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ARTICLES

DIGITAL ADVERTISING AND PURCHASING: FUN OR A NEW TYPE OF DECEPTION?

Kenneth Jull and Nicole Spadotto¹

The interactive digital platform for advertising and purchasing is fun. It can also be manipulated in a way that leads to deception and misleading advertising.

This paper uses the example of “drip pricing” as an illustration of the larger challenges in the digital world. Drip pricing is an advertising technique in which firms frontally advertise only part of a product’s price, and later reveal other charges as the customer navigates the buying process. Behavioral economic research is surveyed which finds that drip pricing often impacts consumer decisions so that they spend more money than they had originally budgeted or anticipated.

Our central thesis is that the complexity of the product or service should be the governing principle in regulating digital advertising in the future. Products in the digital market will range from tickets to a live event to the purchase of a car with specific options.

The paper proposes four general principles as an approach to regulate the digital economy:

Principle one: When a product or service being digitally advertised is transparent, in the sense of being relatively simple to apply, the first screen that a consumer sees should display all-inclusive information (such as pricing).

Principle two: Where the product or service being advertised has complex options, the first screen that a consumer sees should contain a description of the methodology to be applied in subsequent screens in accordance with a matrix of timing and complexity.

Principle three: The interactive digital process should facilitate consumer reversal of choices to the extent that the technology will permit

Principle four: In the case where there is a finding that a digital process constitutes a violation of competition law, an aggravating factor in the assessment of penalty should be whether disadvantaged consumers are impacted in their ability to satisfy basic needs.

On apprécie les plates-formes numériques interactives pour l'achat et pour le marketing; cependant, les commerçants peuvent facilement les manipuler pour produire de la publicité trompeuse et induire le consommateur en erreur.

Pour donner un exemple particulier des vastes problèmes qui se présentent dans l'univers numérique, l'article se penche sur le cas de la « tarification au goutte-à-goutte » : une technique publicitaire dans laquelle un commerce n'affiche d'abord qu'une partie du prix réel d'un produit, puis sale la facture à mesure que le consommateur progresse dans le processus d'achat. Les auteurs ont recensé la recherche en économie comportementale pour constater que ce type de tarification était souvent préjudiciable à l'acheteur, qui se trouve en effet à dépenser plus que ce qu'il aurait cru ou avait originalement prévu à son budget.

Les auteurs avancent la thèse principale suivante : c'est la complexité du produit ou du service qui devrait être le facteur déterminant dans la réglementation de la publicité sur le marché numérique à l'avenir. Celui-ci proposera des produits pouvant aller du simple billet de spectacle au véhicule automobile assorti de nombreux équipements en option.

L'article propose quatre grands principes pour réglementer l'économie numérique.

Premièrement : Lorsque le produit ou service affiché est de nature transparente, à savoir qu'il est relativement simple à tarifier, il faut que le premier écran que voit le consommateur affiche l'information complète (dont le prix).

Deuxièmement : Lorsque le produit ou service affiché est assorti d'options complexes, il faut que le premier écran que voit le consommateur décrive le cheminement qui sera appliqué aux écrans suivants en fonction d'une matrice de temps et de complexité.

Troisièmement : Il doit être aussi aisé que possible pour le client, selon les limites technologiques, de revenir sur ses décisions dans le cadre du processus interactif.

Quatrièmement : Dans les cas où l'on constate qu'un processus numérique contrevient aux lois sur la concurrence, il faut considérer comme facteur aggravant, dans la détermination d'une sanction, la difficulté accrue que peut subir un consommateur désavantagé pour la satisfaction d'un besoin fondamental.

The digital world is an exciting place. It is also fun. The entertainment aspect of interactive digital forums is one of the reasons it is such a psychologically addictive process.² It is no wonder that online advertising is the wave of the future.³

Even though the interactive digital process is fun, it can also be manipulated in a way that leads to deception and misleading advertising. Regulators must adapt to this new technology in a way that balances the advantages of digital processes with fairness in advertising.

To illustrate the larger issues involved in regulating the digital economy, this paper uses the example of “drip pricing” as it applies in the digital world. Drip pricing is an advertising technique in which firms frontally advertise only part of a product’s price, and later reveal other charges as the customer navigates through the buying process.⁴ Drip pricing often impacts consumer decisions which lead to consumers spending more money than they had originally budgeted for and/or anticipated.

We can imagine, for example, a person of modest income planning a trip to fly into Toronto Pearson Airport to visit an ill relative in downtown Toronto for the weekend. This person has a choice: they can either take the Union-Pearson Express train for \$12.35, or they can rent a car. The person may go online and notice that a car can be rented “from \$57.99”,⁵ which would allow the person to have access to the car all weekend and at a price that they can afford. Drawn in and excited by this online digital price, the person then clicks through to the payment phase of the transaction only to notice (perhaps with surprise) that an additional \$26.48 of fees have been added at the very end of the transaction, leaving the estimated total closer to \$100 than just over \$50.⁶

Psychology indicates that this person will likely complete the transaction, and thus would have paid money that could have been used to buy essential items for their ill relative or for the person’s family back home.

You may be thinking to yourself at this moment that you, as a rational person, would have cancelled the online transaction and decided to take the train from the airport to the city at a more affordable price than renting a car. This paper has been written at least partially to stress upon you that it is not likely that you would have made that choice. Rather, like our hypothetical person of modest income, you would have been drawn in and *anchored* by the low price of the car rental—and by the time the extra fees had been dripped upon you, you would have committed to the transaction, felt that the car you were renting was already yours for the weekend, and be bound

by the *inertia* of not wanting to cancel the transaction. The corollary of such a cancellation would be the extra effort to then go back online to book tickets for the train from Pearson.⁷ You, like our hypothetical consumer, would have likely completed the transaction and paid significantly more money than you had budgeted for and/or could afford. And the worst part is, due to the powerful psychology behind drip pricing, you would have not even realized or felt that you had been deceived.

Our central thesis is that the complexity of the product or service should be the governing principle in regulating digital advertising in the future. When the product or service being advertised is transparent, such as tickets to a live event, the first screen that a consumer sees should display all-inclusive information (such as pricing). A corollary of this thesis is that where the product or service being advertised has complex options, such as telecommunication bundles or options on a car, the first screen that a consumer sees should at least contain a simple description of the methodology to be applied in subsequent screens. From a public policy perspective, we argue that the rules governing digital advertising can have a very real economic impact and disadvantaged consumers may be impacted in their ability to satisfy basic needs.

This paper is organized as follows. The first part of the paper surveys existing Canadian law and comparative legal regimes in other jurisdictions that prohibit deceptive marketing. The challenge is to apply existing laws developed in the old print medium to the digital medium. The battleground is the first screen that the consumer clicks through to complete the transaction. Does this first screen have to include all relevant information, or can the interactive process provide the information in stages or steps? If steps are allowed, how long can this process take? Various permutations and combinations of this matrix will be considered.

The second part of the paper outlines the example of drip pricing to illustrate the challenges of legal regulation in the digital world. There are various combinations of physical latency, product or service sophistication, and timing across industries.

The third part of the paper reviews existing literature in the field, both from behavioural and economic perspectives. We conclude that the existing literature uses behavioural economics to identify drip pricing as a manipulative marketing technique. While helpful, this research may suffer from over simplification of the problem because the more challenging question

is whether drip pricing may be an acceptable form of marketing in more complex situations.

The fourth part of the paper applies a matrix analysis to analyze the competing considerations of timing on one axis and complexity of the product or service on the other.

The fifth part of the paper proposes four general principles as an approach to regulate the digital economy. The general principles support the establishment of protective rules, while also allowing for flexibility in internet marketing.

Principle one: When a product or service being digitally advertised is transparent, in the sense of being relatively simple to apply, the first screen that a consumer sees should display all-inclusive information (such as pricing).

The first digital screen that a consumer sees should display all-inclusive information (such as pricing) where the product or service is transparent in the sense of being relatively simple to apply. In the Pearson online car rental example, the first screen should ideally present the price as \$84.47. This is a transparent price with additional fees being easy to calculate and display on the first screen.

This principle is limited by the complexity of the product or service. Depending on the product or service and the digital parameters, it may not be possible to display the entire range of options or information on the first screen. For example, it is possible to “build” a car online with different colours, options, and prices.⁸ However, it is not possible for all of the information to be displayed on the first screen. This leads to principle two.

Principle two: Where the product or service being advertised has complex options, the first screen that a consumer sees should contain a description of the methodology that will be applied throughout the transaction in accordance with a matrix of timing and complexity.

Where the complexity of a product or service does not facilitate a full analysis on the first screen, it should at least contain a simple description of the methodology that will be applied throughout the transaction. In the example of building a car online, the first screen should explain that pricing will vary depending on subsequent choices of engine type and model ranging from sport to luxury.⁹ The various combinations on subsequent

screens should be guided by a matrix analysis of time versus latency, consistent with risk management principles.

Ultimately, we need more thought and rules surrounding online marketing across complex industries which make use of nuanced and fast transactions. One can imagine how choosing a telephone package or choosing additional options while buying a car online is fundamentally different from car rental, for example.

We propose a matrix developed in the fourth part of the paper of timing on one axis and complexity of the product or service on the other to assist with this balancing exercise.

Principle three: The interactive digital process should facilitate consumer reversal of choices to the extent that the technology will permit.

This principle applies particularly if there is sophistication or physical latency elements attached to the object.

Principle four: In the case where there is a finding that a digital process constitutes a violation of competition law, an aggravating factor in the assessment of the penalty should be whether disadvantaged consumers are impacted in their ability to satisfy their basic needs.

If there is a finding of a violation to the extent that disadvantaged consumers are impacted by deceptive advertising techniques, and as a result, are negatively affected in fulfilling their basic needs, a judge should consider this to be an aggravating factor in assessing the penalty. A disadvantaged consumer can be defined as one who is officially under the poverty line, one who is at risk of poverty, and one who is in need or at risk of needing aid from the state to have access to essential products and services.¹⁰

PART I: DECEPTIVE MARKETING IN THE CANADIAN CONTEXT

i) Framework governing deceptive marketing

Part VII.1 of the Canadian *Competition Act* (the “Act”) sets out an administrative regime dealing with deceptive marketing practices. It is a violation to make a representation to the public that is false or misleading in a material respect.¹¹ There are detailed rules dealing with discrete matters such as ordinary price representations¹² and representations relating to the testing of products.¹³ The old “bait and switch” offence is now a violation in the administrative regime.¹⁴ Administrative penalties can be up to \$10 million.

Further guidance may be found in consent agreements filed and registered with the Competition Tribunal (the “Tribunal”). For example, the VW Diesel 3.0 settlement with the Competition Bureau (the “Bureau”) was filed and registered as a consent agreement. The Bureau’s Deceptive Marketing Practices Digest is also a good resource for guidance.¹⁵ There are authoritative texts on Canadian law that should be consulted for guidance on the statute and cases.¹⁶

Some guidance about the parameters of deceptive marketing is found in cases such as *Chatr*.¹⁷ In *Chatr*, at issue were advertisements that claimed “Fewer dropped calls than new wireless carriers”; and representations that Chatr subscribers would have “no worries about dropped calls.” Justice Marrocco defined the consumer perspective as “that of a credulous and technically inexperienced consumer of wireless services.”¹⁸ This test was applied on two levels: (i) literal meaning; and (ii) visual images and sounds.

On the literal meaning level, the Act contains an explicit provision. Section 74.03(5) states: “In proceedings under sections 74.01 and 74.02, the general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining whether or not the person who made the representation engaged in the reviewable conduct.” The literal meaning required analysis on the basis of claims such as “You will have worry-free unlimited talk.”

On the level of visual images, the advertisements conveyed the impression that the non-Chatr customer would have difficulty with his or her phone reception. This person has a cloud or fuzzy speech bubble over his or her head. Sounds included the Bobby McFerrin song “Don’t Worry, Be Happy.”

After considering expert evidence, Justice Marrocco concluded that the fewer dropped calls and more reliable network general impressions represented to the “credulous and technically inexperienced consumer” of wireless services that these advantages were available to consumers in each Chatr zone. The Court found that Chatr failed to conduct an adequate and proper test in certain cities prior to making the fewer dropped calls claim at the time of Chatr’s launch in those cities and therefore engaged in reviewable conduct contrary to s. 74.01(1)(b) of the Act.

An important aspect of the reviewable matters stream is that, similar to the old regulatory offence, the Act conceives of the defense of due diligence. If a Court concludes that the internet process violates the standards set out in the Act, the Court must then consider whether the defendant demonstrates

that it has exercised due diligence. Under the Act, the due diligence defense means that:

74.1 (3) No order may be made against a person under paragraph (1)(b), (c) or (d) if the person establishes that the person exercised due diligence to prevent the reviewable conduct from occurring.

ii) Drip pricing and the Canadian legal regime

In Canada, some cases of drip pricing may constitute false and misleading advertising. In these cases, it is more likely that drip pricing will be reviewed on the civil track of deceptive marketing practices pursuant to paragraph 74.01(1)(a) and section 74.05 of the Act.

In 2018, the Bureau took on key players in the car rental industry over hidden fees, resulting in a total of \$2.25 million in administrative monetary penalties.¹⁹ For example, in the case of *Canada (Commissioner of Competition) v Hertz Canada Ltd*,²⁰ Hertz and Dollar Thrifty made representations to the public about the price at which consumers could rent cars and related products and also about percentage-off discounts starting from at least 2009 across various media, including their websites, mobile apps, and emails.

Hertz and Dollar Thrifty charged consumers non-optional fees in addition to the prices initially advertised. The non-optional fees increased the cost of renting a car from 10% to 57%, depending on the rental location and vehicle type. These initial price representations created the general impression that consumers could rent cars and related products at prices that were not in fact attainable, because consumers were required to pay additional non-optional fees. A consent agreement filed with the Tribunal included an administrative monetary penalty in the amount of \$1,250,000.

The Bureau collected a \$300,000 penalty from Comwave Networks, a telecommunications service provider.²¹ Comwave Networks advertised “unattainable” prices for internet and phone plans. The Consent Agreement reached between the Commissioner of Competition (the “Commissioner”) and Comwave indicated that the company made “concerning” “price representations ... at which consumers could obtain various telecommunications services.”²²

Comwave allegedly made “fine-print disclaimers” about certain “non-optional fees,” disclosing them in the “telephone sales intake process” and requiring personnel “to provide consumers with an itemized breakdown of charges, including these non-optional fees.” According to the Commissioner,

however, all of these disclaimers and disclosures proved insufficient to correct the overall impressions that the initial price representation left with consumers. The Commissioner concluded that notwithstanding the disclaimers and telephone intake process, Comwave's advertisements created the general impression that consumers could obtain telecommunication services at prices that were not in fact *attainable*, because "consumers were required to pay ... additional non-optional fees."

In January 2017, the Ontario government introduced consumer protection legislation aimed to enforce "all-in pricing" in the travel industry, requiring companies to display the total cost of a product, including all taxes and fees in travel advertising. The airline industry has been required to display final prices inclusive of extra charges since 2012. As well, most provinces require all-in pricing to be displayed by auto dealerships. For example, in Quebec, consumer protection laws require that merchants cannot sell their products for prices higher than the advertised price.²³

Advertising in the digital world is a little more nuanced. Transparency should be encouraged, but what does transparency mean? We know with drip pricing, the final price is revealed before payment is made. In the digital sphere, is it enough that the final price is advertised before payment? Where should the line between persuasion and deception be drawn?

As a starting point from which to answer these questions, the rules for the sale of tickets to events in Ontario, outlined in the *Ticket Sales Act*,²⁴ seek to promote fairness, transparency, and consumer protection in Ontario's ticket industry by preventing ticket fraud and providing consumers with more information when purchasing tickets. When making a ticket available for sale or facilitating the sale of a ticket, ticketing businesses must ensure that "the offer discloses the total price of the ticket and includes a separately itemized list of any applicable fees, service charges and taxes."

The legislation has not yet been tested in court. There is potential ambiguity as to the exact point in the process when the face value and total price per ticket must be disclosed. In other words, on one interpretation, the offer must immediately set out the all-inclusive price. On the other hand, it may be argued that as long as the all-inclusive price is disclosed before the purchase is made and credit card authorization (or some other form of payment method) is accepted, there would be compliance. It is our view that the point at which the all-inclusive price must be disclosed depends on the timing of the drip in its relationship with the sophistication of the object, and whether there is risk of physical latency.

Drip pricing in the digital arena is now arguably constrained by consent agreements filed with the Competition Tribunal in the *Ticketmaster* and *StubHub* cases, discussed below under the heading “Drip Pricing in the New Digital Economy”.

iii) Drip pricing and the international legal regime

Drip pricing is considered to be misleading and deceptive advertising in some jurisdictions, but considered to be acceptable in others. Legal treatment of drip pricing also varies depending on the industry sector.

The European Commission in its Directive 2011/83/EU on Consumer Rights addressed drip pricing within the airline sector. Before the investigations and the subsequent prohibition of certain pricing techniques, airlines kept adding charges (fuel surcharges, payment by credit card, etc.) during the online purchasing process. The European Commission now requires airlines to include all applicable taxes, charges, and surcharges in the final flight price; any surcharges should reflect costs.²⁵ Nevertheless, incremental pricing is still an important issue in the airline industry. Some fees for cabin baggage and seat allocation procedures are such that consumers may be forced into paying for additional services. For example, this is the case when a family traveling on a reservation with a (young) child is required to pay extra in order to sit in a seat adjacent to their offspring.²⁶

In the United States, the Federal Trade Commission (the “FTC”) has addressed the issue of drip pricing within the hospitality sector. Jon Leibowitz, a previous Chairman of the FTC, observed, “So-called ‘drip pricing’ charges, sometimes portrayed as ‘convenience’ or ‘service’ fees, are anything but convenient, and businesses that hide them are doing a huge disservice to American consumers.” Despite this, regulation of drip pricing has not been unified, clearly defined, or consistently expressed in the United States.²⁷ David Friedman has written a very comprehensive and thoughtful article titled “Regulating Drip Pricing” which argues that regulatory scrutiny in the United States should heighten particularly where three circumstances overlap — violation of existing guidance, pressures unique to transactional place, and concerns about “attainability”.²⁸

The Australian Competition and Consumer Commission (the “ACCC”) has taken measures to investigate and enforce drip-pricing practices, even calling out “drip pricing” by name. The ACCC brought “drip pricing” actions in Australian Federal Court against Jetstar Airways and Virgin Australia Airlines. The Australian Federal Court found in favour of the ACCC and held that the airlines violated Australian Consumer Law by advertising

fares that “failed to adequately disclose an additional Booking and Service Fee ... that ... was only disclosed to consumers once they had moved through a number of stages of the booking process”.²⁹

iv) Issues specific to the digital economy

In *Bell Canada v Cogeco Cable Canada GP Inc.*,³⁰ a civil case, Bell challenged Cogeco’s use of the phrase “the best Internet experience in your neighbourhood.” Justice Matheson granted an interlocutory injunction with respect to the use of this phrase, and specifically commented on the importance of a first screen of an internet process in the context of the misleading advertising provisions of the Act:

It is at least arguable that, for the purposes of s. 52, the court should consider what the consumer would see on a single screen, including the labels on the hyperlinks on that screen.

I recognize that the amount of content presented on the screen could depend to some extent on the size of the screen on the device chosen by the consumer. Even taking that into account, much of what Cogeco seeks to rely upon would not appear on that first screen.³¹ [emphasis added]

In granting the injunction, Justice Matheson applied the test of a credulous and technologically inexperienced consumer of internet services as set out in *Chatr*³² discussed above.

Each case must of course be evaluated on its own facts. The first screen may contain fine print disclaimers; however, disclaimers have not been favoured by Canadian courts as they tend to be in small print and not drawn to the attention of the consumer in a meaningful way. If the main body of the advertisement on the first screen creates a materially false or misleading general impression in itself, then fine print may not do much to alter the general impression in a way that ensures that consumers will not be misled.³³

The Bureau is responding to evolving challenges in the digital economy.³⁴ The Bureau’s Deceptive Marketing Practices Directorate is continuing to prioritize investigating misleading representations made online in keeping with the digital economy focus.³⁵ The digital sphere poses new challenges and grey areas which will need to be refined. As Josephine Pulumbo, the Deputy Commissioner of Deceptive Marketing Practices, said in remarks delivered on January 22, 2020, “It is true that [the Competition Bureau] may not always win cases, but it is important to take them on regardless—so potential targets know that we are watching, and to bring clarity to the law.”

Pulumbo noted that the digital economy has necessitated greater clarity in the law, as the “global sea change” of the digital economy “means we must re-evaluate how we look at marketing and advertising as the industry shifts to an increasingly digital focus, and we must work to build consumer trust in the digital economy.”³⁶

This changing landscape means that there must still be room for persuasion on the internet, even as consumer protection is prioritized.

PART II: NAVIGATING ONLINE ADVERTISING AND PURCHASING

i) New developments in technology

New developments in technology, artificial intelligence,³⁷ and social media means that technology is pushing our society to progress at a fast rate. These new developments indicate now, more than ever, that the digital world operates differently from the print media.

Unlike newspaper advertisements and mail-order catalogues, online advertising and purchasing occurs in a fast-paced and interactive process. Unlike print media, the first digital screen gives way to an interactive process as the consumer clicks through several pages to complete their online transaction. Regulations need to adapt to fit these new transactions to protect consumers, while at the same time protecting the fun of the internet, and businesses which rely on this model.

