain circumstances. Accordingly, addressing self-preferencing solely based on its "ability to cause anticompetitive effects" risks curtailing beneficial competition and harming consumers. Thus, the Sections respectfully suggest that an analysis rooted in asking whether self-preferencing enhances or harms the competitive process is a useful path to pursuing the Consultation's objectives.

B. Repositioning or Integrating the Unilateral Conduct Provisions

The Sections appreciate this opportunity to provide input to the Government regarding whether the various unilateral conduct provisions in the Act should be condensed into a single, principles-based abuse of dominance or market power provision, or whether these provisions, outside of abuse of dominance, could be repositioned to advance different objectives of the Act, such as fairness in the marketplace.[30] Of course, at their core, these are issues of statutory design, and other jurisdictions, including notably the U.S. and the EU, have designed their competition laws pertaining to unilateral conduct differently from Canada.[31] As the Government notes in its consultation, there have been suggestions, however, that Canada likewise adopt "a singular, broadened unilateral conduct provision,

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[28] See, e.g., Jorge Padilla, Joe Perkins, & Salvatore Piccolo, *Self-Preferencing in Markets with Vertically-Integrated Gatekeeper Platforms*, (September 28, 2020), available at https://ssrn.com/abstract=3701250:

> Gatekeeper platforms may have an incentive to exploit the installed user base of consumers and foreclose competitors when demand growth is slow.

Aurelien Portuese, *"Please, Help Yourself": Toward a Taxonomy of Self-Preferencing*, Info. Tech. & Innovation Found., at 11-12 (2021), available at https://itif.org/sites/default/files/2021-self-preferencing-taxonomy.pdf (arguing that self- preferencing can be anticompetitive if the conduct is solely based on anticompetitive reasons); Jean Tirole, *Competition and the Industrial Challenge for the Digital Age*, IFS Deaton Rev., at 10 (2020), available at www.tse-fr.eu/sites/default/files/TSE/documents/doc/by/tirole/competition_and_the_industrial_challenge_april_3_2020.pdf:

> [T]here is a feeling that the new digital platforms have an unprecedented ability to a) favor their own brands when making a recommendation to consumers, and b) cheaply gather substantial information about third-party products and selectively create copycats for the most successful ones.

[29] Andrei Hagiu, Tat-How Teh & Julian Wright, *Should Platforms Be Allowed to Sell on Their Own Marketplaces?*, RAND J. Econ., at page 30 (forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3606055:

> Indeed, such dual mode intermediation has clear benefits when applied across different products, including: increasing the diversity of products, allowing each product to be provided by the more efficient seller (the platform or the third-parties), saving on search costs for consumers, ensuring more stable supply, internalizing cross-product spillovers in marketing and enabling the platform to have some loss-leaders.

[30] Consultation Paper at pp. 37-38.

[31] See 15 U.S.C. § 2 (hereinafter section 2); Treaty on the Functioning of the European Union art. 102 (hereinafter Article 102).

more akin to the U.S. and Europe."[32] Responding to this question, the Sections believe that a single, broadened unilateral conduct provision could simplify the assessment of most business practices' legality under Canadian competition law.

The Sections respectfully offer further observations, organized under the following considerations: notice to the business community and development of legal standards.

i. Notice to the Business Community

Competition laws pertaining to unilateral conduct face a fundamental challenge of being broad enough to address the full range of anticompetitive conduct and ensuring that businesses can discern the difference between robust competitive behavior and anticompetitive behavior when they make independent decisions and take independent actions in the marketplace. If unilateral conduct provisions fail to do that, then they risk chilling competition, thereby undercutting the very market forces that they have been enacted to protect. In two seminal opinions interpreting the Sherman Antitrust Act, the U.S. Supreme Court voiced this core concern, which, as explained below, resonates equally with unilateral conduct provisions in other jurisdictions.

