PARADIGM OR PARADOX: CANADA'S COMPETITION LAW REGIME IN THE NEW AGE OF POPULISM

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The consumer welfare consensus that has operated as the guiding principle of modern competition policy is under attack in the United States and in Europe. The Neo-Brandeisian movement in the United States seeks to expand the socio-economic objectives of competition law and revert to presumptive analyses focused on market structures rather than market outcomes. Certain European governments are seeking to amend European Union merger control legislation to enable Europe to develop national champions for the globalized economy.

In both cases, such reforms would undermine the regulatory predictability and transparency that is the touchpoint of competition policy grounded in the pursuit of consumer welfare. This article examines the significance of these developments from a comparative perspective and assesses what the rise of this antitrust populism means for Canada. In this context, the Canadian Competition Act—which features a compromise between the ideological purity of the consumer welfare standard and the pursuit of other socio-economic policy objectives—has the potential to be a paradigm in modern competition enforcement. Those reflecting on competition policy in the United States and in the EU may draw some useful lessons from the way in which the Canadian compromise in policy objectives does not undermine the predictability of its regime.

Aux États-Unis comme en Europe, le consensus qui régnait quant à ce qui est bon pour le consommateur—et qui servait de principe directeur dans les politiques modernes sur la concurrence—est attaqué de toutes parts. Le courant néo-brandeisien, chez les Américains, cherche à étendre les objectifs socio-économiques du droit de la concurrence pour revenir à un système d'analyse présomptif qui s'arrête à la structure du marché plutôt qu'à ses résultats, tandis que de l'autre côté de l'Atlantique, certains États cherchent à modifier la législation de l'Union européenne qui réglemente les fusions afin de donner une longueur d'avance à leurs nations dans une économie mondialisée.

Dans les deux cas, de telles réformes viendraient miner la prévisibilité et la transparence qui forment la pierre angulaire d'une politique de concurrence d'abord et avant tout au service du consommateur. L'article se penche sur l'importance de ces derniers développements dans une optique comparative, et se prononce sur les implications potentielles du populisme antitrust pour le Canada. Car dans le présent contexte, la Loi sur la concurrence

canadienne—qui se veut un compromis entre la pureté idéologique de la norme du bien du consommateur et la poursuite d'autres objectifs politiques de nature socio-économique—a le potentiel de s'ériger en nouveau paradigme d'un système moderne d'encadrement de la concurrence. Ceux qui examinent les politiques en la matière aux États-Unis et dans l'Union européenne peuvent donc tirer des leçons du compromis canadien, dans lequel les objectifs en matière de politiques ne viennent pas brouiller la prévisibilité du régime légal.

Recent developments around the world have brought back into sharp focus the debate on whether competition policy, and in particular merger control policy, remains fit for purpose. Rapid technological change and the impact of globalization have generated political developments which have put existing competition law frameworks under pressure, in particular by questioning the extent to which competition law should retain its primary focus on consumer welfare or should seek to achieve other goals, including the creation of national champions, tackling income inequality and addressing environmental and other societal challenges. As in the aftermath of the global financial crisis of 2008, competition law practitioners and agencies—as well as politicians more broadly—have put the objectives of competition policy back on the agenda.

That agenda is not, however, homogeneous, with commentators in the U.S., Europe, and Canada focusing on several different subjects. Nevertheless, these are branches that arguably share a common source, by examining the philosophical basis for competition law policy. As governments come under ever greater pressure from the forces of populism (and in some instances become populist themselves), competition law is increasingly viewed as a means of achieving a wide range of policy objectives, rather than the pursuit of consumer welfare for its own sake through empirical economic evidence. The policy objectives under scrutiny differ as between the U.S., the EU and Canada, but in each case, there is sufficient common ground to warrant closer inspection of their commonalities. This article will seek to determine whether the encroachment of other socio-economic objectives into competition policy in the U.S. and Europe is inevitable, and reflect on what this means for the competition law regime in Canada. More so than its counterparts in the U.S. and Europe, the Canadian regime already fulfils a mandate that provides room for the pursuit of some policy objectives that may be popular with those advocating changes to the established competition law consensus. Given the particular relevance of this debate to merger control, this review will primarily focus on this aspect of competition policy, addressing where relevant other competition policy issues.

In the U.S., the debate coincides with the fortieth anniversary of Robert Bork's seminal publication, *The Antitrust Paradox*, which led to the establishment of a singular policy goal for antitrust—consumer welfare—and that goal being tied to U.S. antitrust legislation. In the context of growing concerns about economic inequality, novel and dynamic disruption from technology, and the rise of the "Platform Economy", the singularity of this consensus is under pressure. Indeed, the "Neo-Brandeisian antitrust movement"[2] sees antitrust enforcement as an important vehicle for achieving a wide range of policy objectives, hitherto allegedly neglected under the current analytical framework.

In Europe, the European Commission's (the "Commission") decision to prohibit the merger of Siemens and Alstom's rail businesses has been the catalyst for strong criticism from the French and German governments on grounds that the merger was the opportunity to create a European national champion to compete on a global level, particularly with Chinese suppliers.[3] The Franco-German position has hardened into a demand for reform of the *European Union Merger Regulation* ("EU Merger Regulation") itself, which would pivot the EU merger assessment framework away from purely competition-based criteria. In essence, political pressures in the EU, driven by the success of populism at the ballot box, have forced politicians ordinarily content to leave EU-wide competition enforcement well alone to propose a series of protectionist reforms that would act as a handbrake on the freedom and independence enjoyed by the Commission to adjudicate merger cases.

In highlighting the challenges facing the competition regimes in the U.S. and the EU, this article ultimately concludes that the Canadian *Competition Act*[4]—which features a compromise between the ideological purity of the consumer welfare standard and the pursuit of other socio-economic policy objectives—is perhaps best suited of the three examined jurisdictions to rise to the challenges of antitrust populism, and therefore has the potential to be a paradigm in modern competition enforcement. Those reflecting on competition policy in the U.S. and the EU may draw some useful lessons from the way the Canadian compromise has been administered over time, in particular how it is possible to incorporate potentially competing policy objectives in the same regime. In this evaluation, of paramount continuing importance is the grounding of competition policy in transparent and predictable analytical frameworks which are independent of political interference on public interest grounds except in the clearest of cases under well-defined parameters. Any future reform to Canada's competition regime (or those of the U.S. and the EU) should keep these objectives front of mind, particularly as other

means exist within government toolkits to further political objectives or industrial policies that conflict with the aforementioned principles.

This article will proceed as follows. Section 1 will provide historical context crucial to the debate in each of the three jurisdictions. Section 2 will examine how antitrust populism has driven the debate both in the U.S. and in Europe, and the significance of that debate to the *status quo* in Canada. Section 3 will reflect on Canada's experience in merger control policy and the interaction of this policy with Canada's broader governmental agenda. Section 4 will conclude with recommendations for Canada—and the U.S. and the EU—going forward.

1. A Comparative Perspective on the Status Quo

a) The Chicago School: Skeptical of Governmental Intervention to Further Industrial Policy Objectives

Modern competition policy in the U.S., the EU and Canada is premised on the neoliberal approach of the Chicago School, which by the end of the 1980s had achieved a degree of consensus in North America and in Europe. The Chicago School places great confidence in free markets and is skeptical of the efficacy of political intervention to further perceived short-term industrial policy objectives.[5] The corollary of this consensus has been the absence of political interventionism in merger policy and enforcement in the last thirty years, despite some notable exceptions.[6]

Political intervention in the context of competition law, and particularly merger control, is often referred to as industrial policy. Although there is no single definition of industrial policy—indeed, it has been said that there "is no end to the list of possible definitions" of the term[7]—a note for the Organization for Economic Co-Operation and Development's ("OECD") 2009 Global Forum on Competition defined industrial policy as referring to:

> [G]overnment interventions influencing business decisions, from general measures such as across-the-board investment incentives to more targeted, sector-specific incentives, or "nationalist" policies such as domestic content requirements for public procurement, the direct or indirect subsidization of specific companies, or dirigiste policies such as the creation of national champions and their protection from competitors and foreign acquirers.[8]

Industrial policies also may be aimed at fostering economic development, such as by increasing exports, decreasing dependence on imports, or creating employment. Notably, any given country's position on industrial policy may be tied to its state of development.[9]

As a consequence of the influence of the Chicago School, the cornerstones of transatlantic merger policy for the past several decades have been objective, competition-based assessment criteria and the devolution of those assessment criteria to independent governmental agencies largely free from political interference. Non-competition factors continue to be relevant only at the margins of this framework. For example, in some high-profile transactions under review in Europe, merging firms may employ lobbying consultants to engage with key governmental stakeholders in parallel with merger control review in an attempt to shape merger control outcomes. Similarly, some high-profile transactions can also attract the attention of politicians, acting individually or on behalf of governments, to express their views publicly prior to a decision being rendered by the relevant competition agency. Moreover, as described below, the EU and Canadian regimes provide for the pursuit of some industrial policy objectives within the framework of their respective competition law legislation; although in the Canadian case, the framework does not provide for political interference by the government of the day into merger control outcomes.

Perhaps the greatest period of tension between competition policy and other policy objectives followed the 2008 economic crisis, which called into question the liberal approach to free market regulation, and justified a more interventionist approach to enable governments to correct for market imperfections. This timing is unsurprising—according to an OECD report issued following the Global Forum, government intervention through industrial policy is frequently driven by a desire to correct market failures.[10] This explains why industrial policy becomes the subject of debate in times of economic crisis, and why governments are more likely to implement interventionist industrial policy during such times. The latest manifestation of this trend emerged in 2015, after which a series of governments with economically patriotic agendas were elected in North America and in Europe. These developments threaten to alter the neoliberal consensus that has dominated merger policy in recent decades.

In the following, the existing merger policy consensus is surveyed, in particular at the points where that consensus has been interrupted during its thirty-year history on both sides of the Atlantic.

b) The United States: the Adequacy (or Inadequacy) of the Consumer Welfare Standard

The fabric of competition policy in the U.S. has been under siege in recent years. As the epicentre of the 2008 financial crisis, and more recently having

elected populist political leadership unafraid to pursue an agenda grounded in economic nationalism—dubbed by some as the "true legacy of the global financial crisis"[11]—this is perhaps unsurprising. Large segments of the U.S. population are questioning and resisting the "open frontiers of globalization" in the midst of increasing concerns of economic inequality within its own borders.[12] Further driving this period of reflection on the role for competition policy as a tool in the hands of governments has been the rise of the "Platform Economy"[13] and the growing prowess of "tech behemoths" such as the FANGs.[14] It has been argued that current antitrust doctrine, and in particular the consumer welfare standard, is ill-equipped to address these challenges.[15]

Stepping further back into the chronology, U.S. antitrust law currently recognizes a "single-pointed goal" for enforcers:[16] the consumer welfare standard, which is also applied in Europe.[17] This standard is premised upon the promotion of "consumer welfare" which, if appropriately enforced, leads companies to engage in conduct that benefits consumers, including by reducing prices, increasing output, improving product quality, and facilitating innovation.[18] According to Christine S. Wilson, Commissioner of the U.S. Federal Trade Commission ("FTC"), "[u]nder the consumer welfare standard, business conduct and mergers are evaluated to determine whether they harm consumers in any relevant market. Generally speaking, if consumers are not harmed, the antitrust agencies do not act."[19]

In economic terms, the consumer welfare standard is the equivalent of consumers' surplus, which is the difference between what a consumer actually pays and what that consumer would be willing to pay for a product or service. The consumer welfare standard does not take into account gains accrued to sellers or producers; only the effect on consumers is relevant.[20]

In contrast, the "total welfare standard" (also known as the "total surplus standard"), which is closer to the prevailing standard in Canada,[21] considers the effect of a practice or transaction on the total economic welfare of all participants—consumers *and* producers.[22] In other words, the total welfare standard refers to the sum of the consumer surplus, defined above, and the producer surplus, which "measures how much more producers are able to collect in revenue for a product than their cost of producing it".[23] It therefore measures the cumulative effect of the practice or transaction on the economy, without being concerned about to whom the benefits flow.[24]

The consensus that placed consumer welfare as the primary goal of U.S. competition policy emerged principally from the work of economic and legal scholars at the University of Chicago in the 1970s. Their efforts

reflected the growing exasperation among the antitrust and business communities with the unpredictable outcomes of antitrust enforcement in the preceding period. As Justice Stewart memorably remarked in 1966: "The sole consistency that I can find is that in litigation under s.7, the Government always wins."[25] Pervading the U.S. landscape prior to the consumer welfare revolution was an assumption that "big is bad"; that concentration is in and of itself undesirable irrespective of the economic impact of such activity on competition or consumers. Chicago School thinkers, by contrast, sought to ground antitrust enforcement in economic principles and evidence, and to replace the presumptive approach to antitrust law that had itself evolved into the consensus for many decades after the introduction of a competition law regime in the U.S in the late nineteenth century, known as the "structuralist" approach.

