

Comments of ITIF

Before the

Competition Bureau of Canada

Ottawa, ON

In the Matter of the:	)
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Proposed Merger Enforcement Guidelines	)
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February 11, 2026

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1. INTRODUCTION AND SUMMARY

On November 13, 2025, the Competition Bureau Canada (the Bureau) issued Proposed Merger Enforcement Guidelines (Proposed Guidelines).[1] The Proposed Guidelines follow significant changes to the Competition Act (the Act) between 2022 and 2024. As the Proposed Guidelines explain, the purpose of the Proposed Guidelines is "to provide general direction on our analytical approach in merger investigations."[2]

Canada faces a structural competitiveness challenge that makes the interpretation of these Proposed Guidelines particularly consequential. Despite being the world's 9th largest economy, Canada ranks only 17th in productivity among OECD nations.[3] This productivity gap matters for competition policy because overenforcement can deter the very activities Canada needs to close it: building firms to efficient scale, vertical integration that drives innovation, aggressive price competition, strategic acquisitions that allow startups to reach global markets, and foreign direct investment that brings capital and expertise.

Other jurisdictions offer cautionary lessons. As the Information Technology and Innovation Foundation (ITIF) has explained, the European Union's approach to competition policy, with its focus on protecting decentralized market structures rather than consumer welfare, has contributed to a widening productivity gap with countries such as the United States in technology-driven sectors.[4] Canada should learn from that experience, not repeat it. At the same time, Canada's small domestic market and openness to trade mean that firms must achieve scale and integrate globally to compete. Competition policies that specifically penalize these strategies will leave Canadian firms trapped at subscale, unable to challenge larger rivals.

ITIF's Schumpeter Project on Competition Policy appreciates the opportunity to comment on the Proposed Guidelines. ITIF commends the Bureau for its effort to put forward guidelines that further sound and administrable merger enforcement as well as provide businesses with greater certainty about what mergers will be found unlawful under the Act. At the same time, ITIF believes that there are several areas where the Proposed Guidelines could be improved to achieve these ends given both the widespread nature of merger activity and its central importance to creating the scale that helps drive competition and innovation.

The structure of this comment mirrors the structure of the Proposed Guidelines: *first*, a discussion of standards for determining which transactions constitute reviewable mergers; *second*, an overview of the general ways in which mergers can harm competition; and *third*, an analysis of the proper standards for assessing anticompetitive effects, including with respect to structural thresholds, partial acquisitions, theories of anticompetitive harm, entry, the failing firm defense, and consideration of a merger's procompetitive benefits. Recommendations and a brief conclusion follow.

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[1] Competition Bureau, Proposed Merger Enforcement Guidelines (Nov. 13, 2025), https://competition-bureau.canada.ca/en/how-we-foster-competition/consultations/proposed-merger-enforcement-guidelines [hereinafter Proposed Guidelines].

[2] *Id.* at Preface.

[3] OECD, GDP per hour worked, https://www.oecd.org/en/data/indicators/gdp-per-hour-worked.html.

[4] Joseph V. Coniglio and Lilla Nóra Kiss, *The Draghi Report: Right Problem, Half-Right Solutions for Competition Policy*, ITIF (Oct. 2, 2024), https://itif.org/publications/2024/10/02/draghi-report-right-problem-half-right-solutions-competition-policy/.

2. WHAT IS A REVIEWABLE MERGER?

ITIF does not at this time provide any substantive feedback on the Proposed Guidelines' discussion of what constitutes a reviewable merger and notes that, to its knowledge, none of the recent changes to the Act modified the Bureau's standards in this area.

