

## ON RECENT AMENDMENTS TO THE CANADIAN COMPETITION ACT: BENEFIT DERIVED AND THE DETERMINATION OF MONETARY PENALTIES

Robert Topel<sup>1</sup>

“It would not appear possible in practice for a competition authority or a court, even with the help of the best experts trained in econometrics, to measure or estimate reliably this theoretically correct minimum fine for a given antitrust violation.”

Wouter Wils (2007)<sup>2</sup>

*Recent amendments to the Canadian Competition Act have expanded the set of antitrust enforcement tools available to the Competition Bureau and Tribunal, while also allowing private parties to apply for damages. This paper focuses on the greatly expanded range of deterrent fines that the Tribunal may impose on violators. These fines may be imposed up to three times the value of the benefit derived from the illegal conduct or, if that concept cannot be “reasonably determined”, up to three percent of a violating firm’s global revenues. The Tribunal may also award damages to injured parties that may not exceed the violator’s benefit derived from the illegal conduct. I argue that antitrust cases where benefit derived can be reasonably determined will be rare, so that fines will be set by other, less objective and transparent means, in which case damages may not be available. These conclusions are consistent with the history of fines set by the European Commission, which for over 25 years has been empowered to set fines based on gains improperly made—a synonym for benefit derived—when it is “possible” to do so, yet there are no documented cases of fines being based on that concept. Overall, my view is the amendments will move Canadian antitrust policy much closer to that of the European Union, which is a source of concern.*

*Les modifications récentes de la Loi sur la concurrence ont élargi la trousse d’outils d’application des mesures antitrust à la disposition du Bureau de la concurrence et du Tribunal de la concurrence, tout en permettant aux parties privées de demander des dommages-intérêts. L’auteur de cet article porte un regard sur la gamme considérablement renforcée d’amendes dissuasives que le Tribunal peut imposer aux contrevenants. Ces amendes peuvent représenter jusqu’à trois fois la valeur de l’avantage dérivé du comportement illégal ou, si cette valeur ne peut être « déterminée raisonnablement », jusqu’à 3 pour cent des recettes mondiales brutes de l’entreprise contrevenante. Le Tribunal peut aussi accorder aux parties lésées des dommages-intérêts ne pouvant excéder l’avantage dérivé du comportement illégal. L’auteur maintient que les*

*poursuites pour violation des lois antitrust dans le cadre desquelles l'avantage dérivé pourra être déterminé raisonnablement seront rares, donc les amendes seront établies par d'autres moyens moins objectifs et transparents, ce qui pourrait éliminer les dommages-intérêts. Ces conclusions cadrent avec les amendes imposées par la Commission européenne qui, depuis plus de 25 ans, est habilitée à infliger des amendes en fonction des gains illicites réalisés – un synonyme d'avantage dérivé – lorsqu'il était « possible » de le faire, même s'il n'existe aucun cas documenté de ce fait. Dans l'ensemble, l'auteur est d'avis que cette modification de la Loi rapprochera vraiment la politique antitrust canadienne de ce que fait l'Union européenne, ce qui le préoccupe*

## I. Introduction and Summary

### a. Background

Successive amendments to the Canadian *Competition Act* (Act) in 2022, 2023, and 2024 have expanded the set of antitrust enforcement tools available to the Competition Tribunal and Competition Bureau, while also allowing private parties to petition for monetary relief (damages) from the Tribunal. Broadly, the amendments: (1) reduce specific thresholds for finding antitrust liability in cases involving “abuse of dominance” and add categories of reviewable conduct; (2) greatly increase the range and basis of Administrative Monetary Penalties (AMPs) that the Tribunal may impose when liability is found; (3) at the discretion of the Tribunal, allow private parties harmed by anticompetitive conduct to collect damages in certain circumstances; (4) repeal the “efficiency defense” in reviewing the competitive impact of mergers; and (5) create a rebuttable presumption that a merger is anticompetitive if it significantly increases market concentration.

In this article I focus on amendments affecting the determination of AMPs and damages for civil infringements, which apply to “abuse of dominance” (section 79), “agreements that prevent or lessen competition” (section 90.1), and, for damages, unilateral business practices under sections 75-78 of the Act. Prior to the amendments, AMPs were capped at relatively low levels, and parties harmed by the conduct could receive injunctive and other forms of relief but not monetary damages. The new amendments greatly expand the range of AMPs available to the Tribunal while also creating opportunities for harmed parties to collect damages. Notably for much of what follows, both AMPs and damages are to be based on a measure of a violator’s “benefit derived” from the illegal conduct. Specifically:

- In cases where the Tribunal finds intentional abuse of dominance (section 79), the Act specifies AMPs to be no greater than the higher of: (i) \$25 million; or (ii) three times the value of the *benefit derived* from the conduct or, if that benefit cannot be “reasonably determined”, three percent of the violator’s worldwide gross revenues.<sup>3</sup> The same formula applies to non-criminal agreements that restrain trade (section 90.1) with the exception that the limit in condition (i) is \$10 million.<sup>4</sup>
- In cases where the Tribunal finds that abuse of dominant position has occurred, the Tribunal’s power to impose AMPs is limited to cases where both anticompetitive impact and anticompetitive “intent” are established.<sup>5</sup>
- For private litigants harmed by anticompetitive conduct and who obtain leave to bring applications to the Tribunal, the Tribunal “may also” order the infringing party to pay damages “not exceeding the value of the *benefit derived* from the conduct...to be distributed among [those affected] in any way the Tribunal considers appropriate.” The set of infringements eligible for damages includes those that may trigger AMPs—abuse of dominance (section 79) and agreements that restrain trade (section 90.1)—plus other reviewable unilateral business practices that do not trigger AMPs.<sup>6</sup> Unlike for AMPs, the amendments do not specify if or how damages are to be determined when the violator’s benefit derived “cannot be reasonably determined.”<sup>7</sup>

Given the prominence of the new concept “benefit derived” (BD) in crafting forms of punishment and compensation, one might expect Parliament to provide a definition of it. Yet a definition of BD is conspicuous by its absence—the amendments are silent on what BD might mean generally, or in specific contexts where it might be calculated. One can only assume that this omission was purposeful, leaving BD to be defined by the Bureau and Tribunal in different cases and contexts. Parliament effectively delegated the authority to define a major new concept and enforcement tool in the Act, and how to calculate it, to agents in the Bureau and Tribunal on a case-by-case basis. As in many legislative-regulatory contexts this delegation has the advantage of relying on agents with presumably greater expertise in antitrust matters. There are also disadvantages that I discuss below.

In order to apply BD the Bureau and Tribunal will need a general definition, at least as a starting point. To an economist, the most plausible

definition is that BD measures a violator's gain in actual or expected future profits caused by its illegal conduct; that is, its incremental profits compared to a "but-for" world in which that conduct did not occur.<sup>8</sup> I will take this as a working definition in what follows, while recognizing that the language of the Act may confer some flexibility to the Bureau and Tribunal.

However it might be defined, a key feature of BD is that it occurs on the violator's side of the market—it is intended to represent what the violator gained from its illegal conduct rather than the harm caused by that conduct. This distinction adds a new layer to Canadian antitrust enforcement. In Canada, as in the US, with the exception of *per-se* violations such as price-fixing, a threshold condition for determining antitrust liability is that the challenged conduct can be shown to cause actual or prospective harm to consumer welfare by lessening competition. No consideration of the violator's BD is necessary for determining liability, though there is a strong presumption that something must have been gained from the conduct or it wouldn't have occurred. As I read the amendments, the imposition of AMPs now requires the Bureau and Tribunal to make a good faith effort to provide a monetary estimate of a violator's BD, or to explain why BD cannot be reasonably determined. BD is also the essential concept underlying anti-trust damages, so damages are disgorgement of the violator's estimated actual or expected illegal gains, even in cases that are not eligible for AMPs (sections 75-77). The Act is oddly silent on how damages might be calculated when BD cannot be "reasonably determined", which I expect to be the typical case.

These features stand in sharp contrast with US law, where monetary penalties are tort claims based on the estimated harm (damage) done to victims of anticompetitive conduct, which are then trebled. For some anticompetitive acts, such as an agreement among competitors that raises prices (section 90.1), damage to consumers and the anticompetitive profits of violators might be roughly equal and concomitant. Consumers pay an overcharge (damages) and the colluding firms receive it (BD), and it is sometimes possible to obtain a rough estimate of the overcharge. But in other cases, including abuse of dominance and the other categories of unilateral conduct listed in sections 75-78 of the Act, the two may be quite different, especially when the alleged harm to competition and violator's gain and/or consumer harm are merely possible or prospective rather than actual, as is often the case. Then the reliance in US law on provable damages in forming monetary penalties may yield little or no deterrence because no calculable damage to consumers has yet occurred. The Act's new emphasis on BD and a much greater range of possible fines might be interpreted as reflecting this difference, giving

greater weight to the deterrence of anticompetitive acts than to compensation of harm.

