

## COMMENTS

### IS THE REST OF THE WORLD MOVING TOWARD THE CANADIAN APPROACH TO EFFICIENCY IN COMPETITION POLICY?

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*Calls for eliminating the efficiency defence in the Competition Act on the basis that it is out of line with competition policies in other jurisdictions do not acknowledge the current state of flux in those jurisdictions. The rejection of the Alstom-Siemens merger opened a debate in Europe on how to allow certain anti-competitive mergers to proceed, and the World Bank and OECD advocate that developing and emerging economies establish strong pro-competitive policies and distinguish “legitimate” from “illegitimate” market power. While antitrust thinking in the United States is moving backwards, the rest of the world appears to be moving towards the Canadian approach to efficiency in competition policy.*

*Les demandes d'élimination de la « défense fondée sur les gains en efficacité » dans la Loi sur la concurrence se basant sur l'argument qu'elle est contraire aux politiques en matière de concurrence dans d'autres pays ne tiennent pas compte des fluctuations constantes qui s'opèrent dans ces pays. Le rejet de la fusion Alstom-Siemens a suscité un débat en Europe quant aux façons de permettre la concrétisation de certaines fusions anticoncurrentielles. Par ailleurs, la Banque mondiale et l'OCDE prônent la mise en œuvre de rigoureuses politiques favorisant la concurrence auprès d'économies émergentes et d'économies en développement, et les exhortent à bien distinguer les pouvoirs de marché « légitimes » de ceux qui sont « illégitimes ». Alors que la pensée en matière d'antitrust aux États-Unis fait marche arrière, le reste du monde semble de plus en plus s'aligner sur l'approche canadienne de l'efficacité dans leurs politiques en matière de concurrence.*

**I**n one of his last public speeches, former Commissioner of Competition John Pecman proclaimed his opposition to the efficiency defence to an anti-competitive merger in s. 96 of the *Competition Act*, stating that it is “out of line with the approach being taken by many of our country’s trading partners, including most notably, the United States.”<sup>2,3</sup> Is he right?

#### The Canadian Approach

Factually, the Canadian critics are correct: the efficiency defence in s. 96 is out of line with other jurisdictions. It was out of line in 1969 when the

Economic Council of Canada recommended it in its foundational *Interim Report on Competition Policy*,<sup>4</sup> and it was out of line in the 1986 amendments that fundamentally changed Canada's competition-law regime.<sup>5</sup>

The Economic Council in 1969 articulated three main concerns:

- that Canadian manufacturing operations served mainly the domestic market and were too small to achieve economies of scale (the “scale” problem);
- that Canadian manufacturing consisted of too many small firms producing too many products which results in short production runs and higher costs (the “specialization” problem); and
- that competition policy, as expressed in the *Combines Investigation Act* (first passed in 1910) and judicial decisions thereunder, if maintained, would severely retard the much-needed modernization of Canadian industry in the face of a more liberal international-trading regime.

The Economic Council addressed the scale problem by recommending a civil-law approach to mergers, and the creation of a tribunal that would adjudicate mergers to determine anti-competitive effects and “offsetting public benefits.” Section 96 of the 1986 amendments gave effect to this recommendation.

Regarding the specialization problem, the Economic Council recommended protection from criminal conspiracy laws when firms entered into specialization agreements with competitors. Section 86(1) of the 1986 amendments provided for the registration of such agreements on the condition that they met the same efficiency test articulated in s. 96.

In 1969, the concern about economic efficiency was unique to Canada. No other jurisdiction had anything similar in their competition laws. Indeed, the then-prevailing hostility of U.S. antitrust to efficiency considerations would later be found insufficiently harsh in the European Union (“EU”).<sup>6,7</sup>

Have the Canadian critics of s. 96 missed important international developments indicating an increasing appreciation of the Canadian approach to competition policy generally and merger efficiencies in particular? Do they appreciate that the United States appears to be going back to the old “big is bad” approach to antitrust pre-dating the “consumer welfare standard” that these critics apparently favour?

## Scale and Specialization in the EU: the debate over Alstom-Siemens

The most visible area of rethinking of competition policy is the EU's traditionally hostile approach to efficiencies in merger review. In 2017, the French company Alstom and the German company Siemens agreed to merge their rail assets hoping to create a European industrial champion that could compete successfully with the much larger CRRC, a Chinese state-owned train manufacturer.<sup>8</sup>

This merger appeared to fit into a new focus on industrial strategy announced in the 2018 joint statement of eighteen EU Member States, which called attention to increasingly fierce competition from other major economic blocks, difficulties in the global trading environment and growing protectionism.<sup>9</sup> The statement urged the EU to develop a European industrial strategy that encourages the creation of major economic players capable of facing global competition on equal terms while protecting European consumers.

