March 31, 2023

To

Innovation Science and Economic Development Canada, Market Framework Policy Branch

Ref. Public consultation regarding how to improve Canadian Competition Policy, based on the topics pointed out by the paper "The Future of Competition Policy in Canada"

Dear Sir/Madam,

We have great pleasure in enclosing a submission on behalf of the Mergers Working Group and the Antitrust Litigation Working Group of the Antitrust Section of the International Bar Association (IBA).

The Co-chairs and representatives of the Antitrust Section would be delighted to discuss the enclosed submission in more detail with ISED if that would be useful.

Yours sincerely,

Samantha Mobley
Co-Chair Antitrust Section

Janet Hui
Co-Chair Antitrust Section

IBA ANTITRUST SECTION COMMENTS ON THE CONSULTATION PAPER ON THE FUTURE OF COMPETITION POLICY IN CANADA

I. INTRODUCTION

The International Bar Association ("IBA") is the world's leading international organization of legal practitioners, bar associations and law societies. As the "global voice of the legal profession", the IBA contributes to the development of international law reform and shapes the future of the legal profession throughout the world. It has a membership of more than 80,000 individual lawyers from over 170 countries, and it has considerable expertise in providing assistance to the global legal community. Further information on the IBA is available at http://ibanet.org.

The IBA's Antitrust Section includes competition law practitioners with a wide range of jurisdictional backgrounds and professional experience. Such varied experience places it in a unique position to provide a comparative analysis for the development of competition laws, including through submissions developed by its working groups on various aspects of competition law and policy. The comments set out in this document have been prepared by the Mergers Working Group ("MWG") and the Antitrust Litigation Working Group ("ALWG") of the IBA's Antitrust Section (jointly referred to herein as the "Working Groups") and draw on that combined experience.

This submission is made to the Market Framework Policy Branch of Innovation Science and Economic Development Canada, ("ISED"). The Section welcomes the opportunity to comment on the ISED's public consultation ("Public Consultation") regarding some of the topics pointed out by the paper "The Future of Competition Policy in Canada" ("Paper"). We offer the following comments and suggestions in the hope that they will assist ISED in the discussions regarding the modernization of Competition Policy in Canada.

II. OVERVIEW

The Working Groups commend ISED for its efforts in seeking feedback and comments on Canada's current competition law (mainly the "Competition Act") and policy framework. The Working Groups agree that discussions on whether and how the current rules and framework should be modernised to better serve the public interest are of great importance, especially in light of the digitalization of the global economy.

The Working Groups will focus on topics where they consider potential improvements are possible, and where they are able to usefully provide information on how peer international jurisdictions approach similar issues, with a view to the holistic goal of ensuring Canada will continue to be seen as a "partner in the global push for fairness, inclusion and prosperity in the world's new marketplace"[1]:

- the MWG provides comments on **acquisitions of potential innovators** (so-called "killer acquisitions") and the **treatment of efficiencies in the context of merger review**; and
- the ALWG provides comments on the topic of **private damages claims,** the treatment of **mergers in the context of private litigation** and the impact of **market studies on private litigation.**

[1] Please refer to page 12 of the Paper.

III. COMMENTS ON FRAMEWORK RELATED TO ACQUISITIONS OF POTENTIAL INNOVATORS

The MWG consists of leading international merger control experts. Given the expertise of the group, the comments below will focus on the topics most relevant to the interaction of Canada's merger control framework with multi-jurisdictional mergers, namely reforms to the pre-merger notification rules and the limitation period for non-notifiable mergers in response to concerns over acquisitions involving potential innovators (i.e. so-called "killer acquisitions"), as well as possible changes to the efficiencies defence.

The MWG appreciates that the topic of "killer acquisitions" has been a focus of many competition agencies in recent years. In this context, the term "killer acquisitions" tends to refer to the acquisition by a dominant firm of an innovative or potentially disruptive firm with a small market presence which results in the eventual loss of existing or future competition, irrespective of whether the affected markets are horizontal, vertical or adjacent.

Globally, there have been **a number of reforms and ongoing proposals to modify existing merger control frameworks to address concerns over "killer acquisitions"**. These reforms generally focus on broadening the jurisdictional test to capture what may be considered "killer acquisitions", although a smaller number of jurisdictions have also focussed on amending the substantive test to identify competition concerns relating to such transactions. Please **refer to Annex 1** for a summary of the reforms in Australia, Austria, EU, France, Germany, Italy, UK and US.

The range of reform approaches encapsulated in Annex 1 suggests that there is **no single optimal approach or 'best practice' in relation to the issue of "killer acquisitions"**. As ISED may be considering revisions to the pre-merger notification rules to better address concerns around "killer acquisitions", the MWG has the following suggestions:

- Given that the Competition Bureau ("Bureau") **already has the power to review non-reportable mergers on an *ex officio* basis**, the starting point for assessing the need for change should be to assess the evidence on whether this power is insufficient to address concerns around "killer acquisitions" falling below the jurisdictional thresholds.
- There is **limited evidence that the reforms implemented in other jurisdictions have achieved the intended effect**, i.e. resulting in the notification and subsequent remedies or prohibition of "killer acquisitions". For example, following its merger control reforms targeting "killer acquisitions", the German competition regulator published a report [2] which found that between the introduction of the reforms in June 2017 and September 2020, **none of the notifications made pursuant to the reforms had led to a phase 2 investigation, remedies decision or prohibition decision**. Furthermore, **only 13% of these notifications concerned the digital sector**, 45% concerned the pharmaceutical sector, and 23% concerned the real estate sector (primarily unfinished properties that did not generate income).
- **Any revision to the existing jurisdictional thresholds should also be accompanied by clear guidelines** on how the transactions will be assessed, so as to create some level of legal certainty for undertakings when envisaging a possible future transaction.
- Broadening the jurisdictional thresholds could have the unintended effect of **significantly increasing the number of no-issues mergers being notified**, which risks the Bureau spending a disproportionate amount of resources on the review of mergers that do not raise concerns when such resources could achieve more impactful outcomes in other policy or enforcement fronts[3].
- If any changes to filing thresholds or additional filing thresholds are introduced, they should be designed in accordance with the ICN Recommended Practices Document.

[2] This report is available in German language only. See https://dserver.bundestag.de/btd/19/261/1926136.pdf.
[3] This comment is also in line with the recommendation made by the International Competition Network ("ICN") in its Recommended Practices for Merger Notification (the "ICN Recommended Practice Document"), which highlights that it is important that mandatory notification thresholds be based on objectively quantifiable criteria. See https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf.