There were persuasive grounds both legally and economically to move away from the structuralist approach. From a legal standpoint, conflicting and incoherent antitrust outcomes undermined the rule of law, exposing companies to the political whims of governmental policy objectives. Economically speaking, economists were beginning to appreciate that antitrust outcomes were also having distortive effects on markets. The regime's agnosticism as to the economic results of conduct meant that antitrust policy in practice supported corporate welfare over consumer welfare.[26] Robert Bork's *The Antitrust Paradox* epitomized the reaction to this state of affairs. Bork published this seminal article at a time of economic hardship, characterized by widespread concern over diminishing U.S. competitiveness. At the time, U.S. firms were seen as "bloated and inefficient, hurting consumers and workers alike, while foreign firms—often bolstered by the domestic industrial policies of their home countries—were competing aggressively."[27] At the heart of the debate was the idea that U.S. antitrust laws had developed such that they were hurting competition, efficiency, and innovation, as demonstrated by courts blocking mergers among competitors with small market shares or mergers that would have otherwise resulted in lower prices or better products for consumers.[28] To remedy these deficiencies, Bork asserted that "the only legitimate goal of antitrust is the maximization of consumer welfare."[29] Following years of rigorous debate, this proposition became and has remained the consensus.[30]

The consumer welfare consensus coalesced around several key principles. First, that free-market competition was efficiency enhancing, and therefore that antitrust enforcement should complement the free market by permitting conduct that does not raise prices, or decrease output, quality, or innovation, even if the permitted conduct negatively impacted competitors.[31] Second,

that empirical evidence, rather than principled assumption, was the only means by which to measure anti-competitive effects, from both a legal and evidentiary standpoint. Third, that much antitrust enforcement is necessarily predictive of corporate behaviour, and as a result, there will inevitably be cases of false positive enforcement outcomes. Such outcomes (*i.e.*, where pro-competitive or competitively benign behaviour is condemned as anti-competitive) have a negative impact on competitive dynamics, also known as chilling effects.[32] These principles have remained consistent to the present day, and have also helped to shape the development of competition law regimes in other jurisdictions, many of which were founded on legislation enacted after the consumer welfare consensus emerged.

The present "antitrust revival" in the U.S., which dates from towards the end of the Obama administration,[33] is primarily driven by renewed engagement in U.S. antitrust law and policy from those outside of the antitrust profession, including from politicians, journalists, and other socio-political stakeholders. In some respects, it is not dissimilar to that which occurred forty years ago. Once again, challengers of the status quo are re-considering what antitrust laws should aim to accomplish and what they must do in order to achieve those goals. Once again, the key question is whether the current framework is adequate to do so.[34]

c) The EU: Adjusting the Scope for Member State Intervention on Public Interest Grounds

In the EU, the adoption of the *EU Merger Regulation* in 1989 marked the commencement of a strict competition-based test for reviewing notifiable transactions, reflecting the growing influence of the Chicago School on European competition policy.[35] Prior to 1989, industrial policy considerations played a significant role in the development of European competition policy, particularly merger policy, and in its enforcement at the supra-national and national levels. Political intervention was justified by the European post-war consensus that emerged in 1945, which presupposed that free markets could not provide full employment and that economic intervention by the state was necessary to mitigate adverse social consequences that arose via their operation.

In this environment, the development of merger policy in the EU was primarily seen as a tool by which to implement industrial policy goals.[36] Such policies promote and protect companies and industries with the ability to inspire strong nationalist sentiments in the country they call home—not unlike national sports champions,[37] including, for example, by granting

state aid, encouraging domestic mergers to create "national champions," or opposing the takeover of a domestic company by a foreign company.[38]

The post-war consensus prevailed until the mid-1970s, and even longer in certain European jurisdictions. Only after the economic downturn of the 1970s ushered in the neoliberal Reagan and Thatcher governments in the U.S. and the United Kingdom, respectively, was an EU-wide merger control regime based on objective competition criteria seriously considered. Negotiations followed throughout the 1980s, with Competition Commissioners Peter Sutherland and Sir Leon Brittan eventually convincing the Member States to abandon an exemption which would have given national governments *carte blanche* to intervene in deals touching on strategic industries.

In 1989, the *EU Merger Regulation* was adopted, which included strict competition criteria for assessing mergers (on the basis of a dominance threshold).[39] This regulation was later amended in 2004.[40] While not explicit in the legislation itself, the consumer welfare standard was its underlying substantive inspiration and EU competition policy has since focused on furthering the interests of consumers, instead of the interests of governments or companies. Crucially, industrial policy was given very limited bandwidth, or in the words of Sir Leon Brittan several years later: "with only the smallest nod in the direction of anything else."[41] That nod was articulated in Article 2(1)(b) of the *EU Merger Regulation*, which noted that while assessing any impediment to effective competition was paramount, the Commission should also take into account other factors, including the "economic and financial power" of the merging parties and the "development of technical and economic progress."

Given the EU's unique position whereby Member States were necessarily forced to cede a degree of their sovereignty over merger review upon adoption of the *EU Merger Regulation*, two other mechanisms were included to act as a check on the Commission's competition law mandate:

- *First*, a "two-thirds rule" was included in the financial thresholds. This enabled a Member State to take jurisdiction over a transaction that otherwise triggered review at the Commission level, provided that the merging parties achieved two-thirds of their EU-wide turnover in the same Member State. This rule acts as an escape valve for mergers that may have cross-border effects, but where the transaction's centre of gravity is in one Member State, for example because it is a merger of two national companies.[42] In that context, it is interesting to note that while EU law proscribes that the enforcement of competition law as it

relates to coordinated and unilateral conduct should be equivalent as between the EC and the Member States, there is no such equivalence requirement with respect to merger control.[43]

- *Second*, a "legitimate interests" exception was added to Article 21 of the *EU Merger Regulation*, which establishes the "one stop shop" principle that underpins EU-wide merger control enforcement. If a merger is notifiable to the Commission, Member States do not have parallel jurisdiction to apply national competition legislation. However, Article 21 provides Member States with the ability to "take appropriate measures necessary to protect legitimate interests other than those taken into account by this Regulation" (*i.e.*, competition). Article 21 further defines legitimate interests as those relating to public security, media plurality, and prudential rules. While narrow in scope, the Commission has been receptive to cases that fall squarely within the scope of legitimate interests, as defined in Article 21.[44]

This unique balance of competence between the Commission and the Member States has largely operated smoothly since 1989. At the national level, some Member States have retained robust powers to intervene in transactions touching on public interest considerations, and Article 21 and the two-thirds rule enable them to override the competition-based criteria of the *EU Merger Regulation* in certain circumstances, such as government-orchestrated bank mergers (*e.g.*, between Lloyds and HBOS in the U.K.) in the aftermath of the 2008 financial crisis.

More recently, some Member State governments have become more vocal in their frustration with the strict competition-based test that underpins the *EU Merger Regulation*, especially in cases of: (i) controversial in-bound foreign investment (for example, UK government intervention torpedoed Pfizer's proposed bid for AstraZeneca in 2014 on the basis of evidence suggesting that the deal would lead to job cuts and a reduction in the combined companies' research and development spending;[45] and the French government imposed onerous conditions on General Electric's attempted takeover of Alstom, including a requirement to retain its headquarters in France, which would presumably have provided the French government with leverage to oppose any job cuts or outsourcing of Alstom's work overseas);[46] and (ii) transactions that would facilitate the creation of national champions (for example, the German Chancellor Angela Merkel has called for a loosening of the legal standard to enable telecoms consolidation in 2014,[47] and in 2018, advocated for an acceleration in intra-European mergers to facilitate competition with North American and Asian competitors).[48]

The *Siemens/Alstom* development is arguably the latest in a line of tensions involving the intersection of competition policy and industrial policy objectives. The key question in the EU, which is also relevant elsewhere, is whether the existing toolkits available to national governments are sufficient to enable them to intervene in transactions where public interest considerations are justifiably relevant. The key risk associated with such intervention is undermining the transparency, predictability, and objectivity on which modern EU competition policy is founded.

d) Canada's Balancing Act Since 1986

Unlike in the U.S. and the EU, the same level of on-going debate regarding the extent to which governments should utilize their competition regimes to develop policy objectives wider than the protection of consumer welfare has not, as of yet, developed in Canada.

The Chicago School consensus has heavily influenced the development of Canadian competition policy, especially since the introduction of the *Competition Act* in 1986.[49] This legislation is anchored in the established economic theory that open markets are the most effective way of allocating resources, improving productivity, and spurring innovation. That said, in global terms, Canada's economy remains relatively small and strongly reliant on international trade, with a limited number of incumbents in many economic sectors, many being required to reach sufficient economies of scope and scale to compete in global markets.[50] Canadian lawmakers were well aware of this fact during the *Competition Act*'s passage through Parliament in 1986.[51] While overwhelmingly designed as a regulatory mechanism that "[establishes] the basic rules for a competitive and fair market-based economy,"[52] the regime also aimed to facilitate the participation of Canadian companies in international markets, as well as to stand up against foreign competitors in the domestic market.[53] These diverse considerations were reflected in the *Competition Act*'s purpose clause:

> 1.1 The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.[54] [emphasis added]

Whilst the promotion of (economic) efficiency is regarded as the regime's primary purpose, the legislation deliberately avoids geographic agnosticism.[55] In fact, the purpose clause establishes that the regime must also have regard to facilitating "the participation of Canadian companies in international markets" and to ensuring that "small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy."[56] In other words, the Canadian regime incorporates additional public policy goals in a way that the regimes in the U.S. and the EU do not. In Canada, there is room for making enforcement decisions that do more than protect consumers from price increases or lower quality or innovation, but which also protect or advance Canadian businesses in both domestic and foreign markets (among other things).

Underlying the purpose clause, the standard of review in the *Competition Act* for mergers is also instructive. Section 92 states that the Competition Tribunal (the "Tribunal") may make an order to dissolve or alter a merger where it "finds that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially." The Competition Bureau's (the "Bureau") *Merger Enforcement Guidelines*, informed by the 2010 iteration of the U.S. *Horizontal Merger Guidelines*,[57] expand on that legal test: "a substantial lessening or prevention of competition results only from mergers that are likely to create, maintain or enhance the ability of the merged entity, unilaterally or in coordination with other firms, to exercise market power."[58]

In practice, like the U.S. and EU regimes, Canada's merger regime is premised on the concept that firms obtaining market power can distort competitive dynamics, thereby damaging competition substantially. This standard is focused on consumer welfare, as demonstrated by section 93 of the *Competition Act*, which identifies factors focused on the impact of a transaction on competition and not a transaction's impact on competitors. In this framework, there is little room for other socio-economic objectives, as the Bureau has observed: "neither the law nor the Bureau's guidelines contain any specific reference to the consideration of public interest factors in its merger assessment. The factors traditionally thought of as public interest considerations in mergers—such as issues of national security, employment, media plurality and industrial policy—are not explicitly set out as factors to consider in the Act." Nevertheless, such considerations do exist in Canadian merger control more broadly, particularly outside of the *Competition Act* in the form of parallel regulatory regimes governing foreign investment, national security and sectoral regulation.[59]

With respect to foreign investment review and sectoral regulation in particular, the *Investment Canada Act*, Bank *Act* and *Canada Transportation Act* carve out clearly-defined grounds for intervention in transactions based on criteria other than the total surplus standard that guides merger review under the *Competition Act*. These specific carve outs preserve the transparency, impartiality and predictability of the Canadian competition law regime to the greatest extent possible, while still giving scope for Parliament to pursue policy goals more diverse than pure economic efficiency.[60]

Nevertheless, the *Competition Act* also contains an inherent compromise, generated as a result of the nature of the Canadian economy and its geopolitical position at the introduction of the modern regime in 1986.[61] The efficiencies defence, set out in section 96 of the *Competition Act*, has the effect of diluting the regime's focus on consumer welfare promoting objectives. It reflects one of the primary economic considerations in play at the time the *Competition Act* was introduced, namely enabling mergers between Canadian firms in highly concentrated industries in order to facilitate the creation of national champions that could achieve minimum effective scale and compete outside of Canada. This rationale was undoubtedly coherent from an industrial policy standpoint in the 1980s, and to a more limited extent, remains as such today.

The efficiencies defence has the power to enable the implementation of otherwise anti-competitive mergers, even in merger-to-monopoly cases.[62] However, its use is relatively circumscribed by the structure of the *Competition* Act: only once a substantial prevention or lessening of competition ("SPLC") has been found (which is assessed in a consumer welfare framework) can the efficiencies defence be engaged. Accordingly, Canada's regime is designed and has been used as an objective tool to foster a market-based economy and is insulated from political influence. There are a few exceptions to this general principle, which have been important features in the development of the regime since 1986.[63]

The efficiencies defence is also unique among the long-standing global competition law regimes. While efficiencies may be argued in other jurisdictions, merging firms are typically required to prove that their claimed efficiencies will be passed on to consumers, reinforcing a commitment to the consumer welfare standard.[64] By contrast, Canada's efficiencies defence does not contain this requirement. For this reason, its continued presence has attracted both domestic and international commentary—and criticism. For example, a Deputy Assistant Attorney General of the U.S. Department of Justice, Antitrust Division, once stated that efficiencies defences that

"expressly favor domestic companies or expressly disfavor foreign ones are perhaps the most common example of *de jure* discrimination."[65]

The relationship between the efficiencies defence and the pursuit of consumer welfare has been developed further in the courts. *First*, in *Superior Propane III*, the Federal Court of Appeal recognized that the appropriate standard to assess efficiencies had to be sufficiently flexible to reflect the various objectives of the *Competition Act*, for example, with a balancing weight approach, which was reflected in the subsequent remitted decision of the Tribunal.[66]

Second, *Superior Propane III* acknowledged that the efficiencies defence should contain an inherent geographical bias. Merging parties cannot simply adduce evidence of efficiencies, but must establish that those efficiencies would give rise to direct benefits to the Canadian economy. Any other interpretation of section 96 of the *Competition Act* would be contrary to the purpose clause, which targets the Canadian economy and which must also give effect to the participation of Canadian firms in international markets.[67]

The Bureau's 2018 draft guidelines on efficiencies reiterated the Tribunal's determination in *Superior Propane I*:[68]

> Under the fourth screen the Bureau will exclude efficiency gains that are achieved outside Canada, unless parties can establish that these efficiencies will accrue to Canada, for example to Canadian customers or shareholders. Savings related to operations in Canada that ultimately benefit foreign shareholders will not be accepted. Further, efficiency gains cannot simply relate to a product that is sold in Canada. The Bureau will focus on testing whether a sufficient nexus between claimed efficiencies and benefits to the Canadian economy exists.[69] (emphasis added)

These essential aspects of the efficiencies defence have since been affirmed by the Supreme Court of Canada in *Tervita Corp. v Canada (Commissioner of Competition)*,[70] which referred to "the context of the relatively small Canadian economy, to which international trade is important,"[71] and concluded that the efficiencies defence was "Parliamentary recognition that, in some cases, consolidation is more beneficial than competition."[72] It is important to acknowledge what an outlier this approach to merger review is in comparison with other jurisdictions, including the U.S. and the EU, where a transaction that gives rise to appreciable price increases could not be saved by productive efficiencies that were not necessarily passed on to consumers.