However, on February 6 2019, the European Commission blocked the merger after finding that it was anti-competitive in the EU.<sup>10</sup>

The immediate response by France's finance minister Bruno Le Maire was blunt:

"Let's have a look at reality, we are facing a huge challenge with the rise of the Chinese industry. What do we do, shall we divide the European forces, or try to merge the European forces from the industrial point of view?"<sup>11</sup>

In a highly-unusual, official joint response,<sup>12</sup> the French and German governments issued a *Franco-German Manifesto for a European industrial policy fit for the 21st Century*, noting that among the top 40 biggest companies in the world, only five are European, and calling for an update of the EU merger guidelines to account for competition at the global level.

However, Margrethe Vestager, the EU's Competition Commissioner, strongly endorsed the decision to block the merger, stating that watering down the merger rules would amount to a "strategic choice" to change Europe's economic model based on fair competition. Nevertheless, she noted the challenge to European openness from "the rise of Chinese state capitalism and US protectionism."<sup>13</sup> In December 2019 however, facing a determined push by France and Germany, Margarethe Vestager announced

that she was going to review the way the EU Competition Commission defines geographic markets for competition cases.<sup>14</sup>

In March 2019, the European Political Strategy Centre, the EU's in-house think-tank, examined the controversy engendered by the Commission's decision in Alstom-Siemens and noted the desirability of attaining greater scale and specialization in EU industry, especially in light of unfair foreign competition. It identified a variety of policy measures geared towards accomplishing this objective but did not call for changes in competition policy.<sup>15</sup>

The Alstom-Siemens decision has forced the EU to reconsider its approach to anti-competitive mergers. Should such mergers always be blocked, or should certain ones be allowed to proceed? If the latter, what criteria should be used? Simply wanting a "national champion" should not be the determining factor. However, the idea of a Canadian-style trade-off between economic efficiency and competitive harm may have some appeal to both sides of that debate.

### **Emerging and Developing Economies: "A Step Ahead"**

Less noticed is the 2017 report of the joint research project of the World Bank and the Organization for Economic Cooperation and Development ("OECD") that explores how countries could reduce poverty and increase shared prosperity. The report advocates for the introduction and strengthening of competition policies to encourage market competition.<sup>16</sup>

The report, a compendium of research studies by economists, calls for a new approach to competition policy, one that views competitive markets and policies as the best means for achieving economic growth, reduced unemployment, lower consumer prices, improved productivity, innovation, and, to the extent that high-wealth households have benefitted from the exercise of market power, a less unequal distribution of wealth.

Accordingly, the report calls for policies to encourage and enhance competitive markets, greater competition enforcement, reduced barriers to entry especially in markets dominated by government-sponsored cartels, and pro-competitive regulations.

Of particular relevance is the view toward market power in Chapter 5 of the report, where the authors state, after their detailed study of the relationship between market power and the distribution of wealth:

While sources of market power vary, and many are generally considered legitimate, such as intellectual property protection for products, processes, or brands, significant sources of market power are violations of competition law or government-created barriers to entry. . . .

To avoid misinterpretation, it is worth emphasizing that this study does not argue that market power is harmful in and of itself. Many sources of market power yield economic benefits, stimulating innovation and investment. Specific benefits may include intellectual property, first-mover advantages, and network effects.

The results are nonetheless suggestive. Illegitimate market power, which is frequently considered harmful for consumers in the long run, is a substantial contributor to overall market power. Consequently, government action to limit illegitimate market power may enhance equality of wealth distributions.<sup>17</sup>

The understanding that market power may be legitimate if associated with positive economic effects is a key insight, as it could suggest a trade-off approach similar to that in s. 96 and s. 86(1) of Canada's *Competition Act*.

Implicitly, the World Bank-OECD report does not regard the U.S. anti-trust approach as a suitable basis for its recommendations to emerging and developing countries. Neither does it identify or endorse Canada's approach to competition policy. However, it displays similar concerns for industrial productivity and economic efficiency that the Economic Council of Canada advocated in its 1969 report.

