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COMMENTS OF ITIF

Before the

Standing Senate Committee on National Finance

Ottawa, Ontario, Canada

In the Matter of:	)	
Fall Economic Statement Implementation Act Bill C-59	)	Public Comment

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COMPETITION AND INNOVATION IN CANADA: ENSURING A PRUDENT APPROACH

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INTRODUCTION

The Canadian economy is at a crossroads. Following decades of low business dynamism, many have asked whether a failure to adequately enforce Canada's Competition Act (the "Act") has resulted in increased market concentration. Most notably, Innovation Science and Economic Development Canada's *What We Heard Report* identified a "general sense [that] the Act must be revised, having failed to prevent concentration from forming in various industries, and resulted in lacklustre enforcement."[1] The Report concluded that "[p]roviding the Bureau a modern and relevant set of tools to carry out its mandate and establishing a sound framework for the promotion of dynamic markets is paramount to meet the concerns of Canadians."[2]

Bill C-59, the 2023 Fall Economic Statement Implement Act, was introduced late last year in the Canadian House of Commons and included a number of amendments to Canada's Competition Act.[3] Bill C-59 follows Bill C-56, An Act to amend the Excise Tax Act and the Competition Act, which itself made a number of important changes to Canadian competition law.[4] The Schumpeter Project on Competition Policy of the Information Technology and Innovation Foundation (ITIF) appreciates the opportunity to comment on Bill C-59, and specifically to present concerns with respect to promoting innovation in Canada.

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[1] "Future of Canada's Competition Policy Consultation – What We Heard Report." Innovation, Science and Economic Development Canada, September 20, 2023. https://ised-isde.canada.ca/site/strategic-policy-sector/en/marketplace-framework-policy/competition-policy/consultation-future-competition-policy-canada/future-canadas-competition-policy-consultation-what-we-heard-report.

[2] *Id.*

[3] Bill C-59, An Act to implement certain provisions of the fall economic statement tabled in Parliament on November 21, 2023 and certain provisions of the budget tabled in Parliament [hereinafter Bill C-59].

[4] Bill C-56, An Act to amend the Excise Tax Act and the Competition Act, 1st Sess. 44th Parl. 2023 (received Royal Assent on December 15, 2023) [hereinafter Bill C-56].

ITIF's comment proceeds in five parts. *First*, there is simply no evidence that Canada's economy is suffering from a concentration problem. Rather, it appears that there has been a decline in the large-scale firms that are often best positioned to drive innovation, productivity and Canada's global competitiveness. *Second*, C-56 risks harming, rather than promoting, innovation in the Canadian economy. *Third*, C-59 troublingly doubles down on C-56's problematic approach and empowers the Competition Tribunal to eschew any consideration of a merger's likely competitive effects in lieu of a myopic focus on market structure. *Fourth*, the move to situate Canadian competition policy firmly within the old European model is a recipe for stifling the innovation Canada needs to remain an economic leader into the 21st century. A brief conclusion follows.

DECLINING DYNAMISM IN CANADA

ITIF recognizes the concerns about reduced economic dynamism in Canada. As we explained in comments responsive to the government's consultation paper:

> As a 2019 report from Deloitte notes, "Competitiveness is critical for businesses, governments, and workers. However, Canada has a competitiveness challenge." In the World Bank's Ease of Doing Business index, Canada fell from the 4th place globally in 2006 to the 23rd in 2019.
>
> In addition, Canada's share of global GDP fell from 2.5 percent in 1978 to 1.9 in 2020, with its leading firms "no longer world-class." "Canada's vanishing corporate titans" is due to slower innovation from long-gone superstar firms. Innovation in Canada has faltered: homegrown innovation (i.e., innovation domestically generated as opposed to imported) grew by a cumulative 0.11 percent from 1970 to 2010—the lowest increase of any G7 nation.[5]

Contrary to popular belief, however, there is no evidence that increased concentration is the problem. As one of us has already made clear, "the fact that StatsCan has not measured concentration since 2009 makes it very difficult to know what the state of concentration is in Canada. Interestingly, that does not stop Canada's Competition Bureau from asserting that concentration has grown to problematic levels in Canada."[6] To be sure, many of the global calls concerning increased concentration are misinformed, including in the United States.[7] In fact, a careful analysis of the U.S. Census Bureau's industrial concentration data found virtually no

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[5] Aurelien Portuese, *The Future of Competition Policy in Canada: The Need to Right the Ship*, Comments to the Minister of Innovation, Science and Industry of Canada Regarding the Future of Competition Policy, ITIF 5–6 (Feb 27, 2023) [hereinafter ITIF Comment to Minister of Innovation, Science and Industry of Canada] (citations omitted).

