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Applying Abuse of Dominance to Facebook's Nascent Competitor Acquisitions

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Nascent competitor acquisitions in digital industries pose a unique threat to competition, but it can be challenging to determine whether any one such acquisition will harm competition in the market. Thanks to recent changes to the Competition Act, nascent competitor acquisitions can likely be challenged under abuse of dominance in some circumstances. Abuse of dominance may have advantages over merger review, because the Commissioner would be able to retrospectively analyze the anti-competitive impact of nascent competitor acquisitions and draw from a more flexible set of remedies to address those effects. Applying the Canadian abuse of dominance doctrine to the allegations in the American FTC v Facebook case demonstrates the benefits and drawbacks of this approach.

L'acquisition de concurrents naissants est un danger insidieux pour la concurrence dans le monde du numérique, comme il peut être difficile de juger si la démarche va ou non s'avérer anticoncurrentielle. Mais, grâce aux récentes modifications à la Loi sur la concurrence, ce type d'acquisition pourra dans certaines circonstances être remis en question pour abus de position dominante. L'invocation de ce principe a ses avantages par rapport à l'analyse des fusions, car le commissaire pourra juger rétrospectivement de l'effet anticoncurrentiel qu'aura pu avoir l'acquisition d'un concurrent naissant et s'armer d'un attirail plus polyvalent de recours pour contrer les répercussions anticoncurrentielles. Nous appliquerons ici la doctrine canadienne de l'abus de position dominante à l'affaire américaine FTC v Facebook pour en faire ressortir les forces et les faiblesses.

I. Introduction

In competitive economies, rapid innovation helps to routinely disrupt industries. Such disruption generates value for consumers by pushing firms to introduce new products, improve product quality and reduce prices. For that reason, innovation has been cited as a key aim of Canadian competition policy.[1] However, such disruption by nascent competitors poses a constant threat to incumbent firms. That threat can tempt

incumbents to fend off competition by acquiring upstart challengers that are poised to erode the incumbent's market power.

At first glance, it is not obvious that acquisitions of small, unestablished firms should receive scrutiny under the *Competition Act* (The "*Act*").[2] Such firms often have low market share and little assets or revenues in Canada. Moreover, nascent competitors, by definition, are just emerging in the market and ultimately may never become commercial successes. Since nascent firms have only small market shares, their acquisitions by established firms may not appear to meaningfully alter the structure of a market, much less that such an acquisition substantially affects competition. Indeed, in the context of traditional industries like manufacturing, nascent competitor acquisitions are typically not troublesome. In those markets, a small startup would be unable to grow quickly enough to exercise competitive discipline on incumbent firms. For this reason, the traditional economic tests used in assessing mergers are difficult to apply to cases involving acquisitions of firms with little market share.

However, with the rise of the digital economy, nascent competitors have become important sources of *potential* competition. Low marginal costs can help digital firms, especially online platforms, to achieve rapid growth.[3] Network externalities, which typically insulate an established firm from competition, may also contribute to exponential growth in digital markets.[4] Accordingly, a small firm can quickly grow to challenge established players in digital markets. In turn, nascent competitor acquisitions can significantly reduce the competitive discipline exercised by upstart firms in digital markets where they would not in traditional industries.

As a result, challenging nascent competitor acquisitions is emerging as an important goal for the competition enforcement. But successfully challenging such mergers at the Canadian Competition Tribunal (the "Tribunal") poses a series of difficulties. The small size of the target companies can pose a hurdle to merger review, as these transactions often fall below premerger notification thresholds. Those thresholds do not consider sales into Canada generated by foreign assets, potentially underrepresenting the risk that the combined firm may exercise market power in Canada.[5] Moreover, the Competition Bureau has identified several notification "loopholes" that may allow merging firms to use strategies like creeping acquisitions to structure their otherwise notifiable transactions so that they do not trigger the notification thresholds.[6]

Further, when the Commissioner challenges an acquisition, they must establish that the acquisition is, on the balance of probabilities, likely to prevent or lessen competition substantially. This requirement places a heavy burden on the Commissioner to show that, but for the acquisition, a nascent competitor or other potential market entrant would have effectively competed with the incumbent in a discernible time frame.[7] As argued by the Competition Bureau (the "Bureau") in its recent submissions relating to modernizing the *Act*,[8] this legal standard would likely be much more difficult to show in a merger where one of the firms is small and its future impact on the market is a matter of speculation compared to a merger between two established firms with sizeable market shares. As a result, it is unclear when and how the Commissioner should challenge nascent competitor acquisitions under merger review, if at all.

In part for these reasons, the Competition Bureau has argued that major changes to the merger review provisions to the *Act* are necessary.[9] However, to determine whether such changes are indeed required, it is important to understand what other tools are available for the Commissioner to review and respond to nascent competitor acquisitions. Competition scholars in Canada[10] and the United States[11] have pointed to abuse of dominance as an alternative to merger review for challenging nascent competitor acquisitions. Thanks to recent changes to s. 79 of the *Act*, the Commissioner likely has the option to challenge a practice of acquisitions as abuse of dominance. Moreover, because the *Act* precludes the Commissioner from challenging the same conduct under both the merger review and abuse of dominance provisions,[12] we must also appreciate the benefits and drawbacks of challenging conduct under s. 79.

While the Commissioner has not yet challenged any nascent competitor acquisitions under abuse of dominance, the US Federal Trade Commission (the "FTC") is challenging Facebook's[13] acquisitions of Instagram and WhatsApp under the analogous doctrine of monopolization.[14] Although the FTC previously investigated both the Instagram and WhatsApp acquisitions and took no action,[15] it now claims that the acquisitions constituted monopolization under Section 2 of the United States *Sherman Act*. The FTC alleges that the acquisitions form part of a practice whereby Facebook acquired the target companies to prevent them from eroding its market power in personal social networking services.[16]

To illustrate how similar claims would be analyzed in Canada, I describe the three requirements for abuse of dominance and determine whether the allegations put forth in the complaint in *FTC v Facebook* might provide

grounds for a case under s. 79. I also discuss some benefits and drawbacks of challenging nascent competitor acquisitions under abuse of dominance. Ultimately, I conclude that abuse of dominance can be a useful framework for identifying and addressing anti-competitive nascent competitor acquisitions, as it allows the Commissioner to retrospectively analyze a series of mergers for anti-competitive effects. The abuse of dominance provisions also provide a more flexible set of remedies that may be preferable in addressing some nascent competitor acquisitions.

II. Substantial Control of the Market

The first factor that the Commissioner must prove in an abuse of dominance case is that the defendant firm "substantially or completely control[s] a class or species of business".[17] While controlling a large market share can lead to a *prima facie* finding of control, the Commissioner must show that the firm has market power, defined as the ability to profitably raise prices above the competitive level.[18] This presents a more fundamental question: what is the relevant market? Ultimately, the Tribunal will consider a variety of factors to determine the product and geographic dimensions of the market. Where available, data as to what substitutes a hypothetical monopolist must control to profitably pursue a small, significant, non-transitory increase in prices will be most probative.[19] Other factors like price relationships, functional interchangeability and switching costs can help the Tribunal establish the relevant product market.[20]

A) Challenges with Digital Offerings

Market definition and proving substantial or complete control is complicated when considering digital markets. Notably, all three companies at issue in *Facebook* operate in two-sided markets, appealing to both users and advertisers. Such two-sided markets have distinctive characteristics. For example, platforms like Facebook become more valuable to advertisers the more users they have.[21] Thus, how a firm performs in one side of the market impacts its appeal in the other market. To this end, social networks like Facebook often offer their products to users for free. While unusual in traditional markets, this is not inherently an anti-competitive practice. The companies drop prices to zero to attract the largest possible user base, which in turn allows them to charge higher prices to advertisers, who subsidize the product for users. Users compensate advertisers by offering their data and their attention in return.[22]

In a case like *Facebook*, the Tribunal would apply the standard hypothetical monopolist test to the specific market at issue. But it would also consider

the two-sided nature of the offering, accounting for any interdependence of demand or feedback effects when determining whether the firm has market power.[23] For example, Facebook's ability to profitably alter the price or quality of its product is constrained by both users and advertisers. To illustrate, consider what might happen if Facebook began to charge users an annual fee for using the platform. While we would expect many users to stop using Facebook, the revenue flowing from the remaining users would be greater than what it is today: zero. However, the loss of users would also make Facebook less attractive to advertisers, who may lower their willingness to pay for ad placements on the platform. This loss of advertising revenue could outweigh the additional revenue from users, meaning that such a move would not be profitable for purposes of the hypothetical monopolist test. Thus, the interdependence of demand between the user and advertising sides of the platform could restrain Facebook from exercising market power.