### **U.S. Antitrust: Reverting to Populism?**

The consumer welfare standard, the prevailing approach in U.S. antitrust law, leaves some room for efficiency, and is under attack from those who argue that it has contributed to under-enforcement of the antitrust laws.<sup>18,19</sup> Under growing populist influence, U.S. antitrust is turning back toward the "big is bad" theory, relying on trends in industrial concentration ratios that lost their legitimacy decades ago because they did not focus on the market-power question. Focusing its investigation on online platforms and big tech companies, both Houses of the U.S. Congress have held hearings on the adequacy of the prevailing antitrust regime.<sup>20,21</sup>

Consider U.S. Senator Elizabeth Warren's proposal to use the antitrust laws to designate "platform utilities."<sup>22</sup> So designated, Amazon would be prohibited from selling its own low-cost batteries on its platform but could

sell the higher-priced branded batteries such as Duracell, Energizer and Eveready.<sup>23</sup>

So much for the idea that U.S. antitrust should focus on lower consumer prices! A recent demonstration of how US antitrust is reversing is the new book by Professor John Kwoka entitled “Controlling Mergers and Market Power: A Program for Reviving Antitrust in America”. His proposals include, inter alia, a stronger reliance on structural presumptions.<sup>24</sup>

### **Where are the Canadian Critics of Section 96 Now?**

Outside the U.S., the world appears to be moving, or at least is considering moving, away from hostility to economic efficiency and towards competition-policy regimes that give efficiencies much greater respect.

Moreover, as the United States moves back toward its historically populist antitrust roots, its antitrust regime will no longer be seen as the global standard for competition policy because the prospective regime is not responsive to concerns for economic efficiency, productivity growth and higher standards of living.

Surely the Canadian critics of the efficiency defence in s. 96 are looking at the future through the rear-view mirror. Their persistent claim that it should be amended to conform with “international practice” does not acknowledge the recent developments in other jurisdictions.

### **ENDNOTES**

<sup>1</sup> Lay Member (full-time), Competition Tribunal, 1998–2003. This commentary is drawn from the author’s keynote address to the annual conference of the Young Lawyers Committee of the Competition Law Section of the Canadian Bar Association, April 25, 2019, Ottawa. The author welcomes comments; e-mail to [lschwartz5205@rogers.com](mailto:lschwartz5205@rogers.com).

<sup>2</sup> John Pecman, “Populism, Public Interest and Competition”, speech to C.D. Howe Institute, April 27, 2018, online: <<https://www.canada.ca/en/competition-bureau/news/2018/05/john-pecman-commissioner-of-competition--populism-public-interest-and-competition.html>>.

<sup>3</sup> In May 2018, Mr. Pecman gave another speech in which he advocated that in any reforms to the Competition Act, a “modern economics-based consumer-welfare standard be maintained.” See Competition Bureau Canada, Speech, “Building antitrust with trust” (10 May 2018), online: <<https://www.canada.ca/en/competition-bureau/news/2018/05/building-antitrust-with-trust.html>>. His statement presumes that Canadian competition policy is based on a consumer-welfare standard.

<sup>4</sup> Economic Council of Canada, *Interim Report on Competition Policy*, Queen's Printer, 1969.

<sup>5</sup> Canada, Consumer and Corporate Affairs Canada, *Competition law amendments: a guide*, (Ottawa: Minister of Supply and Services Canada, 1985) at 4.

<sup>6</sup> See the US Supreme Court 1963 decision in *Philadelphia National Bank* where it stated: "We are clear, however, that a merger the effect of which 'may be substantially to lessen competition' is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial." *United States v Philadelphia National Bank et al.*, 374 US 321 (1963).

<sup>7</sup> Kuoppamäki and Torstila note that in the EU, whose competition laws are more recent than in the US, "[s]ince 2004, EU merger control guidelines state the Commission will consider efficiencies as a part of its evaluation ... despite the guidelines, current EU regulatory practice contains no effective efficiency defence. We investigate empirically all EU merger control decisions from 1991 to 2014, with an emphasis on Article 8 decisions since 2004, Parties have raised efficiency arguments only 21 times since 2004 ... In critical cases, however, efficiency arguments appear to never have been decisive in Commission practice." (See Petri Kuoppamäki and Sami Torstila, "Is There a Future for an Efficiency Defence in European Merger Control?" (November 20, 2015), online: <<http://dx.doi.org/10.2139/ssrn.2727171>>.)

<sup>8</sup> See Reuters, "Explainer: Why Siemens-Alstom rail merger is creating European tensions," January 17, 2019, online: <<https://www.reuters.com/article/us-alstom-m-a-siemens-politics/explainer-why-siemens-alstom-rail-merger-is-creating-european-tensions-idUSKCN1PB216>>.