The Organisation for Economic Co-operation and Development has observed that “trust is essential in situations where uncertainty and interdependence exist.”³⁸ Existing laws that govern misleading and deceptive advertising must be adapted to the new digital world. Consumers need to have trust that the prices they see online are the prices they will actually pay as they click through to complete the transaction. At the same time, the internet is not like a newspaper: part of the fun of the internet is the collaborative nature of transactions, and the positive feelings people get from completing those transactions. There should be room for digital advertising to retain the fun of the internet in their processes. In recognition of the importance of digital platforms, the existing gray areas, and the high levels of trust consumers place in the digital world, governments are beginning to develop regulations specific to the digital world.³⁹

Additionally, and more than ever, regulators such as the Bureau are responding to evolving challenges in the digital economy.⁴⁰ In particular,

the Bureau’s Deceptive Marketing Practices Directorate has committed to investigating misleading representations made online to foster a transparent digital economy in line with consumer protection.⁴¹ In her January 22, 2020 remarks, Palumbo highlighted that the Competition Bureau has resolved five hidden fees cases since 2015. She further noted that deceptive marketing cases are important to the Bureau “because they send a message to all digital advertisers that Canada’s competition watchdog is on guard for anyone who tries to use misleading pricing schemes and deceptive claims to attract consumers.”⁴²

ii) From partition pricing to drip pricing: A case study within the new digital framework

Before considering the digital application of alternate pricing models within the context of drip pricing, it is essential to define the basic pricing concepts and differences between them. Different pricing concepts include partition pricing, flat fee pricing, and drip pricing. Investigating these different pricing mechanisms, and their impacts on consumers, is important: experimental studies have demonstrated that pricing practices can be “profitable strategies that may harm consumers.”⁴³ For example, in his book entitled *Pre-suasion: A Revolutionary Way to Influence and Persuade*,⁴⁴ Robert Cialdini offers psychological studies to support the thesis that the background settings people encounter, which can include whether a consumer sees a flat price upfront or not, may impact the decisions they will make. For a simple example, if we want managers to be achievement oriented we can show them a picture of a runner winning a race, but if we want managers to make careful assessments we can show them a picture of Auguste Rodin’s *The Thinker*.⁴⁵ The following chart summarizes the differences between types of pricing applied to a simple example of a ticket to a sports event, as sold through a ticket broker.

Figure 1

All inclusive	Partition	Flat fee	Drip
\$125 per ticket	\$100 face value + \$25 fee disclosed up front	\$100 face value + \$20 fee + plus \$5 flat order fee disclosed up front	\$100 face value disclosed up front. \$20 (profit) \$5 processing fee disclosed before payment authorization

All-inclusive pricing

All-inclusive pricing is the final dollar figure that the consumer must pay the ticket broker to get the ticket, priced on a per ticket basis. This price includes the profit that the broker will make, plus the cost of processing and delivery. In some cases, this may even include government taxes so that the advertised price is truly the final total price the consumer will be expected to pay.

Partition pricing

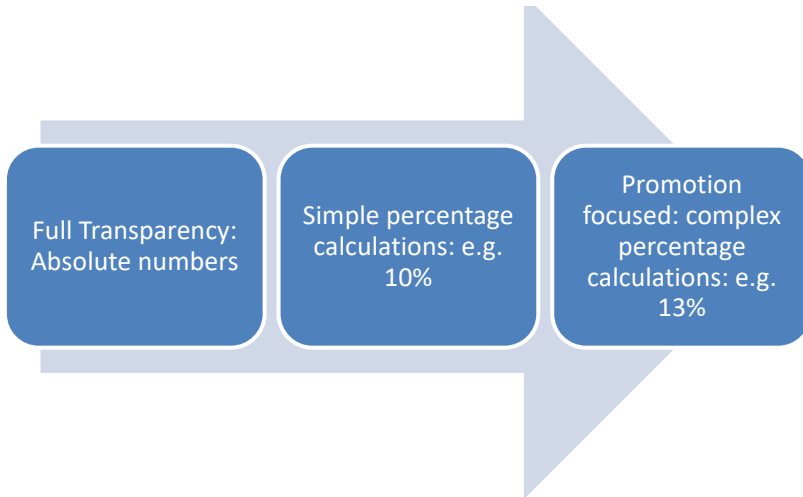
Partition pricing is defined as an advertised price divided into two parts: the larger price is the *base* price (in the example being the face value of the ticket) and the smaller component is the *surcharge* price.⁴⁶ In the ticket example, the advertisement shows the face value of a ticket of \$100 + \$25 in “fees” (made up of \$20 profit + \$5 processing costs for printing or electronic or mobile delivery). Research in the pricing literature suggests partitioned pricing is more effective than combined all-inclusive pricing in increasing demand. People tend to underestimate surcharges and have significantly lower perceptions of the total cost when the price is offered in a partitioned rather than a combined format. One explanation for this is based on the anchoring and adjustment heuristic.⁴⁷ Research shows that consumers are likely to anchor on the base price (in the above example, the face value of \$100) and tend to adjust insufficiently upward to incorporate the surcharge (in the above example of \$25).⁴⁸ However, the partitioned pricing strategy is influenced by whether the surcharge is presented in dollars or as a percentage of the base price, as well as, other factors related to how the format of the price is presented.⁴⁹

An interesting twist is the research that looks at the type of consumer, which leads to varying impacts of partitioned pricing. For example, “promotion focused” individuals perceive partitioned prices to be more attractive than combined prices, while “prevention focused” individuals do not differentiate between the two pricing types.⁵⁰

There are various permutations as to the manner in which the price is partitioned which impacts consumer perception. There is a sliding scale here from fully transparent partition pricing with absolute numbers (such as \$100 plus \$25 in our example above) to versions where the surcharge is calculated by percentages or in other ways that make it more difficult for the consumer to do the calculations. For example, if the surcharge is set out as a percentage, instead of dollar terms, consumers must expend more cognitive effort and are more likely to use the lower effort heuristic or “ignoring

strategies". This leads to lower recalled total costs and likely increased demand.⁵¹ The sliding scale is illustrated by the following spectrum:

Figure 2



Pausing here for a moment, one might ask, what is wrong with using partition pricing to convince consumers to buy products or services? With partition pricing, behavioural research shows that the consumer is being psychologically influenced in ways in which they are not aware. Here is where the spectrum is a useful tool. Where the surcharge is calculated by percentages or in other ways that make it more difficult for the consumer to do the calculations, there is an increased likelihood that the process is manipulative (for example, 10% of a numerical value is easier to calculate than is 13%).

Flat fee pricing

Flat fee pricing is a practice where a flat fee is charged on a per order basis, rather than on a per person or per product basis. For example, a face value of \$100 may have two additional surcharges: a \$20 profit being made by the ticket broker or agent, and a \$5 administrative flat fee charged per order and not per ticket. If 2 tickets are purchased, the total price is 2×120 plus \$5 = \$245, which computes on a per ticket price to be the amount of \$122.50. If 4 tickets are purchased the total price is 4×120 plus \$5 = \$485 which computes on a per ticket price to \$121.25. The challenge for retailers (or in this example ticket brokers) is that it is difficult to know what the final

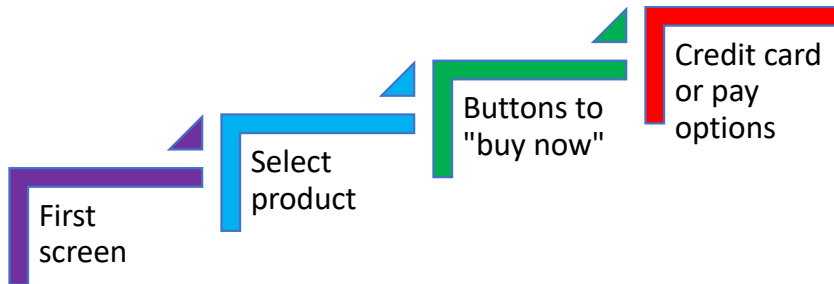
all-inclusive price will be until after the size of the order is determined, as the order fee must be pro-rated to calculate the per ticket all-inclusive price.

Drip pricing

The FTC informally defines “drip pricing” as “a ... technique in which firms frontally advertise only part of a product’s price and later, reveal other charges as the customer navigates the buying process. The additional charges can be mandatory charges ... or fees for optional upgrades and add-ons.”⁵² Drip pricing has been referred to as “partitioned pricing with a temporal delay” in disclosing the entirety of the required commitment, as “[d]rip pricing reveals the partitioned offer in ... drips, with the surcharge presentation coming later.”⁵³ Think back to our example of the person visiting a sick relative needing to rent a car, and being surprised when the final estimated quote was significantly higher than the advertised price. For another example, some gas stations have added a surprise 35-cent surcharge for using a debit card at the pump. As a plaintiffs’ attorney colourfully commented, this practice left consumers without much choice but to pay extra for nothing: “The gas was already in your car, you would go inside, and congratulations, your \$10 of gas is now \$10.35.”⁵⁴

Given the interactive and complex nature of digital platforms, drip pricing is especially prevalent in online transactions. Drip pricing is more complicated than plain partitioned pricing. The key to understanding drip pricing is to understand the time, energy, and emotional impact on a consumer in navigating the process that leads to the ultimate purchase. Consumers must delve deeper into the drip transaction presentation, consuming time and making further commitment to encounter the revelation of the entire offering.⁵⁵ Examples of drip pricing are manifold and can be found in many industries: flight-ticket prices, online admission tickets, tourism fees, ATM fees, and cleaning and service fees on Airbnb.⁵⁶ In the example from a ticket broker sale, the fees of \$20 (profit) plus the processing fee of \$5 per ticket (or \$5 per order of bundle of tickets) are disclosed only after seats have been selected for purchase but before credit card authorization.

In the digital context, drip pricing is an interactive process. The following diagram illustrates the interactive process of clicking on digital buttons and other media.

Figure 3

The interactive process can be overlaid on top of the ticket broker example set out above.

First screen: The first screen aims to impress the consumer. The first screen of a hypothetical ticket broker’s website shows that tickets are available within the consumer’s price range. This will “anchor” the consumer to believing that they can get the tickets for the price range on the first screen.⁵⁷

Select Product: The next screen shows the range of products available, and allows the consumer to explore the seating of the venue within the chosen price range. The consumer is often able to click on the actual seats they might purchase. Research suggests that at this stage of the process, the consumer has likely become excited by the prospect of obtaining tickets at their desired price.

Buttons: Websites will often have “buy now” buttons in vivid colours; once clicked on, the website responds with a sign saying “getting your tickets”. Psychologically, this creates a feeling of ownership over the tickets. This sense of ownership is known as the endowment effect.⁵⁸

The tickets usually can be printed, mailed, or sent by electronic means to a mobile device that the consumer can take to the arena. The electronic option creates the incentive of instant gratification by the receipt of the tickets within minutes, if not seconds, which may further anchor the consumer to the transaction.

Credit Card: Our hypothetical consumer is then asked for credit card authorization (or other pay method such as debit), and for the first time it is revealed (the drip) that the price of a ticket is 25% higher than anticipated. The extra 25% cost represents profits above the face value of the tickets and processing fees.

The consumer now has a choice. The consumer can either proceed to credit card authorization for the tickets available at a higher price than anticipated, or can abandon the process and exit. We will apply behavioural research below to consider what paths this hypothetical consumer is likely to take.

It is also apparent that digital processes have the capacity to both enhance and minimize competition, depending on a series of factors. On the one hand, it is relatively easy for a consumer to compare alternate pricing through a simple internet search. In the travel industry, there are products that do just that.⁵⁹ On other hand, once a consumer spends time wandering down the paths of an internet buying process, they may decide to not repeat that effort with a competitor's website. We recommend flexible principles to take into account the various ways in which consumers interact with the buying process in the digital world.

iii) Drip pricing in the new digital economy

The “new digital economy” presents increasing challenges and leaves us in uncharted legal waters as the framing of the length and depth of the process may impact the legal analysis. The practice of drip pricing in online transactions is the subject of a consent agreement in the case of the *Commissioner of Competition v Ticketmaster*.⁶⁰ In this first Canadian case on digital advertising and pricing, the Bureau settled with Ticketmaster via a consent agreement for an administrative monetary penalty of \$4 million and costs of \$500,000. As part of the consent agreement, Ticketmaster also committed to establishing and adhering to an internal corporate compliance program.

The Ticketmaster consent agreement sets out the following conclusions of the Commissioner which are not contested (but do not constitute formal admissions):

- Ticketmaster supplies or offers to supply tickets to sports and entertainment events and have made representations about the price at which consumers could purchase tickets;
- Representations were made to and target the public in Canada;
- The Commissioner concluded that Ticketmaster advertised prices for tickets that were not in fact attainable, because Ticketmaster charged consumers non-optional fees in addition to the prices initially advertised;
- The Commissioner concluded that certain of the Ticketmaster's

representations created the general impression that consumers could purchase tickets for less than what Ticketmaster actually charges, because consumers were required to pay additional non-optional fees that were added later in the purchasing process;

- The Commissioner concluded that disclosure of the amount of the non-optional fees at later stages of the purchasing process was inadequate to prevent the representations from being false or misleading in a material respect;
- The Commissioner concluded that the non-optional fees often increased the cost of tickets by over 20%, and in some cases, by over 65%;
- The non-optional fees consist of per-ticket fees and per-order fees, with the former charged on a per ticket basis and the latter charged on a per transaction basis;
- The Commissioner acknowledged that Ticketmaster made a number of changes to their websites and mobile applications beginning in July 2018, including changing many of their representations regarding certain non-optional fees and redesigning certain of their websites and mobile applications so that consumers are shown a price inclusive of per-ticket fees, and the maximum per-order fee that could be charged on the entire ticket order, the first time they are shown a price;
- Ticketmaster advised the Commissioner that they have applied these changes voluntarily across Canada in circumstances where their competitors have not made similar changes;
- The Commissioner concluded that Ticketmaster made representations to the public that were false or misleading in a material respect;
- The Commissioner concluded that Ticketmaster has supplied tickets to consumers at prices higher than those advertised; and
- The Commissioner concluded that Ticketmaster has engaged in conduct reviewable pursuant to paragraph 74.01(1)(a) and section 74.05 of the Act.

It is important to note that the settlement between the Bureau and Ticketmaster is a consent agreement. Consent agreements are not law, but they are persuasive and can be good indications of regulatory requirements. As

such, the settlement between the Bureau and Ticketmaster may affect the digital advertising practices of other vendors.

The sequel to the *Ticketmaster* case is the consent agreement filed in the *StubHub* case.⁶¹ Similar to Ticketmaster, StubHub operate online platforms that connect buyers and sellers of Tickets to sports and entertainment events. The Commissioner of Competition concluded that certain of the StubHub's representations created the general impression that consumers could purchase tickets for less than StubHub actually charged, because the initial price shown on the Event Page did not include the non-optional fees added on the Check-Out Page.

The prices shown on the Check-Out Page were often 28% higher than the prices shown on the Event Page due to non-optional fees.

Similar to Ticketmaster, the Commissioner concluded that disclosure of the amount of the non-optional fees at later stages of the purchasing process, including on the Check-Out Page, is inadequate to prevent the representations from being false or misleading in a material respect.

What was different in the StubHub case was an electronic "toggle" which gave consumers an option to use a "show prices with estimated fees" toggle on the Event Page since 2015. However, the Commissioner concluded that, even with this toggle turned "on", in certain cases consumers are required to pay more than the price represented as inclusive of estimated fees.

As is typical for consent agreements, StubHub did not contest the Commissioner's conclusions but did not admit any wrongdoing. StubHub voluntarily made changes to their websites, mobile application, and email to ensure that consumers are shown a price inclusive of non-optional fees the first time they are shown a price.

The Commissioner agreed to more favourable terms in the StubHub agreement than would otherwise be the case because of StubHub's cooperation with the Commissioner's investigation. Accordingly, the administrative monetary penalty was assessed at \$1,300,000. A corporate compliance program was required to be implemented consistent with the Commissioner's bulletin titled "Corporate Compliance Programs".

PART III: LITERATURE REVIEW

The existing literature on drip pricing focuses on behavioural economics to evaluate the impact of a delay in pricing information. The implications of the research on drip pricing will have larger ramifications for the digital

world going forward. Behavioural economics is a large field, which encompasses at least both behavioural psychology, which leads to decisions, and the economic impacts a decision will have on the market.

The Bureau has endorsed the use of behavioural research. Historically, a court could read a print advertisement and arrive at a conclusion about the general impression of the advertisement without the aid of expert evidence about the meaning of words, or their likely impact on consumers. More recently, the Court in *Chatr* looked beyond mere literal meaning of advertisements to consider visual images and sounds that were also online, which makes a literature review grounded in behavioural psychological research important.

As Ellison and Ellison point out, the study of obfuscating prices has taken on additional urgency with technological and internet retail services, wherein firms have strong incentive to sidestep intense price competition.⁶² The importance of such a review is also heightened when considering how drip pricing can manipulate consumer decision making. In considering the research on behavioural psychology, the following factors stand out as relevant to assess drip pricing's impacts on consumer decision-making: 1) length to complete the process or transaction; 2) level of excitement generated by the process, which may anchor the consumer; 3) use percentages to express fees, or other methods which are more ambiguous or difficult to calculate for the consumer; 4) level of effort required to complete the transaction, which may create endowment, self-justification, and inertia. The presence or frequency of these factors may point to a greater need for competition and consumer protection guidelines, while lower frequencies of these factors may allow for more marketing flexibility.

With respect to advertising in telecommunications, the Bureau opposes drip pricing. The Bureau relies on studies which demonstrate that this pricing strategy can be harmful for consumers by significantly limiting their ability to make well-informed decisions.⁶³ The Bureau cites one study which found that drip pricing reduced consumer welfare by 22% by allowing firms to charge higher prices to consumers than they otherwise would have been able to.⁶⁴ As a result, the Bureau recommends that the price advertised by a service provider should represent the "all-in" price for the service, including all mandatory fees (e.g., modem rental fee). In the eyes of the Bureau, simply including a fine print disclaimer should not permit service providers to advertise prices that are not available.

A) Behavioural psychological literature

In the digital world of pricing, there can be a gray area between the hard lines of lawful influential marketing and unlawful manipulation of a consumer. Cass Sunstein suggests that an effort to influence people's choices is manipulative *to the extent that it does not sufficiently engage or appeal to their capacity for reflection and deliberation*.⁶⁵ The word "sufficiently" is important as it adds some flexibility along a spectrum. Applied to pricing like partition or drip pricing, the task would be to define the dividing line on the spectrum between influencing deliberation (which is permissible and the goal of good marketing) and a type of trickery that is designed to subvert deliberation.

Existing literature confirms that drip pricing plays with a consumer's psychology thus allowing a vendor to manipulate a consumer into spending more money than the consumer anticipated; however, there is little headway on developing guiding legal principles which may aid judges in their decisions, and lay out a standard of ethical practices regarding transactions in the digital world. Our contribution is to propose these guiding principles in light of literature suggesting that such principles are needed to protect consumers. We also suggest that these principles should not be applied in a uniform way, as the timing of the drip in relation to the context of the industry is an important factor in determining whether marketing practices are psychologically manipulative.

(i) Anchoring: The basic principle of anchoring is the concept that first impressions last.⁶⁶ Returning to our example of a person of modest income flying into Toronto Pearson Airport to visit an ill relative in downtown Toronto for the weekend, recall that this person has a choice: they can either take the Union-Pearson Express train for \$12.35, or they can rent a car. The person may go online and notice that a car can be rented "from \$57.99",⁶⁷ which would allow the person to have access to the car all weekend and at a price that they could afford. Drawn in and excited by this online digital price, the person then clicks through to the payment phase of the transaction only to notice (perhaps with surprise) that an additional \$26.48 of fees have been added at the very end of the transaction, leaving the estimated total closer to \$100 than just over \$50.⁶⁸

Our hypothetical person of modest income is drawn in and anchored by the lower price of the car rental, and by the time the extra fees have been dripped, has committed to the transaction.

Consumers may anchor themselves onto the lower advertised price, even when they know additional surcharges will be included in the final price as with partitioned pricing. People tend to underestimate surcharges and have significantly lower perceptions of the total cost when the price is offered in a partitioned rather than combined format. One explanation for this is based on the anchoring and adjustment heuristic.⁶⁹ Research shows that consumers are likely to anchor on the base price (for example, a ticket face value of \$100) and then tend to adjust insufficiently upward to incorporate the surcharge (for example, an extra \$25).⁷⁰ We saw this in our example of the car renter: he had anchored onto the initial price and ultimately paid the final higher price because he had decided the initial price was one he could afford.

(ii) Fast Pace: The digital environment is fast paced, which leaves consumers with an abundance of information in a world where choices must be made quickly. Henry Su explains consumers' need to think fast in the digital sphere where snap judgments based on instinct and bias, and where heuristics are encouraged over longer deliberation.⁷¹ Encouraging consumers to make fast decisions in the internet space can impact the legality of drip pricing, as limited time to purchase may intensify the process and make consumers more likely to fall prey to false headline prices—and pay the dripped amount anyway.