Separately, digital markets are often prone to certain types of barriers to entry. Network externalities, switching costs and data accumulation each help to create an "incumbency advantage"[24] that insulates firms from competition. For example, a social network's value proposition to users is to connect people online. The more people there are on a social network, the more valuable it is to each of its users. This is a "network effect" that can help digital platforms with an established user base to fend off challengers who might otherwise offer a competitive product. Without a sufficient base of *existing* users, a new entrant's product is not worth much, which then prevents it from winning new users. On the other hand, some have pointed out that network externalities may contribute to rapid changes in digital market structures.[25] Once a new social media site attracts some users, the product becomes more valuable, and even more users are driven to sign up. This creates the potential for exponential growth where a new offering attracts a certain level of adoption, and thereby creates a winner-take-all dynamic in which firms may compete *for* the market, rather than *within* the market.[26] Accordingly, nascent competition can be a potent source of competitive discipline. And for this same reason, established firms often have a strong incentive to prevent nascent competitors from establishing themselves in the market.

Meanwhile, users are often slow to switch to alternative social media offerings. Setting up an online profile can be time-consuming. Switching from one social network to another means either meticulously transferring your photo, video and text content or starting over anew. It is hard to persuade users to bear the cost of switching to a new platform, especially when

it has few users. Because of such switching costs, a new competitor would likely expect to face difficulty in signing up enough users to achieve sufficient scale as a network to viably compete with established firms. This in turn could dissuade firms that are considering entering the market.

Moreover, digital firms often accumulate vast amounts of data about their users. Firms can use this data to improve their offerings generally, or even to tailor the experience for individual users.[27] This in turn helps make the platform more attractive to users, and thereby benefits consumers. But where that data is exclusive to the incumbent firm, it may also make it more difficult for potential entrants to exercise competitive discipline on the market. For example, compared to established firms with large amounts of user data, nascent social media platforms may be unable to tailor their product to consumers' individual preferences the way that established firms can. Upstart firms may also be at a disadvantage relative to established firms in gaining revenue through advertising, since firms with better data on users can allow sellers to target users with advertisements that are more likely to succeed. This dynamic may also create feedback effects. An established firm's ability to leverage user data to offer a better product and retain users may mean that it can collect even more user data, allowing it to further improve its product relative to that of a nascent competitor. While this may enhance the quality of the product, it may also further insulate the incumbent from competitive pressure. The presence of any or all these barriers to entry will make it more likely that the Tribunal will find that a firm substantially controls a market.

B) Application to *Facebook*

The FTC's complaint in *Facebook* focusses on the user side of the two-sided market in which the firm operates. The relevant market is defined as the provision of personal social networking services throughout the United States.[28] The FTC's complaint alleges that Facebook commands significant control over that market. The FTC notes that, from 2016 to 2020, Facebook's market share in personal social networking ranged from 80% to 98% of daily average users on different devices.[29]

Moreover, the FTC alleges network effects and switching costs help protect Facebook from potential competition. It cites statements made by CEO Mark Zuckerberg: "your friends are here", and "you've made a big investment in your Facebook network and identity".[30] Under the FTC's theory of harm, these barriers to entry make it more likely that Facebook can leverage its large market share to exercise market power without competitive pressure from potential entrants. In response, Facebook argues that

those barriers to entry are not as effective as the FTC asserts. The company contends that other online service providers with substantial user networks would not face such challenges in developing personal social network services.[31] If Facebook could persuade the Tribunal that such potential competition in the market prevents the company from exercising market power, that could defeat an abuse of dominance claim on the merits.

In addressing Facebook's motion to dismiss, the court did not address the two-sided nature of the personal social networking services market.[32] If the case were brought in Canada, the Tribunal would consider whether the interdependence of demand between the user and advertiser sides of the market restricts Facebook's ability to exercise market power. However, as alleged in the FTC's complaint, Facebook commands a large portion of the market and that it is shielded from competition by network effects and switching costs. In Canada, similar outsized market shares and barriers to entry established control in *Nutrasweet*[33] and *Nielsen*.[34] As a result, the allegations set forth by the FTC in its *Facebook* complaint likely could ground a s. 79(1)(a) argument.

III. Practice of Anti-competitive Acts

Second, the Commissioner must show that the firm is engaging in a practice of anti-competitive acts,[35] defined as those "intended to have a predatory, exclusionary or disciplinary negative effect on a competitor or to have an adverse effect on competition".[36] The *Act* further provides examples of anti-competitive acts that, with some exceptions, are generally characterized as having a predatory, exclusionary or disciplinary effect on competitors.[37]

S. 79(1)(b) specifically calls for a "practice" of anti-competitive acts. For these purposes, a practice is typically defined in reference to what it is not: "an isolated act or acts".[38] However, a single sustained act on the part of a dominant firm may satisfy this requirement. Further, a series of different anti-competitive acts can be taken together to establish such a practice.[39] The meaning of a "practice" must also be viewed in light of s. 78, which provides examples of conduct that may ground an abuse of dominance claim. The section encompasses a wide variety of acts, some of which, like freight equalization, clearly involve several acts over time. Others are more commonly discrete occurrences. Nascent competitor acquisitions are on the latter end of this spectrum. A single acquisition does not clearly lend itself to characterization as a practice, unless the Commissioner can demonstrate that it has a lasting effect on competition. As a result, abuse of dominance

challenges to nascent competitor acquisitions will likely be most effective where the Commissioner can point to a series of mergers by the firm. Conversely, the fact that an acquirer has undertaken many acquisitions does not mean that it has engaged in a practice of anti-competitive acts, even if some of those acquisitions were anti-competitive. The Commissioner must ultimately show that those anti-competitive acquisitions were sufficiently connected to render them a practice, rather than a set of distinct, isolated acts.