[6] Robert D. Atkinson, *Big is Beautiful: Strengthening growth and competitiveness in the Canadian economy*, MACDONALD-LAURIER INSTITUTE PUBLICATION 16 (Nov. 2021).

[7] *See* Robert D. Atkinson & Joseph V. Coniglio, *Protecting Innovation: Evaluating the Merger Reform Consultation Paper*, Comments to the Australian Competition Review Taskforce Regarding Merger Reform ITIF 11 (Jan. 19, 2024) ("There is no firm basis supporting claims about increased concentration and market power in the United States, let alone 'international evidence' relevant to [antitrust] reform suggesting that such phenomena are caused by anticompetitive conduct in general or permissive merger enforcement in particular."); *see also* Robert D. Atkinson and Filipe Lage de

increase between 2002 and 2017 (the latest year of data) and an actual decline in concentration among the most concentrated industries.[8] Indeed, it is likely the same is true in Canada, but without evidence from StatsCan, policymakers are acting in the dark.

In addition, if lack of concentration is the problem, one would expect to see poor productivity performance of firms in non-traded sectors (e.g., grocery stores, telecom services, retail, banking, etc.). Traded sector firms (e.g., software, manufacturing, farming, etc.) by definition face more competition because they compete against firms in other nations and have stronger incentives to boost productivity and innovation. This is why when comparing the productivity growth of U.S. and Canadian firms in traded and non-traded sectors, one would expect to find that the relative performance of Canadian firms in non-traded sectors compared to U.S. firms to be worse relative to the United States because of the inherently higher levels of competition in the vastly larger U.S. economy. In fact, the opposite was true. From 2011 to 2022, non-traded sector productivity in the United States grew 28 percent, compared to 14 percent in Canada—double the rate.[9] But non-traded sector productivity in the United States grew 3.5 times faster than the same sectors in Canada. As such, it was the non-traded sectors that, relative to the United States, performed the best. This suggests that it is not a lack of competition in Canada that is the cause of Canada's poor productivity performance. It is much more likely to be the lack of firms with scale economies that can gain high productivity.

As such, in its prior comments to the Minister of Innovation, Science and Industry, ITIF explained that "Canadian competitiveness is impeded by insufficient consolidation, not excessive consolidation."[10] And, importantly, increases in concentration, corporate profits and market power are not necessarily the result of anticompetitive conduct, but efficiency-enhancing and pro-competitive behaviour that benefits consumers.[11] Moreover, as the economist Joseph Schumpeter made clear almost a century ago, the innovation and dynamic competition that drives long-run economic growth[12] is often spurred by scale, which incentivizes appropriability and risk-taking in the face of the uncertainty inherent in the innovation process.[13] That is,

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Sousa, No, Monopoly Has Not Grown, ITIF (June 7, 2021) (concluding that "the widely accepted narrative that monopolization is increasing to crisis levels is not supported by the facts"); C. Lanier Benkard, Ali Yurukoglu, and Anthony Lee Zhang, *Concentration in Product Markets*, NBER Working Paper Series No. 28745 (April 2021).

[8] Robert Kulick & Andrew Card, *Industrial Concentration in the United States: 2002-2017*, U.S. CHAMBER OF COMMERCE 13 (Mar. 2022).

[9] Bureau of Labor Statistics, Detailed Industry Productivity (Labor productivity (Index, 2012=100); accessed September 26, 2023) https://www.bls.gov/productivity/tables/; Statistics Canada (Labour productivity and related measures by business sector industry and by non-commercial activity consistent with the industry accounts; accessed January 5, 2024) https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3610048001.

[10] ITIF Comment to Minister of Innovation, Science and Industry of Canada at 17.

[11] *See, e.g.*, Harold Demsetz, *Industry Structure, Market Rivalry and Public Policy*, 16 J. L. & ECON. 1 (1973).