Accordingly, Canada's regime is not entirely divorced from broader industrial policy objectives, and in particular the furtherance of Canada's

macro-economic objectives, while still maintaining adherence to an evidence-based rule of law. The Chicago School consensus has been integral to the development of modern competition policy in Canada, but not to the exclusion of other guiding factors. As a result, there is some divergence in the way in which the *Competition Act* is structured and enforced in comparison with the U.S. and EU regimes. The recent and growing politicization of competition law in these other jurisdictions raises important questions about the future of the Canadian regime, in particular whether the diluted pursuit of the consumer welfare standard puts Canada's regime in a more advantageous position to adapt to these new political challenges compared with its U.S. and EU counterparts and whether they might wish to adopt a similar approach.

2. The Populism-Driven Debate: A Transatlantic Assessment of the Adequacy of Merger Policy in the 21st century

Having set the scene, this section will consider how the political climate in the U.S. and the EU has contributed to a growing pressure on transatlantic competition policy, leading to calls for substantial reform in both jurisdictions.

Political stakeholders increasingly regard competition law as a vehicle for the pursuit of a broader public policy agenda. In the U.S., the "hipster" or Neo-Brandeisian antitrust movement seeks to address a wide array of public policy goals by returning to antitrust enforcement focused on market structures (in particular presuming that "big is bad") rather than competitive outcomes. In the EU, this has been manifested in a desire of a number of Member States, through reform of the *EU Merger Regulation*, to buttress and support mergers between domestic rivals, irrespective of the potential short-term harm to competition at the EU level.

Both sets of proposals have one thing in common: they demand that competition law frameworks serve a suite of socio-economic objectives more expansive than the pursuit of consumer welfare based on evidentiary rigour and objective assessment that has been the hallmark of transatlantic competition policy for several decades. It remains to be seen whether fundamental structural changes will arise in either jurisdiction. However, they merit evaluation in the context of Canada's competition regime, which has not, to date, experienced a similar level of debate.

a) United States: The Neo-Brandeisian Challenge to the Decades-Old Consumer Welfare Standard

The current re-evaluation of antitrust policy in the U.S. looks at whether competition law should enable governments to implement a wide variety of (at times competing) policy objectives, or whether it should focus solely on the promotion of competition, defined by reference to the effect of corporate behaviour on consumers, especially in terms of impact on product quality, innovation and, most importantly, price.

The decades-old focus on the consumer welfare standard has been challenged by commentators seeking ways in which to address the growing concern over the political and economic power of large corporations.[73] These commentators see antitrust as a method for tackling the various symptoms of power wielded by corporations, including income inequality, inadequate job creation, and stagnant wage growth. By any definition, these priorities—while worthy objectives in their own right—are public policy goals, and in that respect, the U.S. debate has much in common with that in Europe, even if the respective deliberations focus on distinct topics.

Certain parts of the antitrust community in the U.S. have sought quickly to identify empirical flaws in Neo-Brandeisian arguments, in particular the underlying premise that there is a causal link between the perceived flaws in the consumer welfare standard as a method of analyzing competitive dynamics and the various inequalities that have worsened in American society in recent years. Nevertheless, commentators have also acknowledged that the Neo-Brandeisian antitrust movement has contributed to the debate, driving increased engagement with antitrust policy at all levels of public life, as well as potentially acting as a trigger for incremental changes in enforcement practices that would further strengthen the U.S. antitrust regime.

i) Populism as a Driving Force for Change

The current debate involving U.S. competition policy is not dissimilar to that which occurred forty years ago when the structuralist approach—which in short presumed the illegality of mergers and other commercial agreements that created or enhanced market power—was abandoned in favour of the consumer welfare standard. Once again, challengers of the status quo are re-considering what antitrust should aim to accomplish and how it must operate in order to achieve those goals.[74]

The Neo-Brandeisian critique of the consumer welfare standard is grounded in a different philosophical understanding of what antitrust law

is designed to accomplish. At its root is the notion that antitrust is a "safeguard against excessive concentrations of private power."[75] Under this logic, corporations with market power also have economic power; and economic power ultimately translates into both economic inequality and into political power, both of which are harmful to American society. Therefore, the way in which governments scrutinize the act of concentrating market power (principally through antitrust law) has a direct bearing on the way in which those corporations are able disproportionately to influence political discourse.

Some of the key lines of argument that underpin this philosophy are briefly summarized below:

- Lina Khan has criticized the consumer welfare standard in "Amazon's Antitrust Paradox", arguing that "the current [U.S.] framework in antitrust—specifically equating competition with 'consumer welfare,' typically measured through short-term effects on price and output—fails to capture the architecture of market power in the twenty-first century marketplace."[76] Platform markets are uniquely incentivized to pursue growth over profits, she argued, making it difficult for an antitrust agency to prosecute a dominant platform such as Amazon when it was driving down prices for consumers. Ms. Khan proposed a return to the structuralist approach that pre-dated the consumer welfare standard, in which antitrust enforcement would rely on the general assumption that a firm that acquires monopoly power will use that power to society's detriment, and therefore, that dominance should be prevented from emerging.[77]

- Another category of the Neo-Brandeisian critique includes studies observing that competition has declined under the consumer welfare standard because U.S. markets have systematically become more concentrated. For example, Jason Furman and Peter Orszag's study analyzes U.S. census data on market consolidation to conclude that in 75% of the industry groupings measured in the data, the revenue share of the largest firms had increased between 1997 and 2012.[78] Such studies have contributed to a public discourse that equates growing concentration levels with a failure of antitrust policy. The *Wall Street Journal* noted that, "[a] growing number of industries in the U.S. are dominated by a shrinking number of companies," while the *New York Times* has explicitly linked increasing inequality with a decline of competition.[79]

This bandwagon has since accelerated and entered the political arena. Presidential candidate Senator Elizabeth Warren has called for the un-winding of allegedly problematic mergers, such as those that united Facebook, WhatsApp, and Instagram, the banning of platforms from vertically integrating by purchasing customers, and potentially the breaking up of larger tech companies. She has also announced plans for labour reform that would result in amendments to antitrust legislation designed to facilitate worker unionization.[80] Her reasons for doing so are decidedly revisionist in nature. In 2017, she noted that "[i]t's time for us to do what Teddy Roosevelt did—and pick up the antitrust stick again."[81]

Warren's policies have attracted the approval of other progressive political figures. Alexandra Ocasio-Cortez noted in April 2019 that, "[o]ne of the central parts of Warren's proposal is that these tech companies need to decide what they are. The fact that you are going to be both the platform and the vendor represents a very large antitrust problem."[82] Such statements are not solely the preserve of the political campaign trail, but have gained potential legislative traction. Another Presidential candidate, Senator Amy Klobuchar, was a key sponsor of the *Consolidation Prevention and Competition Promotion Act*, introduced in Congress in late 2017. This legislation would codify Neo-Brandeisian antitrust philosophy, reverting U.S. antitrust enforcement to presumptive analyses based on market concentration and firm size, rather than on the impact of economic activity on consumers.[83]

All of these proposals would significantly alter the way in which the U.S. approaches antitrust enforcement, arguably creating a new enforcement paradigm in which measures of market concentration would be more probative than measures of market effects. If the Neo-Brandeisian antitrust movement stands for one thing, it is an inherent skepticism regarding corporate behaviour: a firm with a significant market position may be presumed to be acquiring a smaller competitor for anti-competitive reasons, which is at odds with the more cautious approach to *ex ante* merger enforcement developed under the Chicago School.

ii) Antitrust Community Reactions

Responses to this assault from within the antitrust community have been comprehensive. Quite naturally, given the depth of the consumer welfare consensus, much has been written in its defence. There have also been some carefully considered responses that have engaged with the arguments advanced by revisionist commentators, showing perhaps that doctrinal adherence to the consumer welfare standard is not the only appropriate

reaction to Neo-Brandeisian antitrust.[84] This more nuanced interpretation acknowledges that the consumer welfare standard should remain at the heart of competition policy, and that competition law enforcement should not be overburdened by priorities or policy goals beyond that immediate purview. Historical experience shows that competition enforcement should not revert to considering a wide range of socio-political goals. During that period, antitrust enforcement outcomes were at best haphazard, and in some cases, they stifled the competition that they were allegedly designed to protect.

Notwithstanding these flaws, the debate has drawn welcome attention to the manner in which the consumer welfare standard is enforced in the U.S. It is possible to envisage that the U.S. agencies will continue to use their now traditional consumer welfare framework to guide enforcement policy and investigative practice. However, there may well be room for a re-evaluation of where incremental changes within that framework would be desirable.

The reaction to the Neo-Brandeisian movement in academic circles has sought to test the empirical basis for its worldview. Supporters of conventional consumer welfare posit that certain key assumptions from which Neo-Brandeisian antitrust derives its firepower are not supported by the underlying evidence. Perhaps the best example of this line of response rebuts a central evidentiary plank of the revisionist movement: industry concentration analysis. Critics have pointed out that Neo-Brandeisian antitrust takes a huge leap of faith by relying on market consolidation statistics from institutions like the U.S. Census Bureau as evidence of harm to competition.[85] In view of the enormous changes in antitrust law and enforcement envisaged by the Neo-Brandeisian antitrust movement, it is only right that the evidentiary basis for its proposals comes under close scrutiny.

That said, the popular media coverage that Neo-Brandeisian antitrust has generated of U.S. antitrust policy may ultimately result in some incremental (and beneficial) changes to enforcement policy. These would not do away with the consumer welfare standard, or introduce an additional suite of public policy objectives into the remit of competition law.

Rather, there are signs of a new consensus that may be emerging, loosely based around the following principles:

- The consumer welfare standard must remain the paramount tool for assessing the impact of corporate conduct and merger activity in the field of competition law, recognizing that consumer welfare is not only concerned with price effects, but a wide range of factors;[86]

- There are other means by which governments can seek to cure a wide array of political and societal ills identified by the Neo-Brandeisian antitrust movement (tax reform, reform to political campaign financing, increased regulation *ex-post* in certain industries, such as financial services);

- Complementary merger review regimes focused on more nebulous matters of public interest, sovereignty and national security are better suited to reviewing the impact of transactions on policy issues beyond consumer welfare (thus retaining the regulatory predictability of merger control); and

- Nevertheless, the antitrust community should continue to be vigilant in ensuring that its decades-old framework evolves to take account of modern business practices, and be open to adapting its approaches accordingly.

There is already evidence of a subtle change in U.S. antitrust agency enforcement priorities, including the announcement by the FTC and U.S. Department of Justice of investigations into major online platforms.[87] These investigations will seek to determine whether there is evidence of conduct that has limited innovation, raised prices or restricted output, which are traditional measures of anti-competitive harm assessed under the consumer welfare standard. However, the existence of the investigations themselves has generated some of its momentum from the wider policy discourse.

The assessment of vertical mergers in the U.S. may also prove to be one area where the principles of Neo-Brandeisian antitrust will help to shape a slightly different approach to enforcement. The U.S. competition agencies have historically been reticent to challenge vertical mergers, reflecting the Chicago's School standpoint that vertical mergers typically drive substantial efficiency gains, which outweigh the hypothetical (and, in practice, remote) prospect of competitor foreclosure.[88] By contrast, Neo-Brandeisian antitrust commentators are inherently skeptical of mergers that unite customers and suppliers, arguing that they create "conflicts of interest." They advocate reforms involving dominant platforms not being permitted to act at multiple levels of the value chain.[89] Other recent studies have since argued that empirical evidence shows that vertical mergers can increase prices, which should lead to a reconsideration of the presumptive approach to vertical mergers currently enshrined in the U.S. *Vertical Merger Guidelines*.[90]

Of course, any change at the U.S. Department of Justice or the FTC in vertical merger enforcement will necessarily be constrained by the requirement

for the agencies to prove their case before the courts (an impediment the EU model does not countenance). Regardless, the Neo-Brandeisian movement is correct to ask these questions of the antitrust community. As digital markets evolve and become more complex, many more mergers will come before the agencies that appear to be competitively benign according to the conventional rubric focused on short-term consumer prices and product quality. However, the current debate may encourage the agencies to be open to looking more closely at these cases and with a longer lens, given there can be major policy upsides in pursuing a case successfully under *ex ante* enforcement rather than monitoring the industry for evidence, *ex post*, of anti-competitive effects.