(iii) Endowment effect: A survey of psychological studies show that background settings that people encounter may impact the decisions they make.⁷² Interactive and fast-paced internet processes are often designed to create psychological effects such as an endowment effect which subconsciously impacts consumer choice.⁷³ The endowment effect is when consumers perceive it to be costly to exit a transaction and search for alternative options.⁷⁴ The opening phases of the transaction may have taken up the buyer's limited time and completing the transaction, even on less-desirable dripped terms, may emerge as the consumer's perceived best option in a fast paced digital sphere.⁷⁵ Since going back to search for alternatives may be costly, this can lead to a lock-in of consumers.⁷⁶ Under drip pricing, consumers may therefore underestimate the total price and spend little time searching for alternative options.⁷⁷

(iv) Inertia: Inertia (consumers' belief that switching takes too much time) may also help explain the stickiness of consumers' initial selections when exposed to drip pricing. Inertia is an example of a behavior that is not rational but rather a reflection of the modern and hectic pace of life. Consumers do not feel as if they have the energy or time to spend fixing an issue

that leads to them paying more. As Niels, Van Dijk, and Fields point out, consumers prefer to protect what they perceive they already own more than they like “making gains”.⁷⁸ Consumers tend to remain with their original choice, even when pricing is dripped on the consumer because consumers worry that switching may be a worse deal.⁷⁹ While it may be a rational choice to fix the issue, or switch to a different provider or set of tickets, decision making is not always completely rational. Humans take “shortcuts” and make automatic or subconscious decisions, because making informed and rational decisions all the time would be exhausting.⁸⁰

In addition to the fast-paced nature of digital transactions, Santana, Dallas, and Morwitz⁸¹ found across five studies that participants selected higher priced and relatively unsatisfying options when prices were dripped versus when they were not. Participants read a purchase scenario and made a choice between competitors, then selected any optional add-ons, and were next given the opportunity to either complete the transaction or to start over. Even when participants exposed to drip pricing were given the opportunity to start over and change their selection, they generally adhered to their initial choice. Santana, Dallas, and Morwitz found evidence that participants’ beliefs regarding the similarity of surcharges across firms, self-justification, and inertia help explain their obduracy. In the case of the Pearson car rental, reversal of the transaction would require that the consumer exit, and then access the Pearson train website to book tickets.

(v) Self-Justification: The concept of self-justification requires some elaboration as to why consumers exposed to drip pricing stick with their initial selection, even though it is more expensive and they are relatively dissatisfied with it. Santana et al. found that participants who learned they initially made a mistake by choosing a more expensive option because of drip pricing indicated they were more satisfied with their choice than were those who evaluated the choice from an outsider’s perspective. In other words, consumers subjected to drip pricing convince themselves that the final price is satisfactory.⁸² In this way, consumers protect their self-image as smart shoppers.

(vi) Evidence to the contrary: Though not all of the experimental research supports the anchoring hypothesis, the studies conducted can be distinguished from the profit surcharges we are investigating here. For example, Hayashi et al. argue a hypothesis opposite to the anchoring hypothesis in *Experimental Evidence of Tax Salience and the Labor-Leisure Decision: Anchoring, Tax Aversion, or Complexity?* In the context of partitioned pricing, Hayashi et al. write that if we ascribed to the anchoring hypothesis,

we would expect “that willingness to participate in the labor force would be greater when wages are presented as a higher base wage minus a tax.” Instead, the authors found that portioned pricing “reduces work effort both when wages are presented as a lower base wage plus a bonus or tax credit and when wages are presented as a higher base wage minus a tax.” Hayashi et al. propose an alternative hypothesis to explain the effects of partition pricing: “some individuals may have preferences with respect to actual price descriptions.” For example, there is evidence that some individuals are adverse to taxes and have negative views towards extra costs characterized as taxes as opposed to extra costs not characterized as taxes. However, as previously alluded to, tax surcharges are different from profit surcharges accumulated through drip pricing. Indeed, the authors of this study concede that it might well be that individuals are completely adverse only with respect to labour supply decisions. It also may be that the anchoring hypothesis applies to consumer purchasing decisions and not to labour supply decisions.

(vii) The addictive properties of an internet process that is fun to use:

As set out above, the digital platform takes the consumer through a process starting with the first internet screen and then working through screens which display the range of goods and utilizing interactive buttons that add fun to the process. The fun aspect of the internet should not be underestimated. This entertainment aspect of interactive digital forums is one of the reasons it is such a psychologically addictive process.⁸³

According to the Variable Ratio Reinforcement Schedule (VRRS) theory, the reason internet activity is potentially addictive is because it provides multiple layers of rewards. Constant surfing of the internet leads to multiple rewards that are unpredictable. Each sign gives a user unpredictable results that keep them entertained and coming back for more.⁸⁴ Even simple symbols like a green checkmark or a thumbs up can target a consumer’s affect heuristic to make them feel good about their purchase.⁸⁵ Through symbols and the entertaining interactivity of the transaction, consumers may not even feel “betrayed”⁸⁶ after being dripped with additional charges and resulting in spending more money than they would have otherwise spent.

The “fun” aspect of the internet is largely built upon these multiple layers of rewards and entertainment. These layers should not be eliminated—after all, to do so would be to severely restrict the best parts of the internet. A balance must be struck between maintaining the fun interactive

internet experience and protecting consumers depending on the context and industry.

(viii) Degrees of persuasion to manipulation: As we mentioned previously, Cass Sunstein writes that manipulation occurs when one tries to influence another's choice without giving the latter a sufficient chance to reflect and deliberate.⁸⁷ Again, Sunstein's inclusion of "sufficient" is important as it adds some flexibility along a spectrum. Sunstein gives the example of the Department of Transportation embarking on a vivid, even graphic public education campaign to reduce texting while driving, to demonstrate that some acts of manipulation may count as such even if they leave the chooser better off (indeed, Sunstein says that you might be manipulated to purchase a car that you end up enjoying). We might say that such acts are justified—but they are manipulative all the same. To clarify, Sunstein adds that often the distinguishing mark of manipulation is a justified sense of ex-post betrayal.

Sunstein constructs the philosophical debate underlying the objections to manipulation. The most strongly felt moral objections to manipulation are deontological in character. The objections reflect a sense that people are not being treated respectfully. By way of contrast, a welfarist analysis of manipulation closely parallels the welfarist analysis of fraud and deceit. In a sense, the manipulator can even be seen as a thief, taking something from the chooser without real consent; this illuminates recent initiatives in the area of consumer financial protection.

We propose that matrix analysis may assist with the delicate balancing identified by Sunstein, which is developed further in our four recommended principles.

B) Economic harm literature

Existing literature also addresses the economic harm drip pricing incites. Some wonder why competition does not erode the practice of drip pricing if consumers are likely harmed and largely dissatisfied by the practice.

i) Dominant players and market power

David Friedman suggests that when the drip pricing model becomes dominant, industry players find defection from the model difficult.⁸⁸ For example, in industries like ticket brokerages, arenas will grant exclusive rights to only one ticket broker—thus, reducing robust competition for that event. Further, Friso Bostoen explains that a company like Facebook can

impose an intrusive data policy on its users because Facebook has market power.⁸⁹ This mirrors how one ticket broker can monopolize the competition for one event, and thus has little incentive to mitigate unfair practices like drip pricing. Bostoen also writes that by processing user data inappropriately, Facebook gains a competitive advantage and contributes to market entry barriers—further securing Facebook’s market monopoly.⁹⁰ Similarly, when online ticket brokers use drip pricing, they incentivize other ticket brokers to use drip pricing to remain competitive in the market. Market monopoly is a compelling reason why competition does not eradicate the practice of drip pricing: industry usually gives exclusives to one ticket distributor for an event, which means the consumer has no choice but to use that distributor.⁹¹

Indeed, online platforms have an incentive to engage in manipulative pricing schemes, like drip pricing. Bostoen notes that platforms “compete *for* the market rather than *in* the market” because a platform’s value is linked to the amount of users it has. The market space is small: there is only room for one or a few platforms to achieve the critical mass of consumers necessary to be competitive.⁹² To attract consumers, advertising lower prices upfront and dripping additional surcharges later gives platforms a competitive edge.

ii) Economic decisions based on rounding up

Dripping surcharges on a consumer is effective at least partially because research suggests that people base economic decisions by rounding costs up.⁹³ For example, if a consumer knew the price upfront, they may decide that \$250 is too much to spend on one hockey game. They would reach this conclusion by rounding the \$250 price up to \$300. By comparison, the consumer could purchase a basic 4K HD TV of a decent size for just under \$300, or more fundamentally, our hypothetical consumer could spend the \$300 on books for their children or food for the family. However, if the tickets were initially \$200 and the extra \$50 cost was dripped to the consumer, the consumer may justify the price based on the psychological behavioural effects enumerated above. Alternatively, drip pricing may convince the consumer to spend \$250 on a pair of hockey tickets instead of getting cheaper seats for \$200 a pair.

C) A Consumer Needs Hierarchy

Drip pricing may interfere with savings goals which respect the hierarchy of needs, and in particular basic needs. While this is an unanswered question, Lee and Hanna survey the relationship between spending decisions

and human needs in their article *Savings Goals and Saving Behavior From a Perspective of Maslow's Hierarchy of Needs*.⁹⁴

Maslow developed a model of psychologically healthy people in his seminal *Motivation and Personality*.⁹⁵ He identified a hierarchy of human needs as follows:

- a) the Physiological Needs
- b) the Safety Needs
- c) the Belongingness or Love Needs
- d) the Esteem Needs
- e) the Need for Self-Actualization

Lee and Hanna's results are consistent with Abraham Maslow's theory, which provides empirical evidence to link financial goals to Maslow's hierarchy of needs. Household saving can reflect human needs and the connection between the psychology of human nature and household saving needs in an economic model can open a broader discussion.

Lee and Hanna found that the willingness to save for individual desires (for things that bring pleasure) can be a more important motivation than from a sense of duty (such as future uncertainty) or supporting one's family.⁹⁶ In other words, the higher need for self-actualization is a major motivator to save. This is consistent with Maslow's theory and has implications for financial planners.⁹⁷ Thus, though one could argue the market itself could solve the problem of drip pricing as consumers would frequent firms which do not drip price over ones which do, consumers are not always rational agents. Additionally, as mentioned before, market monopoly limits consumers choices to buy from other firms.

D) Existing recommendations from literature

A literature review demonstrates that many psychological and legal experts consider drip pricing to be a misleading advertising technique. The literature also proposes techniques for consumers to avoid falling prey to targeted and manipulative advertising, like drip pricing. As the existing literature does not propose concrete principles for judges to guide their decisions regarding misleading online pricing models, our contribution is to develop such principles so judges know what to look for in cases, and

understand when they may need expert evidence, as they apply existing laws and regulations to the digital economy.

Henry Su suggests that policy makers and judges should reject models of perfect rationality, and instead look at actual consumer behaviour, to understand the adverse effects of drip pricing on consumers.⁹⁸ We agree.⁹⁹ Our proposed principles are developed with behavioural economics in mind to provide the relevant context for judges to assess manipulative digital marketing techniques. We believe the reason *why* consumers respond to drip pricing is important for legal actors and decision-makers to understand. Further, it is important to recognize situations in which drip pricing is deceptive and to develop policy and judgement guidelines accordingly.

Ellison and Ellison suggest competition agencies may consider specific goals when developing regulations against potentially deceptive online pricing techniques, like drip pricing. They suggest that regulations should be designed to reduce consumers' search costs, "promote efficient consumer choice," and "encourage efficient pricing" of both the base-price and add-on pricing.¹⁰⁰ They also note that "direct regulation of add-on prices could be a useful policy lever" because it simplifies the process for consumers, but that such regulations cannot be so assertive as to destroy the market for valuable add-ons.¹⁰¹ Similarly, to avoid overly paternalistic regulations and protect consumers' choice, Niels, Van Dijk, and Fields propose that firms should disclose salient information to avoid inertia and information overload, activate consumers to make a choice rather than encouraging inertia, and use of opt-in or opt-out models rather than defaulting to an undesirable outcome for the consumer.¹⁰²

Little analysis has been done, however, as to concrete principles judges and policy-makers should consider when confronted with cases of drip pricing in the digital world. The principles we propose bridge the law with the latest research on behavioural economics. Our contribution is to propose guidelines for judges and policy makers in deceptive digital marketing cases, as well as proposing ethical marketing beyond minimum standards.

There exists a spectrum of acceptable marketing practices in relation to drip pricing. Any policies or decisions should not be applied uniformly across industries and drip pricing techniques, because different industries market different products and psychologically implicate people differently. There needs to be some flexibility in applying policies and best practices, because some marketing practices are nefarious, while others merely retain the fun and interactive process of the internet.

We propose that each industry needs to analyze the spectrum of the relationship between their product, the timing of the drip, and the risk of physical latency to adapt the below principles to their purposes.

PART IV: MATRIX ANALYSIS OF COMPLEXITY VERSUS TIME

In some cases, the literal analysis of the first screen will suffice for a court to find that digital advertising is deceptive. Justice Matheson's decision in *Cogeco*, surveyed above, stated that for the purpose of this motion, the Court did not accept Cogeco's submission that the entirety of what a consumer can scroll down to or link to should be considered.

In other cases where the process is more fluid and quick, a court may need to review the impact of visual images, as was the case in *Chatr*. If this path of inquiry is followed, in most cases, this will require consideration of expert evidence in relation to consumer behaviour.

As Archibald and Jull note, a matrix analysis—which is an analysis first derived from a mathematical model—can help with assessing risk management. A matrix analysis “simplifies multiple factors into the balancing of two concepts which then yields priority for action.”¹⁰³ A risk management matrix is grounded in the concepts of negligence law that form the basis of due diligence.¹⁰⁴ The equation of $PL = OC$, which is a type of basic risk management. Matrix analysis in the context of antitrust law has been endorsed by the International Chamber of Commerce in its Antitrust Compliance Toolkit, launched in Paris in April of 2013.¹⁰⁵

The combination of time and complexity can be placed into a matrix analysis.¹⁰⁶ Indeed, the matrix model can be adapted to our purposes to assess the different combinations and permutations of time and complexity depending on the transaction and object at hand. Inserting these factors into the matrix analysis can aid policy-makers, judges, and firms in understanding which regulations should be implemented depending on the nature of each transaction. The matrix analysis gives us a framework for regulation, while also leaving flexibility so that each individual situation may be approached on its own merits. At the same time, the matrix analysis in its flexibility can leave intact the fun, heuristic elements of the internet.

An important consideration in the matrix analysis is how long it would take a consumer to navigate the onscreen process from the first screen until the final purchase, as authorized by a credit card or other form of payment. A spectrum of possibilities depends on the length of the time of the process. At one end of the spectrum are those processes that take only a few seconds

or less than a minute. The profit and fees are therefore disclosed within a few seconds or less than a minute after the base price is presented. This model is close to but not identical to partition pricing as described earlier. Framed in this way, it might be argued that consumers who make purchases online do not expect the first page of the buy-flow to represent the final, total price to be paid.¹⁰⁷

At the other end of the spectrum are processes where the dripped fee is disclosed much later in a lengthy process. The object in this case can be understood to have physical latency, which is an interval between when the consumer agrees to purchase the good or service and when that good or service is actually delivered. The most extreme example of this is the online reservation made for a hotel or resort, where the dripped fee is not disclosed until the guest arrives at the site many months later. The timeframe of the disclosure of pricing is critical.

The following simple matrix illustrates the concept:

Figure 4

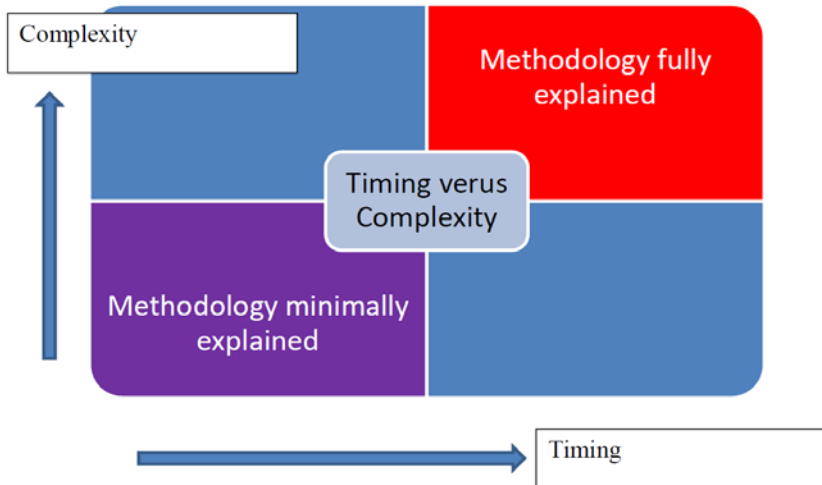


Figure 4 highlights the extremes in the matrix. Where there is maximum complexity and the timing is delayed, the quadrant “maximum explanation” requires a fulsome explanation of the subsequent methodology of calculations. The reverse is lower levels of complexity and time expended, which calls for minimum explanation. In between these extremes are

various combinations of timing and complexity, which call for regulators to develop nuanced approaches.

The matrix analysis is important in assessing drip pricing, because it may shed light on the types and weight of regulations needed in different contexts. As previously discussed, the same levels of regulations are not appropriate across all industries. The matrix analysis is important not only for policy makers who are increasingly called upon to regulate marketing in the digital age, but also for firms which use digital platforms to sell goods and services.

PART V SUGGESTED PRINCIPLES FOR MARKETING IN THE DIGITAL WORLD

Based on the above legal and behavioural analysis, this paper advances four basic principles which are proposed as a framework in the digital economy. (Note that these principles apply more generally beyond the example of drip pricing). These proposed principles are general principles, and will not fit each industry the same way. Each industry should investigate the types of goods or services that are being sold, and should apply these rules as appropriate to their digital marketing practices.

Similarly, regulators should apply such principles in ways which support industry growth, while also allowing for flexibility depending on each unique industry.

Governments have a choice between imposing prior restraint by way of a licensing regime (*ex ante*) or using an offence regime to redress harm that occurs after the fact (*ex post*).¹⁰⁸ Industries like telecommunications are undergoing rapid and fundamental technological and business transformation with the result that they are not simple or stable and the economic stakes are very high. In such contexts, a principles based *ex post* approach is likely more appropriate.¹⁰⁹ Cass Sunstein argues that rules can be overtaken by changing circumstances in fields such as telecommunications:

In the face of rapidly changing technology, current rules for regulation of telecommunications will become ill-suited to future markets. For this reason it may be best to avoid rules altogether, or at least create only a few simple rules that allow room for private adaption.¹¹⁰

This general approach leads to the following four principles:

Principle one: When a product or service being digitally advertised is transparent, in the sense of being relatively simple to apply, the first screen

that a consumer sees should display all-inclusive information (such as pricing).

The first digital screen that a consumer sees should display all-inclusive information (such as pricing) to the extent that the product or service is transparent. In the Pearson car rental example, the first screen should ideally state the price as \$84.47.

Ticketmaster is a good example of the potential for an all-inclusive model to apply at the first screen stage. The product being offered is simple and transparent: tickets to live events have a face value. The subsequent charges add in profit for the ticket broker.

As noted earlier, in the *Ticketmaster* consent agreement, the Commissioner acknowledges that *Ticketmaster* made a number of changes to their websites and mobile applications beginning in July 2018, including changing many of their representations regarding certain non-optional fees and redesigning certain websites and mobile applications so that consumers were presented with an inclusive price of per-ticket fees, and the maximum per-order fee that could be charged on the entire ticket order the first time they are shown a price. *Ticketmaster* advised the Commissioner that it had made these changes voluntarily across Canada in circumstances where their competitors had not made similar changes.

Ticketmaster's Canadian platform is an example of how technology can be used to present all-inclusive pricing on the first screen. A visit to the *Ticketmaster* website in your area¹¹¹ demonstrates the sophistication of a revised digital platform. The first screen for the Elton John “Farewell Yellow Brick Road” concert displays a range of seats with the all-inclusive price displayed prominently. Below the all-inclusive price, the calculation of that price is broken down into a base amount plus an amount for fees, including taxes. The section of the arena for each ticket is noted, alongside a diagram of the arena on the first screen which shows the location of that section in proximity to the stage where Elton John will be performing. A green “next” button sets out the combined face value of the tickets and the added fees with a total amount shown.

The limitation on our first principle is complexity. Depending on the product or service and the digital parameters, it may not be possible to display the entire range of options or information on the first screen. For example, some car manufactures have online capabilities that allow a consumer to request a combination of engines and colours, with additional

options.¹¹² It is not feasible to have all of these options combined on a single screen.

This leads to principle two.

Principle two: Where the product or service being advertised has complex options, the first screen that a consumer sees should contain a description of the methodology that will be applied throughout the transaction in accordance with a matrix of timing and complexity.

Where the complexity of a product or service does not facilitate a full analysis on the first screen, it should at least contain a simple description of the methodology that will be applied throughout the transaction. In the example of building a car online, the first screen should explain that pricing will vary depending on subsequent choices of engine type and model ranging from sport to luxury.

Ultimately, we need more thought and rules surrounding online marketing across complex industries which make use of nuanced and fast transactions. One can imagine how choosing a telephone package online is fundamentally different from renting a car, for example. The goals of accurate quality description while also encouraging a fun interactive internet process are mutually compatible.

We propose a matrix developed in the fourth part of this paper of timing on one axis and complexity of the product or service on the other to assist with this balancing exercise.

Principle three: The interactive digital process should facilitate consumer reversal of choices to the extent that the technology will permit;

Recall that Dallas and Morwitz found that participants who learned they initially made a mistake by choosing a more expensive option because drip pricing indicated they were more satisfied with their choice than were those who evaluated the choice from an outsider's perspective. They convince themselves that the price is satisfactory as a result of self-justification.¹¹³ In other words, the customer's ego may dissuade them from realizing that they may have been duped by the process.

Inertia (consumers' belief that switching takes too much time) also helps explain the stickiness of consumers' initial selections when exposed to drip pricing.

