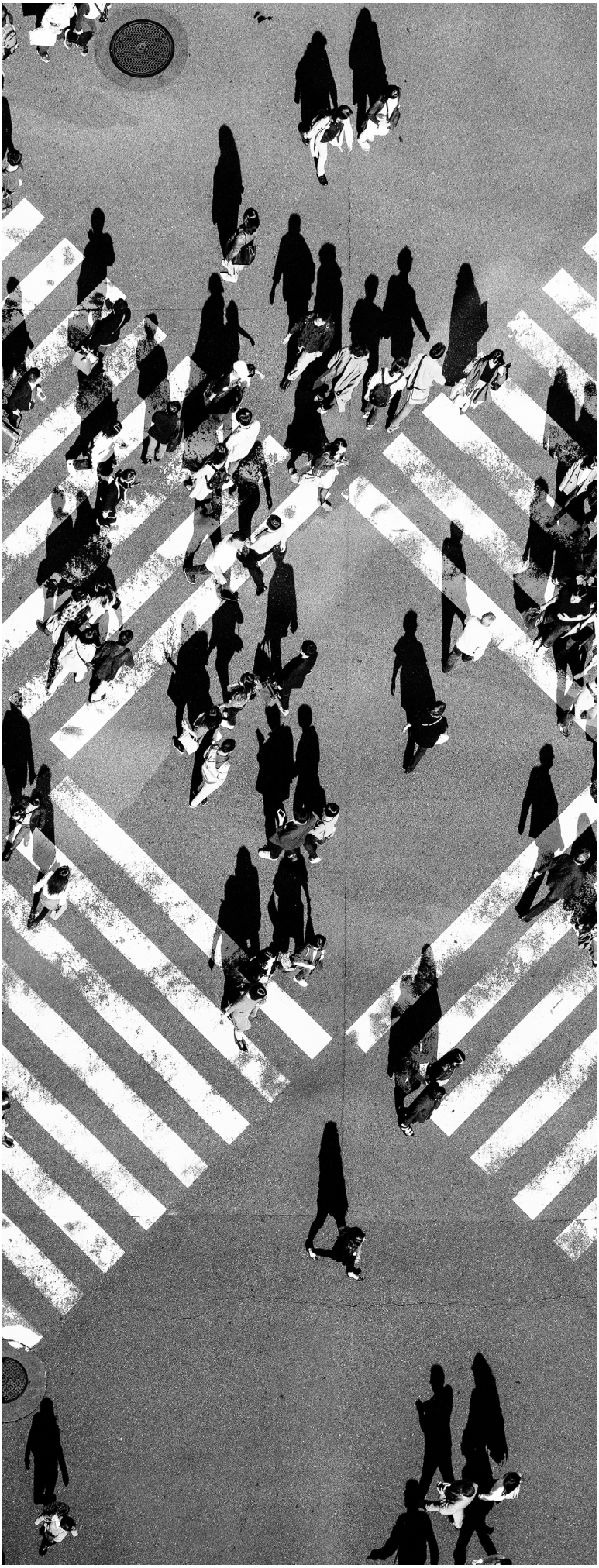

4.

Competition/ Antitrust Law

Competition laws in Canada are contained in one federal statute, the *Competition Act* (the "Act"). The Act is administered and enforced by the Commissioner of *Competition* (the "Commissioner") and the Commissioner's staff, the Competition Bureau (the "Bureau"), which is part of the Innovation, Science and Economic Development Canada portfolio.

Subject to certain limited exceptions, the Act applies to all business activities in Canada.

The Act has five principal categories of provisions: (a) merger provisions, including pre-merger notification; (b) criminal offences in relation to competition, including provisions dealing with conspiracies/cartels and bid rigging; (c) civil reviewable practices provisions, including those dealing with and non-criminal agreements between competitors, abuse of dominant position and other restrictive trade practices; (d) various deceptive marketing practices (civil and criminal offences); and (e)

a provision establishing a private right of action for damages arising from conduct contrary to the criminal provisions of the Act or a breach of an order of the Competition Tribunal (the "Tribunal"). Criminal matters and claims for civil damages are adjudicated before the courts. Civil reviewable conduct is dealt with by the Tribunal on application by the Commissioner or, in some cases, a third-party with the permission of the Tribunal. The Tribunal has the authority to issue a range of remedial orders and, in some cases, administrative monetary penalties.