- The **extension of the period that non-reportable transactions are susceptible to *ex officio* review** to more than one year may not be proportionate, as this could lead to **increased business uncertainty or even discourage investment**.
- The proposal to **introduce a voluntary notification regime** (in addition to the existing mandatory notification regime and the Bureau's *ex officio* power to review non-reportable transactions) **does not appear to be a proportionate means** to address "killer acquisitions" concerns, considering the greater level of business uncertainty accompanying such a reform.

IV. COMMENTS ON FRAMEWORK RELATED TO APPROACH TO EFFICIENCIES IN MERGER CONTROL

The MWG commends the efforts by ISED to revisit the topic of efficiencies in merger reviews, especially in light of Canada's 'total welfare' approach to efficiencies and the statutory nature of its efficiencies defence. The MWG further notes that ISED considers this approach to efficiencies (which has an industrial policy component) to be somewhat unique to Canada as it is "intended to represent a trade-off between domestic concentration and international competitiveness for Canadian firms". [4]

The MWG has prepared a table in Annex 2, which summarizes the approaches adopted by many of the most relevant jurisdictions around the globe. It is apparent that while **most jurisdictions take account of efficiencies in merger reviews**, these tend to **require the benefits to be passed on to consumers (i.e. a 'consumer welfare' approach)**, with the notable exception of Australia. The role of **industrial policy in the context of such efficiencies assessments is also not readily apparent in these other jurisdictions**.

The MWG also has the following observations:

- The **assessment of efficiencies over the course of a merger review is important** since it allows competition policy to balance against the potential competition concerns, the benefits arising from a transaction such as synergies and cost

[4] Page **??** of the Paper

savings which could enhance rivalry in the market, incentives to innovate, the development of new products and expansion into new geographic markets, as well as other consumer benefits. While the MWG has no strong view on the procedural form under which merger efficiencies are best assessed, it believes that any change or abolishment of the current statutory efficiencies defence should be accompanied by an amendment that **enables efficiencies to be accounted for as part of the merger review**.

- While the **majority of peer international jurisdictions** considered by the MWG (with the exception of Australia) currently adopt some form of **consumer welfare standard in relation to efficiencies assessment**, it is important for ISED to **align this standard with the policy priorities** which Canada's competition framework intends to achieve.
- Any revision to the assessment of efficiencies should be **accompanied by clear practical guidelines** which set out the **relevant factors which will be taken into account**, as well as the **evidence required to substantiate the efficiency claims**. This will provide further clarity for parties and enforcement officials, enabling them to better prepare and assess the evidence needed in relation to efficiency claims during a merger review.

V. COMMENTS ON THE FRAMEWORK RELATED TO PRIVATE DAMAGE CLAIMS

The ALWG consists of leading international antitrust litigators from both sides of the bar (i.e., counsel for plaintiffs and defendants). Given that composition, the comments below will focus on the discussion topic directly related to private damages litigation: potentially allowing private parties to seek compensation for damage suffered from civilly reviewable (non-merger) conduct under the current Competition Act. Comments will also discuss the related issue of market studies and the extent to which such studies may give rise to or influence private damages litigation.

In offering these comments, the ALWG is mindful of the diverse views of its membership, and the IBA's membership more generally, on private damages litigation.

Some practitioners view private litigation as a necessary and integral component of an effective antitrust regime, and often the only way to compensate those harmed by anti-competitive conduct. Others believe private litigants to be a poor substitute for effective government enforcement and that such regimes burden business and the courts with disruptive and costly litigation.

Given the diverse views of its membership, the ALWG does not propose to comment on the wisdom of private damages claims for non-cartel conducts, instead it provides information on how international comparator jurisdictions approach the topic and, based on these international experiences, offers some comments for ISED to consider should it decide to allow private parties to seek compensation for non-cartel conduct.

In summary, international experience with private damages litigation varies:

- Many peer international jurisdictions **permit private damages claims for many different types of anti-competitive conduct**, not just hardcore cartel conduct (such as price-fixing, market allocation or bid-rigging).
- Some jurisdictions **permit such claims only after government enforcement** (e.g., India), while many others **permit private claims regardless of prior enforcement** (e.g., the US, EU, UK and Australia).
- Where private claims do not depend on prior enforcement, they are likewise **not usually bound by how the government chooses to review the conduct** (e.g., as a merger versus as an abuse of dominance or as a cartel). In fact, in some jurisdictions, such as the US and Australia, private parties can even **seek damages resulting from mergers that the relevant government agency has reviewed and not challenged**.

Based on the introduction above, the ALWG believes that, if private parties are allowed to seek compensation for damage suffered from civilly reviewable (non-merger) conduct, ISED could consider:

- **Whether private damages claims should be brought only with leave to the Competition Tribunal, as is currently the case, or before the courts as claims brought under section 36 of the Competition Act or both**. Currently, the Competition Tribunal has exclusive jurisdiction to determine whether there has been a violation of the Act's civilly reviewable conduct (in Part VIII of the Competition Act). The ALWG notes that peer jurisdictions vary in their approach to having a specialized versus a generalist adjudicator: in the UK the Competition Appeal Tribunal ("CAT") is the specialized court in that country (competition damages claims can also be brought in the High Court, but then are typically transferred to the CAT); in India the National Companies Law Appellate Tribunal is the specialized court; while the US, Australia and the EU permit claims in non-specialist courts.
- **Whether private damages claims should be available via class proceedings**. The ALWG notes that the vast majority of claims brought in Canada to date under section 36 of the Act have been advanced as class proceedings direct and indirect purchases including, typically on behalf of direct and indirect purchasers including Canadian consumers. Likewise, class proceedings are a significant feature of the private damages regimes in major comparator jurisdictions, such as the US and Australia, and, more recently, the UK. In India class actions are legally permissible although none have been filed to date. While class proceedings are available for claims brought under section 36 of the Competition Act, it is not clear whether they could be advanced before the Competition Tribunal given the language of the statutory leave test in section 103.1 of the Competition Act. More generally, it is doubtful consumers could advance claims before the Tribunal, whether through class proceedings or otherwise, given the requirement that the applicant seeking leave be directly and substantially affected in its business (as opposed to suffering loss or damage).
- **Whether to allow claims related to mergers, or those mergers that have not been notified to the Bureau on a mandatory or voluntary basis**. The possibility of immunization from subsequent civil claims could be a powerful incentive for merging parties to notify transactions to the Bureau that currently fall below the

mandatory notification thresholds. Currently, the Competition Act prohibits the Bureau from prosecuting merging parties under different sections of the Competition Act if it has sought an order under the Act's merger provisions. As described below, merger clearance in Europe immunizes the merging parties from subsequent damages claims for the harm caused by the merger (but not from any subsequent abuse of a dominant position). In contrast, similar "clearances" (i.e., decisions not to challenge mergers) in the US and Australia do not provide similar protection although proceedings of this nature are rare.