3. WHEN DOES A MERGER HARM COMPETITION?

ITIF does not object to the Proposed Guidelines' statement that "[a] merger substantially harms competition only when it is likely to create, maintain or enhance an ability to exercise market power."[5] ITIF further agrees with the Proposed Guidelines that market power should be assessed "with respect to every dimension of competition that matters to market participants," and in particular innovation—the greatest driver of long-run economic growth.[6]

3.1 Types of Market Power

ITIF concurs with the Proposed Guidelines that unilateral and coordinated effects are the two mechanisms through which market power may be exercised, whether directly in a horizontal merger or indirectly through exclusion in a vertical merger. However, the Proposed Guidelines appear to treat mergers that create seller market power as of equal concern with those mergers that create buyer power, despite the lack of symmetry between the two when it comes to assessing competitive harm: Whereas mergers that create market power pose a risk of harm to consumers, mergers that do not result in monopsony power or risk creating a buyer cartel through coordinated effects may create downward pricing pressure through countervailing power—benefiting consumers. Indeed, while the Proposed Guidelines state that an increase in bargaining leverage may not be treated as a procompetitive benefit, they do rightly confirm that this is relevant to assessing harm to competition.[7] As such, the Proposed Guidelines should make clear that seller market power and buyer market power are not symmetric when it comes to the risk of competitive harm, particularly as it pertains to a merger that may increase buyer power through unilateral effects but does not rise to the level of a monopsony.

3.2 Substantial Lessening or Prevention of Competition

ITIF appreciates the Proposed Guidelines' elaboration upon the distinction between a "merger that lessens competition [which] lowers the existing level of competition in the market" and a "merger that prevents competition hinders the development of future competition."[8] ITIF also agrees with the causation standard put forward in the Proposed Guidelines, whereby the Bureau will "compare the level of competition after the merger to the level that would exist had the merger had not been proposed," which inherently "involves considering the conditions that would have likely existed but for, or without, the merger."[9]

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[5] Proposed Guidelines ¶ 32.

[6] *Id.* ¶ 35.

[7] *Id.* ¶ 287. n.129.

[8] *Id.* ¶ 44.

[9] *Id.* ¶ 45.

However, of the multiple examples provided by the Proposed Guidelines of mergers that may substantially prevent competition, the list suggests the Bureau's approach is both over- and underinclusive. With respect to the former, the Proposed Guidelines include as a potentially anticompetitive "an acquisition by the market leader that pre-empts a likely acquisition of the same target by another firm," which implicitly changes the causation standard by treating as the but-for world not the *status quo* absent any merger, but instead a merger with another firm—a hypothetical scenario whose outcome and effect on competition should not constitute the but-for world.[10]

Conversely, the list is underinclusive by failing to include any express example of a merger that may lessen perceived potential competition—the acquisition of a firm that is perceived as a potential competitor—as opposed to those which may lessen actual potential competition—the acquisition of a firm that is a likely entrant, even if not perceived as such. Indeed, the Proposed Guidelines should explain that perceived potential competition theories are in general easier to prove than actual potential competition theories because they involve a present anticompetitive effect, whereas actual potential competition theories, which are included in the Proposed Guidelines' examples, rely on a more speculative loss of future competition.

ITIF commends the Bureau for making clear that it will "consider the effect of a merger on both static and dynamic competition" and that it takes "special care to protect dynamic competition, since it is critical to improving the lives of Canadians over time."[11] But here as well, the Proposed Guidelines should make clear that added difficulties exist in demonstrating that a merger harms dynamic competition—for example, in an R&D market—relative to static competition in existing product markets. In particular, structural evidence should not be given weight in the former case in view of both the generally uncertain nature of the relationship between market structure and innovation, as well as the substantial evidence suggesting that increased concentration may actually spur innovation in many instances.

In view of the importance of dynamic effects, ITIF does not object to the Proposed Guidelines' view that the Bureau will not require quantitative evidence of harm in the form of a "numerical threshold for a material effect."[12] Indeed, quantitatively measuring static and dynamic welfare and tradeoffs can be exceedingly difficult, making qualitative evidence like business documents and industry testimony essential for merger analysis.[13] However, this does not justify the Proposed Guidelines' additional statement that the Bureau may condemn mergers "even when the specific effects of a future competitive disruption cannot yet be measured, or some market participants benefit in the short term."[14] In assessing a merger's effects, the Bureau should always focus on short-term welfare effects, whether dynamic or static in nature, and not condemn a merger on the grounds that speculative long-run harms may outweigh concrete short-run procompetitive benefits.

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[10] *Id.* ¶ 56.