Mergers

A merger is defined broadly in the Act as the acquisition or establishment of control over, or a significant interest in, the whole or a part of a business of a competitor, supplier, customer or other person. Due to the breadth of this definition, foreign transactions often produce issues where the parties own or have a significant interest in a business in Canada.

The Act includes a comprehensive framework for merger review in Canada. As discussed in more detail below, this framework includes two components, namely pre-merger notification provisions applicable to large transactions and substantive merger review provisions applicable to all transactions. Unlike some jurisdictions around the world, these provisions apply independently of each other.

Mandatory Pre-Merger Notification

While mergers do not require advance approval under the Act, certain mergers (i.e., asset acquisitions, share purchases, amalgamations, combinations and acquisitions of interests in combinations) are subject to mandatory pre-merger notification if the applicable "size-of-parties" and "size-of-transaction"

thresholds are exceeded. The Act also has a anti-avoidance provision such that mandatory merger notification requirements will apply to transactions that have been designed to avoid notification. Exemptions from pre-merger notification exist for certain specified transactions.

Subject to an applicable exemption, a merger is notifiable if:

a) the following "size-of-parties" threshold is met:

- Taken as a whole, the merging parties and their affiliates have assets in Canada with an aggregate book value that exceeds, or have annual gross revenues from sales in, from, or into Canada that exceed, $400 million (in the case of an acquisition of shares, the parties are the purchaser and the corporation whose shares are being acquired, and in the case of an acquisition of an interest in a combination, the parties are the purchaser of the interest and the combination whose interest is being acquired).

and

b) any one of the following criteria is met:

- **In the case of an acquisition of assets**, the aggregate book value of the assets of the operating business being acquired exceeds, or the annual gross revenues from sales in or from Canada generated from those assets exceed, a transaction-size threshold set at $93 million for 2022 and changed annually according to changes in Canada's GDP (the size-of-transaction threshold).
- **In the case of a purchase of the shares of (i) a public company**, the acquirer and its affiliates would hold more than 20% of the voting shares as a result of the merger, (ii) a private company, the acquirer and its affiliates would hold more than 35% of the voting shares as a result of the merger, or (iii) either a public or a private company, the acquirer and its affiliates would hold more than 50%, provided the acquirer already owns more than 20% or 35% of the voting shares, as applicable, and the corporation whose shares are being acquired and any corporations controlled by that corporation carrying on an operating business have assets in Canada with an aggregate book value, or annual gross revenues from sales in or from Canada generated from such assets, exceeding the $93 million (2022) size-of-transaction threshold.
- **In the case of an amalgamation of two or more entities**, one or more of those entities carries on an operating business or controls a entity that carries on an operating business and the aggregate book value of the assets in Canada that would be owned by the continuing entity that would result from the amalgamation or by entities controlled by the continuing entity, or the annual gross revenues from sales in or from Canada generated from such assets, exceeds the transaction-size threshold, and each of at least two of the amalgamating entities, together with their affiliates, have assets in Canada with an aggregate book value, or annual gross revenues from sales in, from or into Canada generated from such assets, exceeding the $93 million (2022) size-of-transaction threshold.

- **In the case of a combination of two or more persons** to carry on a business other than through a corporation (e.g., a partnership), one or more of those persons contributes to the combination assets that form all or part of an operating business carried on by those persons, or entities controlled by those persons, and the aggregate book value of the assets in Canada that are the subject matter of the combination, or the annual gross revenues from sales in or from Canada generated from such assets, exceeds the $93 million (2022) size-of- transaction threshold.
- **In the case of an acquisition of an interest** in a combination that carries on an operating business other than through a corporation, the person or persons acquiring the interest, together with their affiliates, would hold an aggregate interest in the combination that entitles the person or persons to receive more than 35% of the profits of the combination or more than 35% of its assets on dissolution or, where the person or persons acquiring the interest are already so entitled, to receive more than 50% of such profits or assets, and the aggregate book value of the assets in Canada that are the subject matter of the combination, or the annual gross revenues from sales in or from Canada generated from such assets, exceeds the $93 million (2022) size-of-transaction threshold.