[12] *See* Robert M. Solow, *Technical Change and the Aggregate Production Function*, 39 REV. ECON. & STAT. 312 (1957); *see also* Charles I. Jones, *Sources of U.S. Economic Growth in a World of Ideas*, 92 AM. ECON. REV. 220 (2002).

[13] *See, e.g.*, JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 105 (1944) (explaining why "[t]he firm of the type that is compatible with perfect competition is in many cases inferior in internal, especially technological, efficiency").

concerns about concentration, to the extent it exists, often miss the bigger picture: even if market concentration or market power may seem problematic from a static perspective, it can facilitate innovation and dynamic efficiencies that ultimately yield productivity gains that far outweigh any short-run harms.

AMENDMENTS IN BILL C-56

The recently enacted Bill C-56 made several troubling changes from the standpoint of promoting innovation. First, the Bill makes "directly or indirectly imposing excessive and unfair selling prices" a violation of the Act.[14] Like concentration, however, concerns about excessive corporate profits[15] are also overstated in other jurisdictions. This includes the United States, where "as a share of GDP, overall corporate profits are now lower than they were in the 1960s."[16] Moreover, scholars have explained that this European-style prohibition of excessive pricing[17] raises serious legal and economic issues associated with chilling procompetitive behaviour or "false positives," as above-cost pricing is often necessary to recoup fixed costs and make investments in new technologies.[18] This is especially true in dynamic industries, where it is "obvious that the ability of competition authorities and courts (or indeed any economist) to distinguish between efficient (fair) and inefficient (unfair) prices in practice is very low."[19]

Second, Bill C-56 also revised the abuse of dominance test so that a finding of anticompetitive intent ("to engage in an anti-competitive act") can suffice to show anticompetitive conduct and the Competition Tribunal issuing a prohibition order.[20] In so doing, Bill C-56 further moves Canadian competition law toward a more European approach, where certain unilateral conduct can be unlawful "by object" without consideration of anticompetitive effects,[21] which is in contrast to the U.S. rule where likely anticompetitive effects must be demonstrated.[22] The problem is clear: the intent to compete on the merits at a competitor's

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[14] Bill C-56 at s. 7.1.

[15] *See, e.g.,* Simcha Barkai, *Declining Labor and Capital Shares*, 75 J. FINANCE 2421 (Oct. 2020).

[16] Joe Kennedy, *Monopoly Myths: Is Concentration Leading to Higher Profits?* ITIF (May 18, 2020).

[17] *See, e.g.*, Case 27/76 *United Brands v. Commission* [1978] ECR 207, [1978] 1 CMLR 429. The U.S. does not have a similar offense. *See, e.g.*, Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004) ("The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system.").

[18] *See, e.g.*, David S. Evans & A. Jorge Padilla, *Excessive Prices: Using Economics to Define Administrable Legal Rules*, 1 J. COMP. L. & ECON. 97 (2005).

[19] *Id.*

[20] Bill C-56 at s. 7.2.

[21] Case C—62/86, *AKZO Chemie BV v. Commission*, [1991], para. 71–72.

[22] *See, e.g.*, Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993) (requiring proof of recoupment for predatory pricing claims); *see also* U.S. v. Microsoft, 253 F.3d (D.C. Cir. 2001) (noting that "in considering whether the monopolist's conduct on balance harms competition and is therefore condemned as exclusionary [] our focus is upon the effect of that conduct, not upon the intent behind it").

expense is practically the same as the intent involved with harming competitors by anticompetitive means—what differs is that whereas consumers benefit from the former, they are harmed in the latter.

Third, Bill C-56 revokes Canada's efficiencies defence in merger review,[23] which as ITIF has explained may have been preferable to both the U.S. and European approaches by virtue of its total surplus analysis that is "the one most recommended by economists because it leads to maximization of growth."[24] Indeed, numerous studies have confirmed the prevalence of merger efficiencies, with one review of the literature concluding that while there is little robust evidence to be skeptical of efficiency claims, "there is evidence of mergers leading to efficiencies in a wide range of industries, including for both goods and services, and for both highly commoditized products and highly differentiated products."[25] The upshot is simple: without a robust efficiencies defence, deals with efficiency benefits that outweigh minor harms and overall enhance competition will be chilled.