[11] *Id.* ¶ 50.

[12] *Id.* ¶ 49.

[13] *See* Harold Demsetz, *The Intensity and Dimensionality of Competition,* in THE ECONOMICS OF THE BUSINESS FIRM: SEVEN CRITICAL COMMENTARIES (1995).

[14] Proposed Guidelines ¶ 52.

In this vein, ITIF also has concerns with the Proposed Guidelines' statement that "where a firm engages in a series of acquisitions in the same market, each subsequent acquisition may be more likely to result in a substantial lessening or prevention of competition."[15] Serial acquisition theories of harm are typically premised on the idea that a given merger is more likely to be anticompetitive if it is part of a pattern of acquisition activity, which is in turn based on the false assumption that growth by mergers is somehow more competitively suspect than growth achieved organically or through contract—mergers, contracts, and unilateral practices all encompass broad swaths of normal and generally procompetitive behavior that only in certain limited circumstances can run afoul of the antitrust laws.

4. HOW WE ASSESS HARM TO COMPETITION

4.1 Overview of Our Analysis

ITIF does not object to the general framework in the Proposed Guidelines for assessing whether a merger harms competition: The Bureau may attempt to satisfy its burden by defining a relevant market and establishing a structural presumption and/or presenting other more direct evidence of anticompetitive harms, which, if done, shifts the burden to the merging parties to either rebut the Bureau's *prima facie* case or, in the alternative, present defenses showing why the merger should not be condemned.

4.2 Market Structure

4.2.1 Market Definition

ITIF agrees that "[m]arket definition is based on substitutability" and "focuses on how demand for a product responds to changes in the relative prices of substitute products"—otherwise known as cross-price elasticity of demand.[16] ITIF further concurs with the Bureau's view that "[w]hile the potential responses of competitors are also important to understanding the ability of a firm or group of firms to exercise market power, we consider supply responses at later stages of our analysis"—that is, the assessment of entry and repositioning.[17]

However, ITIF has concerns about the Proposed Guidelines' treatment of the hypothetical monopolist test. Specifically, to the extent the Bureau unqualifiedly uses as its "base price" the "prevailing price in the relevant market," it may premise its analysis on prices that reflect a degree of market power from pre-merger coordination, which is not necessarily uncommon in certain industries throughout the economy.[18] As a result, the Bureau may fall victim to the "Cellophane fallacy" by including in the market products that are only "substitutes" because prices are already well above the competitive level. Moreover, the Proposed Guidelines nowhere make clear, as they should, that the hypothetical monopolist test is the preferred method of defining a relevant market rather than more subjective and qualitative tests that focus on product and industry features.

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[15] *Id.* ¶ 53.

[16] *Id.* ¶ 82.

[17] *Id.*

[18] *Id.* ¶ 95.

That being said, ITIF does not object in principle to the Bureau making use of an analysis of product dimensions when defining relevant markets, particularly as a way to confirm that the definition obtained through the proper use of the hypothetical monopolist test is consistent with market realities. In particular, the Bureau should prioritize evidence of what it categorizes as "[v]iews, strategies, behaviours and identity of buyers," and especially information "about whether buyers have switched between products in the past," as these data points can be highly probative direct evidence about the extent to which firms compete.[19]

The Bureau states that while it "may define a market for each side of a multi-sided platform," it "may also consider how an exercise of market power on one side affects demand and profit across the platform."[20] It should make clear that while in some cases a relevant market may reflect only one side of the platform, in cases that involve transaction platforms that facilitate a single, simultaneous transaction between participants on both sides of the market, the market should be defined so as to encompass both sides of the platform.

The Bureau's recognition that it "may consider multiple relevant markets in aggregate" should be limited to cases that involve well-defined "cluster markets" so as to avoid an overbroad application that broadly sanctions relevant markets that include complements which can be obtained outside of the cluster—for example, various products sold at a department store.[21] The Proposed Guidelines should include in their assessment not just factors that examine whether the products demonstrate transactional and scope economies, but also the extent to which entering into competition with the cluster is difficult, which helps to prevent false positives.