If each of the applicable thresholds is exceeded, the merging parties are required to provide prescribed information to the Bureau, together with a filing fee set at $77,452.36 for 2022 and changed annually according to changes in Canada's GDP. Moreover, the merging parties cannot complete the transaction until the statutory waiting period under the Act has expired or has been terminated or waived by the Commissioner. The statutory waiting period expires 30 days after all prescribed information has been provided to the Bureau unless, prior to the end of this initial 30-day period, the Commissioner issues a Supplementary Information Request (a "SIR"). If a SIR is issued, the statutory waiting period expires 30 days after the merging parties have complied with the SIR. In our experience, it generally takes a few weeks to several months for the merging parties to respond to a SIR, depending on the nature and scope of the information requested by the Bureau.

The foregoing waiting periods do not apply if the Commissioner has issued an advance ruling certificate (an "ARC") in respect of the proposed transaction. Additionally, there is a provision in the Act that allows the Commissioner to waive the obligation to notify because substantially similar information was previously supplied in relation to a request for an ARC. The waiting period may also be terminated early if the parties receive a notice from the Commissioner indicating that the Commissioner does not currently intend to challenge the merger before the Tribunal.

In addition to the information required to be filed pursuant to a pre-merger notification or a SIR, the Commissioner expects that the initial filing will be accompanied by a statement that addresses the substantive competitive impact of the proposed transaction.

Where the Commissioner has commenced an inquiry into any merger or proposed merger and requires more time to complete the inquiry, the Commissioner may, irrespective of whether the transaction is notifiable, seek an interim order from the tribunal to prevent the completion or implementation of the merger.

Substantive Merger Review

All mergers, regardless of whether they are subject to pre-merger notification, may be subject to substantive review under the Act. In this regard, the Commissioner reviews mergers in order to determine whether they are likely to result in a substantial prevention or lessening of competition (an "SPLC").

As part of this analysis, the Commissioner considers a number of factors, such as the merging parties' collective market share, whether the acquired business has failed or is likely to fail, the extent to which acceptable substitutes for products supplied by the merging parties are or are likely to be available, network effects and the nature and extent of any barriers to entry and expansion, the effects on both price competition and non-price competition, such as quality, choice or consumer privacy, the extent to which effective competition will remain in the market, the likelihood that the merger will result in the removal of a vigorous and effective competitor, the possible entrenchment of leading incumbents' market position, and the nature and extent of change and innovation in the market.

The Commissioner's approach to merger review is discussed in detail in the Bureau's Merger Enforcement Guidelines.

The length of the Commissioner's review varies depending on whether a merger is designated as "non-complex" or "complex". While the review of "non-complex" mergers typically takes no more than 14 days, the review of complex mergers can, in certain cases, exceed 150 days (such as when a SIR has been issued).

If the Commissioner concludes that a merger is likely to result in an SPLC, he will normally attempt to resolve his concerns with the parties. If a resolution cannot be reached with the parties, the Commissioner can apply to the Tribunal for an order. If the Tribunal finds that the merger is likely to result in an SPLC, it may order the merging parties or another other person to: (a) in the case of a completed merger, dissolve the merger or dispose of assets or shares designated by the Tribunal; or (b) in the case of a proposed merger, not proceed with all or part of the proposed merger. In addition, with the consent of the parties and the Commissioner, the Tribunal can also order the parties to either a completed or proposed merger "to take any other action".

If the merger is substantially completed within one year of the issuance of the ARC and the information upon which the ARC was based remains substantially unchanged, the merger may not be challenged before the Tribunal under the merger provisions of the Act.

Where the Commissioner has commenced an inquiry into any merger or proposed merger and requires more time to complete the inquiry, the Commissioner may, irrespective of whether the transaction is notifiable, seek an interim order from the Tribunal to prevent the completion or implementation of the merger.

Finally, the Act includes an "efficiencies defence", which prevents the Tribunal from issuing a remedial order in connection with an otherwise anti-competitive merger if it finds that the efficiency gains resulting from the merger will be greater than, and will offset, the anticipated anti-competitive effects.

