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CANADIAN COMPETITION LAW REVIEW

REVUE CANADIENNE DU DROIT DE LA CONCURRENCE

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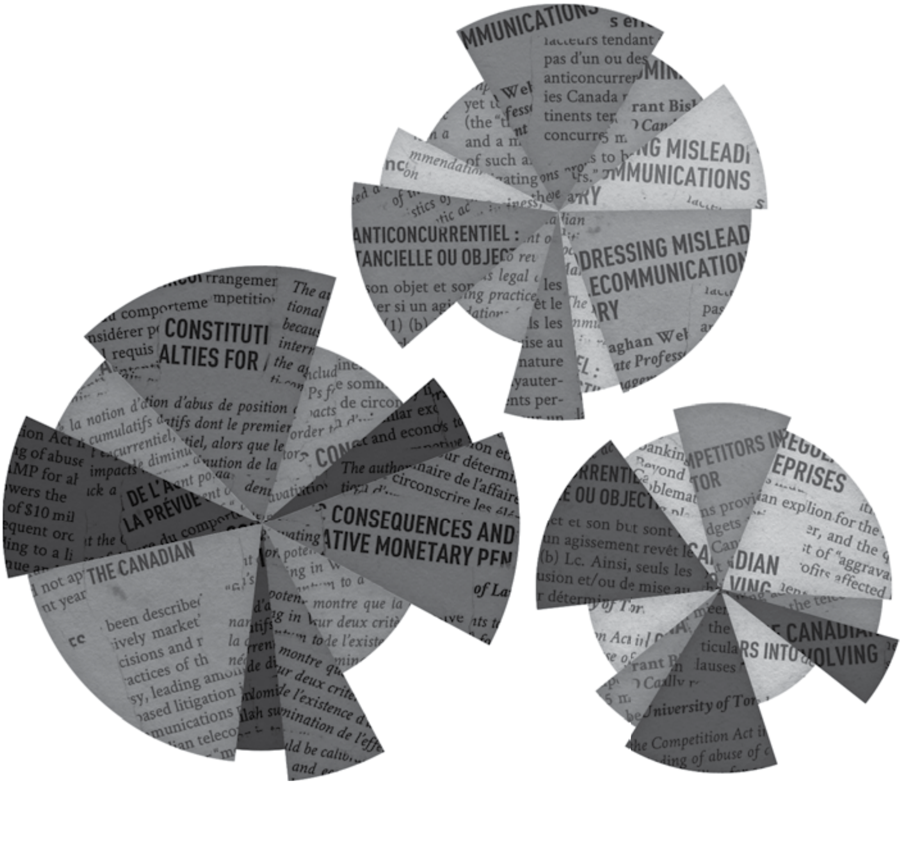
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SCHOLARS PANEL ON NON-PRICE EFFECTS: TURNING SMOKE INTO FIRE

INTRODUCTION

Susan Hutton, Chief Editor,
Canadian Competition Law Review

Reflecting a growing body of commentary globally on what has come to be seen by some as a narrow application of competition law, focused primarily on price effects, amendments to Canada's Competition Act in 2022 call on the Competition Tribunal explicitly to consider the impact of an impugned merger or behaviour on non-price aspects of competition, including quality, choice or consumer privacy. Four leading scholars appeared on the Scholar's Panel at the 2023 CBA Fall Competition Law Conference in October to examine what they see as the appropriate focus and boundaries of an inquiry into non-price competition. Their papers are published here.

- Innovation Effects in Canadian Merger Analysis—Andy Baziliauskas
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JAMES H. BOCKING MEMORIAL AWARD ESSAY

NIPPED IN THE BUD

Applying Abuse of Dominance to Facebook's Nascent Competitor Acquisitions

Gordon Milne*

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

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

I. Introduction

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

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

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

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

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

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

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

To illustrate how similar claims would be analyzed in Canada, I describe the three requirements for abuse of dominance and determine whether the allegations put forth in the complaint in *FTC v Facebook* might provide grounds for a case under s. 79. I also discuss some benefits and drawbacks of challenging nascent competitor acquisitions under abuse of dominance. Ultimately, I conclude that abuse of dominance can be a useful framework for identifying and addressing anti-competitive nascent competitor acquisitions, as it allows the Commissioner to retrospectively analyze a series of mergers for anti-competitive effects. The abuse of dominance provisions also provide a more flexible set of remedies that may be preferable in addressing some nascent competitor acquisitions.

II. Substantial Control of the Market

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

A) Challenges with Digital Offerings

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

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

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

Meanwhile, users are often slow to switch to alternative social media offerings. Setting up an online profile can be time-consuming. Switching from one social network to another means either meticulously transferring your photo, video and text content or starting over anew. It is hard to persuade users to bear the cost of switching to a new platform, especially when it has few users. Because of such switching costs, a new competitor would likely expect to face difficulty in signing up enough users to achieve sufficient scale as a network to viably compete with established firms. This in turn could dissuade firms that are considering entering the market.

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

B) Application to *Facebook*

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

Moreover, the FTC alleges network effects and switching costs help protect Facebook from potential competition. It cites statements made by CEO Mark Zuckerberg: "your friends are here", and "you've made a big investment in your Facebook network and identity".[30] Under the FTC's theory of harm, these barriers to entry make it more likely that Facebook can leverage its large market share to exercise market power without competitive pressure from potential entrants. In response, Facebook argues that those barriers to entry are not as effective as the FTC asserts. The company contends that other online service providers with substantial user networks would not face such challenges in developing personal social network services.[31] If Facebook could persuade the Tribunal that such potential competition in the market prevents the company from exercising market power, that could defeat an abuse of dominance claim on the merits.

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

III. Practice of Anti-competitive Acts

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

S. 79(1)(b) specifically calls for a "practice" of anti-competitive acts. For these purposes, a practice is typically defined in reference to what it is not: "an isolated act or acts".[38] However, a single sustained act on the part of a dominant firm may satisfy this requirement. Further, a series of different anti-competitive acts can be taken together to establish such a practice.[39] The meaning of a "practice" must also be viewed in light of s. 78, which provides examples of conduct that may ground an abuse of dominance claim. The section encompasses a wide variety of acts, some of which, like freight equalization, clearly involve several acts over time. Others are more commonly discrete occurrences. Nascent competitor acquisitions are on the latter end of this spectrum. A single acquisition does not clearly lend itself to characterization as a practice, unless the Commissioner can demonstrate that it has a lasting effect on competition. As a result, abuse of dominance challenges to nascent competitor acquisitions will likely be most effective where the Commissioner can point to a series of mergers by the firm. Conversely, the fact that an acquirer has undertaken many acquisitions does not mean that it has engaged in a practice of anti-competitive acts, even if some of those acquisitions were anti-competitive. The Commissioner must ultimately show that those anti-competitive acquisitions were sufficiently connected to render them a practice, rather than a set of distinct, isolated acts.

A) Recent Changes to the Law

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

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

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

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

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

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

B) Application to *Facebook*

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

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

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

1) Business Justification

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

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

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

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

Similarly, abuse of dominance allows for retrospective analysis of a firm's actions. The Commissioner can observe whether a firm has continued to invest in the acquired company's products and operations. Such investment can help to support the claim that the acquisition was pursued for pro-competitive reasons. On the other hand, failure to nurture the products and operations of a target firm may indicate that anti-competitive intent informed the practice. Of course, there are plausible pro-competitive rationales for such conduct. For example, the incumbent may have acquired the target with a plan to redeploy its assets or employees (dubbed acqui-hiring)[66] to a more profitable project.[67] Where there is a strong argument that such a pro-competitive rationale drove the acquisition, that business justification may defeat the Commissioner's claim. But absent a pro-competitive explanation, a failure to invest in the target firm's products suggests that the acquirer valued eliminating competitive pressure, not acquiring the target company's products or assets.

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

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

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

C) Emphasis On Intent

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

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

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

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

IV. Effect of Preventing or Lessening Competition Substantially

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

Both ss. 79 and 92 refer to two avenues for demonstrating anticompetitive effects, namely "prevention" and "lessening". A lessening of competition arises where a firm enhances its market power through anti-competitive conduct in relation to existing competition.[83] This market power can arise from horizontal effects caused by merging two firms that otherwise would have competed, or through vertical effects caused by the acquisitions of a supplier or customer that forecloses the acquired business to competing firms. Most merger challenges are argued under the "lessen" prong of the test.[84]

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

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

Determining the relevant "but-for" world can be especially challenging in nascent competitor acquisitions.[90] Upstart firms are unproven, and their future entry in the market is uncertain.[91] Further, the anti-competitive effects of nascent competitor acquisitions likely arise later than those in typical mergers.[92] Thus, the Commissioner must argue anti-competitive effects based on predictions which risk being regarded as mere speculation. Digital markets often involve significant barriers to entry, which push entry by potential competitors further into the future.[93] This could make proving future entry difficult, and the Tribunal will not permit the Commissioner to rely on this longer "lead time" to look beyond entry in a discernible time frame.[94]

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

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

A) Application to *Facebook*

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

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

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

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

B) Retrospective Review

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

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

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

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

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

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

C) Alternative Standards for Anti-Competitive Effects

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

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

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

V. Remedies

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

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

As a practical matter, it is easier to prevent a merger than to try to unwind it, especially where digital products have been integrated. For example, ordering a global firm like Facebook to divest itself of Instagram and WhatsApp could engage a jurisdictional issue. Because the Canadian market is relatively small, Facebook might respond to a divestiture order by simply exiting the Canadian market. This may serve to further lessen competition in the Canadian market. Beyond this jurisdictional issue, any attempt to separate Facebook and Instagram would require difficult decisions about which products, resources and employees should be allocated to each successor. At a minimum, this would impose huge logistical challenges on the company. While some of these challenges could be tempered by finding a suitable purchaser for the divested business, this in turn requires finding a buyer that would not itself raise issues over market power. If no suitable purchaser can be found, spinning off the acquired business as a stand-alone company can leave it without the institutional support it needs to thrive. Ultimately, the efficiency of the firms and the quality of the products would likely suffer, so the underlying goals of competition policy may not be furthered by a divestiture.

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

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

Further, where other anti-competitive acts compliment the acquisitions at issue, that conduct is often susceptible to an order that directly ameliorates harm to competition. For example, the Tribunal in *Laidlaw* ordered that contract renewal terms be altered to allow customers to cancel their agreement with the firm more readily. This type of order can help to restore competition by allowing nascent competitors to win over customers from the dominant firm when they enter the market. A case like *Facebook* might allow for a similar remedy. If the Commissioner established abuse of dominance that involved restrictions on interoperability, as alleged by the FTC,[121] then the Tribunal could make an order requiring Facebook to alter those policies. While divestiture remains available as a remedy to abuse of dominance,[122] ordering divestiture should only be considered in exceptional cases where the merged firms can be cleanly separated or where other options will be ineffective to maintain competition in the market.

VI. Conclusion

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

ENDNOTES

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

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

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

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

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

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

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

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

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

[10] *Ibid* at 36-37.

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

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

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

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

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

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

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

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

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

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

[20] *Ibid* at para 67.

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

[22] *Ibid.*

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

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

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

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

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

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

[29] *Ibid* at 46.

[30] *Ibid* at 51.

[31] *Ibid.*

[32] *Ibid.*

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

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

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

[36] Ibid, s 78.

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

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

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

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

[41] Tomi Laamanen, "On the Role of Acquisition Premium in Acquisition Research" (2007) 28 Strategic Management JL 1590 at 1590.

[42] Colleen Cunningham, Florien Ederer & Song Ma, "Killer Acquisitions" (2021) 129:3 J Political Economy 649.

[43] *Competition Act*, *supra* note 2, s 1.1.

[44] *Canada Pipe*, *supra* note 37 at paras 67-68.

[45] *Nutrasweet*, *supra* note 33 at 63-64.

[46] *The Commissioner of Competition v Vancouver Airport Authority*, 2019 Comp Trib 6 at para 460 [*VAA*], citing *Toronto Real Estate Board v Canada (Commissioner of Competition)*, 2017 FCA 39 [*TREB*].

[47] See e.g. Iacobucci, *supra* note 4 at 36-37.

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

[49] *Canada (Director of Investigation and Research) v Laidlaw Waste Systems Ltd* (1992), 40 CPR (3d) 289 [*Laidlaw*].

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

[51] *Laidlaw*, *supra* note 49.

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

[53] *Laidlaw*, *supra* note 49.

[54] *Facebook*, *supra* note 14 at 47.

[55] *Ibid* at 18-20.

[56] UK, Competition and Markets Authority, *Online platforms and digital advertising: Market study final report* (London: 2020) at 10.

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

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

[59] *Ibid* at para 73.

[60] *Facebook*, *supra* note 14 at 54.

[61] *VAA*, *supra* note 46 at paras 622-624.

[62] Facebook, Inc "Unaudited Pro Forma Condensed Combined Financial Information" (EDGAR Database, 30 June 2014).

[63] Organisation for Economic Co-operation and Development, Directorate for Financial and Enterprise Affairs, Competition Committee, *Start-ups, Killer Acquisitions and Merger Control – Background Note*, Doc No DAF/COMP(2020)5, s 4.2.1.

[64] *Ibid.*

[65] *Ibid.*

[66] Aaron Chatterji & Arun Patro, "Dynamic Capabilities and Managing Human Capital" (2014) 28:4 Academy of Management Perspectives 395.

[67] Cunningham, Ederer & Ma, *supra* note 42; Amy C Madl, "Killing Innovation?: Antitrust Implications of Killer Acquisitions" (2020) 38 Yale J Reg Bull 28 at 37-39.

[68] Cunningham Ederer & Ma, *supra* note 42; Pike, *supra* note 62, s 2. While others use the term "killer acquisition" synonymously with "nascent competition acquisition", I prefer to distinguish the two to highlight how post-acquisition conduct can inform the Tribunal's intent analysis. For an example of this

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

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

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

[71] *Ibid*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[86] *Ibid*.

[87] *Ibid* at para 77.

[88] *Ibid* at para 66.

[89] *Ibid* at para 68.

[90] Pike, *supra* note 63, s 4.1; Bureau Submissions 2023, *supra* note 6; US, *Competition in Digital Technology Markets: Examining Acquisitions of Nascent or Potential Competitors by Digital Platforms: Hearing Before the Subcommittee on Antitrust, Competition Policy, and Consumer Rights*, 116th Cong (2019) at 5 (John M Yun) [*Yun Testimony*].

[91] Pike, *supra* note 63, s 4.1.2.

[92] *Ibid*, s 4.1.1.

[93] See substantial control of the market section above.

[94] *Tervita*, *supra* note 7 at 70-77.

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

[96] *Visa, Mastercard*, *supra* note 23 at para 360.

[97] *Canada Pipe*, *supra* note 37 at para 30.

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

[99] See e.g. Giuseppe Colangelo & Mariateres Maggiolino, "Data Accumulation and the Privacy-Antitrust Interface: Insights from the Facebook Case" (2018) 8:3 International Data Privacy Law 224 at 233-236: Iacobucci, *supra* note 5 at 54-59.

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

[101] *Ibid.*

[102] *Competition Act*, *supra* note 2, s 1.1.

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

[104] See e.g. Iacobucci, *supra* note 4 at 36.

[105] *Competition Act*, *supra* note 2, s 79(6).

[106] See e.g. Iacobucci, *supra* note 4 at 36; Pike, *supra* note 62, s 4.2.3; Hemphill & Wu, *supra* note 11 at 1907-1909.

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

[108] Iacobucci, *supra* note 4 at 36; Hemphill & Wu, *supra* note 11 at 1901.

[109] *Canada Pipe*, *supra* note 37 at para 44.

[110] FOF, *supra* note 69. See also Stigler Center, *supra* note 69 at 00h:48m:30s; Pethokoukis, *supra* note 69.

[111] Innovation, Science and Economic Development Canada, *The Future of Competition Policy in Canada* (Ottawa: ISED, 2022) at 22 [ISED], citing UK, Digital Competition Expert Panel, *Unlocking digital competition: Report of the Digital Competition Expert Panel* (London: 2019). See also Pike, *supra* note 63, s 4.1.

[112] Bureau Submissions 2023, *supra* note 5, s 1.4.

[113] Hemphill & Wu, *supra* note 11 (suggesting that anti-competitive effects need not be shown where a dominant firm acquires a nascent competitor).

[114] Pike, *supra* note 63, s 4.3.2; Cunningham, Ederer & Ma, *supra* note 42 at 694—696; *Yun Testimony*, *supra* note 91 at 13.

[115] *Competition Act*, *supra* note 2, ss 92(1)(e)-(f).

[116] *Ibid.*

[117] *Ibid*, s 79(2).

[118] See e.g. *Laidlaw*, *supra* note 49.

[119] *Ibid.*

[120] *Ibid.*

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

[122] *Competition Act*, *supra* note 2, s 79(2).

ARTICLES

FOSTERING SUSTAINABILITY USING THE EXISTING TOOLBOX: ENVIRONMENTAL EFFECTS IN CANADIAN COMPETITION LAW[*]

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Over the last few decades, a debate has formed surrounding whether competition law should take into account sustainability considerations. This paper is not intended to answer this normative debate. Instead, it focuses on the precursor question: can the current iteration of the Competition Act successfully consider environmental goals in its competitive analysis? Although not expressly contemplated in section 1.1 of the Competition Act, this paper argues that, in light of recent amendments to the Competition Act and enforcement actions around the globe, environmental effects can be considered in the competitive analysis framework through the efficiencies defence, green "killer acquisitions," competitor collaborations focusing on sustainability, standard setting in abuse of dominance allegations, and "greenwashing." Nonetheless, if environmental objectives are pursued through the Competition Act, less emphasis should be placed on the enforcement of abuse of dominance and competitive collaboration provisions until further guidance from the Competition Bureau can be issued due to a lack of clarity in these areas. Conversely, the Competition Bureau should instead focus its efforts on deceptive marketing claims and mergers, as these two areas for review create less tension between environmental objectives and competition goals, and are the most likely to have a lasting, positive effect on competition and sustainability.

Voilà quelques dizaines d'années que s'est amorcé en droit de la concurrence un débat normatif quant à savoir s'il faudrait tenir compte de questions de durabilité, débat que cet article ne prétend pas venir clore. Nous nous intéresserons plutôt ici à une question qui aurait dû se poser avant même la présente discussion : la Loi sur la concurrence, dans sa version actuelle, intègre-t-elle bien les objectifs environnementaux dans son cadre d'analyse de la concurrence? Cet aspect n'est pas explicitement mentionné à l'article 1.1, mais nous présenterons l'argument voulant qu'à la lumière des récentes modifications à la Loi et des mesures prises par les autorités autour du globe, la question environnementale ait sa place dans l'analyse de la concurrence par la défense fondée sur les gains en efficience, l'acquisition prédatrice de concurrents, les collaborations entre concurrents dans une visée de développement durable, l'établissement de normes dans les dossiers de potentiel abus de position dominante et les tentatives de « verdissement » d'image.

Quoi qu'il en soit, si l'on admet la défense d'objectifs environnementaux dans l'application de la Loi sur la concurrence, il ne faudra pas prioritiser l'abus de position dominante et la collaboration entre concurrents jusqu'à ce que l'on reçoive des éclaircissements du Bureau de la concurrence à leur sujet. Par ailleurs, le Bureau devrait concentrer ses énergies sur le problème des fusions et des allégations commerciales trompeuses : en effet, ces deux domaines présentent peu de risques de conflit entre les objectifs en matière d'écologie et ceux en matière de concurrence, les interventions ayant alors le plus de chances d'être nettement bénéfiques à long terme pour l'environnement comme pour la concurrence.

I. Introduction

In the last decade, the consequences of global warming and climate change have become well-recognized by the international community. This has resulted in a prominent position for sustainability concerns on the agenda of international organizations, states, and private businesses.[1] This increasing focus on global warming and climate change has shifted consumer preferences towards environmentally friendly goods and services.[2] Accordingly, the green quality of products is gradually becoming a parameter of competition and increasingly driving consumer demand. Where previously climate change and sustainability concerns were primarily confined to politics and environmental law, in recent years they have traversed into other legal spheres that were traditionally unrelated to the environment.[3] This has led to increased calls for competition policy to assist in promoting pro-competitive and sustainable business conduct.[4]

The Canadian *Competition Act*[5] (the "***Act***") does not currently include a provision specifically pertaining to the promotion of sustainability or environmental considerations.[6] This has resulted in a lively debate as some scholars have argued that the purpose of the *Act* in section 1.1 should be revised to allow competition law to be applied for the purpose of environmental protection.[7] Others, however, reject this premise and contend that the Competition Bureau (the "**Bureau**") is not the appropriate body to consider environmental goals.[8] Instead, these scholars argue that it would be more effective to use targeted legislation and other government agencies to address specific environmental objectives.[9]

This paper, however, is not intended to address this larger, normative question of whether competition law is the most appropriate vehicle through which to consider environmental effects and therefore, whether section 1.1 of the *Act*[10] should be amended explicitly to consider this potential new goal.

To answer this question properly, an assessment of the *Act* is necessary first, to determine whether and to what extent environmental effects can be considered within the existing competitive analysis framework. Therefore, to provide sufficient background for those looking to engage in this normative discussion, this paper will provide an overview of where sustainability may be considered within the current iteration of the *Act* and the tensions that develop when analyzing environmental goals alongside existing competition objectives.

This paper will argue that the *Act* is capable of considering environmental effects in its competitive analysis framework. However, the tension between the goals of the *Act* and sustainability may, in some situations, result in the consideration of environmental effects compromising the purpose of the *Act*. Therefore, it will be argued that although the *Act* may consider sustainability in its analysis, there are certain provisions that are better suited for considering these effects, such as those devoted to deceptive marketing and mergers. Due to the potential for alignment between competition and sustainability goals, these two provisions are the most likely to have a positive effect on both competition and the environment. Thus, sustainability goals should be primarily pursued in the competition law context, if at all, through the deceptive marketing and merger provisions of the *Act*. Conversely, the consideration of sustainability goals in the abuse of dominance and competitive collaboration provisions is more likely to require forbearance on the part of the Bureau in situations where they might otherwise take enforcement action but may refrain from doing so if sustainability goals are the primary or a significant purpose of the impugned actions. A lack of clarity regarding enforcement in these areas may lead industries to avoid entering into agreements designed to promote sustainability if they might also lessen competition. Similarly, arguably dominant firms may also refrain from setting environmentally friendly standards, for example, for fear of being accused of abusing their dominant position. Therefore, greater guidance from the Bureau in these areas is necessary before they can be used effectively as a vehicle through which to combat concerns regarding environmental degradation.

In developing this argument, Section II will begin by discussing the sometimes—irreconcilable nature of competition and sustainability goals as well as the tension that this creates when considering environmental effects. Section III will then argue that the current competition law framework in Canada is flexible enough to consider environmental effects specifically when analyzing the efficiencies defence, green "killer acquisitions,"[11] sustainable competitor collaborations, standard setting in abuse of dominance allegations, and "greenwashing."[12] Finally, for completeness, Section IV will briefly engage with the normative debate discussed above to argue that competition law enforcement authorities should be cautious when analyzing environmental effects, especially when an extension of the *Act* beyond its current bounds is required. Furthermore, to the extent that the current competitive framework is suitable for contemplating environmental effects, greater guidance is necessary from the Bureau to ensure that firms feel confident in taking steps to address sustainability in their business and will continue to pursue green competition.

II. The Tension: Competition Law and Sustainability

At present, the *Act* does not include any provisions pertaining directly to the promotion of sustainability or environmental considerations.[13] More specifically, the stated objectives of Canadian competition policy, outlined in section 1.1 of the *Act*, do not explicitly mention the role of competition law in combatting harmful actions towards the environment. Section 1.1 states,

> "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."[14]

When considering the ambit of section 1.1, the Federal Court of Appeal ("**FCA**") in *Tervita Corporation v Commissioner of Competition* held that an environmental purpose cannot be read into the *Act*.[15] To attribute an environmental purpose to the *Act*, the Court wrote, would contradict the legislator's original intent and would be inconsistent with the expertise of the Competition Tribunal.[16] However, this is not to say that environmental effects connected to economic effects cannot be considered. The FCA only considered those environmental concerns having no immediate economic impact as falling outside of the scope of the *Act*'s purpose.[17]

In light of the FCA's ruling in *Tervita*, a debate has emerged as to whether the *Act* is an appropriate vehicle to promote sustainability and thereby, to combat climate change. Some scholars argue that section 1.1 of the *Act* should be amended to allow the Bureau to act for the purpose of advancing environmental protection.[18] Others dismiss this argument, contending instead that the Bureau is not the appropriate body to consider environmental goals[19] and it would be more effective to use targeted legislation and other government agencies to specifically address objectives related to the environment.[20] However, these opposing scholars do not argue that environmental effects should never be considered when assessing anti-competitive and pro-competitive effects, such as in the case of mergers.[21] Instead, their main argument against the explicit discussion of sustainability goals in section 1.1 is that the current goals of the *Act* and environmental objectives are often in tension and therefore, the consideration of environmental effects may harm the achievement of the current objectives outlined in section 1.1, thus undermining the efficacy of the "purpose" clause as a guide to the interpretation and enforcement of the *Act*.