In *Copperweld Corp. v. Independence Tube Corp.*, the U.S. Supreme Court, distinguishing concerted action from independent action, explained that section 2 of the Sherman Act proscribes unilateral conduct only when it "threatens actual monopolization":[33]

> It is not enough that a single firm appears to "restrain trade" unreasonably, for even a vigorous competitor may leave that impression. For instance, an efficient firm may capture unsatisfied customers from an inefficient rival, whose own ability to compete may suffer as a result. This is the rule of the marketplace and is precisely the sort of competition that promotes the consumer interests that the Sherman Act aims to foster. In part because it is sometimes difficult to distinguish robust competition from conduct with long-run anti-competitive effects, Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization. Judging unilateral conduct in this manner reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur.[34]

Nine years later, in *Spectrum Sports, Inc. v. McQuillan*, the Court repeated this core concern from *Copperweld* in a monopolization case, adding that "[t]he law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. It does so not out of solicitude for private concerns but out of concern for the public interest."[35]

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32 Consultation Paper at page 38 (citing C.D. Howe Institute Competition Policy Council, A New Competition Act for a New Federal Government 3–4 (Apr. 28, 2016)).

33 467 U.S. 752, 767 (1984). To be clear, *Copperweld* was a case brought under *section 1* of the Sherman Act, charging a parent corporation and its wholly owned subsidiary of conspiring to violate the antitrust laws. But the Court found it instructive, at the outset, to distinguish joint conduct from unilateral conduct, and to highlight that the antitrust laws treat the former more strictly than the latter because it "inherently is fraught with anticompetitive risk," in that "[i]t deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands." *Id.* at 768–69.

34 *Id.* at 767–68.

35 506 U.S. 447, 458 (1993); see also *id.* at 456.

The concerns articulated in *Copperweld* and *Spectrum Sports* apply generally to competition laws pertaining to unilateral conduct, not just the Sherman Act. Simply put, when it comes to scrutinizing the independent decisions and actions of a single firm, the line between aggressive competition and conduct that tends to destroy competition may be delicate to draw.[36] And how and where that line is drawn is vitally important because the law should not chill or diminish the competitive process that it is seeking to protect, nor should it fall short of capturing truly anticompetitive conduct.[37] Stated differently, the business community subject to the law should be able to understand what unilateral conduct is being prohibited, so that they can refrain from engaging in such conduct and at the same time vigorously pursue actions that may be unwelcome to rivals or partners but nonetheless constitute lawful competition on the merits.

From this perspective, it may be preferable, for most business practices, to consolidate the reviewable practices provisions under Part VIII of the Act into "a singular, broadened unilateral conduct provision" that is moored to a standard based on market power. The business community would then be able to assess the legality of their individual and independent business practices under a single unilateral conduct provision.[38] Similarly, they would be required to consult only a single body of case law from the Competition Tribunal and the courts, and would have the added benefit of the Bureau's enforcement guidelines on abuse of dominance for guidance.[39]

As the Sections note at the outset, this is, of course, a statutory design choice. In their present form, the reviewable practices provisions under Part VIII of the Act reflect a *different* design choice: because the reviewable practices are "in many (if not most) circumstances, pro-competitive or benign," and "the line establishing when this conduct becomes offensive to competition policy objectives is often difficult to define," the Government has chosen to impose only remedial orders for proven violations.[40] In other

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[36] The Competition Tribunal has recognized this challenge in its decisions. See, e.g., *Canada (Dir. of Investigation & Research) v. Tele-Direct (Publications) Inc.*, 1994 Comp. Trib. (CT-1994-003), at 263:

> Competition, even 'tough' competition, is not to be enjoined by the Tribunal but rather only anti-competitive conduct. Unfortunately, distinguishing between competition on the merits and anti-competitive conduct, as the Tribunal has noted in the past, is not an easy task. [citation omitted].

[37] In a 2008 *Antitrust Law Journal* article, Neil Campbell and William Rowley observed:

> When developing or reviewing dominance laws, and considering the nature of the remedy or penalty to be provided, agencies and legislators need to be acutely aware that the difference between improper or unreasonably exclusionary conduct and acceptable conduct (i.e., tough procompetitive behavior) is one of the most uncertain areas of the law in most jurisdictions. The greater the risk and penalty associated with an erroneous determination, the greater the likelihood that firms will pull their competitive punches, usually to the detriment of customers and economic welfare.

A. Neil Campbell & J. William Rowley, *The Internationalization of Unilateral Conduct Laws—Conflict, Comity, Cooperation and/or Convergence?*, 75 ANTITRUST L.J. 267, 350 (2008) ("*The Internationalization of Unilateral Conduct Laws*").