To counter these psychological effects, a transparent and interactive process should contain accessible “buttons” and instructions that make it easier for the consumer to navigate back and reverse decisions in a quick fashion, to the extent that the technology will permit.¹¹⁴

This rule is particularly important when the sophistication and physical latency of the goods or services are engaged. If the product is sophisticated, and a person is psychologically more likely to become invested in the product as a result, there should be early opportunities to reverse the transaction. Similarly, if the person is receiving the object at the same moment they are told about the drip, this leaves little room for the transaction to be reversed.

Principle four: In the case where there is a finding that a digital process constitutes a violation of competition law, it should be an aggravating factor in the assessment of the penalty if disadvantaged consumers are impacted in their ability to satisfy their basic needs.

A set of rules can be derived from John Rawls’ *Theory of Justice* when combined with a behavioural model. The “justice as fairness” theory was constructed by placing peoples behind a “veil of ignorance” so that they do not know their own position in society, and then asking these people to create an agreement to construct a society.¹¹⁵ Since all these people are in an original position of equality and are rationally self-interested, the final agreement reached will be “fair.”

Rawls deduced a series of rules of justice which were ordered in lexical priority:¹¹⁶

- *First Principle*

Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.

- *Second Principle*

Social and economic inequalities are to be arranged so that they are both:

(a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and

(b) attached to offices and positions open to all under conditions of fair equality of opportunity

Beyond the two basic principles, Rawls articulated two priority rules.

His first priority rule (The Priority of Liberty) ranked liberty as the primary value that could only be restricted for the sake of liberty. Rawls' second priority rule (The Priority of Justice over Efficiency and Welfare) puts the principle of justice before efficiency by recognizing that social and economic inequalities are to be arranged so that they are to the greatest benefit of the least advantaged. Rawls maintains that the persons in the initial situation would choose two different principles:

... the first requires equality in the assignment of basic rights and duties, while the second holds that social and economic inequalities of wealth and authority, are just only if they result in compensating benefits for everyone, and in particular for the least advantaged members of society.¹¹⁷

In *Profiting From Risk Management and Compliance 2019*, Archibald and Jull integrated the model developed by Abraham Maslow to mitigate one of the largest critiques of Rawls' theory.¹¹⁸ As we identified earlier in this paper, consumers can be more motivated to save money to spend goods which bring pleasure rather than saving money for obligations like supporting one's family or mitigating future uncertainty. These choices seemingly appear irrational, even though studies support that these are the implicit savings considerations of most people. As such, many critics argue that Rawls' assumption of the rational person is a myth: when we predict what a rational person would do, we are probably thinking about what we would choose as most people believe themselves to be rational. This leads to implicit biases. Archibald and Jull propose imputing a verifiable model of personhood in Rawls' original position behind the veil of ignorance, and predicting which system this person would choose. The model of the person in this schema should be one of a psychologically healthy person, which is enumerated in Maslow's hierarchy of human needs. A psychologically healthy person, according to Maslow, prioritizes in order: 1) physiological needs; 2) safety needs; 3) belongingness or love needs; 4) esteem needs; and 5) the need for self-actualization.¹¹⁹ Referencing psychologically healthy people avoids ethical relativism that may result from relying on actual behaviour.

If we were to place Maslow's model of the person behind Rawls' veil of ignorance, the rules would more likely reflect priority of belongingness within the community than the priority of liberty that Rawls envisioned. The equality principle would remain intact, however, if we use Maslow's

model of the person: a society will be just if the benefits earned by a few also improves the situation for disadvantaged consumers.

Archibald and Jull contend that marrying a Rawls framework with a behavioural model will result in the following four principles: 1) regulatory measures must promote human health and safety as a first priority; 2) regulations should promote the growth of community to the greatest extent possible by making basic services accessible to all; 3) social and economic inequalities are to be arranged so that they are to the greatest benefit of the disadvantaged consumer; 4) long term gains should be balanced against short term costs with respect to community based groups.

To the extent that disadvantaged consumers are impacted by deceitful advertising techniques, and are negatively affected in fulfilling their basic needs as a result, a judge should consider this an aggravating factor in assessing the penalty. A disadvantaged consumer can be defined as those who are officially under the poverty line, those who are at risk of poverty, and those who need or are at risk of needing aid from the state to buy essential products and services.¹²⁰ This principle is derived from the third rule stated above: social and economic inequalities are to be arranged so that they are to the greatest benefit of the disadvantaged consumer. This rule can be applied to the digital economy at the stage of the assessment of penalty.

Consumers must balance their spending to ensure that basic needs of their families are met.¹²¹ There is an important relationship between the psychological needs of human beings and their saving decision.¹²² Behavioural research shows that techniques such as drip pricing lead consumers to make sub-optimal choices. In the case of the disadvantaged lower income consumers, drip pricing will likely influence them to make poor decisions and budget choices.

CONCLUSION

This paper has identified the existing regulations surrounding drip pricing, and instances where stronger regulations may be warranted. An analogy can be drawn between the psychology behind techniques such as drip pricing and hypnotism. The consumer may be in agreement with the final price, but psychological factors change the consumer's behaviour in ways in which they are not aware—much like hypnosis. Obviously the analogy drawn between hypnosis and the psychological effects of drip pricing is not a directly parallel one, but it does serve to demonstrate the point of how powerfully techniques such as drip pricing can manipulate a consumer into spending more money than they budgeted.

However, a balance must be struck between growing industry, protecting consumers, and retaining the interactive ethos of the internet. Our proposed general principles may be adapted and applied to guide various industries in their digital marketing practices, and to afford flexibility in regulations.

These rules were developed through the case study of drip pricing, but we propose that they should be applied to the digital economy as a whole to protect consumers. Indeed, these rules can be expanded and adjusted to many issues in the digital economy—particularly as it continues to develop at a fast rate across various sectors.

Where does this leave the state of digital advertising? The key in a flexible application of our general principles is that firms should *persuade* consumers, not *manipulate* them. The protection of society's disadvantaged depends on it.

APPENDIX I

AVIS
DELIVERS GREAT
WEEKEND RATES



2-Day Weekend Rental Rates Starting at \$55!
 And each additional day (to a maximum of 5 days) from \$21/day.

Plus earn 1,000 Bonus Aeroplan® Miles.*

For details and to reserve visit
avis.ca/metro
 or call 1 800 TRY-AVIS
 (879-2847)

**Must quote AWD # H900200
 and Coupon # MCAA009**




*Terms & Conditions apply. Rates quoted are valid on a sub-compact or compact car. Special rates also available on mid-size cars (group C). Offers valid at off-airport locations in the GTA until June 19, 2011. Blackout periods apply.
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 **Aeroplan is a registered trademark of Aeroplan Canada Inc.

The screenshot shows the AVIS mobile application interface. At the top, the AVIS logo is displayed in white on a red background. Below the logo, the app is in 'Step 3: Your Information' (Optional), which includes input fields for 'Last Name' and 'Wizard Number'. The next section is 'Step 4: Discounts' (Optional), with fields for 'Avis Worldwide Discount' (pre-filled with 'AWD') and 'Coupon Code'. The final section is 'Step 5: Vehicle Selection' (Required), which lists two vehicle categories: 'Small to Full Size' and 'Luxury & Convertibles'. The 'Small to Full Size' option is highlighted with a red box and shows a price of 'from 57.99 CAD' with a right-pointing arrow. A large red arrow points from the right side of the screen towards this highlighted option.

Step 3: Your Information		Optional
Last Name	Last Name	
Wizard Number	Wizard Number	
Step 4: Discounts		Optional
Avis Worldwide Discount	AWD	
Coupon Code	Coupon Code	
Step 5: Vehicle Selection		Required
Small to Full Size	from 57.99 CAD	>
Luxury & Convertibles	from 72.99 CAD	>

AVIS

Email Address Email Address

Mobile Number Mobile Number

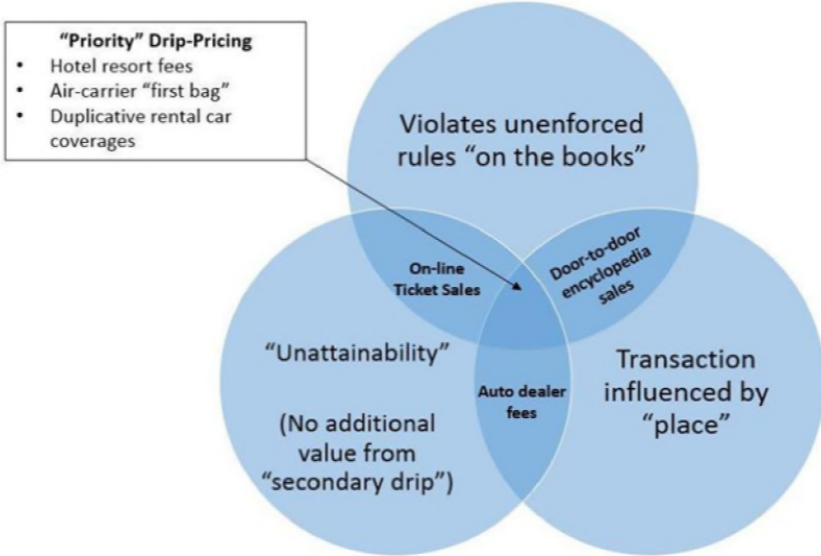
Step 8: Finish Reservation

Base Rate	57.99	CAD
Options	0.00	CAD
Taxes & Fees	26.48	CAD
Estimated Total	84.47	CAD

Reserve

84.47 CAD

APPENDIX II



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ENDNOTES

¹ Kenneth Jull is Counsel at Gardiner Roberts LLP, an adjunct Professor at the University of Toronto, Faculty of Law and an adjunct member of the graduate faculty at Osgoode Hall Law School. Nicole Spadotto is in her third year of the combined B.C.L./J.D. programme at the McGill University Faculty of Law. She was a summer student at Gardiner Roberts in 2019.

² Christina Gregory, “Internet Addiction Disorder: Signs, Symptoms, Diagnosis, and Treatments for Those Who May be Addicted to the Web on Their PC or Smart Phone” (2019) *Psycom*, online: <www.psycom.net/iadcriteria.html>.

³ Damien Geradin & Dimitrios Katsifis, “‘Trust Me, I’m Fair’: Analysing Google’s Latest Practices in Ad Tech from the Perspective of EU Competition Law” (2019) TILEC Discussion Paper No. DP 2019-029, online: <papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3465780_code362710.pdf?abstractid=3465780&mirid=1&type=2>.

⁴ David Adam Friedman, “Regulating Drip Pricing” (2019) 31 *Stan L & Pol’y Rev*, online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=3337073> [Friedman].

⁵ See Appendix I for this real advertisement. In this case, the ad was in traditional media newspaper advertisements. See <https://www.ct-tc.gc.ca/CMFiles/CT-2015-001_Notice%20of%20Application_2_38_3-11-2015_4527.pdf>.

⁶ See Appendix I for the real final price of this transaction. *Ibid*.

⁷ Greater Toronto Airports Authority, “Train to City (UP Express)” (2019) *Toronto Pearson*, online: <www.torontopearson.com/en/transportation/up-express>.

⁸ See e.g. BMW Canada, “Build Your BMW” (2019) *BMW.ca*, online: <www.bmw.ca/en/ssl/configurator.html#>.

⁹ *Ibid*. In this example, the first screen contains a disclaimer that the pricing does not constitute an official offer to buy or sell and is subject to conditions set out.

¹⁰ Muhammad Yunus et al, “Reaching the Rich World’s Poorest Consumers” (March 2015) *Harvard Business Review*, online: <hbr.org/2015/03/reaching-the-rich-worlds-poorest-consumers>.

¹¹ 74.01 (1) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, makes a representation to the public that is false or misleading in a material respect; makes a representation to the public in the form of a statement, warranty or guarantee of the performance, efficacy or length of life of a product that is not based on an adequate and proper test thereof, the proof of which lies on the person making the representation; or makes a representation to the public in a form that purports to be a warranty or guarantee of a product, or a promise to replace, maintain or repair an article or any part thereof or to repeat or continue a service until it has achieved a specified result, if the form of purported warranty or

guarantee or promise is materially misleading or if there is no reasonable prospect that it will be carried out.

¹² Ordinary price: suppliers generally (2) Subject to subsection (3), a person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, makes a representation to the public concerning the price at which a product or like products have been, are or will be ordinarily supplied where suppliers generally in the relevant geographic market, having regard to the nature of the product, have not sold a substantial volume of the product at that price or a higher price within a reasonable period of time before or after the making of the representation, as the case may be; and have not offered the product at that price or a higher price in good faith for a substantial period of time recently before or immediately after the making of the representation, as the case may be.

¹³ Representation as to reasonable test and publication of testimonials. A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of any product, or for the purpose of promoting, directly or indirectly, any business interest, makes a representation to the public that a test has been made as to the performance, efficacy or length of life of a product by any person, or publishes a testimonial with respect to a product, unless the person making the representation or publishing the testimonial can establish that such a representation or testimonial was previously made or published by the person by whom the test was made or the testimonial was given, or such a representation or testimonial was, before being made or published, approved and permission to make or publish it was given in writing by the person by whom the test was made or the testimonial was given, and the representation or testimonial accords with the representation or testimonial previously made, published or approved.

¹⁴ 74.04 (1) For the purposes of this section, bargain price means a price that is represented in an advertisement to be a bargain price by reference to an ordinary price or otherwise; or a price that a person who reads, hears or sees the advertisement would reasonably understand to be a bargain price by reason of the prices at which the product advertised or like products are ordinarily supplied. Marginal note: Bait and switch selling (2) A person engages in reviewable conduct who advertises at a bargain price a product that the person does not supply in reasonable quantities having regard to the nature of the market in which the person carries on business, the nature and size of the person's business and the nature of the advertisement.

¹⁵ Competition Bureau Canada, "The Deceptive Marketing Practices Digest" November 2015 update (Ottawa: Competition Bureau, 2015).

¹⁶ Todd L Archibald & Kenneth Jull, *Profiting From Risk Management and Compliance* (Toronto: Thomson Reuters 2019) at ch 16 [Archibald]. See also Antonio Di Domenico, *Competition Enforcement and Litigation in Canada* (Toronto: Emond Publishing 2018).

¹⁷ *Canada (Commissioner of Competition) v Chatr Wireless Inc*, 2014 ONSC 1146 [Chatr].

¹⁸ *Ibid* at para 132.

¹⁹ Canada, Competition Bureau, “From Bread to Banking: Driving Competition and Innovation in Canada” (2018), *Annual Report of the Commissioner of Competition for the Year Ending March 31, 2018* (Commissioner: John Pecman), online: <www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04380.html>.

²⁰ 2017 CarswellNat 1793.

²¹ Canada, Competition Bureau, “From Bread to Banking: Driving Competition and Innovation in Canada” (2017), *Annual Report of the Commissioner of Competition for the Year Ending March 31, 2017* (Commissioner: John Pecman), online: <www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04328.html>.

²² Consent Agreement, *Commissioner of Competition v Comwave Networks*, Doc CT-2016-014, online: <www.ct-tc.gc.ca/CMFiles/CT-2016-014_Registered%20Consent%20Agreement_02_38_9-13-2016_7866.pdf>.

²³ Blakes, “Competition Bureau Resolves Two Drip Pricing Cases” (26 February 2018), online: *Business Class*, <www.blakesbusinessclass.com/competition-bureau-resolves-two-drip-pricing-cases/>.

²⁴ *Ticket Sales Act, 2017*, SO 2017, c 33, Schedule 3, s 6.

²⁵ Alexander Rasch, Miriam Thöne & Tobias Wenzel, “Drip Pricing and its Regulation: Experimental Evidence” (2018) Düsseldorf Institute for Competition Economics Discussion Paper No 297, online: <www.dice.hhu.de/fileadmin/redaktion/Fakultaeten/Wirtschaftswissenschaftliche_Fakultaet/DICE/Discussion_Paper/297_Ra_sch_Thoene_Wenzel.pdf> at 2 [Rasch].

²⁶ *Ibid* at 3.

²⁷ Friedman, *supra* note 3 at 3.

²⁸ See Appendix II for Friedman’s helpful diagram demonstrating this principle [re-printed with permission of the author].

²⁹ Friedman, *supra* note 3 at 32, citing the Australian Competition & Consumer Commission, “Court Finds that Jetstar and Virgin Australia Engaged in Misleading ‘Drip Pricing’ Practices” (26 Nov 2015), online: <www.accc.gov.au/media-release/court-finds-that-jetstar-and-virgin-australia-engaged-in-misleading-drip-pricing-practices>.

³⁰ 2016 ONSC 6044.

³¹ *Chatr*, *supra* note 16 at para 27.

³² *Ibid*.

³³ Competition Bureau Canada, “The Deceptive Marketing Practices Digest” (10 June 2015), online: <www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03946.html#s2_0> at s 2.3.2. See also *Commissioner of Competition v Yellow Page Marketing BV*, 2013 ONSC 2852 [*Yellow Page Marketing*].

³⁴ Competition Bureau Canada, “Highlights from the Competition Bureau’s Data Form” (Gatineau: Competition Bureau Communications and Marketing Branch, 2019) online: <[www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CB-DataForumHighlights-Eng.pdf/\\$file/CB-DataForumHighlights-Eng.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CB-DataForumHighlights-Eng.pdf/$file/CB-DataForumHighlights-Eng.pdf)>.

³⁵ Matthew Boswell, “No River Too Wide, No Mountain Too High: Enforcing

and Promoting Competition in the Digital Age” (Remarks delivered at the Canadian Bar Association Competition Law Spring Conference, 7 May 2019), online: <www.canada.ca/en/competition-bureau/news/2019/05/no-river-too-wide-no-mountain-too-high-enforcing-and-promoting-competition-in-the-digital-age.html> [Boswell].

³⁶ Josephine Palumbo, “Honest Advertising in the Digital Age” (Remarks delivered at the Canadian Institute 26th Annual Advertising and Marketing Law Conference 22 January 2020), [Competition Bureau Canada], archived online: <<https://www.canada.ca/en/competition-bureau/news/2020/01/honest-advertising-in-the-digital-age.html>>.

³⁷ See e.g. Mireille Hildebrandt, “Law as Computation in the Era of Artificial Legal Intelligence: Speaking Law to the Power of Statistics” 68:1 U Toronto LJ 12.

³⁸ OECD, “Managing Digital Security and Privacy Risk: 2016 Ministerial Meeting on the Digital Economy” (2016), OECD, OECD Digital Economy Papers No 254, online: <<https://www.oecd-ilibrary.org/docserver/5jlwt49ccklt-en.pdf?expires=1573585421&id=id&accname=guest&checksum=F4F3053504532474C853761C61AE4093>>; Background Report. Paris: OECD, cited in “Trust in the Digital Economy: Towards A Framework for Comparative Analysis” by Terry Flew, Professor of Communication and Creative Industries, Creative Industries Faculty, Queensland University of Technology, Brisbane, Australia Presentation to International Communication Association- Shanghai Jiao Tong University International New Media Forum, Shanghai, China, online: <<https://ssrn.com/abstract=3334704>>.

³⁹ For example, a new digital charter will dictate how Canada will combat hate speech, misinformation and online electoral interference in Canada, Prime Minister Justin Trudeau told a technology conference in Paris on May 16, 2019. The Canadian Press, “Trudeau Warns of ‘Meaningful Financial Consequences’ for Social Media Giants That Don’t Combat Hate Speech”, *CBC* (16 May 2019), online: <www.cbc.ca/news/politics/digital-charter-trudeau-1.5138194>

⁴⁰ The Commissioner announced that, under the Interchange Canada program, Mr. George McDonald, currently Associate Partner and Senior Account Leader at IBM, will bring his experience and expertise in organizational evolution and digital transformation to the Competition Bureau. Competition Bureau Canada, News Release, “George McDonald Joins the Competition Bureau as New Chief Digital Enforcement Officer” (2 July 2019), online: <www.canada.ca/en/competition-bureau/news/2019/07/george-mcdonald-joins-the-competition-bureau-as-new-chief-digital-enforcement-officer.html>. As of July 2, 2019, Mr. McDonald will begin serving as Chief Digital Enforcement Officer, reporting directly to Mr. Matthew Boswell, the Commissioner of Competition. Mr. McDonald will help the Bureau monitor the digital landscape, identify and evaluate new investigative techniques, and boost its digital intelligence gathering capabilities.

⁴¹ Boswell, *supra* note 34.

⁴² Pulumbo, *supra* note 35.

⁴³ Gunnar Niels, Reinder Van Dijk & Leon Fields, “Behavioural Economics

and Its Impact on Competition Policy: A Practical Assessment” (2013) 12:3 Competition LJ 374 at 376 [Niels].

⁴⁴ (Toronto: Simon & Schuster, 2016).

⁴⁵ *Ibid* at ch 10, “Six Main Roads to Change: Broad Boulevards as Smart Shortcuts” at p. 151.

⁴⁶ Vicki G Morwitz, Eric A Greenleaf & Eric J Johnson, “Divide and Prosper: Consumers’ Reactions to Partitioned Prices” (1998) 35:4 J Marketing Research 453–463 at 453 [Morwitz].

⁴⁷ Kiljae Lee, Jungsil Choi & Yexin J Li, “Regulatory Focus as a Predictor of Attitudes Toward Partitioned and Combined Pricing” (2014) J Consumer Psychol 355 at 400, citing Amos Tversky & Daniel Kahneman, “Judgment Under Uncertainty: Heuristics and Biases” (1974) 185:4157 Science 1124 [Lee].

⁴⁸ Morwitz, *supra* note 45 at 455.

⁴⁹ *Ibid* at 460.

⁵⁰ Lee, *supra* note 46.

⁵¹ Morwitz, *supra* note 45 at 456.

⁵² Friedman, *supra* note 3.

⁵³ *Ibid* at 7.

⁵⁴ *Ibid* at 26.