A) Recent Changes to the Law

Until June 2022, s. 79(1)(b) would have barred any claims surrounding nascent competitor acquisitions. Formerly, the Commissioner was required to establish "an intended negative effect on a competitor that is predatory, exclusionary or disciplinary" to fulfil the practice of anti-competitive acts requirement.[40] It was not clear that by acquiring a nascent competitor, an incumbent firm would have harmed its competitors. Indeed, such purchases are often at a premium over the value implied by the target's assets, revenue and profits,[41] conferring benefits on the target companies' stakeholders. Indeed, one possible explanation for this premium is that the incumbent is effectively sharing a portion of the profits it expects to derive from preserving its market power.[42]

That approach focused on harm to competitors proved out of step with the goals of the *Act* to promote efficiency and competitive prices for consumers.[43] In *Canada Pipe*, the Federal Court of Appeal held that an anti-competitive act under s. 79(1)(b) must be one that has as its purpose a predatory, exclusionary or disciplinary negative effect on competitors. It concluded that an act that harms competition in the market cannot constitute anti-competitive conduct under s. 79(1)(b) unless the effect on competition arose through harm to competitors.[44] In other words, what defined an anti-competitive act was not harm to consumers, but harm to competitors. On the other hand, the Tribunal in *Nutrasweet* found that a horizontal agreement between competitors to not compete in the Canadian geographic market was not abuse of dominance, because the agreement conferred benefits, not harm, on both parties to the agreement and their competitors.[45] Later, the Federal Court of Appeal's 2017 *TREB* decision slightly expanded the scope of anti-competitive acts to include cases where the dominant party was not a market participant, so long as it had a plausible competitive interest in the market.[46]

After calls to alter the requirements for abuse of dominance in the *Act*,[47] Parliament revised s. 78(1) in June 2022 to include acts that "have an adverse effect on competition".[48] This could open the door to nascent competitor claims, in which the Commissioner cannot prove that an acquisition was intended to harm a competitor. Instead, the Commissioner can point to intended adverse effects on competition. No cases have been litigated yet under this revised definition, but before *Canada Pipe* narrowed s. 79(1)(b) to require harm to competitors, the Tribunal in *Laidlaw* had "no difficulty classifying … acquisitions as acts constituting an anti-competitive practice."[49]

Nascent competitor acquisitions do not fit neatly into any of the acts enumerated in s. 78(1). However, the newly expanded definition of anti-competitive acts likely could encompass nascent competitor acquisitions. Such acquisitions are analogous to a "selective or discriminatory response to an actual competitor … for the purpose of … eliminating that competitor from the market".[50] Moreover, the new definition of anti-competitive act likely revives the Tribunal's reasoning in *Laidlaw*, a case which did not insist on the predatory, exclusionary or disciplinary intent toward competitors that the Tribunal required in *Nutrasweet*.

In *Laidlaw*, a waste disposal company's acquisitions of new entrants to protect market power helped ground a case in abuse of dominance. In that case, the Tribunal highlighted several factors that supported finding that the incumbent waste disposal company's acquisitions constituted a practice of anti-competitive acts, including the rapid timing of the acquisitions, the high degree of market power that the acquisitions created for the incumbent, the weakness of the firm's business justification, the firm's own expressions of subjective intent and the context of other anti-competitive acts by the firm.[51]

Laidlaw was later rendered bad law by the *Canada Pipe* requirement to show harm to competitors, a requirement which stood until the June 2022 *Competition Act* amendments took effect. But now that Parliament has legislated that requirement away, the reasoning in *Laidlaw* is likely a good indication of how the Tribunal would analyze challenges to nascent competitor acquisitions under abuse of dominance.

B) Application to *Facebook*

Several similarities exist between the facts of *Laidlaw* and the allegations in *Facebook*. Notably, in both cases the alleged practices include both nascent competitor acquisitions and other anti-competitive acts. By coupling the

Instagram and WhatsApp acquisitions with policies that prevent interoperability, a practice which is expressly contemplated as anti-competitive in the *Act*,[52] the FTC's complaint could more readily support a claim that Facebook's conduct constituted an anti-competitive practice. However, a key difference between *Laidlaw* and the *Facebook* complaint is the degree of concentration arising from the acquisitions. In *Laidlaw*, the incumbent's acquisitions were so aggressive that at times it controlled 100% of the relevant market.[53] The *Facebook* acquisitions did not lead to such a strong market position, though the FTC alleges its market share reached as high as 98% of users for some devices.[54] Moreover, Laidlaw had also acquired established competitors in addition to upstart firms. [55] The FTC's complaint makes no such claim with respect to Facebook.

On balance, the *Facebook* complaint likely could ground a practice of anti-competitive acts for a case brought in Canada. By acquiring Instagram, Facebook could be alleged to have avoided competing with a growing social networking company that was poised to erode Facebook's market power. Similarly, the FTC alleges that the acquisition of WhatsApp eliminated a powerful potential competitor in an adjacent market that could have altered its offering to compete with Facebook directly. Of course, not even the FTC argues that Facebook and WhatsApp were direct competitors, but excluding potential competitors can similarly undermine competition in the market.[56] The quick succession of the two acquisitions might in turn indicate a practice rather than a mere isolated act, as required under s. 79(1)(b).[57]

1) Business Justification

However, s. 79(1)(b) also hinges on the firm's intent, and the Tribunal will look to the reasonably foreseeable effects of the firm's conduct to inform its analysis on that factor.[58] To indicate that a practice is not intended to harm a competitor or competition, firms often assert a business justification for the impugned practice. To be effective, this justification "must be a credible efficiency or pro-competitive rationale" for the impugned conduct.[59] Such arguments may be more effective in the digital economy where two different offerings may be imperfect competitors for each other. For example, many users maintain both Instagram and Facebook accounts. In light of this, Facebook might assert that it intended to integrate the two offerings and build a better user experience across both platforms, not to avoid competitive pressure.

Based on the FTC's allegations in the *Facebook* complaint, such business justification arguments may be weak. The FTC cites considerable evidence

in its complaint that key executives at Facebook subjectively intended their acquisitions to relieve competitive pressure. Indeed, CEO Mark Zuckerberg argued "it is better to buy than to compete", a perspective which apparently informed the company's acquisition decisions.[60] Where such strong evidence of subjective intent is available, the Tribunal will weigh evidence of that subjective intent against evidence related to the pro-competitive rationale the firm puts forward to determine the "overall character" of the conduct.[61] In a case like *Facebook*, such direct indications of anti-competitive intent from the CEO could be determinative in the Tribunal's findings relating to any business justification.

Another factor that could be considered in assessing the purported business justification is that Facebook paid eye-popping sums to purchase the target companies, as compared to the revenue and profits these companies were generating at the time. For example, Facebook paid $21B for WhatsApp, despite the platform generating a paltry $10M in revenue and $138M in losses.[62] One approach to evaluating whether a merger is expected to have anticompetitive effects is to study what makes up the purchaser's valuation of the target business.[63] Paying an oversized premium for a target company can indicate that the incumbent firm may expect anti-competitive effects from the acquisition that would justify paying more for the firm than its revenue and profits would imply.[64] But where the incumbent can point to credible synergies with its existing offerings, these must be accounted for in the analysis.[65]

Moreover, a series of acquisitions, each being capable of business justification in isolation, may more readily reveal an anti-competitive intent. For example, while Facebook's acquisition of Instagram alone might be justified as an entry into an adjacent market, purchasing WhatsApp to access another adjacent space soon after could undermine that claim. The Tribunal might doubt claims that such rapid acquisitions are fueled by a desire to enter new markets, and more readily accept that the acquisitions are aimed at preventing nascent competitors from imposing competitive discipline in the market. Thus, the Tribunal would assess any evidence showing that the target companies were viewed by Facebook as potential entrants or competitive threats to Facebook's lines of business.

Similarly, abuse of dominance allows for retrospective analysis of a firm's actions. The Commissioner can observe whether a firm has continued to invest in the acquired company's products and operations. Such investment can help to support the claim that the acquisition was pursued for pro-competitive reasons. On the other hand, failure to nurture the products

and operations of a target firm may indicate that anti-competitive intent informed the practice. Of course, there are plausible pro-competitive rationales for such conduct. For example, the incumbent may have acquired the target with a plan to redeploy its assets or employees (dubbed acqui-hiring)[66] to a more profitable project.[67] Where there is a strong argument that such a pro-competitive rationale drove the acquisition, that business justification may defeat the Commissioner's claim. But absent a pro-competitive explanation, a failure to invest in the target firm's products suggests that the acquirer valued eliminating competitive pressure, not acquiring the target company's products or assets.

