Consumer Choice Center Comments on the Anti-Competitive Conduct and Agreements Enforcement Guidelines

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The **Consumer Choice Center** is an independent, non-partisan consumer advocacy group championing the benefits of freedom of choice, innovation, and abundance in everyday life. We champion smart policies that are fit for growth, promote lifestyle choice, and defend technological innovation.

Herein, we will offer our comments on the Anti-Competitive Conduct and Agreements Enforcement Guidelines (henceforth "the Guidelines"), albeit from a consumer-focused perspective of Canadian consumers.

General Views on the Consultation

The aim of the Competition Bureau (henceforth "the Bureau") is to be an independent law enforcement agency that protects and promotes competition on behalf of Canadian consumers and businesses. This goal is laudable, and the Consumer Choice Center also works to promote competition, growth, and innovation for consumers in Canada. While our goals align, where we would like to provide recommendations for this consultation is to encourage the Competition Bureau to allow for a dynamic and ever-changing market, to not inadvertently punish consumers by taking away opportunities for companies to innovate, and finally to work towards positive relationships with international partners in order to facilitate a bright economic future for all Canadians.

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Our Response to the Guidelines Allowing for a Dynamic Market and the possibility of Inadvertently Punishing Innovation

The Bureau itself has officially stated that "In general, firms have more market power the less they face effective competitive constraints". Market power is often construed to be a negative label throughout the document, for example by stating that "market power is the ability to influence market outcomes or behave independently of market forces." However, the Competition Bureau must recognize that gaining market power is often the result of creating a useful and innovative product that consumers want to buy and use. Those who obtain this power through illegal means should be held accountable, **but an entity should not be investigated, or forced to break itself up into smaller entities, just because their product or service is popular with consumers.**

Enforcing competition rules by analyzing entities from a hostile posture perpetuates the myth that they are naturally manipulating the market somehow in order to achieve this success. However, success does not have to equal manipulation of markets, it is often simply that they have put time and resources into developing products their customers need, and customers deserve to be able to let them know this product is useful through making them winners within the market. That is the tacit communication that the market offers every consumer. Market reach reflects consumer demand.

A dynamic market can only be truly free if firms are allowed to be successful by developing products that consumers want and need. If these guidelines make success seem like something that should be investigated, there is less incentive for companies to actually invest in research and development in order to make people's lives better.

Some specific examples within the guidelines that lend themselves to the possibility of inadvertently punishing innovation and success that is beneficial to consumers, and actually harming the natural flow of a dynamic market, are the following:

> 26. Simply having and exercising market power does not raise issues under the ACCA provisions. Firms may have market power

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> because they have competed effectively and grown large enough to influence market outcomes. This can be a natural part of the competitive process.
>
> 27. On the other hand, market power may also be the result of anti-competitive activities, such as anti-competitive conduct or agreements. In most cases, this is because the anti-competitive conduct or agreement interferes with the competitive process to reduce the amount of competition a firm faces. The result is the firm has more market power than it otherwise would.

It is beneficial for consumers that the Bureau recognizes that simply having market power might just be because the firm competed fairly and won in the market. But the further provision to this must include that firms may have market power not only because they competed effectively and grown large enough to influence market outcomes, but also because consumers themselves have chosen that competitor as the winner of the market competition as a result of liking what they had to offer, whether that be one service or many services that compliment each other.

For example, the Bureau is currently suing Google for their advertising technology. The issue the Bureau has with Google is that they have created programs that address many parts and levels of the ad-reach market. IN particular, the Bureau states:

> *"the Bureau found that Google has:*
>
> *"unlawfully tied its various ad tech tools together to maintain its market dominance..."*

The Bureau should acknowledge that a company building many tech tools that interact with one another does not automatically mean that Google maliciously controls the market, rather they have an understanding of what their customers need and have successfully innovated to meet those needs so that their customers can seamlessly advertise their products to consumers. Opening legal procedures against companies for creating more products that

make a user experience better simply punishes a firm for innovating, and even for pushing the rest of the market to innovate as well. If those companies are operating within the law, this is not a matter for competition entities to intervene.

When it comes to integration of different services within one firm, the onus must be on the Bureau to show that this integration is actually harming consumers rather than just making competitors less successful, which happens when one entity brings a product to market that people prefer over another. Integration often has many positives, such as lower cost to access new technology, convenience, and reliability.

Another part of the guidelines that we are concerned about is the portion on mergers and acquisitions:

> *314. Sometimes acquisitions can harm the competitive process. For example, a firm buying its competitor may reduce competition in a market. In other cases acquisitions can be pro-competitive, such as when they allow firms to combine their assets and skills to compete more effectively.*

It is important for the Bureau to take into consideration that mergers and acquisitions are good for consumers as they distribute capital much better, and lower prices for consumers. Not all firms that “buy competitors”, or in other words expand their business, should have investigations opened against them. Larger firms offer better scale, which can lower costs to consumers. It also allows firms to bring together their different expertise to deliver new and exciting products and services that could not be possible otherwise. If these mergers and acquisitions are carried out in any way that breaks the law, using fraud or misrepresentation, they should be punished accordingly. However, launching an investigation, or suing and/or demanding these mergers are halted, misses the benefits to consumers. Furthermore, the market is still open for actors to continue to innovate, or for new innovators to enter the scene.