[38] Other commentators have made a similar observation: "A uniform threshold would arguably be easier for businesses to understand and comply with, and be more consistent with the efficiency objective and goal of enhanced welfare for businesses and consumers (whether obtained directly or indirectly) from competitive markets and the process of competition." George Addy et al., *Abuse of Dominance in Canada: Reflections on 25 Years of Section 79 Enforcement*, 25 CANADA COMPETITION L. REV. 276, 312 (2012) ("*Abuse of Dominance in Canada: Reflections on 25 Years*").

[39] Competition Bureau, Abuse of Dominance Enforcement Guidelines (2019).

[40] See NAT'L COMPETITION LAW SECTION, CANADIAN BAR ASS'N, COMMENTS ON THE COMPETITION BUREAU'S DISCUSSION PAPER: *OPTIONS FOR AMENDING THE COMPETITION ACT* 11 (Oct. 2003). In their comments, the National Competition Law Section of the Canadian Bar Association counseled against the introduction of administrative monetary penalties for violations of the reviewable practices provisions (other than abuse of dominance), noting that it would "represent a dramatic change in the approach of Parliament" to reviewable practices. *Id.* at 10–11. See also, *Abuse of Dominance in Canada: Reflections on 25 Years* at p. 302:

> Concerns to avoid chilling aggressive procompetitive conduct were at the heart of the requirement that reviewable conduct be permitted unless and until the conduct was found by

words, in lieu of trying to better delineate the circumstances under which unilateral conduct such as a refusal to deal or an exclusive dealing arrangement would constitute a violation, the Government chose to limit the severity of the consequences by focusing on remedial orders in an effort to avoid chilling legitimate competition on the merits. Whereas some suggest that this approach to the reviewable practices regime has worked adequately,[41] the Sections recognize that this reflects *one* design choice, and respectfully suggest that other considerations, including notice to the business community, can support alternative design choices, such as the single standard posed by the Government's consultation.

ii. Development of a Single Legal Standard to Promote a More Robust Competition Law Regime

As the Government notes in its consultation, the reviewable practices provisions under Part VIII are subject to a patchwork of differing standards regarding dominance or market power, and competitive effects.[42] Notably, refusals to deal under section 75 and price maintenance under section 76 are *not* limited by any dominance threshold, and both provisions require *only* a showing of an actual or likely "adverse effect on competition,"[43] which is less demanding than the "substantial lessening or prevention of competition" standard that governs abuse of dominance under section 79.[44] By contrast, exclusive dealing under section 77 and delivered pricing under section 81 apply to a firm that is a "major supplier of a product in a market" or is otherwise "widespread in a market,"[45] which differs from the dominance threshold under section 79, and requires that a firm "substantially or completely control, throughout Canada or any area thereof, a class or species of business."[46] Turning to competitive effects, exclusive dealing under section 77, similar to abuse of dominance, requires a showing of actual or likely "substantial lessening of competition,"[47] but delivered pricing under section 81 has no such requirement.[48]

The Sections provide this detail to highlight the different combinations of standards (dominance and competitive effects) that emerge from the current regime under Part VIII. For each reviewable practice, the applicable standards presumably require their own separate, common law development through decisions from the Competition Tribunal and the federal courts. Moreover, this enterprise may be further complicated because the Bureau has on occasion challenged a business practice under its own provision

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> an expert Tribunal to result in anti-competitive effects. Moreover, the limited range of injunctive relief initially provided for in Part VIII reflected an emphasis on curing competition concerns on a going forward basis rather than seeking redress for the past consequences of reviewable conduct.

41 The National Competition Law Section has expressed the view that "the current reviewable practices regime and its underlying rationale are sound." *Id.* at 11. As other commentators have noted, this approach "has the virtue of minimizing the chilling effects on legitimate conduct that inevitably result when legal uncertainty is combined with potentially large fines and/or bounties for private sheriffs." See *The Internationalization of Unilateral Conduct Laws* at p. 290.

42 Consultation Paper at p. 38.

43 Competition Act §§ 75(1)(e) & 76(1)(b).

44 *Cf.* Competition Act § 79(1)(c). See *B-Filer Inc. v. Bank of Nova Scotia*, 2006 Comp. Trib. 42 (CT-2005-006), at ¶ 211 ("From the plain meaning of the words used by Parliament, we find that 'adverse' is a lower threshold than 'substantial'."); *Abuse of Dominance in Canada: Reflections on 25 Years*, at page 306 & n.190 (noting that an "adverse effect on competition" is a lower threshold and citing decisions); NAT'L COMPETITION LAW SECTION, CANADIAN BAR ASS'N, SUBMISSION ON BILL C-23: *COMPETITION ACT* AMENDMENTS 11 (Mar. 2002) ("'Adverse effect on competition' creates a significantly lower threshold than a 'substantial prevention of lessening of competition.' How much lower is anybody's guess.").

