

TECHNATION^{CA}

TO:

Innovation, Science and Economic Development Canada
C.D. Howe Building
235 Queen Street,
Ottawa
ON K1A 0H5

March 30, 2023

**RE: SUBMISSION OF TECHNATION REGARDING CONSULTATION ON
THE FUTURE OF COMPETITION POLICY IN CANADA**

Thank you for the opportunity to participate and provide comments on the ISED consultation on the future of competition policy in Canada. At TECHNATION, we believe that competition underlies a productive, innovative, and resilient economy. Policies that support competition can boost Canada's economic growth by stimulating entry by new businesses, productivity, and innovation. We support strong competition laws and policies in Canada, which may lead to an improved competition legal landscape, facilitate more effective enforcement, align us with our international counterparts, and ensure that both businesses and consumers benefit from a competitive marketplace. Antitrust law can and should evolve, but what should not change is its focus on promoting what is best for customers. Above all else, Canada's Competition Act should focus on eliminating or mitigating harm to Canadian consumers. We would welcome a follow-up discussion with your officials to discuss this submission.

To this end, our primary concerns with proposals included in your discussion paper are where this focus has shifted. ISED's consultation paper references proposed and enacted reforms in the US, EU, UK, and Australia that introduce regulations targeting a handful of companies above a certain size and with varying business models. The review of Canada's competition law framework should be to address unique local market concerns before other considerations. Otherwise, the new regulatory framework will fail to achieve its overarching objectives and result in unintended consequences, including dampened innovation, higher consumer prices, and less digital sector investment.

TECHNATION urges ISED to exercise caution, and 1) observe whether the amendments to the Competition Act passed in the 2022 Budget achieve their legislative objective of strengthening competition law in Canada; and 2) see if laws enacted abroad deliver the intended benefits to businesses and consumers and outweigh the costs, including unintended consequences. Introducing untested ex-ante regulatory rules (similar to the EU's Digital Markets Act) in Canada will lead to great uncertainty for businesses and risk-reducing innovation and investment.

As always, we welcome further dialogue on these important issues.

TECHNATION^{CA}

COMMENTS ON SPECIFIC ISSUES

1. MERGER REVIEW

a. Thresholds & Notification - Limitation Period

It is not necessary to extend the one-year limitation period to challenge completed mergers, regardless of the type of transaction. This extension would lead to substantial uncertainty for business and deter pro-competitive combinations. In particular, we are concerned that extending the limitation period would create significant uncertainty for the merging parties, and their investors and employees. The Bureau's existing oversight powers are sufficient to require the Bureau to identify potentially problematic transactions in a timely manner. However, we support the proposal that the notification thresholds should be based on the parties' size. We believe that this will be necessary to accommodate the unique situation of medium-sized enterprises in the technology industry, which are often overwhelmed with compliance obligations and struggle to remain competitive. At TECHNATION, we have firsthand knowledge of the unique needs of these not-so-large companies from many interactions with MSMEs (Micro, Small, and Medium Enterprises) on Canada's Digital Marketplace, a digital platform we developed to connect and promote the government's digital services to Canadian innovation from small and micro businesses across the nation. Small and Medium Enterprises (SMEs) are the lifeblood of a dynamic and resilient economy. They create jobs, bring innovative products and ideas to the market, and put pressure on larger businesses to remain competitive. Pro-competitive policies support the ongoing participation of SMEs in the marketplace and promote dynamism and competitiveness in the Canadian economy.

At a time when inflation is on the rise and consumers value low-cost, high-quality, and innovative products, any potential limitations on mergers should be approached with caution, particularly in Canada and particularly if directed to digital players—where there is no evidence that there has been under-enforcement.

b. Interim Relief

We do not believe that there is a need to grant the Bureau greater injunctive powers to prevent the closing of "potentially problematic transactions". The term "potentially problematic transactions" is subjective, and basing the Bureau's exercise of its regulatory powers on such a nebulous term is bound to be problematic both for the Bureau and the parties involved. The supposed matter of insufficient time for the Commissioner to properly prepare a case that meets the standards established by the case law, which now clearly includes a balancing of efficiencies even at the stage of a preliminary injunction, can be mitigated by the Bureau improving its internal administrative systems for increased efficiency. We advocate caution around the proposal to provide the Bureau with more time to review a transaction and review the standards for interim relief, to avoid making the Bureau more powerful but less efficient, and to balance the various interests of stakeholders.