4.2.2 Increases in Market Share and Concentration

ITIF does not object in principle to the Proposed Guidelines' inclusion of rebuttable presumptions of harm based on structural evidence. However, ITIF has serious concerns with the specific thresholds put forward in subsection 92(3) that the Proposed Guidelines discuss. Specifically, the presumption that mergers will harm competition when they result in a change in HHI greater than 100, and either a market-wide HHI greater than 1,800 or a combined firm with a share greater than 30 percent, falls well short of the point where increased concentration is likely to result in reduced innovation—namely, in 3-2 mergers that create a collusive duopoly or a merger to monopoly.

To be sure, while the Proposed Guidelines state that "[t]he presumption can be refuted where other evidence proves that the merger would not in fact likely create, maintain or enhance market power and thereby substantially harm competition," and correctly note that "[t]he nature of the market and the impact of change and innovation on the stability of existing market shares may also be relevant" to its analysis, the Bureau misses the opportunity to go further and, in order to avoid unnecessarily chilling procompetitive transactions, confirm that in cases where the broader industry trends in concentration are driven not by consolidation but by dynamic forces, an exception to application of a structural presumption will exist.[22]

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[19] *Id.* ¶ 100.

[20] *Id.* ¶ 114.

[21] *Id.* ¶ 86.

[22] *Id.* ¶ 130.

4.3 Minority Interests

ITIF agrees with the Proposed Guidelines that interlocking directorates—where one person, or alternatively two representatives of the same company, reside on the boards of two competitors—can lessen competition in certain cases. Moreover, transactions that create a minority interest, which can include firms taking a partial ownership stake in a competitor, are ubiquitous in the modern economy and are generally procompetitive—for example, as a critical way for smaller firms to obtain the patient capital they need to scale and ultimately compete more effectively. In certain circumstances, however, they can be anticompetitive by "influencing the pricing decisions or other competitive incentives of the interest holder, the target firm, or both," such as through unilateral effects.[23] As a result, to avoid chilling procompetitive transactions—especially in high-tech markets—and to reduce the administrative costs associated with reviewing the many partial acquisitions that occur, as well as to provide businesses with greater certainty, the Bureau should include in revised guidelines a safe harbor making clear that ownership stakes lower than 10 percent will not be deemed anticompetitive. Safe harbors for interlocking directorates should also be considered.

As a specific case of minority interest transactions, the Proposed Guidelines identify how transactions that create common ownership can create a risk of anticompetitive harm. However, in comparison to the scenario of cross-ownership, the risk of unilateral effects or tacit collusion is substantially lower when considering transactions that create common ownership: Whereas a firm taking a minority stake in a competitor may have the incentive and ability to compete less by recapturing some of the profits from diverted sales, this is not necessarily the same for firms where the same common owner has a minority stake in two competitors but lacks control—*ceteris paribus*, each firm still has the same incentive to maximize its profits and compete. Rather, the primary risk of competitive harm from common ownership involves, as the Bureau describes, collusion resulting from "access to confidential information," which reflects a concern that can be addressed independently of the merger review process by policing anticompetitive information-sharing agreements.[24]

4.4 Anticompetitive Effects of Mergers

ITIF acknowledges that Section 92(1)(b)-(c) of the Act gives the Bureau power to condemn mergers that harm competition in labour markets. Indeed, as the Proposed Guidelines suggest, "[a] merger may harm competition if it eliminates rivalry between the merging firms in attracting workers, or otherwise makes it harder for workers to find effective alternatives."[25] However, the Proposed Guidelines do not adequately account for the difficulties associated with treating reduced producer welfare in a labour market as a cognizable competitive injury—there are many mergers that may result in harms to labour which nonetheless create competitive benefits in the form of lower prices for consumers, and the Bureau must ensure that concerns about purported harms to labour do not chill transactions that significantly benefit product market competition and consumers.

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[23] *Id.* ¶ 141.

[24] *Id.* ¶ 144.

[25] *Id.* ¶ 157.