45 Competition Act §§ 77(1)(e) & 81(1).

46 *Id.* § 79(1)(a).

47 *Id.* § 77(2).

48 The Sections note that delivered pricing under section 81 has never been enforced.

(e.g., exclusive dealing or tied selling under section 77) and as an abuse of dominance under section 79.[49]

In view of the differing standards—and combinations of standards—regarding dominance and competitive effects under the current reviewable practices regime, a second statutory design consideration is whether "a singular, broadened unilateral conduct provision" would promote a more focused and robust development of unilateral conduct standards and principles in Canada, spearheaded by the Competition Tribunal with its specialized expertise. The Sections respectfully suggest that reviewing and adjudging a firm's business decisions and actions under a single dominance/market power standard and the same SPLC standard could simplify the assessment of most business practices' legality under Canadian competition law.

The Sections understand that the most recent amendments to sections 78 and 79 of the Act have moved the law toward a unified unilateral conduct standard. Specifically, the new abuse of dominance provisions affirmatively define an "anti-competitive act" for purposes of section 79 as "any act intended to have a predatory, exclusionary or disciplinary negative effect on a competitor, or to have an adverse effect on competition."[50] This language thus clarifies that reviewable practices like refusals to deal and price maintenance that have, or are likely to have, "an adverse effect on competition" fall within the purview of section 79.[51] It likewise makes clear that reviewable practices like exclusive dealing and tied selling that have, or are likely to have, an "exclusionary effect" fall within the purview of section 79.[52]

The recent amendments also make clear that the Competition Tribunal, in assessing whether a challenged practice has had, is having, or is likely to have the effect of preventing or lessening competition substantially in a market, may consider (among other non-price factors) "any other factor that is relevant to competition in the market that is or would be affected by the practice."[53] Together with the above-mentioned amendment to section 78, this language signals, as the Government notes in its consultation, that abuse of dominance "includes intended harm directed both toward a competitor as well as toward competition itself."[54] "Both subjective intent and reasonably foreseeable consequences are relevant, and distinguish truly anti-competitive behaviour from justifiable business decisions that nevertheless may prejudice a competitor."[55]

As the Sections understand it, the most recent amendments thus modernize sections 78 and 79 by shifting the analytical focus away from harm to a competitor (which can just as readily result from legitimate business decisions taken in furtherance of aggressive competition) to actual or likely harm to competition in a relevant market. These changes to sections 78 and 79 further effectuate a "decoupling" of abuse of dominance from the other reviewable practices provisions in Part VIII, which were originally

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49 See *Canada (Comm'r of Competition) v. Canada Pipe Co.*, 2005 Comp. Trib. 3 (CT-2002-006); *Canada (Dir. of Investigation & Research) v. Tele-Direct (Publications) Inc.*, 1994 Comp. Trib. (CT-1994-003); *Canada (Dir. of Investigation & Research) v. NutraSweet Co.*, 1989 Comp. Trib. (CT-1989-002).

50 Competition Act § 78(1).

51 *Id.* §§ 75(1)(e) & 76(1)(b).

52 *Id.* § 77(2)(c).

53 *Id.* § 74(1). The Competition Tribunal may also consider the effect of the practice on barriers to entry in the market including network effects; the effect of the practice on price or non-price competition, including quality, choice or consumer privacy; and the nature and extent of change and innovation in a relevant market.

54 Consultation Paper at p. 17.

55 *Id.* at 33.

framed around disadvantage or prejudice to a specific person in a supply relationship with the respondent.[56]

IV. Comments on Administration and Enforcement of the Law

A. Expanding the Bureau's Powers

The Consultation Paper identifies certain limitations on the Bureau's ability to take action in an authoritative and timely fashion. In this regard, it contrasts the Bureau's existing enforcement powers to those of its international counterparts, such as the European Commission ("EC"), the U.S. Federal Trade Commission ("FTC") and the U.S. Department of Justice ("DOJ").