As Carl Shapiro has noted:

> As a general principle, the greater and more durable is the market power of an incumbent firm, the larger is the payoff from preventing that firm from acquiring the smaller firms that, if left to grow on their own, would become its strongest challengers.[91]

It is important to acknowledge that all commentators on both sides of the spectrum bring a degree of subjectivity to the debate. Quite rightly, the Neo-Brandeisian antitrust movement should be challenged where its conclusions are based on supposition. Similarly, there should be no room for a dogmatic or presumptive approach to vertical mergers within the consumer welfare framework. Institutionalizing the generality that vertical mergers are usually pro-competitive can detract from rigorously examining the evidence on possible foreclosure and the parties' claimed efficiencies. In the last few years, the U.S. agencies have shown an increasing willingness to contest vertical mergers or demand remedies as a condition to avoiding litigation, notably the decision to litigate *AT&T/Time Warner*,[92] and to seek remedies in *Staples/Essendant*[93]and *Fresenius Medical Care/NxStage*.[94] There are also widely-reported rumours that the U.S. agencies may update their *Vertical Merger Guidelines*, which have not been revised since 1984.[95] This may suggest that the lessons of Neo-Brandeisian antitrust are already being observed, although not necessarily in all the ways those commentators intended.

b) European Union: Growing Calls for Political Intervention in Merger Control

i) The Implications of *Siemens/Alstom*

In Europe, a string of developments have followed the Commission's prohibition of the *Siemens/Alstom* transaction in February 2019, including the announcement of unprecedented proposals from the EU's two major economies partially to dismantle the *EU Merger Regulation's* evidentiary framework, which rests on protecting competition and not competitors.

The decision in *Siemens/Alstom* concluded that significant anti-competitive price effects would arise in the markets for signalling and high-speed rolling stock, to the detriment of consumers in the EU. At the heart of the analysis was geographic market definition, and the Commission's conclusion that when considering competition at the global level, producers based in China, Japan and Korea should be excluded from the analysis since these markets are not open to international competition. Based on these parameters, the combined shares of Siemens and Alstom in the relevant product markets exceeded a level typically associated with dominance under EU case law; and the combined entity would have dwarfed its next closest competitor, Bombardier. Accordingly, and absent any viable remedy package, the Commission prohibited the proposed transaction.

The condemnation from both the French and German governments, which both strongly and publicly supported the merger as a means to enable European companies to compete with larger competitors overseas, was swift and comprehensive. The French Minister of Economy and Finance Bruno Le Maire stated:

> We want to build with Germany some very concrete proposals. We have to take all the consequences of what happened with Siemens/Alstom. We need on the one side to change the competition rules so that we will be able to build European industrial champions.[96]

The comments of German Economy Minister Peter Altmaier were similar. In the lead-up to the decision, Germany expressed frustration at the perception that the EU's competition laws no longer reflect current geopolitical realities, saying "[w]e need international champions in Europe that are able to compete globally;"[97] recognizing that "this is only possible if mergers are permitted so that existing companies can reach necessary size."[98]

These comments will be familiar to those that have reviewed the Parliamentary debates in Canada leading to the introduction of the *Competition Act*, and specifically the efficiencies defence, in the period leading to its adoption in 1986. In those debates, it was noted that "Big is not necessarily bad. In fact, when debating international markets and related goals, the bigger the stronger, the bigger the better."[99] As in Canada several decades ago, European governments have identified the threat of foreign competition through the globalization of the world economy as a significant threat to their national interests, which echoes Canada's concern at the introduction of the *Competition Act* to ensure that its economy (i.e. sovereignty) would not be jeopardized by a playing field in which larger (foreign) competition predominated.

The battle lines were drawn quite clearly in these reactions, which criticized the *EU Merger Regulation* as not being fit for purpose for the modern environment, in much the same way (although for different reasons) as the Neo-Brandeisian antitrust movement has criticized the consumer welfare standard in the U.S. At the heart of this criticism is a belief that competition laws should achieve more than the short-term protection of competition and consumers. In Europe, this has manifested in a frustration that the *EU Merger Regulation* does not provide for discriminatory application based on merging parties' nationality (or potentially other public interest considerations not directly relevant to the price, quality or variety of products and services offered to consumers in the near future).

ii) The Franco-German Manifesto

On February 19, 2019, the French and German governments published the *Franco-German Manifesto for a European industrial policy fit for the 21st Century* (the "Manifesto"),[100] which advocates a number of initiatives designed to ensure that the EU remains a "manufacturing powerhouse in 2030," with a particular focus on enabling European companies to compete on the global stage.

The Manifesto identified three main routes to developing a robust European industrial strategy in the next decade: *first*, through massive investment in the development and creation of new technologies, an area where the EU has been perceived to lag behind other geographic regions such as North America and Asia; *second*, by adapting the EU's regulatory framework, specifically in the areas of state aid and merger control policy, to reflect the fact that "there is no regulatory global level playing field;"[101] and *third*, by taking effective measures to protect European technologies, companies and

markets, including via pan-European foreign investment screening and a robust trade policy to buttress the EU's strategic autonomy.[102]

In respect of merger control specifically, two key changes are contemplated. *First*, the Commission would be required to be more flexible in its assessment of geographic markets and the timeliness and likelihood of new entry, both key factors in any merger assessment, but especially between horizontal competitors. It is unclear how this reform would operate in practice; however, if it forced the Commission to make assumptions about the timeliness and likelihood of entry by new players in certain markets, it would replace evidence-based assessment with a series of presumptions that could undermine the objectivity of the Commission's assessment, not unlike the structuralist interpretation favoured by Neo-Brandeisian antitrust in the U.S. *Second*, the Manifesto proposes that the European Council would have a veto right in "well-defined cases" over the Commission's merger decisions.[103] Such rights would be incremental to the existing powers of Member State governments under Article 21 to intervene in deals reviewed by the Commission to protect their legitimate interests, which covers a defined range of public interest issues, including national security and defence, media plurality and financial prudential regulation. In theory, there is no cap on the type of public interest issue that could result in intervention pursuant to the Manifesto, which has the potential seriously to undermine regulatory certainty for merging parties by bringing political actors into the review process.

If implemented, the Manifesto would transform pan-European competition policy, undermining the current European consensus described in section 1(c), which is based on a politically independent merger policy that uses objective criteria to assess the impact of notified transactions on competition, not on competitors. The Manifesto's sponsorship by the two largest economies in the EU (post-Brexit) provides it with both impetus and legitimacy as negotiations between Member States' governments commence and as the Commission embarks on new leadership in late 2019. The Franco-German position has more recently been strengthened by support from Poland, with a further set of proposals being published in July 2019.[104] This document reinforces the Manifesto, and adds further proposals focused on how best to modernize EU merger policy, including in respect of the digital economy, where predatory or "killer" acquisitions are noted as requiring particular consideration. At the time of writing, the potential timetable for moving the Manifesto forward remains unclear, but the collective power wielded by the French, German and Polish governments in the corridors of

Brussels will likely ensure that these proposals are considered seriously by the Commission.

iii) The Future of Competition Policy in the EU

The two key proposals relating to merger control policy in the Manifesto share several themes with the pressures being placed on the consumer welfare standard in the U.S.

First, the Manifesto would impose the generality of presumption in place of the rigour of empirical analysis. Since the *EU Merger Regulation* allegedly acts as a handbrake on the creation of European national champions, the Manifesto would force the Commission to expand its approach to geographic market definition, irrespective of whether this would result in consumers, particularly those in Europe, experiencing higher prices. This resonates with the growing political pressure in the U.S. to reverse the burden of proof onto merging parties in cases where market shares exceed relatively modest thresholds.[105] Neither approach seeks to identify whether a particular transaction will, on balance, lead to relatively greater pro-competitive efficiencies or anti-competitive effects, but rather imposes a homogeneous approach that would potentially detach reviewing competition agencies from the evidence.

Second, the Manifesto would impose on EU competition policy a degree of responsibility for a range of industrial policy objectives that would prove too onerous to bear. It would inevitably lead to the dilution of the Commission's current mandate to focus on the pursuit of pro-competitive outcomes to the exclusion of other factors. While the Manifesto does not task competition policy with solving problems such as income inequality (as some revisionist commentators have proposed in the U.S.), it does considerably expand the means by which public interest considerations can override the decision-making process based on a version of the consumer welfare standard. This has the potential to be harmful rather than beneficial to the Manifesto's stated objectives of encouraging European national champions. Any measures that undermine regulatory predictability and introduce subjectivity into merger review carry the risk of dampening cross-border trade, whether this is investment by Asian companies into European markets or mergers between two European companies to achieve greater scale.

Despite these fundamental flaws, the Manifesto does focus on areas of the Commission's developed practice where incremental changes in approach may, in the long term, lead to valuable dividends. For example, with respect

to market definition, the Commission's existing framework is a precedent-based approach.[106] For reasons of regulatory certainty, the Commission can be reluctant to change its approach to market definition in an industry it has examined before. This has its advantages, given that all Commission decisions are published, allowing companies and their advisors to plan for the merger review process. However, in industries that have developed significantly in a short period of time, merging parties are typically required to submit voluminous evidence to overturn Commission precedent, which is itself based on a historic assessment of the relevant market. While this "presumption of good precedent" has no doubt been an effective way of achieving regulatory certainty, it should not obviate the need for the Commission to be receptive to adjusting its approach where the evidence substantiates such adjustment. The exposure of this tension in *Siemens/Alstom* may encourage the Commission to look carefully at its current practice in this area. In a landmark speech delivered just after her reappointment as Commissioner for Competition in December 2019, Margrethe Vestager, announced the Commission's intention to re-examine its approach to market definition analysis that was last codified in its market definition notice in 1997.[107]

Moreover, the politicization of competition policy in the EU has not solely been driven by Member State government intervention. Under the leadership of Commissioner Vestager, the Commission has taken assertive public positions on a number of topics, positioning itself as a "consumer champion" willing to stand up against the largest (and often American) companies. This has generated cries of discriminatory treatment in the U.S.[108] More importantly, under Commissioner Vestager's tenure, the manner in which the Commission has represented itself publicly has altered towards a more political rhetoric when announcing enforcement action or decisions.[109] This change is subtle, but has also contributed to the growing politicization of competition law in the EU. It is no secret that Ms. Vestager is regarded to have further political ambitions, showing that even in the Commission's insulated world of objective competition criteria, there is room for its decision-makers to pursue broader objectives.[110]

In this context, the recent Franco-German intervention is perhaps less surprising, as it becomes increasingly difficult to insulate competition policy from wider and potentially conflicting political or industrial policy objectives. It is notable that the recent experience in the EU is similar to the debate in the U.S., where Neo-Brandeisian antitrust proposals seek to widen the socio-economic objectives delegated to competition law. In this respect, the Canadian *Competition Act* has the potential to provide useful insights.

3. The Canadian Paradigm? What the U.S. and Europe Can Learn from the Canadian Experience

Returning to Canada, it is necessary to consider whether the U.S. and EU debates legitimize Canada's regime as a paradigm for modern competition law enforcement, or whether they raise difficult questions regarding the extent to which the *Competition Act* remains fit for purpose to address its own enforcement challenges in the twenty-first century.

As described in section 1(d) above, Canada's competition law regime is anchored primarily in the consumer welfare standard, much like its American and European counterparts. Nevertheless, there is a compromise inherent in the legislative purpose of the *Competition Act*, which provides Canada's regime with a degree of flexibility to examine a transaction or practice through a lens that is broader than the "consumer welfare standard" applied in the U.S. and the EU. Canada's employment of a "total welfare standard" considers the effect of a transaction or practice on both consumers and producers; or rather, the economy as a whole. The efficiencies defence, while its use is prescribed and only available after the Bureau establishes a merger likely causes an SPLC, is the most obvious manifestation of this compromise in Canadian competition policy, and sets Canada apart from most other major competition law regimes. So too does the explicit recognition in respect of certain sectors considered critical to national sovereignty—banks and transportation undertakings—that competition policy should inform the ultimate decision of the sectoral regulator but not supplant the national interest where the two diverge.[111]

Evaluating the proposals for reform in the U.S. and in Europe—which in different ways seek to expand the scope of competition policy's core objectives and thereby potentially undermine the predictability and political independence of competition enforcement—the Canadian paradigm can be an instructive example of how it is possible to use competition policy primarily as a tool to protect and enhance consumer welfare, but also to develop some other complementary socio-economic objectives, such as ensuring the equitable participation of small and medium-sized businesses in the economy. This approach may be worth further consideration in the context of the Neo-Brandeisian debate on how best to get more out of U.S. competition enforcement. Similarly, the *Competition Act* expressly provides a means by which domestic merging parties can achieve scale efficiencies in order to facilitate their ability to compete on the international level. While Neo-Brandeisians would baulk at the idea of the efficiencies defence—with its rationale that "big is not always bad"—being available in the U.S., the

equivalent movement in Europe could consider how the Canadian system has sought to provide this outlet for mergers that would otherwise generate short-term anti-competitive effects without undermining the regime's focus on consumer welfare and the political independence of its decision-making system.