Reliance on BD in determining AMPs and damages appears to place important analytical limits on the Bureau's and Tribunal's discretion. I argue below that this appearance is deceiving—especially in unilateral conduct cases where a “reasonably determined” measure of a violator's gain will rarely be available. Evidence from the EU supports this pessimism. There, guidelines for setting AMPs by the European Commission (EC) have included for over 25 years an infringer's “gains improperly made” as a factor to be used in setting AMPs, if it is “possible” to measure those gains. The close similarity of the language in the EC's guidelines to that in the Act is striking, yet there are no documented instances of the EC using a measure of improper gains in setting AMPs, which are often extraordinarily large. As an economic matter, the absence of documented cases is significant because reliance on an objective measure of a violator's gains in setting fines would provide clear and analytically correct deterrence of anticompetitive conduct, while also making imposed fines more defensible. Whether one calls the concept “benefit derived” or “gains improperly made”, this fact and the analytical difficulties in properly defining a violator's BD, much less calculating it, suggest that the Canadian experience is likely to be similar.<sup>9</sup>

The conceptual challenge is that while determining that a form of conduct is anticompetitive is typically difficult and uncertain, identifying and calculating what a violator *gained*, or might gain, from the conduct is often far more uncertain and speculative. This is why I expect that the large majority of AMPs will be set by other means, with great reliance on the Tribunal's discretion and expanded powers. A related concern is the Act's requirement that damages paid to harmed parties can be no larger than the infringer's BD, which as I read the Act, means that a reliable measure of BD is a prerequisite for awarding damages. Then if the Tribunal concludes that damages are warranted it may strain to create a justifying measure of BD, no matter how uncertain and speculative it might be.

The evaluation of business practices that fall within the unilateral conduct and civil agreements provisions of the Act typically involve an imprecise balancing of procompetitive and anticompetitive effects. Prior to the recent amendments a finding of infringement could result in behavioural remedies that enjoin or modify the offending conduct, and fines that were relatively modest—the upper limit on AMPs for abuse of dominance was only \$10 million. The Bureau argued that such limits were inadequate to deter conduct by large firms and were out of step with the very large fines

imposed in other jurisdictions.<sup>10</sup> The amendments greatly expand the range of deterrent AMPs that can be wielded by the Tribunal, which may enhance deterrence. Yet if, as I expect, reliable estimates of BD are rare, and the concept itself is rarely used, the added uncertainty of financial penalties set by other means risks muddying the waters for businesses, who cannot be confident of exactly what conduct might be deemed anticompetitive and what metric will be used in determining penalties if liability is found. If so, the new powers in the Act could dampen competition. Magnifying this concern, these new powers give broad discretion for antitrust authorities and bureaucrats to define BD in ways that align with their own preferences or with alternative political goals, which shift over time.<sup>11</sup> As experience in the EU demonstrates, there are few constraints.

The rest of the paper is organized as follows. Section II lays some groundwork by reviewing the purpose and design of effective antitrust penalties. I compare the methods of determining monetary penalties and damages specified in the Act's amendments to methods that have evolved in the United States and the European Union, with particular attention to the reasons why Canadian penalties were designed as they are and the relative advantages, and disadvantages, of Canadian law. Section III then turns to a rather pessimistic analysis of how the Canadian concept of BD might be applied in practice. Section IV concludes.

## II. The Purpose and Design of Antitrust Penalties

As an economist, my instinct is to evaluate the operation and effectiveness of public policies by asking "Compared to what alternatives?" The largest Western economies subject to sophisticated antitrust enforcement are the US and the EU, so a high-level comparison of institutions and financial penalties in Canada, the US, and the EU is instructive.

Broadly speaking, enforcement agencies in these jurisdictions agree on their missions, each stating that the purpose of their activities is to protect the "competitive process". For example, the Canadian Competition Bureau states that its "advocacy and enforcement work focuses on protecting the *competitive process* rather than enforcing a particular market outcome"<sup>12</sup>. Similarly, the European Commission "focuses on preventing harm to the *competitive process*"<sup>13</sup>, while the US Department of Justice and Federal Trade Commission will intervene to "prevent those mergers that would...harm the *competitive process*."<sup>14</sup> Missing from these statements, and from any supporting documents I have found, is a clear definition of the very thing being

protected—the *competitive process*. I believe a clear definition is important, so here is one that I think is useful and covers the necessary ground.

I use the term “competitive process” to refer to unilateral (i.e., non-collusive) acts by sellers of goods and services that are meant to attract and retain the business of customers, such as pricing, product design, innovation, and advertising.<sup>15</sup> Implicit in this definition is that such acts enhance the gains from trade between a firm and its customers; they are generally welfare enhancing.<sup>16</sup> “Anticompetitive conduct” refers to acts by business firms that seek profits by illegally interfering with or hindering the competitive process in ways that reduce the gains from trade. With this definition, I treat the phrases “protecting the competitive process” and “protecting competition” as synonymous.

An implicit tenet of antitrust enforcement is that rational individuals engage in anticompetitive acts because they benefit, in some way, from doing so. Behavioural remedies—such as enjoining conduct that is found to harm competition—are interventions that prevent harmful conduct from occurring or continuing, while monetary penalties are meant to dissuade such acts by making them costly and perhaps also to repair the harm such acts have done to victims.

Monetary penalties in antitrust serve two broad and closely related purposes:

- *Deterrence and disgorgement*: To be effective deterrents, monetary penalties must be strong enough that the expected gains from engaging in anticompetitive acts are offset by expected penalties. Monetary penalties should also account for the probabilities that the illegal acts are both discovered and successfully prosecuted, which in many circumstances might be low. Penalties large enough to deter anticompetitive conduct must then be larger, perhaps much larger, than violators’ expected gains, in which case disgorgement is achieved.
- *Compensation of those harmed and creation of private incentives to detect anticompetitive conduct*: The victims of anticompetitive conduct should be compensated for harm caused by the conduct. In addition, payment of damages effectively deputizes and incentivizes victims (and their agent lawyers) as private antitrust enforcers.

These purposes are best served when there is clarity of both the nature of conduct that is illegal and the penalties that will be imposed. Canada’s amendments to the Act certainly increase the range of possible AMPs and

so they appear to strengthen deterrence—perhaps by too much, as discussed below. They also create new opportunities for compensation of injured parties. In multiple ways the amendments create a sort of hybrid of US enforcement, penalties, and compensation, which are relatively clear, and those in the EU, which are not. Table 1 shows the basic structure of financial penalties and compensation of harm for antitrust violations in Canada, the US, and the EU.

**Table 1**

**Antitrust Monetary Penalties and Damages in Canada, the United States, and the European Union**

	<b>Canada</b>	<b>United States</b>	<b>European Union</b>
<b>Monetary Penalties: Criminal Conspiracy</b>	<ul style="list-style-type: none"> <li>• Criminal offence prosecuted by the PPSC</li> <li>• Imprisonment, and/ or fine at discretion of the Court</li> <li>• Paid to Canadian Treasury</li> </ul>	<ul style="list-style-type: none"> <li>• Criminal offence prosecuted by DOJ</li> <li>• Imprisonment and/ or fine of up to 20% of affected commerce</li> <li>• Paid to US Treasury</li> </ul>	<ul style="list-style-type: none"> <li>• Non-criminal offence treated as civil violation</li> </ul>
<b>Monetary Penalties: Civil Violations</b>	<ul style="list-style-type: none"> <li>• Determined by Tribunal for:               <ol style="list-style-type: none"> <li>(1) intentional abuse of dominance</li> <li>(2) agreements restraining trade</li> </ol> </li> <li>• AMP of up to the greater of:               <ol style="list-style-type: none"> <li>(1) \$25M (abuse) or \$10M (agreements)</li> <li>(2) Three times the benefit derived from the conduct, or 3% of global revenue</li> </ol> </li> <li>• Paid to Canadian Treasury</li> </ul>	<ul style="list-style-type: none"> <li>• DOJ &amp; FTC may seek civil fines for breach of a consent decree or a procedural violation</li> </ul>	<ul style="list-style-type: none"> <li>• Determined by European Commission for:               <ol style="list-style-type: none"> <li>(1) Conspiracy</li> <li>(2) abuse of dominance</li> <li>(3) agreements restraining trade</li> </ol> </li> <li>• Guidelines, but no fixed methods or metrics; base fine is adjusted up or down at Commission discretion</li> <li>• Capped at 10% of global revenue</li> <li>• Paid to EU Treasury</li> </ul>

	Canada	United States	European Union
<b>Damages</b>	<ul style="list-style-type: none"> <li>• Determined by civil courts for actions under section 36(1) based on criminal violations, paid to plaintiffs</li> <li>• Under Part VIII, determined by Tribunal for:                             <ol style="list-style-type: none"> <li>(1) Acts that trigger AMPs</li> <li>(2) Certain unilateral vertical</li> </ol> </li> <li>• Distributed by Tribunal as it deems appropriate</li> </ul>	<ul style="list-style-type: none"> <li>• Determined in private litigation</li> <li>• Three times damages suffered by plaintiffs</li> <li>• Methods have evolved through litigation</li> <li>• Paid to plaintiffs</li> </ul>	<ul style="list-style-type: none"> <li>• Plaintiffs may recover damages in courts of member states</li> </ul>

### Financial Penalties and Damages in Canada versus the US

In the US, the government agencies tasked with enforcing antitrust law are the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC). Their powers in antitrust enforcement are broadly similar, though only the DOJ can deal with criminal violations. In civil cases including unilateral business conduct under Section 2 of the Sherman Act or the Clayton Act—acts that would include “abuse of dominance” in the language of the Act—their powers are effectively limited to investigating conduct and seeking behavioural or structural remedies via consent decrees or litigation.<sup>17</sup> Substantial monetary penalties for non-criminal matters arise via private litigation, including class actions, which may follow agency investigations and actions or arise independently. These private suits are torts that allow harmed parties to collect damages equal to three times the estimated monetary harm caused by the illegal conduct (“treble damages”). In other words, in the US both deterrence/disgorgement and compensation of victims are based on the same measure, damages.