Nonetheless, there are indications that the objectives of competition law and Canada's environmental goals may not always be irreconcilable.[22] Competition law can produce outcomes that have significant sustainability benefits, such as ensuring that natural resources are efficiently allocated and used.[23] For example, competition policies, such as the 2022 amendments to section 93 of the *Act* (which specifically instructed the Competition Tribunal to consider the impact of a merger on non-price aspects of competition),[24] that aim at improving quality, including the sustainable quality of products, increasing choice, and stimulating green innovation, may advance environmental goals as well as create more competitive markets.[25] Thus, as will be discussed further below, there are areas of competition law where environmental goals and sustainability may complement and even promote the stated objectives of the *Act*.

A) The Interdependence of Competition and Environmental Goals

In its 2021 Report, "Environmental Considerations in Competition Enforcement," the OECD highlighted two situations where competition law can play an important role in fighting climate change.[26] First, competition law may advance the goals of environmental protection when conduct that is found to be anti-competitive also results in environmental damage.[27] For example, enforcement measures against a standard-setting cartel due to its potential to reduce competition through the promotion of standards may, in some circumstances, also have the inherent benefit of ensuring that more sustainable and innovative firms are not pushed out of the market and are able to continue to promote environmental goals. These types of cases allow competition law to act interdependently with sustainability without any conscious decision on the part of the Commissioner of Competition (the "**Commissioner**") to advance environmental objectives.

Second, where consumer preferences favour more environmentally-friendly products and services, increased competition may assist in advancing environmental goals as companies are likely to increase their supply and adjust their investments to capture a larger share of this greener demand.[28] The amplified preference of consumers towards environmentally-friendly products will also increase their willingness to pay, thereby incentivizing companies to invest in greener products, increasing market differentiation in this space.[29] Therefore, through maintaining competitive markets, the *Act* indirectly promotes environmental objectives when consumer preferences align with more sustainable products. Accordingly, to the extent that investing in greener initiatives can provide companies with a competitive advantage, the creation of a more competitive market will also combat climate change.[30]

B) The Misalignment Between Competition and Environmental Goals

Nonetheless, the common sense inference for some is that competition policies are intrinsically at odds with environmental protection because increased competition is usually associated with higher output and lower prices, which supports overconsumption of limited environmental resources.[31] There are generally three conditions, all or some of which may be present at the same time, where a more competitive market may not provide the incentives necessary for companies to invest in sustainability, placing competition law at odds with environmental protection goals.

First, companies may face a first mover disadvantage and will not invest in greener production or processes if they fear they will be undercut by their rivals. They will instead choose to free ride on the advantage gained by other firms being the first movers in this area.[32] Although this market failure can be overcome through coordination between businesses, there is a fine line between pro-competitive and anti-competitive collaboration, as will be discussed further below. This uncertainty is further exacerbated by the limited guidance from the Bureau in this area which may well result in firms shying away from cooperation despite the potential environmental benefits due to fear of inadvertently entering into an anti-competitive collaboration.

Second, environmental objectives will not be advanced through competitive markets where demand for a sustainable alternative may exist, but it is not high enough to cover the fixed costs of production required to create the product or to allow the company to achieve sufficient scale.[33] As a result, it is likely that these sustainable alternatives will not be produced due to high costs and the inability to reach necessary scaling.

Finally, competitive markets will not promote environmental goals in situations where consumers, though potentially motivated by sustainable choices, still opt for less environmentally friendly alternatives. This often results from free-riding by some consumers on the behaviour of others as they rely on them to make more sustainable choices instead of making the choice themselves.[34] This decreases demand for sustainable alternatives and in the long-run decreases the supply of these products, thereby harming the environment and decreasing product differentiation as well as consumer choice.

C) The Challenges with Considering Environmental Effects

Aside from the potential market failures resulting from inconsistencies between competition and environmental goals, one of the main criticisms levelled at the contemplation of sustainability objectives within competitive assessments is that the analysis of non-economic effects would fall outside the mandate of competition authorities, thereby harming their legitimacy.[35] Accordingly, many associate the idea of incorporating non-economic environmental effects into competitive analysis as being more in line with populist or neo-Brandeisian views of antitrust.[36] As long as Canadian competition law does not adhere directly to these views, authorities may face some challenges in applying environmental considerations in the traditional competitive assessment framework.[37] This section will provide an overview of some of these challenges.

The first challenge that competition authorities may face in analyzing the environmental impact of conduct within the existing competition law framework is determining how environmental effects should be considered and to what extent.[38] Although environmental considerations are often seen as being difficult to analyze due to their qualitative nature, in practice there are relatively limited difficulties when the environmental effects being evaluated are captured by looking to non-price dimensions of competition.[39] In cases where sustainability effects are easily categorized as economic, while the effects may be more complex to quantify due to their potentially non-pecuniary and more subjective nature, there are still well-accepted methods of quantification that can be used to assess the environmental effects.[40] The difficulty is in analyzing environmental effects that do not have easily cognizable economic dimensions, especially when these must be compared to economic effects.[41] For example, the Tribunal may have difficulty comparing the effects of a merger that is likely to result in a decrease in the quality of environmental performance of a given product but may also decrease shipping costs through vertical integration by 15%. This inherent difficulty is primarily why the FCA in *Tervita* considered those environmental concerns having no economic impact as falling outside of the scope of the *Act*'s purpose.[42]

The second challenge for competition authorities is determining the correct timeframe for the assessment of environmental effects.[43] This is important because the timeframe for analysis can significantly affect the outcome of the assessment.[44] For example, in the United States car emissions case, the Department of Justice opened an investigation against four vehicle producers who had signed a voluntary agreement in California to impose environmental standards above the federal legal requirements. [45] In this case, if the competition authorities considered a shorter time frame for their analysis of the environmental effects, the focus of the analysis might have been on the increase in prices and elimination of choice for consumers wanting to buy cheaper, more environmentally-friendly cars as a result of the cooperation. If, instead, a longer timeframe had been used, the competition authorities may have also considered the reduction in harmful emissions from the use of less polluting cars as well as cost savings for individuals from reduced fuel consumption and the positive impact on green innovation.[46] Therefore, depending on whether the test is "harm to consumers", "harm to competition" or "public interest", authorities have to make a judgement call and adopt the timeframe that is most appropriate. However, the timeframes used by agencies may not always be able to accurately capture the reality when it comes to environmental effects, which may well prove difficult for authorities to navigate.[47]

III. Evaluating Sustainability in the Existing Framework

As outlined above, the sustainability-competition debate puts competition agencies in a difficult position, especially when the objectives of the two areas are in tension. Nonetheless, where these goals align, it is possible for competition agencies to consider environmental effects within the current competitive analysis framework. In this section, the interplays between competition policy and environmental objectives will be further fleshed out by analyzing the efficiencies defence, green "killer acquisitions," competitor collaborations, abuse of dominance, and greenwashing conduct through the deceptive marketing provisions, to determine where and how environmental effects can be considered within the current iteration of the *Act*.

A) Mergers

At the 2022 Green Growth Summit, the Commissioner noted that one important area of intersection between competition law and environmental objectives is the merger review process.[48] Under the *Act*, the Bureau has jurisdiction to review transactions that fall within the definition of a "merger" in section 91[49] and to challenge such transactions on the basis that they prevent or lessen, or are likely to prevent or lessen, competition substantially, under section 92.[50] In order to determine whether a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially, a variety of factors, outlined in section 93 of the *Act*, may be considered.[51]

Although environmental effects are not expressly discussed in section 93, there are two potential situations within merger analysis that may illustrate how and where sustainability may be considered. The first is where the merging parties' raise the efficiencies defence under section 96 of the *Act.* This defence is an affirmative claim by the merging parties that although their merger is anti-competitive and will prevent or lessen competition under section 92, the efficiencies that will result from the merger outweigh and offset those anti-competitive effects.[52] The second is a "green killer acquisition". This specific type of merger occurs when an incumbent firm acquires an innovative target that has a focus on sustainability with the intention of terminating the development of the target's innovations to prevent future competition.[53] Each of these cases will be discussed in turn below.

i) The Efficiencies Defence

Even if a merger is found to be likely to prevent or lessen competition substantially under section 92,[54] it may still be saved if the efficiencies defence in section 96 of the *Act* can be proven on a balance of probabilities.[55] As such, "the onus of alleging and proving that efficiency gains from the merger will be greater and will offset the effects of any prevention or lessening of competition resulting from the merger falls upon the merging parties."[56] The analysis under section 96 therefore requires determining "whether the efficiency gains of the merger, which result from the integration of resources, outweigh the anti-competitive effects, which result from the decrease in or absence of competition in the relevant geographic and product market."[57]

The efficiencies defence is Parliament's recognition that the integration of the activity between two firms following a merger may result in productive efficiencies due to real cost savings in resources, allowing firms to increase output or produce better quality products from the same amount of input.[58] Such efficiencies can, for example, take the form of reduced production costs enabled by less resource-intensive production methods or lower transportation costs.[59] However, the efficiencies defence also captures more than just productive efficiencies, including allocative efficiency (i.e., the degree to which resources available to society are allocated to their most valuable use) and dynamic efficiencies (i.e., the optimal introduction of new products and production processes over time).[60] The efficiencies defence further acknowledges Canada's large geography, comparatively small population, and the need for Canadian businesses to effectively compete in the global marketplace.[61] Accordingly, "[i]n the context of the relatively small Canadian economy, to which international trade is important, the efficiencies defence is Parliamentary recognition that, in some cases, consolidation is more beneficial than competition."[62]

a) The Consideration of Environmental Effects in Tervita

Although the *Act* does not expressly indicate whether a merger's environmental effects should be considered as part of the efficiencies defence, the Supreme Court of Canada ("**SCC**") in *Tervita* clarified the scope of section 96 when analyzing qualitative effects, such as environmental objectives.[63]

In overturning the FCA's decision, the SCC in *Tervita* established that the Commissioner has the burden of quantifying (or at least estimating[64]) any quantifiable anti-competitive effects of a proposed merger when an efficiencies defence has been raised.[65] That quantification or estimate must be grounded in evidence that can be challenged and weighed.[66] Failure to do so, the Court held, will result in a zero weight on all quantifiable effects that the Commissioner failed to quantify.[67]

The quantification burden that this decision effectively created has been heavily criticized by many as it has been argued that this preference for quantifiable effects has created a hierarchy of evidence that has the potential to place even low-quality quantitative evidence above convincing qualitative evidence in evaluating any anti-competitive effects.[68] Some scholars also argue that, even though the change seems to have been driven by procedural fairness,[69] the current adversarial system does enough to ensure the credibility of evidence such that the requirement for quantification is unnecessary.[70] Moreover, the distinction between qualitative and quantitative evidence is not as simple in practice as, in theory, all competitive effects are in some way quantifiable.[71] Finally, it has been questioned why the Commissioner, rather than the parties, is required to set the target to be met in developing evidence of efficiencies.[72] Although this may minimize subjectivity, it is not clear whether the Commissioner is in the best position to provide the evidence. However, there is also nothing to suggest that the merging parties would be any better at producing this evidence.[73] As a result of these concerns, there has been fear following the SCC's decision in *Tervita* that the requirement for quantitative evidence will be detrimental to the recognition of both competitive and anti-competitive environmental effects in the analysis of the efficiencies defence in the future.[74]

Some scholars have also raised trepidations that the emphasis on quantifying effects could have consequences beyond the efficiencies defence, limiting the agreements that businesses might decide to enter into for purposes of promoting sustainability.[75] Although not explicitly discussed in the SCC's decision in *Tervita*, there are questions regarding whether the consideration of environmental effects in the context of the efficiencies defence can be expanded into the greater merger analysis when determining whether there is a substantial lessening or prevention of competition. While environmental effects on their face may not have a place within this part of the analysis, it remains open as to whether pro-competitive effects of a merger that are protective of the environment as well as anti-competitive effects that result in environmental harm, might also be considered, especially with the newly added consideration of non-price effects in subsection 93(g.3). The addition of this new factor in section 93 will allow the Tribunal to consider non-price environmental effects which may include, for example, increases in the quality of environmentally friendly cleaning products or the addition of a new environmentally conscious waste disposal business line, which could increase consumer choice and therefore increase competition. Despite the addition of the non-price factor in section 93, it is clear that the effect of the merger on competition would need to be the primary consideration in the Commissioner's analysis. Accordingly, it is unlikely that environmental effects alone could be incorporated as a significant piece of the general merger analysis framework.

b) The Elimination of the Efficiencies Defence

The potential frustrations with the analysis of the efficiencies defence are not only at issue when environmental effects are at play. The Bureau has often voiced its distaste with the defence more generally due to its difficult and expensive analysis process, which has not landed on deaf ears within Parliament.[76] Therefore, although the efficiencies defence is the only provision in the *Act* where environmental effects have been explicitly considered, the future of the efficiencies defence is grim. In early March 2023, the Bureau released "The Future of Competition Policy in Canada", its submission to the Innovation, Science and Economic Development Canada's consultation on the future of competition policy in Canada (the "**Consultation**").[77] In its submission, the Bureau contended that the efficiencies defence is no longer supportable and is inconsistent with international practices. Accordingly, the Bureau recommended that the efficiencies defence be eliminated and a new section 93 factor be added to allow for the consideration by the Tribunal of efficiency gains in determining whether a merger substantially lessens or prevents competition.[78] Despite the Bureau's submission and similar calls from the Canadian Bar Association to add a factor in section 93 if the efficiencies defence were to be eliminated, Bill C-56, which was introduced into Parliament on September 21, 2023, did not include a new section 93 factor for efficiency gains along with the elimination of the efficiencies defence in section 96.[79] Although at the time of writing the Bill has not yet been passed, it is anticipated to do so and the opposition bills tabled by both the NDP[80] and the Conservatives[81] would also do away with it (although the NDP bill does add it as a factor to consider when assessing the likely competitive impact of the merger). Thus, recent events provide a clear signal that the efficiencies defence and the potential for considering efficiency gains as a section 93 factor may prove little to no help in furthering environmental goals in the future.

ii) Green Killer Acquisitions

Innovation drives economic growth and firm profitability. This often makes innovative firms the target of acquisitions by incumbents, typically in the early stages of product development.[82] These types of acquisitions are commonly referred to by scholars as "killer acquisitions".[83] Traditionally, killer acquisitions have been viewed by economists as positive because firms that are better at exploiting technologies acquire innovative targets to realize synergies, effectively enabling specialization and subsequently increasing innovation and overall welfare.[84] However, relatively recently a different motive for acquiring innovative firms has been suggested. This theory of harm argues that an incumbent firm may acquire an innovative target with the intention of terminating the development of the target's innovations to pre-empt future competition.[85] The acquiring firm might find it more profitable to buy and shut down a nascent firm's product rather than suffer the loss in revenue it expects to incur when the nascent firm's product matures (even if it would "cannibalize" its own sales after the acquisition).[86] These start-up or nascent firms play a vital role in competitive markets and therefore, if subject to killer acquisitions, there is a loss of not only a competitive constraint, but also increased product choice in the market.[87]

The risk that a loss of potential competition can harm consumers is well established.[88] Therefore, with the increasing demand for greener products from consumers, it is no surprise that an increasing number of mergers have been driven by an environmental rationale and impact, including so-called "green killer acquisitions".[89] This theory of harm sees incumbents acquiring more sustainable competitors with the aim to alleviate competitive pressure to produce greener or less polluting products or services.[90] Beyond the resulting effects on competition, these kinds of mergers may also drive up prices and lead to less use of these greener products thereby damaging the environment.[91] The harm associated with this practice is heightened when green innovation is carried out by smaller players as the merger may not be notifiable to competition authorities, allowing the action to potentially go unchecked.[92]

a) The Difficulty with Challenging Green Killer Acquisitions

Although green killer acquisitions do not necessarily raise novel competition law issues, panelists at the Bureau's Green Growth Summit in September 2022 suggested that they may warrant increased scrutiny in merger review.[93] Despite the potential harm associated with these types of mergers, it is quite difficult for the Bureau to monitor the marketplace and discover them in the first place. As the concept of green killer acquisitions is the acquisition of a nascent firm, these mergers often do not trigger the notification threshold in the *Act*. In its submission to the Consultation, the Bureau noted that "only five acquisitions made by the largest tech firms – Google, Apple, Amazon, Facebook and Microsoft – were notified under the *Act* in the past decade".[94] Accordingly, even though the Commissioner can challenge mergers that are non-notifiable, these types of transactions often fly under the radar and are not caught by the Bureau for review in the first place.

Moreover, the challenging of killer acquisitions is often difficult.[95] In Canada, the Commissioner must identify, on a balance of probabilities, "concrete market opportunities" that an emerging competitor is likely to exploit before remedies will be available due to the anti-competitive nature of the transaction.[96] Additionally, the SCC in *Tervita* held that the correct approach to section 92 requires a consideration of more than 'mere possibilities' of events in the future with due weight given to business judgment.[97] The Bureau has expressed that proving this can be difficult, if not impossible, when a business is still developing the products that would challenge other competitors, as is the case with these types of acquisitions.[98] Emerging green competitors may pose a potential threat to dominant firms and may become a threat over only a short period of time due to their exponential growth.[99] However, discerning and proving that an acquisition of a very new firm with small or non-existent sales is a threat to competition may be challenging.[100]

It has been argued that serial acquisitions of this type (i.e., a series of small acquisitions over time) may actually be better tackled through the recently expanded abuse of dominance provision in section 79, which will be discussed in more detail below.[101] This approach would examine a series of killer acquisitions to establish that the firm adopted a strategy of acquiring emerging green competitors to prove that it abused its dominant position.[102] However, despite some discussion of killer acquisitions in the Bureau's recently released guidance on the amendments to the abuse of dominance provisions,[103] uncertainty and a lack of transparency as to how a review of serial acquisitions would unfold under section 79 makes it unlikely that this will be a significant area of enforcement by the Bureau in the near future.

b) Global Amendments to Tackle Killer Acquisitions

Canada is not the only jurisdiction being challenged by killer acquisitions. In September 2023, the European Commission (the "**Commission**") published a "Merger Brief" setting out the agency's views on how its current legal framework supports the incorporation of sustainability considerations into EU merger control.[104] In its report, the Commission stated that it aims to be vigilant against green killer acquisitions.[105] Where the green killer acquisitions originate from smaller companies with lower turnover, the Commission affirmed its intention to rely on Article 22 of the *EU Merger Regulation*, which allows the Commission to review cases which do not qualify for review under the merger control laws of the requesting member state.[106] Under this approach, the Commission accepts referrals of mergers from Member States if it becomes aware of a transaction that can affect trade between Member States that threatens to significantly impede competition in at least one Member State, even if the transaction is not legally notifiable under any merger control thresholds at the Commission or national level.[107]

The United States has also stated its intention to utilize current tools to combat killer acquisitions. Although the US pre-merger notification system subjects most mergers of significant size to pre-merger review for competition concerns, a transaction does not have to be subject to such review for the Federal Trade Commission or the Department of Justice to be able to challenge it under antitrust laws.[108] Under section 7 of the *Clayton Act*, these agencies can challenge acquisitions of stocks or assets, without regard to whether the acquisition requires pre-merger notification, thereby allowing the US to review killer acquisitions using its existing framework.[109] As in Canada, however, non-notifiable transactions may fly below the radar and escape detection.

In contrast, the United Kingdom's Competition & Markets Authority (**CMA**) has voiced scepticism regarding its ability to handle killer acquisitions without amending UK competition law. On April 25, 2023, the UK government published the *Digital Markets, Competition and Consumers* bill, which introduced significant changes to the jurisdictional thresholds used in UK merger review aimed at killer acquisitions.[110] These new filing thresholds for killer acquisitions of nascent businesses will eliminate the need for an overlap between merging parties' activities in the UK where one party has a high share of supply (at least 33%) and substantial UK presence (turnover exceeding £350 million).[111] This new threshold is intended to complement the government's proposal to regulate acquisitions by businesses with "strategic market status" that are included in the proposed new digital markets regime. Under those proposed rules, all transactions involving a designated company will require notification if (a) that company acquires a shareholding of at least 15%, (b) the value of the transaction is at least £25 million, and (c) the target has a UK nexus.[112]

c) Proposals to Amend the Act to Ensure Better Enforcement of Killer Acquisitions

The Bureau, similar to the UK's CMA, has voiced its apprehension that the existing merger framework is not sufficient to effectively tackle killer acquisitions. In early March 2023, the Bureau proposed to amend the *Act* to include a new standard for reviewing potential killer acquisitions.[113] Although the new standard proposed by the Bureau is somewhat unclear, it likely entails lowering the threshold for intervention such that the mere possibility that a nascent firm could someday compete with the dominant firm would be sufficient for the merger to be blocked.[114] Moreover, discussions have emerged of possible changes to the *Act*'s pre-merger notification criteria, including a possible reduction in the "size of parties" threshold, as a means of increasing detection of these types of acquisitions.[115] Further, when challenging killer acquisitions, the timeframe for assessment is crucial.[116] Many of the effects from such mergers will only become clear further into the future than what most competition agencies currently consider.[117] Accordingly, it has been proposed that a longer timeframe for the limitation period for challenging mergers after approval be adopted to allow the Bureau to gather evidence of actual (rather than potential) harms and efficiencies that may take longer to be realized.[118] Thus, if these proposals were to be adopted, it is likely that greater enforcement will be seen in this area in the future, thereby indirectly combatting climate change through the increased protection of green innovations, among others.

B) Competitor Collaborations

The *Act* adopts a dual-track approach to certain types of competitor collaborations. Section 45 of the *Act* houses the *per se* provisions which make it a criminal offence for two or more competitors in the supply of products or services to conspire, agree or arrange to fix prices, allocate customers or markets, or restrict the output of a product or service, regardless of the effect on competition.[119] The civil track provision is found in section 90.1 which prohibits agreements between competitors that do not fall within the scope of section 45, but only if they substantially prevent or lessen competition.[120] Depending on the type of competitor collaboration, those with environmental effects will be reviewed under either section 90.1 or 45.

In addition to the creation of this dual track, the 2009 amendments to the *Act* also removed the defence to section 45 for conspiracies, combinations, agreements or arrangements that related, among other things, to measures to protect the environment.[121] After the removal of this defence from the *Act*, the Competition Law Section of the Canadian Bar Association suggested that a 'safety valve' be created for certain categories of agreements that are not anti-competitive in nature but are still considered illegal under the revised section 45, to replace the gap left by the removal of the environmental defence. However, this was never incorporated into the adopted revisions.

Even in the absence of an express safety valve for these environmental agreements in section 45, otherwise illegal sustainability agreements may still be able to proceed. Section 45(4) of the *Act* includes a defence for agreements that are ancillary and necessary to a broader or separate legitimate agreement.[122] Accordingly, certain agreements between competitors aimed at the implementation of higher environmental standards in a given industry or at the development of more sustainable products could benefit from this defence if the collaborative aspect of their agreement is directly related to the achievement of sustainability goals, and reasonably necessary for their effectiveness.[123] However, the defence is only available where parties to an agreement can establish that: "(i) a *per se* illegal price, allocation or output restriction is ancillary to a broader agreement that includes the same parties; (ii) the restriction is reasonably necessary to achieve the objectives of that broader agreement; and (iii) the broader agreement does not contravene the *per se* price-fixing, market allocation or output prohibitions."[124] Additionally, although in 2009 an explicit reference to environmental agreements as a potential successful use of the ancillary restraints defence was included in the Bureau's "Competitor Collaboration Guidelines",[125] this was removed in the 2021 updates to the collaboration guidelines.[126] As the elements for establishing this defence are often difficult to prove and the comfort of explicit reference to the use of this defence in environmental agreements has been removed from the Bureau's guidelines, even careful self-assessment may not be enough to provide the security needed by firms to enter into these agreements.

i) Advancements of Environment Goals Through Collaboration

Despite this trepidation, many forms of collaboration between businesses for the achievement of sustainability goals are unlikely to raise any competition law issues.[127] Further, beneficial forms of cooperation intended to advance environmental objectives are unlikely to harm competition, provided that the businesses do not have significant market power.[128] As outlined in Section II above, tensions are most likely to develop where the promotion of environmental objectives through collaboration significantly restricts competition.[129] However, this does not mean that environmental goals cannot be furthered through the use of collaborative agreements.