This anti-competitive intent is most dramatically illustrated by "killer acquisitions", in which an incumbent firm purchases the target company and then discontinues either the target's product or its own to avoid competition among the two offerings.[68] Such cases are particularly harmful to consumers, who face the prospect of higher prices and a loss of choice between the two offerings. Of course, killer acquisitions must not be confused with acquisitions in which the target's product ultimately fails. In such cases, it is consumers' revealed preferences, not the incumbent, that kills the product. Distinguishing between these two explanations may in some cases be a difficult factual inquiry.

According to the FTC's complaint, Facebook did not "kill" WhatsApp or Instagram, but integrated it to some degree with Facebook's own products. Indeed, Facebook argues that this integration and the company's investment in refining and marketing the platforms are the very reason that Instagram is successful.[69] This could support an argument that the acquisitions were motivated by a pro-competitive business justification. For its part, the FTC asserts that Facebook "slowed innovation and promotion of" the target companies' products.[70] It specifically alleges that Facebook restricted investment in developing new privacy features on WhatsApp.[71] If a similar case were brought in Canada, the Commissioner might argue that, even if the Instagram and WhatsApp acquisitions had a pro-competitive business justification, they allowed Facebook to abuse its dominance through the other alleged anti-competitive conduct like imposing restrictions on interoperability. Ultimately, the Tribunal would weigh the evidence in support of each position and consider the "overall character" of Facebook's conduct to determine whether that conduct was motivated by anti-competitive intent.[72]

The business justification in abuse of dominance plays a similar role to the efficiencies defence in merger review. Under the efficiencies defence, firms may be allowed to pursue an otherwise anti-competitive merger

where it will derive efficiencies from the merger that "are greater than and offset" the anti-competitive effects of the proposed merger.[73] Under abuse of dominance, such efficiencies could often be positioned as the requisite pro-competitive rationale to ground a business justification. The quantification requirements associated with the efficiencies defence likely make abuse of dominance a more attractive option for challenging nascent competitor acquisitions.[74] However, Parliament is in the process of repealing the efficiencies defence, which will alter how firms can justify acquisitions under merger review.[75] No similar change is expected regarding business justifications under abuse of dominance. As a result, the repeal of the efficiencies defence may influence how the Commissioner weighs the choice of challenging nascent competitor acquisitions under abuse of dominance versus merger review.

C) Emphasis On Intent

Abuse of dominance is anomalous in competition law for its emphasis on the "intended negative effect" behind a party's conduct.[76] While "intent" commonly indicates a subjective mental state, its meaning in the context of s. 79(1)(b) is somewhat different. S. 79(1)(c) requires that the anti-competitive conduct by the dominant firm must have the effect of "preventing or lessening competition substantially in the market".[77] In order to give independent meaning to paragraphs (b) and (c) of s. 79(1), anti-competitive acts need not have anti-competitive effects, and anti-competitive effects may arise from conduct that is not anti-competitive under paragraph (b).[78]

Thus, conduct cannot be considered anti-competitive simply because of its effects. Instead, what makes conduct anti-competitive is its purpose. To determine the purpose motivating impugned conduct, the Tribunal will consider reasonably foreseeable effects, any pro-competitive business justifications, and the firm's subjective intent.[79] But this leaves little room to distinguish paragraphs (b) and (c). Whether conduct has anti-competitive effects overall turns on whether the pro-competitive effects (which inform the business justification) outweigh any harms to competition. Thus, what separates intent under paragraph (b) from effects under paragraph (c) is subjective intent and the foreseeability of effects. Reliance on these two considerations could undermine the effectiveness of abuse of dominance in addressing a practice of anti-competitive nascent competitor acquisitions.

As explored above, the *Facebook* complaint argues that the WhatsApp and Instagram acquisitions had foreseeable negative effects on competition. The FTC also invokes evidence that the firm's subjective intent was

anti-competitive. However, not all cases will be so clear-cut. For example, if documentary evidence surrounding a nascent competitor acquisition revealed that the dominant firm thought of the target company as offering a product complementary to its own offerings, that would be a strong indication that the subjective intent behind the acquisition was not to prevent competition. Meanwhile, the acquisition may still serve to eliminate competitive discipline from the market even if the anti-competitive effects were not readily foreseeable. In such a case, considering the incumbent's subjective motivation for the acquisition could lead the Tribunal to find that anti-competitive intent is not proven, leaving the Commissioner unable to address the harm to competition.

Even acquisitions that firms undertake with benign, pro-competitive intent can lead to reduced quality and higher prices in the market. Considering the objectives in s. 1.1 of the act, those effects on quality and prices, not the firm's view of its own conduct, should determine whether the impugned practice is anti-competitive. Thus, the focus in abuse of dominance on "intended effects" may undermine the effectiveness of s. 79 in challenging nascent competitor acquisitions. Recognizing these challenges, some advocate collapsing paragraphs (b) and (c), so that abuse of dominance would require only substantial control of the market and a practice with anti-competitive effects.[80] Such a change may reduce the risk that evidence of benign subjective intent may be used to exclude anti-competitive conduct from abuse of dominance.

IV. Effect of Preventing or Lessening Competition Substantially

Finally, the Commissioner must show that the impugned conduct has had, is having, or is likely to have the effect of preventing or lessening competition substantially in the market.[81] In other words, the Commissioner must show that, but for the anti-competitive practice, the dominant firm would be less able to exercise market power.[82]

Both ss. 79 and 92 refer to two avenues for demonstrating anticompetitive effects, namely "prevention" and "lessening". A lessening of competition arises where a firm enhances its market power through anti-competitive conduct in relation to existing competition.[83] This market power can arise from horizontal effects caused by merging two firms that otherwise would have competed, or through vertical effects caused by the acquisitions of a supplier or customer that forecloses the acquired business to competing

firms. Most merger challenges are argued under the "lessen" prong of the test.[84]

Meanwhile, the "prevention" prong deals with cases in which a merger protects one or both merging parties' existing market power from the entry of a potential competitor.[85] In *Tervita,* the Supreme Court set out the three steps to analyzing whether prevention has occurred. First, the Tribunal will identify the potential competitor, which may be the acquirer, the target, or a third party that is prevented from entering the market because of the merger. In the case of nascent competitor acquisitions, the target firm is likely to be the relevant potential competitor. Next, the Tribunal will conduct a "but-for" analysis to determine if, absent the merger, the potential competitor would likely have entered the market and decreased the market power of the incumbent firm. This is an inherently predictive exercise. Finally, the Tribunal will determine if that anti-competitive effect is substantial.[86] Because nascent competitor acquisitions typically deal with incumbents who seek to protect their existing market power, this prong may be used more frequently in such cases. But the core of the analysis remains the same. Ultimately, both the lessening and prevention prongs hinge on whether the merging firms would have substantially greater market power with the merger than they would have without the merger.