⁵⁵ *Ibid* at 7.

⁵⁶ Rasch, *supra* note 24 at 2.

⁵⁷ Morwitz, *supra* note 45 at 455.

⁵⁸ Friedman, *supra* note 26 at 9.

⁵⁹ For example, see TripAdvisor and Expedia.

⁶⁰ Competition Tribunal Ct. 2018-005. The Consent agreement is with Ticketmaster L.L.C., Tnow Entertainment Group, Inc., and Ticketmaster Canada LP. One of the authors, Kenneth Jull, was listed as counsel on the Bureau’s original Notice of Application in this case.

⁶¹ C T-2020-2 The Competition Tribunal, Consent Agreement, The Commissioner of Competition and StubHub Inc., StubHub Canada Ltd.

⁶² Glen Ellison & Sara Fisher Ellison, “Search and Obfuscation in a Technologically Changing Retail Environment: Some Thoughts on Implications and Policy,” (2018) 18 Innovation Pol’y & Econ 1 at 4 [Ellison].

⁶³ Competition Bureau Canada, “Submission by the Interim Commission of Competition—Bureaucratic Notice of Consultation CRTS 2018-422—Proceeding to Establish a Mandatory Code for Internet Services” (20 December 2018), online: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04405.html, citing Rasch, *supra* note 26; Charlotte Duke et al, “Study Into the Sales of Add-On General Insurance Products: Experimental Consumer Research” (2014) Report for the Financial Conduct Authority, *London Economics*, online: <www.fca.org.uk/publication/market-studies/gi-add-ons-experimental-consumer-research-report.pdf>.

⁶⁴ Steffen Huck & Brian Wallace, “The Impact of Price Frames on Consumer Decision Making: Experimental Evidence” (2015), *Journal of Economic Literature* 1—47 as cited by the Bureau; *Supra* note 16.

- ⁶⁵ Cass R Sunstein, “Fifty Shades of Manipulation” (2015) 1:3–4 J Marketing Behavior 213 [Sunstein].
- ⁶⁶ Morwitz, *supra* note 45 at 455.
- ⁶⁷ For this real advertisement, see Appendix I. In this case, the ad was in traditional media newspaper advertisements. See *Commissioner of Competition v Aviscar Inc* 2015 CarswellNat 6184, CT-2015-001, online: <www.ct-tc.gc.ca/CMFiles/CT-2015-001_Notice%20of%20Application_2_38_3-11-2015_4527.pdf> [Aviscar].
- ⁶⁸ *Ibid.*
- ⁶⁹ Lee, *supra* note 46.
- ⁷⁰ Morwitz, *supra* note 45 at 455.
- ⁷¹ Henry C Su, “Thinking, Fast, Free, and Fashionable: Competition and Consumer Protection in a Mobile Internet World” (2012) 27:1 Antitrust 82 at 82 [Su].
- ⁷² For a broad discussion of this phenomenon, see generally: Robert Cialdini *Pre-suasion: A Revolutionary Way to Influence and Persuade* (Toronto: Simon & Schuster, 2016).
- ⁷³ Friedman, *supra* note 26; Katja Seim, Maria Ana Vitorino & David M Muir “Drip Pricing When Consumers Have Limited Foresight: Evidence from Driving School Fees” (2017) online: <repository.upenn.edu/cgi/viewcontent.cgi?article=1345&context=marketing_papers>.
- ⁷⁴ Friedman, *supra* note 26 at 9.
- ⁷⁵ *Ibid* at 4.
- ⁷⁶ *Ibid* at 9.
- ⁷⁷ Rasch, *supra* note 24 at 2.
- ⁷⁸ Niels, *supra* note 42 at 375.
- ⁷⁹ Mike Walker, “Behavioural economics: the lessons for regulators,” (2017) European Competition Journal 1 at 6.
- ⁸⁰ Niels, *supra* note 42 at 376.
- ⁸¹ Shelle Santana, Steven Dallas & Vicki G Morwitz, “Consumer Reactions to Drip Pricing” (20 September 2017), online: <faculty.tuck.dartmouth.edu/images/uploads/faculty/nemc/Santana_Dallas_Morwitz_Drip_Pricing.pdf> [Santana].
- ⁸² *Ibid* at 30–31.
- ⁸³ *Supra* note 1.
- ⁸⁴ *Ibid.*
- ⁸⁵ Su, *supra* note 70 at 84.
- ⁸⁶ Sunstein, *supra* note 64.
- ⁸⁷ *Ibid.*
- ⁸⁸ Friedman, *supra* note 3 at 13.
- ⁸⁹ Friso Bostoën, “Online Platforms and Pricing: Adapting Abuse of Dominance Assessments to the Economic Reality of Free Products,” (2019) 35:3 Computer L & Sec R 263 at 277 [Bostoën].
- ⁹⁰ *Ibid* at 277.
- ⁹¹ We note that part of the issue of drip pricing, as it relates to competition, is the exclusiveness many ticket companies have in the market for a particular event. We

suggest that this may be an abuse of dominance; while this discussion is out of the scope of this paper, more research should be conducted in this regard.

⁹² Bostoan, *supra* note 88 at 270.

⁹³ Using basic math and rounding to 100, if it is smaller than 250, we round it off to 200 (round down). If it is 250 or bigger, we round it off to 300 (round up).

⁹⁴ Jae Min Lee & Sherman D Hanna, “Savings Goals and Saving Behavior From a Perspective of Maslow’s Hierarchy of Needs” (2015) 26:2 J Fin Counseling & Planning 129 [Lee & Hanna].

⁹⁵ A.H. Maslow’s classic model was developed in his work, *Motivation and Personality*, 2nd ed (New York: Harper & Row, 1970) [Maslow]. For a full discussion of this model as part of a theory of justice, see Archibald, *supra* note 15].

⁹⁶ Lee & Hanna, *supra* note 92 at 140.

⁹⁷ *Ibid* at 142–143.

⁹⁸ Su, *supra* note 70 at 85.

⁹⁹ For a counter argument, see Niels, *supra* note 41 at 384.

¹⁰⁰ Ellison, *supra* note 59 at 22.

¹⁰¹ *Ibid* at 28.

¹⁰² Niels, *supra* note 42 at 381.

¹⁰³ Archibald, *supra* note 15 at s INT:10:40—Introduction and Overview.

¹⁰⁴ The equation of $PL = OC$, is a type of basic risk management. It premises that some losses will not attract liability. If the probability multiplied by the loss is less than the object times the cost, the conduct is blameless. Justice Linden has cited Mr. Justice Learned Hand in expressing the notion in terms of the burden of adequate precautions. He suggested that liability depended upon whether B is less than PL. See Allen M Linden, ed, *Canadian Tort Law*, 6th ed (Toronto: Butterworths, 1997) at 6.

¹⁰⁵ See generally, International Chamber of Commerce, “ICC Antitrust Compliance Toolkit” (2013), online (pdf): <<https://iccwbo.org/content/uploads/sites/3/2013/04/ICC-Antitrust-Compliance-Toolkit-ENGLISH.pdf>>.

¹⁰⁶ Archibald, *supra* note 15 at s 2:20:10—Application of Matrix Planning at the Policy Level.

¹⁰⁷ For an example of an argument that consumers do not expect the first page of an internet process to include all inclusive pricing, see the response of counsel for Live Nation in *Commissioner of Competition and Live Nation Entertainment et al.*, 2018 CarswellNat 5661, CT 2018-005, Response of the Respondents, at paras 40–42.

¹⁰⁸ See Ken Jull & Stephen E Schmidt, “Preventing Harm in Telecommunications Regulation: A New Matrix of Principles and Rules within the *Ex Ante* Versus *Ex Post* Debate” (2009), 47 CBLJ 329.

¹⁰⁹ The exception to this is where telecommunications can impact life and safety, such as the case in 911 emergency service. See Archibald, *supra* note 15 at 6–5.

¹¹⁰ Sunstein, *supra* note 64 at 993–94.

¹¹¹ See <<https://www.ticketmaster.ca/>>.

¹¹² See <<https://www.bmw.ca/en/ssl/configurator.html#/>>.

¹¹³ Santana, *supra* note 80 at 30–31.

¹¹⁴ For a diagram illustrating the complexity of digital platforms, and the potential places buttons should be present to allow a consumer to turn back in the transaction, see Appendix IV.

¹¹⁵ (Cambridge, Mass: Harvard University Press, 1971) at 136–142.

¹¹⁶ Rawls, *supra* note 114, at 302-303.

¹¹⁷ *Ibid* at 14 to 15. Rawls then developed the above basic principles into a full statement that contained two principles combined with two priority rules, at 302-303.

¹¹⁸ Archibald, *supra* note 15.

¹¹⁹ Maslow, *supra* note 93.

¹²⁰ Muhammad Yunus et al, “Reaching the Rich World’s Poorest Consumers” (March 2015), *Harvard Business Review*, online:<hbr.org/2015/03/reaching-the-rich-worlds-poorest-consumers>.

¹²¹ Lee & Hanna, *supra* note 93 at 129–47.

¹²² *Ibid*.

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

Michael Caldecott¹

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

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

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

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

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

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

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

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

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

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

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

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

1. A Comparative Perspective on the Status Quo

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

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

Political intervention in the context of competition law, and particularly merger control, is often referred to as industrial policy. Although there is no single definition of industrial policy—indeed, it has been said that there “is no end to the list of possible definitions” of the term⁷—a note for the Organization for Economic Co-Operation and Development's (“OECD”) 2009 Global Forum on Competition defined industrial policy as referring to:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In 1989, the *EU Merger Regulation* was adopted, which included strict competition criteria for assessing mergers (on the basis of a dominance threshold).³⁹ This regulation was later amended in 2004.⁴⁰ While not explicit in the legislation itself, the consumer welfare standard was its underlying substantive inspiration and EU competition policy has since focused on furthering the interests of consumers, instead of the interests of governments or companies. Crucially, industrial policy was given very limited bandwidth, or in the words of Sir Leon Brittan several years later: “with only the smallest nod in the direction of anything else.”⁴¹ That nod was articulated in Article 2(1)(b) of the *EU Merger Regulation*, which noted that while assessing any impediment to effective competition was paramount, the Commission should also take into account other factors, including the “economic and financial power” of the merging parties and the “development of technical and economic progress.”

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

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

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

- *Second*, a “legitimate interests” exception was added to Article 21 of the *EU Merger Regulation*, which establishes the “one stop shop” principle that underpins EU-wide merger control enforcement. If a merger is notifiable to the Commission, Member States do not have parallel jurisdiction to apply national competition legislation. However, Article 21 provides Member States with the ability to “take appropriate measures necessary to protect legitimate interests other than those taken into account by this Regulation” (*i.e.*, competition). Article 21 further defines legitimate interests as those relating to public security, media plurality, and prudential rules. While narrow in scope, the Commission has been receptive to cases that fall squarely within the scope of legitimate interests, as defined in Article 21.⁴⁴

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

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

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

d) Canada's Balancing Act Since 1986

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

The Chicago School consensus has heavily influenced the development of Canadian competition policy, especially since the introduction of the *Competition Act* in 1986.⁴⁹ This legislation is anchored in the established economic theory that open markets are the most effective way of allocating resources, improving productivity, and spurring innovation. That said, in global terms, Canada's economy remains relatively small and strongly reliant on international trade, with a limited number of incumbents in many economic sectors, many being required to reach sufficient economies of scope and scale to compete in global markets.⁵⁰ Canadian lawmakers were well aware of this fact during the *Competition Act's* passage through Parliament in 1986.⁵¹ While overwhelmingly designed as a regulatory mechanism that "[establishes] the basic rules for a competitive and fair market-based economy,"⁵² the regime also aimed to facilitate the participation of Canadian companies in international markets, as well as to stand up against foreign competitors in the domestic market.⁵³ These diverse considerations were reflected in the *Competition Act's* purpose clause:

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

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

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

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

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

Nevertheless, the *Competition Act* also contains an inherent compromise, generated as a result of the nature of the Canadian economy and its geopolitical position at the introduction of the modern regime in 1986.⁶¹ The efficiencies defence, set out in section 96 of the *Competition Act*, has the effect of diluting the regime's focus on consumer welfare promoting objectives. It reflects one of the primary economic considerations in play at the time the *Competition Act* was introduced, namely enabling mergers between Canadian firms in highly concentrated industries in order to facilitate the creation of national champions that could achieve minimum effective scale and compete outside of Canada. This rationale was undoubtedly coherent from an industrial policy standpoint in the 1980s, and to a more limited extent, remains as such today.

The efficiencies defence has the power to enable the implementation of otherwise anti-competitive mergers, even in merger-to-monopoly cases.⁶² However, its use is relatively circumscribed by the structure of the *Competition Act*: only once a substantial prevention or lessening of competition ("SPLC") has been found (which is assessed in a consumer welfare framework) can the efficiencies defence be engaged. Accordingly, Canada's regime is designed and has been used as an objective tool to foster a market-based economy and is insulated from political influence. There are a few exceptions to this general principle, which have been important features in the development of the regime since 1986.⁶³

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

i) Populism as a Driving Force for Change

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

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

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

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

- Lina Khan has criticized the consumer welfare standard in “Amazon’s Antitrust Paradox”, arguing that “the current [U.S.] framework in antitrust—specifically equating competition with ‘consumer welfare,’ typically measured through short-term effects on price and output—fails to capture the architecture of market power in the twenty-first century marketplace.”⁷⁶ Platform markets are uniquely incentivized to pursue growth over profits, she argued, making it difficult for an antitrust agency to prosecute a dominant platform such as Amazon when it was driving down prices for consumers. Ms. Khan proposed a return to the structuralist approach that pre-dated the consumer welfare standard, in which antitrust enforcement would rely on the general assumption that a firm that acquires monopoly power will use that power to society’s detriment, and therefore, that dominance should be prevented from emerging.⁷⁷
- Another category of the Neo-Brandeisian critique includes studies observing that competition has declined under the consumer welfare standard because U.S. markets have systematically become more concentrated. For example, Jason Furman and Peter Orszag’s study analyzes U.S. census data on market consolidation to conclude that in 75% of the industry groupings measured in the data, the revenue share of the largest firms had increased between 1997 and 2012.⁷⁸ Such studies have contributed to a public discourse that equates growing concentration levels with a failure of antitrust policy. The *Wall Street Journal* noted that, “[a] growing number of industries in the U.S. are dominated by a shrinking number of companies,” while the *New York Times* has explicitly linked increasing inequality with a decline of competition.⁷⁹

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

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

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

ii) Antitrust Community Reactions

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

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

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

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

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

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

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

- There are other means by which governments can seek to cure a wide array of political and societal ills identified by the Neo-Brandeisian antitrust movement (tax reform, reform to political campaign financing, increased regulation *ex-post* in certain industries, such as financial services);
- Complementary merger review regimes focused on more nebulous matters of public interest, sovereignty and national security are better suited to reviewing the impact of transactions on policy issues beyond consumer welfare (thus retaining the regulatory predictability of merger control); and
- Nevertheless, the antitrust community should continue to be vigilant in ensuring that its decades-old framework evolves to take account of modern business practices, and be open to adapting its approaches accordingly.

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

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

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

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

As Carl Shapiro has noted:

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

It is important to acknowledge that all commentators on both sides of the spectrum bring a degree of subjectivity to the debate. Quite rightly, the Neo-Brandeisian antitrust movement should be challenged where its conclusions are based on supposition. Similarly, there should be no room for a dogmatic or presumptive approach to vertical mergers within the consumer welfare framework. Institutionalizing the generality that vertical mergers are usually pro-competitive can detract from rigorously examining the evidence on possible foreclosure and the parties' claimed efficiencies. In the last few years, the U.S. agencies have shown an increasing willingness to contest vertical mergers or demand remedies as a condition to avoiding litigation, notably the decision to litigate *AT&T/Time Warner*,⁹² and to seek remedies in *Staples/Essendant*⁹³ and *Fresenius Medical Care/NxStage*.⁹⁴ There are also widely-reported rumours that the U.S. agencies may update their *Vertical Merger Guidelines*, which have not been revised since 1984.⁹⁵ This may suggest that the lessons of Neo-Brandeisian antitrust are already being observed, although not necessarily in all the ways those commentators intended.

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

i) The Implications of *Siemens/Alstom*

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

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

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

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

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

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

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

ii) The Franco-German Manifesto

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

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

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

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

If implemented, the Manifesto would transform pan-European competition policy, undermining the current European consensus described in section 1(c), which is based on a politically independent merger policy that uses objective criteria to assess the impact of notified transactions on competition, not on competitors. The Manifesto's sponsorship by the two largest economies in the EU (post-Brexit) provides it with both impetus and legitimacy as negotiations between Member States' governments commence and as the Commission embarks on new leadership in late 2019. The Franco-German position has more recently been strengthened by support from Poland, with a further set of proposals being published in July 2019.¹⁰⁴ This document reinforces the Manifesto, and adds further proposals focused on how best to modernize EU merger policy, including in respect of the digital economy, where predatory or "killer" acquisitions are noted as requiring particular consideration. At the time of writing, the potential timetable for moving the Manifesto forward remains unclear, but the collective power wielded by the French, German and Polish governments in the corridors of

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

iii) The Future of Competition Policy in the EU

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

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

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

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

to market definition, the Commission's existing framework is a precedent-based approach.¹⁰⁶ For reasons of regulatory certainty, the Commission can be reluctant to change its approach to market definition in an industry it has examined before. This has its advantages, given that all Commission decisions are published, allowing companies and their advisors to plan for the merger review process. However, in industries that have developed significantly in a short period of time, merging parties are typically required to submit voluminous evidence to overturn Commission precedent, which is itself based on a historic assessment of the relevant market. While this "presumption of good precedent" has no doubt been an effective way of achieving regulatory certainty, it should not obviate the need for the Commission to be receptive to adjusting its approach where the evidence substantiates such adjustment. The exposure of this tension in *Siemens/Alstom* may encourage the Commission to look carefully at its current practice in this area. In a landmark speech delivered just after her reappointment as Commissioner for Competition in December 2019, Margrethe Vestager, announced the Commission's intention to re-examine its approach to market definition analysis that was last codified in its market definition notice in 1997.¹⁰⁷

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

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

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

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

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

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

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

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

a) Recent debate on *Competition Act* Reform

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. The Way Forward: Implications for the Future

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

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

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

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

ENDNOTES

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

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

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

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

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

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

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

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

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

⁹ *Ibid* at 11.

¹⁰ *Ibid*.

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

¹² *Ibid*.

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

¹⁴ “FANG” is an acronym for Facebook, Amazon, Netflix, and Google.

¹⁵ See generally, Lina M. Khan, “Amazon’s Antitrust Paradox” (2017) 126 *Yale LJ* 710 [Khan].

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

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

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

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

²⁰ *Ibid* at 4.

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

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

²² *Ibid* at 8.

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

²⁴ *Ibid* at para. 95.

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

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

²⁷ Phillips, *supra* note 13 at 2.

²⁸ *Ibid*.

²⁹ Bork, *supra* note 5 at 7.

³⁰ Phillips, *supra* note 13 at 3.

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

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

³³ Wu, *supra* note 16 at 2.

³⁴ Phillips, *supra* note 13 at 3.

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

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

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

³⁸ OECD, *supra* note 8 at 11.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁵³ *Ibid.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁷⁰ *Tervita*, *supra* note 23.

⁷¹ *Ibid* at para 87.

⁷² *Ibid*.

⁷³ See e.g. Khan, *supra* note 15.

⁷⁴ Phillips, *supra* note 13 at 3.

⁷⁵ Khan, *supra* note 15 at 744.

⁷⁶ *Ibid* at 716.

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

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

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

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

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

⁸² Brian Feldman, “AOC Doesn’t Use Facebook Anymore” (15 April 2019),

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

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

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

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

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

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

- ⁸⁸ For a fuller overview of this consensus, see Steven C Salop, “Invigorating Vertical Merger Enforcement” (May 2018) 127 Yale LJ 1962.
- ⁸⁹ Khan, *supra* note 15 at 754.
- ⁹⁰ Jonathan B. Baker et al, “Five Principles for Vertical Merger Enforcement Policy”, (2019) 33:3 Antitrust 12, online: <<https://economics.mit.edu/files/17754>>.
- ⁹¹ Shapiro, *supra* note 84 at 741.
- ⁹² Edmund Lee and Cecilia Kang, “U.S. Loses Appeal Seeking to Block AT&T-Time Warner Merger”, *The New York Times* (26 February 2019), online: <<https://www.nytimes.com/2019/02/26/business/media/att-time-warner-appeal.html>>.
- ⁹³ Federal Trade Commission, “FTC Imposes Conditions on Staples’ Acquisition of Office Supply Wholesaler Essendant Inc.” (28 January 2019), online: <<https://www.ftc.gov/news-events/press-releases/2019/01/ftc-imposes-conditions-staples-acquisition-office-supply>>.
- ⁹⁴ Federal Trade Commission, “FTC Requires Fresenius Medical Care AG & KGaA and NxStage Medical, Inc. to Divest Bloodline Tubing Assets to B. Braun Medical, Inc. as a Condition of Merger” (19 February 2019), online: <<https://www.ftc.gov/news-events/press-releases/2019/02/ftc-requires-fresenius-medical-care-ag-kgaa-nxstage-medical-inc>>.
- ⁹⁵ M Sean Royall and Richard H Cunningham, Partners, and Chris Wilson and Chris Kopp, Associates, Gibson, Dunn & Crutcher LLP, “Updated Vertical Merger Guidelines May Be On The Horizon” (24 April 2019), online: <<https://www.wlf.org/2019/04/24/wlf-legal-pulse/updated-vertical-merger-guidelines-may-be-on-the-horizon/>>.
- ⁹⁶ Mr. Le Maire’s comments were widely reported in the press, including at: Natasha Turak, “French finance minister blasts EU decision to block Alstom-Siemens merger in face of Chinese competition” *CNBC* (10 February 2019), online: <<https://www.cNBC.com/2019/02/10/le-maire-blasts-eu-decision-to-block-alstom-siemens-merger.html>>.
- ⁹⁷ Mr. Altmaier was speaking at a technology conference in Munich, as reported by Reuters: Leigh Thomas, “France, Germany step up pressure over Alstom-Siemens deal”, *Reuters* (21 January 2019), online: <<https://www.reuters.com/article/us-alstom-m-a-siemens/france-germany-step-up-pressure-over-alstom-siemens-deal-idUSKCN1PF0PK>>.
- ⁹⁸ Peter Altmaier, “Announcement of Germany’s industrial strategy 2030” (Remarks delivered at the announcement of Germany’s “industrial strategy 2030”, 5 February 2019).
- ⁹⁹ *House of Commons Debates*, 33rd Parl, 1st Sess, No 8 (7 April 1986) at 11927 (Hon Michel Côté). In the same debate it was noted specifically that the *Competition Act* would “help Canadian businesses face up to their foreign competitors, both domestically and internationally.”
- ¹⁰⁰ *Franco-German Manifesto*, *supra* note 3.
- ¹⁰¹ *Ibid* at 3.
- ¹⁰² *Ibid* at 6.
- ¹⁰³ The European Council is a collective, political body that sets the European Union’s overall political direction and priorities. It comprises the heads of state or

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

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

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

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

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

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

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

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

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

¹¹² Pecman, *supra* note 65.