One of the most significant ways that environmental objectives have been advanced through cooperative agreements is the use of standard setting to move an entire industry towards the production of more environmentally-friendly products.[130] Nonetheless, standard setting in the environmental context has the potential to reduce competition.[131] For example, rivals can use the process to eliminate opportunities for product differentiation which may facilitate collusive outcomes.[132] Standard setting can also create barriers to entry for new competitors or eliminate products that may appear less desirable in light of environmental protection goals, but are cheaper for consumers.[133] Both of these situations reduce choice and increase prices for consumers.[134]

Regardless of the potential for a reduction in competition as a result of cooperation in the sustainability context, these types of agreements may lead to the advancement of environmental objectives. However, once the door is open for businesses to cooperate, unintended consequences may arise as a result.[135] Accordingly, many companies looking to cooperate to positively promote environmental goals may find their behaviour at odds with competition law and therefore subject to potential liability. Consequently, the perceived uncertainty about the legality of agreements associated with environmental benefits has led to many companies being dissuaded from entering into such cooperative agreements in the first place.[136]

ii) Global Jurisprudence on the Enforcement of Collaborative Agreements

Although there is a perception of greater risk in entering these types of agreements because of the increased potential for liability, jurisprudence globally suggests that generally only the truest collusive conduct will be reviewable. In its recent *Car Emissions* case, the European Commission fined five carmakers for colluding on slowing down the entrance into the market of technology for nitrogen oxide emissions cleaning for diesel cars.[137] Despite the technology being available to the manufacturers, the competitors agreed not to implement it in order to maintain their competitive advantage.[138] The Commission found this cooperative agreement to be an illegal cartel.[139]

Further, in the 2015 case exploring the "Chicken for Tomorrow" initiative, the Dutch Consumer and Markets Authority ("**ACM**") held that an industry-wide agreement to improve living standards of broiler chicken in the Netherlands restricted competition under article 101(1) of the *Treaty of the Functioning of the European Union* and could not be exempted under article 101(3).[140] Under the "Chicken for Tomorrow" agreement, parties agreed on a new minimum standard for chicken welfare that included slower growing chicken, fewer chickens per square meter in broiler chicken barns, more dark hours, and various environmental measures.[141] Most importantly, the ACM found that this agreement would result in a complete replacement of all regular chicken in the participating supermarkets with this new, more expensive product.[142] Accordingly, even though the agreement did provide benefits to animal welfare and sustainability, the ACM held that this did not outweigh the disadvantages for consumers arising from decreased choice and higher product prices.[143]

Finally, in France, the French competition authority found that competitors and their trade association in the hard-wearing floor covering sector had entered into an agreement to limit advertising on the individual environmental performance of their floor coverings, beyond the legal requirements.[144] Although the parties claimed that the agreement was meant to prevent excessive greenwashing, the agency held that the practice was likely to distort customers preferences and dissuade manufacturers from providing more innovative and sustainable products.[145]

iii) Greater Guidance is Necessary for Sustainable Collaboration

At the 2022 Green Growth Summit, in his opening remarks the Canadian Commissioner recommended that competition law promote pro-competitive collaboration as a means to achieve environmental objectives.[146] Many argue, however, that the limited guidance provided by the Bureau in this area may actually chill or prohibit such cooperation.[147] As mentioned, for example, the Bureau's most recent Competitor Collaboration Guidelines, released in May 2021, do not explicitly refer to sustainable competitor collaborations.[148] However, there is the potential that even if guidance is provided, companies may not take advantage of it, as they have done in the past. For example, in April 2020, the Bureau released guidance on competitor collaborations during the COVID-19 pandemic, which companies failed to take advantage of.[149]

Nevertheless, if pro-competitive collaboration can be used as a venue through which environmental goals may be achieved, it may be beneficial to consider amending the *Act* to reintroduce the "environmental defence" to accusations of wrongdoing under the criminal cartel provisions of the *Act* as well as civil competitor collaboration measures. Although likely repealed for lack of use, so long as sufficient clarity is provided as to the application of the defence, the emerging focus in Canada on sustainability may enable the defence to create the correct balance between promoting environmental goals and ensuring anti-competitive agreements are avoided. This rather minimal legislative change may be all that is necessary to provide much needed clarification to some sustainable collaborations.

Further, the recent amendments to the *Act* included an expanded list of factors that the Tribunal may consider in cases of civil-track reviewable competitor collaborations to determine whether there is or is likely to be a substantial lessening or prevention of competition, including network effects, any tendency to entrench the market position of leading incumbents, and the effect of the collaboration on price or non-price competition including quality, choice or consumer privacy.[150] Although these new factors were included to address potential competitive harms in the digital market and are potentially applicable more broadly to the environmental context, a lack of guidance in this area likely leaves these factors practically unusable.[151] Therefore, although it is possible that these amendments may open the door for greater enforcement from the Bureau in the area of sustainable competitors collaborations, absent more specific guidance, it is conceivable that these amendments may instead prevent necessary sustainable agreements intended to advance environmental goals from being entered into in the first place.

C) Abuse of Dominance Claims

Although there is little jurisprudence on the matter, in theory, environmental goals may also be considered in abuse of dominance claims in section 79 of the *Act* through anti-competitive practices such as environmental standard setting.[152] An abuse of dominance occurs when "a dominant firm or a dominant group of firms engages in a practice of anti-competitive acts, with the result that competition has been, is, or is likely to be prevented or lessened substantially in a market."[153]

With the high demand by consumers for greener products, there is the potential for increasing anti-competitive conduct as firms look to create competitive advantages for themselves, even illegally, in this progressively competitive space. These anti-competitive actions might include conduct by a dominant firm that is predatory, exclusionary, disciplinary, or intended to affect competition adversely.[154] Exclusionary abuses in the sustainability sphere may occur where a dominant incumbent with a polluting technology abuses its leading position by foreclosing a rival firm with greener technology.[155] For example, a dominant producer of chemical-based household cleaning products may attempt to abuse its dominant market position to push a producer of organic, environmentally-friendly cleaning products out of the market due to fear of actual or potential rivalry. Predatory bidding strategies used to foreclose rivals can also be at issue in greener product markets. For example, the European Commission recently opened an investigation into a potential abuse of dominance by Public Power Corporation in the wholesale electricity sector in Greece. In that case, the Commission alleged that the company might have distorted competition by adopting predatory bidding strategies to prevent rivals from competing in the wholesale market and reducing investments into the generation of clean energy.[156]

i) Tensions in Considering Environmental Objectives in Abuse of Dominance Cases

However, not all anti-competitive conduct that relates to sustainability results in harm to the environment. In fact, dominant firms may engage in conduct that might be considered abusive but also beneficial to the environment, creating a tension between the goals of competition law and the achievement of a greener climate. Some potential examples of this tension include, companies refusing to deal with downstream suppliers that do not meet the environmental criteria set by the regulatory standards of the industry; firms choosing to enter long-term exclusive arrangements in order to recover significant environmental investments; or the operation of an e-commerce platform that prioritizes a firm's own green products whilst demoting the more pollutive products of a rival.[157]

This tension is highly evident in cases of industry standard-setting by incumbents, as this practice is generally seen as highly efficient and pro-competitive.[158] However, standard-setting in the context of environmental benchmarks has recently been subject to increased skepticism due to its potential to hinder new entrants and decrease innovation.[159] The "Abuse of Dominance Enforcement Guidelines" already contemplate the idea of standard-setting industry groups,[160] such as those at issue in the FCA's decision in *Toronto Real Estate Board v Commissioner of Competition*.[161] In that case, the FCA held that the Toronto Real Estate Board ("**TREB**"), a trade association, had abused its dominant position by restricting the manner in which real estate agents could use information from the MLS database, effectively instituting a standard that the industry was required to follow. Accordingly, dominant firms that come together, even for benign reasons such as increasing sustainability standards, may be found to have contravened the abuse of dominance provisions as the conduct may have a disciplinary or exclusionary effect on smaller competitors.[162]

ii) The Potential for Increased Enforcement

As discussed in Section III(A)(i)(a), the SCC in *Tervita* established a hierarchy wherein quantifiable evidence is favoured over qualitative evidence. Although this finding in *Tervita* was in relation to the efficiencies defence, there was a fear that this hierarchy may impede on the analysis of abuse of dominance conduct as well. However, the FCA's decision in *TREB* may have put these qualms at ease as the Commissioner did not lead any quantitative evidence that TREB's conduct resulted in higher prices or decreased competition. The FCA held that quantitative evidence is not necessary to prove a substantial lessening of competition and the Commissioner has no legal burden to lead quantitative evidence at all.[163] Accordingly, it is likely that either party may rely on environmental effects, regardless of their qualitative nature, when analyzing whether a substantial lessening of competition has resulted from potentially anti-competitive conduct by a dominant firm, which may positively or negatively impact enforcement strategies in the future.

Moreover, the recent amendments to the *Act* in June 2022 have expanded the scope of the abuse of dominance provisions under the *Act*.[164] The amendments extended a private right of action for abuse of dominance cases to private parties, allowing them to apply directly to the Competition Tribunal if they are directly and substantially affected by the conduct.[165] Previously, only the Commissioner could raise abuse of dominance allegations before the Tribunal. Although it is possible that the extension of private party claims will result in an uptick in the number of cases brought under the abuse of dominance provision, this might be muted by the inability for private parties to seek monetary damages from the harm suffered.[166]

The amendments also included an expanded definition of "anti-competitive act".[167] The *Act* now defines an anti-competitive act as one that is "intended to have a predatory, exclusionary, or disciplinary negative impact on a competitor, *or to have an adverse effect on competition*" (emphasis added).[168] The Bureau has indicated that, in its view, the addition of the words "or to have an adverse effect on competition", has broadened the potential harm captured by the abuse of dominance provisions to include not only conduct that harms competitors but also competition or the competitive process more broadly.[169] As a result of this broader definition, anti-competitive conduct relating to environmental considerations may now be punished under the *Act*, leading to a potential for increased enforcement and greater liability for arguably dominant firms.

One of the goals of revising the definition of "anti-competitive act" was to clarify the definition of anti-competitive conduct in light of contradictory jurisprudence as well as address perceived gaps and inconsistencies created by a potentially overly limited scope of section 78.[170] More specifically, this updated definition, which includes both harms to competitors and harms to competition, was intended to codify the legal standard articulated in the jurisprudence post-*TREB*.[171] However, questions have been raised regarding how section 78 of the *Act* should now be interpreted, how the goals of section 78 interact with those of the *Act* as a whole in section 1.1, and how firms are expected to comply with such a broad and ambiguous provision. Therefore, although intended to increase certainty, it appears as though these amendments have, in practice, created greater uncertainty and have made it more difficult for companies to distinguish between aggressive pro-competitive conduct and anti-competitive abuses of dominance.[172] Although the Bureau released guidance on the amendments in October 2023,[173] some outstanding questions still remain regarding how the new definition will be used in practice.

These issues are only exacerbated when green products and services are at play. Due to the already limited jurisprudence, companies will face significant uncertainty when choosing to engage in conduct that promotes environmental goals but may have potentially anti-competitive results due to the increased possibility for an abuse of dominance claim. Although the Commissioner has yet to bring an allegation of abuse of dominance relating to the environment, it is clear that the tools are available for the Bureau to be successful in a potential allegation of anti-competitive environmental standard setting. This new provision is also a potential "catch all" for various conduct which harms both the environment and competition and therefore, has the potential to become much more active in the sustainability space in the future.

Although the new guidance from the Bureau does address the new factor in section 79(4) (the effect of the practice on price and non-price competition, including quality, choice or consumer privacy) when assessing if a practice is or is likely to prevent or lessen competition substantially, there is no further explanation as to how this factor may be used in practice.[174] Additionally, there is no mention of the environment at all in the new guidance. Therefore, absent further guidance from the Bureau, companies may well err on the side of caution when engaging in behaviour which may fall under the newly expanded abuse of dominance provisions. Firms should also carefully evaluate how the environmental impacts of their behaviour may be considered after the decision in *TREB* expanded the Commissioner's ambit by removing the requirement for the Bureau to present quantitative evidence when alleging anti-competitive conduct.

D) Greenwashing

The increasing concern by Canadians for the environment has led to an increase in demand for "green" products and services.[175] More specifically, studies have found that the vast majority of consumers globally would change their consumption habits to reduce their environmental impact.[176] This has resulted in an uptick in green innovation as companies look to reduce their environmental impact and differentiate themselves to capitalize on this increased demand.[177] However, as the supply of green products has increased, so has the number of false or misleading environmental ads or claims, an act known as greenwashing.[178] This practice harms competition and innovation as, while consumers may be prepared to pay a premium for a good or service that gives the impression of being better for the environment,[179] it is an area where consumers can easily be misled, preventing them from being able to make informed purchasing decisions.[180]

Greenwashing has become a real problem due to the marketability of sustainability and its potential to increase profit margins.[181] This has resulted in the potential for misaligned incentives as increased demand from customers for more sustainable products creates an incentive for firms to highlight those features, sometimes in a false manner.[182] To fight this, competition law has emerged as the primary enforcement mechanism in Canada to combat greenwashing.[183]

As greenwashing is the utilization of false or misleading advertising or claims about the relative environmental attributes of products or services, it is regulated under the deceptive marketing provisions in section 74.01 of the *Act*.[184] To determine whether an environmental claim is false or misleading in a material respect and therefore reviewable conduct under section 74.01, the courts will look to the general impression left by the representation as well as its literal meaning.[185] The general impression will be that of a 'credulous', 'hurried' and 'technically inexperienced' consumer, who is seeing the advertisement for the time.[186] This has been interpreted as a fairly low standard of sophistication for the viewer thereby placing a heavy onus on the company to prove that the advertisement is clear and accurate.[187] Further, performance claims falling under section 74.01(1) must also be supported by 'adequate and proper' testing thereby requiring advertisers to have substantiated their claims before they are utilized for advertising purposes.[188]

Reviewable deceptive marketing can be challenged either as a civil offence with administrative remedies, or as a criminal offence.[189] In June 2022, amendments to the *Act* came into force that increased the civil offence administrative monetary penalties.[190] The new maximum administrative monetary penalty for corporations is the greater of (1) $10 million for first infringements ($15 million for each subsequent violation), or (2) three times the value of the benefit derived from the deception (or, if this cannot be reasonably determined, up to 3% of a company's annual worldwide gross revenues).[191] This surpasses penalties imposed by the US Federal Trade Commission for similar conduct.[192] The Bureau maintains that the increase in administrative monetary penalties was necessary to address concerns that the prior penalties amounted to a pittance for the world's largest firms.[193] Accordingly, the Bureau contends that the penalties needed to be greater than the profit that the firm might realize as a result of its anti-competitive conduct in order to provide a strong financial incentive for businesses to comply with the *Act*.[194] However, liability is not limited to administrative monetary penalties for contravention of the deceptive marketing provisions as businesses also face the increasing risk of consumer class actions.[195] For example, in a class action settled between Volkswagen, Audi, and various consumers for emissions representations, Volkswagen and Audi were required to pay $2.1 billion to consumers in settlement.[196]

i) An Overview of Canadian Greenwashing Jurisprudence

The Bureau has pursued a number of cases through the deceptive marketing provisions of the *Act* in the area of greenwashing, proving their intention to take these claims seriously.[197] In 2016, Volkswagen Group Canada Inc and Audi Canada Inc entered into a consent agreement with the Bureau after its investigation found that the car manufacturers had misled consumers by promoting their 2.0 litre diesel engine vehicles sold or leased in Canada as having diesel engines that were cleaner than an equivalent gasoline engine, in contravention of paragraph 74.01(1)(a) of the *Act*.[198] In addition to the class settlement payout of $2.1 billion discussed above, Volkswagen and Audi also agreed to pay an administrative monetary penalty of $7.5 million each.[199]

In 2018, Volkswagen and Audi were the subject of another investigation by the Bureau, this time with Porsche Cars Canada, Ltd., regarding similar representations made in respect of their 3.0 litre diesel engines.[200] The Bureau's investigation found that Volkswagen and Audi misled consumers, in contravention of paragraph 74.01(1)(a) of the *Act*. The investigation also found that Porsche misled its consumers when promoting vehicles sold or leased in Canada by representing them as having engines in compliance with emissions standards[201] The Bureau entered into a consent agreement with the auto manufacturers under which Volkswagen and Audi committed to paying an administrative monetary penalty of $2.5 million each.[202]

Finally, at the beginning of 2022, the Bureau left the automotive space and concluded its investigation into Keurig Canada Inc.'s environmental claims regarding the recyclability of its single-use coffee pods.[203] The Commissioner concluded that these representations created the general impression that K-Cup pods are recyclable in each location where those representations were made to the public.[204] The investigation also found that Keurig Canada's claims about the steps involved to prepare the pods for recycling were false or misleading as they gave the general impression that consumers could prepare the pods for recycling by peeling the lid off and emptying out the coffee grounds, but some cities required additional steps to be taken to recycle the pods.[205] In its settlement agreement, Keurig Canada agreed to pay a $3 million administrative monetary penalty, pay for the Bureau's investigation at an additional cost of $85,000, and donate $800,000 to a Canadian environmental organization.[206] Pursuant to the consent agreement, Keurig Canada agreed to change its recycling claims and the packaging of the K-Cup pods as well as publish corrective notices about the recycling of its product on its website and social media, in national and local news media, in the packaging of all new brewing machines, and via email to its subscribers.[207]

ii) Guidance on Greenwashing in Canada and Globally

Despite the increasing jurisprudence in this area, the Bureau has issued minimal guidance for the making of environmental claims. In 2008, the Bureau published "Environmental Claims: A guide for industry and advertisers", which was intended to act as guidance with respect to the Bureau's enforcement of the misleading advertising provisions of the *Act*.[208] However, the Bureau archived this guide on November 4, 2021, noting that it may not reflect the Bureau's current policies and practices.[209] Unfortunately, no substantive direction has been provided since, such as that provided in comparable jurisdictions including the Green Guide in the United States, the Green Claims Code in the United Kingdom, or New Zealand's Environmental Claims Guidance.[210] A general overview of the guidance provided by each of these jurisdictions is provided below.

The present US Green Guide is the fourth iteration of the Federal Trade Commission's guidance designed to help marketers avoid making environmental claims that mislead consumers.[211] The Green Guide provides direction including, general principles that apply to all environmental marketing claims; how consumers are likely to interpret particular claims; how marketers can substantiate their environmental claims; and how firms should qualify their marketing claims to avoid deceiving consumers.[212]

In July of 2020, the Commerce Commission of New Zealand ("**NZ Commission**") released its own guidelines to help firms avoid breaching the New Zealand *Fair Trading Act* when making environmental claims.[213] The direction provided in the guidelines covers general principles and examples of cases brought by the NZ Commission in the past as well as further guidance for firms on common environmental claims such as, lifestyle claims, comparative claims, branding, and certification stamps.[214]

Most recently, in 2021, the CMA in the UK released its "Green Claims Code".[215] The CMA developed this code to provide businesses with a framework for reviewing their environmental claims.[216] This framework includes a checklist with six key points to evaluate whether environmental claims made by a firm are genuinely green as well as extensive guidance to help businesses feel more confident about their green claims.[217] Although primarily created to assist businesses, the CMA's guidance also ensures greater consumer confidence in the green claims made by businesses.[218] As a result, the "Green Claims Code" also sets out a series of tips to help consumers determine if environmental claims about the products and services they are purchasing are genuine.[219]

It is evident from the Bureau's investigations into Keurig and various automotive manufacturers that it is taking an active role in addressing greenwashing in Canada. Although this greater emphasis may be the result of a conscious uptake in enforcement by the Commissioner, there has also been an increase in false, misleading, or unsupported environmental claims in Canada.[220] As the emphasis on environmental protection grows, the incentive for firms to invest more in the marketing of their sustainable products will only increase. Accordingly, the deceptive marketing provisions of the *Act* will be crucial in maintaining faith in these claims in the eyes of consumers such that they continue to purchase products that are marketed as environmentally friendly. Consequently, greater guidance is needed from the Bureau to ensure that firms feel confident in their claims and continue to pursue sustainable agendas.

IV. The Inherent Limitations in Expanding the *Act* and the Path Forward

As demonstrated above, the *Act* does provide for the potential consideration of environmental policy objectives in its current competitive analysis framework where the goals of competition and the environment are aligned. However, these two aims are sometimes at odds, creating a tension that requires a hierarchy to be instilled between them. Furthermore, there are sections of the *Act* where environmental effects have not yet been considered but have the potential to do so. To the extent discussed above, these areas provide opportunities for enforcement to be expanded and the boundaries of competition law to be pushed.[221] Nonetheless, as will be argued below, there are inherent limitations and dangers in doing so.[222] Accordingly, it is not surprising that despite the increasing prevalence of environmental concerns within the Canadian political sphere, discussions by the Bureau or legislators surrounding amendments to the *Act* to expressly reflect environmental policy objectives have not arisen.[223]

However, that does not mean that all is quiet on this front. As mentioned in Sections I and II, a debate has been forming regarding the normative question as to whether competition law should take into account sustainability considerations at all.[224] This paper is not intended to compare and contrast the arguments in this normative debate, it has instead focused on the precursor question: can the current iteration of the *Act* successfully consider environmental goals in its competitive analysis? As this has been answered in the affirmative, for completeness it is important to briefly discuss the main arguments against the explicit consideration of environmental effects in the *Act* to demonstrate the inherent limitation it places on the analysis of sustainability concerns, specifically where an expanded scope of the *Act* is necessary.

Those that contend that competition law should not consider environmental effects argue that competition law should not be used to pursue policy objectives that go beyond the core promotion and maintenance of efficient market structures as this could dilute the effectiveness of antitrust, be difficult to enforce, and result in unintended spill-over effects.[225] These scholars contend that although integrating environmental benefits as they relate to competition can promote the goals of the *Act* as well as environmental objectives, antitrust analysis should not try to fit in environmental considerations where they do not belong.[226] Accordingly, to the extent that competition and environmental policy objectives are at odds, competition law cannot address these concerns.[227] Moreover, even where the *Act*'s current framework implicitly allows for the consideration of environmental effects, the Bureau has generally chosen not to use its enforcement powers to pursue an environmentalist agenda.[228]

Another significant issue with the consideration of environmental effects in the competitive analysis framework is the risk, specifically in Canada, that the Bureau could overstep its jurisdiction. It is cautioned that environmental issues should not be used as a trojan horse to impede on another's jurisdiction, specifically that of the provincial government as the environment is not explicitly governed by one distinct head of power. As a result, both Parliament and the provincial government can legislate in respect of the environment so long as they maintain their respective jurisdictions.[229] Thus, there is considerable risk for Parliament in attempting to regulate environmental issues within the competition law framework that it may overstep its jurisdiction. This may prevent Parliament from engaging with amendments to the *Act* regarding environmental goals out of fear of encroaching on provincial jurisdiction.

Further, legislative reform is slow. Accordingly, even if Parliament were to expand the scope of the *Act* to allow for the explicit consideration of environmental effects, the implementation of these amendments would take time. Even then, despite Parliament's best efforts, once enacted, the regulation may still be insufficient to reach the desired outcome.[230]

Finally, in general, competition and environmental law each serve broad policy aims.[231] Each could potentially advance market efficiency in their own ways. However, their market failures are distinct and the institutional remedies to combat these failures are generally very different as a result.[232] Therefore, to maintain predictability within the competition law regime, it is critical that the conceptual differences between the two policy tools are kept clear.[233] Accordingly, although competition law is still integral to addressing climate change through its potential role in reshaping markets to adjust consumer preferences towards more sustainable products and services, any policy instability or uncertainty concerning how enforcement by the Bureau will unfold may have the effect of stifling environmentally beneficial investments.[234]

As demonstrated throughout this paper, the *Act* is already capable of considering environmental effects, especially those with an economic dimension. However, there are inherent limitations when advancing environmental objectives through competition law, especially where the provision requires the *Act* to expand its scope. Accordingly, regardless of the larger, normative question, it is clear that the Bureau must be careful when considering environmental effects within the current competitive framework, especially when doing so pushes the current limitations of the *Act*, such as in the newly expanded abuse of dominance provisions.

Consequently, as the potential for the inclusion of environmental effects grows, if the Bureau wishes to use its powers as a means to promote sustainability it should focus its efforts on common sustainability cases, such as greenwashing claims through the deceptive marketing provisions or mergers, as these are provisions of the *Act* where the potential for tension between sustainability and competition goals is least likely. As a result, the Bureau's activities in these areas are the most likely to have the greatest positive effect on competition and sustainability. The consideration of environmental objectives in abuse of dominance claims, on the other hand, is much more hypothetical and requires further guidance from the Bureau prior to increases in enforcement measures to ensure predictability and legitimacy. Similarly, when considering sustainable competitor collaborations, though they have the greatest potential to promote sustainability, it is unclear where the line is between harmful cartels and pro-competitive collaborations and the possibility for being accused of illegal collusion may well be too high for firms to risk. Thus, it is in the author's view unlikely that firms will turn to this particular tool in advancing their sustainability agendas, absent guidance from the Bureau and/or reinstatement of the "environmental defence" to allegations under section 45.