The anti-competitive effects stage poses perhaps the greatest barrier to challenging a nascent competitor acquisition as abuse of dominance. The Commissioner must show on a balance of probabilities that competition will be substantially lessened or prevented. Under the prevention prong, the Commissioner must show that the potential competitor was likely to enter in a "discernible" timeframe.[87] Though the timing does not need to be precisely determined, a "mere possibilit[y]" of future entry at some time will not suffice. [88] As alleged anti-competitive effects are projected further into the future, the Tribunal is more likely to find the arguments speculative and unreliable.[89]

Determining the relevant "but-for" world can be especially challenging in nascent competitor acquisitions.[90] Upstart firms are unproven, and their future entry in the market is uncertain.[91] Further, the anti-competitive effects of nascent competitor acquisitions likely arise later than those in typical mergers.[92] Thus, the Commissioner must argue anti-competitive effects based on predictions which risk being regarded as mere speculation. Digital markets often involve significant barriers to entry, which push entry by potential competitors further into the future.[93] This could make proving future entry difficult, and the Tribunal will not permit the Commissioner

to rely on this longer "lead time" to look beyond entry in a discernible time frame.[94]

To show that a practice preserved or increased a firm's market power, the Commissioner often points to rising prices in the market to establish the required adverse effects on competition. Absent some other explanation like a rise in the price of inputs, a jump in price can show that a firm is exercising more market power. However, proving such negative effects on competition can be more challenging in digital markets like the one considered in *Facebook*. The monetary price to use many online services, including Facebook and Instagram, is zero.[95] The structure of the two-sided market means that Facebook's revenues flow from advertisers instead of users. However, once the relevant product market is defined, the Tribunal will look to the anti-competitive effects on that market.[96] In *Facebook*, that would mean that the anti-competitive effects must relate to the user side of the market, because that is the relevant market in the FTC's complaint.

However, price is not the only criterion that can show an anti-competitive effect. Impacts related to product quality, service levels, innovation and choice in the market can also ground the requisite effects for s. 79(1)(c).[97] But while *Canada Pipe* cites reduced consumer choice as a sign of lessened competition, having many options is less tightly linked to competition than price and quality, which are at the core of consumer decision-making. Indeed, where the consumer demands are homogeneous, robust competition can force firms out of the market where one firm is able to produce a better product at a lower cost than its competitors.

A) Application to *Facebook*

The FTC's *Facebook* complaint alleges significant impacts to the quality of products in the market. For example, before being acquired by Facebook, WhatsApp embraced a focus on privacy innovation, which the FTC alleges did not persist after the acquisition.[98] Though competition scholars have criticized the invocation of privacy in some claims, those criticisms focus on privacy being treated as an end in itself to competition policy, rather than as a key element of product quality.[99] In the *Facebook* case, the alleged loss of privacy innovations reveals how, by acquiring nascent competitors, the FTC believes Facebook relieved itself of competitive pressure. This in turn allegedly allowed it to reduce its investment in designing superior products or reaching new customers. The result is that, controlling for price, Facebook allegedly offers a lower-quality product than WhatsApp and Facebook

would have offered to consumers if their separate offerings vigourously competed.

On the other hand, some of the FTC's arguments in the *Facebook* complaint may not establish a substantial lessening or prevention of competition in Canada. For example, the FTC posits that Facebook's decision to scrap its own mobile-first photo sharing site after acquiring Instagram showed the merger was a killer acquisition with anti-competitive effect.[100] However, by the FTC's own admission, Facebook's offering was under development with an unknown launch date.[101] It is not clear that, even if Facebook's offering had been commercialized, it would have grown to be an effective competitor against Instagram, which was already gaining popularity. Because of the winner-take-all nature of social network markets, Facebook may have cut its losses and never chosen to launch its competing product. If a similar case were brought in Canada, it is not clear that the Commissioner would be able to prove Facebook's likely entry in a discernible timeframe. As a result, that claim regarding anti-competitive effects under the "prevent" prong would run the risk of being labelled speculative.

Further, it is not obvious that having both platforms in the market would be beneficial to users. One platform would probably cannibalize the other platform's users, rendering both less valuable due to the network externalities inherent in social media. Meanwhile, it would be costly and inefficient to maintain both products. Thus, Facebook's choice to prioritize Instagram's superior product had clear efficiency benefits with uncertain impacts on market power. This challenge illustrates how choice and efficiency, both goals of the *Act,* can be in conflict.[102] Where consumer choice, in and of itself, is treated as a goal of the *Act*, rather than one way of promoting efficiency, these conflicts may arise. One goal must give way to another. Given the uncertainty of Facebook's photo sharing app ever competing with Instagram, the elimination of Facebook's own answer to Instagram may not provide grounds for the Commissioner to meet the requisite anti-competitive effects for s. 79(1)(c).

On balance, the allegations put forth by the FTC in the *Facebook* complaint would likely provide sufficient grounds to bring an abuse of dominance case with respect to anti-competitive effects. Those arguments could be bolstered by showing the impact of Facebook's policy against interoperability, conduct that is specifically contemplated as anti-competitive acts under s. 78(1)(g). On the other hand, the Commissioner's case would be complicated by the lack of price impacts and the challenge of demonstrating that a nascent competitor would have effectively competed in a discernible time

frame. However, these challenges might be mitigated in an abuse of dominance claim by reviewing the effects of Facebook's conduct in retrospect.

B) Retrospective Review

Challenging nascent competitor acquisitions can be difficult for a key practical reason: it is hard to establish that an acquisition related to a nascent firm will have anti-competitive effects. Such acquisitions can also have neutral or even pro-competitive effects. This challenge is compounded under merger review because the Commissioner cannot challenge a merger later than one year after the merger has been substantially completed.[103] This prevents the Commissioner from relying on longer-term effects on competition revealed by an ex-post review. Reviewing mergers in hindsight under abuse of dominance may better equip the Commissioner to demonstrate the anti-competitive effects of a merger.[104]

Under s. 79, the Commissioner can bring an application regarding abuse of dominance within three years after the practice has ceased.[105] The Tribunal has not had occasion to consider how this time limitation is calculated. Intuitively, it seems to indicate that all acquisitions would be open to challenge, so long as they are part of an anti-competitive practice which the Commissioner can show is continuing or which ceased within the last three years. However, this raises further questions. For example, say the company has not made any acquisitions in the past three years, but is actively surveying the market to detect nascent competitors. Has the practice ceased for the purposes of s. 79(6)? Moreover, the Tribunal could interpret the provision differently and find that only acquisitions made within the past three years can be addressed under s. 79, which could limit the scope of remedies available if abuse of dominance is established. As I explain below, the Tribunal will likely favor remedies restricting further mergers over orders to dismantle past ones. This reduces the importance of determining which past acquisition may attract a remedy, so long as the broader practice is within the limitation period.

Regardless, abuse of dominance allows the Commissioner to observe the market and the party's conduct after the merger. This has been posited as a key benefit of the abuse of dominance framework.[106] The *Facebook* complaint illustrates the advantage of analyzing conduct in retrospect. For example, Facebook's alleged move to curtail investment in privacy features after acquiring WhatsApp is cited by the FTC as one way that acquisition has negatively impacted competition.[107] This type of evidence can only be adduced in hindsight. The ability to observe market conditions and a party's

conduct for some time after the acquisition may help the Commissioner to demonstrate the anti-competitive effects of nascent competitor acquisitions.

Moreover, some scholars point out that while merger review considers just one merger, abuse of dominance can retrospectively review several acquisitions that, taken together, may more readily reveal substantially lessened competition.[108] This benefit ought not to be overstated, as merger review considers the market at the time of the merger. So, to the extent that each successive acquisition alters the structure of the market, past mergers will inform the review of future ones. However, the impact of a series of nascent competitor acquisitions is not adequately reflected by simply "adding up" the market share of each successive acquired firm. Nascent competitors have the potential to grow to the point that they can impose competitive discipline in the market, and accurately analyzing whether nascent competitor acquisitions are anti-competitive requires considering that potential. This is a concern that is ill-suited for merger review, which tends to focus on market structure at the time of the merger, and abuse of dominance is likely a more apt framework for assessing those harms.