Conspiracies and Cartels

A conspiracy, agreement or arrangement between competitors to fix prices, allocate markets and/or restrict output is a criminal offence (the "cartel offence"). Often referred to as "the supreme evil of antitrust," the cartel offence is the cornerstone of the Act and a top enforcement priority of the Bureau. Proof of competitive harm is not required to establish the offence. The term "competitors" includes not just actual competitors, but potential competitors as well. The cartel offence prohibits the following categories of agreements:

- **Price Fixing Agreements** include any agreement between competitors to fix or control the price, or any component of the price, to be charged by competitors. The term "price" includes any discount, rebate, allowance, price concession or other advantage in relation to the supply of a product.
- **Market Allocation Agreements** include, among other things, agreements between competitors not to compete with respect to specific customers, groups or types of customers, in certain regions or market segments, or in respect of certain types of transactions or products.
- **Output Restriction Agreements** include, among other things, agreements between competitors to limit the quantity or quality of products supplied, reduce the quantity or quality of products supplied to specific customers or groups of customers, limit increases in the quantity of products supplied by a set amount or discontinue supplying products to specific customers or groups of customers.
- **Wage-Fixing Agreements** include agreements among unaffiliated employers to agree to fix, maintain, decrease or control wages or other terms of employment. This provision is not limited to agreements among competitors. "Terms of employment" may include the responsibilities, benefits and policies associated with a job, such as job descriptions, allowances such as per diem and mileage reimbursements, non-monetary compensation, working hours, location and non-compete clauses, or other directives that may restrict an individual's job opportunities. *This provision comes into force as of June 23, 2023.*
- **No-Poach Agreements** include agreements among unaffiliated employers to refrain from hiring or trying to hire one another's employees. This provision is not limited to agreements among competitors. This provision prohibits all forms of agreements among employers that limit opportunities for their employees to be hired by each other. Examples of such limitations include restricting the communication of information related to job openings and adopting hiring mechanisms, such as point systems, designed to prevent employees from being poached or hired by another party to the agreement. *This provision comes into force as of June 23, 2023.*

Bid-rigging is another criminal offence under the Act that is deemed illegal without proof of anticompetitive effects. Bid-rigging occurs where two or more persons agree that, in response to a call for bids or tenders, one or more of them will not submit a bid, will withdraw a bid or will submit a bid arrived at by agreement.

The Act also contains criminal prohibitions against implementing a foreign conspiracy and sector specific offences, namely provisions prohibiting conspiracies involving federal financial institutions and conspiracies relating to professional sport.

The penalties for engaging in cartel offences are severe and include substantial fines and, in the case of an individual, imprisonment.

Further, the Act allows persons who have suffered loss or damage as a result of these criminal offences to bring civil damage claims in the courts. These claims are frequently brought as class actions, which can be expensive and time consuming to defend.

Civil Reviewable Practices

The Act contains a number of civil provisions, referred to as "reviewable practices", which relate to ordinary, lawful business practices that may, occasionally have anticompetitive effects on the Canadian economy and consumers. Such practices are presumptively lawful and may only be prohibited if there is proof of anti-competitive effects arising from such practices.

Non-Criminal Agreements Between Competitors

The Act contains a reviewable practice pertaining to agreements between competitors that are likely to cause an SPLC in any relevant market. The Tribunal may, on application by the Commissioner, make remedial cease-and-desist orders in connection with agreements between competitors that cause an SPLC. In particular, joint ventures, strategic alliances, and similar collaborations between competitors may be subject to review, prohibition or other order under these provisions.

Abuse of a Dominant Position

The abuse of dominance provisions in the Act provide that where one or more persons have market power and where such a person or persons engage in a "practice of anticompetitive acts" such that competition has been, is being or is likely to be substantially prevented or lessened in a market, the Tribunal may, on application of the Commissioner, issue prohibition and other orders in respect of the conduct, including orders for administrative monetary penalties up to the greater of (i)$10 million (for an initial order / $15 million for any subsequent violation) and (ii) three times the value of the benefit obtained from the anti-competitive conduct, or, if that amount cannot be reasonably determined, 3% of annual worldwide gross revenues.

Restrictive Trade Practices

Restrictive trade practice rules apply to unilateral conduct, namely refusals to deal, resale price maintenance, exclusive dealing, tied selling and market restrictions.

- **Refusal to deal** is a refusal to supply a would-be customer under certain specific circumstances. While there is no absolute obligation on any business to supply to any particular customer(s) or would-be customer(s), in certain circumstances, where the would-be customer is willing and able to meet the supplier's usual trade terms, is unable to obtain adequate supplies elsewhere and the impact would be that the would-be customer is unable to carry on business as a result or otherwise substantially affected by the refusal, the refusal may be subject to review. Further conditions would also need to be met in order for the Tribunal to issue an order requiring that a supplier accept the customer (i.e. the product must be in ample supply and the refusal to supply must have had, or be likely to have, an adverse effect on competition in a market).