- **Whether claimants seeking damages should be exposed to adverse costs awards, or entitled to recover up to their full costs of investigating and advancing the proceeding as is the case today for claims brought under section 36 of the Competition Act**. For example, Australia insulates claimants from adverse costs awards in certain circumstances. This can incentivise meritorious claims that might not otherwise be brought. On the other hand, it reduces the discipline that adverse costs awards can bring and risks burdening defendants and the courts with unmeritorious claims and strike suits.

The ALWG provides in Annex 3 a summary of the international experiences, focused on the availability of private damages in these jurisdictions. The ALWG also provides in Annex 4 a summary of the international experiences, focused the treatment of mergers in private damages litigation.

The ALWG also believes it is important to provide comments on private litigation as an element of antitrust policy:

- Generally speaking, international regimes recognize that the ability for private plaintiffs to bring damages actions covering a wide breadth of anti-competitive activity is a **critical part of providing consumers relief, and deterring wrongful conduct**. The ALWG recognizes that, as currently designed, the provisions in Part VIII of the Competition Act are "reviewable practices" that are not deemed to be wrongful conduct, and the existing enforcement rights of both competition

agency and private litigants focus on prohibition and other remedial orders.

- **In some circumstances, the enforcers will decline to bring a civil, non-merger case**, including because the legal standards are difficult to prove in court. In these situations, **properly incentivized private plaintiffs can fill the void**. The government and private actions can also be complimentary—when, for example, the government is seeking an injunction to stop conduct and private plaintiffs seek damages.
- **How much private enforcement occurs varies by jurisdiction**. For example, some commentators believe the US system permits too much litigation. It is not uncommon, for example, to have an enforcer bring a case that includes a monetary component (e.g., corporate fine, restitution, disgorgement), while multiple sets of class action counsel bring parallel cases for damages. In these situations, it is **important that the enforcer prevent double-counting**, by factoring into the relief it seeks the likely apportionment of civil damages.
- On the other hand, only five of Australia's 139 active class actions as of December 2022 are proceedings for loss or damage allegedly sustained due to conduct contravening one of the restrictive trade provisions in Part IV of the Australian Competition and Consumer Act 2010 (Cth) ("CCA") (ie, cartel conduct, misuse of market power, resale price maintenance, or anti-competitive agreements including exclusive dealing). Only one of these proceedings relates to conduct that exclusively occured in Australia; all other proceedings are claims relating to **conduct which has wholly or partially occured in another jurisdiction** because of which it is alleged that Australian persons have suffered loss or damage. However, there are indications that the introduction into the CCA of the "no adverse costs order" provision in 2019 has led to more actions by private litigants. At the same time, **Australian, EU, Indian and UK plaintiffs can only recover single damages (with interest), not treble damages as their US counterparts can**. This difference may partially explain the greater apparent popularity of private damages claims in the US relative to Australia.

The **international experience with market studies is more varied than with private**

litigation. They feature prominently in some jurisdictions and less so in others. Regardless, while market studies can result in public reports, they **do not seem to have resulted in significant private litigation internationally**. The ALWG provides at Annex 5 an overview on the international experience with market studies.

VI. CONCLUSION

The IBA Working Groups appreciate the opportunity provided by ISED to comment on the Paper and on the modernization project carried out by ISED.

The Working Groups would be pleased to respond to any questions that ISED may have regarding these comments; or provide additional comments or information that may assist ISED.

ANNEX 1 – ACQUISITIONS OF NASCENT COMPETITORS

The MWG has prepared the table below, which summarizes recent merger control reforms adopted by a number of peer jurisdictions around the globe regarding their (a) jurisdictional tests and (b) substantive tests to address concerns over "killer acquisitions". These reforms generally focus on (a) although we have identified a number of relevant reforms relating to (b).

With respect to (a), the MWG has broadly identified three approaches that governments or competition agencies have adopted to address concerns over "killer acquisitions". These are (i) the introduction of an alternative jurisdictional threshold that sits alongside the existing threshold(s) ('alternative jurisdictional threshold')[5]; (ii) the imposition of an obligation on designated parties (typically as part of *ex-ante* legislation or code of conduct) to notify certain future acquisitions ('designated notification obligation')[6]; and (iii) the extension of the scope of the authority's jurisdiction to review transactions that do not meet the existing jurisdictional thresholds ('below-threshold jurisdiction)[7].

Jurisdictions	Reform(s) to jurisdictional test	Reform(s) to substantive test
EU	• **Reform approach:** designated notification obligation and below-threshold jurisdiction • Designated notification obligation: the Digital Markets Act ("DMA") requires platforms designated as 'gatekeepers' to notify the EC of any intended acquisition in the digital sector. The DMA is currently in force, but the anticipated obligations for 'gatekeepers' only commence in 2024. • Below-threshold jurisdiction: the EC has in recent years sought to clarify its jurisdiction to review mergers below its mandatory thresholds through a Member State merger referral request mechanism under Article 22 of the European Union Merger Regulation (EUMR). It has in recent times published guidance and a Q&A document on its new policy to accept merger clearance referral requests from Member States for transactions that fall	• No recent or incoming reforms.

[5] Such as the transaction value-based thresholds introduced in Austria and Germany.
[6] Such as the Digital Markets Act ("DMA") in the EU.
[7] Such as the Article 22 referral mechanism in the EU.