4.4.1 Mergers Between Competitors

While ITIF agrees with the Bureau that "[i]n all our reviews, our focus is identifying whether the merger is likely to lead to a greater ability to exercise market power," it accepts that in some cases mergers may result in harmful unilateral effects by increasing transactional leverage, including in the context of bargaining and bidding markets, separate from any increase in sell-side market power but in a way that harms buyers or consumers.[26] That being said, in a footnote, the Proposed Guidelines state that the Bureau will "apply the same framework to mergers among buyers, including buyers of labour" such that "[i]n these cases, if a seller loses bargaining leverage, this may result in lower wages or worse terms of employment, for example."[27] As such, the same problem noted *supra* arises: A merger may result in harms to sellers (including labour) but result in significant consumer benefits, thus creating a risk that the Bureau will condemn transactions that on the whole benefit Canadian consumers.

While the Proposed Guidelines make clear that structural factors have at least some relevance to assessing whether a merger will result in unilateral or coordinated effects in a static or existing product market, the Proposed Guidelines rightfully appear to treat the analysis of harm to dynamic competition, or "rivalry over time based on investments or innovation," differently. [28] Specifically, they appear to forbear from stating that, for example, *ceteris paribus*, a merger in a more highly concentrated R&D market is more likely to result in anticompetitive effects. This tacit recognition should be made express: As noted *supra*, structural evidence involving the number of competitors or market shares should not be viewed as probative when assessing the effects of a transaction in an R&D market, as not only is the general relationship between market structure and innovation uncertain, but increased market concentration can often spur innovation in many markets. To be sure, while it is true that "[a] merger can harm dynamic competition by lessening incentives to innovate or to invest in products or features," to make its case, the Bureau should rely on more direct evidence like relevant past conduct and, if available, the transaction's actual effects on innovation.[29]

4.4.2 Non-Horizontal Mergers

While ITIF generally agrees with the Proposed Guidelines' discussion of how, under certain circumstances, vertical mergers can result in anticompetitive effects, the Bureau errs in its treatment of the elimination of double marginalization (EDM) as an efficiency claim, rather than as a factor that should be assessed at the initial stage of determining the merged firms' foreclosure incentives.[30] That is, unlike horizontal mergers, vertical mergers do not involve the elimination of a competitor and instead entail inherent procompetitive incentives to increase output through EDM, which may create downward pricing pressure that outweighs any foreclosure incentives and thus any risk of *prima facie* competitive harm.

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[26] *Id.* ¶ 5.

[27] *Id.* ¶ 180 n. 89.

[28] *Id.* ¶ 206.

[29] *Id.* ¶ 207.

[30] *Id.* ¶ 286 n.128.

ITIF also has substantial concerns with the Proposed Guidelines' confirmation that the Bureau will police "conglomerate mergers," which it defines as "mergers between firms offering products that are not part of the same or competing supply chains" but involve the combination of "complements or products that are related because they are purchased by the same customers."[31] Condemning a transaction that combines complementary products precisely because it results in procompetitive benefits that allow a firm to better compete on the merits runs counter to the goals of sound merger policy.[32] And, of course, unlike increased tacit collusion created through horizontal mergers, anticompetitive "tying" or a reduction in "interoperability"—the harms identified by the Bureau with respect to conglomerate mergers—by the merged firm can be addressed if and when it arises under the laws prohibiting anticompetitive agreements and the abuse of dominance.[33]

4.4.3 Platforms and Multi-Sided Markets

ITIF questions at the outset any need for a separate section in the Proposed Guidelines specifically addressing platform markets—as the Bureau explains, it will "apply the frameworks described elsewhere in Part 4.4 while considering their particular features" and "define markets as described in Part 4.2.1.6."[34] That is, the same legal principles that apply to mergers in non-platform markets should be used to assess a transaction in a platform market. To be sure, while ITIF appreciates the Proposed Guidelines' understanding that "[t[here are often significant economies of scale or scope associated with multi-sided platforms," concerns about "tipping" are regularly overstated and do not constitute a unique theory of competitive harm or limitation on entry in platform markets.[35] Indeed, as the Bureau makes clear, many platform markets are typified by multi-homing, which "can allow participants to access network effects across multiple platforms, while still benefiting from competition between them."[36]

ITIF also acknowledges the Proposed Guidelines' recognition that "[d]ynamic competition may be particularly important in platform markets" such that "[w]hen assessing a merger, the most effective competitive threat to a dominant platform may be the potential for displacement or disintermediation by an innovative competitor, or the growth of a nascent competitor with niche or complementary offerings."[37] Indeed, in view of these sorts of market dynamics, the Bureau should be especially careful about condemning transactions based on structural characteristics that are unlikely to adequately depict competition going forward: As intimated *supra*, upon demonstration of a sufficiently dynamic market, the Bureau should make an exception to the application of any structural presumption so as to avoid false positives.