But challenging a nascent competitor acquisition under abuse of dominance does not entirely resolve the difficulty with demonstrating anti-competitive effects. The Commissioner must still show that "but for" the acquisition, there would be *substantially* more competition in the market, either from existing firms or new entrants.[109] This requires evidence about a world that does not exist. However, the difficulty of proving anti-competitive effects must not lead to reliance on ill-supported assumptions.

For example, Instagram has become a leading social networking platform since Facebook acquired it. This may lead some to assume that, but for the acquisition, Instagram would have competed with Facebook. But this presupposes that Instagram's success was not *because* of its acquisition by Facebook. As noted above, Facebook argues that, by investing in Instagram and integrating it with its other offerings, Facebook catalyzed Instagram's growth.[110] Ultimately, the Tribunal would have to weigh the evidence in support of these arguments. But because of the inherent challenge of proving what would have happened had the merger not occurred, it is impossible to know, and hard for the Commissioner to show on a balance of probabilities, that competition would have been greater absent the acquisition.

C) Alternative Standards for Anti-Competitive Effects

The government is alert to such challenges in proving anti-competitive effects. In November 2022, Innovation, Science and Economic Development Canada launched a consultation process that considers lowering the standard of proof for anti-competitive effects in abuse of dominance claims. It cites a suggestion from a UK expert panel that anti-competitive effects be considered under a "balance of harms" approach which would consider the magnitude of potential impacts alongside the likelihood of that harm.[111] Under that framework, a remote chance for severe harm to competition could establish anti-competitive effects under s. 79(1)(c) where under the current law it would not. This approach would ease the Commissioner's evidentiary burden in many cases and allow the Tribunal to more effectively weigh the risks that a nascent competitor acquisition poses to competition.

Meanwhile, the Competition Bureau has proposed a different approach. In response to the ISED consultation process, the Bureau proposed legislative changes to impose a structural presumption of anti-competitive effects where the combined firm would exceed a threshold market share or where the merger would significantly increase concentration. Where the presumption applied, the burden would shift to the merging firms to show that the proposed merger would not harm competition before the merger may proceed.[112] Similar structural presumptions have been proposed for abuse of dominance claims.[113] However, because upstart firms have limited market share, nascent competitor acquisitions may not meet the threshold to trigger the structural presumption. Meanwhile, such an approach would inevitably have a chilling effect which would discourage large firms from pursuing benign mergers, as those firms would bear the cost of gathering evidence to demonstrate that the merger would not have anti-competitive effects.

The additional costs associated with burden shifting might also impact the market for startup investment.[114] Especially in risky, highly innovative industries, startup investors often plan to sell their stake in a company and its intellectual property to an established firm. While some of these incumbents purchase the nascent competitor to prevent future competition, others go on to scale up the product and realize synergies with their own offerings. The imposition of additional costs on the incumbent acquiror may make incumbents less likely to pursue such acquisitions. Without the prospect of sale to an incumbent, innovative startups may struggle to obtain funding and innovation may slow. Indeed, because established incumbents are often an important potential acquirer, we would expect the effect to be strongest on startups entering relatively concentrated markets, since any acquisition

by an incumbent would trigger the structural presumption. Thus, the negative effects of the structural presumptions would be most severe on the markets that would benefit most from disruptive innovation. While such effects are likely to result from any increased opposition to nascent competitor acquisitions, the proposed structural presumptions would likely be especially chilling.

V. Remedies

Remedies pose a pragmatic difficulty when challenging an acquisition in retrospect. In abuse of dominance cases, the Tribunal has more flexibility to make orders than in merger review cases. Merger review sets out a list of orders that the Tribunal may make, which generally surround blocking a future merger or unwinding a past one.[115] The Tribunal is not empowered to make forward-looking orders beyond the merger at issue. Any alternative orders must be made with the consent of the parties.[116] However, under s. 79, the Tribunal may prohibit any practice that is found to be an abuse of dominance, and it also has broad discretion to make an additional or alternative order if preventing the practice "is not likely to restore competition in" the market. The *Act* specifically grants the Tribunal power to order divestitures in abuse of dominance cases, so the remedies available under s. 79 includes all those available under merger review and more.[117] This broader flexibility may enable the Tribunal to craft better remedies to address anti-competitive nascent competitor acquisitions.

However, it is not obvious what remedies would be appropriate and effective if a firm is found to have engaged in anti-competitive nascent competitor acquisitions. One intuitive option under either merger review or abuse of dominance would be to order that the company divest itself of the businesses it acquired as part of the anti-competitive practice. But this option has several drawbacks. As a legal matter, the merged firm could be expected to argue that the legislative intent of the abuse of dominance provision is not to allow the Commissioner to obtain an order for divestment under s. 79 where the limitation period for merger review has expired.

As a practical matter, it is easier to prevent a merger than to try to unwind it, especially where digital products have been integrated. For example, ordering a global firm like Facebook to divest itself of Instagram and WhatsApp could engage a jurisdictional issue. Because the Canadian market is relatively small, Facebook might respond to a divestiture order by simply exiting the Canadian market. This may serve to further lessen competition in the Canadian market. Beyond this jurisdictional issue, any attempt to

separate Facebook and Instagram would require difficult decisions about which products, resources and employees should be allocated to each successor. At a minimum, this would impose huge logistical challenges on the company. While some of these challenges could be tempered by finding a suitable purchaser for the divested business, this in turn requires finding a buyer that would not itself raise issues over market power. If no suitable purchaser can be found, spinning off the acquired business as a stand-alone company can leave it without the institutional support it needs to thrive. Ultimately, the efficiency of the firms and the quality of the products would likely suffer, so the underlying goals of competition policy may not be furthered by a divestiture.

Because divestiture is the only remedy readily available, merger review may be unsatisfactory where the merger has already been completed. Abuse of dominance provides a broader remedial scope. One available option would be to prohibit the firm from pursuing further acquisitions in a particular industry and/or geography of concern.[118] Of course, this would potentially bar the firm from pursuing other acquisitions that could have neutral or pro-competitive effects.

Due to the limited case law on the subject, we can only look to *Laidlaw* to understand what remedies might be applied. In that case, the offending firm was forbidden from any further acquisitions in the relevant geographic areas for three years.[119] The Tribunal also made a series of orders related to Laidlaw's other abusive practices, including barring the firm from imposing exclusivity and other anti-competitive terms in their contracts.[120] This is likely a helpful model for remedies in future cases. While unwinding past mergers is often an unsatisfactory remedy, forbidding future acquisitions may prevent the firm from continuing to shore up its market power through acquisitions. This may in turn restore competition by allowing nascent competitors to begin exercising competitive discipline in the market.

Further, where other anti-competitive acts compliment the acquisitions at issue, that conduct is often susceptible to an order that directly ameliorates harm to competition. For example, the Tribunal in *Laidlaw* ordered that contract renewal terms be altered to allow customers to cancel their agreement with the firm more readily. This type of order can help to restore competition by allowing nascent competitors to win over customers from the dominant firm when they enter the market. A case like *Facebook* might allow for a similar remedy. If the Commissioner established abuse of dominance that involved restrictions on interoperability, as alleged by the FTC,[121] then the Tribunal could make an order requiring Facebook to

alter those policies. While divestiture remains available as a remedy to abuse of dominance,[122] ordering divestiture should only be considered in exceptional cases where the merged firms can be cleanly separated or where other options will be ineffective to maintain competition in the market.

VI. Conclusion

Nascent competitor acquisitions in digital industries pose a unique threat to competition, but it can also be challenging to determine whether any one acquisition will harm competition in the market. Until recently, merger review was the only framework for challenging such acquisitions. Thanks to recent changes to the *Act*, abuse of dominance likely poses an alternative approach to nascent competitor acquisitions in some circumstances, especially where there is evidence of subjective anti-competitive intent and where the acquisitions are coupled with other anti-competitive acts. In bringing an abuse of dominance claim, the Commissioner would be able to analyze several mergers retrospectively. This approach may more readily reveal the anti-competitive effects of a series of mergers. If the Commissioner's abuse of dominance claim succeeded, a flexible set of remedies would be available to address that conduct.