A showing of consumer harm, or the dangerous probability of future harm, is a threshold requirement for establishing liability. In a nutshell, this is the US version of the “consumer welfare standard” for protecting the competitive process. For cases involving the Canadian concept of abuse of dominance by a single firm, where the illegal acts may also have harmed competitors, those competitors may sue for damages in the form of lost profits. The consumer welfare standard still applies as the threshold test, however, because competitor claims for damages typically require a prior showing of harm to consumer welfare.<sup>18</sup>

The widely accepted rationale for trebling is that acts in restraint of trade are not always detected, so penalties for detected acts should be substantially larger than the damages they cause if they are to achieve deterrence, which also strengthens incentives for private litigants to discover them. Why trebling is the appropriate multiple is not obvious, though it has stood the test of time—Congress has declined proposals to change it—and expert review.<sup>19</sup> And note that trebling of BD has been adopted in the Canadian Act for setting AMPs.

The detection rationale for a multiple greater than one is most obvious for conspiracies, which are by nature secret. Some have argued that trebling is excessive in matters of unilateral conduct because the business practices at issue, such as exclusive dealing or loyalty discounts, are directly observable, so the multiple should be just one. But observing a business practice and uncovering its purpose are different things. For example, in the Act fines for abuse of dominance require a showing of both anticompetitive impact and intent. Putting aside how “intent” might be defined, like conspiracy it can be disguised and difficult to prove, and it is more likely to be disguised when intent is a criterion for finding liability and setting fines.<sup>20</sup> Then multiples greater than one are justified. Note that trebling is a hard rule under US law but an upper bound in the Act; the Tribunal can impose smaller AMPs at its discretion.

The American system has several virtues. One is that courts have historically accepted a set of more-or-less plausible methods for determining liability and calculating damages that are grounded in economic theory. Another is that the damage metric and methods that are the basis for monetary penalties are relatively clear, so business firms are broadly aware of the consequences of illegal acts while private litigants—including the plaintiffs’ bar—are aware of the rewards for detecting those acts and successfully prosecuting them. The rules of the game are relatively clear and stable. Related to this point, the damage metric and accepted methods for estimating it are reviewable constraints on financial penalties that limit the discretion of lower-court judges and juries.

A third virtue is the delegation of a large share of enforcement and penalties to private litigation, which both saves government resources and is beyond the reach of government power. Then monetary penalties are not a revenue source for the government that writes and enforces the laws, and a large part of antitrust enforcement is unconnected to the preferences and career concerns of agency bureaucrats, or to political considerations that shift with changes in administrations.

The prominent role of private litigation in the US also has important disadvantages. In litigation both liability and penalties are decided by judges—who may rarely oversee an antitrust case and typically have little or no expertise in the area—and juries composed of several citizens with no antitrust or economics background at all. Related, the availability of treble damages creates powerful incentives to bring questionable cases, and equally powerful incentives to settle, avoiding a trial. Settlements often have little connection to the original allegations, but they are, by definition, acceptable to both sides. Experts might do better. As I interpret the Act and its recent amendments, Canada has opted for the benefits of experts' knowledge and discretion in enforcement and the setting fines over the resource savings, constraints, and diffusion of power of the US system.

The treble *damages* metric applied in the US differs from the Canada's BD metric in several important ways.

First, in the US, the monetary metric underlying penalties and deterrence is the quantifiable harm that anticompetitive conduct does to *consumers*.<sup>21</sup> In the US, it is widely (though not universally) accepted that the purpose of antitrust law is the promotion of consumer welfare, which is best accomplished by protecting the competitive process, as defined above. The implicit assumption of US law is that deterrence is most effective when penalties are explicitly and formulaically tied to the harm caused by anticompetitive acts.

In contrast, the amendments to the Act are primarily concerned with enhancing deterrence; restitution appears to be a secondary goal and the Act does not mention any measure of harm as a factor to be considered in setting AMPs.<sup>22</sup> The deterrence metric comes from the *violator's* side. Putting aside until later how BD might be measured and applied, Parliament's choice of BD rather than consumer harm as a deterrent is very significant, with important implications discussed below. It suggests that the amendments' authors believe that an infringing act's harm to consumers and competition versus its benefit to a violator can be very different, and that the higher deterrent purpose of enforcement is better tied to some measure of BD than to the American concept of damages.

Second, while deterrent AMPs in the Act may be imposed up to three times the BD, damages, when they are allowed, cannot exceed the violator's BD; there is no multiple applied, no alternative based on the violator's revenue or the act's severity, and no consideration of whether the violator's BD is an appropriate metric for compensation. So while the enhanced right of access marks a significant increase in the Act's reliance on private

enforcement incentives, a multiple of one (or less, as the Tribunal may decide) compared to three in the US continues the Act's greater reliance on public enforcement and also perhaps "the perceived excesses of private enforcement in the United States."<sup>23</sup> Note as well that in cases of unilateral conduct where "intent" is not established but where the Tribunal finds that damages should be awarded, payment of damages is an implicit AMP capped by the violator's BD. This unitary multiple is consistent with the idea that, absent a finding of intent, a challenged business practice such as exclusive dealing or tying is publicly observable; a larger deterrent is not economically justified.

In cases where both an AMP and damages are to be paid the Act is ambiguous regarding whether the damage amount is to be paid by the violator in addition to the AMP, resulting in an effective fine of up to four times the BD, or whether it is to be paid out of the AMP. The phrase "may also" defining this Tribunal power suggests the former. Nor does the Act indicate how or if damages are to be determined if the violator's BD cannot be "reasonably determined"—a strict reading suggests there can be no damage award in this case, but perhaps it's up to the Tribunal to come up with something.<sup>24</sup> But the more important question is: In cases where BD and measurable consumer harm are conceptually different, which appears to be the presumption underlying BD, why are damages based on what the violator(s) gained rather than an independent measure of the actual harm to victims, which might be more easily and accurately determined? If the goal of paying damages is to compensate those harmed, then damages should be based on a measure of that harm when such a measure can be "reasonably determined".

Third, because US monetary penalties are determined in private litigation, they are paid to those who were allegedly harmed, not the government. The US government does not have standing to collect damages unless it was itself harmed as a purchaser of goods and services. Under the Act, AMPs will be determined by the Bureau and Tribunal—government agencies populated with political appointees—and will be paid to the Canadian Treasury. This feature is similar to the structure of EU fines, to which I now turn.

### **Financial Penalties and Damages in Canada versus the EU**

The US and Canada each base deterrence and restitution on a single metric; damages for the US and BD for Canada. The EU separates the two. As in Canada, EU monetary penalties are imposed by an agency, the European Commission, within very broad guidelines that leave more room for

the Commission's discretion than the Act grants the Bureau and Tribunal.<sup>25</sup> There is no fixed methodology or even a stated metric for setting fines, but it is clear that the major goal is deterrence, however achieved. A "symbolic fine" may also be imposed.<sup>26</sup>

After a long list of factors to be considered in setting a fine, close similarity to the Canadian Act and its new use of BD arises in Paragraphs 31 and 32 of the EC Guidelines for determining financial penalties, which read:

"The Commission will also take into account the need to increase the fine in order to exceed the amount of *gains improperly made as a result of the infringement where it is possible to estimate that amount* ... . The final amount of the fine shall not, in any event, exceed 10% of the total turnover in the preceding business year of the [violating entity]."<sup>27</sup>

So, in the EU a synonym for "benefit derived" may be taken into account, if possible, but unlike in Canada it is not the central concept in setting AMPs; it is a factor among many, though the Guidelines state that it "will" be taken into account when "possible". As in the Act, beyond mentioning "gains improperly made" the EU Guidelines provide no guidance as to what those gains might be or how they might be calculated for any particular type of conduct. Those are left to the Commission. And notice that 10 percent of a violator's worldwide revenue is in play if measurement of improper gains is not possible.<sup>28</sup> Canada's three percent limit is modest by comparison.

Perhaps ominously for how the BD concept might be applied in Canada, from the 1998 inclusion of "improper gains" in the EC Guidelines up through 2021—a 23 year window—"the Commission does not seem to have ever justified an increase of an antitrust infringement sanction based specifically on improper gains."<sup>29</sup> Nor have I found any recent cases where the concept of "improper gains" has been applied. This suggests that the Act's "reasonably determined" condition for using BD to set monetary penalties might rarely be satisfied. And without a reasonably determined BD there would seem to be no opportunity for damages under the Act's amendments.<sup>30</sup>

In contrast to both Canada and the US, in the EU the distinction between deterrent AMPs and compensating damages is explicit. Since 2014 those harmed by anticompetitive acts have been able to sue for damages in the courts of Member States and, in stark contrast to the vague guidelines on penalties, the EC describes in some detail a variety of acceptable methods for calculating damages in various circumstances.<sup>31</sup> Based on my experience these are the same methods that are commonly used to calculate damages

in US litigation. In Canada, when the Tribunal grants leave to petition for damages the upper bound that can be disbursed is the Tribunal's estimate of the *violator's* BD; there is no requirement that actual damage to consumers or others be calculated, even in matters where damages are more easily determined than a violator's BD.