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

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

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

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

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

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

¹²⁰ *Ibid* at 45.

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

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

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

¹²⁴ *Ibid* at para 130.

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

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

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

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

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

¹²⁹ *Ibid.*

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

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

¹³² *Ibid.* at 124.

A REPLY TO CHIASSON AND JOHNSON, FACEY AND DUECK

Roger Ware

In a recent article in this Journal Matthew Chiasson and Paul Johnson proposed a major reframing of Canadian enforcement policy on horizontal mergers towards the promotion of innovation and away from more established criteria based on static efficiency. As a vehicle for accomplishing this goal they propose the abolition of section 96, the efficiencies defense. In this article, which echoes the position taken by Brian Facey and David Dueck in an earlier reply, I argue against the Chiasson and Johnson proposal. I point out that Canada's enforcement policy on horizontal mergers has evolved over 30 years to become an exemplary framework for evaluating mergers based on economic efficiency, albeit static efficiency. Their proposal would abandon the current highly sophisticated framework in favour of a much vaguer non-consequentialist approach to merger policy. I show that such a change would introduce greater uncertainty into the enforcement framework, with the potential for both Type I and Type II errors to increase. I also argue that the debate over innovation and market structure has placed too much emphasis on the so called "inverse-U shaped relationship". I conclude that a better approach would be to keep the current statutory framework but to exercise the discretion already available under the Act to give consideration to the innovation effects of proposed mergers.

Dans un récent article paru dans ce Journal, Matthew Chiasson et Paul Johnson proposaient une réforme majeure de la politique canadienne d'application de la loi concernant les fusions horizontales tendant à la promotion de l'innovation plutôt qu'au respect de critères plus traditionnels fondés sur l'efficacité statique. En tant que moyen pour parvenir à cet objectif, ils proposent l'abrogation de l'article 96, la défense fondée sur les gains en efficacité. Dans cet article, qui fait écho à la position adoptée par Brian Facey et David Dueck dans une réponse antérieure, je présente les arguments contre la proposition de MM. Chiasson et Johnson. Je fais remarquer que la politique d'application de la loi du Canada en matière de fusions horizontales a évolué pendant 30 ans pour devenir un cadre exemplaire afin d'évaluer les fusions à la lumière de l'efficacité économique, même s'il s'agit d'efficacité statique. Aux termes de leur proposition, le cadre actuel hautement sophistiqué serait abandonné au profit d'une approche non-conséquentialiste beaucoup plus vague de la politique en matière de fusion. Je fais remarquer qu'un tel changement serait source d'une plus grande incertitude au sein du cadre d'application de la loi, et de possibilités d'accroissement du nombre d'erreurs du type I et du type II. Je soutiens en outre que le débat au sujet de l'innovation et de la structure

du marché a placé un accent trop prononcé sur la soi-disant « relation en U inversé » (inverse-U shaped relationship). Je conclus que mieux vaudrait conserver le cadre législatif actuel, mais exercer le pouvoir discrétionnaire déjà accordé par la Loi pour envisager les effets novateurs des fusions proposées.

Introduction

The Summer 2019 issue of the *Canadian Competition Law Review* included articles on the efficiencies defence by Matthew Chiasson and Paul Johnson¹ and by Brian Facey and David Dueck.² The former authors were advocating for, and the latter authors opposing, a major shift in the enforcement approach to horizontal mergers under Canadian Competition Law.

The central proposition from Chiasson and Johnson is to reframe the enforcement of mergers towards the promotion of innovation, and away from the promotion of static efficiency measures, the latter emphasis having prevailed since the implementation of the 1986 Competition Act (the “Act”). Chiasson and Johnson propose that one way to encourage this redirection is to abolish section 96 of the Act, which contains the efficiencies defense. The authors emphasize that their argument for abolishing the efficiencies defense is distinct from those that have been put forward by others, most notably that doing so would align Canada’s merger policy with that of other major OECD economies. They further argue that a significant fraction of the gains to be expected from abolishing the efficiencies defense would be gains in “X-efficiency”, the idea conceived by Harvey Leibenstein more than 50 years ago that describes production by firms within, rather than on, their production frontier.³

Facey and Dueck take the opposite view, and argue strongly for keeping the efficiencies defense. There are two major elements to their case. The first is the claim that many mergers stimulate innovation rather than stifle it. In effect, they support the efficiencies defense as being pro-innovation rather than against it. Second, they argue that quantification of efficiency gains by the Competition Bureau and the Tribunal tends to underestimate those gains, partly because they are likely to have a significant qualitative component, which is challenging to quantify.

While I am supportive of the goal of encouraging innovation, I have doubts about the method of achieving it put forth by Chiasson and Johnson. Canada’s approach to merger enforcement has been refined steadily for more than three decades (longer if one goes back to an influential report by the Economic Council of Canada in 1969)⁴ and is precise, coherent and

based on sound economic principles. It would be fair to describe Canada's merger enforcement methodology as an example for Competition Policy enforcement throughout the world.⁵

In the following sections I set out my concerns with the proposal advocated by Chiasson and Johnson.

Do we want Competition Policy to be Consequentialist, or not?

The development of enforcement policy on horizontal mergers in Canada represents the culmination of a long evolution of steering competition law and policy toward solid *economic* foundations. The 1986 Competition Act itself was enacted with that same goal, and with the intention of putting economic efficiency in the forefront of policy under the new statutory framework.

In order to design competition policy within an economic framework, it is desirable that the framework be *consequentialist*. A consequentialist policy is one that is evaluated by its outcomes, and not by some vague wish embedded in the policy itself. As Ross and Winter put it in their authoritative survey of efficiencies in merger policy

A common argument that violates this principle is that competition policy is about "protecting competition," and, therefore, any merger negatively impacting competition should be ruled out. Such an argument is without economic foundation. What should ultimately matter in terms of approving or rejecting a merger is the impact that the merger has on individual welfare.⁶

Alternatively, as Kenneth Heyer of the U.S. Department of Justice is quoted as stating, "efficiency is the goal, competition is the process".⁷

With this in mind, some of the language used by Chiasson and Johnson is vague and seems to violate this principle. For example, in the *Abstract* they state that:

"the Competition Act has a bias towards authorizing anticompetitive mergers in the name of economic efficiency even though such mergers are more likely to reduce efficiency overall".⁸

In addition, they note that:

“it is worth asking whether there is a meaningful conflict between competition and efficiency to justify a defence for anticompetitive mergers in the first place”.⁹

The problem that I have with these statements is that they are not *consequentialist*. If we just consider the term “competition” itself, it is sufficiently vague that the precise meaning is unclear. This can be clearly seen through the following two examples. First, if firms are Bertrand competitors with homogeneous products, then two firms are sufficient to ensure an outcome of perfect competition.¹⁰ So, what does adding another firm do—does it make the market more “competitive”? Judged by consequentialist criteria it does not. Second, consider a market that meets the conditions for a perfectly contestable market.¹¹ Now just one firm is sufficient for price and output to be set at competitive levels. Again, adding more firms would not make the market more competitive. In general, without defining the conditions of competition, it is impossible to say what “increasing competition” means.

Second, Chiasson and Johnson use the term “anticompetitive mergers” frequently and loosely. From an economic perspective, the term anticompetitive merger should be reserved for a merger that leads to a reduction in total economic surplus or economic welfare, compared with a but-for world absent the merger. Judged by this criterion, the enforcement of the Competition Act should not lead to the approval of any anticompetitive mergers, because the enforcement standard and the welfare standard would be the same.^{12 13}

Type I and Type II errors

Any enforcement strategy, not just in the field of competition law, has to consider the possibility of what statisticians call Type I and Type II errors. A Type I error occurs when an innocent person is convicted of a crime, and a Type II error occurs when a guilty person goes free. In the context of merger policy, a Type I error would occur when a merger that would increase long run total welfare is blocked, and a Type II error would occur when a merger that would decrease long run total welfare is permitted.

A merger policy based around criteria of static efficiency, such as the one embedded in the Act, will of course still lead to occasional Type I and Type II errors. Good mergers will be blocked and bad mergers will be permitted. Such is the nature of the forward-looking and speculative nature of the merger review process, which involves decision making under uncertainty. However, the frequency of such errors would likely increase if merger policy is, as suggested by Chiasson and Johnson, reformulated for the purposes of

stimulating innovation, which is a dramatic change in the foundation of Competition Policy. The result would be two-fold. First, mergers that will likely increase innovation will be blocked (Type I errors). Second, mergers that would have likely decreased innovation will be permitted (Type II errors). And, most likely, these Type I and Type II error probabilities would increase, for the fundamental reason that innovation is subject to a high level of uncertainty, and predicting innovation is much more difficult than predicting changes in measures of static efficiency.¹⁴

The reasons that Type I and Type II errors will increase are straightforward and twofold. First, the payoffs concerning any policy towards innovation are inherently long-term—much longer term than the standard two-year horizon of conventional policy towards horizontal mergers. Second, the process of innovation involves great uncertainty, almost by its very definition. If we knew how to make a lighter and more powerful battery for electric cars, we would already be doing it. Adding innovation as a policy goal, no matter what the instrument is, will inevitably create more uncertainty in achieving successful outcomes.

Legal theorists will debate about the desired level of Type I and Type II errors, but they will always occur with positive probability. Accordingly, if we abolish section 96 of the Competition Act, as Chiasson and Johnson propose, we will have to accept that more pro-competitive mergers (which would have increased long-run static welfare) will be likely be prohibited (Type I errors).

A more sophisticated approach to the problem of the increased uncertainty that would be introduced by any competition policy aimed at promoting innovation would be to explicitly introduce the criteria of maximizing *expected total surplus* (rather than total surplus) as the goal of merger policy. An excellent discussion of how this could work in principle is offered by Federico, Scott Morton, and Shapiro (2019).¹⁵ Expected total surplus means that even an innovation project with a low probability of success could have an important effect on the enforcement decision if the impact of a successful innovation would be large. As an example, a merger could be blocked when an innovation project will be shut down after the merger, but has a low probability of success even if it continued. This could increase expected total surplus because if the project was successful, the gains would be very large. But it is more likely that the innovation will not succeed in any case, whether the merger goes ahead or not.¹⁶ A merger might also be approved where more and additional innovation would have taken place without the merger, but a completed merger had a higher expected surplus.

Serious doubt exists as to whether a merger rule based on expected total surplus would be judiciable (i.e., capable of being implemented by the Competition Tribunal). Such a rule would require the Tribunal to hear and validate evidence on the probability of success of innovation programs that are either in progress or planned by the merging parties. The additional surplus that would be created by a successful innovation would also have to be quantified and supplied in evidence. Both the surplus magnitudes and the associated probabilities are difficult to estimate with any accuracy and it is likely that experts would widely disagree. The Tribunal has found it challenging to adjudicate merger cases based on essentially the criterion of total surplus (e.g. *Superior Propane*) and a more elaborate methodology of expected total surplus is likely not feasible to implement.

The “Inverted U-Curve”: Would preventing more mergers actually increase innovation?

Chiasson and Johnson are convinced that increasing “competition” will increase innovation and that preventing more mergers will increase competition. Neither of these propositions is particularly robust, however, and the link is a tenuous one on which to base a major shift in competition policy.

The first proposition had been debated by economists at least since the work of Schumpeter (who favoured monopoly) and Arrow’s pioneering article in 1962.¹⁷ Arrow did not reach any firm conclusions. However, since that time a vast literature has expanded our knowledge of this topic, from both a theoretical and an empirical perspective.

Several effects interact and impinge on the relationship between innovation and market structure. These effects include:

- i) *The Replacement Effect.* Arrow (1962) showed that a monopolist would have less incentive than a competitive firm to invest in a given process innovation because the monopolist is replacing its own monopoly profit stream and the competitive firm is not.
- ii) *The Schumpeter Effect.* Schumpeter argued very early on that economies of scale in the R&D process meant that large firms have an inherent advantage.
- iii) *The Efficiency Effect.* The efficiency effect works in the opposite direction to the replacement effect. When a monopolist can beat an entrant to a given innovation, it will always have an additional incentive to do so, because it will be able to preserve its monopoly profits, whereas the

entrant will only get a share of duopoly profits if it is first to market with the innovation.

- iv) *Patent Racing Effects*. When a race among firms occurs to be the first to file a patent on a given innovation, there is a large “winner-takes-all” discontinuity in the payoff function, which increases the incentive to invest in R&D. In some cases, total investment in R&D can even exceed the socially optimal amount (Loury 1979).

It is not surprising, given the complex interaction between these effects, that there is not a consistent relationship between innovation and market structure. In an influential paper Aghion, Bloom, Blundell, Griffith and Howitt (2005) derived an “inverse U-curve” relationship between innovation and market structure, such that as competition increases innovation first increases for fairly concentrated markets but as competition continues to increase at some point the industry rate of innovation will start to decline. The authors also provided some empirical support for their conclusions with data from several industries.¹⁸

Facey and Dueck take the inverse U-curve as given and point out that, for any given merger, we do not know which part of the curve the industry is on, so that a merger might lead to more innovation (the downward sloping segment of the curve) rather than less innovation (the upward sloping segment, seemingly the segment identified by Chiasson and Johnson).

Although the relationship between market structure and innovation has been an active research field for at least 50 years, more recent work has thrown considerable doubt on whether an inverse-U relationship can be supported, either as a theoretical result or an empirical one. A good summary of recent work is provided by Haucap, Rasch and Stiebale, who also study this relationship in the pharmaceutical industry.¹⁹ Their conclusion, broadly, is that in research intensive industries innovation tends to increase with the number of firms when there are a small number of firms (roughly from one to three firms). When there are a larger number of firms, the various factors at play make it impossible to find a consistent effect. Marshall and Parra also show in a theoretical model that increases in competition (measured by market structure in a differentiated market) may increase or decrease the rate of innovation and, as a result, increase or decrease measures of total welfare.²⁰ Finally, in a new empirical paper based on the hard disk drive industry, Igami and Uetake show that the data support a rate of innovation that initially increases with increasing competition but then steadily levels

off.²¹ There is no indication of an inverted U-relationship in any of these recent papers.

As others have noted²² the structural relationship between innovation and competition, if it exists at all, does not model the impact of *mergers*, but rather the general relationship between market structure and innovation. One key issue in any fully fleshed out theory of mergers is whether a merger will be more likely to encourage additional consolidation, or alternatively, whether a merger is more likely to encourage entry, which will tend to restore the pre-merger level of competition and mitigate any anti-competitive effects of the merger

If Section 96 is not the right vehicle for a greater emphasis on innovation in merger decisions, then how should this be accomplished in Canada?

Several influential American scholars have recently argued for a greater emphasis on promoting innovation in antitrust policy in general and in merger policy in particular.²³ As Facey and Dueck point out, the Act already provides for consideration of innovation. The problem with addressing innovation through section 96 is that it would distort the current framework *away* from the efficiency promoting structure that is currently in place, in favour of the hope, and little more, that the new distorted framework would succeed in promoting a higher rate of innovation.

A further complication with the Chiasson and Johnson proposal is the direction given to the Tribunal by the Supreme Court of Canada in *Tervita*. In that decision, the SCC seemed to direct the Tribunal to adhere closely to a quantified, and static, yardstick of total surplus as a decision rule in evaluating mergers.²⁴

Facey and Dueck argue that even the current framework does not give proper consideration to efficiency gains, so that repealing section 96 would move the needle further in the wrong direction, when more consideration should be given to efficiency gains in mergers under the current framework, rather than less, as is being proposed. The case made by Facey and Dueck is essentially twofold: first, that the Bureau overstates the SLC effects of a merger by assuming that they will remain in place over a long time horizon, when entry and product differentiation will typically mitigate these effects. Second, the efficiency effects of a merger are often of a qualitative nature, and hard to quantify as part of the computational exercise now required by the Tribunal in the wake of the *Tervita* decision.

A balanced assessment of these arguments is that Canada's framework does already allow for consideration of innovation effects of a merger, with significant discretion available to the Commissioner in how that consideration is exercised. This seems a preferable arrangement to tinkering with the Act in a way that is guaranteed to distort decision making, by not giving the appropriate weight to mergers that are expected to have large static efficiency gains.

Conclusions

Several authors have proposed recently that merger policy should place a greater emphasis on innovation effects. As a general proposition this is not novel; for example Gilbert and Sunshine in 1995 proposed that "innovation markets" should be defined in addition to product and geographic markets when investigating a potentially anticompetitive merger.²⁵ Federico, Scott Morton and Shapiro propose something similar to Gilbert and Sunshine, suggesting that an *innovation diversion ratio* can be identified, which will isolate the likely effects of a proposed merger in reducing innovation relative to the but for world in which the merger did not take place. Such proposals are constructive and may indeed help to increase the emphasis put on innovation in merger review. The proposal by Chiasson and Johnson to repeal section 96 with the same purpose in mind is not in my view a helpful one, for the reasons I have set out in this article.

ENDNOTES

¹ Matthew Chiasson & Paul A Johnson, "Canada's (In)efficiency Defence: Why Section 96 May Do More Harm Than Good for Economic Efficiency and Innovation" (2019) 32:1 *Can Competition L Rev* 1 [Chiasson & Johnson].

² Brian A Facey & David Dueck, "Canada's Efficiency Defence: Why Ignoring Section 96 Does More Harm Than Good for Economic Efficiency and Innovation" (2019) 32:1 *Can Competition L Rev* 33.

³ There is an obvious irony in abolishing an "efficiencies defense" designed to promote efficiency, in order to promote efficiency.

⁴ Canada, Economic Council of Canada, *Interim Report on Competition Policy*, (Ottawa: Queen's Printer, 1969).

⁵ "Canada is the leading jurisdiction in which modern competition law has engaged with the problem of how to approach anticompetitive mergers where nontrivial efficiency gains are also expected". Roger Ware & Ralph Winter, "Merger Efficiencies in Canada: Lessons for the Integration of Economics into Antitrust Law" (2016) 61:3 *The Antitrust Bulletin* 365 at 375.

⁶ Thomas Ross & Ralph A Winter, "The Efficiency Defense in Merger Law: Economic Foundations and Recent Canadian Developments" (2004) 72:2 *Antitrust LJ* 471.

⁷ See William J Kolasky & Andrew R Dick, “The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers” (Paper delivered at the United States Department of Justice Antitrust Division, 20th Anniversary of the 1982 Merger Guidelines: The Contribution of the Merger Guidelines to the Evolution of Antitrust Doctrine, 10 June 2002), online: <<https://www.justice.gov/archives/atr/20th-anniversary-1982-merger-guidelines>> at 2 (quoting Kenneth Heyer of the U.S. Department of Justice as stating, “efficiency is the goal, competition is the process”).

⁸ Chiasson & Johnson, *supra* note 1 at 1.

⁹ *Ibid* at 4.

¹⁰ The Bertrand model of price-setting oligopoly is one of the most basic models employed in antitrust economics. With two firms producing identical products, the Bertrand equilibrium has both firms producing at marginal cost, i.e. mimicking the equilibrium in perfect competition.

¹¹ In a perfectly contestable equilibrium a single firm (i.e. a monopolist) is forced to price at marginal cost by the threat of entry which could substitute the entrant’s production for the entire supply of the incumbent.

¹² The recent decision by the Supreme Court of Canada in *Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3 (*Tervita*) is supportive of a more mainstream adoption of the total surplus criterion.

¹³ Perhaps some blame should accrue to the term Substantial Lessening of Competition, which despite more than 30 years of experience with the Competition Act, still lacks a clear definition. There is little clarity from either the Tribunal or the Bureau as to whether an SLC is defined solely from the demand side, or whether the Bureau should take into consideration any variable cost savings before identifying a lessening of competition. The Tribunal in *The Commissioner of Competition v Superior Propane Inc*, 2002 Comp Trib 16 seemed to favour the former approach, but Chief Justice Crampton in *The Commissioner of Competition v. CCS Corporation et al.*, 2012 Comp Trib 14 (the Competition Tribunal’s decision in the *Tervita* case) and comments from the Bureau in their “Practical Guide to Efficiencies Analysis in Merger Review” seem to favour the latter approach.