Differences in the institutional design of each agency and their role within their competition law system will impact the enforcement powers bestowed upon the agencies. The institutional design and role of the Bureau differ from those of the EC and the FTC, both of which act as investigator, prosecutor and decision-maker in the first instance. In contrast, the Bureau[57] is institutionally designed as a law enforcement agency operating within an adversarial judicial process, with similarities to the DOJ. The Bureau acts as the "competition police," investigating potential anticompetitive conduct. If the conduct is criminal (e.g., cartels), then the Bureau can make a recommendation to the Public Prosecution Service of Canada ("PPSC") that criminal charges be laid. A criminal trial would then be held before the courts, where the PPSC would act as prosecutor. In non-criminal matters (e.g., mergers, abuse of dominance), the Bureau can act as the prosecutor and challenge such conduct before the Competition Tribunal or the courts, similar to the DOJ. Importantly, in both criminal and non-criminal cases, the Bureau does not, itself, decide the outcome of the cases – this is left to the Competition Tribunal and courts.

Within this context, the Consultation Paper raises the prospect of giving the Bureau the powers to: (i) compel and collect information without the need for court authorization (akin to civil investigative demands ("CIDs") in the U.S.); (ii) make legally enforceable marketplace rules (akin to FTC rule-making authority); and (iii) act as a decision-maker, potentially including a first-instance ability to authorize or prevent forms of conduct (as the EC does).[58]

(i) Ability to Compel Production of Information

The Bureau's ability to discharge its enforcement mandate depends on its ability to investigate and to compel information where necessary. As such, in principle, enhancing the Bureau's ability to collect and compel information in the context of market studies may be useful. That said, the Sections understand that the Bureau already has extensive formal investigative powers to investigate violations of the Act, including through searches, subpoenas and compulsory testimony under oath, but that these all require prior judicial authorization.[59] As such, the Sections believe that any enhanced powers should be balanced against the rights of persons from whom information is compelled, given that complying with production orders often is a time-intensive and costly exercise, especially if required of third parties

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56 Credit is given to George Addy and his co-authors for the term "decoupling." See, *Abuse of Dominance in Canada: Reflections on 25 Years*, at p. 305 ("The potential de-coupling of section 79 from the original philosophy of reviewable practices in Part VIII appears to be part of a larger and more gradual fragmentation of the reviewable practices provisions since 2002.").

57 Consultation Paper at p. 13.

58 Consultation Paper at pp. 49-54.

59 Competition Act, §§11, 15, 16.

who are not under investigation or, in the context of market studies in particular, where there is no evidence of wrongdoing in the market.

The Sections submit that existing U.S. frameworks may provide helpful guidance on the types of safeguards that should be implemented to mitigate the risk of undue burden on the persons from whom information is compelled. In the U.S., both the FTC and DOJ can issue CIDs in support of an investigation, albeit subject to slightly different processes. The FTC requires authorization from the Commission before it can issue a CID.[60] A recipient of a CID can seek to quash or limit the CID by petitioning the FTC through an administrative process.[61] If a recipient refuses to comply with a CID, the FTC can petition a district court to enforce the CID and compel compliance.[62]

The DOJ may issue CIDs pursuant to the *Antitrust Civil Process Act* ("ACPA").[63] After the DOJ issues a CID, the recipient can petition a federal court to modify or set aside the CID. The recipient can challenge the CID on the grounds that it does not comply with the ACPA or that it violates a constitutional or legal right of the recipient.[64] Like the FTC, the DOJ can petition a district court to enforce the CID and compel compliance.[65]

Regarding general market studies, where there is no specific violation of a law under investigation, the FTC has the authority to use compulsory process for market studies through a 6(b) Order.[66] This authority enables the FTC to conduct wide-ranging studies that do not have a specific law enforcement purpose. The FTC can issue a resolution authorizing use of a 6(b) Order. Similar to a CID, the party receiving a 6(b) Order can petition the FTC to quash or limit the 6(b) Order, and the FTC can seek to enforce the 6(b) Order in federal court.

These safeguards are based on the proposition that enforcement agencies cannot have unsupervised powers in a rule of law system. Should the Government choose to expand the Bureau's powers to compel production of information without prior judicial or other review (e.g., Ministerial authorization to commence a market study), the Sections suggest that parties be afforded the ability to obtain expeditious and effective post-issuance review of the orders by a court or the Competition Tribunal.