Finally, as in Canada but unlike in the US, monetary penalties for anti-trust infringements flow to the general EU budget.<sup>32</sup> The EC, which like the Canadian Tribunal determines liability and imposes fines, explicitly regards these fines as a government revenue source that substitutes for taxation:

“This money is not earmarked for particular expenses, but Member States' contributions to the EU budget for the following year are reduced accordingly. The fines therefore help to finance the EU and reduce the burden for taxpayers.”<sup>33</sup>

Recent cases demonstrate that these fines can be very large and the reasoning behind them opaque.<sup>34</sup> For example, in 2018 the EC fined Google €4.3 billion for abuse of dominance related to its Android operating system, and fined Qualcomm €1 billion for exclusionary payments to Apple. Those two fines alone amounted to 3.7 percent of the EU budget for that year. In 2017 Google was fined €2.7 billion for abuse related to its search engine, and Scania was fined €0.9 billion for participating in a cartel, accounting for 2.6 percent of the EU budget.<sup>35</sup>

In two recent abuse of dominance decisions the EC's findings of liability and large fines have been overturned, marking an important change in EU law on abuse of dominance. In yet another major case involving Google, the EC initiated an investigation of Google's online advertising business in 2016. In 2019 the EC found Google's conduct exclusionary, imposing a fine of €1.5 billion. On appeal the Commission's findings and fine were annulled in their entirety by the EU General Court in September 2024.<sup>36</sup> Similarly, in 2009 the EC fined Intel €1.1 billion for abuse of dominance related to loyalty discounts in procurement contracts with certain computer manufacturers. After 15 years of appeals by Intel and counter-appeals by the EC, in October 2024 the European Court of Justice overturned the EC's findings in their entirety.<sup>37</sup> In both cases the EC had found the challenged contracts *per-se* illegal, arguing that evidence of anticompetitive impact was not necessary. The courts' new standard recognizes that the practices at issue generally have pro-competitive rationales, so that quantitative evidence of impact is required. These decisions appear to end the EC's *per se* standard in dominance cases, which is a step closer to the balancing considerations applied in the US and Canada.

In requiring quantitative evidence of anticompetitive impact the EU courts' decisions are particularly relevant for the possibility of measuring BD in unilateral conduct cases. Specifically, in its *Intel* appeal the EC included a quantitative analysis of the extent to which Intel's loyalty contracts could exclude competition from its main rival, Advanced Micro Devices, as a backup in case the court denied its *per-se* arguments. The court rejected the EC's analysis as unreliable. As I explain in more detail below, a reliable analysis of exclusionary impact in such cases is only a first step toward a "reasonable" measure a violator's BD. Because loyalty discounts and other forms of unilateral conduct are generally procompetitive, it is not sufficient to show that the extent and form of existing contracts can illegally exclude. It is also necessary to specify the form of less restrictive or extensive "but-for" contracts that would have been legal, and to offer a "reasonably determined" analysis of how competition, prices, and profits would have played out in that but-for world.

A common feature of EC fines is the absence of a transparent methodology for determining them; they reflect the EC's judgement (or assumption) of the severity of the infringement and the size of fine that would be a sufficient deterrent. Importantly for thinking about the new deterrent powers in the Act, none of the EC fines mentioned above involved a calculation of the infringer's "improper gains", or any detailed explanation of how the fine was constructed. Then an obvious concern is that the Commission is being true to its acknowledgment that fines are a source of government revenue, so that antitrust policy may be politically distorted toward raising revenue, or to other goals such as protecting competitors rather than protecting competition and consumer welfare. The Canadian Act's rules for finding liability and setting AMPs for anticompetitive conduct are more constrained and specific, and in my view more economically literate than in the EU, which are clear comparative benefits. Even so, the fact that BD is not a well-defined or easily determined metric suggest that it will be rarely used, so that BD will not define or constrain AMPs sought by the Bureau or imposed by the Tribunal.<sup>38</sup> I view that and the fact that imposed fines flow to the Canadian Treasury as sources of concern.

### **III. How, and How Often, Might Benefit Derived Be Applied?**

With the new amendments to the Act, it would appear that BD will be the key metric determining deterrent monetary penalties for antitrust infringements. In the abstract, basing AMPs on BD makes economic sense—a penalty at least as large as a rational infringer's BD, adjusted upward to account for uncertain detection and prosecution, would be an effective and

clear deterrent. Appearances are deceiving because the Act properly recognizes that there will be circumstances where an infringer's BD "cannot be reasonably determined", in which case the authorities may seek and impose fines up to three percent of a firm's worldwide gross annual revenue. This raises two crucial questions about how AMPs and damages will be determined:

First, how often and in what circumstances will there be a reliable estimate of a violator's BD?

Second, when no reliable measure of BD exists, what rules and methods will the authorities use to establish AMPs within the vast range "up to" three percent of a firm's worldwide revenue?

The Act amendments and recent legal commentary on them are silent on these crucial questions.

Evidence from the EU and the US is not encouraging. Regarding the first question, the answer appears to be "rarely, if ever". The EC's guidelines on setting fines have included a violator's "gains improperly made"—surely a synonym for BD—as a factor since they were first published in 1998, including clarifying revisions published in 2006. As in the Act, the stated rationale for this factor is deterrence. Yet as noted above the EC has not used this factor as justification for a fine, nor has it indicated how one might calculate it. Given the strong theoretical argument for basing deterrence on BD, one would expect EC authorities to use it if they could. The fact that they do not indicates that "reasonably determined" (Canada) or "possible" (EU) estimates of BD will be very rare, and that AMPs will have to be set by other, less specific, means, bounded only by three percent of worldwide revenue. Hence the pessimistic quote from Wils (2007) that opened this paper.<sup>39</sup>

Evidence from the US is similar. Though most monetary penalties for US antitrust violations are settlements or damage estimates from private litigation, the DOJ seeks monetary fines for criminal conspiracies using criteria spelled out in the US Sentencing Commission's guidelines on antitrust fines.<sup>40</sup> Notably, these policies resemble the EC's guidelines applied to all antitrust offences, though they are more specific and they apply only to criminal conspiracies. As a matter of basic economics, in collusion cases there is at least some degree of theoretical correspondence between damages to consumers, who pay an elevated price, and the "benefit derived" by conspirators who receive the higher price. Yet like the EC, the Sentencing Commission considers the volume of commerce to be a "more readily measurable substitute" for the severity of an offence than "the damage caused or profit made by the

defendant.” “Because damages are difficult and time consuming to determine...the volume of commerce...serves as the basis for the offense level enhancements [to fines].” Again, this reliance on “volume of commerce” rather than some measure of anticompetitive gains suggests that reasonable or reliable measures of BD will in practice be rare.

Rarity raises an additional problem mentioned above. When harmed parties petition the Tribunal for damages, the Act specifies that they may collect up to the value of the violator’s BD—an estimate of their actual damages might play some unstated role in determining what they get, but it is bounded by the violator’s BD even when BD and damages are very different. As I read the amendments, the very opportunity to collect damages depends on the existence of a reasonably measured BD, so in cases where the Tribunal finds that there is no such measure the parties harmed by anti-competitive conduct would have no claim to damages. There is no defined amount “to be distributed among [those affected] in any way the Tribunal considers appropriate”<sup>41</sup> and no clearly-stated discretion of the Tribunal to create one.

As I noted above, the fact that the “reasonably determined” criterion for applying BD is directly mentioned in sections of the Act dealing with AMPs but not in sections dealing with damages might allow the Tribunal to finesse these issues, say by using a “reliable” lower bound for BD to pay damages or simply defining BD to *be* damages at the Tribunal’s discretion. But these possibilities don’t solve the fundamental contradiction that the violator’s actual BD and the damage to those harmed are often conceptually different. An economically coherent and clear solution would be to fix the Act, basing deterrent AMPs on a “reasonable” measure of BD and basing compensation on an (also reasonable) measure of damages.

Regarding the second question above, the Act is silent on specific methods to be applied in setting AMPs when a reasonable measure of BD is not available. The previous cap on AMPs was \$10 million, which the Bureau properly regarded as too small to deter violations by even mid-sized businesses, and perhaps irrelevant to large multinational firms. Under the amended Act the only formal constraint is that a fine may not exceed three percent of the violator’s annual worldwide revenue, which represents a massive increase in the Tribunal’s deterrent powers. This cap is not limited to the revenues generated by a particular product or line of business affected by the violating conduct, nor is it limited to affected revenues generated in Canada.

For example, suppose the Tribunal concludes that Apple’s “closed garden” App Store model illegally excludes competition for iPhone applications, harming Canadian consumers and app producers, but that a reasonable measure of Apple’s BD from the violating practices cannot be constructed. Prior to the recent amendments, the maximum fine available to the Tribunal was \$10 million. Now it is three percent of Apple’s worldwide revenue, inclusive of all its business activities. Apple’s 2024 worldwide revenue was roughly US \$390 billion<sup>42</sup>, so the upper bound on an AMP is \$11.7 billion, which is over 1000 times higher than before. It might be obvious that the Tribunal would not go that far, but neither is it clear what it would do—the amendments offer no clearly-stated rules or other constraints. The power and discretion of the Bureau-Tribunal looks very much like that of the European Commission.