Regardless of the enforcement route taken by the Bureau, if any is taken at all, greater formal and informal guidance is necessary as stakeholders have increasingly expressed concerns that one of the main hindering factors towards sustainable innovation is the fear of competition law implications.[235] The Bureau plays an important role in creating "soft law" guidance for businesses to clarify how the agency will address these issues.[236] The Bureau's current approach to enforcement in this space, especially with respect to deceptive marketing and competitor collaborations, remains far from clear.[237] Moreover, even where further guidance is provided from the Bureau in areas such as abuse of dominance, the consideration of environmental effects or the environment in general appear to be continually absent.[238] It is especially important in these cases that the Bureau provide frequent guidance and increased transparency to ensure that sustainable innovation continues. Businesses are looking for some consistency and guidance so that they can make the necessary investments in the sustainability sphere.[239] Guidance from the Bureau is crucial in advancing environmental objectives in this way.

V. Conclusion

Although not expressly contemplated in section 1.1 of the *Act*, environmental effects can be considered in the competitive analysis framework so long as the objectives of sustainability and the goals of competition are aligned. Especially where these effects can be easily quantifiable and have an economic dimension, the *Act* is properly positioned to promote environmental objectives through the fostering of innovation and consumer choice. The current framework is flexible enough to consider environmental effects through the efficiencies defence, green killer acquisitions, competitor collaborations focusing on sustainability, standard setting in abuse of dominance allegations, and the deceptive marketing practice of greenwashing. However, if environmental objectives are pursued through the *Act*, it has been argued that less emphasis should be placed on the enforcement of abuse of dominance and competitive collaboration provisions until further guidance from the Bureau can be issued due to a lack of clarity in these areas. Rather minimal legislative changes such as reinstating the "environmental defence" to accusations of wrongdoing under the criminal cartel provisions of the *Act* as well as the civil competitor collaboration measures would also assist, in the first instance. Moreover, if it chooses to do so, the

Bureau should focus its efforts on greenwashing claims through the deceptive marketing provisions and mergers, as these two areas create less tension between environmental objectives and competition goals, and are the most likely to have a lasting, positive effect on competition and sustainability.

ENDNOTES

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[**] Samantha Steeves is a 2023 graduate of the University of Western Ontario Faculty of Law. This paper was completed in the course of a third-year thesis at the University of Western Ontario Faculty of Law.

[1] Organisation for Economic Co-operation and Development, "Environmental considerations in competition enforcement OECD Competition Committee Discussion Paper" (2021) at 7, 10, online (pdf): *OECD.org* <www.oecd.org/daf/competition/environmental-considerations-in-competition-enforcement-2021.pdf> [OECD, "Environmental Considerations"].

[2] *Ibid* at 10.

[3] Julien Beaulieu, "Green Competition: Introduction to the Interactions between Competition and Environmental Policy in Canada" (2021) 33 Can Comp L Rev 144 at 162.

[4] OECD, "Environmental Considerations", *supra* note 1 at 10.

[5] *Competition Act*, RSC 1985, c C-43 [*Act*].

[6] Beaulieu, *supra* note 3.

[7] Vasiliki Bednar, "Senator Weston Response re: Examining the Canadian Competition Act in the Digital Era Consultation Paper" (15 December 2021) at 8, online (pdf): *Senator Colin Deacon* <https://static1.squarespace.com/static/63851cbda1515c69b8a9a2b9/t/63d1eaeb7152687ffc0cb574/1674701548598/bednar.pdf>.

[8] Jeffrey Church, "Amendments to the *Competition Act*: Economic Foundations" (December 2021) at 3, online (pdf): *Senator Colin Deacon* <https://static1.squarespace.com/static/63851cbda1515c69b8a9a2b9/t/63d1edbdbc9d5700c4f687df/1674702274784/church.pdf>.

[9] Zirjan Derwa, "SUBMISSION: *Examining the Canadian Competition Act in the Digital Era*" (1 February 2022) at 6, online (pdf): *Senator Colin Deacon* <https://static1.squarespace.com/static/63851cbda1515c69b8a9a2b9/t/63d1ee7cd0103b25c1d6e2d9/1674702461538/z_derwa.pdf>.

[10] *Act*, *supra* note 5, s 1.1.

[11] "Killer acquisitions" occur when a company acquires control of an innovative, nascent firm with the intention of eliminating a possible source of future competition.

[12] "Greenwashing" is the use of false or misleading environmental ads or claims to promote a company or a company's product of being more environmentally friendly.

[13] Beaulieu, *supra* note 3.

[14] *Act*, *supra* note 5, s 1.1.

[15] *Tervita Corporation v Commissioner of Competition*, 2013 FCA 28 at paras 155-56, rev'd 2015 SCC 3 [*Tervita* FCA].

[16] *Ibid*.

[17] *Ibid*.

[18] Bednar, *supra* note 7 at 8.

[19] Church, *supra* note 8 at 3.

[20] Derwa, *supra* note 9 at 7.

[21] *Ibid*.

[22] Beaulieu, *supra* note 3 at 147.

[23] Competition & Markets Authority, "Guidance: Environmental Sustainability and the UK Competition and Consumer Regimes: CMA Advice to the Government" (14 March 2022), online: *Competition & Markets Authority* <https://www.gov.uk/government/publications/environmental-sustainability-and-the-uk-competition-and-consumer-regimes-cma-advice-to-the-government/environmental-sustainability-and-the-uk-competition-and-consumer-regimes-cma-advice-to-the-government>.

[24] The 2022 Amendments to the *Act* included the addition of a new consideration in subsection 93(g.3) that allows the Competition Tribunal to consider any effect of the merger or proposed merger on price or non-price competition, including quality, choice or consumer privacy when evaluating whether a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially. See, *Act*, *supra* note 5, s 93(g.3).

[25] OECD, "Environmental Considerations", *supra* note 1 at 10.

[26] *Ibid*.

[27] *Ibid*.

[28] *Ibid*. See also, Maarten Pieter Schinkel & Yossi Spiegel, "Can collusion promote sustainable consumption and production?" (2017) 53 Int'l J of Industrial Organization 371 at 375, 384, 387.

[29] Philippe Aghion et al, "Environmental Preferences and Technological Choices: Is Market Competition Clean or Dirty?" (2020) National Bureau of Economic Research Working Paper No 26921 at 1. See also OECD, "Environmental Considerations", *supra* note 1 at 10; Schinkel & Spiegel, *supra* note 28 at 384, 387.

[30] OECD, "Environmental Considerations", *supra* note 1 at 10.

[31] *Ibid*.

[32] Maurits Dolmans, "Sustainable Competition Policy" (2020) 5/6:4/1 Comp L & Policy Debate 2 at 8; Theon Van Dijk, "A New Approach to Assess Certain Sustainability Agreements Under Competition Law", in Simon Holmes, Dirk Middelschulte & Martijn Snoep, eds, *Competition Law, Climate Change & Environmental Sustainability* (Paris: Concurrences, 2021) at 66.

[33] Van Dijk, *supra* note 32 at 67.

[34] *Ibid* at 66-67. See also, OECD, "Environmental Considerations", *supra* note 1 at 11.

[35] OECD, "Environmental Considerations", *supra* note 1 at 14.

[36] *Ibid*.

[37] *Ibid* at 15.

[38] *Ibid*.

[39] *Ibid*.

[40] For examples of well-accepted methods for quantification of non-economic

effects see, OECD, *Cost-Benefit Analysis and the Environment: Further Developments and Policy Use* (Paris: OECD Publishing, 2018).

[41] OECD, "Environmental Considerations", *supra* note 1 at 15.

[42] *Tervita* FCA, *supra* note 15 at paras 155-56.

[43] OECD, "Environmental Considerations", *supra* note 1 at 19.

[44] *Ibid* at 19-20.

[45] Coral Davenport, "Justice Department Drops Antitrust Probe Against Automakers That Sided With California on Emissions", *The New York Times* (7 February 2020), online: <www.nytimes.com>.

[46] OECD, "Environmental Considerations", *supra* note 1 at 20.

[47] The difficulty with determining a timeframe for analysis is also a challenge with *ex-ante* enforcement of mergers under the prevention branch. The SCC in *Tervita Corporation v Commissioner of Competition* discussed the importance of utilizing an appropriate and likely timeframe instead of simply speculating as to the timeframe to be considered when reviewing a merger that falls under the prevent branch of section 92. In that case, the Court held that when determining the likelihood of entry into the market by one of the merging parties, the timeframe for entry must be discernable. While the timeline does not need to be precise, there must be evidence the merging party is expected to enter the market absent the merger. Otherwise, the timeline of entry is simply speculative and the test of likelihood of prevention of competition is not met. For more information see, *Tervita Corporation v Commissioner of Competition*, 2015 SCC 3 at para 68 [*Tervita* SCC].

[48] Taraleigh Stevenson & Mark Katz, "Seeing Green: Sustainability Remains of Interest to the Competition Bureau" (3 October 2022), online (blog): *Davies Ward Phillips & Vineberg LLP* <https://www.dwpv.com/en/Insights/Publications/2022/Seeing-Green-Sustainability-Interest-Competition-Bureau>.

[49] *Act*, *supra* note 5, s 91.

[50] *Ibid*, s 92.

[51] *Ibid*, s 93.

[52] *Ibid*, s 96.

[53] Colleen Cunningham, Florian Ederer & Song Ma, "Killer Acquisitions" (2021) 129:3 J of Pol Economy 649 at 650.

[54] *Act*, *supra* note 5, s 92.

[55] *Ibid*, s 96; Competition Bureau Canada, "Merger Enforcement Guidelines" (6 October 2011) at 37, online (pdf): *Government of Canada* <https://ised-isde.canada.ca/site/competition-bureau-canada/sites/default/files/attachments/2022/cb-meg-2011-e.pdf> [Competition Bureau Canada, "Merger Guidelines"].

[56] *Tervita* SCC, *supra* note 47 at para 89. See also, *Canada (Commissioner of Competition) v Superior Propane Inc*, 2002 Comp Trib 16 at para 399, aff'd 2003 FCA 53.

[57] *Tervita* SCC, *supra* note 47 at para 90.

[58] Beaulieu, *supra* note 3 at 148.

[59] *Ibid* at 150.

[60] *Tervita* SCC, *supra* note 47 at para 102; *Canada (Commissioner of Competition) v Secure Energy Services Inc*, 2023 Comp Trib 2 at para 493 [*Secure Energy*].

[61] Ian Li & Eric Patenaude, "Canadian Government and Competition Bureau signals potential changes to merger notification and approval process" (February 11, 2022), online (blog): *Torys LLP* <https://www.torys.com/our-latest-thinking/publications/2022/02/canadian-government-and-competition-bureau-signal-potential-changes>.

[62] *Tervita* SCC, *supra* note 47 at para 87.

[63] Michael Trebilcock & Francesco Ducci, "The Evolution of Canadian Competition Policy: A Retrospective" (2018) 60 Can Bus L J 171 at 194.

[64] *Secure Energy*, *supra* note 60 at para 517.

[65] *Ibid*; CD Howe Institute, "The Impact of the Supreme Court's New 'Quantitative Evidence' Ruling on Business Mergers" (30 April 2015) at 3, online (pdf): *cdhowe.org* <https://www.cdhowe.org/sites/default/files/attachments/other-research/pdf/Communique_April%2030_2015_CPC.pdf>.

[66] *Secure Energy*, *supra* note 60 at para 517.

[67] Trebilcock & Ducci, *supra* note 63 at 194.

[68] Beaulieu, *supra* note 3 at 153; Ralph A Winter, "Tervita and the Efficiency Defense in Canadian Merger Law" (2015) 28 Can Comp L Rev 133.

[69] Trebilcock & Ducci, *supra* note 63 at 195.

[70] CD Howe Institute, *supra* note 65 at 5.

[71] *Ibid* at 4; Beaulieu, *supra* note 3 at 153.

[72] Trebilcock & Ducci, *supra* note 63 at 195.

[73] *Ibid.*

[74] Beaulieu, *supra* note 3 at 153.

[75] CD Howe Institute, *supra* note 65 at 6.

[76] Li & Patenaude, *supra* note 61.

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

[78] *Ibid.*

[79] C-56, *An Act to amend the Excise Tax Act and the Competition Act*, 1st Sess, 44th Parl, 2023, cl 10.

[80] C-352, *An Act to amend the Competition Act and the Competition Tribunal Act*, 1st Sess, 44th Parliament, 2023.

[81] C-339, *An Act to amend the Competition Act (efficiencies defence)*, 1st Sess, 44th Parliament, 2023.

[82] Cunningham, Ederer & Ma, *supra* note 53 at 649.

[83] OECD, "Start-ups, Killer Acquisitions and Merger Control" (2020) at 3, online (pdf): *OECD.org* <https://www.oecd.org/daf/competition/

start-ups-killer-acquisitions-and-merger-control-2020.pdf> [OECD, "Killer Acquisitions"].

[84] Cunningham, Ederer & Ma, *supra* note 53 at 649-50.

[85] *Ibid* at 650.

[86] *Ibid.*

[87] OECD, "Killer Acquisitions", *supra* note 83 at 3.

[88] *Ibid.*

[89] OECD, "Environmental Considerations", *supra* note 1 at 34.

[90] *Ibid* at 38.

[91] Christopher Ragan, "A green future: competition policy and competitiveness" (The Competition and Green Growth Summit, Ottawa, 20 September 2022) [unpublished].

[92] *Ibid.* The size-of-transaction notification threshold for mergers in Canada for the year 2023 is $93 million. See, Competition Bureau Canada, News Release, "Pre-merger notification transaction-size threshold to remain at $93M in 2023" (3 February 2023), online: *Government of Canada* <https://www.canada.ca/en/competition-bureau/news/2023/02/pre-merger-notification-transaction-size-threshold-to-remain-at-93m-in-2023.html>.

[93] Stevenson & Katz, *supra* note 48.

[94] Competition Bureau Canada, "Future of Competition Policy—Bureau Submission", *supra* note 77.

[95] Edward M Iacobucci, "Examining the Canadian *Competition Act* in the Digital Era" (2021) at 35, online (pdf): *Senate of Canada* <https://sencanada.ca/media/368377/examining-the-canadian-competition-act-in-the-digital-era-en-pdf.pdf>.

[96] *Tervita* FCA, *supra* note 15 at para 109.

[97] *Tervita* SCC, *supra* note 47 at para 76; Dany H Assaf & Marina Chernenko, "The *Tervita* Decision: Prevention of Competition, Efficiencies Defences, and Knowing the Unknowns in Merger Review" (2015) 29:3 Antitrust 66 at 68.

[98] Chris Margison et al, "Competition Bureau Recommendations Regarding Merger Review in Canada" (2022), online (blog): *Fasken Martineau DuMoulin LLP* <https://www.competitionchronicle.com/2022/02/competition-bureau-recommendations-regarding-merger-review-in-canada/>.

[99] Iacobucci, *supra* note 95 at 35.

[100] *Ibid.*

[101] *Ibid* at 36.

[102] *Ibid.*

[103] Competition Bureau Canada, "Bulletin on Amendments to the Abuse of Dominance Provisions" (25 October 2023), online: *Government of Canada* <https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/consultations/bulletin-amendments-abuse-dominance-provisions> [Competition Bureau Canada, "Bulletin on Amendments"].

[104] European Commission, "Competition merger brief" (September 2023), online (pdf): *europa.eu* <https://competition-policy.ec.europa.eu/system/

files/2023-09/kdal23002enn_mergers_brief_2023_2.pdf> [European Commission, "Competition merger brief"].

[105] *Ibid.*

[106] *Ibid.*

[107] Elena Wiese, Martin Sura & Florian von Schreitter, "Merging Green—Key take-aways from the European Commission's thinking on green mergers" (28 September 2023), online: *Hogan Lovells International LLP* <https://www.engage.hoganlovells.com/knowledgeservices/viewContent.action?key=Ec8teaJ9VarXKpR3EdhiC17eOOGbnAEFKCLORG72fHz0%2BNbpi2jDfaB8lgiEyY1JAvAvaah9lF3dzoxprWhI6w%3D%3D&nav=FRbANEucS95NMLRN47z%2BeeOgEFCt8EGQ0qFfoEM4UR4%3D&emailtofriendview=true&freeviewlink=true>.

[108] OECD, "Start-ups, killer acquisitions and merger control—Note by the United States" (11 June 2020) at 12, online (pdf): *ftc.gov* <https://www.engage.hoganlovells.com/knowledgeservices/viewContent.action?key=Ec8teaJ9VarXKpR3EdhiC17eOOGbnAEFKCLORG72fHz0%2BNbpi2jDfaB8lgiEyY1JAvAvaah9lF3dzoxprWhI6w%3D%3D&nav=FRbANEucS95NMLRN47z%2BeeOgEFCt8EGQ0qFfoEM4UR4%3D&emailtofriendview=true&freeviewlink=true>.

[109] *Ibid.*

[110] Bill Batchelor et al, "UK to Revamp Merger Control, Expanding CMA's Jurisdiction and Making Procedures More Flexible" (2 May 2023), online: *Skadden, Arps, Slate, Meagher & Flom LLP and Affiliates* <https://www.skadden.com/insights/publications/2023/05/uk-to-revamp-merger-control>.

[111] *Ibid.*

[112] *Ibid.*

[113] Competition Bureau Canada, "Future of Competition Policy—Bureau Submission", *supra* note 77. See also, "Future of Canada's Competition Policy Consultation—What We Heard Report" (20 September 2023), online: *Government of Canada* <https://ised-isde.canada.ca/site/strategic-policy-sector/en/marketplace-framework-policy/competition-policy/consultation-future-competition-policy-canada/future-canadas-competition-policy-consultation-what-we-heard-report>.

[114] *Ibid.* See also, Competition Bureau Canada, "Examining the Canadian *Competition Act* in the Digital Era" (8 February 2022), online (pdf): *Government of Canada* <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwi5tqWJvdiCAxWAFjQIHc2xBhUQFnoECAgQAw&url=https%3A%2F%2Fsencanada.ca%2Fmedia%2F368377%2Fexamining-the-canadian-competition-act-in-the-digital-era-en-pdf.pdf&usg=AOvVaw0ma7TWPSWG1257nnOq9ECR&opi=89978449>.

[115] Mark Katz et al, "Canadian Government Consults on Far-Reaching Changes to Canada's Competition Law" (24 November 2022), online (blog): *Davies Ward Phillips & Vineberg LLP* <https://www.dwpv.com/en/Insights/Publications/2022/Government-Consults-Changes-Canada-Competition-Law>.

[116] OECD, "Environmental Considerations", *supra* note 1 at 39.

[117] *Ibid.*

[118] *Ibid*; Katz et al, *supra* note 115.

[119] *Act*, *supra* note 5, s 45; Beaulieu, *supra* note 3 at 153.

[120] *Act*, *supra* note 5, s 90.1.

[121] Beaulieu, *supra* note 3 at 153-54.

[122] *Ibid*. *Act*, *supra* note 5, s 45(4).

[123] Beaulieu, *supra* note 3 at 154.

[124] Competition Bureau Canada, "Competitor Collaboration Guidelines" (6 May 2021) at 23, online (pdf): *Government of Canada* <https://ised-isde.canada.ca/site/competition-bureau-canada/sites/default/files/attachments/2022/CB-BC-CCGs-Eng.pdf> [Competition Bureau Canada, "Competitor Collaboration Guidelines"].

[125] Competition Bureau Canada, "Competitor Collaboration Guidelines—Enforcement guidelines" (23 December 2009), online (pdf): *Government of Canada* <https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/publications/competitor-collaboration-guidelines-enforcement-guidelines>.

[126] *Ibid.*

[127] Competition & Markets Authority, *supra* note 23.

[128] *Ibid.*

[129] *Ibid.*

[130] OECD, "Policy Roundtables: Horizontal Agreements in the Environmental Context" (2010) at 12, online (pdf): *OECD.org* <https://www.oecd.org/competition/cartels/49139867.pdf> [OECD, "Policy Roundtables"].

[131] *Ibid.*

[132] *Ibid.*

[133] *Ibid.*

[134] *Ibid.*

[135] Craig Alexander, "A green future: competition policy and competitiveness" (The Competition and Green Growth Summit, Ottawa, 20 September 2022) [unpublished].

[136] OECD, "Environmental Considerations", *supra* note 1 at 24.

[137] European Commission, Press Release, "Antitrust: Commission fines car manufacturers €875 million for restricting competition in emission cleaning for new diesel passenger cars" (8 July 2021), online: *European Union* <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3581> [European Commission, "Commission fines car manufacturers"]; *ibid* at 23.

[138] *Ibid*; OECD, "Environmental Considerations", *supra* note 1 at 23.

[139] European Commission, "Commission fines car manufacturers", *supra* note 137.

[140] Jan Peter van der Veer, "Valuing Sustainability? The ACM's analysis of 'Chicken for Tomorrow' under Art. 101(3)" (18 February 2015), online (blog): *Kluwer Competition Law Blog* <https://competitionlawblog.kluwercompetitionlaw.com/2015/02/18/valuing-sustainability-the-acms-analysis-of-chicken-for-tomorrow-under-art-1013/>.

[141] *Ibid.*

[142] *Ibid.*

[143] Jacqueline M Bos, Henk van de Belt & Peter H Feindt, "Animal welfare,

consumer welfare, and competition law: The Dutch debate on the Chicken of Tomorrow" (2019) 8:1 Animal Frontiers 20 at 20.

[144] Autorité de la concurrence, Press Release, "19 October 2017: Cartels in the Floor Coverings Sector" (19 October 2017), online: *Autorité de la concurrence* <https://www.autoritedelaconcurrence.fr/en/communiques-de-presse/19-october-2017-cartel-floor-coverings-sector>; *ibid.*

[145] Autorité de la concurrence, *supra* note 144.

[146] Stevenson & Katz, *supra* note 48; OECD, "Environmental Considerations", *supra* note 1 at 23.

[147] Stevenson & Katz, *supra* note 48.

[148] *Ibid.*

[149] Competition Bureau Canada, "Competition Bureau statement on competitor collaborations during the COVID-19 pandemic" (8 April 2020), online: *Government of Canada* <https://www.canada.ca/en/competition-bureau/news/2020/04/competition-bureau-statement-on-competitor-collaborations-during-the-covid-19-pandemic.html>.

[150] Elad Gafni & Ian Macdonald, "Significant First-Round Amendments to The Competition Act Come Into Force" (28 June 2022), online (blog): *Gowling WLG International Limited* <https://gowlingwlg.com/en/insights-resources/articles/2022/significant-amendments-to-competition-act/>.

[151] *Ibid.*

[152] *Act*, *supra* note 5, s 79.

[153] Competition Bureau Canada, "Abuse of Dominance" (last modified 20 January 2022), online: *Government of Canada* <www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00511.html>.

[154] *Ibid.*

[155] OECD, "Environmental Considerations", *supra* note 1 at 31.

[156] *Ibid.*

[157] *Ibid* at 32.

[158] Stevenson & Katz, *supra* note 48.

[159] *Ibid.*

[160] Competition Bureau Canada, "Abuse of Dominance Enforcement Guidelines" (7 March 2019) at 48-50, online (pdf): *Government of Canada* <https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/publications/abuse-dominance-enforcement-guidelines>; Kate McNeece, "Competition enforcement in a greener economy" (The Competition and Green Growth Summit, Ottawa, 20 September 2022) [unpublished].

[161] *Toronto Real Estate Board v Commissioner of Competition*, 2017 FCA 236 [*TREB*].

[162] McNeece, *supra* note 160.

[163] *TREB*, *supra* note 161 at paras 121-28.

[164] Shuli Rodal et al, "First round of amendments to the Competition Act now in effect" (24 June 2022), online (blog): *Osler, Hoskin & Harcourt LLP* <https://www.osler.com/en/resources/regulations/2022/

first-round-of-amendments-to-the-competition-act-now-in-effect#:~:text=The%20amendments%20came%20into%20force,on%20the%20most%20important%20changes>.

[165] Competition Bureau Canada, "Guide to the 2022 amendments to the *Competition Act*" (24 June 2022), online (pdf): *Government of Canada* <https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/publications/guide-2022-amendments-competition-act> [Competition Bureau, "Guide to the 2022 amendments"].

[166] Gafni & Macdonald, *supra* note 150.

[167] Rodal et al, *supra* note 164.