(ii) Rule-Making Authority/Decision-Making Authority

The Sections support the objective of allowing the Bureau to be able to provide more certainty without resorting to litigation. There may be ways to do so that do not necessarily involve granting the Bureau authority to act as a rule-maker or decision-maker at first instance, which is outside of its current institutional role. The Sections do not take a position on whether or not the Bureau should be granted authority to act as a rule-maker or decision-maker at first instance.

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60 16 C.F.R. § 2.7(a).

61 16 C.F.R. § 2.10 (requiring that petitions to "limit or quash any compulsory process" be filed with the Secretary of the Commission).

62 16 C.F.R. §2.13(b)(1).

63 15 U.S.C. §§ 1311-1314.

64 15 U.S.C. § 1314(c) ("Such petition ... may be based upon any failure of such portions of the demand to comply with the provisions of this chapter, or upon any constitutional or other legal right or privilege of the petitioner.").

65 15 U.S.C. § 1314(a).

66 15 U.S.C. § 46(b).

We do note that the Act contains legislative authorization for the Bureau to pre-clear conduct (but no "public interest" override) under section 124.1. Under this provision, the Commissioner of Competition may, upon application by any person, issue legally binding opinions on the applicability of any provision of the Act to any proposed conduct or practice. The Sections understand that the Bureau's current practice with respect to providing advisory opinions is limited and could be expanded to provide meaningful guidance, akin to the DOJ's Business Review Letter process or the FTC's Competition Advisory Opinions.[67]

To date, we understand that the Bureau's ability to provide meaningful advisory opinions has been hampered by resource constraints and is characterized by a cautious approach. The only meaningful advisory opinions issued by the Bureau under section 124.1 in recent years have related to the multi-level marketing provisions of the Act and are required under certain provincial direct seller licensing legislation.[68] Additional resources for the Bureau to more effectively discharge this aspect of its mandate would be welcome.

B. Expanding the Scope of Private Enforcement

The Consultation Paper raises the prospect of expanding the ability for private parties to seek damages in the courts or before the Competition Tribunal, for conduct contravening the Act's civil provisions, such as abuse of dominance, exclusive dealing, and price maintenance.[69] This change would bring civil matters on par with criminal matters with respect to private parties. Allowing private plaintiffs to claim damages in court for civil violations would supplement government enforcement in resource intensive matters across a broader range of conduct and act as a further deterrent.

In the U.S., private enforcement has long been a hallmark of antitrust law.[70] In developing the U.S. antitrust laws, Congress intended private enforcement to play a distinct enforcement role. The FTC has noted that "[p]rivate participation in monitoring the behavior of actors subject to the law can provide more effective detection of violations when the private monitor is closer than a public inspector to the relevant information."[71] While federal enforcers generally are limited to injunctive relief for civil antitrust matters, private plaintiffs may also seek damages (which must be "trebled") and attorneys' fees.[72] Private damages are intended to serve both a deterrence function and to provide compensation

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67 For more information on the DOJ Business Review Letter process, see U.S. Department of Justice, Introduction to Antitrust Division Business Reviews (2011), available at www.justice.gov/sites/default/files/atr/legacy/2011/11/03/276833.pdf. For more information on the FTC Competition Advisory Opinions process, see U.S. Federal Trade Commission, Competition Advisory Opinions (Accessed March 20, 2023), available at www.ftc.gov/advice-guidance/competition-guidance/competition-advisory-opinions.

68 For more information on these advisory opinions, see Competition Bureau, Multi-Level Marketing Plans and Schemes of Pyramid Selling (2009), available at https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/publications/multi-level-marketing-plans-and-schemes-pyramid-selling.

69 Consultation Paper at pp. 51-53

70 For example, private enforcement has been a focus of significant areas in the technology sector in the U.S. outside of federal enforcement, including for example a series of litigation focused on mobile app stores. *Epic v. Apple*, 559 F. Supp. 3d 898 (N.D. Cal. 2021) (decision after trial of claims brought by app developer); *In re Google Play Store Antitrust Litigation*, No. 20-CV-05761-JD, 2022 WL 17252587 (N.D. Cal. Nov. 28, 2022) (certifying proposed class claims on behalf of certain Google Play Store users).