### **Why is “Benefit Derived” Difficult to Measure? An Illustrative Example**

In practice, the antitrust authorities in the EU and US largely eschew attempts to measure anything similar to BD even in collusion cases where anticompetitive gains take the form of an elevated price, which is in principle observable if gains have actually occurred.<sup>43</sup> This is especially relevant because possible applications of BD under the new amendments will mainly apply to matters of unilateral conduct, including not only abuse of dominance where BD determines AMPs and possibly damages, but also in matters of “reviewable” conduct where AMPs are not imposed but damages can be awarded. In these categories the alleged anticompetitive effects and profits are often vague or prospective, and may merely have a “dangerous probability” of occurring in the future. They haven’t happened yet, and they might not happen at all. Further complicating matters, as the Act recognizes the business practices that might trigger antitrust liability—such as exclusive dealing, loyalty discounts, and price maintenance—almost always have procompetitive rationales that must be weighed against possible anticompetitive impact, while the threshold requirement of “intent” for AMPs in matters of abuse of dominance is difficult to discern or to distinguish from aggressive competition on the merits.

“Predatory pricing” is an exclusionary tactic that provides a stark example of these points.<sup>44</sup> Although convincingly documented cases of predation are in short supply and critiques of the theory are not, the alleged conduct is simple. An incumbent firm with monopoly power faces competition from a (typically smaller) rival, which may be a new entrant. To drive its rival out or impede entry the incumbent reduces price below incremental cost,

willingly losing money in the short run. This imposes losses on the rival as well, which the rival is less able to sustain. The rival eventually leaves the market, or does not enter, never to return. The predator then raises price to the monopoly level, recouping its investment. The successful predator's BD relevant for deterrence is the expected present value of *future* profits that accrue after driving the rival (or rivals) from the market, perhaps reduced by its losses during the predation period, *compared to the profits it would have earned from its best legal strategy.*

In this example consumers benefit from low prices during the period of predation, but will be harmed in the future after the strategy (we assume) succeeds. Assuming the conduct is challenged by the authorities while it is occurring, which is the typical case, the observed facts are that consumers are benefitting from low prices while the alleged predator is losing money. The rival is also losing current profits, which is typically the source of complaint to the authorities and of claims for damages.

Assuming that the conduct is found to be illegal, what would be a “reasonably determined” measure of the predator's BD that would serve the deterrent purpose of an AMP? Any effort to calculate it would require the Bureau/Tribunal to predict what the predator's future prices and profits would be compared to a but-for world where the illegal elements of the conduct did not occur, adjusted for the impact of the conduct on future entry and for the likelihood the strategy succeeds. Crucially, what is the predator's “but-for” legal conduct, which is essential for constructing a measure of BD? Reducing price in the face of entry is a pro-competitive act—it is the very essence of competition—that the law should protect. Then a “reasonably determined” estimate of BD would require calibration of just how large a price cut would have been acceptable for meeting competition, and how that price cut would have affected the outcomes listed above. Good luck trying to determine that value.

These considerations mean that any estimate of the predator's BD would be speculative and likely implausible—it would almost surely fail any “reasonable” version of the “reasonably determined” test. Again, I refer to the quote from Wils (2007) that opened this paper.

Then what? The constraints that BD places on Bureau/Tribunal discretion are gone, and an AMP must be determined by less objective criteria—as in the EC—bounded only by three percent of a firm's worldwide revenue. I don't think we can know what those criteria will be, or how they will be

applied. Nor can businesses that are busy competing with rivals, so the result may be a dampening of competition that harms buyers.

Finally, assuming the conduct is found illegal, the only parties that have been clearly harmed in this example are rivals, who have lost current profits. But as I read the Act amendments the harmed rivals have no damage claim before the Tribunal if there is no reliable or reasonable measure of BD.<sup>45</sup> Moreover, even if the Tribunal did construct a measure of the predator's *future* BD from the conduct, it would have no obvious relation to rivals' *current* lost profits. If harmed rivals' claims of lost profits are to be taken seriously and compensated, then there should be an independent estimate of their damages relative to a but-for world of legal conduct. Alternatively, the Tribunal might interpret the violator's BD as not its future gain, but instead the current losses it imposes on its rivals. Then BD would really be a "damage-to-competitors" calculation and the resulting AMP would be roughly equivalent to the US model of treble damages. Whether such an interpretation is plausible to lawyers and Canadian courts is beyond my expertise, but as an economist I think it a rather large stretch.

### **Difficulties in Measuring Benefit Derived: Unilateral Conduct**

Legal cases alleging naked predation are rare, but it has many close cousins among allegedly exclusionary unilateral contracting practices, and cases involving these practices are not rare. I will discuss two Canadian abuse of dominance cases, but my concerns are general.

Many of the challenges in determining a reliable measure of BD arise in matters involving so-called "loyalty discount" contracts, which are a form of exclusive dealing. These are vertical procurement agreements in which the seller conditions price discounts or rebates on a specified share of a product line that a buyer commits to purchase from the seller. Such contracts were a central issue in EC's recently-overturned case against Intel—discussed above—and in the parallel private suit against Intel brought by Advanced Micro Devices Inc. (AMD) in the US.<sup>46</sup> In Canada, the 2005 Canada Pipe (CP) case involved loyalty discounts and rebates that CP offered to distributors who agreed to purchase all of their cast iron drain, waste, and vent (DWV) requirements from CP—the contracted share was 100 percent, so the contracts were exclusive.<sup>47</sup> Because the large majority of distributors were covered by CP's exclusive contracts, the Competition Bureau alleged that the contracts abused CP's dominant position by preventing other manufacturers of cast iron DWV products from selling through enough distributors, so they could not compete effectively in the marketplace.<sup>48</sup>

As demonstrated in Snyder, Murphy, and Topel (2014), in situations like the CP case loyalty discount contracts always have a pro-competitive rationale.<sup>49</sup> Yet they can have anticompetitive exclusionary effects under certain conditions. For example, like the Bureau's reasoning in CP, assume that a dominant seller enters into such contracts with a large share of buyers, which can reduce the sales opportunities for a rival. If the production technology has important economies of scale, then the rival's remaining opportunities to sell may be too small to support it as an effective competitor. The resulting market outcome may raise prices *relative to a legal situation in which the dominant seller's contracts were less restrictive or extensive*. For example, the contracts might specify a minimum share of 75 percent rather than 100, leaving sufficient headroom for rivals to compete, or the dominant seller might contract with fewer buyers, so rivals can compete for the remaining buyers.

Assume for the sake of argument that the Tribunal finds that these conditions held and that the contracts are illegal. How might the Tribunal measure the dominant seller's BD, either as an input to creating an AMP under section 79 or as a damage amount under section 77?

As with price cuts in the face of entry when evaluating predatory pricing, loyalty discount contracts are a natural outcome of the competitive process. Then a but-for-world that eliminates the offending conduct is not one where loyalty contracts are prohibited; it is one where the contracts are less extensive or restrictive than the actual ones, so that rivals might be more formidable competitors or entry is more likely. It is one thing for the Tribunal to conclude that contracts were exclusionary. It is quite another to specify the features of contracts that would have been legal, and then to simulate how market competition would have played in that but-for-world. That effort would be loosely informed speculation. But that speculative exercise is precisely what is required in order to measure of a violator's BD and a deterrent AMP.

Since 2005 the Competition Bureau has challenged nine unilateral business practices as anticompetitive. Of these, three resulted in a finding that the conduct was not illegal and five, including Canada Pipe, were settled with an agreed modification of the practice but no admission that the conduct was anticompetitive.<sup>50</sup>

The only case resulting in a finding of liability was *Toronto Real Estate Board* (TREB 2016).<sup>51</sup> The Tribunal found that TREB's restrictive rules on the use of certain multiple listing service (MLS) information impeded

potential competition from operators of “virtual online websites”, which could result in higher consumer prices and prevent the emergence of innovative new services. The Tribunal also found that the exclusionary conduct was intentional, so under the amended Act this case would seem to qualify for imposition of an AMP based on BD rather than just a conduct remedy. Though the Tribunal enjoined the challenged rules and required other measures to restore competition<sup>52</sup>, we can still ask if and how a deterrent fine might be determined under the amended Act, and whether BD is a useful tool for doing so.

The TREB is a non-profit platform serving thousands of dues-paying member realtors in the greater Toronto area. It is not a direct beneficiary of the challenged conduct—any anticompetitive gains would be enjoyed by its members, and it seems implausible to assign exclusionary “intent” and a fine to each of them. That point aside, how could the members’ aggregate BD from the challenged rules be determined?

Similar to the issues in *US v. Microsoft* (2001)<sup>53</sup> and many other unilateral conduct cases, the competition excluded by the TREB’s challenged rules was largely “nascent”—innovative new services and providers that might evolve in the absence of the rules, and their emergence might improve quality and reduce prices. As in the case of loyalty discounts, construction of a reasonably determined BD would require the Tribunal to predict how this potential competition would have played out in the absence of the conduct, including what “innovative new services” would have evolved and how they would have impacted prices and welfare. As the Court of Appeals in *Microsoft* framed a very similar problem:

“[N]either plaintiffs nor the court can confidently reconstruct a product’s hypothetical technological development in a world absent the defendant’s exclusionary conduct... . [The question is] whether as a general matter the exclusion of nascent threats is the type of conduct that is reasonably capable of contributing significantly to a defendant’s monopoly power.”<sup>54</sup>

In other words, the court was able to conclude that certain of Microsoft’s practices were meant to illegally hamper potential competition, but it also concluded that attempting to simulate how the market might evolve in either the recent past or in the future in the absence of the illegal conduct is a fool’s errand. And it is precisely the latter task that would be involved in calculating a deterrent BD, either in *Microsoft*, *TREB*, or in other matters alleging exclusion of potential competition and innovation. I expect that in the vast majority of such matters the Tribunal will, like the European

Commission, determine AMPs by other, more subjective, standards, and that damages may not be available at all. Constructing deterrent AMPs will be more art and guesswork than science.