ENDNOTES

[*] Juris doctor student at the University of Toronto, graduating in 2024. The author would like to thank Professor Edward Iacobucci, whose course on Competition Policy inspired this paper, as well as Dimitri Dimitropoulos and the 2023 James H. Bocking Memorial Award jury for their helpful comments and suggestions.

[1] Letter from Minister of Innovation, Science and Economic Development to the Commissioner of Competition (20 January 2022), online: *Government of Canada* <ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/our-organization/letter-minister-innovation-science-and-economic-development-commissioner-competition>; John Pecman, "FinTech: The Innovation Agenda and role of government" (opening remarks delivered at the FinTech workshop: Driving competition and innovation in the financial services sector, 21 February 2017), online: *Government of Canada* <www.canada.ca/en/competition-bureau/news/2017/02/fintech_the_innovationagendaandroleofgovernment.html>; *Competition in the digital age: The Competition Bureau's Strategic Vision for 2020-2024* (Ottawa: Innovation, Science and Economic Development Canada, 2020).

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

[3] David A Wolfe & Mdu Mhlanga, "The Platform Economy and Competition Policy: Options for Canada" (2022) Innovation Policy Lab Working Paper No 2022/02, online: <hdl.handle.net/1807/126246>.

[4] Edward M Iacobucci, "Examining the Canadian *Competition Act* in the Digital Era", Legislative Comment, (2004) *Competition Act*, RSC 1985, c C-34 at 8.

[5] Competition Bureau Canada, "The Future of Competition Policy in Canada, Submission by the Competition Bureau" (15 March 2023), online: *Government of Canada* <ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/promotion-and-advocacy/regulatory-adviceinterventions-competition-bureau/future-competition-policy-canada> [Bureau Submissions 2023].

[6] Competition Bureau Canada, "Examining the Canadian *Competition Act* in the Digital Era, Submission by the Competition Bureau" (8 February 2022), online: *Government of Canada* <www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04621.html>, s 2.7 [Bureau Submissions 2022].

[7] *Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3 at para 66.

[8] Bureau Submissions 2022, *supra* note 6; Bureau Submissions 2023, *supra* note 5.

[9] Bureau Submissions 2023, *supra* note 5.

[10] *Ibid* at 36-37.

[11] C Scott Hemphill & Tim Wu, "Nascent Competitors", (2020) 168 U Pa L Rev 1879.

[12] *Competition Act*, *supra* note 2, s 79(7)(b).

[13] In 2021, the company changed its name from Facebook to "Meta". However,

I refer to the company as "Facebook" throughout this piece to match the legal proceedings I reference.

[14] *FTC v Facebook Inc*, 581 F Supp (3d) 34 (ND DC 2022) [*Facebook*].

[15] Alexei Oreskovic "Facebook says WhatsApp deal cleared by FTC", *Reuters* (10 April 2014); Letter from April J Tabor to Thomas O Barnett (22 August 2012) Regarding Proposed Acquisition of Instagram, Inc. by Facebook, Inc. File No 121-0121, online (pdf): *Federal Trade Commission* <www.ftc.gov/sites/default/files/documents/closing_letters/facebook-inc./instagram-inc./120822barnettfacebookcltr.pdf>.

[16] *Facebook*, *supra* note 14 at 7.

[17] *Competition Act*, *supra* note 2, s 79(1)(a).

[18] *Canada (Director of Investigation and Research) v D & B Co of Canada Ltd* 1995, 64 CPR (3d) 216 at para 58 [*Nielsen*].

[19] *Canada (Commissioner of Competition) v Superior Propane* 2000, 7 CPR (4th) 385 at para 57 [*Superior 2000*].

[20] *Ibid* at para 67.

[21] Jacques Crémer, Yves-Alexandre de Montjoye & Heike Schweitzer, *Competition Policy for the Digital Era* (Luxembourg: Publications Office of the European Union, 2019) at 20.

[22] *Ibid*.

[23] *The Commissioner of Competition v Visa Canada Corporation and MasterCard International Incorporated*, 2013 Comp Trib 10 at para 189 [*Visa, Mastercard*].

[24] Crémer, de Montjoye & Schweitzer, *supra* note 21 at 23; Iacobucci, *supra* note 4 at 8.

[25] See e.g. Iacobucci, *supra* note 4 at 8.

[26] Crémer, de Montjoye & Schweitzer, *supra* note 21 at 36; Iacobucci, *supra* note 4 at 8; Hemphill & Wu, *supra* note 11 at 1887.

[27] Crémer, de Montjoye & Schweitzer, *supra* note 21 at 24-29; Argentesi et al, "Merger Policy in Digital Markets: An Ex Post Assessment" (2020) 17:1 J Competition L & Econ 95 at 112.

[28] *Facebook*, *supra* note 14 at 40.

[29] *Ibid* at 46.

[30] *Ibid* at 51.

[31] *Ibid*.

[32] *Ibid*.

[33] *Canada (Director of Investigation & Research) v Nutrasweet Co* 1990, 32 CPR (3d) 1 at para 52 [*Nutrasweet*].

[34] *Nielsen*, *supra* note 18 at 58-62.

[35] *Competition Act*, *supra* note 2, s 79(1)(b).

[36] Ibid, s 78.

[37] *Canada (Commissioner of Competition) v Canada Pipe Co*, 2006 FCA 233 at paras 64-65 [*Canada Pipe*].

[38] *Nutrasweet*, *supra* note 33 at 59.

[39] *Canada (Commissioner of Competition) v Canada Pipe Co*, 2005 Comp Trib 3 at para 171, rev'd on other grounds 2006 FCA 233.

[40] *Nutrasweet*, *supra* note 33 at 59.
[41] Tomi Laamanen, "On the Role of Acquisition Premium in Acquisition Research" (2007) 28 Strategic Management JL 1590 at 1590.
[42] Colleen Cunningham, Florien Ederer & Song Ma, "Killer Acquisitions" (2021) 129:3 J Political Economy 649.
[43] *Competition Act*, *supra* note 2, s 1.1.
[44] *Canada Pipe*, *supra* note 37 at paras 67-68.
[45] *Nutrasweet*, *supra* note 33 at 63-64.
[46] *The Commissioner of Competition v Vancouver Airport Authority*, 2019 Comp Trib 6 at para 460 [*VAA*], citing *Toronto Real Estate Board v Canada (Commissioner of Competition)*, 2017 FCA 39 [*TREB*].
[47] See e.g. Iacobucci, *supra* note 4 at 36-37.
[48] *Competition Act*, *supra* note 2, s 78(1).
[49] *Canada (Director of Investigation and Research) v Laidlaw Waste Systems Ltd* (1992), 40 CPR (3d) 289 [*Laidlaw*].
[50] *Competition Act*, *supra* note 2, s 78(1)(j).
[51] *Laidlaw*, *supra* note 49.
[52] *Competition Act*, *supra* note 2, s 78(1)(g).
[53] *Laidlaw*, *supra* note 49.
[54] *Facebook*, *supra* note 14 at 47.
[55] *Ibid* at 18-20.
[56] UK, Competition and Markets Authority, *Online platforms and digital advertising: Market study final report* (London: 2020) at 10.
[57] *Nutrasweet*, *supra* note 33 at 59.
[58] *Canada Pipe*, *supra* note 37 at para 67.
[59] *Ibid* at para 73.
[60] *Facebook*, *supra* note 14 at 54.
[61] *VAA*, *supra* note 46 at paras 622-624.
[62] Facebook, Inc "Unaudited Pro Forma Condensed Combined Financial Information" (EDGAR Database, 30 June 2014).
[63] Organisation for Economic Co-operation and Development, Directorate for Financial and Enterprise Affairs, Competition Committee, *Start-ups, Killer Acquisitions and Merger Control – Background Note*, Doc No DAF/COMP(2020)5, s 4.2.1.
[64] *Ibid*.
[65] *Ibid*.
[66] Aaron Chatterji & Arun Patro, "Dynamic Capabilities and Managing Human Capital" (2014) 28:4 Academy of Management Perspectives 395.
[67] Cunningham, Ederer & Ma, *supra* note 42; Amy C Madl, "Killing Innovation?: Antitrust Implications of Killer Acquisitions" (2020) 38 Yale J Reg Bull 28 at 37-39.
[68] Cunningham Ederer & Ma, *supra* note 42; Pike, *supra* note 62, s 2. While others use the term "killer acquisition" synonymously with "nascent competition acquisition", I prefer to distinguish the two to highlight how post-acquisition conduct can inform the Tribunal's intent analysis. For an example of this