¹⁴ There is another reason to expect errors to increase: the long history of government involvement in promoting innovation has taught us that governments are not actually very good at it.

¹⁵ Giulio Federico, Fiona Scott Morton & Carl Shapiro, “Antitrust and Innovation: Welcoming and Protecting Disruption” in Josh Lerner and Scott Stern, eds, *Innovation Policy and the Economy, Volume 20* (Chicago: University of Chicago Press, 2019) 125 [Federico, Scott Morton & Shapiro].

¹⁶ As Federico, Scott Morton and Shapiro explain, this is why a rule of “more likely than not” as a criterion for considering the innovation will lead to errors in decision making. *Ibid* at 16.

¹⁷ Kenneth J Arrow, “Economic Welfare and the Allocation of Resources for Inventions” in Richard R Nelson, ed, *The Rate and Direction of Inventive Activity* (Princeton: Princeton University Press, 1962) 609.

- ¹⁸ Philippe Aghion, Nick Bloom, Richard Blundell, Rachael Griffith & Peter Howitt, “Competition and Innovation: An Inverted U-Relationship” (2005) 120:2 *Q J Economics* 701.
- ¹⁹ Justus Haucap, Alexander Rasch & Joel Stiebale, “How Mergers Affect Innovation: Theory and Evidence” (2019) 63 *Intl J Industrial Organization* 283.
- ²⁰ Mitsuru Igami & Kosuke Uetake, “Mergers, Innovation, and Entry-Exit Dynamics: Consolidation of the Hard Disk Drive Industry, 1996-2016” (2019) SSRN Working Paper, online: <<https://ssrn.com/abstract=2585840>>.
- ²¹ Guillermo Marshall and Alvaro Parra, “Innovation and competition: The role of the product market” (2019) 65 *Intl J Industrial Organization* 221.
- ²² Federico, Scott Morton & Shapiro, *supra* note 15.
- ²³ *Ibid.*
- ²⁴ See e.g. *Tervita*, *supra* note 12 at para 131 *et seq.*
- ²⁵ Richard Gilbert & Stephen Sunshine, “Incorporating Dynamic Efficiency Concerns in Merger Analysis: The Use of Innovation Markets” (1995) 63:2 *Antitrust LJ* 569.

YEAR IN REVIEW 2019: COMPETITION LAW IN THE DIGITAL AGE

Susan Hutton, Laura Rowe & Sarah Stirling-Moffet

Under a new Commissioner of Competition, Matthew Boswell, 2019 was a somewhat quieter year for Canada's Competition Bureau in terms of difficult merger cases but saw, if anything, relatively greater enforcement activity on the abuse of dominance and deceptive marketing fronts. In terms of overall approach, the prevailing winds seemed to be steady through the transition, as Mr. Boswell continued to focus on the digital economy and took the opportunity to update both the Abuse of Dominance Guidelines and the Intellectual Property Enforcement Guidelines to reflect ongoing case law developments applicable to these areas.

Sous la tutelle de Matthew Boswell, le nouveau commissaire de la concurrence, 2019 a été une année un peu plus calme pour le Bureau de la concurrence du Canada pour ce qui est des affaires complexes dans le domaine des fusions. Cependant, on a constaté une relative augmentation des activités d'application de la loi visant les abus de position dominante et la commercialisation trompeuse. En ce qui concerne l'approche globale, les principales tendances sont demeurées les mêmes pendant la transition : M. Boswell a continué à axer les efforts sur l'économie numérique et a profité de cette occasion pour mettre à jour tant les lignes directrices sur l'abus de position dominante que celles sur la propriété intellectuelle afin de tenir compte des évolutions de la jurisprudence applicables à ces domaines.

Introduction & Highlights

Canada's Competition Bureau (the "Bureau") welcomed a new Commissioner of Competition in 2019, as Matthew Boswell was confirmed in the role in March. Commissioner Boswell joined the Bureau in 2011 and had previously served as the Senior Deputy Commissioner of both the Mergers and Monopolistic Practices and the Cartels and Deceptive Marketing Practices branches. Prior to joining the Bureau, Commissioner Boswell was Senior Litigation Counsel in the Enforcement Branch at the Ontario Securities Commission and an Assistant Crown Attorney in Toronto with the Ministry of the Attorney General of Ontario.

The Bureau had a relatively quiet year in terms of difficult merger cases, with five cases "concluded with issues" (i.e., the subject of a Consent Agreement, abandoned or undertakings) in 2018-19 compared to seven in 2017-18 and nine in 2016-17. In contrast, the abuse of dominance and

deceptive marketing fronts had relatively busy years, with new investigations announced and several old ones concluded in industries ranging from pharmaceuticals to airlines. The Bureau also updated both the *Abuse of Dominance Guidelines* and the *Intellectual Property Enforcement Guidelines* to reflect ongoing case law developments applicable to these areas. Echoing directives from the Minister as well as enforcement priorities of its colleagues in Europe and the United States, an increasing focus on the digital economy was also at the forefront of the Bureau's activities, as reflected in its 2019-2020 Annual Plan and an invitation to market participants to provide information about competitive concerns in digital markets.

Other highlights of 2019 included:

- In July, the Bureau issued a *Draft Model Timing Agreement* for use in merger reviews where the parties intend to rely on the efficiencies defence.¹
- The Bureau updated its *Immunity and Leniency Programs*, clarifying that cooperating witnesses are not confidential informers and do not benefit from informer privilege.
- The International Consumer Protection and Enforcement Network (ICPEN) designated Canada's Competition Bureau as President-Elect of the Network. The Bureau will lead the Network from July 1, 2020 to June 30, 2021.
- The merger review provisions of the *Canada Transportation Act*, enacted in 2007, were used for the first time in 2019. Despite the Commissioner's conclusion that the acquisition by First Air of Canadian North would substantially lessen or prevent competition between the two airlines serving communities in Canada's far north, the Minister of Transportation approved the tie-up as being, on balance, in the public interest—but subjected it to several conditions.
- Parrish & Heimbecker opted to complete its proposed acquisition of a grain elevator in Virden, Manitoba from Louis Dreyfus Company upon the conclusion of the second 30-day waiting period following certification by the parties of their responses to a Supplementary Information Request. The Bureau responded by challenging the acquisition at the Competition Tribunal—proceedings are ongoing.
- The Competition Tribunal issued its decision in the Commissioner's abuse of dominance case against the Vancouver Airport Authority

(the “VAA”) related to the VAA’s refusal to allow more than two firms to provide in-flight catering and galley handling services at the Vancouver International Airport. While the Tribunal accepted the Commissioner’s argument that the VAA had a “plausible competitive interest” in the galley handling market, it ultimately dismissed the application, concluding that the VAA had legitimate business justifications for its conduct.

- The Hudson’s Bay Company and Ticketmaster each paid \$4.5 million to settle separate allegations of deceptive advertising/pricing practices, the former in relation to advertised sale prices (where evidence of the “ordinary selling price” did not meet the Bureau’s standard), and the latter in relation to additional fees added to the advertised prices for event tickets. Consent agreements were registered with the Tribunal to settle the allegations against both companies, neither of which admitted to any wrong-doing.
- The Bureau was also active on the advocacy front, intervening in reviews by both British Columbia and Ontario of liquor legislation and related regulations in those provinces, as well as in the Federal Department of Finance’s consultation on open banking, and the Canadian Radio-television and Telecommunications Commission’s (the “CRTC’s”) review of competition in mobile wireless services.

Mergers

Merger Review Thresholds & Filing Fees Increased

The pre-merger notification threshold for the “size of target” increased to \$96 million² in January 2019 based on either the target’s book value of assets or its gross revenues from sales in or from Canada. The threshold for the “size of parties” has not changed since the merger provisions went into force in 1989 and is set at \$400 million based on either the total book value of assets or the total gross revenues from sales in, from or into Canada of all parties to the transaction, together with their affiliates.

Of note, for the first time since indexing of the “size of target” threshold began, the threshold has remained the same for 2020 as this article went to press (March 2020). In contrast, the merger filing fee, which is required to be indexed annually for inflation pursuant to the *Service Fees Act*, increased in April 2019 to \$73,584 and will increase again to \$75,056 for transactions filed on or after April 1, 2020.³

Expanded Role for Merger Notification Unit

One of Commissioner Boswell's first moves was to expand the role of the Merger Notification Unit (formerly the MNU), now referred to as the Merger Intelligence and Notification Unit (MINU), to reflect a broader role in actively gathering intelligence about non-notifiable transactions in Canada that might raise competition concerns.⁴ In his first major speech as Commissioner at the Canadian Bar Association's Competition Law Spring Conference in May 2019, Commissioner Boswell announced this broadened role for the MINU, and encouraged parties to non-notifiable transactions that could raise competition concerns to voluntarily provide information about the transaction to the Bureau early on, to avoid a post-closing review.⁵

Transport Canada Approves First Air and Canadian North Merger despite Bureau's Objections

In February 2019, for the first time since the provision was enacted in 2007, the Competition Bureau provided a report to the Minister of Transport as part of a public interest review as it relates to national transportation pursuant to section 53.1 of the *Canada Transportation Act*. If invoked, the provision gives the Minister of Transportation—rather than the Commissioner or the Competition Tribunal—the final say as to whether the merger is in the public interest (taking the Commissioner's views of the likely impact on competition into account as only one factor of many). The Commissioner reported to the Minister in this case that the proposed merger of First Air and Canadian North would likely result in a substantial lessening of competition in the provision of passenger travel and cargo services in Nunavut and the Northwest Territories.⁶

After receiving the Commissioner's report and concluding his public interest review, the Minister of Transport approved the merger subject to a series of terms and conditions. Such terms and conditions include a moratorium on price increases for passenger and cargo travel beyond those related to operating costs, no reductions to weekly schedules, access to northern infrastructure for new airlines, increasing Inuit representation across the merged entity's operations, and transparency and accountability measures. The Minister said that the approval with terms and conditions "strikes a balance between any public interest considerations and the need to have a more efficient and financially sustainable northern air carrier."⁷

The merger review provisions of the CTA refer only to the Commissioner's "assessment of the competitive impact" of a merger. They do not explicitly mention the possibility of an efficiency defense to a transaction,

which the Commissioner and the Tribunal would have had to consider if the merger had been reviewed under the *Competition Act*. As a result, the Commissioner refused to consider the various efficiencies which appear to have been a principal basis of the Minister's public interest decision.

Thoma Bravo's Acquisition of Aucerna Approved with Consent Agreement

The Commissioner challenged one aspect of private equity firm Thoma Bravo's acquisition of Aucerna, a company that supplies a reserves valuation and reporting software called Value Navigator to Canadian oil and gas producers, among other products. Thoma Bravo already owned Aucerna's closest competitor in that space, Quorum, which supplies a competing software called MOSAIC.

The transaction had closed on May 13, 2019. In its investigation of this transaction, the Bureau concluded that the transaction was a merger to monopoly in the oil and gas reserves software market in Canada for medium and large producers. On June 14, 2019, the Bureau challenged the acquisition by filing an application with the Tribunal under section 92 of the *Competition Act*. Thoma Bravo subsequently entered into a consent agreement with the Bureau, the terms of which require Thoma Bravo to divest Quorum's MOSAIC business to a purchaser approved by the Commissioner.⁸

This was the first contested merger challenge filed with the Tribunal since 2015.

Commissioner Challenges P&H's Acquisition of Grain Elevator from Louis Dreyfus in Manitoba

The Commissioner also challenged the Parrish & Heimbecker (P&H) acquisition of a grain elevator in Virden, Manitoba from Louis Dreyfus Company in 2019. P&H's proposed acquisition of Dreyfus's 10 grain elevators in Western Canada was publicly announced in September 2019, and the Bureau responded by issuing a Supplementary Information Request. The transaction closed on December 10, 2019, just two days after the expiry of the second 30-day waiting period under the *Competition Act*, and over the Bureau's objections.⁹

On December 19, 2019, the Commissioner filed an application with the Competition Tribunal for an order requiring P&H to sell either its own elevator in Moosomin, Saskatchewan, or its newly acquired elevator in Virden. The Commissioner also sought a five-year prohibition on P&H acquiring

any other grain elevators in the relevant markets unless it notifies the Bureau of any such transaction.¹⁰

The Commissioner applied to the Tribunal for an expedited proceeding in this case before P&H filed its reply—the first proposed use of the (optional) alternative rules.¹¹ P&H opposed the use of the expedited proceeding process on the basis that the issues in dispute in this case are more complicated than the Commissioner made them out to be and that the Commissioner has an informational advantage. P&H also pointed out that the Commissioner retains the ability to seek an interim order under section 104 of the *Competition Act* to remedy any alleged imminent harm, although he had not done so. The Tribunal denied the Commissioner's application for an expedited proceeding, finding that the Commissioner had not persuaded the Tribunal that using the expedited process would be a reasonable and advisable option in light of the circumstances of this specific matter and considerations of fairness.

The hearings in this case are set for two weeks in November 2020.¹²

Efficiencies Defence in Merger Reviews: Bureau Issues Draft Model Timing Agreement

On July 16, 2019, the Bureau issued a draft model timing agreement for use in merger reviews where the parties intend to rely on the efficiencies defence in section 96 of the *Competition Act*.¹³ The efficiencies defence provides that the Tribunal cannot impose a remedy with respect to a merger that is likely to substantially lessen or prevent competition if the efficiencies likely to be gained from the merger are greater than, and would offset, the anticompetitive effects, and these efficiencies would likely be lost if the remedy were to be imposed.

As stated in its news release, the purpose of the timing agreement is “to ensure that the Bureau has the time and information it requires to properly assess the parties’ claimed efficiencies.” In order to do so, “the model agreement establishes timed stages for the parties’ engagement with the Bureau, including the production of evidence and information, throughout the review.”¹⁴

As of March 2020, the Bureau had received comments from several parties and had not yet finalized the Model Timing Agreement. While increasing the procedural certainty of merging parties, several commentators¹⁵ noted that the rigidity of the Agreement could serve to lengthen reviews—particularly in light of the (apparently new) refusal of the Bureau to consider

the efficiency defence until after the conclusion of its analysis of the likely competitive effects of the transaction.

Merging parties are not required to enter into a timing agreement with the Bureau, but if parties intend to rely on the efficiencies defence and wish to receive confirmation from the Bureau that it will not challenge the transaction, the Bureau will now insist on some form of a timing agreement. Alternatively, parties may choose to close after the statutory waiting period expires and test their efficiencies defence before the Competition Tribunal, if challenged.

Bid-Rigging and Conspiracies

Four Guilty Pleas and Two Settlements in Quebec Municipal Bid-rigging Scheme

On January 17, 2019, the first of four engineering executives charged in connection with a municipal bid-rigging conspiracy in Quebec pled guilty. Dave Boulay, the former Director and Assistant Vice-President, Outaouais for engineering firm Dessau Inc. (“Dessau”) pled guilty to participating in a bid-rigging scheme from 2006 to 2008 and was sentenced to 12-months, including 6 months of house arrest and 6 months under curfew.¹⁶

On February 19, 2019, Dessau reached a settlement with the Public Prosecution Service of Canada (“PPSC”) and agreed to pay \$1.9 million in relation to bid-rigging on municipal infrastructure contracts in Quebec from 2003 to 2011.¹⁷ The settlement took into account Dessau’s participation in the Government of Quebec’s Voluntary Reimbursement Program and the fact that Dessau is no longer in operation and had begun the process to dissolve the company.

On March 13, 2019, the engineering firm Genivar (now WSP Canada) was ordered to pay \$4 million as part of a settlement with the PPSC that concluded the Bureau’s investigation into the company’s role in a bid-rigging scheme between 2002 and 2011.¹⁸ This settlement also took into account WSP Canada’s participation in the Government of Quebec’s Voluntary Reimbursement program and the fact that the company has implemented a corporate compliance program designed to prevent further anticompetitive activity by employees.

On June 20, 2019, Michel Famery, formerly a Regional Vice-President for Dessau, pled guilty to rigging bids for City of Gatineau infrastructure

contracts between 2004 and 2006 and was sentenced to 18-months, including 9 months of house arrest and 9 months under curfew.¹⁹

On July 25, 2019, two more engineering executives pled guilty to participating in the bid-rigging scheme. André Mathieu, formerly Vice-President and Associate for Cima+ admitted to playing a lead role in the scheme between 2004 and 2008. He was sentenced to 22 months, including 7 months of house arrest and 15 months under curfew, and was ordered to perform 140 hours of community service. Claude Marquis, formerly Regional Director, Outaouais for Genivar, admitted to joining the scheme in 2005.²⁰ Marquis was sentenced to 6 months of house arrest, 13 months under curfew and 120 hours of community service.

Bureau Updates Immunity and Leniency Programs

The Bureau released a slightly updated version of its *Immunity and Leniency Programs* on March 15, 2019. The update states that cooperating witnesses are not considered “confidential informers,” and do not benefit from informer privilege.²¹ The update was triggered by an Ontario Superior Court of Justice ruling in the bread price-fixing case.²² In that case, the Court held that two cooperating witnesses were confidential informers. The Bureau’s update, which states that the opposite is true, is a reaction to the Court’s decision in that case which seems to be at odds with aspects of the Bureau’s Immunity and Leniency Programs. In particular, a cooperating witness has an ongoing duty under the Programs to cooperate with the investigation, which is at odds with the informer privilege that is tied to the granting of confidential informer status.

This update followed a significant revision to the Programs in September 2018, which had ended the automatic provision of leniency afforded to a corporate immunity applicant’s officers, directors and employees, and instead required that any implicated individuals must provide cooperation in order to qualify. That revision had also changed how fine reductions for leniency applicants are calculated, basing them on the value of cooperation, as opposed to the order in which the applicants first contacted the Bureau. Both updates had been criticized by the defendants’ bar for making the Programs less attractive to potential applicants, while the Bureau took the view that the amendments would encourage fuller and more timely cooperation by those participating in the Program.²³ Given the confidential nature of such discussions, there were limited indications in 2019 of whether and how these and other changes made to the Programs are working in practice.

Abuse of Dominance

As noted above, 2019 was a relatively busy year on the monopolistic practices front, as the Bureau pursued several abuse of dominance investigations, concluded others and decided not to appeal the decision of the Tribunal to dismiss its application against the VAA. It also requested public comments on potential abuses by so-called digital platform businesses and updated the Abuse of Dominance Guidelines to reflect the Tribunal's decision in the Toronto Real Estate Board (*TREB*) case regarding the role of business justifications in the assessment of whether conduct is anti-competitive.

Bureau Continues Investigation of Predatory Pricing Allegations Against WestJet and Swoop

The Bureau's investigation into allegations that WestJet's low-cost carrier division, Swoop, is engaging in predatory pricing began in November 2018. Flair Airlines ("Flair"), an "ultra low-cost carrier" ("ULCC") based in Edmonton, complained to the Bureau that WestJet and Swoop were offering below cost prices on six routes on which Flair operated and alleged that the intent of these low prices was to force Flair and other ULCC competitors out of the market.²⁴ Flair withdrew from the Edmonton-Hamilton route and claims that it lost about \$10 million because of WestJet and Swoop's actions.²⁵ The Commissioner filed a motion with the Federal Court seeking Section 11 orders against WestJet and Swoop on December 5, 2018, requiring them to produce documents relevant to the intent behind certain pricing and capacity decisions, the competitive landscape on certain routes and the impact of WestJet/Swoop's decisions on competition.²⁶ These orders were granted by Chief Justice Crampton on December 11, 2018.²⁷ The Order also compelled WestJet's Vice-President of Pricing and Revenue Management, John Weatherhill, to answer questions under oath. The Federal Court granted a second motion to the Commissioner, compelling a second WestJet senior employee, corporate planning manager Michael Claren, to be examined on April 29, 2019.²⁸ The Bureau has made no further statements about the investigation, which is presumed to be ongoing.

Competition Bureau Discontinues Investigations into Water Heater Rentals

On September 19, 2019, The Bureau announced that it had discontinued its investigation into Enercare Inc.'s water heater rental contracts and return practices in Ontario.²⁹ The Bureau concluded that, while Enercare

holds a dominant market position and that Enercare's use of "buyout only, useful life" contracts ("BOULC") has an exclusionary intent, the evidence obtained by the Bureau to date had not supported a conclusion that Enercare's conduct is having or has had the effect of substantially lessening or preventing competition.³⁰ In particular, the evidence did not establish that the BOULC assists Enercare in maintaining materially higher rental rates and was insufficient to establish that the BOULC had the requisite negative impact on entry or expansion by competitors.³¹ The end of this investigation comes nearly five years after the Bureau was successful in obtaining consent agreements with water heater rental companies related to similar anti-competitive conduct in the same geographic region.³²

Competition Bureau Concludes Investigations into Abuse of Dominance in the Pharmaceutical Industry

The Bureau concluded two investigations into alleged abuses of dominant positions in the pharmaceutical industry in 2019. One involved alleged restrictions on off-label use of vaccines provided to a provincial public immunization program and the other involved allegations of predatory pricing and exclusionary conduct related to biosimilar drug competition.