Jurisdictions	Reform(s) to jurisdictional test	Reform(s) to substantive test
	below the EUMR thresholds and/or their respective national merger control thresholds.[8] This power was affirmed by the General Court in *Illumina v Commission* in July 2022.[9] The EC envisions this mechanism to be used to address so-called 'killer acquisitions', such as where the turnover of at least one of the parties "does not reflect its actual or future competitive potential", which includes situations where the target is (1) a start-up with significant competitive potential and low revenues; or (2) an important innovator. • In addition to the Article 22 mechanism, below-threshold mergers that are not subjected to *ex ante* review may also be investigated on the basis of abuse of dominance following the European Court of Justice's judgment in the *Towercast* case (this is discussed further in Annex 4).[10]	
Austria	• **Reform approach:** alternative jurisdictional threshold • In 2017, Austria introduced a new transaction value threshold into its merger control regime. Austria has published a Joint Guidance on Transaction Value-Based Thresholds with Germany in 2018, which was subsequently updated in 2021.[11] • The transaction value threshold is set at EUR 200 million, requires the target to be 'active in Austria to a significant extent' and it applies on an economy-wide basis.	• In September 2021, Austria introduced the 'significant impediment of effective competition' ("SIEC") test (already used in the EU) as an alternative to the existing dominance test for the substantive merger assessment, but there is no indication that this was done in response to "killer acquisitions".
Germany	• **Reform approach:** alternative jurisdictional threshold and designated notification obligation • Alternative jurisdictional threshold: In 2017, Germany introduced a new transaction value based threshold into its merger control regime. It has published a Joint Guidance on Transaction Value-Based Thresholds with Austria in 2018, which was subsequently updated in 2021[12].	• In July 2013, Germany replaced the dominance test with the SIEC test, but this reform had the aim to align the substantive test of Germany's with the EU. There is no indication that this was done in response to 'killer acquisitions.

[8] The guidance was published in March 2021 is pursuant to a Member State referral mechanism under Article 22 of the EU Merger Regulation, please see https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021XC0331%2801%29. A Q&A relating to the guidance was published in December 2022, please see https://competition-policy.ec.europa.eu/system/files/2022-12/article22_recalibrated_approach_QandA.pdf.

[9] Please refer to https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-07/cp220123en.pdf.

[10] Please refer to https://app.parr-global.com/files/cases/1567858/C_0449_21%20EN%20Concl-.pdf for Case C-449/21 dated 13 October 2022.

[11] Please refer to https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionsschwelle.pdf?__blob=publicationFile&v=2

[12] Please see footnote 8.

Jurisdictions	Reform(s) to jurisdictional test	Reform(s) to substantive test
	• The transaction value threshold is set at EUR 400 million, requires the target to be 'active in Germany to a significant extent' and it applies on an economy-wide basis. • Designated notification obligation: In January 2021, Germany introduced an enhanced merger control tool which allows the Federal Cartel Office ("FCO") to impose on a specific large company an obligation to notify the FCO of all future transactions in one or several specific economic sectors. This order may only be imposed in economic sectors in which the FCO has previously conducted a sector inquiry.	
Italy	• **Reform approach:** below-threshold jurisdiction • *Autorità Garante della Concorrenza e del Mercato* ("AGCM") on 27 December 2022 published guidance[13] on how it intends to exert its new power to call-in below threshold mergers, which was introduced in the August 2022 reform to the Italian Competition Law with the potential application towards so-called "killer acquisitions". • Pursuant to its new power, the AGCM may call-in transactions for up to six-months after closing where (i) at least one existing turnover threshold is exceeded, or the total worldwide turnover of the undertakings concerned exceeds EUR5 billion[14]; and (ii) there are concrete risks for competition taking into account the detrimental effects on the development and diffusion of small undertakings characterized by innovative strategies. The notice clarifies that the AGCM may exercise this power if the target is a start-up with significant competitive potential, is an important innovator, has access to competitively significant assets (including data or intellectual property rights) or provides key inputs/components for other industries.	• The August 2022 reform to the Italian Competition Law enables the AGCM to consider the anticompetitive effects of a concentration on "small firms characterized by innovative strategies, including in the new field of technologies". This provision may form the basis for AGCM to intervene in so-called 'killer acquisitions' to either impose remedies or prohibit the transaction.
France	• No prior or proposed reforms. • A consultation to, among other proposals, introduce a transaction value threshold (similar to Germany and Austria) was conducted	• No recent or incoming reforms.

[13] Please refer to this press release (in Italian language only): https://www.agcm.it/pubblicazioni/bollettino-settimanale/2022/46/Bollettino-46-2022.

[14] As of January 2023, the existing turnover thresholds are triggered where (i) the total Italian turnover of all undertakings concerned exceed EUR517 million; and (ii) at least two of the undertakings concerned each have Italian turnover exceeding EUR31 million.

Jurisdictions	Reform(s) to jurisdictional test	Reform(s) to substantive test
	in October 2017, with the conclusion being reached in June 2018 that no legislative reform was necessary.	
UK	• **Reform approach:** designated notification obligation and alternative jurisdictional threshold. • Designated notification obligation: In July 2021, the UK government launched consultation of the new pro-competition regime for digital markets, under which a bespoke merger regime would apply to firms designated as having 'strategic market status' ("SMS"). In the consultation outcome published in May 2022,[15] it appears the regime would operate in parallel with the existing merger control regime, and entails a mandatory and suspensory advanced reporting requirement on SMS firms to inform the Competition and Markets Authority ("CMA") of its most significant transactions, i.e. where over a 15% equity is acquired by an SMS firm, the value of the SMS firm's holding exceeds GBP25 million, and the transaction meets a local nexus test. • Alternative jurisdictional threshold: In April 2022, the UK government announced wide-ranging reforms to UK competition and consumer law policy, including the introduction of a new 'acquirer only' share of supply threshold that extends the CMA's jurisdiction over mergers where an acquirer has an existing share of supply of goods or services of 33% or more in the UK or a substantial part of the UK, and a UK turnover of at least GBP350 million. No share increment is required and there is no minimum threshold for the target to meet. The UK government considers that the new threshold will provide an effective jurisdictional basis for 'killer acquisitions' that risk undermining the development of new products or services. [16] • The above reforms have been consolidated into the Digital Markets, Competition and Consumer Bill, and the first reading of the bill is likely to take place in spring 2023.	• The proposals for the designated notification obligation for SMS firms also envisage a lower standard of proof of competitive harm to apply to Phase 2 investigations. Instead of applying the usual substantial lessening of competition ("SLC") test based on the balance of probabilities (i.e. more likely than not), the CMA may intervene on mergers where there is a 'realistic prospect' of SLC (which is the test currently applied to Phase 1 investigations). • In an earlier 2019 report by the Digital Competition Expert Panel, there were proposals to introduce a 'balance of harms' standard as an alternative to the 'balance of probabilities' standard, which takes into account the scale and likelihood of potential harms and benefits arising from the merger to assess whether the merger is expected to be beneficial or harmful to competition. As at the time of this writing, this standard does not appear to be contemplated in the proposals for the Digital Markets, Competition and Consumer Bill.

[15] See consultation outcome, A new pro-competitive regime for digital markets – government response to consultation dated May 2022 - https://www.gov.uk/government/consultations/a-new-pro-competition-regime-for-digital-markets/outcome/a-new-pro-competition-regime-for-digital-markets-government-response-to-consultation#part-3-strategic-market-status.