### **Difficulties in Measuring Benefit Derived: Agreements that Restrain Trade**

Section 90.1 of the Act prohibits “agreements or arrangements” that substantially lessen, or are likely to lessen, competition in a relevant market. As with the unilateral practices discussed above, the amendments to the Act allow the Tribunal to impose AMPs and pay damages in these matters. My understanding is that the Bureau has acted on very few section 90.1 cases and, of the two relatively recent cases it did bring, both were resolved by consent agreements before reaching the Tribunal.

The first case, in 2011, involved an arrangement between Air Canada and United Airlines. In the consent decree the two parties agreed to refrain from coordinating prices, the number of available seats at each price, and from sharing sensitive information.<sup>55</sup> In the second “e-books” case, from 2017, HarperCollins had agreed with other book publishers to switch their distribution models from wholesaler (arm’s length) transactions to agency, in which retailers would not control the prices of the e-books they sold. The Bureau and HarperCollins entered a consent agreement that allowed retailers to discount e-book prices.<sup>56</sup>

Though the cases ended in consent agreements, one can imagine nearly identical scenarios in which the agreements existed for some substantial period and were found to have an actual, rather than potential anticompetitive impact. For example, in the Air Canada-United Airlines case the Bureau might have shown that after the agreement was implemented, fares on routes covered by the agreement increased relative to fares on comparable routes that were not covered. Similarly, in the HarperCollins case, the Bureau might have shown that the switch from a wholesaler to an agency distribution model resulted in an increase in the retail prices of agency-sold e-books compared to the retail prices in other markets where the agency model was not adopted. Other “agreement” matters under section 90.1 may have this general character.

The facts and anticompetitive findings in the previous paragraph assumed the existence of a well-defined and observable but-for world in which the illegal conduct did not occur. The comparator market outcome allowed a “natural experiment” that measures BD as the elevation of the actual over the but-for price—the price impact of the conduct—times the number of

units the violator sells at the elevated price. Conveniently, in these examples the higher price received by the violator is also the elevated price paid by buyers, so a damage payment equal to BD is also reasonable. More generally, because damages and anticompetitive profits are in theory roughly the same in matters of horizontal agreements, the “before and after” or “unaffected market” methods of constructing a but-for benchmark can be directly applied to measure the violators’ BD. These methods are developed and well-known.<sup>57</sup>

Real world cases are rarely, if ever, so clean as these examples might suggest. For most matters that would fall under section 90.1 a convincing and observable “but-for” world will not exist. As an example, consider the recent US lawsuits that challenged the contractual agreements among 35 Blue Cross and Blue Shield (BCBS) health insurance companies in the US, together forming the BCBS Association.<sup>58</sup> Simplifying a bit, the agreements specified that each BCBS entity operated in an “exclusive service area” (ESA), which might be a state or combination of states. Then, for example, BCBS of Alabama is the only Blue-branded company that can sell health insurance to customers in the Alabama ESA. Among other things, the lawsuits challenged the ESAs as illegal restrictions on competition, so that all Blue entities should be able to compete for customers throughout the US.

Putting aside the merits of these complaints, just as above a measure of the BCBS system’s “benefit derived” from its agreements requires a “reasonably determined” specification of the but-for world in which the agreements would not have existed—including, in particular, the prices and market shares of all sellers that would have occurred in that presumably “more competitive” world. Further complicating things, the “market” is “two-sided” and subject to network effects<sup>59</sup>—to compete effectively a seller of health insurance to final customers (and employers) must also negotiate medical service provider prices with multitudes of local hospitals, systems, and clinics in each regional market where it operates. In this case, the challenged agreements and market structure have been in place for decades, so a “before-and-after” experiment is implausible. And there is no parallel market outcome that reliably mimics how competition would play out among 35 Blue competitors plus the other national insurance companies that now exist. I doubt that the Canadian Bureau would even attempt the task of calculating and defending a measure of BD in this situation, nor would the Tribunal accept such a measure. Any AMP would be constructed by other, more subjective and speculative methods. I believe matters such as this one will be by far the most common.

## IV. Summary and Conclusions

Prior to recent amendments to the *Competition Act*, administrative monetary penalties for antitrust and other violations of the Act were capped at low levels (\$10 million), while parties harmed by the conduct could receive injunctive and other forms of relief but not monetary damages. Regarding AMPs, the Competition Bureau persuasively argued that the range of fines that could be applied was far too low to form effective deterrents, especially for violations committed by very large businesses. The amendments vastly increase the range of possible AMPs, while allowing the Tribunal to award damages to harmed parties.

The important new concept underlying these powers is a violator's "benefit derived" from its illegal acts. From the language of the amendments it would seem that consideration of the violator's BD is a threshold requirement in all matters where fines and/or damages are contemplated. That is, the authorities must either construct and defend a "reasonably determined" measure of BD or explain why it isn't feasible to do so, in which case AMPs, at least, can be set by other means. I expect "other means" to be the method in the large majority of cases; at least the economically most important ones. Then the only statutory limit on AMPs is three percent of a firm's world-wide revenue, which can be huge.

Oddly, in my view, the amendments specify that damages are also to be based on the violator's BD. What the Tribunal may do regarding damages in situations where a reliable measure of BD is not available is not clear, but a strict reading suggests that damages cannot be awarded in those cases. This, and the fact that damages caused by illegal conduct and a violator's gains are typically different, seem to me clear shortcomings of the amended Act that can, and should, be corrected.

The amendments to the Act bring the tools available to the Bureau and the Tribunal much closer those of the European Commission. This fact is concerning for two reasons. First, the EC Guidelines on setting fines have long included the equivalent of BD as a factor that should be used, when "possible", in setting antitrust fines, yet there is no evidence that the EC has ever done so. I regard this as empirical evidence from a highly similar institutional setting, indicating that a measure of "benefit derived" will rarely constrain AMPs. Second, absent the analytical and objective constraint of a credible BD measure, the Bureau and Tribunal have wide berth to impose discretionary AMPs, much like the powers of the EC that I regard as excessive and harmful to competition.

The *Competition Act* is admirably clear, consistent, specific, and economically literate regarding the types of business practices that can trigger antitrust liability. In this sense the Act is more constraining, in positive way, than the structures of US and EU enforcement. Under the new amendments, the same cannot be said about the determination of monetary penalties. Some further explicit rules and constraints—such as lower caps on AMPs, restricting penalties to reflect the amount of Canadian commerce affected, and specifying particular methods to be followed when “benefit derived” cannot be measured—would allay many concerns.

## ENDNOTES

- <sup>1</sup> Isidore and Gladys Brown Distinguished Service Professor of Economics, Emeritus, Booth School of Business, The University of Chicago, and Senior Consultant, Charles River Associates. I have benefitted from comments by the Editors on an earlier draft, and from discussions with other authors in this volume. I also gratefully acknowledge useful discussions with Kevin M. Murphy and James Herbison.
- <sup>2</sup> Woulter Wils, “The European Commission’s 2006 Guidelines on Antitrust Fines: A Legal and Economic Analysis”, (14 February 2007) at 19, online: <[ssrn.com/abstract=962654](https://ssrn.com/abstract=962654)>. This paper is also available at (2007) 30:2 World Competition 197.
- <sup>3</sup> *Competition Act*, RSC 1985, c C-34, s 79(3.1) [Act]. The \$25 million maximum increases to \$35 million for subsequent orders made against the respondent under this section.
- <sup>4</sup> *Ibid.*, ss 90.1(1.3), 74.1(1)(c). The \$10 million threshold increases to \$15 million for subsequent orders made against the respondent under the respective sections.
- <sup>5</sup> “A broader range of remedies, including administrative monetary penalties, are available for instances where all three elements, i.e., dominance, anticompetitive intent and effects, are present.” See Canada, Competition Bureau, “Guide to the December 2023 amendments to the Competition Act” (18 December 2023), online: <[competition-bureau.canada.ca/how-we-foster-competition/education-and-outreach/guide-december-2023-amendments-competition-act](https://competition-bureau.canada.ca/how-we-foster-competition/education-and-outreach/guide-december-2023-amendments-competition-act)>.
- <sup>6</sup> In the Act, *supra* note 3, the practices are abuse of dominance (s 79(4.1)), agreements in restraint of trade (s 90.1(10.1)), deceptive marketing (s 74.1), and the unilateral business practices specified in s 75 (Refusal to Deal), s 76 (Price Maintenance), and s 77 (Exclusive Dealing and Tied Selling).
- <sup>7</sup> In cases of reviewable matters of deceptive marketing, the Tribunal may award damages to buyers “not exceeding the total of the amounts paid to [the violator]”: Act, *supra* note 3, s 74.1(1)(d). So for these acts damages are bounded by the amount paid, while AMPs are bounded by benefit derived.
- <sup>8</sup> This definition of BD aligns with early proposals to amend the Act’s sections dealing with AMPs. See House of Commons, *A Plan to Modernize Canada’s Competition Regime: Report of the Standing Committee on Industry, Science, and Technology* (April 2002) (Chair: Walt Lastewka) at 49, which argues that “the penalty [AMP] must be greater than the profit that the abusive firm might realize as a result of its anticompetitive conduct”.
- <sup>9</sup> In 2022 Australia amended the AMP provisions of its Treasury Law in ways that are roughly equivalent to Canada’s. Australian authorities may impose AMPs bounded by the larger of: (i) A\$50 million; or (ii) three times the “value of the benefits that have been obtained” from the conduct or, if that benefit cannot be determined by the Court, thirty percent of the violator’s Australian revenues during the breach period: *Competition and Consumer Act 2010* (Commonwealth), 1974/51, s 76(1B) (Austl) [emphasis added].
- <sup>10</sup> Canada, Competition Bureau, *Examining the Canadian Competition Act*