In this uncertain environment, it would be unwise for any Canadian debate on significant reform to the *Competition Act* not to take into account these global trends and influences. As we enter the third decade of the twenty-first century, the structure of the Canadian competition regime can represent a middle ground between those in the U.S. and Europe robustly defending the paramountcy of consumer welfare and those seeking revolutionary reform to the fabric of competition policy by widening its socio-economic objectives in a vague and potentially unprincipled manner. In that sense, the *Competition Act* has the potential to be a paradigm for evolving global attitudes to competition policy in the coming years.

a) Recent debate on *Competition Act* Reform

The *status quo* in Canada has not been without its detractors, both historically and more recently. The tenor of these calls for reform has focused on the incompatibility of the efficiencies defence with a regime focused on protecting against consumer harm; and some in the Canadian competition law community are now calling for the efficiencies defence to be repealed, arguing that the *Competition Act* is an anachronistic paradox in need of modernization.[112]

The principal criticism of the efficiencies defence is that it dilutes Canada's commitment to pursuing the primary purpose of the *Competition Act*, namely economic efficiency measured principally against the consumer welfare standard. For example, a former Commissioner of Competition, John Pecman, has argued in favour of removing the efficiencies defence entirely from the *Competition Act*. In a speech in April 2018 (while still Commissioner), Pecman noted that:

> We need to be careful not to be penny wise, pound foolish when considering the impact of mergers on the Canadian economy and it's high time we reassess the desirability of the efficiencies defence to promote an innovative and competitive economy, especially in regard to international competition. There are considerable benefits to be realized for the Canadian economy and those that participate in it, by bringing our approach to efficiencies in line with that of other modern competition enforcement agencies.[113]

He further argued that the efficiencies defence undermines innovation, and in theory forces the Bureau to give credence to the inherent value of short-run fixed cost savings over longer-term dynamic efficiencies, when the latter are the true motors of innovation and therefore also competition and prosperity.[114]

This second argument has been further developed by Matthew Chiasson and Paul Johnson, who have argued for the repeal of the efficiencies defence on utilitarian grounds, namely that competition, not consolidation, is the true motor of innovation and therefore economic efficiency, but that these significant beneficial effects are often overlooked in the trade-off analysis under section 96 of the *Competition Act* because they are less susceptible to *ex ante* prediction or quantification. This difficulty, they argue, is especially pronounced in relation to substantiating the magnitude and scope of x-inefficiency generated by consolidation,[115] particularly in light of the primacy of quantified (as opposed to qualitative) anti-competitive effects as recently articulated by the Supreme Court of Canada in *Tervita*.[116]

These well-considered proposals conclude that the efficiencies defence is no longer aligned with the primary purpose of the *Competition Act*: the pursuit of economic efficiency for the Canadian economy. Accordingly, the only logical path is to reform the *Competition Act* by removing the efficiencies defence entirely. Other arguments in favour of reform have also been made, such as the better alignment of Canada's merger review regime with those of other jurisdictions,[117] and to remove the possibility of the *Competition Act* sanctioning "mergers-to-monopoly."[118]

There have also been responses from supporters of the *status quo*, who have argued that the continuation of the efficiencies defence is a necessity in view of the considerable economies of scale and the pooling of innovation or research and development resources that can be generated by mergers and acquisitions.[119] From this standpoint, consumer welfare can be enhanced by permitting the efficiencies defence to exist in its current form. In view of the complex relationship between innovation, concentration and competition, removing the availability of the efficiencies defence entirely would be a disproportionate response, and would presume that increased market concentration inevitably diminishes innovation, which is not always (or even often) the case.[120]

This debate is entirely justified and important, but has not touched on factors outside of the parameters of economic theory. In my view, the debate should not only focus on whether the efficiencies defence is the best method

of promoting economic efficiency in Canada, but also, as a matter of policy, whether the degree of flexibility afforded by the purpose clause and the efficiencies defence (augmented, perhaps with the paramountcy of the "national interest" in a few select industries) make the Canadian regime more compatible with the populist pressures that have been developing in the U.S. and in Europe. From this alternative perspective, it may be that the limited compromise between consumer welfare and other socio-economic objectives in the *Competition Act* is a useful framework for those seeking to address potential reform to the competition law regimes in the U.S. and Europe.

b) The Alternative Case for Retaining the *Status Quo*

In the context of the encroachment of populism into antitrust observed in the U.S. and the EU, the compromise between the consumer welfare standard and other policy objectives contained in the *Competition Act* is not necessarily a negative. On one hand, Canada's existing regime provides it with the potential for a degree of flexibility in responding to evolving political pressures that may force competition authorities to look at anti-competitive harm beyond the prism of consumer welfare; on the other hand, Canadian decisional practice demonstrates that in challenged cases, the efficiencies defence has been deployed successfully on only a handful of occasions and an objective, evidentiary framework for measuring the defence has been developed in the courts. Moreover, the burden of establishing the efficiencies generated by a transaction—including difficult-to-quantify qualitative efficiencies—rightly rests with the merging parties.[121]

Retaining this framework is beneficial from a policy perspective. We should not assume that Canada will remain insulated from the debates raging in the U.S. and EU about the purpose of competition law in the digital age. In these jurisdictions, the politicization of competition policy is a genuine risk to the consensus that has used the analysis of empirical evidence to guide *ex ante* merger enforcement. There is currently no evidence that political stakeholders in Canada will follow the example of their counterparts in the U.S. and the EU in calling for the dilution of the existing legal standard to accommodate broader policy objectives; but it would be prudent to remain open to its possibility.

How exactly can the debates in the U.S. and Europe on the proper objectives of competition law use the Canadian experience as a guide? There is no doubt that the *Competition Act* is at its heart grounded in the consumer welfare standard. However, both the contents of its purpose clause and the way in which the efficiencies defence is structured and applied are good

examples of how consumer welfare can co-exist with other socio-economic objectives and yet retain the degree of transparency and predictability that critics of the Neo-Brandeisians and the Franco-German *Manifesto* have levelled at proposals for reform. The Canadian experience is of course not perfect, and the debate on reforming the *Competition Act* in Canada will likely continue. However, lessons can be learned from this experience to help to shape the reaction to the challenges facing the competition regimes in the U.S. and Europe. Moreover, calls for the repeal of the efficiencies defence in Canada are arguably "too late" as they aim to conform to a policy consensus that has been seriously weakened.

With respect to the U.S., it is unlikely that the Canadian efficiencies defence can hope to provide significant guidance to a regime seeking to respond to a Neo-Brandeisian movement that, above all else, argues against market concentration. The efficiencies defence is the philosophical acknowledgement that concentration can improve welfare in certain circumstances. This position simply cannot be reconciled with the Neo-Brandeisian presumptive approach that concentration is, in and of itself, a bad thing. However, the *Competition Act's* purpose clause shows that a competition law regime can be structured to focus primarily on one purpose (in Canada's case to "promote the efficiency and adaptability of the Canadian economy"), while also pursuing other objectives secondarily. In Canada's case, this (in theory) permits the Bureau to pursue economic efficiency in the form of consumer welfare, but also to look to other objectives, such as to "expand opportunities for Canadian participation in world markets" and to ensure that "small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy".[122] These objectives are not necessarily consistent with the sole pursuit of consumer welfare; and yet this has not prevented the Canadian regime from enforcing the *Competition Act* primarily through a consumer welfare lens. This experience is relevant to the U.S. debate between defenders of the consumer welfare standard and Neo-Brandeisians. Those unequivocal defenders of the Chicago School consensus may be able to take comfort from a regime that contains a purpose clause articulating objectives broader than consumer welfare.

The delicate balance between the consumer welfare standard and other policy considerations in the *Competition Act* should also enable the Bureau to chart a middle course in its enforcement approach to the digital economy, protecting the competitive process including where necessary by promoting the interests of smaller market participants, such as by using market studies to review sectors for structural weaknesses. By contrast, the ideological

purity of the consumer welfare standard in the U.S. does not provide the same level of inherent flexibility.

As regards the EU, the way in which the Canadian regime has structured and applied the efficiencies defence is perhaps more directly applicable as a method by which socio-economic objectives beyond the consumer welfare standard can be incorporated into a competition law regime without sacrificing its predictability and transparency. The efficiencies defence provides an outlet for mergers that would otherwise generate anti-competitive effects without undermining the regime's primary focus on consumer welfare and the political independence of its decision-making system. This is not a straightforward balance to strike, and there are signs that the Franco-German *Manifesto*, if implemented, would politicize the EU merger review process by granting additional veto powers to political actors, as well as by mandating a presumptive approach to key areas of analysis such as market definition, which would detach merger review from its current objective rigour.

A neater solution for this issue may be available. In essence, the proposals of certain Member State governments aim to reform the EU merger control system to enable mergers that create European national champions to take on non-European competitors in global markets. Rather than achieving this objective by presumptively requiring the Commission to take a broader view on market definition and thereby not identify any anti-competitive effects arising from a merger of two European companies with relatively modest global shares but a much bigger presence in Europe, the reform movement in Europe should look at the more nuanced and evidence-based operation of the Canadian efficiencies defence. The defence only applies once the Bureau has identified a likely SPLC; and the case law has developed to require the merging parties to meet a relatively high evidential burden in order to outweigh and offset that SPLC finding.[123] It is only in cases where harm to EU consumers would outweigh and offset efficiencies realized in the EU that a merger to create European national champion would run into difficulties under the substantive test in the *EU Merger Regulation*.

Most importantly, while the efficiencies defence has been criticized in a number of respects, it does not fundamentally interfere with Canada's application of the consumer welfare standard in the vast majority of cases. Only a small minority of transactions result in an SPLC being identified; and therefore potentially engage the efficiencies defence. Moreover, the procedure for establishing efficiencies and balancing them against the identified anti-competitive effects is achieved through a construct based on economic

evidence, rather than the subjective determinations of political actors. As described by the Supreme Court in *Tervita*:

> The jurisprudence has consistently recognized the importance of an objective approach to the balancing analysis (see *Superior Propane IV*, at para. 38). As the Federal Court of Appeal recognized in this case: "Objective determinations are better suited for ensuring predictability in the application of the Competition Act and avoiding arbitrary decisions. Predictability is particularly important in merger reviews since most merger transactions are reviewed only by the Commissioner and rarely reach the Tribunal. A methodology which favours objective determinations whenever possible allows the parties to merger transactions and the Commissioner to more readily predict the impacts of a merger, discourages the use of arbitrary judgment in the process, and reduces overall uncertainty in the Canadian business community."[124]

As a result, the efficiencies defence largely does not undermine the transparency and predictability of the Canadian regime. Merging parties know where they stand with respect to arguing efficiencies, and the system provides an opportunity for parties successfully to argue that the Canadian economy would better be served by more concentration in a particular industry, even if that had some short-run price or non-price effects for consumers. That compromise is now relevant to the European environment, and can be a basis on which the *EU Merger Regulation* maintains its overriding commitment to consumer welfare while also seeking to achieve broader socio-economic objectives.

The debate in Europe can also reflect on the interaction of Canada's competition regime with the parallel regulatory schemes for foreign investment and national security, and sectoral regulation in transportation and banking institutions. This interaction demonstrates that from a philosophical perspective, Canada does not regard competition law as the only solution to the problems confronting sophisticated national economies in a globalized world.[125] It is within the power of governments to regulate business conduct and merger activity in any way they see fit; and for some time Canada has recognized that a competitively-benign transaction may nevertheless raise concerns based on other policy objectives. However, Canada has sought clearly to articulate the concerns and sectors which could trump consumer welfare, so as not to undermine the predictability, transparency and fairness of the merger control regime.

c) Will pressure on the *Competition Act* to reform increase over time?

Having considered how the Canadian experience can be a useful reference point for the competition policy debates underway in the U.S. and in Europe, we should also consider whether there is any prospect of Canadian competition policy coming under pressure from antitrust populism to focus more closely on other socio-economic objectives at the expense of consumer welfare. For the most part, the prognosis suggests that such a major shift is not on the horizon in Canada. Nevertheless, there is evidence of close alignment in the objectives of the federal government and the Bureau, suggesting that the intersection of politics and antitrust is likely to be a key area of focus in Canada in the coming years.

This trend is apparent in recent interactions between the federal government and the Bureau in respect of the digital economy, an area in which the Bureau itself has been very active in the last few years.[126] As part of the announcement of the government's new *Digital Charter* in May 2019,[127] aimed at modernizing the rules governing the digital sphere in Canada, the Minister of Innovation, Science and Economic Development issued a public letter to the Commissioner of Competition, requesting that the Bureau take the lead in ensuring that the Bureau has the tools necessary to police competition in the digital environment.[128]

Interestingly, the Minister's letter recognized the inherent compromise in the Bureau's mandate:

> "The welfare of Canadian citizens must remain at the core of all of our programs and policies"; [*whilst also noting that*] "we must carefully examine how we can promote competition and create a healthy environment, especially for our small and medium-sized businesses.[129]

These remarks exemplify the way in which the *Competition Act* primarily seeks to further consumer welfare, but without forgetting the other objectives described in its purpose clause; and provides re-assurance that the federal government does not currently envisage any recalibration of the balance between those objectives as a matter of policy.