[168] *Act*, *supra* note 5, s 78(1). See also, Competition Bureau, "Guide to the 2022 amendments", *supra* note 165.

[169] Competition Bureau Canada, "Bulletin on Amendments", *supra* note 103.

[170] *Ibid*; Practical Law Canada Competition, "Competition Bureau Recommends Sweeping Competition Act Amendments" (last amended 1 March 2022), online: <ca.practicallaw.thomsonreuters.com/w-034-6258?transitionType=Default&contextData=(sc.Default)&firstPage=true>.

[171] Competition Bureau Canada, "Bulletin on Amendments", *supra* note 103.

[172] Mark Katz, Anita Banicevic & Charles Tingley, "Significant changes to Canadian competition law" (December 2022), online: *Financier Worldwide* <https://www.financierworldwide.com/significant-changes-to-canadian-competition-law#.Y7doSy3b1mA>.

[173] See, Competition Bureau Canada, "Bulletin on Amendments", *supra* note 103.

[174] *Ibid.*

[175] Competition Bureau Canada, "Environmental Claims and Greenwashing" (20 January 2022), online: *Government of Canada* <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04607.html> [Competition Bureau Canada, "Environmental Claims"].

[176] Robin Spillette, Huy Do & Antonio Di Domenico, "Greenwashing: What It Is and Why It Matters" (2022) 35:1 Can Comp L Rev 83 at 85.

[177] Kelly Harris, "How To Avoid Greenwashing in Canada" (11 October 2022), online (blog): *Global Advertising Lawyers Alliance* <http://blog.galalaw.com/post/102hyvx/how-to-avoid-greenwashing-in-canada>.

[178] Canadian Competition Bureau, "Environmental Claims", *supra* note 175; Spillette, Do & Di Domenico, *supra* note 176 at 157.

[179] Van Dijk, *supra* note 32 at 58.

[180] New Zealand Commerce Commission, "Environmental Claims", online: *New Zealand Government* <https://comcom.govt.nz/business/dealing-with-typical-situations/environmental-claims>.

[181] Ragan, *supra* note 91.

[182] McNeece, *supra* note 160.

[183] Nikiforos Iatrou, Michael Caldecott & Leila Far Soares, "Greenwashing Just Got More Expensive in Canada" (October 28, 2022), online: *Today's General Counsel* <https://www.todaysgeneralcounsel.com/

greenwashing-just-got-more-expensive-in-canada/?utm_source=rss&utm_medium=rss&utm_campaign=greenwashing-just-got-more-expensive-in-canada>.

[184] *Supra* note 5, s 74.01; Spillette, Do & Di Domenico, *supra* note 176 at 84.

[185] Paula Boutis, "Greenwashing Lands Keurig Canada $3 Million Fine From the Competition Bureau of Canada" (26 January 2022), online (blog): *Aird Berlis LLP* <https://www.airdberlis.com/insights/publications/publication/greenwashing-lands-keurig-canada-3-million-fine-from-the-competition-bureau-of-canada>.

[186] *Canada (Competition Bureau) v Chatr Wireless Inc*, 2013 ONSC 5315 at paras 124–26.

[187] Harris, *supra* note 177.

[188] *Ibid.*

[189] *Ibid*; Spillette, Do & Di Domenico, *supra* note 176 at 87.

[190] Harris, *supra* note 177; Iatrou, Caldecott & Far Soares, *supra* note 183.

[191] Harris, *supra* note 177.

[192] Iatrou, Caldecott & Far Soares, *supra* note 183.

[193] *Ibid.*

[194] *Ibid.*

[195] *Ibid.*

[196] Competition Bureau Canada, "Volkswagen and Audi to pay up to $2.1 billion to consumers and $15 million penalty for environmental marketing claims" (19 December 2016), online: *Government of Canada* <canada.ca/en/competition-bureau/news/2016/12/ volkswagen-audi-pay-up-2-1-billion-consumers-15-million-penalty- environmental-marketing-claims.html> [Competition Bureau, "Volkswagen and Audi"].

[197] McNeece, *supra* note 160.

[198] Competition Bureau, "Volkswagen and Audi", *supra* note 196.

[199] *Ibid.*

[200] Competition Bureau Canada, "Up to $290.5 million in compensation for Canadians in Volkswagen, Audi and Porsche emissions case" (12 January 2018), online: *Government of Canada* <https://www.canada.ca/en/competitionbureau/news/2018/01/up_to_290_5_millionincompensationforcanadiansinvolkswagenaudiand.html>.

[201] *Ibid.*

[202] *Ibid.*

[203] *Commissioner of Competition v Keurig Canada Inc* (6 January 2022), CT-2022-001, online: Competition Tribunal <https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/518827/1/document.do>.

[204] *Ibid.*

[205] Competition Bureau Canada, "Keurig Canada to pay $3 million penalty to settle Competition Bureau's concerns over coffee pod recycling claims" (2022 January 6), online: *Government of Canada* <https://www.canada.ca/en/competition-bureau/news/2022/01/keurig-canada-to-pay-3-million-penalty-to-settle-competition-bureaus-concerns-over-coffee-pod-recycling-claims.html>.

[206] *Ibid.*

[207] *Ibid.*

[208] Spillette, Do & Di Domenico, *supra* note 176 at 92.

[209] *Ibid.*

[210] Iatrou, Caldecott & Far Soares, *supra* note 183.

[211] Federal Trade Commission, "Environmentally Friendly Products: FTC's Green Guides", online: *Federal Trade Commission* <https://www.ftc.gov/news-events/topics/truth-advertising/green-guides>.

[212] *Ibid.*

[213] New Zealand Commerce Commission, *supra* note 180.

[214] Clayton Utz, "Making a 'greenwashing' claim? The New Zealand Commerce Commission guidance could help Australian businesses" (12 August 2020), online: *Lexology* <https://www.lexology.com/library/detail.aspx?g=f065065c-a885-424d-b25a-7eea7f8a6b24>.

[215] Katie Skelton, "What is the Green Claims Code and how can it affect your business?" (20 May 2022), online: *Ailuna* <https://ailuna.com/green-claims-code/>.

[216] *Ibid.*

[217] *Ibid.*

[218] *Ibid.*

[219] Competition and Markets Authority, "Green Claims Code – get your green claims right", online: *gov.uk* <https://greenclaims.campaign.gov.uk>.

[220] Competition Bureau Canada, News Release, "Be on the lookout for greenwashing" (26 January 2022), online: *Government of Canada* <https://www.canada.ca/en/competition-bureau/news/2022/01/be-on-the-lookout-for-greenwashing.html>.

[221] OECD, "Environmental Considerations", *supra* note 1 at 20.

[222] *Ibid.*

[223] Beaulieu, *supra* note 3 at 157.

[224] OECD, "Environmental Considerations", *supra* note 1 at 15.

[225] Beaulieu, *supra* note 3 at 158.

[226] Denise Hearn, "Competition enforcement in a greener economy" (The Competition and Green Growth Summit, Ottawa, 20 September 2022) [unpublished].

[227] McNeece, *supra* note 160.

[228] Beaulieu, *supra* note 3 at 158.

[229] *Constitution Act, 1867* (UK), 30 & 31 Vict, ss 91, 92, reprinted in RSC 1985, Appendix II, No 5.

[230] OECD, "Environmental Considerations", *supra* note 1 at 9.

[231] Hearn, *supra* note 226.

[232] *Ibid.*

[233] *Ibid.*

[234] *Ibid.*

[235] OECD, "Environmental Considerations", *supra* note 1 at 27.

[236] *Ibid.*

[237] Stevenson & Katz, *supra* note 48.

[238] Competition Bureau Canada, “Bulletin on Amendments”, *supra* note 103.

[239] Sarah Keyes, “A green future: competition policy and competitiveness” (The Competition and Green Growth Summit, Ottawa, 20 September 2022) [unpublished].

SCHOLARS PANEL ON NON-PRICE EFFECTS: TURNING SMOKE INTO FIRE

INNOVATION EFFECTS IN CANADIAN MERGER ANALYSIS

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Recent amendments to the Canadian Competition Act direct the Competition Tribunal to consider non-price competitive effects under the merger and other civil provisions of the Act. This commentary first provides an overview of the economics literature on the effects of mergers on innovation incentives, and then summarizes the challenges to mergers that potentially threaten innovation by antitrust authorities in the US and Europe, and the much smaller number of such challenges in Canada. Canadian real GDP per capita and innovation by Canadian businesses, which are keys to Canadians' standards of living, lag other advanced economies. This commentary considers whether the fact that relatively few mergers have been challenged by the Competition Bureau on the basis of concerns about innovation effects may be a partial cause of lagging innovation in Canada. It concludes that there is little evidence that innovation-reducing mergers in Canada have been allowed because of deficiencies in the Act, Tribunal jurisprudence, or Bureau enforcement practices. Several commentators have noted that the relatively poor innovation performance of Canadian businesses is likely caused in part by the challenges that start-ups face in obtaining sufficient financing to successfully commercialize their innovations, and by Canada's relatively weak intellectual property rights regime, which can make it difficult for Canadian business to capture more of the returns from their investments in innovation. Mergers can help overcome these challenges, such that more aggressive merger enforcement can undermine firms' investment incentives. Repeal of the Section 96 efficiencies defence, if Bill 56 is enacted, may also reduce incentives to invest in innovation in some cases.

Avec ses récentes modifications, la Loi sur la concurrence canadienne impose désormais au Tribunal de la concurrence de prendre en compte les effets sur la concurrence autres que de nature tarifaire dans le cadre de ses dispositions relatives aux fusionnements et autres dispositions civiles. Dans le présent commentaire, nous passerons d'abord en revue la littérature économique qui concerne l'effet des fusions sur l'incitation à l'innovation, puis ferons la synthèse des contestations contre les fusions potentiellement nuisibles à l'innovation qu'ont faites les autorités antitrust aux États-Unis *et en Europe (et, en nombre bien plus modeste, les autorités au Canada). Le PIB réel par habitant et les innovations que génèrent nos entreprises sont le moteur de notre qualité de vie au Canada; or, la machine est plus lente ici que dans d'autres économies avancées. Nous nous demanderons si ce retard en innovation pourrait être en partie imputé au fait que le Bureau de la concurrence stoppe assez rarement les fusions par souci des effets à ce chapitre. Notre conclusion : il y a peu d'indications que cela résulte de lacunes du côté de la Loi, de la jurisprudence ou du travail du Bureau si des fusions jugulant l'innovation ont été admises. Plusieurs commentateurs sont d'avis que si les entreprises canadiennes font relativement mauvaise figure sur le plan de l'innovation, c'est probablement à cause de la difficulté qu'ont les jeunes pousses à obtenir un financement adéquat pour commercialiser leurs concepts, et aussi du régime assez mou du pays en matière de propriété intellectuelle qui peut les empêcher d'en tirer un rendement intéressant. La fusion peut toutefois être une solution à ces problèmes, et donc, un encadrement trop strict pourrait freiner l'investissement privé dans l'innovation. Ce sera potentiellement le cas si le projet de loi 56 est adopté : certains investisseurs pourraient se voir découragés par son abrogation de l'article 96, ce qui les priverait de la « défense fondée sur les gains en efficience ».*

1. Introduction

The 2022 amendments to the Canadian *Competition Act* ("Act") explicitly direct the Competition Tribunal ("Tribunal") to consider non-price competitive effects in the merger, abuse of dominance, and competitor collaboration provisions of the Act. Notwithstanding that non-price effects were not specifically included in the Act prior to the 2022 amendments, the Tribunal has, for some time, already been reading such effects into the merger and abuse provisions. Even so, the effects of firm conduct on non-price dimensions of competition have played a significant role in only a small number of Competition Bureau ("Bureau") merger and abuse of dominance investigations and have been secondary (to price effects) concerns in several others. Non-price effects have been much more predominant in competition investigations in the US and Europe.[2]

This commentary focuses on innovation, a key non-price dimension of competition, and in particular on how innovation effects are assessed in the analysis of mergers. It begins with an overview of the economic analysis of innovation in antitrust reviews of mergers. The relatively simple indicators of the price effects of mergers, such as market concentration measures and pricing pressure tests, are reasonably well developed and have long been used by competition authorities and merging firms to identify potential problematic mergers. These simple tests do a reasonable job of identifying mergers that are likely to result in price increases, at least before efficiencies are considered. Other, more sophisticated, economic tools for assessing price effects, such as demand estimation and merger simulation modelling, have also been frequently applied to estimate price effects and are widely used by the enforcement agencies and firms' experts.

There is much less agreement on how to assess the effects of mergers and other firm conduct on non-price dimensions of competition, including innovation. Most commentators agree that the link between market concentration and anticompetitive price effects is much tighter than the link between concentration (or any other simple statistics or observables) and non-price effects, and depending on the theory of anticompetitive harm, there may not be a link at all. The OECD, for example, has noted that "(t)he studies investigating the effect of competition on innovation are numerous, and generally do not support a simple, unidirectional relationship. Rather, as is often the case with antitrust theories of harm, the literature suggests that innovation effects depend on the particular characteristics of a market,"[3] and "a broad-brush conclusion on the impact of mergers on innovation may not be advisable."[4] Furthermore, while economists estimate price effects using a widely accepted set of models, there are no such general and widely accepted economic models for the assessment of innovation and other non-price effects.

The next section of this commentary discusses the European Commission's analysis of the Dow/DuPont merger, an important merger case involving concerns about innovation effects. An Appendix contains a summary of the analysis of other innovation mergers by the US enforcement agencies and the European Commission. This section is followed by an overview of analyses of innovation effects by the Bureau and Tribunal. The Bureau has alleged non-price anticompetitive effects to meet its burden to demonstrate a substantial lessening or prevention of competition ("SLPC") in several litigated merger cases, although with one partial exception, its concerns about non-price effects appeared to be secondary to its concerns about price effects. It has successfully met its burden to prove an SLPC in relation to non-price effects in most of these litigated cases. The Bureau has also resolved its concerns about innovation effects arising from mergers with a Consent Agreement in a small number of cases, including Dow/DuPont, [5] Bayer AG/Monsanto, [6] and Thoma Bravo. [7] Arguably, the most important litigated non-price effects matter in Canada was the *Toronto Real Estate Board* ("*TREB*") abuse of dominance case, in which the Bureau alleged that the respondent's practices were likely to result in a SLPC based on non-price effects. The Commissioner's evidence in support of an SLPC in this case was almost exclusively qualitative, consisting mainly of the testimony of frustrated entrants, with no or limited quantitative support. The Tribunal agreed with the Commissioner and concluded that the impugned practices were likely to result in an SLPC. This case suggests that proving non-price effects in Canadian civil cases, even using only qualitative evidence, may not be excessively burdensome.

The last section of this commentary begins with a discussion of the importance of innovation to Canadian standards of living. This section explains that real GDP per capita growth has been lagging in Canada relative to other advanced countries (and is expected, according to the OECD, to continue to be lower than most other advanced economies), and documents how low levels of R&D spending and innovation have been an important cause. It then discusses the role of the merger provisions of the Act and the Bureau's merger enforcement practices in Canada's lagging innovation performance. The Competition Bureau has challenged few mergers in which it has identified innovation concerns, relative to the US and the EU agencies. While this is to be expected given the relatively small size of the Canadian economy, the number of challenges nevertheless seems to be proportionally small. Some commentators have argued that Canadian firms have too much market power and the merger provisions of the Act are underenforced, and the Bureau itself has recommended that the Act be amended to strengthen its enforcement power.

This last section argues that there is little evidence of underenforcement of innovation mergers in Canada. Moreover, certain features of the Canadian economy, such as the relatively poor record of Canadian firms in commercializing their innovations and Canada's relatively weak property rights, may support (and explain) more lenient enforcement of mergers involving innovating firms. Mergers can help address both of these challenges: acquisition by a larger firm with complementary capabilities can facilitate the commercialization of a smaller firm's innovation and provide necessary financing; and when property rights are weak a merger can increase the extent to which firms capture the returns to their investment in innovation.

The Section 96 efficiencies exception may also help explain why there have been fewer merger challenges based on innovation concerns in Canada, although the Bureau does not appear to have publicly commented on a merger where it had innovation concerns but nevertheless refrained from challenging because of the efficiencies defence. This section also discusses how a total surplus standard potentially allows some innovation-increasing mergers that would be blocked if the government's Bill 56, which would repeal the efficiencies defence, is enacted. Innovation-increasing mergers could also be blocked if section 96 is not repealed but the total surplus standard is instead replaced by a consumer welfare standard. Increases in merging firm profits resulting from higher post-merger prices are not anti-competitive effects in an efficiencies trade-off under a total surplus standard. Higher post-merger profits may also create incentives for firms to innovate. Repeal of Section 96 may therefore reduce incentives for firms to innovate.[8]

2. Overview of the Economic Analysis of Innovation Effects in Mergers

Innovation includes the creation of new products that provide benefits to consumers, improvements to existing products ('product innovations'), and reductions in the cost of producing new or existing products ('process innovations'). The foundational economic analyses of the effects of mergers on innovation were provided by Joseph Schumpeter[9] and Kenneth Arrow,[10] both giants of 20th century economics. Schumpeter is often associated with the 'market power is good for innovation' school and Arrow is often cited for support by the 'competition promotes innovation' side, although Shapiro[11] explains that the ideas of these two scholars are not so irreconcilable.

When economists think about whether a law, regulation, or antitrust enforcement will increase innovation, they think about effects on firms' incentives and abilities. A firm will have the incentive to spend resources on R&D and other innovative activity if the expected return to innovation, RI, exceeds the cost of engaging in innovation activity, CI; that is the firm will innovate only if RI > CI. If a merger increases a firm's return to innovation or reduces its cost of innovating, then it could move from an environment in which RI < CI to one where RI > CI, in which case we would predict that the merger will increase innovation. Conversely, a merger that reduces the return to innovation (or, less likely, increases the cost of innovation), may flip the inequality from RI > CI to RI < CI, so that the merger reduces innovation.

Schumpeter focused on how increased market power, or increases in firm size more generally, can tip the scales towards the returns to innovation outweighing the costs. His reasoning was simply that a firm will invest in the creation of a new product if it expects to earn a high enough profit after it innovates, and market power creates higher profits. If, after innovating, the firm must sell its product in a market where it only earns a 'competitive' return, the firm may not incur the costs of innovating in the first place.

After all, it can earn a 'competitive' profit without innovating, so why incur the cost of innovating? The economic logic is similar to the logic supporting patent protection, where innovators are granted protection from competition for some period to give them the incentive to innovate—consumers are forced to pay high prices because of the monopoly created by the patent, which increases the profits of the innovator thus creating the incentive to spend resources on innovation. Consumers are assumed to be better off in the long run because they benefit from the new product.

A key insight of Schumpeter is the idea of 'appropriability', which represents the firm's ability to capture the benefits of its innovation—if an innovation can be easily copied by other firms, the firm's return from innovating will be competed away, which eliminates the incentive to innovate. A stronger incentive to build a better mousetrap exists if imitators will not be able to copy the design, because the innovator would be able to charge a higher price and get a better return on its investment in innovation. By the same token, if there is another firm that is most likely to copy the innovation, and the innovator acquires that firm, the firm's incentive to innovate will increase because it would be able to appropriate more of the returns, including the returns that would otherwise accrue to the acquired rival firm. In addition, if the acquired firm is a competitor, the firm may also be able to charge a higher price following the merger, which further increases the return to innovation and makes the incentive to innovate stronger.

Arrow, on the other hand, focused on the fact that a firm in a competitive market has more to gain from innovation than does a monopolist. The return to innovation for a firm in a competitive market includes the profit that it 'steals' from other firms. For example, if a firm creates a better product, it will likely retain most of its current market share and it will take some market share from the other firms in the market. A monopolist, on the other hand, would not have the ability to take market share from other firms in the market—by definition, it is the only competitor-- and therefore if it did not expand the market, innovation would only cannibalize its own sales. The effect of 'stealing' market share from competitors creates a stronger incentive for the firm in a competitive market to spend resources on innovation compared to a monopolist. That is, RI can be higher for a firm in an unconcentrated market than for a monopolist.

The 'innovation diversion ratio' ("IDR") can be used to assess the 'business stealing' effect on the incentive to innovate.[12] The IDR measures the fraction of the extra profits a firm would earn from innovation that come at the expense of a rival. When firms A and B merge, the IDR for the effect of the merger on A’s incentive to invest in an innovation is calculated as the ratio between the profits that Firm B is expected to lose from the introduction of A’s new product (i.e. sales that will be diverted to A’s new product from B) and the additional profits that Firm A is expected to earn from its innovation. The profits that Firm B is expected to lose is higher the more substitutable A’s new product is for B (so that the volume that B loses is higher). The higher the innovation diversion ratio, the larger the ‘business stealing effect’—that is, when this ratio is ‘high’, a merger internalizes more of the sales that would be lost to the merging partner absent the merger, so that the incremental profit from innovation is lower with a merger, reducing the incentive to innovate. When the IDR is large, so is the risk that the merger will reduce innovation relative to no merger, all else equal.

Because of the opposite incentives from ‘appropriability’ and ‘business stealing’, the direction of the net effects of mergers on innovation incentives is theoretically ambiguous, even when only downstream market considerations are taken into account—the prospect of higher downstream prices following a merger can increase returns to innovation, while the merger can reduce innovation incentives because the merger eliminates the ‘business stealing’ reward to innovation effort.[13] Mergers can, however, also generate efficiencies (or synergies), which can increase merging firms’ abilities and incentives to innovate by combining complementary R&D assets and capabilities or by increasing the extent to which the innovating firm appropriates the returns to its investment in innovation.

A merger combining firms’ R&D assets and development programs can make the firms more efficient at developing new products or making product or process improvements, which can result in new innovations or faster commercialization. A merger may also allow firms to apply a more efficient production process to a wider sales base, which creates a stronger incentive to invest in process improvements. A merger that results in reduced incremental R&D costs improves the ability and incentive for the merging firms to innovate,[14] which not only tends to benefit consumers, but also helps offset any consumer harms from higher post-merger prices.[15]

A merger can also improve merging firms’ innovation incentives by increasing appropriability of returns to innovation—that is, a merger can facilitate the internalization of returns to innovation that would otherwise be captured by other firms. One way this can occur is through internal knowledge diffusion. Firm A will have a stronger incentive to spend resources on innovation the more of the returns to its investment that it can appropriate. If merging partner B has a separate research program that can benefit from

A's R&D, through knowledge sharing the merger may allow A to appropriate more of the returns to its investment (because the benefit of A's R&D on B's product is internalized by the merged firm). While A could license its innovation to B without a merger, which would allow it to appropriate some of the benefits of its innovation that it transfers to B, a merger may nevertheless increase appropriation if A cannot extract all of the benefits of the R&D through arms-length licensing, which is often the case. Accordingly, for this effect to be merger specific, the knowledge generated by A's R&D must therefore not only be useful to B, it must also be the case that A could not be able to fully capture the benefits to B through licensing.[16]

In addition to allowing a firm to capture additional returns through *voluntary* knowledge diffusion to its merger partner, mergers can also internalize *involuntary* knowledge spillovers to other firms. An example of an involuntary knowledge spillover is a new discovery spread among the researcher community as a result of scholarly publications, or 'clusters' where companies located in close proximity learn from each other's successes and failures. Involuntary knowledge transfers also can occur as a result of employee mobility, where employees move from one company to another and bring their knowledge and skills with them. When other firms benefit from A's R&D through such spillovers, A does not appropriate all of the returns from its innovation. For example, through knowledge gained by spillovers, B can partially imitate A's product without infringing on its IP.[17] In such cases, a merger can internalize involuntary spillovers and increase the returns to A's R&D spending.[18] Internalization of knowledge spillovers may not be merger-specific if, for example, firms could form a research joint venture, which would not risk the loss of downstream price competition.[19] In general, when firms can appropriate returns to R&D by licensing IP and limiting spillovers without a merger, then the incremental benefits of a merger are weaker.

A newer set of economic models, building on the work of Schumpeter, Arrow, and others, was sparked by the European Commission's analysis of 'innovation spaces' in the Dow/DuPont merger. Federico et al (2017)[20] and (2018)[21] attempt to resolve the tension between the business-stealing, or cannibalization, effects and market power, or price coordination, effects of a merger on innovation incentives. [22] The question the authors ask is whether, in an oligopoly model where firms sell differentiated products, firms are likely to innovate more or less after they merge. These models were developed by the Commission's Chief Economist team contemporaneously with the Commission's review of the Dow/DuPont merger and appears to form at least part of the theoretical basis for the Commission's 'innovation spaces' theory of harm in that merger.[23] The European Commission's review of the Dow/Dupont merger, as well as the Bureau's review of this merger, are discussed in more detail below.