[16] See consultation outcome, Reforming competition and consumer policy: government response dated April 2022 - https://www.gov.uk/government/consultations/reforming-competition-and-consumer-policy/outcome/reforming-competition-and-consumer-policy-government-response#chapter-1-competition.

Jurisdictions	Reform(s) to jurisdictional test	Reform(s) to substantive test
US	• **Reform approach**: below-threshold jurisdiction and designated notification obligation • In October 2021, the FTC announced a proposed order stating that future merger enforcement orders will include a provision requiring the acquirer to seek prior approval from the FTC for subsequent below-threshold transactions affecting the relevant markets. The FTC has discretion to include requirements based on the future market power the merging party is likely to possess, in order to identify mergers involving nascent or fringe competitors. • Under the proposed Platform Competition and Opportunity Act ("PCOA"), any acquisition by a "covered" platform meeting the designated quantitative thresholds would be prohibited, unless the online platform can show that the acquired entity is not its competitor and does not enhance its market position. PCOA is still in the early stages of the legislation process.	• The Federal Trade Commission ("FTC") and the Department of Justice ("DOJ") announced in July 2021 that they are rewriting their joint merger guidelines. The revised guidelines are expected to make it easier for the agencies to challenge acquisitions of potential or nascent competitors and so called "killer acquisitions" of start-ups that could independently develop into meaningful competitors. • The FTC recently challenged the Meta/Within transaction on the basis of potential competition. The FTC lost the case and the parties closed the transaction, but the court did recognize that the potential competition doctrine remains a valid legal theory.[17] This could embolden the FTC and DOJ to bring similar cases in the future.
Australia	• **Reform approach:** designated notification obligation • In August 2021, the Australian Competition and Consumer Commission ("ACCC") proposed merger regime changed to deal with 'killer acquisitions' through a tailored test applicable to a defined category of "large digital platforms". In defining this category, the ACCC will consider factors such as the platform's size and scope, whether it has market power and whether it is a 'gateway' firm that is able to control how other businesses interact with consumers. The test will likely require a lower probability of competition harm to be established and have lower notification thresholds than those applicable to the broader economy. • In November 2022, the ACCC Interim Report No. 5: Updating competition and consumer law for digital platform services[18] considered a stricter prohibition on certain categories of	• In August 2021, the ACCC proposed the following changes to the economy-wide substantive merger test:[19] (a) to amend the merger factors that currently guide the application of the SLC test such that there is a focus on structural conditions for competition and the potential negative effects of an acquisition. These could include consideration of control and access to data, and potential loss of competitive rivalry; (b) clarification of the burden of proof of SLC as 'a possibility that is not remote';

[17] Fed. Trade Comm'n v. Meta Platforms, Inc., 5:22-cv-04325-EJD (N.D. Cal. Jul. 28, 2022)

[18] See the September 2022 interim report for the ACCC's digital platform services inquiry 2020-2025 - https://www.accc.gov.au/focus-areas/inquiries-ongoing/digital-platform-services-inquiry-2020-25/september-2022-interim-report

[19] PaRR Report: "ACCC set to reveal merger control regime change proposals next week – chairman". - https://app.parr-global.com/intelligence/view/intelcms-xpvhk9

Jurisdictions	Reform(s) to jurisdictional test	Reform(s) to substantive test
	acquisitions by designated large digital platforms, (i.e. prohibiting digital platforms that meet the relevant criteria from acquiring any business in certain categories, such as those businesses operating in the same or adjacent markets, or businesses that may allow a digital platform firm to extend, expand or entrench its market power).	(c) introduction of a provision to deem acquisitions where one party already has substantial market power and as a result of the acquisition, is likely to entrench, materially increase or materially extend the substantial market power, as having the effect of SLC. • In the November 2022 report which focuses on the digital sector, the ACCC echoed the suggestions above and made the following additional proposals: (a) to introduce a 'balance of harms' assessment (similar to the proposal discussed in the UK section above); (b) to reverse the burden of proof for acquisitions by large digital platforms that meet the relevant criteria; (c) to have an enhanced deeming provision, which also focuses on situations where an acquisition by a large digital platform could raise barriers to entry for rivals or remove / weaken sources of future competitive constraints.

ANNEX 2 – TREATMENT OF EFFICIENCIES IN MERGER REVIEW

The MWG has prepared the table below, which summarizes the approaches adopted by certain peer jurisdictions for efficiencies assessments in the context of merger reviews.

Jurisdiction	How are efficiencies assessed?	Total welfare *or* consumer welfare standard
EU	• Recital 29 of the EUMR and the European Commission (EC) horizontal merger assessment guidelines provide the basis for merger efficiencies to be taken into account during the merger assessment. • The EC will consider any substantiated efficiency claim where such efficiencies generated by the merger are "*likely to enhance the ability and incentive of the merged entity to act pro-competitively for the benefit of consumers, thereby counteracting the adverse effects on competition which the merger might otherwise have*".[20] • Any efficiency claim must meet three cumulative conditions: the efficiencies have to benefit consumers, be merger-specific and be verifiable.	• Consumer welfare standard
UK	• The CMA takes into account efficiencies when assessing whether there is an SLC, as detailed in its merger assessment guidelines.[21] Section 22 of the Enterprise Act 2002 also requires the CMA to consider 'relevant customer benefits' (discussed below) in its merger review. • The CMA considers there to be two categories of efficiencies, rivalry-enhancing efficiencies and relevant customer benefits. Rivalry-enhancing efficiencies change the incentives of merging parties and induce them to act as stronger competitors to their rivals (e.g. by reducing marginal costs that gives them incentives to provide lower prices and/or better quality), and these are assessed when determining whether any SLC arises. Relevant customer benefits refer to benefits to UK customers that result from the merger other than through improved competition in the market (e.g. greater levels of innovation, reduced carbon	• Consumer welfare standard

[20] See the EC's Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, paras 77 to 88. - https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32004R0139

[21] See the CMA's Merger Assessment Guidelines, paras 8.2 to 8.27 - https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1051823/MAGs_for_publication_2021_--_.pdf