That said, the compromise achieved in the *Competition Act* will continue to give rise to enforcement challenges in the digital economy. For example, quantifying anti-competitive effects in transactions where merging parties provide high-quality services at low cost or for free does not fit neatly into the established preference for substantiating quantitative effects in the

trade-off analysis under the efficiencies defence. Moreover, it is not yet clear how the Bureau would examine a merger of two domestic technology companies seeking to combine their respective platforms to achieve significant economies of scale and network effects, thereby generating substantial efficiencies. Under the current framework, if substantiated, that company may benefit from the efficiencies defence notwithstanding the transaction's anti-competitive effects, which could be particularly pronounced (but difficult to quantify) in a market with high entry barriers.

In this regard, commenting on the efficiencies defence in particular, Commissioner Matthew Boswell has noted that it is "particularly ill-suited for the digital economy,"[130] although it remains unclear whether he considers the efficiencies defence to be inappropriate *per se*, or whether the current stance is more a recognition of the difficulty that would inevitably attend a section 96 analysis in this context (where dynamic efficiencies and long-run anti-competitive effects are more likely to be relevant).[131]

For those with concerns about potential spill-over effects from the Neo-Brandeisian antitrust movement in the U.S., recent commentary by Commissioner Boswell provides reassurance that the Bureau's leadership, like its U.S. and European antitrust enforcement counterparts, remains of the view that competition law is "generally up to the task" of dealing with novel theories of harm arising from the digital economy.[132] Accordingly, the answer for Canada may lie in the continuation of the case-by-case approach currently under operation, but with a recognition of the impact of digitization on the way in which anti-competitive harm is assessed.

For some transactions, there remains the possibility that consolidation can drive innovation; in other cases, it is likely that consolidation would be detrimental to innovation, and therefore to competition and Canada's overall economic efficiency. This uncertainty demonstrates that it would be an error to undertake substantial reform of the *Competition Act*, for example by moving it towards a more conventional consumer welfare model. There should still be room for merging parties to demonstrate that their transaction will, on balance, improve economic efficiency despite its anti-competitive effects; otherwise there would be the danger of creating a framework grounded in presumption, not dissimilar to the Neo-Brandeisian antitrust thesis that the agglomeration of economic power in one firm automatically leads to adverse consumer outcomes. Such presumptions, when applied to merger activity in particular, can have a chilling effect on investment and innovation, as firms are naturally uncertain about the predictability of the regulatory process.

4. The Way Forward: Implications for the Future

Competition law is likely to remain an integral tool as governments grapple with dynamic change brought about by the digitization and globalization of the world economy. These changes have already resulted in pressure being applied to competition authorities in the U.S. and the EU to re-cast their approach to empirical assessment in response to these developments. In both cases, this would undermine the reputation they have developed for the evidence-based, objective assessment of pro and anti-competitive effects. Competition enforcement is most effective when it is predictable and grounded in evidentiary rigour. Should currently proposed reforms be implemented, both of these jurisdictions will face the challenge of reconciling their traditionally empirical approach with the additional demands placed on their competition law frameworks from a wider suite of policy objectives.

As they seek to address these challenges, the U.S. and EU regimes should look to the Canadian experience over the last few decades, which has been based on the pursuit of consumer welfare at the same time as providing for carefully-defined secondary objectives, including the equitable participation of small and medium-sized businesses in the economy and the recognition, through the efficiencies defence, that concentration may, on balance, be beneficial in order to foster Canadian participation in the international economy. This compromise has largely been achieved without needing to depart from an assessment framework grounded in objective economic evidence and focused on the outcomes of conduct rather than using the principles of presumption to identify anti-competitive harm on an *ex ante* basis.

There is currently no evidence that the trends we have observed in the U.S. and in Europe are likely also to generate momentum in Canada. However, if they do, Canada's regime is arguably well-positioned to react in a way that does not undermine confidence in the predictability of its regime. While incremental changes may be advantageous for enforcement in the digital economy, such as those for which Commissioner Boswell has advocated, the Bureau already has a framework that enables it to promote competition, while simultaneously giving additional emphasis to other policy considerations. The efficiencies defence is an important aspect of that compromise, enabling the Bureau to fulfil its mandate not only to pursue economic efficiency but also to facilitate the participation of Canadian firms in international markets.

For some time, the Canadian regime has in some respects been viewed as anachronistic for its almost unique efficiencies defence and the compromise between pure consumer welfare and the pursuit of other policy objectives enshrined in its purpose clause. However, in today's global political climate, the *Competition Act* is perhaps best suited of the three examined jurisdictions to rise to the challenges of antitrust populism. Looked at in this light, it was perhaps not anachronistic but ahead of its time. As the global antitrust community reflects on how best to respond to the re-opened debate on the proper purpose of competition policy, examining the Canadian compromise as a paradigm, and not as a paradox of modern competition enforcement, would be a valuable exercise.

ENDNOTES

[1] Associate at McCarthy Tétrault LLP. The author would like to thank Ashley Taborda and Julien Beaulieu, also associates at McCarthy Tétrault LLP, for their assistance in the research and development of this project.

[2] This term refers to those for whom "bigness has become a unifying theory of all that is wrong with the U.S. economy and society. Fight bigness, the argument goes, and we will achieve long-held progressive goals, including the very goal of reducing the number of big firms," in line with arguments made in the early part of the 20th century by Supreme Court Justice Louis Brandeis: see Joe Kennedy, "Why the Consumer Welfare Standard Should Remain the Bedrock of Antitrust Policy" (Paper delivered at the Information Technology and Innovation Foundation, October 2018), online: <https://docs.house.gov/meetings/JU/JU05/20181212/108774/HHRG-115-JU05-20181212-SD004.pdf>.

[3] Meeting of the French and German Economy Ministers, *A Franco-German Manifesto for a European industrial policy fit for the 21st Century*, (Berlin: 19 February 2019) [*Franco-German Manifesto*].

[4] *Competition Act*, RSC 1985, c C-34.

[5] See generally Richard H. Bork, *The Antitrust Paradox: A Policy at War with Itself* (New York: Free Press, 1978) [Bork].

[6] These exceptions include: *Boeing/McDonnell-Douglas* (1999); *General Electric/Honeywell* (2001) and *Pfizer/AstraZeneca* (2014). However, these anomalies are generally regarded as exceptions that prove the rule of non-political review of mergers on purely consumer welfare grounds.

[7] Thomas W. Ross, "Recent Canadian Policy Toward Industry: Competition Policy, Industrial Policy and National Champions" (Paper prepared for the Second Lisbon Conference on Competition Law and Economics, 9 January 2008) at 4, online: <https://www.sauder.ubc.ca/sites/default/files/2019-04/2008_01_ross.pdf>.

[8] Meeting of the OECD Global Forum on Competition, *Competition Policy, Industrial Policy and National Champions*, DAF/COMP/GF(2009)9 (19 October

2009) at 25, online: <https://www.oecd.org/daf/competition/44548025.pdf> [OECD].

[9] *Ibid* at 11.

[10] *Ibid.*

[11] Philip Stephens, "Populism is the true legacy of the global financial crisis", *Financial Times* (30 August 2018), online: <https://www.ft.com/content/687c0184-aaa6-11e8-94bd-cba20d67390c>.

[12] *Ibid.*

[13] Noah Joshua Phillips, "Looking Back to the Future: What the Past Can Tell Us About the Future of Antitrust" (Prepared Remarks delivered at the Technology Policy Institute: Is the Platform Economy Forcing us to Reconsider Antitrust Enforcement?, Washington, DC, 15 November 2018) at 1, online: <https://www.ftc.gov/system/files/documents/public_statements/1456097/looking_back_to_the_future.pdf> [Phillips].

[14] "FANG" is an acronym for Facebook, Amazon, Netflix, and Google.

[15] See generally, Lina M. Khan, "Amazon's Antitrust Paradox" (2017) 126 Yale LJ 710 [Khan].

[16] Tim Wu, "After Consumer Welfare, Now What? The 'Protection of Competition' Standard in Practice", online: (2018) April CPI Antitrust Chronicle 2 at 6 <https://www.competitionpolicyinternational.com/wp-content/uploads/2018/04/CPI-Wu.pdf> [Wu].

[17] While there are no explicit references to the consumer welfare standard in EU competition legislation, the EU's guidance documents governing both merger control and the review of behavioural conduct indicate that EU competition law is primarily framed by reference to the impact of corporate behaviour on consumer welfare. For a full overview of this topic, see Svend Albæk, "Consumer Welfare in EU Competition Policy" in C. Heide-Jørgensen, C.Bergqvist, U. Neergaard and S.T. Poulsen, eds, Publications and Discussion Papers of the Chief Competition Economist of the European Commission (January 2013), online: <https://ec.europa.eu/dgs/competition/economist/consumer_welfare_2013_en.pdf>.

[18] See, e.g., United States, Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* (19 August 2010) at s 10, online: <https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf> [*US Horizontal Merger Guidelines*].

[19] Christine S. Wilson, "Welfare Standards Underlying Antitrust Enforcement: What You Measure is What You Get" (Luncheon Keynote Address delivered at the George Mason Law Review 22nd Annual Antitrust Symposium: Antitrust at the Crossroads?, 15 February 2019) at 1, online: <https://www.ftc.gov/system/files/documents/public_statements/1455663/welfare_standard_speech_-_cmr-wilson.pdf>.

[20] *Ibid* at 4.

[21] There is some debate around the extent to which Canada should apply a total surplus standard to merger review. It was noted by the Tribunal in *Tervita II* that "the total surplus standard should be the starting point", but that the Tribunal will also "determine whether there are likely to be any socially adverse effects

associated with the merger" if such arguments are put forth by the Commissioner. See *The Commissioner of Competition v CCS Corporation et al*, 2012 Comp Trib 14 at para 281, [*Tervita II*].

[22] *Ibid* at 8.

[23] *Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3 at para 92, [2015] 1 SCR 161 [*Tervita*].

[24] *Ibid* at para. 95.

[25] *United States v Von's Grocery Co*, 384 US 270 at 301 (USSC 1966) (Stewart, J., dissenting).

[26] U.S. courts protected corporate welfare by protecting firms from their more efficient competitors due to a belief that "great industrial consolidations [were] inherently undesirable, regardless of their economic results": see e.g., *United States v Aluminum Co of America*, 148 F 2d 416 (2d Cir 1945), as cited in Joshua D. Wright et al, "Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust" (2019) 51 Ariz St LJ 293 at 300.

[27] Phillips, *supra* note 13 at 2.

[28] *Ibid.*

[29] Bork, *supra* note 5 at 7.

[30] Phillips, *supra* note 13 at 3.

[31] The first such case precedent was *Reiter v Sonotone Corp.*, 442 US 330 at 343 (USSC 1979).

[32] As is evident, although consumer welfare was defined by Bork to mean net social welfare (i.e., the sum of producer surplus and consumer surplus), in modern practice, the consumer welfare standard in the U.S. focuses exclusively on surplus gains for consumers, disregarding efficiency gains for producers. This is discussed further on page 5.

[33] Wu, *supra* note 16 at 2.

[34] Phillips, *supra* note 13 at 3.

[35] In this paper, the term "EU Merger Regulation" encompasses both the regulation adopted in 1989 and the reformed regulation adopted in 2004. See EC, *Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings*, [1989] OJ, L 395/1 [*EU Merger Regulation I*]; EC, *Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings*, [2004] OJ, L 24/1 [*EU Merger Regulation II*].

[36] For a fuller description of the history of merger control policy in Europe, see Damien Geradin & Ianis Girgenson, "Industrial Policy and European Merger Control—A Reassessment" (2011) Tilburg Law and Economics Center Discussion Paper No 2011-053.

[37] Susan M Hutton & Kevin Rushton, "National Champions: Canadian Competition & Industrial Policy" (Paper prepared for the 2007 Competition Law & Policy Forum at Langdon Hall in Cambridge, Canada, 12 February 2007) at 1.

[38] OECD, *supra* note 8 at 11.

[39] Specifically, Article 2(3) of *EU Merger Regulation I* identifies the relevant legal standard, which is grounded in the protection of competition: "A concentration which would significantly impede effective competition, in the common market or

in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market."

[40] *EU Merger Regulation I*, *supra* note 35 at art 2(3), which enabled the Commission to block mergers which create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market. This test was expanded in 2004 to enable the Commission to block mergers that fall short of the dominance threshold, but which nevertheless "significantly impede effective competition" ("SIEC"); see *EU Merger Regulation II*, *supra* note 35 at art 2(3). In practice, most mergers are now assessed against this lower SIEC threshold.

[41] Leon Brittan, QC, "The Early Days of EC Merger Control" in *EC Merger Control: Ten Years On* (Brussels: The International Bar Association in association with the European Commission Directorate General for Competition, 2000) 1 at 3.

[42] This exception transfers jurisdiction back down to the national level, and has enabled governments to approve mergers that would not necessarily have received the same treatment by the Commission. For example, in the *E.ON/Ruhrgas* case (see: *E ON Ruhrgas AG and E ON AG v Commission*, T-360/09, [2012] online: <http://curia.europa.eu/juris/liste.jsf?num=T-360/09&language=EN>), the German competition authority, the Bundeskartellamt, prohibited the transaction on competition grounds, but such prohibition was over-turned by the German Ministry of Economics. The deal was ultimately blocked by the Düsseldorf High Court.