The 'price coordination' effect in this model can either improve or diminish the merging firm's investment incentives—the merger increases the merged firm's profits whether it innovates or not. On the other hand, the 'innovation externality' (business-stealing) effect unambiguously reduces the merging firm's investment incentives. The net effect on the merging firm's innovation is therefore theoretically ambiguous and depends on the features of the market, including, among other things, the effectiveness of innovation effort, the cost of innovation, the nature of the demand function for the innovated product, the number of innovating competitors, and changes in the marginal cost of production.

To explore the impact on the merged firm's innovation incentives, Federico et al choose model parameters such that the 'price coordination' channel would necessarily increase the merged firms' incentive to innovate, but nevertheless find that the 'innovation externality' tends to dominate, such that the overall effect of a merger on innovation by the merging firms is negative. Furthermore, the negative effect on the merged firm's investment incentives was found to be stronger if the merging firms were close downstream competitors.

In the models considered by Federico et al, innovation efforts are 'strategic substitutes', in the sense that, when the merging firms reduce their innovation efforts, the efforts of non-merging firms would tend to increase. Accordingly, in theory, even if a merger reduces the incentive of merging firms to innovate, the net effect of a merger on total innovation by all firms is theoretically ambiguous. The authors numerically simulate their models and find that, even under assumptions that they call 'not highly restrictive', a merger results in lower overall innovation by the industry and reduces consumer welfare.[24]

Economists have subsequently developed several models that challenge the finding by Federico et al that most mergers reduce innovation and harm consumers. Denicolò and Polo (2018)[25] show that mergers do not necessarily reduce innovation by demonstrating that if the incremental cost of innovation does not increase too quickly at higher levels of innovation effort (i.e. returns to innovation effort do not diminish too quickly), then the merged firm may shut down one of the firm's research efforts and instead concentrate efforts on one of the merged firm's labs. This could result in an increase in overall R&D by the merged firm, relative to pre-merger levels. Bourreau et al (2021)[26] introduce a 'demand expansion' effect, which is derived from the increase in demand for the merged firm's product from an innovation and is independent of the 'margin effect' that increases the firm's return to innovation through higher post-merger prices. The demand expansion effect can increase the merging firms' innovation levels, especially if the merger reduces production costs.

In a research note, RBB Economics (a European economics consultancy) notes that Federico et al's conclusion that overall industry innovation is reduced with a merger only occurs in cases where the number of firms in the market is 'low enough', and the critical number of competitors depends on the model parameters. The authors argue that under some parameter values, only a merger to monopoly would reduce overall innovation and harm consumer welfare.[27]

A) Summary of Some Lessons From Economic Models

The following summarizes some lessons from the models outlined above:

- A merger can reduce the merging firms' innovation incentives through a 'business-stealing' effect that internalizes the sales gains from the innovation that would have been 'stolen' from a competitor absent the merger. The innovation diversion ratio can be used to assess the magnitude of this effect.

- A merger that increases market power increases the merging firm's profit whether it innovates or not. The effect of increased market power from a merger on innovation incentives is theoretically ambiguous and can either increase or decrease innovation.[28]

- A merger can therefore increase or decrease merging firms' innovation efforts, ignoring efficiencies or synergies. Federico et al (2017) and (2018) find that mergers in concentrated markets generally reduce overall innovation (even accounting for increased innovation by non-merging firms), while other models such as Denicolò and Polo (2018) and Bourreau et al (2021) show that mergers can increase innovation, even absent efficiencies.

- A smaller number of non-merging (and potentially innovating) firms generally increases the risk that a merger will reduce innovation, but the 'critical' number competitors required to ensure that innovation does not decrease with a merger depends on the nature of demand

and costs and therefore the overall effects of a merger on innovation are very case-specific. In some cases, only a merger to monopoly or near-monopoly reduces innovation.

- A merger can improve innovation incentives if the merging firms can appropriate more of the returns to innovation, either through voluntary transfers of knowledge or internalization of involuntary spillovers. The appropriability benefits of a merger are less important the more firms can, without a merger, appropriate returns through a research joint venture, licensing of intellectual property rights, or other means. Appropriability benefits of mergers may not be merger-specific if the firms can capture returns to innovation through less anticompetitive means.

- A merger that results in a substantial lessening of competition may still, on balance, benefit consumers, even absent efficiencies. This could occur, for example, if the merging firm creates a new or improved product that benefits consumers and the merging firms can exercise a materially greater market power after they merge.

- A merger can reduce the costs of innovation by combining complementary R&D assets, which increases the merging firms' incentive to innovate.

- Increased appropriability and efficiencies achieved through the combination of innovation capabilities can offset the innovation-reducing effects of mergers.

3. Innovation Merger Challenges in Other Jurisdictions

Until recently, the US agencies and the European Commission mainly challenged mergers on innovation grounds in cases where products are already in later stages of development but not yet brought to market--so-called 'pipeline' products. Concerns about pipeline products can arise when a pipeline product in development by a firm is expected to compete with existing products or with other pipeline products of another firm.

This section provides an overview of the European Commission's analysis of the Dow/Dupont merger. An Appendix summarizes some other mergers challenged by the US agencies and the European Commission based on concerns about innovation effects.

Dow/DuPont was perhaps the most important innovation merger review undertaken by the European Commission.[29] The Commission's review consisted of a number of steps: identifying innovation spaces and research targets on which each merging firm focuses; identifying overlaps and competitors for each of the identified 'innovation spaces', based on internal company documents and RFIs to other global R&D players; calculating patent shares based on quality; considering evidence from internal documents of a significant decrease in R&D capabilities post-merger, or discontinuation, delay, or reorientation of parties' overlapping lines of research and pipeline products; and analyzing efficiencies.[30]

A key component of the Commission's review of the innovation effects of the merger was its patent analysis. The Commission looked at patents corresponding to 'discovery' or 'research' stage of the R&D process and gathered patent data on the type of crop protection that was targeted by the research. It then estimated patent quality, based on forward citations (i.e., the number of citations in subsequent patents), since patents are very heterogeneous and most are never or rarely cited, and assessed quality based alternatively on internal and external citations. It then calculated quality-adjusted patent shares, which it benchmarked with various samples ('Top 50/25/10), or weights for patent quality, after adjusting shares for patent age since the actual quality of 'young' patents is understated by citation counts. Based on this analysis, the Commission found that the merging firms had patent shares ranging from 40% to 60% for insecticides, and 30% to 50% for selective herbicides (partly depending on internal or external citations). It also found that concentration indices were high.[31]

The parties argued that expected higher profits from the merger would incentivize more investment in innovation, which should be balanced against any negative effects of the merger on innovation. The Commission responded that the net effect of higher downstream profits on innovation is *a priori* ambiguous, since less competition in product markets increases (relative to pre-merger) firm profits if firms innovate and also if they do not innovate, and the overall effect depends on a number of factors. The model constructed by the Commission's Chief Economist Team (subsequently published in Federico, Langus, and Valletti (2017) and (2018)—discussed above), although not cited in the Commission decision, was claimed to demonstrate that business-stealing effects (which reduce innovation) tend to dominate 'market power' incentives (which may increase innovation), such that, absent synergies and increase appropriability, mergers reduce innovation and harm consumers for most model parameters.

4. Non-Price Effects in Canadian Merger Cases

Even prior to the 2022 amendments to the Act, the Competition Tribunal and the Supreme Court of Canada included non-price effects in merger analysis. A substantial lessening or prevention of competition is determined by whether the merger is likely to create, maintain or enhance the ability of the merged firm to exercise market power,[32] and market power is the ability to profitably influence price, as well as quality, variety, service, advertising, innovation or other dimensions of competition, the latter of which are referred to as non-price effects.[33] Non-price effects have featured in the analysis of SLPC in several litigated merger cases (under section 92), as well in abuse cases (paragraph 79(1)(c)). In all of the litigated merger cases, the Bureau's primary concerns in relation to SLPC have been about price increases, with non-price effects having a secondary role, but non-price effects were the key allegation in the *TREB* abuse of dominance case. In the recent *Secure* merger decision, the Commissioner argued non-price effects under section 92 and these effects were by far the largest part of the Commissioner's anticompetitive effects calculation for purposes of the Section 96 efficiencies trade-off.[34] The following is an overview of Canadian merger matters involving innovation and other non-price effects.

A) Thoma Bravo

In 2019 the Bureau reviewed a proposed transaction that would have combined what were effectively the only two oil reserves software products (MOSAIC and Val Nav) used by Canadian oil and gas companies.[35] Upon review, the Bureau had concerns about the likely price and non-price effects of the transaction. The Bureau found that the merging firms' two products were each other's closest competitors, and that they competed vigorously on both price and non-price dimensions, including product features, software updates, and customer service. The Bureau further concluded that competition led to the development of product quality and capability through software updates and releases. As evidence in support of its concerns about 'dynamic competition' and innovation, the Bureau referred to the fact that the companies monitored each other's product developments, including strengths and weaknesses, and targeted each other's customers with better pricing, service, and features. After finding that reserves software suppliers in the US and other countries were not sufficiently adapted for use in Canada and also finding significant barriers to entry, the Bureau concluded that the transaction would likely reduce the incentives of the companies to 'enhance and maintain' their reserves software in Canada, and in addition to this lost dynamic competition, the merger would likely have led to higher prices and lower service quality. Thoma Bravo agreed to divest its MOSAIC software to an independent purchaser pursuant to a Consent Agreement.

The Bureau's brief position statement does not describe in any detail any economic analysis that it undertook in one of the very few mergers it has reviewed that feature concerns about innovation and quality. The impression left by the Bureau's position statement is that any merger involving a merger to monopoly, where the merging firms compete in innovation, is likely to result in a substantial lessening of competition on the basis of concerns about the loss of dynamic competition and lower product quality.

B) Dow/DuPont

In 2017 the Bureau also reviewed the merger of Dow and DuPont.[36] The Bureau's concerns were focused on cereal broadleaf herbicides and pre-seed burn-off additives for cereal crops in Western Canada, and acid copolymers and ionomers in a North American market. The merging firms and Bayer AG were the three principal suppliers of broadleaf herbicides in Western Canada, and the Bureau concluded that entry and expansion would not effectively constrain the negative effects of the merger on competition for these products in the relevant time frame (two years). The Bureau also concluded that competition would be harmed because the loss of innovation rivalry would reduce the parties' incentives to innovate in broadleaf herbicides. The Bureau also had concerns about the effects of the merger on pre-seed burn-off additives and acid copolymers but did not indicate a concern with innovation with respect to these products.

The Bureau' position statement indicated that it relied on a 'formal economic model' to assess innovation effects, which relied primarily on qualitative information. The qualitative information used by the Bureau included party documents describing the parties' innovation assets, strategic objectives, commercialization timelines, the likelihood of commercialization, and the expected impact of innovations if commercialization were successful. The Bureau's statement also indicated that it used quantitative analysis including demand estimation and merger simulation to predict quantifiable anticompetitive effects, although this work might have been done for the purposes of the section 96 efficiencies trade-off. To resolve the Bureau's concerns, the parties agreed to divest DuPont's global cereal herbicides business to FMC Corporation.[37]

In a speech,[38] John Pecman, the then-Commissioner of Competition, highlighted the fact that the Bureau did not use the idea of 'innovation spaces' (also known as 'innovation markets') which had been used by the

European Commission to assess the merger. According to the Commissioner, the European Commission's approach of using 'innovation markets' does not require "linking innovative activity to specific innovative products that benefit consumers; instead, the argument holds that the reduction in innovative activities itself constitutes harm to competition."[39] Commissioner Pecman's observation is important because, under an 'innovation markets' approach, "the link between consumer benefit and innovation need not even be developed."[40]

While the Bureau has not provided any detail on its economic theory, its 'formal economic model' may have been based on an Arrow-type replacement or cannibalization effect where the merger reduces innovation incentives if at least one of the merging firms would capture substantial sales and margin from its merger partner if it innovated pre-merger but considers these diverted sales to be cannibalized post-merger. There is no indication in the Bureau's public statements that it considered whether the transaction would result in merger synergies that would enhance innovation incentives or reduce the costs of R&D. Efficiencies arguments were considered by the US DOJ and the European Commission in their respective reviews of the merger.

C) Bayer AG/Monsanto

In September 2016, Bayer agreed to acquire Monsanto. In May 2018, the Commissioner and Bayer entered into a Consent Agreement to resolve the Commissioner's concerns that the acquisition would likely substantially lessen and prevent competition in the supply of seeds and seed products for canola, soybeans, carrots, and other products, although the Bureau's primary focus appeared to be on products related to canola, which is Canada's largest crop in terms of acreage.[41] Bayer and Monsanto were two of the three leading suppliers of canola seeds in Canada, and there appeared to be a fringe of four other suppliers. According to the Bureau, seed companies invest heavily in the development of varieties that deliver higher yields, better drought and disease resistance, and better structural properties to assist with harvest. Seed firms also develop herbicide tolerance traits for canola.

The Bureau concluded that the acquisition would result in an SLPC in canola seeds and traits because it would eliminate rivalry between the merging companies, which would likely result in higher prices and a decrease in the rate of innovative activity directed towards the development of improved canola varieties. The Bureau also found that Bayer would have an incentive to increase royalty rates to other seed company competitors for the use of Monsanto's Roundup Ready trait, which would raise competitors' costs. In reaching its conclusions, and to design the appropriate remedy, the Bureau 'relied heavily' on a merger simulation model, which it did not describe in any detail. The Bureau's statement does not specifically mention that this model was used to analyze the effects of the transaction on innovation incentives.

D) Rogers-Shaw

In the litigated *Rogers-Shaw* merger, the Commissioner's SLPC claim related mainly to price effects, but it also included allegations that the merger, even with the divestiture of Shaw's discount Freedom Mobile cellular telephone business to Videotron, would slow the introduction of 5G.

The Commissioner made several other claims about the prevention of competition relating to non-price effects, including that Shaw was a maverick disruptor and innovator, was on a growth trajectory, had planned to purchase 3500 MHz of spectrum to begin offering 5G services, and planned to expand its network and enter new markets.[42] The Tribunal agreed with the Commissioner that Shaw, had the merger never been proposed, would likely have acquired 3500 MHz spectrum, and with this spectrum would eventually have launched full 5G service.[43] The issue for the Tribunal was whether, with the divestiture to Videotron, Freedom Mobile would still likely launch full 5G service within two years of when Shaw would have done so and in roughly the same areas.[44]

The Tribunal rejected the Commissioner's argument that Freedom Mobile—which would be transferred by Shaw to Videotron before Rogers purchased the remainder of Shaw—would be a less effective competitor than Shaw, including in relation to the rollout of 5G. The Commissioner claimed that Videotron would have smaller scale than the combined Freedom and Shaw Mobile, which would reduce its ability to invest in and expand its network.[45] The Tribunal, however, considered that Videotron was likely to have more wireless revenue and subscribers and more spectrum such that Freedom would not have smaller scale under Videotron's ownership[46]. The Tribunal also found that, relative to Shaw, Videotron would have a more advantageous cost base with which to compete, which would allow it to better invest in and expand its network[47]. Videotron also obtained its own 3500MHz spectrum licences in the recent set-aside auction[48], and was already operating and building a 5G network in Quebec.[49]

For these reasons, the Tribunal concluded that, although Freedom's 5G rollout may take somewhat longer under Videotron, "consumers are not likely to be materially worse off with respect to 5G services, as a result of the Merger and Divestiture."[50] The Tribunal found the evidence about the timing of Freedom's 5G rollout and the nature of additional services under Shaw that was put forth by the Commissioner was 'thin', and ultimately "the Tribunal [did] not consider that any delays that might be associated with Videotron's rollout of full 5G services, relative to Shaw's corresponding deployment, warrant substantial weight in the assessment of whether competition is likely to be prevented or lessened substantially."[51] The Tribunal also found that "Videotron, which is in the process of rolling out 5G services in Quebec, would likely do the same in Alberta and British Columbia, within a time frame that will ensure that competition is not substantially prevented or lessened."[52]

To date, this decision appears to be the only 'loss' suffered by the Bureau in a merger case involving non-price or innovation effects.

E) Secure/Tervita

In Secure, the Commissioner alleged that both price and adverse non-price effects were likely to result in an SLPC. The alleged price effects were price increases for various oilfield waste disposal services provided by the parties. The alleged non-price effect related to the amenities that oil and gas customers would have lost as a result of Secure's plans to close duplicative waste-disposal facilities following the merger with Tervita.

In agreeing with the Commissioner that the merger would likely result in an SLPC under section 92, the Tribunal made passing reference to unspecified non-price effects.[53] The Commissioner also claimed that the merger would cause consumer harm from post-merger facility closures, which are non-price effects, for the purposes of the Section 96 efficiencies trade-off. The Commissioner's expert quantified these harms, and while the Tribunal discounted many of the quantified non-price effects alleged by the Commissioner under section 96, the Tribunal did find that the harms from non-price effects were significantly larger than the harms from price effects. Ultimately, the Tribunal concluded that Secure failed to establish that efficiencies will be greater than, and offset, the effects of any SLPC.[54]

F) Toronto Real Estate Board

The Commissioner filed an application under the abuse of dominance provisions for an order that would prohibit the Toronto Real Estate *Board*

("*TREB*") from engaging in allegedly anticompetitive acts in relation to the supply of residential real estate brokerage services in the Greater Toronto Area. This case is interesting for the analysis of non-price effects because the Commissioner successfully demonstrated an SLPC case based almost exclusively on qualitative evidence.

The Commissioner's claim was that TREB restricted access to Multiple Listing Service ("MLS") information on the virtual office websites ("VOW") of its broker members and restricted the ways in which members could display and use that information (the "VOW Restrictions"). The Tribunal agreed with the Commissioner that the VOW Restrictions constituted a practice of anticompetitive acts under paragraph 79(1)(b) and that these anticompetitive acts were having and were likely to have the effects of preventing competition under paragraph 79(1)(c). With respect to the latter, the Tribunal's main finding was the VOW restrictions had substantially reduced the degree of non-price competition in the supply of MLS-based residential real estate brokerage services in the GTA, including substantial impacts on innovation, quality, and the range of real estate brokerage services offered in the GTA[55].

In response to the Commissioner's SLPC evidence, TREB argued that 'substantiality' can be assessed with qualitative evidence "only … when these effects cannot be quantitatively estimated, and that the Commissioner has the burden to demonstrate that the effects cannot be quantified before turning to qualitative evidence."[56] The Tribunal rejected this argument, citing the Supreme Court of Canada:

> In *Tervita*, the Supreme Court clearly distinguished between the measurement of anti-competitive effects under section 92 and the balancing exercise under section 96 on efficiencies. Quantification is only mandatory for the latter. In the context of a merger, the Court found that the "the statutory scheme does not bar a finding of likely substantial prevention where there has been a failure to quantity deadweight loss" (Tervita at para 166). The Tribunal is of the view that such analysis similarly applies to a finding of substantial prevention of competition in the context of an abuse of dominant position.[57]

The Tribunal clarified that the Commissioner can meet the SLPC requirements through either qualitative or quantitative evidence, or both, but also that satisfying the requirement that the Commissioner must adduce 'sufficiently clear and convincing evidence' to prove the SLPC on a balance of probabilities may be more difficult to meet with qualitative evidence because such evidence may be less 'probative' than quantitative evidence.

Furthermore, the Tribunal could draw an adverse inference "if evidence that would or could be available has not been adduced",[58] which presumably means that the Tribunal could draw an adverse inference if the Commissioner tried to prove an SLPC with qualitative evidence when quantitative evidence to prove the same point was available. Furthermore, the Tribunal recognized that "there may be a greater need for the Commissioner to rely on qualitative evidence in innovation cases like this one. This is because dynamic competition is generally more difficult to measure and to quantify."[59]

Most of the Commissioner's evidence, which the Tribunal relied on in reaching its conclusion on SLPC was based on the testimony of VOW entrants. ViewPoint, the largest independent real estate brokerage in Nova Scotia, testified that it needed the VOW data feed, especially data about sold and recently sold properties to compete effectively using its brokerage model[60]. TheRedPin testified that the VOW restrictions have limited its ability to "get better traction as a brokerage"—it believes that, among other things, access to the disputed data would let it offer better and more services and attract more people to its brokerage.[61] According to Realosophy, another virtual brokerage, the absence of sold data was constraining Realosophy's growth: "…its inability to obtain a data feed with sold and "pending sold" data limits Realosophy's ability to provide services to consumers online and to its clients."[62]

Based on this testimony, the Tribunal concluded that "the VOW Restrictions have had a significant adverse impact on entry into, and expansion within, the Relevant Market by web-based and other brokerages that would like to offer full-information VOWs in the GTA."[63] Specifically, the Tribunal noted that "those restrictions have prevented ViewPoint, a very disruptive and substantial potential competitor, from entering into the Relevant Market; and have prevented two additional disruptive brokerages, TheRedPin and Realosophy, from expanding within that market."[64]

The Tribunal considered and rejected TREB's claims that the Commissioner should have been required to adduce quantitative evidence, arguing that "if full-information VOWs were as much of a disruptive technology as the Commissioner has suggested, the impact of their presence on residential real estate brokerage markets in the United States and in Nova Scotia would be observable,"[65] and noting that the Commissioner's evidence did not include any empirical analysis of the effects of full-information VOWs in other markets. The Tribunal, however, agreed with the opinion of the Commissioner's expert that to conduct such empirical analysis it would have been necessary to obtain a "tremendous amount" of data, and would have required a great deal of effort, for results that may not have been reliable or particularly informative given the need to control for local market factors.[66] As such, the Tribunal declined to draw an adverse inference from the Commissioner's failure to conduct an empirical assessment.

Whether prohibition of the VOW Restrictions had the anticipated effects of increasing competition in the Toronto real estate brokerage market is unclear. However, it seems that many of the entrants who said they would compete in the market without the restrictions have not yet done so. As of November 2023, ViewPoint appears to only list properties in Nova Scotia. The search bar on www.viewpoint.ca says 'Enter any address, PID, street, town or city in Nova Scotia', and the main header on this site says "Search Nova Scotia Real Estate: See real-time data on all 6,967 MLS® listings and 674,092 properties in Nova Scotia."[67] TheRedPin left the market in June 2018.[68] Realosophy's website lists six agents,[69] and Realosophy had five properties listed on Realtor.ca for sale as of August 4, 2023.[70] If these entrants have not in fact entered the Toronto brokerage market in a significant way, and no other effective VOW competitors have entered the market, perhaps the Tribunal will reconsider its exclusive reliance on qualitative evidence in establishing a SLPC in future cases.

G) Summary of Innovation Concerns in Canadian Mergers

To this point, we have limited guidance with respect to the treatment of innovation and other non-price effects in merger analysis by the Competition Bureau and Tribunal. With the exception of *Rogers-Shaw*, none of the key innovation cases were litigated, and all we know from public sources is what we see in Bureau position statements, which unfortunately do not provide a lot of detail on the Bureau's analysis. What we may infer is the following:

- To date, innovation effects have rarely been the Bureau's primary concern when assessing a merger. Concerns about innovation appear to have been mainly an 'add-on' when the Bureau also had more traditional concerns about the price effects of mergers in specific product markets. The general pattern in the Bureau's theory of harm related to innovation seems to have been that the merging firms had very high market shares in concentrated markets, and they innovated to improve their products, such that—presumably based on 'business stealing' effects—a merger would likely result in reduced innovation in addition to upward pressure on prices. It is unclear whether innovation concerns resulted in the Bureau challenging a merger that it would not have challenged on traditional price-effects grounds. The incremental impact of innovation concerns may have been that in some cases, such as Dow/DuPont and Bayer/Monsanto, remedies were expanded to include R&D facilities.

- The Bureau appears to have rejected the European 'innovation spaces' (or 'innovation markets') approach to addressing innovation concerns. That said, the Bureau's statements indicated generalized concerns about innovation where the merging firms competed in downstream markets, rather than concerns with specific 'pipeline' products. It is unclear whether the Bureau has ruled out applying this theory of harm in future cases. To the extent the merging parties may have provided evidence on these points in efforts to resist R&D divestitures, the Bureau's position statements justifying the remedies in the Consent Agreements are silent.

- The Bureau's position statements describing its analysis in innovation mergers provide no guidance on how any claim about cost reductions or improved appropriability (which potentially enhance the incentive to innovate) would impact a competitive effects analysis under section 92 or the efficiencies trade-off under section 96 (which will be repealed if Bill 56 is enacted into law). Neither efficiencies nor appropriability are discussed in any of the Bureau statements in the three merger cases discussed above.