Jurisdiction	How are efficiencies assessed?	Total welfare *or* consumer welfare standard
	emissions); while these do not prevent an SLC, they may outweigh the adverse effects of an SLC. o Note that relevant customer benefits are not taken into account in the CMA's competitive assessment, but may be considered when the CMA makes a Phase 2 referral decision or when considering remedies options. • Rivalry-enhancing efficiencies need to be (a) timely, likely and sufficient to prevent an SLC from arising, (b) merger-specific, and (c) benefit customers in the UK.	
US	• The current US Merger Guidelines provide for a consideration of efficiencies in two ways. First, efficiencies "may enhance competition by permitting two ineffective competitors to form a more effective competitor." Second, the guidelines recognize an efficiencies "defense" once a *prima facie* case is established if the efficiencies are "merger specific" and are sufficient to create cost reductions that would offset any potential price increase following the merger.[22] The current DOJ and FTC leadership, however, are reconsidering this approach to efficiencies, and the new guidelines that the agencies are currently drafting will likely take a different approach. The head of the DOJ Antitrust Division, Jonathan Kanter, has publicly stated that he believes the traditional analysis does not reflect "market realities."[23]	• Currently consumer welfare standard
Australia	• The CCA does not explicitly provide for the consideration of merger efficiencies during the merger review process, although the statutory list of factors that should be taken into account when determining an SLC is not exhaustive. The ACCC's Merger Guidelines[24] list efficiencies as a merger factor it considers as part of its competitive assessment. • The ACCC considers the impact of efficiencies on the internal cost structure of the firm as being most relevant to its competitive assessment, and it considers favorably efficiencies that are likely to result in lower prices, increased output and/or higher quality	• 'Modified' total welfare standard

[22] See Horizonal Merger Guidelines, 19 August 2010 at https://www.justice.gov/atr/horizontal-merger-guidelines-08192010#10

[23] See https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-modernizing-merger-guidelines

[24] See the ACCC's Merger Guidelines, para 7.63 to 7.66 - https://www.accc.gov.au/system/files/Merger%20guidelines%20-%20Final.PDF

Jurisdiction	How are efficiencies assessed?	Total welfare *or* consumer welfare standard
	goods or services. The efficiencies have to be merger-related, involve a significant reduction in the marginal production cost of the merged firm, and be supported by clear and compelling evidence that resulting efficiencies directly affect the level of competition in a market and these efficiencies will not be dissipated post-merger. • While the Merger Guidelines appears to suggest a total welfare standard, the Australian Competition Tribunal decision on the *Qantas/Air New Zealand* merger clarified that the relevant standard is a 'modified total welfare standard', where "*the use of a form of the total welfare standard as the most appropriate standard for identifying and assessing public benefit. We say "form of" the total welfare standard because … whilst the Tribunal does not require that efficiencies generated by the merger or set of arrangements necessarily be passed on to consumers, it may that, in some circumstances, gains that flow through only to a limited number of members in the community will carry less weight*".[25]	

[25] *Re Qantas Airways* (2005), at [185].

ANNEX 3 – PRIVATE RIGHTS OF ACTION TO RECOVER DAMAGES

The ALWG has prepared a summary of the availability of private damages in SEVERAL jurisdictions.

Jurisdiction	Availability of private damages
US	• The US legal regime permits private parties to obtain damages for all types of antitrust violations, whether based in "hardcore" cartel conduct (e.g., price fixing, bid rigging, market allocation) or otherwise (e.g., monopolization, tying, exclusive dealing). Section 4 of the Clayton Act provides for the trebling of damages in such actions. Jury trials are also available. • Historically, private damages actions based on cartel conduct have been more common than actions based on other forms of anti-competitive conduct, since they often can leverage the existence of a criminal antitrust investigation, and have fewer legal burdens associated with proving the case. In recent years, however, there have been prominent examples in the US of civil, non-merger damages actions, mirroring increased enforcement by the DOJ and FTC in this area. • Class actions are commonplace in the US and are conducted using an "opt-out" model.
EU	• In EU member states, private parties are entitled to seek compensation for damages that result from any type of EU competition law infringement. This includes any hardcore and "by-object" infringements such as cartels. Cartels have been the most important and are an increasingly active area of private damages litigation across various EU member states. Such litigation is common in some the larger member states such as Germany, France and Spain, with many plaintiffs also launching claims in the Netherlands. • Private damages claims are also available in relation to abuses of a dominant position. This area is less active than cartel damages litigation. There is an increasing number of private enforcement actions in recent years in various countries (including for example Spain, France, the Netherlands and the Czech Republic), although, to date, successful claims appear to be rare. • Private damages claims in theory are also available in relation to non-hardcore, "by-effect" infringements. However, this is not a very active area of private damages litigation in EU member states. In fact, "by-effect" infringements are also not the primary target of enforcement action by the EU Commission or most national competition authorities. The underlying reason is the relatively high standard of proof that authorities and plaintiffs face to establish an infringement.
UK	• In the UK, those harmed by an infringement of competition law are entitled to seek damages with respect to: (1) the prohibition on anti-competitive conduct (the Chapter I prohibition); and (2) the prohibition on the abuse of a dominant position (the Chapter II prohibition). • Claimants are entitled to bring claims on a "stand-alone" basis (where the claimant is required to prove an infringement of competition law to establish liability), or on a "follow-on" basis (where the claimant may rely on a regulator's prior infringement finding as evidence that anti-competitive behaviour has occurred, meaning that they only need to prove that the infringement caused them to suffer loss and the quantum of that loss). Some claims are a "hybrid" – i.e. they draw on aspects of an infringement decision but also include stand-alone elements. • The UK has established itself as an attractive forum for private actions claims arising out of competition law breaches. Significantly, the introduction of an opt-out class actions regime in October 2015 allows the pursuit of mass claims in

	the UK by a single representative on behalf of an entire class of claimants (other than those who have expressly opted out of the action), without needing to identify every individual claimant upfront. The CAT granted its first collective proceedings order in August 2021, authorizing opt-out collective proceedings for damages against Mastercard, and 2022 has subsequently seen a record number of opt-out class actions being launched. [26]
Australia	• The CCA permits private parties to seek compensation for loss or damage by reason of any conduct that contravenes the restrictive trade provisions in Part IV of the CCA (cartel conduct, misuse of market power, resale price maintenance, or anti-competitive agreements including exclusive dealing). Compensation is limited to loss or damage that may be proven to the civil standard (i.e., on the balance of probabilities). • The CCA also permits an applicant for loss or damage to seek an order from the court to the effect that the applicant is not liable for the costs of any respondent to the proceedings, regardless of the outcome or likely outcome of the proceedings. This is known as a "no adverse costs order." To avail itself of this protection the applicant bears the onus of demonstrating that the action: o raises a reasonable issue for trial; o raises an issue that is not only significant for the applicant, but may also be significant for other persons or groups of persons; and o the disparity between the financial position of the applicant and the financial position of the respondent is such that the possibility of a costs order that does not favour the applicant might deter the applicant from pursuing the action. • Finally, class actions may be instituted by private parties seeking damages for Part IV contraventions of the CCA. Australia utilises an "opt-out" model; persons within the defined group will be bound by the outcome of the proceedings unless they opt out by written notice by a date fixed by the court.
India	• The Competition Act, 2002, permits parties to claim monetary compensation against respondents arising out of final orders rendered following enforcement activity by the Competition Commission of India ("CCI"). Such claims are available against all types of behavioural contraventions of the Act (e.g., cartels, bid-rigging, abuse of dominance, exclusive agreements, minimum resale price maintenance, tied selling, and refusal to deal). • Because private claims can only follow final orders (including all appeals), private parties can be significantly delayed in obtaining compensation. To date, there has been only one application for compensation before India's Appellate Tribunal since the CCI began enforcement activity in 2009.