alternative use, see Andy Baziliauskas & Margaret Sanderson, "Should Canada Overhaul the SLPC Test for Mergers?" (2023) 35:2 Can Comp L Rev 128 at 136.

[69] *FTC v Facebook Inc*, 581 F Supp (3d) 34 (ND DC 2022) (Factum, Facebook Inc at paras 32—33) [FOF]. See also Stigler Center, "ANTITRUST AND COMPETITION CONFERENCE Part 9 Day Two Panel One "Innovation and Start-Up Ecosystem" (21 May 2018) at 00h:48m:30s, online (video): *YouTube* <www.youtube.com/watch?v=8icWaFFmehg&ab_channel=StiglerCenter>; James Pethokoukis, "Incumbents Vs Startups: The Case That Big Tech Is Squashing Small Tech" (4 June 2018), online (blog): *AEI* <www.aei.org/economics/incumbents-vs-startups-the-case-that-big-tech-is-squashing-small-tech/>.

[70] *Facebook*, *supra* note 14 at 55.

[71] *Ibid*.

[72] *VAA*, *supra* note 46 at para 626.

[73] *Competition Act*, *supra* note 2, s 96(1).

[74] When considering the efficiencies defence, the Tribunal requires the Commissioner to quantify the deadweight loss that a merger will cause. Where the Commissioner fails to do so, then the Tribunal will assume the appropriate figure is zero, and any marginal efficiency gains by the firm will suffice to ground the efficiencies defence. Conversely, no such quantification is required under abuse of dominance, though it may help the parties' arguments. Thus, the expansion of abuse of dominance to include nascent competitor acquisitions may afford the Commissioner a more effective means of challenging acquisitions where the resulting deadweight loss cannot easily be quantified.

[75] Bill C-56, *An Act to amend the Excise Tax Act and the Competition Act*, 1st Sess, 44th Parl, 2023, cl 10 (first reading 21 Sep 2023).

[76] *Competition Act*, *supra* note 2, s 78(1).

[77] *Ibid*, s 79(1)(c).

[78] *Canada Pipe*, *supra* note 37; *Nutrasweet*, *supra* note 33.

[79] *Canada Pipe*, *supra* note 37 at para 67.

[80] Iacobucci, *supra* note 4 at 37; CD Howe Institute Competition Policy Council, "Undo Haste: Rushed Competition Act Reforms Warrant Further Examination" (9 June 2022), online (pdf): *CD Howe Institute* <www.cdhowe.org/sites/default/files/2022-06/For%20release%20Communique_2022_0609_CPC_0.pdf>. See also Bureau Submissions 2023, *supra* note 2, s 2.1.

[81] *Competition Act*, *supra* note 2, s 79(1)(c).

[82] *Canada Pipe*, *supra* note 37 at paras 43-44.

[83] *Canada (Director of Investigation and Research) v Hillsdown Holdings (Canada) Ltd* (1992), 41 CPR (3d) 289 at 45.

[84] John S Tyhurst, *Canadian Competition Law and Policy* (Toronto: Irwin Law Inc, 2021) at 197.

[85] *Tervita*, *supra* note 7 at para 55.

[86] *Ibid*.

[87] *Ibid* at para 77.

[88] *Ibid* at para 66.

[89] *Ibid* at para 68.

[90] Pike, *supra* note 63, s 4.1; Bureau Submissions 2023, *supra* note 6; US, *Competition in Digital Technology Markets: Examining Acquisitions of Nascent or Potential Competitors by Digital Platforms: Hearing Before the Subcommittee on Antitrust, Competition Policy, and Consumer Rights*, 116th Cong (2019) at 5 (John M Yun) [*Yun Testimony*].
[91] Pike, *supra* note 63, s 4.1.2.
[92] *Ibid*, s 4.1.1.
[93] See substantial control of the market section above.
[94] *Tervita*, *supra* note 7 at 70-77.
[95] *Facebook*, *supra* note 14 at 55.
[96] *Visa, Mastercard*, *supra* note 23 at para 360.
[97] *Canada Pipe*, *supra* note 37 at para 30.
[98] *Facebook*, *supra* note 14 at 55.
[99] See e.g. Giuseppe Colangelo & Mariateres Maggiolino, "Data Accumulation and the Privacy-Antitrust Interface: Insights from the Facebook Case" (2018) 8:3 International Data Privacy Law 224 at 233-236: Iacobucci, *supra* note 5 at 54-59.
[100] *Facebook*, *supra* note 14 at 55.
[101] *Ibid*.
[102] *Competition Act*, *supra* note 2, s 1.1.
[103] *Competition Act*, *supra* note 2, s 79(7).
[104] See e.g. Iacobucci, *supra* note 4 at 36.
[105] *Competition Act*, *supra* note 2, s 79(6).
[106] See e.g. Iacobucci, *supra* note 4 at 36; Pike, *supra* note 62, s 4.2.3; Hemphill & Wu, *supra* note 11 at 1907-1909.
[107] *Facebook*, *supra* note 14 at 55.
[108] Iacobucci, *supra* note 4 at 36; Hemphill & Wu, *supra* note 11 at 1901.
[109] *Canada Pipe*, *supra* note 37 at para 44.
[110] FOF, *supra* note 69. See also Stigler Center, *supra* note 69 at 00h:48m:30s; Pethokoukis, *supra* note 69.
[111] Innovation, Science and Economic Development Canada, *The Future of Competition Policy in Canada* (Ottawa: ISED, 2022) at 22 [ISED], citing UK, Digital Competition Expert Panel, *Unlocking digital competition: Report of the Digital Competition Expert Panel* (London: 2019). See also Pike, *supra* note 63, s 4.1.
[112] Bureau Submissions 2023, *supra* note 5, s 1.4.
[113] Hemphill & Wu, *supra* note 11 (suggesting that anti-competitive effects need not be shown where a dominant firm acquires a nascent competitor).
[114] Pike, *supra* note 63, s 4.3.2; Cunningham, Ederer & Ma, *supra* note 42 at 694—696; *Yun Testimony*, *supra* note 91 at 13.
[115] *Competition Act*, *supra* note 2, ss 92(1)(e)-(f).
[116] *Ibid*.
[117] *Ibid*, s 79(2).
[118] See e.g. *Laidlaw*, *supra* note 49.
[119] *Ibid*.
[120] *Ibid*.

[121] *Facebook*, *supra* note 14 at 40.
[122] *Competition Act*, *supra* note 2, s 79(2).