The vaccines investigation focused on the proposed inclusion of a clause in a procurement contract which would have restricted public health authorities from using the vaccine for off-label uses.³³ The Bureau concluded that there was no contravention of the *Competition Act* because the proposed clause was not ultimately included in the procurement contract. However, the Bureau implied in its position statement summarizing the investigation that it viewed such a clause as potentially having an anti-competitive purpose and that the use of similar restrictions in other contexts could be scrutinized.³⁴

The Bureau's predatory pricing investigation focused on whether Janssen Inc. engaged in conduct that inhibited the entry or expansion of biosimilar products in Canada that compete with Janssen's biologic product, Remicade.³⁵ The Bureau found that Janssen was engaging in conduct that could raise concerns under the abuse of dominance provisions of the *Competition Act*, but concluded that it lacked sufficient evidence that the conduct was likely to substantially lessen or prevent competition.³⁶ Janssen's alleged anti-competitive conduct included supplying hospitals with Remicade for 1 cent per vial, providing free Remicade to patients who are not eligible to receive reimbursement under a public or private insurance plan, entering into contracts with hospitals and public and private insurers that require or induce

them to favour Remicade over its biosimilars, and entering into exclusive contracts with third-party infusion clinics that prohibit them from infusing biosimilar alternatives to Remicade.³⁷ These practices are similar to the practices that led to Hoffmann La Roche's conviction under the former *Combines Investigation Act* (the pre-cursor to the *Competition Act*), which included giving away Valium to hospitals and selling it in government contracts for \$1 to eliminate a competitor from the hospital market and prevent other competitors from entering.³⁸ However, in this case, the Bureau did not find sufficient evidence to support either a predation theory of harm (as there was insufficient evidence that Janssen's low pricing strategy was sufficiently widespread that it was likely to eliminate, discipline or deter entry by one or more competitors) or an exclusionary theory of harm (as there was insufficient evidence that, absent Janssen's conduct, biosimilar firms would have likely competed more vigorously with Janssen on dimensions of competition like price, quality and service).³⁹ The Bureau did indicate that it would continue to monitor the biologic and biosimilar industry for anti-competitive conduct. Of particular interest to the Bureau is the implementation of "switching" policies by public and private insurers, as these policies have benefitted competition for other classes of pharmaceuticals and for biologics in other jurisdictions.⁴⁰

Competition Tribunal Rules Against the Commissioner in Vancouver Airport Authority Case

2019 saw the conclusion of the Commissioner's challenge of VAA's alleged abuse of dominance related to its decision to refuse to allow new firms to provide in-flight catering and galley handling services at the Vancouver International Airport. The Commissioner had argued that by restricting the provision of in-flight catering and galley services to two firms, the VAA had restricted airlines' choices and increased the costs of running an airline in Canada.⁴¹

The judicial members of the Competition Tribunal agreed with the Commissioner that the VAA had substantial or complete control of the market for galley handling services through its control of airside access at the airport and also agreed that the VAA had a "plausible competitive interest" in the market for galley handling services.⁴² The Tribunal's finding on "plausible competitive interest" clarified the concept, which had been introduced in the *TREB* case, explaining that it serves as a screen intended to filter out conduct that is unlikely to fall within the purview of section 79(1) (b) at an early stage of the Tribunal's assessment.⁴³ The Tribunal also elaborated on the meaning of "plausible," concluding that "plausible" should be

interpreted to mean “reasonably believable” and that there must be “some credible, objectively ascertainable basis in fact” to find a plausible competitive interest.⁴⁴ However, the Tribunal accepted VAA’s argument that it had legitimate business justifications for its conduct, namely that its intent was to preserve existing competition by ensuring that airlines at the airport were served by at least two full-service caterers—but that traffic conditions near the airport did not permit reliable catering by off-airport providers.⁴⁵

The Tribunal also concluded that VAA’s conduct did not have the effect of preventing or lessening competition substantially in the market.⁴⁶ Although the Tribunal found that “but for” VAA’s conduct there may have been some limited and positive price and/or non-price effects in the Galley Handling Market, it ultimately concluded that the Commissioner did not demonstrate that the requirements of section 79(1)(c) were met.⁴⁷

The Tribunal also concluded that the Regulated Conduct Defence (“RCD”) does not apply to section 79 (abuse of dominance) nor to any of the reviewable conduct provisions of the *Competition Act*.⁴⁸ The Tribunal noted that section 79 does not contain the required “leeway language”⁴⁹ which would have allowed the RCD to apply and that the rationales which supported the development of the RCD doctrine are not present in respect of section 79.⁵⁰

On November 20, 2019 the Commissioner announced that he would not appeal the Tribunal’s ruling. The Commissioner said that the decision provided valuable jurisprudence and helped to clarify certain aspects of the law and in particular that the Bureau was pleased that the Tribunal had confirmed that not-for profit and regulated entities are not exempt from complying with the abuse of dominance provisions of the *Competition Act*.⁵¹

Competition Bureau Asks Businesses to Report Potentially Anti-Competitive Conduct in the Digital Economy

In May 2019, the Minister of Innovation, Science and Economic Development, The Honourable Navdeep Bains, wrote a letter to the Commissioner requesting his assistance with considering critical issues related to the digital economy.⁵² The Minister asked the Competition Bureau to work with policy leads in the Strategy and Innovation Policy Sector of ISED to look into the impact of digital transformation on competition, the emerging issues for competition in data accumulation, transparency, and control, the effectiveness of current competition policy tools and marketplace frameworks and the effectiveness of current investigative and judicial processes.⁵³ In order to support this work, on September 4, 2019, the Bureau published a call-out

for information from Canada's business community about conduct in the digital economy that may be harmful to competition.⁵⁴

The Bureau is examining potential concerns that certain core digital markets have become increasingly concentrated, to the detriment of consumers and businesses. The Bureau sought information from participants in potentially affected markets to understand whether, and if so why, this is the case.

The Bureau's background paper outlined two potential explanations of concentration in digital markets: 1) digital markets may have 'tipped' to a dominant firm through legitimate market forces, or 2) dominant firms may have engaged in anti-competitive conduct rather than competition on the merits.⁵⁵ Legitimate market factors which may 'tip' digital markets and lead to less competition could include network effects, economies of scale and access to large volumes of data.⁵⁶ Anti-competitive strategies that could create or reinforce a dominant position include refusals to deal, self-preferencing, margin squeezing, most-favoured-nation requirements, and creeping acquisitions.⁵⁷ The Bureau is looking for information on these factors and strategies from market participants in order to potentially support investigations, inform how the Bureau analyzes anti-competitive strategies in the digital economy, and develop potential guidance to market participants.⁵⁸

Other jurisdictions such as the UK and the United States had already launched investigations into antitrust issues in the digital economy. The United States Justice Department started an antitrust review into internet companies such as Facebook, Google, Amazon and Apple in July 2019.⁵⁹ The UK's Competition and Markets Authority also began an investigation into Facebook and Google's alleged dominance in digital advertising in July.⁶⁰ Other jurisdictions, such as the EU, Germany and Australia have also launched investigations and studies on Big Tech.

Bureau Updates Abuse of Dominance Guidelines

In March 2019 the Competition Bureau released updated *Abuse of Dominance Guidelines*,⁶¹ replacing the previous edition which had been issued in 2012. The updated Guidelines provide more detailed guidance on business justifications and mitigate concerns about a potential increase in mandated access remedies in the context of alleged refusals to supply. The Bureau also replaced the longstanding guidance that market shares of less than 35% will generally not prompt further examination under section 79 with a general statement that it will not investigate a firm with a market share below 50%

unless other evidence indicates that the business possesses a “substantial degree of market power.”⁶² This change brings the Guidelines into line with recent enforcement practice and case law in the area.

Deceptive Marketing

The International Consumer Protection and Enforcement Network (ICPEN) designated Canada’s Competition Bureau as President-Elect of the Network, for a term which will run from July 1, 2020 to June 30, 2021. The Bureau has stated that its term at the head of this international enforcement agency network “will focus on promoting truth in advertising online and building consumer confidence in the digital economy.”⁶³

In February 2019, the Bureau called on sellers and marketers of natural health products in Canada to ensure that weight loss claims made in their advertising are not false, misleading or unsubstantiated. In particular, it reminded firms operating in this sector that “[u]nder the *Competition Act*, claims about the performance or efficacy of a product must be based on adequate and proper testing”.⁶⁴

The Bureau also sent letters to nearly 100 influencer marketing brands and agencies in Canada, urging them to ensure that their marketing practices comply with the law. The Bureau noted that they must make it clear when they have relationships with the businesses, products or services they promote, and that they should base any reviews on actual experience/use.⁶⁵

On October 28, 2019, the Bureau entered into a temporary consent agreement with FlightHub that prohibits it from using false or misleading marketing practices.⁶⁶ The Bureau announced it was investigating FlightHub for allegedly misleading marketing practices related to so-called “hidden fees” related to, for example, seat selection and flight cancellation. The Bureau is also investigating allegations that flight prices sometimes increase after flight selection. In its news release, the Bureau emphasized its focus on investigating compliance with deceptive marketing practices requirements in the digital economy.⁶⁷

Ticketmaster was investigated in 2019 in relation to certain practices related to the reselling of its tickets, and then separately paid a negotiated \$4.5 million administrative monetary penalty in June for allegedly misleading pricing practices. The Bureau concluded that Ticketmaster’s practices in relation to resellers did not contravene the *Competition Act*.⁶⁸ However, the investigation into misleading pricing claims in online ticket sales led the Bureau to conclude that “Ticketmaster’s advertised prices were not

attainable because they added mandatory fees during the later stages of the purchasing process ... the price representations were misleading even though the amount of the fees was disclosed before consumers completed their transaction⁶⁹ Ticketmaster admitted no wrongdoing but decided to settle the matter with a registered Consent Decree including the payment of \$4.5 million.⁷⁰

In May 2019, the Hudson's Bay Company (HBC) agreed to a negotiated \$4.5 million payment to settle allegations of misleading advertised prices for mattresses.⁷¹ As part of the consent agreement registered with the Tribunal, HBC will ensure that its advertising complies with the *Competition Act*.⁷²

Neither FlightHub, Ticketmaster nor Hudson's Bay Company admitted any wrongdoing in relation to these settlements.

Competition/Intellectual Property Interface

Final Version of Revised Intellectual Property Enforcement Guidelines Released

The Competition Bureau released the final version of its revised *Intellectual Property Enforcement Guidelines* (IPEGs) on March 13, 2019.⁷³ The IPEGs were updated to reflect the Federal Court of Appeal's findings in *Toronto Real Estate Board v Commissioner of Competition (TREB)* on the application of subsection 79(5) of the *Act* and the Federal Government's amendments to the *Patented Medicines (Notice of Compliance) Regulations* (the "*PM(NOC) Regulations*").⁷⁴ In *TREB*, the Federal Court of Appeal found that subsection 79(5)—which states that “an act engaged in only pursuant to the exercise of any right or enjoyment of any interest derived from [intellectual property] is not an anti-competitive act”⁷⁵—does not shield all assertions of intellectual property rights from allegations of anti-competitive conduct.⁷⁶ If a right based on IP is used to engage in anti-competitive conduct, the Bureau may (in some cases) intervene.⁷⁷ The IPEGs were also updated to reflect the amendments to the *PM(NOC) Regulations* which removed the prospect of “dual litigation” under both the Regulations and the *Patent Act*, and replaced the PMNOC summary proceedings with a full action which leads to a final determination under the *Patent Act*. Accordingly, the Bureau removed the discussion of the impact of dual litigation from the IPEGs. Notably, “dual litigation” will no longer be an expected cost of patent litigation which the Bureau considers when determining whether a payment in a patent litigation settlement is anti-competitive.

Advocacy

Bureau Advocates for Increased Competition in Liquor Sales and Banking

The Bureau was also busy on the advocacy front in 2019, in light of its promise to challenge regulators both federally and provincially to consider the impact of their regulatory activities on competition. Notably, the Commissioner made submissions to both British Columbia and Ontario's reviews of legislation and regulations relating to liquor licensing and made submissions to the Federal Department of Finance in response to its consultation paper on open banking.

The Commissioner's letter to the Government of British Columbia focused on how BC's laws apply to the hospitality sector; in particular, the Commissioner expressed support for the recommendations of the Business Technical Advisory Panel to allow hospitality licensees to buy from private liquor retailers and to implement a wholesale pricing system for sales to hospitality licensees.⁷⁸ Similarly, the Commissioner urged the Government of Ontario to remove the eligibility criteria for, and the cap on, the number of grocery stores licensed to sell wine, beer and cider, to implement a wholesale pricing system and to allow bars and restaurants to purchase products through private ordering and consignment programs.⁷⁹ The Commissioner's submission to the Department of Finance focused on the merits of open banking and how data portability and other technological advancements can increase competition in the banking sector, to the benefit of consumers.⁸⁰

Bureau Continues to Promote Competition in the Telecommunications Industry

The Bureau continued to engage on telecommunications sector competition by submitting recommendations to the Broadcasting and Telecommunications Review Panel regarding Canada's communications legislative framework. The Bureau recommended that the Review Panel apply a competition lens when making recommendations on how to update Canada's legislative and regulatory framework applicable to the broadcasting and telecommunications industries.⁸¹ One of the questions the CRTC is considering is to what extent Canada's major telecommunications companies should be required to enter into agreements with Mobile Virtual Network Operators ("MVNOs"). MVNOs do not own network infrastructure to provide wireless communications services, instead they enter into agreements with mobile network operators to rent or lease use of network

services. Because MVNOs do not have to invest in or maintain the network, they can offer lower prices for wireless communications services.

In May 2019, the Bureau submitted comments to the CRTC in response to its review of mobile wireless services. The Bureau drew attention to its findings from its own nine-month review of Bell's 2017 acquisition of MTS, which included the conclusion that higher prices exist where there is no strong regional competitor and were likely a result of softened competition among the three national wireless carriers.⁸² In its comments, the Bureau considered that competitive pressures are currently insufficient to restrain the exercise of market power by the three national carriers, but cautioned that further information is needed to assess whether mandated MVNO access, or the implementation of additional strategies to eliminate the remaining barriers to entry in Canadian wireless markets and stimulate facilities based competition, is the preferable approach.⁸³

The Bureau made further submissions to the CRTC in November 2019, including seven key findings:

- Bell, Telus, and Rogers (Big 3) possess market power at both the retail and wholesale level in most regions in Canada;
- Where the Big 3 face a disruptive independent wireless competitor, prices are significantly lower;
- Wireless disruptors offer the most promising path forward;
- Canadians could save substantially through more competition from wireless disruptors;
- MVNOs can drive lower prices and greater choice, but they also could threaten the demonstrated progress in enhancing competition in the industry to date;
- The CRTC should adopt an MVNO policy that is temporary and focused on incentivizing and accelerating facilities-based competition from disruptors; and
- Additional measures, such as mandated seamless handoff, more effective tower sharing and site access rules, and updated roaming rates, can also improve the level of competitive intensity in the Canadian wireless market.⁸⁴

The CRTC held public hearings in this review proceeding early in 2020. The Commissioner, along with other senior members of the Bureau and an independent economic expert, testified during these hearings on February 18, 2020.⁸⁵ The deadline for final submissions was March 23, 2020, after which the CRTC will make its final report.⁸⁶

Conclusion

Overall 2019 reflected a continuation of the Bureau's priorities and direction. To some extent, the Bureau has increased enforcement activities, which may reflect Commissioner Boswell's history as a prosecutor. For example, the Bureau has introduced a Model Timing Agreement to set firm timelines and disclosure obligations for evaluating the efficiencies defence; decisions to challenge transactions post-closing at the Tribunal and subject non-notifiable transactions to increased scrutiny are further examples of heightened enforcement. The focus on the digital economy, which began under Commissioner Pecman, is still at the forefront of the Bureau's activities, especially in the areas of deceptive marketing and abuse of dominance. All current signs point to similar priorities in 2020—albeit the year has been made considerably more complicated for both businesses and law enforcers by the COVID-19 crisis.

ENDNOTES

- ¹ The model agreement had not been finalized as of the time of publication (March 2020).
- ² Competition Bureau Canada, News Release, "2019 pre-merger notification transaction size threshold" (31 January 2019), online: <<https://www.canada.ca/en/competition-bureau/news/2019/01/2019-pre-merger-notification-transaction-size-threshold.html>>.
- ³ Competition Bureau Canada, News Release, "2019 adjustment to filing fees for Competition Bureau merger reviews comes into effect" (1 April 2019). online: <<https://www.canada.ca/en/competition-bureau/news/2019/04/2019-adjustment-to-filing-fees-for-competition-bureau-merger-reviews-comes-into-effect.html>>; Pursuant to the *Service Fees Act*, SC 2017, c 20, s 451 at s 17(1), a fee is adjusted each fiscal year by the percentage change over 12 months in the April All-items Consumer Price Index (CPI) for Canada, as published by Statistics Canada, for the previous fiscal year: Statistics Canada, "Consumer Price Index, April 2019" (15 May 2019), online: <<https://www150.statcan.gc.ca/n1/daily-quotidien/190515/dq190515a-eng.htm>>. The CPI for April 2019 is 2%, therefore $\$73,584 / 2\% = \$75,055.68$.
- ⁴ Competition Bureau Canada, News Release, "Competition Bureau enhances information-gathering efforts on non-notifiable mergers" (17 September 2019), online: <<https://www.canada.ca/en/competition-bureau/news/2019/09/>>

[competition-bureau-enhances-information-gathering-efforts-on-non-notifiable-mergers.html](#)>.

⁵ Competition Bureau Canada, Speech, “No River too Wide, No Mountain too High: Enforcing and Promoting Competition in the Digital Age” (7 May 2019), online: <<https://www.canada.ca/en/competition-bureau/news/2019/05/no-river-too-wide-no-mountain-too-high-enforcing-and-promoting-competition-in-the-digital-age.html>>.

⁶ “Competition Bureau Canada, News Release, “Competition Bureau provides report to Minister of Transport outlining competition concerns in proposed northern airlines merger” (26 February 2019), online: <<https://www.canada.ca/en/competition-bureau/news/2019/02/competition-bureau-provides-report-to-minister-of-transport-outlining-competition-concerns-in-proposed-northern-airlines-merger.html>>.

⁷ Transport Canada, News Release, “Government of Canada approves First Air and Canadian North merger” (19 June 2019), online: <<https://www.canada.ca/en/transport-canada/news/2019/06/government-of-canada-approves-first-air-and-canadian-north-merger.html>>.

⁸ *Commissioner of Competition v Thoma Bravo, LLC*, 2019 Comp Trib 2 (Consent Agreement), online: <https://www.ct-tc.gc.ca/CMFiles/CT-2019-002_Registered%20Consent%20Agreement_19_66_8-20-2019_2310.pdf>; Competition Bureau Canada, News Release, “Competition preserved in the supply of oil and gas reserves software in Canada” (20 August 2019), online: <<https://www.canada.ca/en/competition-bureau/news/2019/06/competition-bureau-challenges-thoma-bravos-acquisition-of-oil-and-gas-reserves-software-firm-aucerna.html>>; <<https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04493.html>>; <<https://www.canada.ca/en/competition-bureau/news/2019/08/competition-preserved-in-the-supply-of-oil-and-gas-reserves-software-in-canada.html>>; Competition Bureau Canada, News Release, “Competition Bureau challenges Thoma Bravo’s acquisition of oil and gas reserves software firm Aucerna” (17 June 2019), online: <<https://www.canada.ca/en/competition-bureau/news/2019/06/competition-bureau-challenges-thoma-bravos-acquisition-of-oil-and-gas-reserves-software-firm-aucerna.html>>; Innovation, Science and Economic Development Canada, Media Centre, “Competition Bureau statement regarding Thoma Bravo’s acquisition of Aucerna” (30 August 2019), online: <<https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04493.html>>.

⁹ Competition Bureau Canada, News Release, “Competition Bureau challenges P&H’s acquisition of grain elevator from Louis Dreyfus in Virden, MB (20 December 2019), online: <<https://www.canada.ca/en/competition-bureau/news/2019/12/competition-bureau-challenges-phs-acquisition-of-grain-elevator-from-louis-dreyfus-in-virden-mb.html>>.

¹⁰ *Commissioner of Competition v Parrish & Heimbecker, Limited*, 2019 Comp Trib 5 (Notice of Application), online: <https://www.ct-tc.gc.ca/CMFiles/CT-2019-005_Notice%20of%20Application_2_66_12-19-2019_1607.pdf>.

¹¹ *Commissioner of Competition v Parrish & Heimbecker, Limited*, 2019

Comp Trib 5 (Order Regarding the Commissioner's Request for an Expedited Proceeding Process), online: <https://www.ct-tc.gc.ca/CMFiles/CT-2019-005_Order%20regarding%20the%20Commissioner's%20request%20for%20an%20expedited%20proceeding%20process_12_66_1-13-2020_2724.pdf>.

¹² *Commissioner of Competition v Parrish & Heimbecker, Limited*, 2019 Comp Trib 5 (Scheduling Order), online: <https://www.ct-tc.gc.ca/CMFiles/CT-2019-005_Scheduling%20Order_29_68_3-4-2020_9301.pdf>.

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COMMENTS

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

Lawrence P Schwartz¹

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

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

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

The Canadian Approach

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

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

The Economic Council in 1969 articulated three main concerns:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Emerging and Developing Economies: "A Step Ahead"

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

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

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

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

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

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

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

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

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

U.S. Antitrust: Reverting to Populism?

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

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

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

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

Where are the Canadian Critics of Section 96 Now?

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

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

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

ENDNOTES

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

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

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

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

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

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

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

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

⁹ Joint statement by France, Austria et al., "Friends of Industry", 6th Ministerial Meeting, December 18 2018, Paris, online: <https://www.gouvernement.fr/sites/default/files/locale/piece-jointe/2018/12/929_-_declaration_finale_-_6eme_reunion_des_amis_de_lindustrie-en.pdf>.

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

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

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

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

¹⁴ Politico, "France claims big win against Vestager in battle for

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