<sup>9</sup> Joint statement by France, Austria et al., "Friends of Industry", 6<sup>th</sup> Ministerial Meeting, December 18 2018, Paris, online: <[https://www.gouvernement.fr/sites/default/files/locale/piece-jointe/2018/12/929\\_-\\_declaration\\_finale\\_-\\_6eme\\_reunion\\_des\\_amis\\_de\\_lindustrie-en.pdf](https://www.gouvernement.fr/sites/default/files/locale/piece-jointe/2018/12/929_-_declaration_finale_-_6eme_reunion_des_amis_de_lindustrie-en.pdf)>.

<sup>10</sup> See EC, "Mergers: Commission prohibits Siemens' proposed acquisition of Alstom", Press release (February 6, 2019) online: <[http://europa.eu/rapid/press-release\\_IP-19-881\\_en.htm](http://europa.eu/rapid/press-release_IP-19-881_en.htm)>.

<sup>11</sup> See Competition Policy International, "EU: Le Maire blasts EU decision to block Alstom-Siemens merger," February 10, 2019, online: <<https://www.competitionpolicyinternational.com/eu-le-maire-blasts-eu-decision-to-block-alstom-siemens-merger/>>.

<sup>12</sup> See Government of France, "A Franco-German Manifesto for a European industrial policy fit for the 21<sup>st</sup> Century," February 19, 2019, online: <<https://www.gouvernement.fr/en/a-franco-german-manifesto-for-a-european-industrial-policy-fit-for-the-21st-century>>.

<sup>13</sup> See Competition Policy International, "EU: Vestager is Concerned about weaker merger rules," March 4, 2019, online: <<https://www.competitionpolicyinternational.com/eu-vestager-is-concerned-about-weaker-merger-rules/>>.

<sup>14</sup> Politico, "France claims big win against Vestager in battle for

champions,” December 12, 2019, online: <<https://www.politico.eu/article/europe-competition-france-claims-big-win-against-margrethe-vestager-in-battle-for-champions-alsom-siemens/>>.

<sup>15</sup> European Political Strategy Centre, “EU Industrial Policy after Siemens-Alstom: Finding a new balance between openness and protection”, March 18, 2019, online: <[https://ec.europa.eu/epsc/publications/other-publications/eu-industrial-policy-after-siemens-alstom\\_en](https://ec.europa.eu/epsc/publications/other-publications/eu-industrial-policy-after-siemens-alstom_en)>.

<sup>16</sup> World Bank and OECD, *A Step Ahead: Competition Policy for Shared Prosperity and Inclusive Growth*, Washington DC, 2017. This publication builds on the World Bank Group Global Engagement on Competition Policy for Inclusive Growth and Shared Prosperity and the proceedings of its inaugural conference, organized jointly with the OECD and held at the World Bank Group headquarter in Washington, DC in June 2015.

<sup>17</sup> *Ibid* at pp.151-152.

<sup>18</sup> Competition Policy International and Computer and Communications Industry Association, Inaugural Conference on Challenges to Antitrust in a Changing Economy, Harvard Law School, November 9 2018. Available at <<https://www.competitionpolicyinternational.com/harvard-conference-2018/>>.

<sup>19</sup> *Ibid*; “The Consumer Welfare Standard”, online: <<https://vimeo.com/304934910>>.

<sup>20</sup> US House Committee on the Judiciary, “House Judiciary Committee Launches Bipartisan Investigation into Competition in Digital Markets”, Press release, June 3 2019, online: <<https://judiciary.house.gov/news/press-releases/house-judiciary-committee-launches-bipartisan-investigation-competition-digital>>.

<sup>21</sup> US Senate, Subcommittee on Antitrust, Competition Policy and Consumer Rights, “Oversight of the Enforcement of the Antitrust Laws,” September 17 2019, online: <<https://www.judiciary.senate.gov/meetings/09/17/2019/07/23/2019/oversight-of-the-enforcement-of-the-antitrust-laws>>.

<sup>22</sup> See Elizabeth Warren, “Here’s how we can break up Big Tech,” March 8, 2019, online: <<https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c>>.

<sup>23</sup> See Herbert J. Hovenkamp, “The Warren Campaign’s Antitrust Proposals” (March 2019), online: University of Pennsylvania Law School Legal Scholarship Repository <[https://scholarship.law.upenn.edu/faculty\\_scholarship/2060/](https://scholarship.law.upenn.edu/faculty_scholarship/2060/)>.

<sup>24</sup> See <<https://mailchi.mp/competitionpolicyinternational.com/john-kwoka-controlling-mergers-and-market-power?e=5d83288c29>>.