TECHNATION^{CA}

c. Efficiencies Defense

A review of the efficiencies defense should avoid becoming a snag in the wheel of efficiency. We do not share in the view that section 96 of the Competition Act (commonly known as the “efficiencies defense”) unduly prevents the Competition Tribunal from exercising its power and is used as a shield by companies engaging in anti-competitive transactions.

The efficiencies defense is often pointed to as an impediment to robust enforcement of competition laws in Canada, notwithstanding that its existence has not played nearly the role in Canadian competition law enforcement that has been suggested. Publicly available data supports the fact that the defense has made little difference between the approval or disapproval of specific mergers by the Bureau or by courts called upon to review the Bureau's enforcement decisions. There should be a data-driven approach to the question of whether the efficiencies defense is justifiable on policy grounds. We believe that public policy formulation should be anchored on evidence and justified as a proportionate response to real rather than imaginary problems. Market concentration and innovation are not mutually exclusive, and mergers between competitors often increase efficiency and innovation. Hence, we are of the view that merger reviews should carefully evaluate potential efficiencies rather than focusing only on potential anticompetitive effects.

d. Creating an ‘easier’ injunction standard

Injunctive relief is available to Canada’s Competition Bureau (CCB); the availability of even an interim injunction was recently confirmed by the Federal Court merger challenges. It is important to note that this well-defined injunction standard (with the lower bar for the balance of convenience in government action) has long been available to the CCB for merger cases when it can demonstrate the likelihood of a substantial anticompetitive effect. Any lowering of the current standards carries great risks and would allow the CCB to become an effectively unreviewable independent investigator, judge, and jury—which is contrary to applicable time-tested legal principles.

e. Unilateral Conduct

Market power is an essential consideration in antitrust scrutiny, which inquires whether a market participant or participants can manipulate the price or non-price factors (e.g., quality, choice, privacy) without losing customers. Competition law regimes have avoided imposing bright-line rules as to what constitutes a dominant position, as every market is defined by different, evolving dynamics that can constrain or enhance firms’ abilities to compete. Furthermore, the impact of behavior would differ across markets. The same behavior that may be considered indicative of market power in one market may merely be vigorous, consumer-benefiting competition in another. Bright-line rules without any linkage to actual effects or harm would fundamentally depart from competition policy as we know it. Linking “dominance” or “joint dominance” to specific behavior could lead to over-capture. The international standard of inquiry should remain whether the firm(s) in a particular market is/can engage in behavior that results in anticompetitive harm owing to their market influence.

TECHNATION strongly disagrees with the suggestion of introducing bright-line rules or presumptions for platforms. Canada's Competition Act is meant to be a law of general application for virtually all businesses in Canada. Introducing rules for only a small subset of so-called "dominant firms or platforms" increases those firms' costs and reduces their incentive to innovate. Targeting one company in a sector while protecting its rivals in the same sector weakens competition and harms consumers. Regulation should be proportionate and fair, and should not put certain companies at a disadvantage relative to their competitors.

2. COMPETITOR COLLABORATION

a. Digital Economy – Pricing Algorithms

In keeping with the focus on the digital economy, which is a central theme of this Consultation, a key concern is how to treat pricing algorithms. For example, how should the law deal with the potential for "algorithmic collusion", which the government explains as "the idea that automation could make it easier for firms to arrive at or sustain collusive outcomes with no or minimal human interaction."¹ Prosecuting algorithmic collusion criminally requires proof beyond a reasonable doubt that the parties intended to collude. What if the programmers merely sought to have prices set in a profit-maximizing way? While this particular algorithmic pricing topic has generated much attention in public discourse, TECHNATION believes the right approach is to include the pro-competitive benefits of pricing algorithms, especially when used by sellers to try to have the lowest price remains to be determined how best to approach it from a regulatory perspective.