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[31] *Id.* ¶ 214.

[32] *Id.* ¶ 51.

[33] *Id.* ¶ 220.

[34] *Id.* ¶ 244.

[35] *Id.* ¶ 248.

[36] *Id.* ¶ 249.

[37] *Id.* ¶ 250.

4.5 Entry

ITIF agrees with the Bureau that entry should be "likely, timely, and sufficient to constrain a material exercise of market power" if it is to rebut a *prima facie* case of anticompetitive harm.[38] However, the Proposed Guidelines' discussion of the types of barriers to entry could be more rigorous so as to avoid overstating the extent to which barriers to entry exist. For example, the Bureau distinguishes between "cost advantages" and "economies of scale and scope" even though the latter could simply be viewed as an example of the former; conversely, "network effects" are often seen as a form of economies of scale and scope—specifically, demand-side economies—as could be barriers associated with "learning by doing."[39]

Moreover, the Proposed Guidelines' discussion of sources of potential competition overlooks that many firms that might be viewed as "entrants" are in fact market participants and thus should be considered at the stage where the Bureau determines whether a transaction will result in *prima facie* anticompetitive harm (i.e., for purposes of calculating market shares). These include not only "fringe firms already in the market" with an ability to expand, but also rapid entrants, which can often include "firms that sell the relevant product in nearby geographic areas" or "firms that sell similar products, or make products with machinery or technology similar to that used to make the relevant product."[40] Ensuring that these rapid entrants are accounted for when assessing a *prima facie* case of anticompetitive harm, rather than at the entry stage, helps to limit false positives that arise from the wayward application of structural presumptions.

4.6 Failing Firms and Exiting Assets

ITIF agrees with the Proposed Guidelines that a viable defense to a *prima facie* anticompetitive merger could exist where the "parties may be able to prove that the merger is not the cause of the loss of a competitor if they can show that, in the absence of the merger, imminent failure is probable and the assets of the firm are likely to exit the relevant market and no longer materially impact competition in that market."[41] ITIF also does not object to the framework put forward in the Proposed Guidelines in requiring a demonstration to this effect, both that "the firm is failing" and that "there is no alternative to the merger likely to result in a materially greater level of competition," in order to successfully make out this defense.[42]

However, the Proposed Guidelines fail to make clear that mergers that may create a *prima facie* risk of competitive harm may also not ultimately be anticompetitive due to weakened competition, even if the failing firm defense cannot be met. Specifically, a firm may be "flailing" in such a way that its competitive position is significantly declining so as to negate any risk of anticompetitive harm. Relevant considerations that the Bureau should consider in assessing this defense include inadequate resources to compete or fund innovation, a declining market share, as well as a poor reputation in the market.

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[38] *Id.* ¶ 255.

[39] *Id.* ¶ 273.

[40] *Id.* ¶ 262.

[41] *Id.* ¶ 277.

[42] *Id.* ¶ 279.