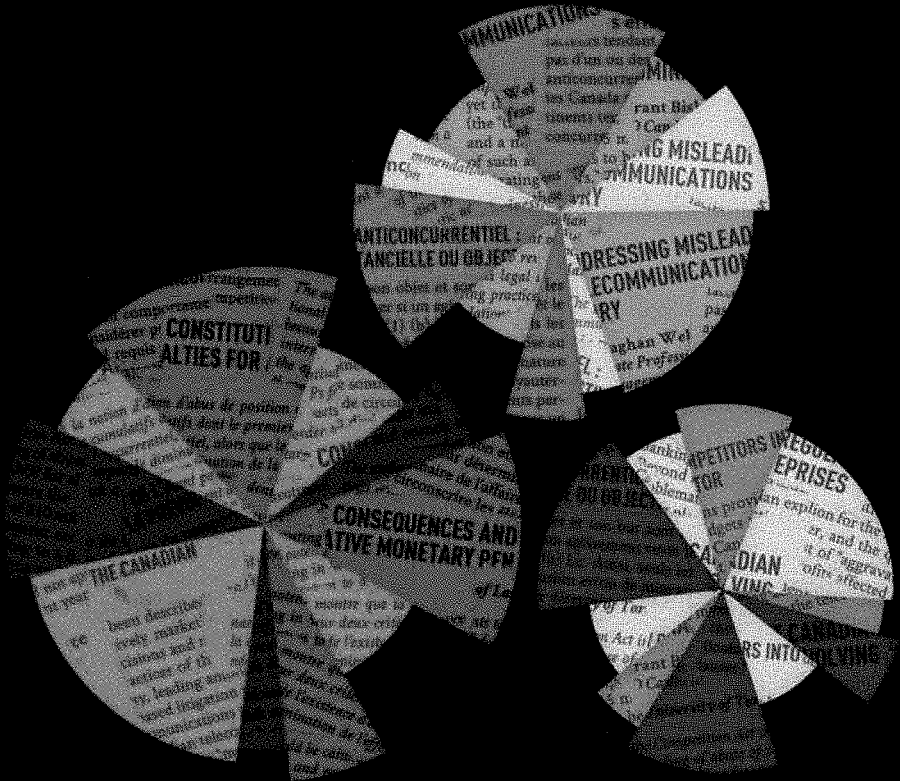


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Vol. 33 | 2021 | N° 2

# CANADIAN COMPETITION LAW REVIEW

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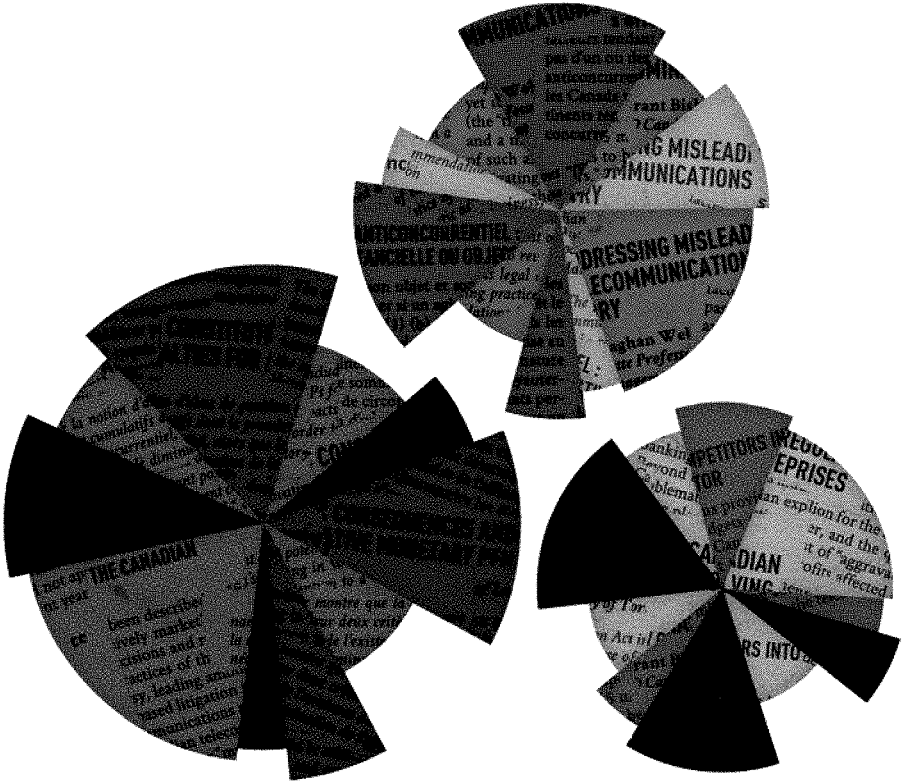
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ISSN 1929-6851 (Online) / ISSN 1929-6843 (Print)



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