in the *Digital Era* (Submission) (8 February 2022), s 3.3, online: <[competition-bureau.canada.ca/how-we-foster-competition/promotion-and-advocacy/regulatory-advice/interventions-competition-bureau/examining-canadian-competition-act-digital-era](https://competition-bureau.canada.ca/how-we-foster-competition/promotion-and-advocacy/regulatory-advice/interventions-competition-bureau/examining-canadian-competition-act-digital-era)>. For example, in 2020 the Bureau and Facebook settled an investigation of Facebook’s privacy practices for \$9 million: Canada, Competition Bureau, News Release, “Facebook to pay \$9 million penalty to settle Competition Bureau concerns about misleading privacy claims” (19 May 2020), online: <[canada.ca/en/competition-bureau/news/2020/05/](https://canada.ca/en/competition-bureau/news/2020/05/)>. The US FTC challenged the same conduct and reached a settlement with Facebook for \$5 billion, which some observers regarded as inadequate: Rohit Chopra, “Lessons from the FTC’s Facebook Saga” (27 September 2022), online: <[theregreview.org/2022/09/27/chopra-lessons-from-the-ftcs-facebook-saga/](https://theregreview.org/2022/09/27/chopra-lessons-from-the-ftcs-facebook-saga/)>.

<sup>11</sup> For example, during the Republican George W Bush administration, with the *Antitrust Modernization Commission Act of 2002*, Pub L No 107–273, 116 Stat 1856, Congress created the Antitrust Modernization Commission, which submitted its report in 2007: US, Antitrust Modernization Commission, *Report and Recommendations* (2 April 2007) [Antitrust Modernization Commission Report]. In September 2008 the DOJ adopted its recommendations regarding unilateral conduct under the *Sherman Antitrust Act of 1890*, 15 USC § 1 at 2 [Sherman Act]. A Democratic administration under Barack Obama took office in 2009. In April 2009 the new head of antitrust at the DOJ withdrew the Report, stating that it “no longer represents the policy of the Department of Justice”: Christine A Varney, “Vigorous Antitrust Enforcement In This Challenging Era” (Address to the United States Chamber of Commerce, 12 May 2009) [unpublished] at 8, online: <[justice.gov/d9/atr/speeches/attachments/2015/06/25/245777.pdf](https://justice.gov/d9/atr/speeches/attachments/2015/06/25/245777.pdf)> (remarks by the Assistant Attorney General—Antitrust Division).

<sup>12</sup> Canada, Competition Bureau, Competition Bureau Submission to the OECD on Excessive Pricing in Pharmaceuticals (Regulatory Advice/Interventions) (5 November 2018), s 3, online: <[competition-bureau.canada.ca/how-we-foster-competition/promotion-and-advocacy/regulatory-advice/interventions-competition-bureau/competition-bureau-submission-oecd-excessive-pricing-pharmaceuticals](https://competition-bureau.canada.ca/how-we-foster-competition/promotion-and-advocacy/regulatory-advice/interventions-competition-bureau/competition-bureau-submission-oecd-excessive-pricing-pharmaceuticals)>.

<sup>13</sup> Alexander Iken et al, “Non-Price Competition: EU Merger Control Framework and Case Practice” (2024) 1 Competition Pol’y Brief 1 at 1, online: <[competition-policy.ec.europa.eu/document/download/b0042baf-a258-4c31-b31a-6331cb8d54a2\\_en?filename=kdak24001enn\\_competition\\_policy\\_brief\\_non-price\\_merger-control.pdf](https://competition-policy.ec.europa.eu/document/download/b0042baf-a258-4c31-b31a-6331cb8d54a2_en?filename=kdak24001enn_competition_policy_brief_non-price_merger-control.pdf)>.

<sup>14</sup> US Department of Justice, *Merger Guidelines: U.S. Department of Justice and the Federal Trade Commission* (18 December 2023), at 18.

<sup>15</sup> For simplicity, here and throughout the paper I refer to the acts of sellers and the exercise of monopoly power. My discussion applies equally to acts of buyers who might exercise monopsony power over sellers.

<sup>16</sup> The modifier “generally” is important. For example, unilateral acts that fall within my definition of the competitive process, such as loyalty discounts and

other vertical restraints, may nevertheless be welfare reducing when they exclude or weaken competitors. As discussed below, the Act's amendments limiting AMPs for "abuse of dominance" absent exclusionary intent appear to recognize this distinction.

<sup>17</sup> In criminal cases the DOJ may seek fines up to 20 percent of the commerce affected by the illegal acts. The magnitude of fines depends on the severity of the infringement. In civil matters, the DOJ and FTC may only seek fines for "breach of a consent decree or for a procedural violation": Antitrust Modernization Commission Report, *supra* note 11 at 286. Prior to 2021, on rare occasions the FTC had sought retrospective fines in the form of disgorgement or restitution under the *Federal Trade Commission Act*, 38 Stat 717, § 13(b) (codified as amended at 15 USC § 41-58). In *AMG Capital Management, LLC v FTC*, 141 S Ct 1341 (2021), the Supreme Court ruled that the FTC is not authorized to obtain monetary remedies or disgorgement. This decision likely constrains the DOJ as well.

<sup>18</sup> See e.g. Herbert Hovenkamp, "A Primer on Antitrust Damages" (2011) University of Pennsylvania, All Faculty Scholarship No 1846, online: <[scholarship.law.upenn.edu/faculty\\_scholarship/1846](http://scholarship.law.upenn.edu/faculty_scholarship/1846)>.

<sup>19</sup> See Antitrust Modernization Commission Report, *supra* note 11.

<sup>20</sup> Allegations of concealment have recently been raised against Google. See e.g. David Streitfeld, "How Google Spent 15 Years Creating a Culture of Concealment", *The New York Times* (21 November 2024), online: <[nytimes.com/2024/11/20/technology/google-antitrust-employee-messages.html](https://www.nytimes.com/2024/11/20/technology/google-antitrust-employee-messages.html)>.

<sup>21</sup> In the case of monopsony, the harm would be to sellers. For simplicity my discussion deals with acts by sellers that harm consumers. My discussion throughout applies equally to cases of monopsony.

<sup>22</sup> As established by the US Supreme Court in *Illinois Brick Co v Illinois*, 431 US 720 (1977), indirect purchasers harmed by anticompetitive conduct do not have standing to sue for damages. Direct purchasers such as wholesalers can sue for and collect the full amount of an anticompetitive overcharge, even if they pass it on to their buyers. In this sense the main goal of US law is also deterrence rather than restitution—direct purchasers have stronger incentives to identify and litigate illegal acts than the diffuse buyers to whom they sell, and the important thing for deterrence is that the violator pay the total amount of damages, not who receives those damages.

<sup>23</sup> Shuli Rodal et al, *The Amended Canadian Competition Act: What Businesses Need to Know* (Toronto: Osler, Hoskin & Harcourt, LLP, 2024), online: <[osler.com/wp-content/uploads/2024/07/The-amended-Canadian-Competition-Act\\_v5.pdf](https://www.osler.com/wp-content/uploads/2024/07/The-amended-Canadian-Competition-Act_v5.pdf)> at 27.

<sup>24</sup> The Tribunal might note that the "reasonably determined" requirement for estimating BD appears in the parts of the Act that apply to AMPs, but not in the parts dealing with damages. This omission could allow the Tribunal to fashion a BD-based damage estimate without satisfying the "reasonably determined" criterion, while the AMP imposed on the violator is determined by other criteria. Or, as discussed below, in matters involving exclusionary

conduct that harms a competitor, the Tribunal might define the violator's "benefit" to be the reduction in profits that the exclusionary act imposes on the competitor.

<sup>25</sup> EU, *Guidelines on the method of setting fines imposed pursuant to Article 23(2) (a) of Regulation No 1/2003*, [2006] OJ, C 210/02 [Guidelines].

<sup>26</sup> *Ibid* at para 36.

<sup>27</sup> *Ibid* at paras 31-32 [emphasis added].

<sup>28</sup> The Commission's decision in *Pioneer Hi-Fi Equipment* established that the revenue ceiling is worldwide, not simply the amount of commerce affected by the conduct or the amount in the EU. See EC, *Decision of 14 December 1979 relating to a proceeding under Article 85 of the EEC Treaty (IV/29.595 – Pioneer Hi-Fi Equipment)*, [1980] OJ, L 60/21.

<sup>29</sup> Francesca Gentile, Raphael Reims & Petar Petrov, "Setting Fines in Antitrust Cases—A Review of the Application of the 2006 Guidelines", *Competition Policy International* (25 April 2021), online: <pymnts.com/cpi-posts/setting-fines-in-antitrust-cases-a-review-of-the-application-of-the-2006-guidelines>.