[26] *Merricks v Mastercard* [2021] CAT 28

ANNEX 4 – PRIVATE DAMAGES LITIGATION RELATED TO MERGERS

The ALWG has prepared a summary of the international experiences, focused on the treatment of mergers in private damages litigation.

Jurisdictions	Treatment of mergers in private damages litigation
US	• An agency's decision to decline to challenge a merger does not preclude private plaintiffs from doing so. In the U.S system, private plaintiffs can bring their own challenge to block a merger (although this is very rare). Additionally, private plaintiffs can challenge a merger after the fact (known as a "consummated merger" challenge). Finally, private plaintiffs can point to the effects of a merger as evidence of monopolization, an anti-competitive agreement between competitors, or any other kind of antitrust claim. In other words, an agency's decision regarding a merger does not, as a legal matter, insulate the merger against a challenge brought by private plaintiffs
EU	• In principle, under EU law, if a transaction qualifies as a concentration that falls within the EU merger regulation[27] (EUMR), it cannot also qualify as an abuse of a dominant position or an anti-competitive agreement. This is set out in Article 21(1) of the EUMR. In practical terms, this means if the EU Commission approves a concentration under the EUMR, it cannot be later challenged as an abuse of a dominant position or as an anti-competitive agreement by private parties such as customers or competitors. • Such parties however have other recourse against these concentrations. This results from the nature of the EU's merger control regime, where all mergers which meet the thresholds are subject to mandatory notification. After the notification, the EU Commission issues an administrative (clearance or prohibition) decision. This decision, in turn, can be challenged by third parties in an administrative litigation before the European Courts of Justice. This right to a legal review is set out in Article 21 of the EUMR and Article 263 of the Treaty on the Functioning of the European Union. The legal review by the European Courts of Justice is administrative in nature, which means that damages claims are not available, and the legal review is limited to the issue whether the EU Commission's decision was lawfully issued. • However, the situation is different, if a transaction does not meet the notification thresholds set out in the EUMR, and therefore it is not subject to *ex ante* competition law enforcement. On 17 March 2023, in a high-profile preliminary ruling in C-*449/21 Towercast*, the European Court of Justice (ECJ) held that such below-thresholds mergers can constitute an abuse of a dominant position within the meaning of EU competition law and thus they can become subject to *ex post* competition enforcement action by national competition authorities. Advocate General Kokott, in her opinion of 13 October 2022, explained that this position is not only consistent with black-letter EU law and earlier judgements of the ECJ, but it is also supported by sound policy arguments: o "48. […] supplementary application of Article 102 TFEU [ie the EU law against the abuse of dominance – comment by IBA] […], is likely to contribute to the effective protection of competition in the internal market, in so far as concentrations which are problematic under competition law do not meet the thresholds under merger control law and are therefore not subject, in principle, to ex ante control. This is because, as the Italian Government and the Commission point out, a gap in protection has emerged in recent years in the coverage and control, under

[27] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, p. 1–22

	competition law, of acquisitions of innovative start-ups, for example in the fields of internet services, pharmaceuticals or medical technology ('killer acquisitions'). This concerns situations in which established and powerful undertakings acquire emerging undertakings which do not yet have a large turnover and which operate in the same, neighbouring, upstream or downstream markets, at an early stage of their development in order to eliminate them as competitors and consolidate their own market position. In order to ensure effective protection of competition in that respect also, it should therefore be possible for a national competition authority to resort at least to the 'weaker' instrument of punitive *ex post* control under Article 102 TFEU, provided that the conditions for it are met. Such a need may also exist in the case of acquisitions in highly concentrated markets, such as that in the present case, where the aim of such acquisitions is to eliminate competitive pressure from an emerging competitor."[28] • The *Towercast case* related to public enforcement, i.e. the issue was whether a threshold transaction that is below the EUMR's thresholds can be challenged as an abuse of a dominant position by a competition authority. Nevertheless, the ECJ very clearly explained that such below-threshold mergers are generally subject to Article 102 of the Treaty on the Functioning of the European Union (TFEU), which prohibits the abuse of a dominant position. It is well established in EU law that any breach of Article 102 TFEU can be subject to private enforcement action in courts of EU member states. Thus, the *Towercast* ruling implies that private parties can also challenge below-threshold mergers on the basis that they amount to an abuse of a dominant position. At this stage, however, this remains a theoretical possibility only: as of March 2022, the ALWG is not aware of any such claims, ie whereby an aggrieved party would have successfully claimed damages from a dominant company as a result of the latter's involvement in a merger.
UK	• The ALWG is not aware of any cases where a merger which was cleared by the CMA has been the subject of a private damages claim arguing that the merger constitutes an abuse of dominance or a horizontal agreement between competitors. However, in principle there is nothing to prevent a claimant making such allegations and, if proven, in principle they should be capable of giving rise to damages awards just as in any other "stand-alone" damages claim.
Australia	• The ACCC's decision to review and clear a merger does not preclude third parties from taking private action for misuse of market power or an anti-competitive agreement. • The clearance process is not specified in statute but is a procedure advised and implemented by the ACCC. Typically, when a merger is cleared in Australia, the ACCC provides only an indication that it will not oppose the transaction. The ACCC does not unequivocally state that the particular transaction does not, or will not, substantially lessen competition in a market in Australia. The ACCC expressly leaves open the prospect that it will rereview its decision not to oppose should further information come to its attention. • This means that a decision to "clear" a merger is not a bar to action by a third party who is aggrieved by the transaction or holds the view that the transaction is likely to substantially lessen competition in a market in Australia. Such a person may take proceedings alleging that the transaction is likely to substantially lessen competition in a relevant market in Australia in breach of section 50 CCA, and under section 81(1) CCA may seek an order from the court for

[28] See https://curia.europa.eu/juris/document/document.jsf?docid=267143&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=1752043 at [48]

	directions for the purpose of securing the disposal by the acquirer of all or any of the shares or assets acquired. Damages for loss caused by the merger may also be sought under section 82 CCA. Although rare such cases have been brought in the past although none have been litigated to judgment but instead have settled as between the relevant parties.
India	• Closed mergers control orders normally do not trigger inquires of abuse of dominance and hence do not result in subsequent claims for compensation. However, if the party or parties engaged in post-merger abusive conduct, the CCI could take enforcement action which could lead to private compensation claims.