71 William Kovacic, Former Chairman, Fed. Trade Comm'n, Speech to the British Institution of International & Comparative Law's Third Annual Conference on International and Comparative Competition Law: The Transatlantic Antitrust Dialogue (May 15, 2003), available at www.ftc.gov/news-events/news/speeches/private-participation-enforcement-public-competition-laws.

72 15 U.S.C. § 15 ("[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States … and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.")

for private litigants. While public enforcers are constrained in their ability to pursue resource intensive cases under an effects-based analysis, the potential for significant damages can fund a broader range of private litigation. In addition, private plaintiffs may be in a better position to assert their rights through private damages where they are able to recover for past harm.[73]

At the same time, allowing for private rights of action creates the potential for inconsistency in enforcement and incentives for non-meritorious litigation. For example, the interests of private litigants, both competitors and class representatives, can diverge from those of the general public.[74] This is one of the reasons why agency enforcers, as the expert bodies tasked with upholding competition for their respective jurisdictions, are typically afforded greater discretion in identifying and redressing anticompetitive practices than private litigants.[75]

In the U.S., mechanisms that have developed (intentionally and unintentionally) to address these questions have included modifying the doctrine governing liability standards or devising special doctrinal tests to evaluate the validity of private claims.[76] For example, the U.S. Supreme Court has imposed certain pleading standards for civil cases in federal courts, requiring plaintiffs to include enough facts in their complaint to make it plausible (not merely possible or conceivable).[77] As another example, the "antitrust injury" doctrine requires that a plaintiff seeking damages under sections 4 and 16 of the Clayton Act demonstrate that its injury resulted from an anticompetitive aspect of the alleged antitrust violation.[78] Additionally, federal rules for certification of class actions impose certain requirements in order for a court to certify a class of plaintiffs.[79]

From the U.S. perspective, however, there is little doubt that private and public antitrust enforcement are complementary tools for effective compliance with antitrust laws. Private litigation can complement public enforcement by strengthening deterrence, allowing for compensation to those affected by infringements, and by empowering plaintiffs to challenge anti-competitive behavior directly.[80]

However, the Sections understand that any expansion of private damages litigation from criminal to civil violations would alter the current civil enforcement landscape in Canada. The Sections also note the Bureau's desire that a broader civil enforcement system "would have to be designed to avoid

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73 ORG. FOR ECON. COOP. AND DEV., *Summary of Discussion of the Roundtable on the Relationship Between Public and Private Antitrust Enforcement* (2015) , https://one.oecd.org/document/DAF/COMP/WP3/M(2015)1/ANN2/FINAL/en/pdf.

74 ABA Antitrust Law Section, *Differences and Alignment: Final Report of the Task Force on International Divergence of Dominance Standards* 31 (2019)

75 See, e.g., FED. TRADE COMM'N, *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act* (2022), www.ftc.gov/system/files/ftc_gov/pdf/p221202sec5enforcementpolicystatement_002.pdf.

76 *Kovacic Speech to the British Institution of International & Comparative Law* (citing Stephen Calkins, Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System, 74 Georgetown Law Journal 1065 (1986)).

77 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

78 Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334 (1990).

79 Fed. R. Civ. P. 23(a) (requiring numerosity, commonality, typicality, and adequacy of class representative and counsel); Fed. R. Civ. P. 23(b); see also William Cavanaugh et al., *Trends in Class Certification*, GLOBAL COMPETITION REV., Jul. 19, 2021, https://globalcompetitionreview.com/review/us-courts-annual-review/2021/article/trends-in-class-certification.

80 ORG. FOR ECON. COOP. AND DEV., *Executive Summary of the Roundtable on the Relationship Between Public and Private Antitrust Enforcement* (2015), available online at: https://one.oecd.org/document/DAF/COMP/WP3/M(2015)1/ANN3/FINAL/en/pdf.

unmeritorious or strategic litigation."[81] To achieve this, the Sections suggest that the Canadian government carefully evaluate the legal framework and experience of countries that have attempted to design such a system.

V. Conclusion

The Sections appreciate this opportunity to provide their views on the Consultation Paper and are available for any further consultation the government may deem appropriate.

[81] Consultation Paper at p. 53. See also Competition Bureau, The Future of Competition Policy in Canada (March 15, 2023), available online at: 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.