[43] See EC, *Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market*, [2019] OJ, L 11/3 at para 1.

[44] The Commission has accepted several interventions brought on the grounds specified in Article 21, such as Case IV/M.423, *Newspaper Publishing* (media plurality), Case IV/M.759, *Sun Alliance/Royal Insurance* (prudential rules). However, Article 21 has occasionally been used by Member States to protect national champions from takeovers by foreign competitors. In cases such as Unicredito/HVB, Abertis/Autostrade, and E.ON/Endesa, national governments in Poland, Italy, and Spain sought to rely on national-industry specific regulation to disrupt a transaction involving the acquisition of a national company by a foreign competitor. While the Commission prevailed in these cases against national governments, the cases were often considered a strategic success for the national governments in question since they, in practice, stymied the foreign investment at issue. See Commission decisions of 18 October 2005, Case COMP/M.3894, *Unicredito/HVB*; of 22 September 2006, Case COMP/M.4249, Abertis/Autostrade and of 25 April 2006, Case COMP/M.4110, *E.ON/.Endesa*.

[45] See e.g. Rupert Neate and Sean Farrell "Pfizer pulls out of fight for AstraZeneca", *The Guardian* (19 May 2014), online: <https://www.theguardian.com/business/2014/may/19/pfizer-pulls-out-battle-pharmaceutical-takeover-astrazeneca>.

[46] See e.g., Kim Willsher "France opposes General Electric's €12.4bn offer for Alstom energy arm", *The Guardian* (6 May 2014), online: <https://www.theguardian.com/world/2014/may/06/france-opposes-general-electric-offer-alstom-energy>.

[47] Michael Carroll, "Merkel backs calls for European telco consolidation", *Fierce Wireless* (9 May 2014), online: <https://www.fiercewireless.com/europe/merkel-backs-calls-for-european-telco-consolidation>.

[48] See e.g. Patrick Donahue, "Merkel Urges Europe Mergers to Develop 'Global Players' in Tech", *Bloomberg* (8 October 2018), online: <https://www.bloomberg.com/news/articles/2018-10-08/merkel-urges-europe-mergers-to-develop-global-players-in-tech>.

[49] The *Competition Act* is not Canada's first legislation dealing with competition: in 1889, Parliament passed a statute titled *An Act for the Prevention and Suppression of Combinations formed in restraint of Trade* (SC 1889, c 41) prohibiting conspiracies, combinations, and agreements that had the effect of unduly limiting competition in trade or product. This legislation was incorporated into the *Criminal Code* in 1892, where it remained until 1960 when it was consolidated into the *Combines Investigation Act* (SC 1960, c 45). It was this legislation that was amended and re-named the *Competition Act* in 1986. See Calvin S. Goldman & J. D. Bodrug, eds., *Competition Law of Canada* (New York: Jurish Publishing, Inc., 2013), s 1.01.

[50] *Tervita,* supra note 23 at 167. According to the World Bank Group, Canada was the world's tenth biggest economy by size of GDP in 2017 (excluding the EU). Canada's GDP is approximately 9% of the EU's GDP, and 8% of the U.S.' GDP (see: The World Bank Group, "GDP (current US$), World Bank national accounts data, and OECD National Accounts data files", online: <https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?view=map&year_low_desc=true>). In 2017, the sum of Canadian exports and imports of goods and services corresponded to 64.06% of the country's GDP (compared to 35.10% in 1960). However, even if this percentage may seem high, it is below the 71.70% world average (see: The World Bank Group, "Trade (% of GDP), World Bank national accounts data, and OECD National Accounts data files", online: <https://data.worldbank.org/indicator/ne.trd.gnfs.zs?year_high_desc=false>). For a discussion on merger policy considerations in small market economies, see Lynette Chua Xin Hui, "Merger Control in Small Market Economies" (2015) 27 Sing Ac 369, online: <https://journalsonline.academypublishing.org.sg/Journals/Singapore-Academy-of-Law-Journal/e-Archive/ctl/eFirstSALPDFJournalView/mid/495/ArticleId/423/Citation/JournalsOnlinePDF>.

[51] OECD, *OECD Reviews of Regulatory Reform: Canada 2002 Maintaining Leadership Through Innovation* (ebook, 2002) at 79, Box 9. In a 2002 decision, the Tribunal explained why there may have been more interest for the efficiencies defence in Canada than in the United States at the time. See *Canada (Commissioner of Competition) v Superior Propane Inc.,* 2002 CACT 16 at para 141 [*Superior Propane III*]: "Given the historical American concern with preventing increases in industrial concentration and the possible political ramifications of

conjoining economic and political power, efficiency concerns have been given much less importance. The same cannot be said for Canada. Since industrial concentration was already high in certain sectors and because of the increased openness of the Canadian economy to foreign competition, further increases in domestic concentration were deemed less important than the gains in economic efficiency that could be obtained, if proven."

[52] *House of Commons Debates*, 33rd Parl, 1st Sess, No 8 (7 April 1986), at 11926 (Hon Michel Côté) as cited in *Superior Propane III*, *supra* note 51 at para 81.

[53] *Ibid.*

[54] Although they may seem to conflict with each other, these objectives are generally in line with the recommendations of many competition law research reports released during the two decades preceding the enactment of the *Competition Act*. These objectives have been described as "no more than statements of the beneficial results of attaining the stated purpose of the Act", which should not prevail in case of conflict with more specific provisions of the Act. See *Canada (Commissioner of Competition) v Superior Propane Inc*, 2001 FCA 104 at para 35 [*Superior Propane II*].

[55] The primacy of consumer welfare is evident in the construction of the operative provisions of the *Competition Act*. For example, the abuse of dominance provision (section 79) and merger provisions (sections 91 to 93) are framed by reference to behaviour that has the effect of preventing or lessening competition substantially. In economic parlance, this equates to an assessment of whether the impugned activity has a detrimental impact on consumers.

[56] *Competition Act*, *supra* note 4 at s 1.1.

[57] *US Horizontal Merger Guidelines*, *supra* note 18.

[58] Canada, Competition Bureau Canada, *Merger Enforcement Guidelines* (6 October 2011), online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03420.html>.

[59] This legislation includes the *Investment Canada Act* (RSC, 1985, c 28 (1st Supp)), the *Bank Act* (SC 1991, c 46) and the *Canada Transportation Act* (SC 1996, c 10). For more details, refer to Competition Bureau Canada, "Competition Bureau submission to the OECD Competition Committee roundtable on Public Interest Considerations in Merger Control", (14 June, 2016) at para 7, online: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04101.html.

[60] The *Investment Canada Act* provides for parallel jurisdiction alongside the *Competition Act* for mergers exceeding financial thresholds applicable to the *Investment Canada Act*. Pursuant to section 94 of the *Competition Act*, under the *Bank Act* and *Canada Transportation Act*, the Minister of Finance and Minister of Transport have jurisdiction to consider certain mergers in their respective sectors on public interest grounds. Unlike with foreign investment reviews, the *Competition Act* directly provides for these Ministers to override the Tribunal's (and therefore the Bureau's) jurisdiction in certain cases.

[61] As noted in a report on the Tribunal's decision in *Superior Propane III*, *supra* note 51, by William Rosenfeld: "In order to survive, Canada needed disproportionately large enterprises to take on the larger world. Fostering

efficiency therefore, was the way to achieve policy objectives. Canada has always been an economy dramatically dependent upon exports. The geographic extent and the small population of the nation itself has historically led to a concentrated industrial structure. The ability to maintain large capitally intensive enterprises in Canada's essential mining, oil and gas, and forest industries has constantly focused competition law upon the need to foster efficiency." William Rosenfeld, "*Superior Propane*: the case that broke the law" (2003) 6:9 Global Competition Rev 34 at 34.

[62] This was done in *Superior Propane II, supra* note 54. For comments on the increased use of economics in Canadian competition regulation, see Marcel Boyer, Thomas W. Ross & Ralph A. Winter Boyer, "The Rise of Economics in Competition Policy: A Canadian Perspective" (December 2017) 50 Can J of Economics 1489.

[63] Reform to the *Competition Act* has, at various times, considered the overarching framework encapsulated in the purpose clause and the efficiencies defence, most notably in 2002 when Bill C-249, *An Act to amend the Competition Act*, 3rd Sess, 37th Parl, 2004 (a private member's bill), proposed to repeal the efficiency defence in section 96. Under the proposal, efficiency gains would have become one of a number of factors to be considered in the analysis of whether a merger substantially lessened or prevented competition rather than a standalone provision in the *Competition Act*. Bill C-249 also proposed a "consumer benefit" requirement, in which the only efficiency gains to count would be those providing benefits to consumers, including through more competitive prices and increased product choice. The House of Commons passed Bill C-249, but it did not get through the Senate before the 2004 federal election. See online: <http://publications.gc.ca/Collection-R/LoPBdP/BP/prb0222-e.htm>.

[64] The requirement to prove that efficiencies would be passed on to consumers was debated prior to the introduction of the *Competition Act* in 1986, but was ultimately discounted, arguably to ensure that section 96 of the *Act* was aligned with the purpose clause. South Africa is the only other competition law regime with a codified efficiencies defence of a similar nature.

[65] Roger Alford, "The Public Interest Standard and the Dangers of Discrimination" (Remarks delivered at the Global Seminar Series in Düsseldorf, Germany, 8 May 2018), online: <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-roger-alford-delivers-remarks-global-seminar-series-d>. For domestic commentary, see John Pecman, "Populism, Public Interest and Competition" (Speech delivered at the CD Howe Institute, Toronto, Ontario, 27 April 2018), online: <https://www.canada.ca/en/competition-bureau/news/2018/05/john-pecman-commissioner-of-competition---populism-public-interest-and-competition.html> [Pecman].

[66] In this decision, the Tribunal provided a comprehensive historical overview of the efficiencies defence. It described the context of adoption of the *Competition Act* as follows: "While, quite obviously, the government was concerned with fairness "on the market", the primary reason for amending the Combines Investigation Act in 1986 was the need to strengthen Canadian business and provide an incentive for productivity in the face of aggressive international

competition to which the government was committed and which would ultimately benefit consumers", see: *Superior Propane III, supra* note 50 at para 81.

[67] Of course, any identified and provable efficiencies accruing to Canada are only off-set against anti-competitive effects arising in Canada, since the Bureau does not have jurisdiction to quantify or enforce against anti-competitive effects likely to arise outside of Canada. This point of view was expressed in *Superior Propane III*, where the Tribunal concluded that the crystallization of anti-competitive effects outside of Canada must be excluded from the section 96 analysis. See *Superior Propane III, supra* note 51 at paras. 192-195.

[68] *Canada (Commissioner of Competition) v. Superior Propane Inc.* (2000 Comp Trib 15) [*Superior Propane I*].

[69] Competition Bureau Canada, "A practical guide to efficiencies analysis in merger reviews", (20 March 2018), online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04350.html>.

[70] *Tervita, supra* note 23.

[71] *Ibid* at para 87.

[72] *Ibid.*

[73] See e.g. Khan, *supra* note 15.

[74] Phillips, *supra* note 13 at 3.

[75] Khan, *supra* note 15 at 744.

[76] *Ibid* at 716.

[77] Khan's practical solutions range from introducing presumptions of predation for dominant firms, using market shares to establish presumptions of dominance, and banning mergers that give rise to "conflicts of interest" (i.e., vertical mergers where the purchaser post-merger acts as supplier to the target's competitors).

[78] Jason Furman, "Beyond Antitrust: The Role of Competition Policy in Promoting Inclusive Growth" (Remarks delivered at the Searle Center Conference on Antitrust Economics and Competition Policy, Chicago, Illinois, 16 September 2016), online: <https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160916_searle_conference_competition_furman_cea.pdf>.

[79] Theo Francis & Ryan Knutson, "Wave of Megadeal Tests Antitrust Limits in the US", *Wall Street Journal* (18 October 2015), online: <https://www.wsj.com/articles/wave-of-megadeals-tests-antitrust-limits-in-u-s-1445213306>; Eduardo Porter, "With Competition in Tatters, the Rip of Inequality Widens", *New York Times* (12 July 2016), online: <https://www.nytimes.com/2016/07/13/business/economy/antitrust-competition-inequality.html>.

[80] Senator Warren's plan is available at: Elizabeth Warren, "Empowering American Workers and Raising Wages" (3 October 2019), *Medium* (blog), online: <https://medium.com/@teamwarren/empowering-american-workers-and-raising-wages-a60f27847bcb>.

[81] Elizabeth Warren, "It is time for us to do what Teddy Roosevelt did—and pick up the antitrust stick again." #CAPIdeas" (16 May 2017 at 12:52pm), online: *Twitter* <https://twitter.com/senwarren/status/864523986671161348>.

[82] Brian Feldman, "AOC Doesn't Use Facebook Anymore" (15 April 2019),

Intelligencer, online: <http://nymag.com/intelligencer/2019/04/alexandria-ocasio-cortez-doesnt-use-facebook-anymore.html>.

[83] For further details on the legislation, please refer to: Amy Klobuchar, "In an Effort to Lower Costs for Consumers, Help Even Playing Field for Business, and Encourage Innovation—Klobuchar, Senators Introduce Legislation to Promote Competition" (14 September 2017), *United States Senator Amy Klobuchar*, online: <https://www.klobuchar.senate.gov/public/index.cfm/2017/9/in-effort-to-lower-costs-for-consumers-help-even-playing-field-for-business-and-encourage-innovation-klobuchar-senators-introduce-legislation-to-promote-competition>.