ANNEX 5 – MARKET STUDIES AND PRIVATE LITIGATION

The ALWG has prepared an overview on the international experience with market studies.

Jurisdiction	Market study framework
US	• Market studies by enforcement agencies are not an important feature of the US system. There are some exceptions. For example: o The FTC occasionally conducts retrospective studies of consummated mergers; o The FTC has a group that monitors oil and gas prices, and in that context has released reports on occasion; and o The DOJ and the FTC convene hearings and workshops to discuss industry-specific issues (such as in the health care or labor markets). • Generally speaking, the DOJ and FTC are organized to identify and pursue individual cases, not to conduct studies on entire industries. The ALWG is not aware of any of the above efforts that have directly led to private litigation.
EU	• The EU Commission has the power to conduct sector inquiries, when the trend of trade between Member States, the rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the common market. • In such cases, the Commission may conduct an inquiry into a particular sector of the economy or into a particular type of agreements across various sectors. During a sector inquiry, the Commission has almost identical powers as in case of an administrative investigation into other anti-competitive conduct. In particular, it can request information, take statements, inspect companies' premises, and impose fines on companies which fail to respond or cooperate. However, in a sector inquiry the Commission cannot make infringement findings or impose remedies or fines for substantive competition law infringements. • Historically, the Commission has considered sector inquiries to be a very helpful tool for furthering its understanding of certain new or changing sectors. The Commission conducted sector inquiries in various regulated and other sectors: o in the telecommunications market: 3G (2004-2005), mobile roaming (2000), leased lines (1999-2002) local loop (2000-2002), and most recently on consumer internet of things (2020-2022) o in the energy market (2005), and subsequently specifically on state aid to secure electricity supplies (2015-2016) o in the financial services sector: retail banking (2005-2007), business insurance (2005-2007) o pharmaceuticals (2008-2009) o e-commerce (2015-2017) • None of these sector inquiries directly triggered any wave of private litigation. Instead, the EU Commission followed up in certain sectors with targeted enforcement against certain practices, for example, after the pharmaceuticals and e-commerce sector inquiries. To the extent that such enforcement may have had an effect of enabling certain private damages actions, that has been indirect in nature and not quantifiable.
UK	• The CMA can investigate markets with particular features which may give rise to anti-competitive effects, but which might not be captured by the prohibitions on anti-competitive agreements and abuse of dominance, by launching a market study and, subsequently, a market investigation. • Under the Enterprise Act 2002, the CMA may launch a market investigation if it has reasonable grounds for suspecting that any feature of a market in the UK prevents, restricts or distorts competition in connection with the supply or

	acquisition of goods or services in the UK or a part of it. The CMA may first undertake a market study, a shorter preliminary investigation into the workings of a market, before preceding to a full market investigation. Market investigation references can also be made by sectoral regulators with competition powers, such as Ofgem in relation to the energy sector and the Financial Conduct Authority in relation to financial markets. • Market investigations in the UK aim to promote competition where particular market features are generating anti-competitive effects, but where the issue is not necessarily attributable to individual infringements of competition law. In general, investigations focus on broader structural concerns, such as consumer behaviour and sector-wide practices, rather than conduct of individual companies. The remedies available to the competition regulator at the end of a market investigation are extensive, including far-reaching structural, behavioural and consumer-facing remedies. The regulator can also make recommendations to government for a change in policy/regulation. • As they do not result in findings of infringement against individual companies, market investigations tend not to lead directly to private enforcement. However, a high level of disclosure is required of participants in the course of a market investigation. Confidentiality is not a bar to such disclosure, although the regulator is under a general duty not to further disclose confidential business information obtained in the course of its investigation, with certain exceptions. While market investigations may form the basis for alleging an infringement under the Chapter I or II prohibitions and resulting private damages claims, to-date claims have only been brought relying indirectly on such investigations.
Australia	• The ACCC may undertake a market study of its own volition, or in the alternative, may be directed by the Treasury Department to undertake a public inquiry into a certain matter with a formal report or reports to be delivered to government (such as the long-term reviews that are presently underway in Australia in relation to gas and electricity markets, and digital platforms). • Inquiries directed by the government are implemented to better understand industry sectors and to permit the ACCC to make recommendations to government as to any changes to legislation necessary to address issues identified. The long running gas inquiry (commenced in 2017 and not mandated to complete until 2030) has identified several areas for proposed legislative reform. Information and evidence acquired during that inquiry has directly led to recent government intervention in the East Coast Gas Market in the form of a price cap on domestic sales of gas in 2023. Information provided to the ACCC during an inquiry may also be disclosed to the market if it is in the public interest that disclosure should be made. This can have reputational effects and may provide private litigants with some insights into corporate conduct that may otherwise not be available. • Market studies undertaken by the ACCC on its own volition have ranged from wine and agriculture to communications. These are undertaken with the intention of providing a greater degree of transparency into the workings of a particular sector. They improve the ACCC's ability to move quickly if necessary, due to improved understanding of that sector. • To date the ACCC's market studies have not led to private litigation but have permitted the regulator itself to take action (for example, a review into excessive surcharges on credit cards led to proceedings being instituted against Mastercard in May 2022 for allegedly engaging in anti-competitive conduct commencing in late 2017). • It seems unlikely that private enforcement actions would flow from the ACCC's market studies given that they tend to report on industry trends rather than the actions of particular corporations, although they could form part of the material relied on by litigants for the purposes of grounding a claim.

India	• Competition advocacy is one of the CCI's key non-enforcement mandates. Hence, it carries out, from time to time, market studies and publishes market study reports. Final market study reports are publicly available on the CCI's website. In the last several years, the CCI has studied the e-commerce, pharmaceutical, private equity, and telecommunications industries, among others. • Because private compensation claims in India can only follow final enforcement orders, market studies do not result in private claims in India.