<sup>30</sup> An alternative interpretation is that "improper gains" could be reasonably determined in most cases, but that the EC (invariably) chose to use other criteria in setting fines—an option that is more constrained in the Canadian Act. I regard this interpretation as unlikely—the Guidelines, *supra* note 26, indicate that the EC "will" take into account that a fine should exceed a measure of "gains improperly made" when doing so is "possible", yet the record provides no documentation that it has ever done so.

<sup>31</sup> European Commission, "Report from the Commission to the European Parliament and the Council on the implementation of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union" (14 December 2020), online: <[competition-policy.ec.europa.eu/document/download/05c4fe49-1ba7-40f9-80da-dd42e578ba7d\\_en?filename=2020\\_ec\\_report\\_on\\_damages\\_directive.pdf](https://competition-policy.ec.europa.eu/document/download/05c4fe49-1ba7-40f9-80da-dd42e578ba7d_en?filename=2020_ec_report_on_damages_directive.pdf)> [Implementation Report].

<sup>32</sup> Only US criminal fines for collusion under section 1 of the Sherman Act, *supra* note 11, are paid to the government. US Sentencing Commission guidelines for determining criminal fines resemble the EU guidelines applied to all antitrust offenses, though they are more specific. See United States Sentencing Commission Office of the General Counsel, "Primer on Antitrust Offences" (2023), online: <[www.ussc.gov/sites/default/files/pdf/training/primers/2023\\_Primer\\_Antitrust.pdf](https://www.ussc.gov/sites/default/files/pdf/training/primers/2023_Primer_Antitrust.pdf)>.

<sup>33</sup> European Commission, "Competition Policy, Fines" (accessed 6 January 2024), online: <[competition-policy.ec.europa.eu/index/fines\\_en](https://competition-policy.ec.europa.eu/index/fines_en)>.

<sup>34</sup> Yun Chee Foo, "Highest ever fines", *Reuters Graphics* (accessed 6 January 2024), online: <[fingfx.thomsonreuters.com/gfx/editorcharts/EU-GOOGLE-ANTITRUST/0H0012Y9L1DV/index.html](https://fingfx.thomsonreuters.com/gfx/editorcharts/EU-GOOGLE-ANTITRUST/0H0012Y9L1DV/index.html)>.

<sup>35</sup> In the case involving Scania, Iveco, Daimler, Volvo/Renault, and DAF settled with the EC in 2016, paying a combined fine of €2.9 billion. See Ann-Christin

Richter & Christopher Unseld, “The Scania judgment of the EU General Court” (28 February 2022), online: <<https://www.hausfeld.com/fr-be/what-we-think/competition-bulletin/the-scania-judgment-of-the-eu-general-court/>>.

<sup>36</sup> Court of Justice of the European Union, “Press Release No 143/24” (18 September 2024), online: <[curia.europa.eu/jcms/upload/docs/application/pdf/2024-09/cp240143en.pdf](https://curia.europa.eu/jcms/upload/docs/application/pdf/2024-09/cp240143en.pdf)>.

<sup>37</sup> *European Union v Intel Corporation Inc*, C-240/22 P, ECLI:EU:C:2024:915 [Intel].

<sup>38</sup> Section 79(3.2) of the Act, *supra* note 3, lists “aggravating or mitigating factors” that the Tribunal “shall take into account” in setting an AMP for abuse of dominance. In addition to “the effect on competition” and “gross revenue from sales affected by the practice”, the list ends with “any other relevant factor”. This language indicates that the Tribunal has very broad discretion—especially when BD is not available as an upper bound.

<sup>39</sup> *Supra* note 2. Wils also notes “the theoretical relevance of the amount of the illicit gain for setting the optimal fine as well as the practical impossibility in most cases to estimate this amount with sufficient precision and at a reasonable administrative cost . . . . This should however not exclude that, in those rather unlikely circumstances in which the Commission has a reliable estimate of the illicit gains available, it could take this amount into account, at least to ensure that the fine exceeds it”: *Ibid* at 38.

<sup>40</sup> United States Sentencing Commission Office of the General Counsel, *supra* note 33.

<sup>41</sup> Act, *supra* note 3, ss 79(4.1), 75(1.2).

<sup>42</sup> Federica Laricchia, “Apple revenue worldwide 2004-2024” (5 November 2024), online: <[www.statista.com/statistics/265125/total-net-sales-of-apple-since-2004](https://www.statista.com/statistics/265125/total-net-sales-of-apple-since-2004)>.

<sup>43</sup> Even in this case the supra-competitive profits of the colluding firms—their BD—is smaller than the damages suffered by consumers because the collusive agreement reduces consumption below the competitive level.

<sup>44</sup> E.g. Act, *supra* note 3, s 78(1)(g). The classic and highly-criticized case in the US is *Utah Pie Co v Continental Baking Co*, 386 US 685 (1967).

<sup>45</sup> As with other unilateral practices, the Tribunal might conclude that “intent” to exclude was not proven. Then the Tribunal can impose remedies but not an AMP. But under the Act the damage claims of harmed rivals require a measure of BD.

<sup>46</sup> See *Intel*, *supra* note 38 and Steve Lohr & James Kanter, “A.M.D.-Intel Settlement Won’t End Their Woes”, *The New York Times* (12 November 2009), online: <[nytimes.com/2009/11/13/technology/companies/13chip.html](https://nytimes.com/2009/11/13/technology/companies/13chip.html)> (discussing settlement of the Intel-AMD litigation).

<sup>47</sup> *Canada (Commissioner of Competition) v Canada Pipe*, 2005 CanLII 94635 (CACT).

<sup>48</sup> A detailed summary of the case appears in Corinne Xu, “Loyalty Discounts and Rebates: A Commentary on Canada Pipe and Abuse of Dominance in Canada” (2018) 31:1 CCLR 100.

<sup>49</sup> Kevin M Murphy, Edward A Snyder & Robert H Topel, “Competitive

Discounts and Antitrust Policy”, in Roger D Blair & D Daniel Sokol, eds, *The Oxford Handbook of International Antitrust Economics* (New York: Oxford University Press, 2015), 89.

<sup>50</sup> Cases where the conduct was not found illegal: *The Commissioner of Competition v Vancouver Airport Authority*, 2019 CanLII 132624 (CACT); *The Commissioner of Competition v Visa Canada Corporation and MasterCard International Incorporated*, 2013 CACT 10; *B-Filer Inc et al v The Bank of Nova Scotia*, 2006 CACT 42. Cases that resulted in a settlement agreement with no admission of a violation: *The Commissioner of Competition v Canada Pipe Company Ltd* (19 December 2007), CT-2002-006 (CACT), online: <[decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/463783/index.do](https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/463783/index.do)>; *The Commissioner of Competition v The Canadian Real Estate Association* (25 October 2010), CT-2010-002 (CACT), online: <[decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/463512/index.do](https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/463512/index.do)>; *The Commissioner of Competition v Direct Energy Marketing Limited* (30 October 2015), CT-2012-003 (CACT), online: <[decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/463069/index.do](https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/463069/index.do)>; *The Commissioner of Competition v Waste Services (CA) Inc and Waste Management of Canada Corp* (16 June 2009), CT-2009-003 (CACT), online: <[decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/463621/index.do](https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/463621/index.do)>; *The Commissioner of Competition v Reliance Comfort Limited Partnership* (5 November 2024), CT-2012-002 (CACT), online: <[decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/463165/index.do](https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/463165/index.do)>.

<sup>51</sup> *The Commissioner of Competition v The Toronto Real Estate Board*, 2016 CACT 7.

<sup>52</sup> See Canada, Competition Bureau, “Summary of reasons in ruling in Toronto Real Estate Board case” (10 May 2016), online: <[competition-bureau.canada.ca/how-we-foster-competition/education-and-outreach/news-releases/summary-reasons-ruling-toronto-real-estate-board-case](https://competition-bureau.canada.ca/how-we-foster-competition/education-and-outreach/news-releases/summary-reasons-ruling-toronto-real-estate-board-case)>.

<sup>53</sup> 253 F 3d 34 (DC Cir 2001).

<sup>54</sup> *Ibid* at 79.

<sup>55</sup> *The Commissioner of Competition v Air Canada et al* (24 October 2012), CT-2012-001 (CACT), online: <[decisions.ct-tc.gc.ca/ct-tc/cdo/en/463302/1/document.do](https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/463302/1/document.do)>.

<sup>56</sup> *The Commissioner of Competition v Harper Collins Canada Limited* (9 January 2018), CT-2017-002 (CACT), online: <[decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/462808/index.do](https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/462808/index.do)>.

<sup>57</sup> See Hovenkamp, *supra* note 19; and Implementation Report, *supra* note 32.

<sup>58</sup> *In re: Blue Cross Blue Shield Antitrust Litigation*, No 2:13-cv-20000-RDP (ND Ala), online: <[alnd.uscourts.gov/blue-cross-blue-shield-mdl-2406](https://alnd.uscourts.gov/blue-cross-blue-shield-mdl-2406)> (records of the case before the District Court). I was an expert in a different case involving similar allegations.

<sup>59</sup> That is, buyers of health insurance services prefer a seller with a large provider network of hospitals and doctors, while providers prefer to deal with insurance companies with many customers.