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If the Bureau errs on the side of protecting competitors rather than avoiding the harm this protectionism has on consumers, the result may be that products become cheaper and less useful, and ultimately leave all consumers worse off. It is market competition that truly allows for consumers to win.

Again, if that conduct shows intentional manipulation of a dynamic market, then the Bureau should certainly investigate and even prosecute that entity. However, the terminology presented in the above clauses may make it seem to firms that innovation can be looked at as something to be investigated and sued, and getting too successful for bringing useful products to market is something that should be investigated.

Our Response to the Guidelines Allowing for Seamless International Trade and Maintaining Positive Relationships with International Partners

The way that the Guidelines are presented shows that the scope of investigation, prosecution, and/or enforcement is not limited to Canada, but to international entities when they have a direct effect on the Canadian market. If they are entering as competition within the market, then that firm comes under the Bureau's purview. This is evident in several sections of the Guidelines, including the following:

> *Subsection 90.1(2) provides a list of factors we may consider when assessing if conduct has the effect of harming competition:*

In deciding whether to make the finding referred to in subsection (1), the Tribunal may have regard to the following factors:

> *(a) the extent to which foreign products or foreign competitors provide or are likely to provide effective competition to the businesses of the parties to the agreement or arrangement;*

And

7.1.4.2 Plausible competitive interest

376. To satisfy paragraph 79(1)(b), the conduct or agreement must have the effect of harming competition in a market "in which the person or persons have a plausible competitive interest."

377. A firm has a competitive interest in a market when it has any sort of incentive to harm competition in it. A firm always has a competitive interest in a market it competes in. This is because it could directly benefit from a reduction in competition. Here are some examples of how firm could have a competitive interest in a market it does not compete in:

a. *The firm receives a benefit from harming competition in a market it controls, such as market participants sharing their profits with the firm*
b. *The firm is controlled by or acts on behalf of market participants, such as a trade association acting on behalf of its members*
c. *By harming competition in that market, it makes it more difficult to compete directly with the firm in a different market*

International relationships are at particular strain at the moment. We encourage the Bureau to exercise caution in investigating international firms on the basis of simply being successful in the Canadian market. For example, technological firms, particularly those located in the United States, are some of the most innovative firms bar none in the world, and Canadian consumers are made better off with access to this new and emerging technology. They will often bring innovations to the Canadian market that Canadian firms have not presented themselves, or are working on creating and manufacturing. What's more, these investments often create new entrepreneurial opportunities for Canadians who can create auxiliary services or goods congruent to that new innovation.

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This should not trigger section 377(a) since this does in a way harm Canadian-born competition, rather it will spur innovation by Canadian firms that ends up being a net positive for consumers.

While the Government of Canada presently negotiates with the United States and other international markets to make Canadians more economically better off in an uncertain world economy, it is more important than ever to encourage foreign entrance and innovation into the Canadian market.

In fact, the OECD's 2025 Economic Survey on Canada states the following:

> *"Foreign and Canadian multinational companies, which are larger than average, foster innovation by bringing new technologies and services and by investing in R&D. They contribute to the bulk of business investment and have higher investment per worker than other firms. Multinationals accounted for about 37% of Canada's private-sector employment in 2023, but they made up 65% of all business investment."*

This shows that multinational investment is an important part of the Canadian economy. If the Bureau investigates every instance of investment that ends up being enormously successful in Canada out of suspicion that they have done something uncouth to gain market dominance, that would have the unintended consequence of spooking future investment in Canada and harming consumers even further.

It is certainly not beneficial for the Government of Canada's interests to make Canada look like an inhospitable environment for investment at a time of economic uncertainty and especially while entering into future negotiations pertaining to the Canada-United States-Mexico Agreement (CUSMA). Some companies simply do better than others, and that is the simple product of competition. Having a competitive advantage through research and development should not be considered a violation of competition laws, but rather a gateway towards happier Canadian consumers since other entities

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then innovate and create new products to cater to consumers' needs, thereby expanding the market even further.

Conclusion

Overall, the Consumer Choice Center supports the Competition Bureau's goal of protecting and promoting competition on behalf of Canadian consumers and businesses through these Guidelines. However, we have written this recommendation to strongly urge the Bureau to ensure they launch investigations and prosecute on the basis of allowing for a dynamic market, not punishing innovation, and working towards positive relationships with international partners. This is the way towards more open markets that benefit all Canadian consumers and businesses, and allows for prosperity for all.

Respectfully,

The Consumer Choice Center

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