- The Tribunal's SLPC findings in *TREB* relied almost exclusively on the testimony of prospective entrants, who said they would enter the market if it were not for the alleged anti-competitive practices. It's not clear that any of the entrants who testified that they would enter have done so in any meaningful way since the VOW restrictions were removed some time after 2017. It may be the case that traditional brokerages improved the quality of their offerings, or reduced their commissions, in response to actual entry by VOWs or the threat of entry. i.e., that they responded to the potential for innovation by innovating themselves. This would be a good case for a retrospective analysis, which would include consideration of whether the Tribunal's acceptance of the entrants' testimony and its finding that time-consuming and costly empirical analysis need not be undertaken was prudent.

5. Merger Enforcement and Innovation in the Canadian Economy

According to a recent report from TD Bank,[71] "when adjusting for the rising population, Canada's real GDP per capita has been deteriorating for many years." The report notes that although Canada's GPD per capita was about $4,000 more than the average advanced economy at the beginning of the 1980s, Canada's advantage relative to other advanced economies had disappeared by 2000 and was significantly lower than the average GDP per capita among its peers, and especially relative to the US, by 2023[72]. Since the oil shock in 2014-2015, Canadian real GDP grew by only 0.4% per year, compared to an average growth of 1.4% in advanced economies[73]. As the underlying reasons for this lagging performance, the TD Bank report points to weak investment, including in intellectual property, and a decline in R&D spending. The report notes that "(o)ver the last 20 years, Canadian R&D investment has been in perpetual decline, while all other G7 countries have seen increases to varying degrees. This issue is being compounded by already-low absolute levels of R&D investment as a per cent of GDP. As of 2021, Canadian R&D spending accounted for roughly 1.7% of GDP, half of the current U.S. share and lower than most other countries."[74] The OECD forecasted in 2021 that Canada's annual growth in real per capita GDP would be only 0.7% from 2020-2030, last among advanced countries, and growth to 2060 would be only 0.8% per year, also last among advanced countries.[75]

Innovation is widely understood to be a key driver of improved productivity and standards of living. As noted by Globerman and Emes, "(i)nnovation is an important contributor to productivity, and productivity underlies improvements in standards of living."[76] Globerman and Emes explain that "it is widely acknowledged that Canada's innovation performance has been, and remains, relatively weak by international standards."[77] They show that Canada's competitiveness, as measured by the Global Competitiveness Index ("GCI"), has been weak, compared to many other countries.[78] The Conference Board of Canada notes that "(u)ntil recently, Canadian businesses have had little competition, high resource prices, generally good trade with the United States, and other favourable conditions. This has meant that they haven't had to innovate as much as businesses in other countries to be profitable…But a low-innovation, high standard of living equilibrium is unsustainable. Volatile resource prices, changing demographics, and increasing economic protectionism are exposing Canada's business innovation weakness and generating pressure to become more innovative in the coming years."[79] According to a June 2023 Senate Report, citing Statistics

Canada, between 2018 and 2020, Canada's ratio of domestic expenditures on R&D to GDP was about 33% lower than the OECD average, and in 2021 Canada had the lowest number of resident patent applications per million inhabitants in the G7.[80]

Is there scope for further amendments to the Act or changes to Bureau enforcement practices to help improve innovation in the Canadian economy? The Bureau has challenged few mergers on innovation grounds relative to the European Commission and the US agencies.[81] Of course, the European and US economies are much larger than Canada's, so we would not expect the same number of merger challenges. Nevertheless, the fact that the Bureau has challenged only three mergers on innovation grounds over the last six years, only one of which was not also challenged by the European Commission and the US agencies, seems like a small number. Is there a problem of underenforcement of innovation mergers in Canada?

Part of the answer as to why there are relatively few innovation merger challenges in Canada may be that, since Canadian firms spend less on R&D compared to most other countries, there are simply fewer firms in Canada for which innovation is an important competitive variable. As such, it may make sense that fewer mergers of Canadian firms involve innovation concerns.[82] The Council of Canadian Academies notes that the issue may be the structure of the Canadian economy: "Canada's traditional R&D gap relative to the United States is explained by the greater specialization of the U.S. manufacturing sector in higher-technology, R&D-intensive industries than is the case for Canadian manufacturing."[83]

Others have pointed to Canadian competition law and enforcement as a reason for poor R&D performance by Canadian firms. Hearn, in Policy Options, claims that "(o)ur nation has long struggled with below-average entrepreneurship rates, low business entry and exit rates, stifled innovation and high consumer prices. A key cause of these trends is industry concentration from decades of unchallenged merger waves."[84] Bester finds that "evidence suggests that current approaches to merger law in Canada and abroad have underestimated the harms these transactions can pose to competition and overestimated the effectiveness of the remedies intended to mitigate those harms", and "there is evidence that the harms arising from anticompetitive mergers have been discounted, the potential benefits generated by them overstated and that the competition law remedies applied to address identified harms have been ineffective."[85] And of course, the Competition Bureau is seeking to strengthen its powers under the Competition Act, eliminate the Section 96 efficiencies defence, and lighten its burden to prove a substantial lessening or prevention of competition, including by adopting a US-style structural presumption, at least in part because of concerns that current legislation does not allow it to properly enforce the Act in matters involving non-price effects.[86] The federal government's Bill-56, introduced on September 21, 2023, would repeal the section 96 efficiencies defence, as recommended by the Bureau, if enacted into law.

Is there evidence that the Act does not give sufficient powers to the Bureau, or that a more stringent competition law is required to encourage innovation in the Canadian economy? Or, more generally, is there evidence that there is significant underenforcement of the merger (or other) provisions of the Act in relation to mergers that may reduce innovation? It is difficult to identify a merger that was not challenged by the Bureau on innovation grounds because of deficiencies in the merger provisions of the Act, or with the Bureau's enforcement decisions. Baziliauskas and Sanderson[87] argue that major revisions are not needed to address alleged underenforcement of the merger provisions of the Act, including with respect to the analysis of non-price effects, although some changes to the law and enforcement practice could be considered. These changes include some of the clarifying amendments to Section 93 as suggested by Professor Iacobucci,[88] increasing Bureau funding to limit concerns about the costs of litigation and complexity, enabling more merger retrospectives (which could be extended to abuse of dominance and other provisions for matters involving innovation concerns), and extending the Section 97 limitation period beyond one year.[89]

The following are some possible reasons for more lenient enforcement of mergers in Canada where innovation may be a concern, relative to some other countries, which may also explain why there are seemingly relatively few mergers challenged on innovation grounds in Canada.

A) Smaller Canadian Firms Lag in Commercializing Their Innovations

When considering the causes of poor innovation performance by Canadian companies, Globerman and Emes note that "the available evidence suggests that the weak link in Canada's innovation process is the limited success that start-up companies have in using new technologies to become anchor firms in a growing innovation ecosystem."[90] A 2016 report by the Government of Canada notes that "Canada has a strong record in starting businesses, with 78,000 new companies established in 2013. However, we have less success in developing companies to a global scale. Growing firms must have the ability to source top talent from anywhere in the world.

Start-up companies, in particular, must also have enough financing to get them through critical stages of their development." [91]

In a 2021 letter to Ontario innovation policymakers, the C.D. Howe Institute argued that "that there is no lack of good Canadian ideas, research, or access to intellectual property (IP). The failure, instead, stems from a lack of success in turning these ideas and IP, and the skills of Canadians, into commercial successes…Part of this commercialization deficit is connected to Canada's difficulty growing smaller businesses into larger ones."[92] The letter also says that "(u)nder-investment by Canadian firms and governments, relatively low levels of angel and seed capital financing, the size of Canada's own market, protectionism and over-regulation in many sectors combine to stifle innovation. One can add our habit of policies that tend to favour businesses that stay small."

The OECD notes that "investment markets are not always as competitive as is sometimes assumed. In that case, a larger firm might also have the advantage of having better access to funding to enable the firm to bring the product to market."[93] Furthermore, nascent firms may lack the ability to develop their products compared to larger, more established firms, who may have more experience and expertise in later stages of development.[94]

This suggests one reason why it may be prudent for the Bureau to be cautious when challenging acquisitions of smaller competitors on innovation grounds: Canadian start-ups have historically been relatively unsuccessful at developing their products in part because of insufficient financing and expertise at commercializing their innovations, and acquisitions by competitors can help overcome these challenges.

B) Canada's Intellectual Property Rights Regime

As noted above, if a firm cannot capture enough of the returns from its investment in innovation, it will have a weaker incentive to innovate, and a merger can strengthen this incentive. For example, if a firm cannot capture all of the returns to its investment in intellectual property through arms-length licensing, a merger can facilitate the appropriation of additional returns through the voluntary transfer of knowledge to a merger partner. Similarly, mergers can allow a firm to capture some of the returns to knowledge creation that would otherwise spill over to other firms. When intellectual property rights are strong, firms can capture more of the returns to their investment without a merger (this is one of the factors enforcement agencies consider when assessing whether a merger increases innovation incentives), and when property rights are weak, mergers can facilitate the capture of more of the returns to innovation. In its Dow/DuPont decision, the European Commission noted that "(h)igh appropriability supports innovation incentive by ensuring that the successful innovator can capture a large share of the innovation's value….However, if imitation concerns are properly dealt by with effective IPRs, then this channel is largely irrelevant."[95]

An assessment of Canada's intellectual property rights regime is well beyond the scope of this commentary. However, some commentators have argued that Canada's intellectual property protections are weak relative to other countries. For example, a Fraser Institute study of Canadian intellectual property rights in the biopharmaceutical industry finds that:

> The intellectual property environment in Canada clearly has consequences for this country's global competitiveness. Overall, there are numerous deficiencies that weaken intellectual property protections within Canada relative to what is provided in other industrialized nations. The result is an IP regime characterized by significant uncertainty and instability for biopharmaceutical firms. Weaknesses such as onerous patentability requirements, insufficient enforcement mechanisms, and inadequate anti-counterfeiting measures place Canada in the company of Mexico, Malaysia, China, and Russia in the IP Index rankings.[96]

Canada is one of 22 countries on the 2023 'Watch List' of the Office of the United States Trade Representative ("USTR").[97] A country is placed on the Priority Watch List or Watch List if "particular problems exist in that country with respect to IP protection, enforcement, or market access for U.S. persons relying on IP."[98] The report notes that "Canada made significant progress in intellectual property (IP) protection and enforcement with the implementation of important IP provisions in the United States-Mexico-Canada Agreement (USMCA)"[99] but "(d)espite this progress, various challenges to the adequate and effective protection of IP rights in Canada remain."[100] In an international comparison of the effectiveness of intellectual property frameworks, the Global Innovation Policy Center ranked Canada 16th, behind most other 'high-income' OECD members.[101] A Canadian Senate report said that witnesses "expressed concerns that Canadian companies face challenges when competing globally due to a lack of protection in areas such as data and intellectual property."[102]

As discussed in the Economics section, mergers can improve incentives for firms to innovate by increasing the extent to which they can appropriate the returns to their investments in innovation, by, for example, voluntarily transferring knowledge to their merger partner and thereby internalizing more of the returns to innovation, or by capturing some of the returns to the firm's investment that involuntarily spill over to other firms. When intellectual property rights are well protected, firms can capture more of the returns to their investments without a merger, and as a result the innovation-enhancing benefits of a merger tend to be weaker. If a firm can already capture most of the returns to its IP by licensing to other firms or can limit knowledge spillovers to other firms because its IP rights are protected, then a merger provides fewer benefits in the form of appropriability of returns to innovations.[103] When IP rights are relatively weak, mergers can act as a substitute for IP rights by allowing firms to appropriate more of the returns to innovation. Thus, to the extent that IP rights in Canada are weak, a more lenient merger policy may be warranted as a way to increase appropriability of investments in innovation.

C) The Efficiencies Defence and Producer Surplus

The Competition Act's Section 96 efficiencies defence places more weight on producer surplus in the assessment of the effects of a merger compared to most other jurisdictions. This should imply that some mergers that cause innovation concerns that would be blocked in the US and Europe under a consumer welfare standard would, because of section 96, be allowed in Canada, and not only because fixed cost savings (including savings in R&D expenditures) to producers are balanced against harms to consumers. Under a total welfare standard, higher producer profits resulting from higher post-merger prices, which occur at the expense of consumer welfare, are not anticompetitive effects in the trade-off. These higher profits also allow firms to appropriate more of the returns to their innovation investments, which, as explained above, may improve investment incentives.[104] A total surplus standard under Section 96 (which would be repealed if Bill 56 is enacted) would therefore justify more lenient enforcement relative to other countries, or at least potentially explain why the Bureau challenges fewer mergers based on innovation concerns relative to other countries.

A corollary of this logic is that, if the federal government's recent Bill to eliminate the efficiencies defence is enacted, some mergers that improve firms' innovation incentives may be blocked. In particular, Bill 56 would repeal the efficiencies defence but would not, as recommended by the Bureau,[105] explicitly incorporate efficiencies as a section 93 factor. The latter would allow for consideration of efficiencies in the determination of whether a merger is likely to substantially lessen or prevent competition. If efficiencies considerations are not added to the Act or are not read in by the Tribunal, enactment of Bill 56 would allow the Tribunal to issue an order to block even a merger that benefits consumers through efficiencies, including through the introduction of new products. That is, mergers that result in an increase in market power but also result in lower prices and/or better products for consumers may potentially be blocked if Bill 56 is enacted.[106]

Of course, retaining a total surplus standard would also permit mergers that harm consumers and reduce firms' innovation incentives. This situation may occur if a merger reduces the firms' production costs by enough to offset harms to consumers, including likely harms from lost innovation to the extent these are proven. If the section 96 efficiencies defence is to be repealed, in light of Canada's poor R&D record it would be prudent to consider a carve-out for mergers that harm consumers (or just substantially lessen or prevent competition) but nevertheless improve firms' investment incentives.

D) Summary of Innovation Merger Enforcement in Canada

Merger enforcement, especially when it involves innovating firms, does not occur in a vacuum. Canadian real GDP growth, and therefore growth in Canadian living standards, has lagged compared to other countries, and is expected, according to the OECD among others, to continue to be slow. An important cause of Canada's lagging performance is that Canadian businesses do not innovate and commercialize their innovations as much as businesses in other countries do. Although mergers between competitors can stifle innovation in some cases, they can also improve firms' abilities and incentives to innovate because of R&D complementarities, improved appropriability of the returns to innovation, and market power effects.

Certain features of the Canadian landscape have been identified by other commentators as contributing to Canada's lagging R&D performance, two of which are discussed above—namely, the difficulties faced by Canadian start-ups and other small firms in commercializing their innovations, and Canada's relatively weak intellectual property rights. Mergers can help overcome these challenges, and it would be prudent for the Bureau and Tribunal to acknowledge, or continue to acknowledge, this fact.

The economic modelling of innovation effects is in its relative infancy, and there is enough uncertainty among economists and their existing models to warrant caution when enforcing merger laws. There appears to be consensus among economists that enforcement agencies should not take a hands-off approach to mergers for fear of harming innovation incentives, especially in pipeline-pipeline or pipeline-product mergers when there are few firms with 'pipeline' products in development. However, given that mergers may increase the ability and incentive for firms to innovate, an aggressive approach to mergers on the basis of harms to innovation is also not warranted, especially when a merger will not create a monopoly.

APPENDIX: MERGERS INVOLVING INNOVATION EFFECTS IN THE US AND EUROPE

In 2014, the European Commission challenged the merger of Medtronic—the incumbent producer of drug-coated balloons for the treatment of vascular diseases—and Covidien, which had a product in late development that would compete with Medtronic's product, also in late development, and for which there was only one other credible competitor.[107] The Commission also challenged the merger of Pfizer and Hospira in 2015. Pfizer had an infliximab biosimilar drug in testing that would compete with Hospira's existing product, and there was only one other competitor developing a similar product.[108] The companies divested Pfizer's pipeline product to resolve the Commission's concerns.

The above cases are examples of 'pipeline to product' mergers, where the concern revolved around a product that was under development as a competitor to an existing product. On the other hand, concerns around 'pipeline to pipeline' mergers revolve around the amalgamation of two R&D streams. Examples of 'pipeline to pipeline' mergers that have been challenged by the European Commission include *Novartis/GSK Oncology Business* in 2015, where the Commission had concerns about overlaps in innovative cancer treatments.[109] GSK and Novartis were two of only three firms with an existing product or product in development for skin cancer and ovarian cancer. The European Commission's primary concern was that the merger would have reduced Novartis' incentive to develop and commercialize its own product in competition with GSK, whose drugs were closer to the market. An additional concern was that development efforts for treatments for other cancers in earlier stages of development would suffer because Novartis would rationalize its research efforts in favour of GSK's products in development. The Commission's concerns were resolved through divestiture of Novartis' licensed MEK inhibitor to the owner of the drug (Array) for which Novartis had the exclusive license. *J&J/Actelion* in 2017 was a merger of firms with treatments for insomnia in Phase II trials, and the European Commission was concerned about a reduction in the number of orexin-antagonistic (the mechanism of action) products that would likely enter the insomnia treatment market.[110]

In a 'pipeline to pipeline' case not involving pharmaceuticals or medical devices, the Commission challenged the merger of *General Electric and Alstom* in 2015.[111] At the time of the merger, GE had started to commercialize its 'very large' heavy-duty gas turbine, and Alstom had a similar product in late development. The Commission concluded that the merger would have caused GE to discontinue Alstom's R&D efforts, including development and commercialization, in heavy-duty gas turbines ("HDGT"). The Commission also had a broader set of innovation concerns besides HDGT, so that the remedy included a broad range of innovation assets, including Alstom's technology for heavy-duty gas turbines, existing upgrades and the technology for future upgrades, several Alstom engineers, and two test facilities for HDGT. This case is an early example of the Commission's concerns about the effects of combining firms with overlaps in innovation capabilities.

A) Mergers Involving Innovation Capabilities

Under the economic theories of the effects of mergers on innovation, the incentives for firms to innovate depend on the extent of downstream competition between the merging firms, either currently or in future markets, as well as on synergies that the firms may realize post merger. That is, the change in firms' incentives to innovate is driven by competitive constraints in identified downstream markets—a merger can strengthen the incentive to innovate by increasing returns because the merger increases appropriability (i.e., the firm captures profit that would have been competed away by its merger partner) or by increasing prices in the downstream market (i.e., more market power). On the other hand, a merger can weaken innovation incentives because of the 'cannibalization' effect in downstream markets. These downstream markets can be either existing markets, or future markets that do not yet exist, but are likely to exist when innovation bears fruit. As such, these theories have typically been used to assess the innovation effects of mergers involving late 'pipeline' products that are in the final development stage, where specific innovation efforts are linked to specific downstream markets.

US cases involving overlapping innovation capabilities include *Nielsen/ Arbitron* in 2013, which raised concerns about audience measurement services. The specific concern was that the two merging firms were, because of their strength in traditional television and radio rating services, in the best position to enter into cross-platform ratings services.[112] The FTC found that the merging companies were the only firms with large and demographically representative panels and had already initiated development of cross-panel products. In this case, the FTC was concerned that the merger would diminish future competition in an innovative product. The transaction was cleared subject to the divestment and licensing of assets that would allow a competitor to replicate Arbitron's cross-platform rating services.

Applied Materials/Tokyo Electron in 2015 involved two of the largest suppliers of tools for manufacturing semiconductor chips.[113] The DOJ concluded that the merging firms were the two firms most capable of developing leading-edge semiconductor tools for high-volume manufacturing (HVM). The DOJ identified overlaps in specific tools, including pipeline-to-product overlaps. The DOJ also had broader innovation concerns relating to dynamic competition. DOJ economists explained that "the Division found that the existing overlap between the specifically identified tools is emblematic of a broader competition to develop new deposition and etch semiconductor tools."[114] In particular, the DOJ's theory of harm was that the merger would combine the firms that were most likely "to develop and manufacture the *next generation* [emphasis added] of HVM deposition and etch tools"[115], and as such would have eliminated the competition between the two companies for being selected as the future development partner for down-stream suppliers, as well as any eventual competition between the companies' future products.

In *Bayer/Monsanto* in 2018, the DOJ found that the merger would reduce current and dynamic competition in several areas. In addition to harm from the loss of price competition, the DOJ alleged harm to innovation.[116] The remedies in this case included the divestment of a comprehensive package of R&D assets to a third party (BASF).

In *Halliburton/Baker Hughes* in 2016,[117] the merging firms were large global suppliers of oilfield services. The DOJ had concerns about anticompetitive harm in 23 distinct markets, and also had broader concerns about the loss of dynamic competition, since the merging firms (and a third competitor, Schlumberger) competed directly to drive technological innovation. The firms abandoned the transaction after the DOJ filed suit.[118]

Western Digital/Hitachi in 2011 was a merger of two of the three leading suppliers of hard-disk drives (HDDs). Producers continuously innovated to increase HDD storage capacity. While the European Commission did not specifically articulate a specific innovation concern in this case, concerns about innovation were part of its assessment of efficiencies and the design of the remedy.[119]

In *Deutsche Boerse/NYSE Euronext* in 2012, the merging firms were competitors in exchange-traded European financial derivatives. The European Commission concluded that the merging firms were close competitors for new product introductions and innovation, including in technology, processes, and market design. The merging firms competed to introduce new and improved contracts, and their incentive to innovate was driven in part by actual or potential competition.[120]

ENDNOTES

[1] Andy Baziliauskas is an economist specializing in competition matters at Charles River Associates. The opinions and conclusions expressed in this article are solely those of the author and should not be attributed in any way to any other individual or organization. The author would like to thank Frank Mathewson, Susan Hutton, Margaret Sanderson, Dimitri Dimitropoulos, Lisa Stockley, and Rahim Lila for their valuable comments and suggestions. Any remaining mistakes are the responsibility of the author.

[2] See e.g. James Mancini, "Considering non-price effects in merger control—Background note by the Secretariat" (2018), online (pdf): *Organisation for Economic Co-operation and Development* <one.oecd.org/document/DAF/COMP(2018)2/en/pdf>.

[3] *Ibid* at para 9.

[4] *Ibid* at para 16.

[5] Competition Bureau Canada, "Merger between Dow and Dupont" (27 June 2017), online: <ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/position-statements/merger-between-dow-and-dupont> [Bureau Dow-Dupont Statement].

[6] Competition Bureau Canada, "Bayer AG's acquisition of Monsanto Company" (30 May 2018), online: <ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/position-statements/bayer-ags-acquisition-monsanto-company> [Bureau Monsanto Acquisition Statement].

[7] Competition Bureau Canada, "Competition Bureau statement regarding Thoma Bravo's acquisition of Aucerna" (30 August 2019), online: <ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/position-statements/competition-bureau-statement-regarding-thoma-bravos-acquisition-aucerna> [Bureau Aucerna Acquisition Statement].

[8] A total surplus standard also permits mergers that harm consumers and reduce firms' incentives to innovate, which would occur when merger-induced production cost reductions offset harms to consumers from higher prices.

[9] Joseph A. Schumpeter, *Capitalism, Socialism and Democracy* (New York: Harper and Brothers, 1942).

[10] Kenneth J. Arrow, *Economic Welfare and the Allocation of Resources for Invention* in Universities-National Bureau Committee for Economic Research & Committee on Economic Growth of the Social Science Research Council, eds, *The Rate and Direction of Inventive Activity: Economic and Social Factors* (New Jersey: Princeton University Press, 1962) at 609-25.

[11] Carl Shapiro, "Competition and Innovation Did Arrow Hit the Bull's Eye?" in Josh Lerner & Scott Stern, eds, *The Rate and Direction of Inventive Activity Revisited* (Chicago: University of Chicago Press, 2012) at 361-404.

[12] Joseph Farrell & Carl Shapiro, "Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition" (2010) 10:1 The B.E. Journal of Theoretical Economics art 9.

[13] There is still a lively debate about whether mergers in highly concentrated markets should be presumptively illegal, or whether the merging firms should bear more of the burden of demonstrating that their merger is not anti-competitive. Even the pro-enforcement side concedes that some mergers may increase firms' incentives to innovate but argues that it is often more likely that mergers reduce these incentives. For the pro-enforcement side, see Jonathan Baker, "Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation" (2012) 74 Antitrust LJ 575 & Shapiro, *supra* note 11. On the other side, see Bruno Jullien & Yassine Lefouili, "Horizontal Mergers and Innovation" (2018) 14:3 Journal of Competition Law & Economics 364.

[14] See Giulio Federico, Fiona Scott Morton & Carl Shapiro "Antitrust and Innovation: Welcoming and Protecting Disruption" (2020) 20:1 Innovation Policy and the Economy 125.

[15] The Competition Bureau's *Merger Enforcement Guidelines* (ss 12.17-12.18) contain a section on gains in dynamic efficiency "including those attained through the optimal introduction of new products, the development of more efficient productive processes, and the improvement of product quality and service." This appears to contemplate innovation efficiencies that benefit consumers.

[16] Pierre Régibeau & Katharine E. Rockett, "Mergers and Innovation" (2019) 64:1 The Antitrust Bulletin 31 at 39.