Furthermore, TECHNATION believes rules related to artificial intelligence should be reserved for the government's proposed *Artificial Intelligence and Data Act (AIDA)*² as a more coherent regulatory approach.

b. Potentially anti-competitive joint ventures

Potentially anti-competitive joint ventures or competitor collaborations may be hard to detect, which could be solved by establishing either a voluntary notification process or a voluntary clearance process for such agreements, including drug patent settlements. TECHNATION believes that certainty is essential and this process must be expeditious. Also, the potential reintroduction of buy-side collusion into the criminal conspiracy provision or dealing with it using a per se civil approach can solve the problem. We urge that the inclusion of buy-side labour agreements such as no-poach and wage-fixing agreements that were only added earlier this year be revisited.

¹ Discussion Paper, *supra*, note 1, at 41.

² C-27, *Digital Charter Implementation Act*, 1st sess, 44th Parl, 2022, cl 39.

3. ADMINISTRATION AND ENFORCEMENT OF THE ACT

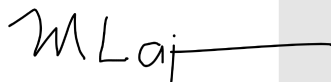
We do not share the view that creating a competitive marketplace in Canada requires the concentration of regulatory powers in the Bureau. The current legal framework already gives the Bureau the power to seek and obtain tremendous volumes of company data and documents in deciding whether to challenge a merger.³ Increasing the powers of the Bureau to act as a decision-maker, for example by authorizing simplified information-collection, or a first-instance ability to authorize or prevent forms of conduct will only lead to increased compliance obligations for businesses without commensurate value for the public. It will also leave affected parties with fewer options to challenge unfair outcomes.

However, we support the idea of increasing the Bureau's independence, which will impact its accountability model. Currently, the Bureau is housed within ISED, and the Commissioner must take direction from the ISED Minister in limited circumstances. Like similar agencies in peer countries, the Bureau should become truly independent and, like the Privacy Commissioner, reports directly to Parliament. Such an approach will, among other things, make it easier to frame the discussion on whether private parties should be allowed to seek compensation for damages suffered from civilly reviewable conduct (other than mergers).

TECHNATION recognizes the pressures on Bureau processes when enforcing the Competition Act, in terms not just of budget but also of evidence gathering and time. The time pressure in fast-changing digital markets is of particular note for TECHNATION. Given this, TECHNATION supports efforts by the government to increase the efficiency of enforcement not only as a means to achieve timely intervention, but to ensure the maximum possible certainty for businesses across both particular markets and the wider economy. In this context, evaluating the efficacy and sufficiency of internal processes and resourcing is important.

Nonetheless, it is crucial that the Act retain judicial oversight wherever practicable. TECHNATION does not support a change that effectively gives the Bureau a free hand to compel document disclosure and render decisions without judicial oversight; oversight which currently exists to ensure that intervention by the Bureau is sufficiently meritorious and beneficial for the economy. Similarly, while there are good examples internationally of a public policy role for competition authorities, it does not seem compatible with the Bureau's contention that bringing cases is too resource intensive to add a further function in the form of market studies that will redirect resources away from enforcement.

Thank you for the opportunity to submit this commentary.



Michele Lajeunesse
Senior Vice-President, Government Relations & Policy

³ Competition Act, R.S.C. 1985, c. C-34

TECHNATION^{CA}

About TECHNATION

As a national industry association, TECHNATION is the industry-government nexus for technology prosperity in Canada. As a member-driven, not-for-profit, TECHNATION unites Canada's technology sector, governments, and communities to enable technology prosperity in Canada. TECHNATION champions technology prosperity by providing advocacy, professional development and networking opportunities across industry and governments at all levels; connecting Canadian scale-ups with global tech leaders; engaging the global supply chain; and filling the technology talent pipeline.

TECHNATION has served as the authoritative national voice of the \$230 billion ICT industry for over 60 years. More than 44,000 Canadian ICT firms create and supply goods and services that contribute to a more productive, competitive, and innovative society. The ICT sector generates more than 671,100 jobs and invests \$8.0 billion annually in R&D, more than any other private sector performer. For more information: www.technationcanada.ca. TECHNATION was formerly the Information Technology Association of Canada (ITAC).