- **Price Maintenance** is where a person either influences upward or discourages the reduction of another person's selling prices by means of agreement, threat, promise or any like means or refuses to supply or otherwise discriminates against a person because of that person's low pricing policy, in each case with the result that competition in a market is likely to be adversely affected.
- **Exclusive Dealing** occurs where a supplier requires or induces a customer to deal only, or mostly, in products supplied by the supplier or someone designated by the supplier.
- **Tied Selling** occurs when a supplier, as a condition of supplying a particular product, requires or induces a customer to acquire a second product, or prevents the customer from using or distributing another product with the supplied product.
- **Market Restriction** occurs when a supplier requires a customer to sell specified products in a defined market, or penalizes a customer for selling outside of a defined market.

Where any of the aforementioned practices are viewed by the Commissioner as likely to have a substantial or adverse effect on competition in a market (depending on the provision in question), the Commissioner may apply to the Tribunal for an order to cease the practice. Subject to obtaining the permission of the Tribunal, private litigants may also bring cases to the Tribunal under these restrictive trade practices provisions.

Deceptive Marketing Practices

The Act contains both criminal and civil (reviewable) provisions to address deceptive marketing practices. The making of materially false or misleading representations to the public for the purpose of promoting a product, service or business interest is both a criminal offence and a reviewable practice under the Act.

The Commissioner has the discretion to choose which track (i.e. criminal or civil) to pursue with respect to suspected false and misleading representations.

Specific provisions pertaining to marketing representations remove the requirement for the Commissioner to prove materiality where the representation at issue was contained in the sender information or subject matter of an electronic message.The Act also contains a number of more specific criminal offences and reviewable practices in connection with deceptive marketing, some of which are set out below for illustrative purposes:

Criminal Offences

- **Deceptive Telemarketing**: It is an offence where interactive telephone communications are used to make false or misleading representations in promoting the supply of a product or a business interest.
- **Double Ticketing**: It is an offence for a business to put two prices on a product, and charge the higher of the two prices.

- **Pyramid Selling:** It is an offence to engage in a multi-level marketing plan with certain characteristics. At a general level, multi-level marketing plans whereby participants generate earnings through recruitment as opposed to the supply of products that consumers are willing to purchase are subject to criminal prohibition.
- **Drip Pricing:** The Act prohibits offering a product or service at a price that is unattainable, because consumers must also pay additional non-government-imposed charges or fees to buy the product or service. (The Act includes both criminal and civil drip pricing provisions.)

Civil Reviewable Practices

- **Ordinary Price Claims:** The Act prohibits the making, or the permitting of the making, of any materially false or misleading representation, to the public, as to the ordinary selling price of a product, in any form whatever. The ordinary selling price is determined by using one of two tests: either a substantial volume of the product was sold at that price or a higher price, within a reasonable period of time (volume test); or the product was offered for sale, in good faith, for a substantial period of time at that price or a higher price (time test).
- **Performance Representations:** The Act prohibits the making, or the permitting of the making, of a representation to the public, in any form whatever, about the performance, efficacy or length of life of a product, which is not based on adequate and proper testing. The onus is on the person making the representation to prove that the representation is based on an adequate and proper test, which must be conducted before the representation is made.
- **Bait and Switch Selling:** The Act prohibits a person from advertising, at a bargain price, a product or service that the person does not supply in reasonable quantities, having regard to the nature of the product in which the person carries on business, the nature and size of the person's business and the nature of the advertisement.

The penalties for engaging in deceptive marketing practices are wide ranging and may include imprisonment, substantial fines, administrative monetary penalties, prohibition orders, the publication of a corrective notice and/or restitution, depending on the conduct at issue and the Commissioner's enforcement approach.

Private Civil Actions for Damages

The Act contains provisions establishing a private right of action for damages arising from conduct contrary to the criminal provisions of the Act or a breach of an order made by the Tribunal or another court under the Act. Note that the Act provides only for single, not treble, damages. There is also a provision for the recovery of the costs of any investigation and any civil proceedings.