[84] See e.g. Carl Shapiro, "Antitrust in a time of populism" (2018) 61 Intl J of Industrial Organization 714 [Shapiro].

[85] In particular, this line of argumentation is based on two key points. *First*, it is impossible to obtain any substantive insight into the impact of industry concentration when the industries in question are so broadly defined. For example, one industry in the U.S. Census Bureau data is "Utilities", representing US$367 billion revenues in 2012 in the U.S.. When such a diverse and clearly non-substitutable range of products and services are included in the same category, any conclusion regarding the evidence of industry concentration is inevitably flawed, or must at the very least be treated with caution. *Second*, the data from sources like the U.S. Census Bureau does not represent a concentrated picture. In short, the alleged "monopolies" identified by hipster antitrust as so corrosive to society do not exist based on their own data. For example, the U.S. Census Bureau data for transportation and warehousing indicates that industry concentration has risen by over 11% between 1997 and 2012. Firms are undoubtedly getting bigger. However, the total proportion of revenue attributable to the top fifty firms is just 42%. These data indicate, according to normative economic analysis, that the transportation and wholesale industries in the U.S. are still very fragmented. Not only are there fifty larger firms operating at one end of the scale, but the remaining 58% of revenues is derived from a much larger group of competitors. See, e.g. *ibid.* See also Gregory J Werden & Luke M Froeb, "Don't Panic: A Guide to Claims of Increasing Concentration" (2018) 33:1 Antitrust Magazine at 74, 76–77.

[86] The Neo-Brandeisian movement criticizes the consumer welfare standard for its narrow focus on price, to which defenders of the status quo have responded. For example: Carl Shapiro, "Opening Statement before Senate Judiciary Committee, Subcommittee on Antitrust, Consumer Protection and Consumer Rights", Transcribed Statement (13 December 2017), at 3 "[T]hose who say that the 'consumer welfare' standard is narrowly focused on price to the exclusion of other factors are simply incorrect: properly applied, the 'consumer welfare' standard includes a range of factors that benefit consumers, not just low prices but improved product variety and quality and of course more rapid innovation."

[87] See, e.g. Margaret Harding McGill, "State antitrust probes target Facebook, Google as FTC investigates tech" (6 September 2019) online: <https://www.politico.com/states/new-york/albany/story/2019/09/06/state-antitrust-probes-target-facebook-google-as-ftc-investigates-tech-1173296>.

[88] For a fuller overview of this consensus, see Steven C Salop, "Invigorating Vertical Merger Enforcement" (May 2018) 127 Yale LJ 1962.

[89] Khan, *supra* note 15 at 754.

[90] Jonathan B. Baker et al, "Five Principles for Vertical Merger Enforcement Policy", (2019) 33:3 Antitrust 12, online: <https://economics.mit.edu/files/17754>.

[91] Shapiro, *supra* note 84 at 741.

[92] Edmund Lee and Cecilia Kang, "U.S. Loses Appeal Seeking to Block AT&T-Time Warner Merger", *The New York Times* (26 February 2019), online: <https://www.nytimes.com/2019/02/26/business/media/att-time-warner-appeal.html>.

[93] Federal Trade Commission, "FTC Imposes Conditions on Staples' Acquisition of Office Supply Wholesaler Essendant Inc." (28 January 2019), online: <https://www.ftc.gov/news-events/press-releases/2019/01/ftc-imposes-conditions-staples-acquisition-office-supply>.

[94] Federal Trade Commission, "FTC Requires Fresenius Medical Care AG & KGaA and NxStage Medical, Inc. to Divest Bloodline Tubing Assets to B. Braun Medical, Inc. as a Condition of Merger" (19 February 2019), online: <https://www.ftc.gov/news-events/press-releases/2019/02/ftc-requires-fresenius-medical-care-ag-kgaa-nxstage-medical-inc>.

[95] M Sean Royall and Richard H Cunningham, Partners, and Chris Wilson and Chris Kopp, Associates, Gibson, Dunn & Crutcher LLP, "Updated Vertical Merger Guidelines May Be On The Horizon" (24 April 2019), online: <https://www.wlf.org/2019/04/24/wlf-legal-pulse/updated-vertical-merger-guidelines-may-be-on-the-horizon/>.

[96] Mr. Le Maire's comments were widely reported in the press, including at: Natasha Turak, "French finance minister blasts EU decision to block Alstom-Siemens merger in face of Chinese competition" *CNBC* (10 February 2019), online: <https://www.cnbc.com/2019/02/10/le-maire-blasts-eu-decision-to-block-alstom-siemens-merger.html>.

[97] Mr. Altmaier was speaking at a technology conference in Munich, as reported by Reuters: Leigh Thomas, "France, Germany step up pressure over Alstom-Siemens deal", *Reuters* (21 January 2019), online: <https://www.reuters.com/article/us-alstom-m-a-siemens/france-germany-step-up-pressure-over-alstom-siemens-deal-idUSKCN1PF0PK>.

[98] Peter Altmaier, "Announcement of Germany's industrial strategy 2030" (Remarks delivered at the announcement of Germany's "industrial strategy 2030", 5 February 2019).

[99] *House of Commons Debates*, 33rd Parl, 1st Sess, No 8 (7 April 1986) at 11927 (Hon Michel Côté). In the same debate it was noted specifically that the *Competition Act* would "help Canadian businesses face up to their foreign competitors, both domestically and internationally."

[100] *Franco-German Manifesto*, *supra* note 3.

[101] *Ibid* at 3.

[102] *Ibid* at 6.

[103] The European Council is a collective, political body that sets the European Union's overall political direction and priorities. It comprises the heads of state or

government of the EU member states, along with the President of the European Council and the President of the European Commission.

[104] Meeting of the French, German, and Polish Governments, *Modernising EU Competition Policy* (Bruegel: 4 July 2019), online: <https://www.bmwi.de/Redaktion/DE/Downloads/M-O/modernising-eu-competition-policy.pdf?__blob=publicationFile&v=4>.

[105] See e.g., Center from American Progress, "Reviving Antitrust: Why Our Economy Needs a Progressive Competition Policy" (29 June 2016), online: <https://cdn.americanprogress.org/wp-content/uploads/2016/06/28143212/RevivingAntitrust.pdf>.

[106] See further in: EC, "Commission Notice on the definition of the relevant market for the purposes of Community competition law", 97/C 372/03 (Official Journal of the European Communities, 9 December 1997), online:<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31997Y1209(01)&from=EN>.

[107] Margrethe Vestager, "Defining markets in a new age" (Speech delivered at the Chillin' Competition Conference, Brussels, Belgium, 9 December 2019), online: <https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/defining-markets-new-age_en>.

[108] See e.g., Rochelle Toplensky, "Europe's Tougher Approach to Big Tech", *Wall Street Journal* (10 September 2019), online: <https://www.wsj.com/articles/europes-tougher-approach-to-big-tech-11568127217>. The theme of U.S. versus EU enforcement divergence is explored in greater detail in D. Daniel Sokol, "Troubled Waters Between U.S. and European Antitrust", (2017) 115 Mich L Rev 955.

[109] It is also important to recognize that, to some degree, all competition agencies are political actors driving their own policy agendas. While the Commission is legislatively protected from interference by national or regional politicians pursuing industrial policy goals, all of its merger decisions must be blessed by the Commission's full College of Commissioners, all but one of whom have no responsibility for competition law enforcement.

[110] See for example, "Is Margrethe Vestager championing consumers or her political career?", *The Economist*, (14 September 2017), online: <https://www.economist.com/business/2017/09/14/is-margrethe-vestager-championing-consumers-or-her-political-career>.

[111] For example, in 2019 the Minister of Transport approved the merger of First Air with Canadian North, despite the conclusion by the Bureau that the transaction would lead to anti-competitive effects. Of note, the Bureau refused to consider the efficiencies defence in its analysis of the merger, stating that this fell outside the scope of its mandate in circumstances where its jurisdiction to review the merger was superseded by the Minister of Transport. See Transport Canada, News Release, "Government of Canada approves First Air and Canadian North merger" (19 June 2019), online: <https://www.canada.ca/en/transport-canada/news/2019/06/government-of-canada-approves-first-air-and-canadian-north-merger.html>.

[112] Pecman, *supra* note 65.

[113] *Ibid.*

[114] *Ibid.*

[115] X-inefficiency is the divergence of a firm's observed behavior in practice, influenced by a lack of competitive pressure, from efficient behavior assumed or implied by economic theory. In concentrated markets, a firm may be able to use inefficient production techniques and still stay in business, contrary to mainstream economy theory which relies on the assumed rational profit-maximizing behaviour of corporations.

[116] *Tervita, supra* note 23 at para 146.

[117] John Pecman, "Strengthening competition: Innovation, collaboration and transparency", (Remarks delivered at the Canadian Bar Association's Competition Law Fall Conference, Ottawa, Ontario, 6 October 2016), online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04148.html>.

[118] Senate, *Journals of the* Senate, 37th Parl, 2nd Sess, Issue No. 31 (5 November 2003) online: <https://sencanada.ca/en/Content/Sen/committee/372/bank/31ev-e>. These remarks to the Standing Senate Committee on Banking, Trade and Commerce by the Acting Commissioner of Competition Gaston Jorre were made in support of Bill C-249, which would have removed the efficiencies defence from the Competition Act. Further details on these considerations are available in the Competition Bureau Canada, *Report of the Advisory Panel on Efficiencies* (August 2005), online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01954.html>.

[119] Brian A Facey and David Dueck, "Canada's Efficiency Defence: Why Ignoring Section 96 does more harm than good for economic efficiency and innovation" (2019), 32:1 Can Competition L Rev 33.

[120] *Ibid* at 45.

[121] The fact that relatively few cases have been decided in the Tribunal on the basis of a balancing of anti-competitive effects versus pro-competitive efficiencies does not necessarily mean that the efficiencies defence has played a peripheral role in merger enforcement in Canada. Such analyses are likely more common in the course of the Bureau's administrative review of a transaction, and likely to influence both merging parties in their decisions on whether to offer remedies, and the Bureau on whether to challenge a merger before the Tribunal.

[122] *Competition Act, supra* note 4 at s 1.1.

[123] *Tervita, supra* note 23 at para 122: "The merging parties bear the onus of establishing all other elements of the defence, including the extent of the efficiency gains and whether the gains are greater than and offset the anti-competitive effects."

[124] *Ibid* at para 130.

[125] Indeed, under those other regulatory regimes, there have been cases where the Bureau has identified anti-competitive effects under the *Competition Act*, but such conclusions have been overridden by broader public interest considerations. The recent approval by the Minister of Transport of the merger of First Air and Canadian North is a good example of the limited circumstances in which

public interest considerations take precedence over the substantive test in the *Competition Act*.

[126] Recent Bureau activity in relation to the digital economy includes: the publication of revised Abuse of Dominance Guidelines (see Competition Bureau Canada, "Abuse of Dominance Enforcement Guidelines", (7 March 2019), online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04420.html>), a White Paper on Big Data (see Competition Bureau Canada, "Big data and innovation: key themes for competition policy in Canada", (19 February 2018), online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04342.html>), and a Market Study on Technology-led innovation in the Canadian financial services sector (see Competition Bureau Canada, "Technology-led innovation in the Canadian financial services sector", (14 December 2017), online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.Nsf/eng/04322.html>), all reinforced by the Bureau's annual plan, the most recent of which puts the digital economy at the forefront (Competition Bureau Canada, "2019-20 Annual Plan: Safeguarding the Future of Competition", (25 July 2019), online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04480.html)>.

[127] Innovation, Science and Economic Development Canada, *Canada's Digital Charter in Action: A Plan by Canadians, for Canadians* (21 May 2019), online: <https://www.ic.gc.ca/eic/site/062.nsf/eng/h_00109.html>.

[128] The letter is available at: The Honourable Navdeep Bains, *Letter from Minister of Innovation, Science and Economic Development to the Commissioner of Competition* (21 May 2019), online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04464.html>.

[129] *Ibid.*

[130] Matthew Boswell, "Discussing Competition Policy in the Digital Era" (Remarks at the Competition Bureau's Data Forum, Ottawa, Ontario, 30 May 2019). See also Dominic Thérien, Stéphanie St-Jean & Bianca Annie Marcelin, "The New Commissioner of Competition Requests Changes to Address Digital Economy Challenges" (4 June 2019), *McCarthy Tétrault Terms of Trade* (blog), online: <https://www.mccarthy.ca/fr/node/58436>.

[131] In other comments, the Commissioner has signaled a tougher stance on accepting efficiencies during the Bureau's merger review process, noting he is "highly unlikely" to exercise enforcement discretion on the basis of an efficiencies defence in an otherwise problematic transaction, without "reliable, credible and probative evidence" of efficiencies. The full speech is available at: Matthew Boswell, "No River too Wide, No Mountain too High: Enforcing and Promoting Competition in the Digital Age" (Remarks at the Canadian Bar Association Competition Law Spring Conference 2019, Toronto, Ontario, 7 May 2019), online: <https://www.canada.ca/en/competition-bureau/news/2019/05/no-river-too-wide-no-mountain-too-high-enforcing-and-promoting-competition-in-the-digital-age.html>.

[132] *Ibid.* at 124.