CONCERNS WITH BILL C-59

If enacted into law, Bill C-59 will only make matters worse. Specifically, the Bill removes the caveat that the Competition Tribunal shall not condemn a merger based solely on evidence that the concentration or market share will be increased.[26] But concentration by itself is a poor predictor of market power or economic performance[27] not just because of efficiencies, but other market dynamics like entry that affect behaviour. Indeed, a recent study in the consumer-packaged goods industry that analyzed mergers with an average HHI of over 3,300 and an average delta-HHI of over 120 found that merging party prices still did not increase on average.[28] Additionally, the paper found that "not only do 28% of mergers lead both merging and non-merging parties to lower prices for consumers", but "22% of mergers cause merging parties to lower prices and non-merging parties to raise them"—facts that are highly supportive of an efficiency explanation.[29]

Second, increased economic scale can not only drive static cost savings but dynamic efficiency benefits. Specifically, numerous studies across many economies around the world continue to confirm that the

[23] Bill C-56 at s. 8.

[24] ITIF Comment to Minister of Innovation, Science and Industry of Canada at 10.

[25] Maureen K. Ohlhausen & Taylor M. Owings, *Evidence of Efficiencies in Consummated Mergers* at 1(2023).

[26] Bill C-59 at s. 250.

[27] *See, e.g.*, Jonathan B. Baker, *Merger Simulation in an Administrative Context*, 77 ANTITRUST L.J. 451, 456 (2011) ("[R]ules based on market shares and market concentration provide poor guidance for analyzing mergers…").

[28] Vivek Bhattacharya, Gastón Illanes, and David Stillerman, Merger Effects and Antitrust Enforcement: Evidence from US Consumer Packaged Goods, NBER Working Paper Series No. 31123 (Dec. 2023).

[29] *Id.* at 16-17.

relationship between concentration and innovation often takes the form of an inverted-U, [30] such that mergers in moderately or even highly concentrated markets can increase innovation. In other words, rather than reflect a lack of competition, mergers that increase concentration can stimulate the healthy process of dynamic and innovative competition described by Schumpeter decades ago. Indeed, studies have also found that the existence of higher markups in certain industries is best explained not by anticompetitive behaviour but by decreases in marginal costs flowing from technological progress.[31]

To be sure, market structure can play an important role in merger analysis. For example, under U.S. law, mergers that result in certain levels of market concentration or a high combined market share can under certain circumstances be treated as presumptively anticompetitive.[32] However, this presumption is rebuttable, allowing merging parties to present evidence both that market structure is not a good predictor of competitive effects, as well as offer efficiencies defences. As such, not only is Bill C-59 problematic on its own terms by equating market structure with competitive harm, but it becomes even more troubling when viewed in conjunction with Bill C-56 by virtue of creating a regime where transactions could be condemned by virtue of increased concentration alone—making structural factors wholly dispositive.

BROADER IMPLICATIONS

The implications of Bill C-56 and C-59 on Canadian competition law are profound. In effect, they reflect a "Europeanization" of its competition law regime and abandonment of the consumer welfare model that defines the American approach. As one of us has explained, the structuralist and exploitative model of the old European tradition is "fundamentally inapposite to the dynamic processes that characterize business conduct in the new Economy," and in particular "dynamic Schumpeterian competition [which] recognizes market power as an *inherent* part of the competitive process."[33] Indeed, for decades the EU has moved toward—rather than away from—an economic approach that focuses on competitive effects.[34]

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[30] *See, e.g.*, Philippe Aghion at al., *Competition and Innovation: An Inverted-U Relationship*, 120 Q. J. ECON. 701 (2005); Michael R. Peneder & Martin Woerter, *Competition, R&D and Innovation: Testing the Inverted-U in a Simultaneous System*, 24 J. OF EVOLUTIONARY ECON. 653 (2014) (Switzerland); Michiyuki Yagi & Shunsuke Managi, *Competition and Innovation: An inverted-U relationship using Japanese industry data*, Discussion Papers 13062, Research Institute of Economy, Trade and Industry (RIETI) (2013) (Japan); Michael Polder & Erik Veldhuizen, *Innovation and Competition in the Netherlands: Testing the Inverted-U for Industries and Firms*, 12 J. OF IND. COMPETITION AND TRADE 67 (2012) (Netherlands); Chiara Peroni & Ivete Gomes Ferreira, *Market competition and innovation in Luxembourg*, 12 J. OF IND. COMPETITION AND TRADE 93 (2012) (Luxembourg).