4.7 Procompetitive Benefits

ITIF understands that, pursuant to statutory amendments, "[e]fficiencies do not constitute a defense to an anti-competitive merger under the Act" on the grounds that they will improve producer and therefore total welfare.[43] As ITIF explained, this change was of particular concern, as "without a robust efficiencies defence, deals with efficiency benefits that outweigh minor harms and overall enhance competition will be chilled."[44] As such, ITIF takes great comfort in seeing that the Proposed Guidelines confirm the Bureau will account for procompetitive benefits in its "examination of whether competition is likely to be harmed substantially in any relevant market."[45]

However, while ITIF has no objections to requiring that these procompetitive benefits be "verifiable and likely to occur" as well as "specific to the merger," the Proposed Guidelines err in imposing the additional requirement that they be "rivalry-enhancing" in a way that appears to limit procompetitive benefits to cases where they help a smaller firm compete with a larger competitor.[46] While these efficiency benefits should be cognizable, the Bureau should affirm that other cost savings that benefit consumer welfare—as opposed to simply total welfare—will be credited, as these benefits also "enhance competitive outcomes in a way that benefits Canadians."[47]

With this in mind, ITIF does not understand the Bureau's decision not to consider cost savings that result from either "a redistribution of wealth" and to place a heightened standard on demonstrating cost savings "arising from reduced headcount, overhead consolidation, or other forms of internal restructuring"—both of which can benefit consumers.[48] Indeed, as the Proposed Guidelines elsewhere note, the Bureau's focus should be on assessing a merger's effects on consumers vis-à-vis increased market power, "even though the merger might have implications for other policy objectives that are beyond the scope of the Act."[49] Similarly, the Proposed Guidelines' statement that "when a merger otherwise presents significant competition concerns, even gains that are supported by rigorous evidence are unlikely to change our conclusions regarding harm to competition" is similarly problematic when viewed in the broader context of the Act.[50] Only mergers that substantially harm competition should be condemned, and in many cases substantial harms to competition may be outweighed by substantial procompetitive benefits.

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[43] *Id.* ¶ 286.

[44] Robert D. Atkinson, Joseph V. Coniglio and Lawrence Zhang, *Comments to the Parliament of Canada Regarding Proposed Amendments to Canadian Competition Law*, ITIF (Feb. 23, 2024), https://itif.org/publications/2024/23/comments-to-the-parliament-of-canada-regarding-proposed-amendments-to-canadian-competition-law/.

[45] Proposed Guidelines ¶ 284.

[46] *Id.* ¶ 285.

[47] *Id.* ¶ 286.

[48] *Id.* ¶ 287.

[49] *Id.* ¶ 43.

[50] *Id.* ¶ 288.

RECOMMENDATIONS

For these reasons, ITIF has concerns with the Proposed Guidelines and respectfully offers the following recommendations for the Bureau to consider:

- **Ensure that merger enforcement does not chill innovation**: While the Proposed Guidelines rightly emphasize the importance of dynamic competition and innovation in a number of areas, the reflexive application of the statutory structural presumption risks chilling procompetitive transactions, requiring the Bureau to use its enforcement discretion to craft an exception for sufficiently dynamic markets.
- **Horizontal mergers should be the enforcement focus**: While vertical mergers and cross-ownership transactions should also be condemned in the rare cases where they are anticompetitive, the Proposed Guidelines give far too much attention to conglomerate, serial acquisition, and common ownership theories of harm that lack any clear connection to real, merger-specific anticompetitive effects.
- **Do not unnecessarily limit procompetitive benefits:** While the Bureau is right not to conflate the elimination of an efficiencies defense under a total welfare standard with firms' ability to present procompetitive justifications for their mergers, it should make clear that it will broadly credit any verifiable and merger-specific procompetitive benefits that enhance consumer welfare through lower prices, increased output, improved product quality, or enhanced innovation.

CONCLUSION

ITIF commends the Bureau for what are, in general, thoughtful and comprehensive Proposed Guidelines following what were, in some cases, problematic changes to the Act. Clear and practical merger guidelines are important for giving businesses predictability and ensuring consistent enforcement in a hugely consequential area of the Canadian economy.

However, Canada's ongoing productivity challenges and relatively small domestic market make the need for a merger policy that is fine-tuned to support innovation especially important. Canadian firms often need to achieve scale, integrate complementary capabilities, and attract investment in order to compete internationally.

Consistent with its comments *supra* on the various aspects of the Proposed Guidelines, ITIF looks forward to the Bureau issuing revised guidelines that provide greater flexibility to ensure that mergers which allow firms to better compete and innovate to the benefit of Canadian consumers are not unduly chilled.

Very truly yours,

Joseph V. Coniglio
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