[31] See, e.g., Hendrik Döpper et al., Rising Markups and the Role of Consumer Preferences, Harvard Business School Working Paper 22-025 (2022).

[32] *See, e.g.*, United States v. Philadelphia National Bank et al., 374 U.S. 321 (1963).

[33] Joseph V. Coniglio, *Rejecting the Ordoliberal Standard of Consumer Choice and Making Consumer Welfare The Hallmark of an Antitrust Atlanticism*, CPI ANTITRUST CHRON. (Aug. 2017).

[34] *See, e.g.*, Case C-413/14 P – Intel Corporation Inc. v European Commission [2017].

There is a reason for this: whereas the American shift away from a structure-focused antitrust regime in the 1950s and 1960s toward the consumer welfare model helped enable an unprecedented technological revolution that gave rise to the technology titans that are now the envy of the world, the old European approach saw stagnation and the failure to develop any large scale technological players—a fact demonstrated by the EU's Digital Markets Act, which designates no European firms as tech "gatekeepers." And the reason is straightforward: structure-based competition rules strangle the scale needed to engage in the Schumpeterian competition the drives disruption, as well as the incremental innovations by large incumbents that contribute to much of overall dynamic welfare gains.[35]

Indeed, the movement away from the American model of consumer welfare and innovation is even more concerning given the current geopolitical environment. Specifically, in the context of a global rivalry between the U.S. and China, a broader Anglosphere united around policies that drive innovation and growth is critical to ensure continued prosperity and technological progress in the 21st century.[36] Unfortunately, rather than reflect a commitment by Canada to be an innovation leader in the 21st century, as we have seen, Bills C-56 and C-59 take exactly the opposite approach.

RECOMMENDATIONS

ITIF respectfully offers the following recommendations to this standing committee:

- **Rethink the "big is bad" narrative:** Not only is there little evidence to suggest that concentration has increased either in Canada or the United States, but increased business dynamism can be spurred by the increased scale needed to support the Schumpeterian and innovation competition that drives long-run economic growth.
- **Reconsider Bill C-56:** While already enacted into law, Bill C-56's excessive pricing offence, shift toward intent evidence for abuse of dominance cases, and removal of the efficiencies defence in merger enforcement are each highly problematic from the standpoint of promoting innovation. They warrant reconsideration and ultimately repeal.
- **Amend Bill C-59:** At the very least, Canada should not proceed further with the amendment in Bill C-59 which will empower the Competition Tribunal to condemn mergers based on market structure alone—regardless of contrary economic evidence or efficiency justifications—and which in so doing ratifies the failed old European approach to competition policy.

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[35] See, e.g., Daniel Garcia-Macia, Chang-Tai Hsieh, Peter J. Klenow, *How Destructive Is Innovation?* 87 ECONOMETRICA 1507 (Sept. 2019) (finding that most growth comes from incumbents and incremental innovations).

[36] *Cf.* Robert D. Atkinson, Joseph V. Coniglio & Lilla Nóra Kiss, *Promoting Innovation in the Anglosphere: Why the DMCC is the Wrong Path Forward*, Comments to the UK Parliament Regarding the Digital Markets, Competition and Consumers Bill ITIF 8–9 (Jan. 22, 2024).

CONCLUSION

ITIF agrees that the Canadian government must "ensure that policy, legislative and regulatory approaches support competition and innovation as much as possible."[37] Unfortunately, Bills C-56 and C-59 promise to do exactly the opposite. While treating market structure as sufficient to condemn a merger is problematic in itself, in conjunction with Bill C-56's elimination of the efficiencies defence, Bill C-59 effectively transforms Canadian competition law into the failed "big is bad" regime that both the United States and even Europe have moved away from. Canada already has such a deficit in large firms and a surfeit of small, less productive firms, that this change will just reinforce this problematic structural feature of the Canadian economy. In sum, Bills C-56 and C-59 will stifle the innovation and productivity gains that are critically needed to reinvigorate the Canadian economy and make it an innovation leader in the 21st century.

Thank you for your consideration.

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[37] "Future of Canada's Competition Policy Consultation – What We Heard Report." Innovation, Science and Economic Development Canada, September 20, 2023. https://ised-isde.canada.ca/site/strategic-policy-sector/en/marketplace-framework-policy/competition-policy/consultation-future-competition-policy-canada/future-canadas-competition-policy-consultation-what-we-heard-report.

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