[17] Federico, Scott Morton & Shapiro, *supra* note 14 at 133.

[18] Régibeau & Rockett, *supra* note 16 at 39-40.

[19] Federico, Scott Morton, & Shapiro, *supra* note 14 at 133.

[20] Giulio Federico, Gregor Langus & Tommaso Valletti, "A simple model of mergers and innovation" (2017) 157:C Economics Letters 136.

[21] Giulio Federico, Gregor Langus & Tommaso Valletti, "Horizontal Mergers and Product Innovation" (2018), online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=2999178>.

[22] A related model developed before Dow/DuPont is Massimo Motta & Emanuele Tarantino "The Effect of a Merger on Investments" (2016), CEPR Discussion Paper No. DP11550.

[23] See Daniel Coublucq, David Kovo & Tommaso Valletti, *Innovation Concerns in European Merger Control: Dow/DuPont and Bayer/Monsanto* in John Kwoka Jr., Tommaso M. Valletti & Lawrence J. White, eds, *Antitrust at a Time of Upheaval: Recent Competition Policy Cases on Two Continents* (Competition Policy International, 2023).

[24] Federico, Langus & Valletti, *supra* note 21 at 14.

[25] Vincenzo Denicolò & Michele Polo, "Duplicative research, mergers and innovation" (2018) 166:C Economics Letters 56.

[26] Marc Bourreau, Bruno Jullien & Yassine Lefouili, "Mergers and Demand-Enhancing Innovation" (2018, revised 2021) Toulouse School of Economics Working Paper No 18-907, online: <www.tse-fr.eu/publications/mergers-and-demand-enhancing-innovation>.

[27] "An innovative leap into the theoretical abyss: Dow/Dupont and the Commissioner's novel theory of harm" (5 July 2017), online: *RBB Economics,*

Brief 54 <www.rbbecon.com/publication/article/an-innovative-leap-into-the-theoretical-abyss-dow-dupont-and-the-commission-s-nov> at 3-4.

[28] The Competition Bureau recognizes in its Intellectual Property Enforcement Guidelines (para 71) that "there may be instances when creating or increasing market power is justified because of the efficiencies created."

[29] *Commission v Dow/Dupont*, M.7932, [2004], online (pdf): <ec.europa.eu/competition/mergers/cases/decisions/m7932_13668_3.pdf> [*Dow/Dupont*].

[30] Coublucq, Kovo & Valletti, *supra* note 23.

[31] *Ibid.*

[32] *Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3 at para 44.

[33] *Ibid.*

[34] For a discussion of non-price effects in litigated cases in Canada, see Andy Baziliauskas & Margaret Sanderson, "Should Canada Overhaul the SLPC Test For Mergers?", Can Competition L Rev [forthcoming in 2023].

[35] Bureau Aucerna Acquisition Statement, *supra* note 7.

[36] Bureau Dow-Dupont Statement, *supra* note 5.

[37] The merged firm also agreed to divest the DuPont portfolio of cereal broadleaf and pre-seed herbicides in Canada, along with associated chemical ingredients, and Dow's global acid copolymer and ionomer business to resolve the Bureau's concerns.

[38] John Pecman, "Growing the new economy: the integral relationship between competition and innovation" (Remarks delivered at the Commissioner of Competition Vancouver Competition Policy Roundtable, Vancouver, British Columbia, 18 January 2018), online: <www.canada.ca/en/competition-bureau/news/2018/01/growing_the_new_economytheintegralrelationshipbetweencompetition.html>.

[39] *Ibid.*

[40] *Ibid.*

[41] Bureau Monsanto Acquisition Statement, *supra* note 6.

[42] *Canada (Commissioner of Competition) v Rogers Communications Inc and Shaw Communications Inc*, 2023 Comp. Trib. 1 at para 145, 163, aff'd 2023 FCA 16.

[43] *Ibid* at para 185.

[44] *Ibid* at para 187.

[45] *Ibid* at para 265.

[46] *Ibid* at para 268.

[47] *Ibid* at para 269.

[48] *Ibid* at para 272.

[49] *Ibid* at para 277.

[50] *Ibid* at para 278.

[51] *Ibid.*

[52] *Ibid* at para 5.

[53] *Canada (Commissioner of Competition) v Secure Energy Services Inc*, 2023 Comp. Trib. 02 at para 366: "In sum, the Tribunal finds that, in the 136 SLC Markets, the anti-competitive effects resulting or likely to result from the Merger

have the required magnitude in terms of price increases and reduction of non-price competition for waste disposal services. The Tribunal also finds that Secure will have the ability to impose such effects in a material part of the Relevant Markets and in respect of a material volume of sales, and that it will have the ability to sustain material price increases and material reductions in non-price benefits of competition for a duration of approximately two years or more."

[54] *Ibid* at para 710.

[55] *The Commissioner of Competition v The Toronto Real Estate Board*, 2016 Comp. Trib. 7 at para 4.

[56] *Ibid* at para 469.

[57] *Ibid.*

[58] *Ibid* at para 470.

[59] *Ibid* at para 471. The Tribunal went on to find that "when dealing with innovation, reliable statistical or empirical evidence is sometimes not available and the Commissioner may need to resort to more qualitative tools and instruments to demonstrate the competitive effects of a challenged conduct. Such evidence can take the form of business documents, witness statements and testimonies, industry analyses, etc. (*ibid*).

[60] *Ibid* at para 511.

[61] *Ibid* at para 524.

[62] *Ibid* at para 528.

[63] *Ibid* at para 550.

[64] *Ibid* at para 551.

[65] *Ibid* at para 653.

[66] *Ibid* at para 655.

[67] Accessed on 4 November 2023.

[68] Romana King, "Opinion: The End of TheRedPin" (15 June 2018), online (blog): *Zolo* <www.zolo.ca/blog/the-end-of-theredpin>; Tess Kalinowski, "Online brokerage TheRedPin closes its doors", *Toronto Star* (15 June 2018), online: <www.thestar.com/business/real_estate/2018/06/15/online-brokerage-theredpin-closes-its-doors.html>.

[69] Realosophy, "Agents" (last visited: November 14, 2023), online: <www.realosophy.com/agents>.

[70] Realtor.ca, "MLS & Real Estate Map" (last visited: August 4, 2023), online: <www.realtor.ca/map#Sort=6-D&OrganizationId=216900&IncludePins=1&Currency=CAD>.

[71] Marc Ercolao, "Mind the Gap: Canada is Falling Behind the Standard-of-Living Curve" (13 July 2023), online: *TD Bank* <economics.td.com/ca-falling-behind-standard-of-living-curve>.

[72] *Ibid.*

[73] *Ibid.*

[74] *Ibid.*

[75] Yvan Guillemette & David Turner, "The Long Game: Fiscal Outlooks to 2060 Underline Need for Structural Reform" (October 2021), online (pdf): *Organisation for Economic Co-operation and Development* <www.oecd-ilibrary.

org/deliver/a112307e-en.pdf?itemId=%2Fcontent%2Fpaper%2Fa112307e-en&mimeType=pdf>.

[76] Steven Globerman & Joel Emes, "Innovation in Canada: An Assessment of Recent Experience" (15 January 2019), online: *Fraser Institute* <www.fraserinstitute.org/studies/innovation-in-canada-an-assessment-of-recent-experience> at 5. See also "Research to Insights: Investment, Productivity and Living Standards" (1 September 2022), online: *Statistics Canada* <www150.statcan.gc.ca/n1/pub/11-631-x/11-631-x2022004-eng.htm>; "The Future of Productivity", online: *Organisation for Economic Co-operation and Development* <www.oecd.org/economy/the-future-of-productivity.htm>.

[77] Globerman & Emes (*ibid*) at i.

[78] GCI combines 114 different country attributes that are important for productivity, including attributes that are grouped into an 'innovation'. Indicators included in the 'innovation' pillar are: 1) capacity for innovation; 2) the quality of scientific research institutions; 3) company spending on R&D; 4) university-industry collaboration; 5) government procurement of advanced technology; 6) the availability of scientists and engineers and 7) patent applications; Globerman & Emes (*ibid*) at 5.

[79] "Innovation Report Card 2021" (updated 28 June 2021), online: *The Conference Board of Canada* <www.conferenceboard.ca/hcp/innovation-report-card-2021/>.

[80] Canada, Senate of Canada, *Needed: An Innovation Strategy for the Data-Driven Economy* (June 2023), (Chair: Pamela Wallin) at 10-11 [Senate Report]. Figure 1 shows that in 2021, Canada had 123 resident patent applications per million inhabitants, well behind the G7 average of 620.

[81] Gilbert & Green find that between 2004 and 2014, the Department of Justice and the FTC have identified innovation concerns in about a third of their merger challenges. See Richard Gilbert & Hillary Greene, "Merging Innovation into Antitrust Agency Enforcement of the Clayton Act" (2015) 863:6 Geo Wash L Rev 1919 at 1921 (SSRN: <ssrn.com/abstract=2716224>).

[82] Many of the mergers challenged by the US and the European Commissions are in pharmaceuticals and medical devices, possibly because firms in these industries have well-defined and organized R&D programs so that it is relatively straightforward to identify 'pipeline' products as well as the downstream products with which pipeline products would likely compete. There just aren't that many large Canadian firms in these industries.

[83] "Paradox Lost: Explaining Canada's Research Strength and Innovation Weakness" (2013), online (pdf): *Council of Canadian Academies* <cca-reports.ca/wp-content/uploads/2018/10/paradoxlost_en.pdf> at 7.

[84] Denise Hearn, "Lack of competition blunts Canadian innovation" (24 February 2022), online: *Policy Options* <policyoptions.irpp.org/magazines/february-2022/competition-hurts-innovation-canada/>.

[85] Keldon Bester, "Merger Policy for a Dynamic and Digital Canadian Economy" (26 September 2022), online: *Centre for International*

Governance Innovation <www.cigionline.org/publications/merger-policy-for-a-dynamic-and-digital-canadian-economy/>.

[86] Competition Bureau Canada, "Examining the Canadian *Competition Act* in the Digital Era, Submission by the Competition Bureau" (8 February 2022), online: *Innovation, Science and Economic Development Canada* <www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04621.html>; and Competition Bureau Canada, "The Future of Competition Policy in Canada, Submission by the Competition Bureau" (15 March 2023), online: *Innovation, Science and Economic Development Canada* <ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/promotion-and-advocacy/regulatory-adviceinterventions-competition-bureau/future-competition-policy-canada>. For a discussion of the Bureau's proposal's see Baziliauskas & Sanderson, *supra* note 34.

[87] Baziliauskas & Sanderson, *supra* note 34.

[88] Edward M. Iacobucci, "Examining the Canadian Competition Act in the Digital Era" (27 September 2021), online (pdf): <examining-the-canadian-competition-act-in-the-digital-era-en-pdf.pdf>.

[89] In a letter to the Minister of Innovation, Science and Industry, the heads of the US antitrust enforcement agencies note that "We have found that it is important for our agencies to have the authority to address unlawful mergers even after they have been consummated. In our experience, it is a valuable aspect of the United States' regime that there is no statute of limitations for suing to block transactions, and that were there one it would materially impede our ability to stop mergers that ultimately lessened competition." See United States of America, Federal Trade Commission, *Re: Ministry's Public Consultation Paper on the Future of Competition Policy in Canada*, (letter), authored by Lina Khan & Jonathan Kanter (31 March 2023), online (pdf): <www.justice.gov/atr/page/file/1578296/download>.

[90] Globerman & Emes, *supra* note 76 at 22.

[91] Innovation, Science and Economic Development Canada, "Positioning Canada to Lead: An Inclusive Innovation Agenda" (last modified 26 July 2016), online: *Government of Canada* <ised-isde.canada.ca/site/innovation-better-canada/en/long-read>.

[92] Daniel Schwanen, "Canada's Commercialization Deficit" (17 December 2021), online: *C.D. Howe Institute* <www.cdhowe.org/intelligence-memos/daniel-schwanen-canadas-commercialization-deficit>.

[93] "Start-ups, Killer Acquisitions and Merger Control" (2020), online (pdf): *Organisation for Economic Co-operation and Development (OECD)* <www.oecd.org/daf/competition/start-ups-killer-acquisitions-and-merger-control-2020.pdf> at 33.

[94] *Ibid*; See also Charles Plant, "The Missing Ingredient: Solving Canada's Shortcomings in Growing Large Firms and Increasing Productivity" (August 2023), online (pdf): *C.D. Howe Institute* <www.cdhowe.org/sites/default/files/2023-08/Commentary_645.pdf>; Jerome Gessaroli notes that, according to a 2020 survey, 60% of Canadian start-ups viewed being bought out as a

long-term goal and argues that "[r]egulations limiting acquisitions could eliminate a lucrative exit strategy for many start-up founders and their investors, with the unintended consequence of reducing the incentive for investors to provide the venture capital that is usually vital for a start-up's success" in Jerome Gessaroli "Don't let Competition Act changes suffocate innovation, productivity", *Financial Post*, online: <financialpost.com/opinion/opinion-dont-let-competition-act-changes-suffocate-innovation-productivity>.

[95] *Dow*/Dupont, *supra* note 29; Also:

A market is more likely to be characterised by high appropriability if the benefits from introduction of new products are protected by patents and strong IPRs. This means that the original innovator can be expected to reap the benefits from its innovation, with no significant spillovers to its competitors. Formal patent rights may be complemented by strategies to lengthen the effective economic life of a patent used in defense against generic entry for off-patent products to further raise the degree of appropriability. (Annex 4, para 95).

[96] Kristina M. L. Acri, nee Lybeck, "Intellectual Property Rights Protection and the Biopharmaceutical Industry: How Canada Measures Up" (24 January 2017), online: *Fraser Institute* <www.fraserinstitute.org/studies/intellectual-property-rights-protection-and-the-biopharmaceutical-industry-how-canada-measures-up>.

[97] Office of the United States Trade Representative, "2023 Special 301 Report", online (pdf): <ustr.gov/sites/default/files/2023-04/2023%20Special%20301%20Report.pdf> at 5. There are seven countries on the Priority Watch List, including China, India, and Russia. The only European country on the Watch List is Bulgaria.

[98] *Ibid* at 6.

[99] *Ibid* at 73.

[100] *Ibid.*

[101] "International IP Index, 2023 Eleventh Edition", online: *Value Ingenuity* <www.valueingenuity.com/ip-index/>; Sean Speer & Michael Robichaud "Fixing Canada's weak patent regime is better than handouts for spurring innovation" *Financial Post* (5 July 2016), online: <financialpost.com/opinion/fixing-canadas-weak-patent-regime-is-better-than-handouts-for-spurring-innovation>. According to Speer & Robichaud, "Onerous patentability requirements, poor pharmaceutical-related enforcement, and a lack of patent-term restoration are just some of the weaknesses with Canada's IP policy. And even after a round of IPR reforms, Canada's global ranking remains somewhere between Poland and Taiwan and well below most other nations with comparable levels of GDP per capita."

[102] Senate Report, *supra* note 80 at 14.

[103] In Dow/DuPont, the European Commission found that IP rights in the crop protection industry were strong, and as a result firms can expect to reap the returns to their investments in innovation even without a merger: "the transaction is unlikely to significantly increase appropriability on the basis of the mechanisms identified in the economic literature." *Dow/Dupont*, *supra* note 29 at Annex 4, s 5.

[104] As noted above, the Bureau's Intellectual Property Enforcement Guidelines recognize that increasing market power can be justified because of the efficiencies created. The IPRGs also state that "the Bureau considers both the short-term and long-term implications of conduct when analyzing efficiencies in cases involving IP. Efficiencies are explicitly recognized in sections 90.1 and 96 of the Act in the context of agreements or arrangements among competitors and mergers." Competition Bureau Canada, "Intellectual Property Enforcement Guidelines" (11 August 2023), online: *Innovation, Science and Economic Development Canada* <ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/intellectual-property-enforcement-guidelines> at para 71.

[105] Competition Bureau Canada, "Examining the Canadian *Competition Act* in the Digital Era, Submission by the Competition Bureau" (8 February 2022), online: *Innovation, Science and Economic Development Canada* <ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/promotion-and-advocacy/regulatory-adviceinterventions-competition-bureau/examining-canadian-competition-act-digital-era#sec02_1> at s 2.1.

[106] A merger that increases the merging firms' market power may nevertheless benefit consumers if variable cost savings are of sufficient magnitude that the resulting downward pricing pressure offsets the upward pricing pressure resulting from an increase in market power. Consumers may also benefit from a merger that increases firms' market power if the merger results in the introduction of new or improved products.

[107] *Commission v Medtronic/Covidien*, COMP/M.7326, [2014] Office for Publications of the European Union, L-2985 Luxembourg, online (pdf): <ec.europa.eu/competition/mergers/cases/decisions/m7326_20141128_20212_4138173_EN.pdf>.

[108] *Commission v Pfizer/Hospira*, COMP/M.7559, [2015] Office for Publications of the European Union, L-2985 Luxembourg, online (pdf): <ec.europa.eu/competition/mergers/cases/decisions/m7559_20150804_20212_4504355_EN.pdf>.

[109] *Commission v Novartis/GlaxosmithKline Oncology Business*, COMP/M.7275, [2015], online (pdf): <ec.europa.eu/competition/mergers/cases/decisions/m7275_20150128_20212_4158734_EN.pdf>.

[110] *Commission v J&J/Actelion*, M.8401, [2017], online (pdf): <ec.europa.eu/competition/mergers/cases/decisions/m8401_740_3.pdf>.

[111] *Commission v General Electric/Alstom (Thermal Power—Renewable Power & Grid Business)*, M.7278, [2015], online (pdf): <ec.europa.eu/competition/mergers/cases/decisions/m7278_6808_3.pdf>.

[112] "Nielsen Holdings N.V., and Arbitron Inc., In the Matter of" (last updated 2 April 2014), online: *Federal Trade Commission* <www.ftc.gov/legal-library/browse/cases-proceedings/131-0058-nielsen-holdings-nv-arbitron-inc-matter>.

[113] US, Office of Public Affairs, *Applied Materials Inc. and Tokyo Electron Ltd. Abandon Merger Plans After Justice Department Rejected Their Proposed Remedy*, (News Release), (27 April 2015) online: *US Department of Justice* <www.justice.

gov/opa/pr/applied-materials-inc-and-tokyo-electron-ltd-abandon-merger-plans-after-justice-department>.

[114] Nicholas Hill, Nancy L. Rose & Tor Winston, "Economics at the Antitrust Division 2014–2015: Comcast/Time Warner Cable and Applied Materials/Tokyo Electron" (2015) 47 Rev Ind Organ 425, online (pdf): <economics.mit.edu/sites/default/files/publications/RIO-2015.pdf> at 433.

[115] *Ibid* at 434.

[116] "U.S. v. Bayer AG, et al." (updated 30 June 2019), online: *Antitrust Division, US Department of Justice* <www.justice.gov/atr/case/us-v-bayer-ag-and-monsanto-company>.

[117] US, Office of Public Affairs, *Justice Department Sues to Block Halliburton's Acquisition of Baker Hughes*, (News Release), (6 April 2016) online: *US Department of Justice* <www.justice.gov/opa/pr/justice-department-sues-block-halliburton-s-acquisition-baker-hughes>.

[118] US, Office of Public Affairs, *Halliburton and Baker Hughes Abandon Merger After Department of Justice Sued to Block Deal*, (News Release), (1 May 2016) online: *US Department of Justice* <www.justice.gov/opa/pr/halliburton-and-baker-hughes-abandon-merger-after-department-justice-sued-block-deal>.

[119] EU, European Commission, *Mergers: Commission clear Western Digital's Acquisition of Hitachi's hard disk drive business subject to conditions*, (News Release), (23 November 2011) online: <ec.europa.eu/commission/presscorner/detail/en/IP_11_1395>.

[120] *Commission v Deutsche Borse/NYSE Euronext*, COMP/.6166 [2012], online (pdf): <ec.europa.eu/competition/mergers/cases/decisions/m6166_20120201_20610_2711467_EN.pdf>.

RECONSIDERING WELFARE

Keldon Bester

Recent amendments to Canada's Competition Act expanded the list of potential factors to determine an impact on competition for mergers, competitor collaborations and abuse of dominance. Though a part of a non-exhaustive list of factors the Competition Bureau and Competition Tribunal can consider, the additional factors are a signal from the government of a desire for a broader conception of the dimensions of competition. That desire is likely to be frustrated however by a competition law framework, and in particular a merger enforcement framework, guided by estimating welfare tradeoffs. Building on the policy conversation surrounding the consumer welfare standard in the United States, the more general welfare frame for antitrust analysis is limited because of its outdated and incomplete conception of welfare, its tendency to narrow analysis to quantitative and short-term factors, and its contribution to an increasingly unwieldy and inequitable body of law. The federal government's 2022-23 consultation and review of the Competition Act presents an opportunity for Canada to reconsider the welfare frame as the foundation for the future of its competition law. To begin that process of reconsideration, two potential paths diverting from the welfare frame, Wu's competitive process standard and Posner's market power north star, are put forward to inform a post-welfare competition policy in Canada.

Les récentes modifications à la Loi sur la concurrence canadienne ont élargi la liste des facteurs pouvant servir à mesurer les éventuelles conséquences pour la concurrence d'une fusion, d'une collaboration entre concurrents ou d'un abus de position dominante. L'emploi de cette liste, qui ne se veut pas exhaustive, est laissé à la considération du Bureau de la concurrence et du Tribunal de la concurrence, mais il reste que sa bonification est un signal du désir du gouvernement d'élargir sa conception de la concurrence et de ses différentes facettes. Ce désir risque toutefois d'être frustré par le régime du droit de la concurrence, et plus particulièrement son encadrement des fusions, guidé comme il l'est par des considérations de bien-être. Comme l'illustrent les discussions stratégiques concernant le niveau de vie des consommateurs aux États-Unis, cette notion-phare assez floue de « bien-être » est limitante pour orienter l'analyse antitrust vu la conception dépassée et incomplète qu'on a du bien-être, et vu sa tendance à restreindre les analyses à des facteurs quantitatifs et à court terme ainsi qu'à contribuer à rendre la masse de droit toujours plus lourde et inéquitable. L'occasion est toutefois là en 2022–2023, dans le cadre des consultations du gouvernement fédéral et de son réexamen de la Loi sur la concurrence, de remettre en question le principe du bien-être *comme fondement des prochaines moutures du régime de droit de la concurrence au Canada. Pour entamer cette remise en question, deux autres voies potentielles sont proposées comme substitution au principe du bien-être : la norme du processus concurrentiel, par Wu, et le principe-guide du pouvoir de marché, par Posner.*

1. Introduction

> "[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. A value choice of such magnitude is beyond the ordinary limits of judicial competence"
>
> -Justice Brennan, United States v Philadelphia Nat'l Bank, 374 U.S. 321 (1963)

In 2022 the *Competition Act* received its first material amendments since 2009. Though only a preview of the government's declared interest in a more wide-ranging review of the act, the amendments made a number of important changes, among them an increased focus on anticompetitive behaviour in labour markets including wage-fixing and non-compete agreements. Beyond these headline-grabbing changes however, the amendments also attempted to broaden the scope of factors for considering impacts on competition for mergers, competitor collaborations and abuse of dominance.[1]

These additional factors signal the government's desire for a broader lens when assessing the consequences of potentially anticompetitive conduct, especially in digital markets. The amendments introduce language related to the potential consequences of network effects, the position of existing incumbents, and non-price dimensions of competition such as innovation, choice and privacy. While the changes are a step in the right direction toward a broader appreciation of the benefits of competition, these additional factors are unlikely to generate meaningful changes or expansion in enforcement. So long as Canada's competition law framework, and particularly its assessment of mergers, rests on a foundation of welfare analysis, whether under a total surplus, balancing weights or consumer standard, the policy goal of a deeper appreciation of the benefits of competition will be frustrated.

In the merger context the goal of welfare analysis is to attempt to quantify as best as possible the likely outcomes of a merger and use the net effect to guide for judicial decision-making. A noble goal in theory, but the practicalities of this approach have serious consequences for the scope and prioritization of factors of analysis, further frustrated by the limitations of the litigation context. In the United States debate and reconsideration of the primacy of the so-called consumer welfare standard in antitrust enforcement and its consequences over the past half century of the law is ongoing. Though its law lacks a consumer welfare standard, Canada's approach to merger analysis is not immune to the criticisms that have fallen on American enforcement. The parallels between the frameworks of the two countries and their close relationship mean the ongoing debate is an opportunity for Canada to assess the analytic frame that makes up the foundation of merger analysis in Canada.

If policy makers wish to expand the scope of Canada's competition policy, having welfare analysis as its foundation should be a target for reform. Arising from the economic assumptions driving the development of the *Competition Act,* the provisions that flowed from those assumptions, and recent jurisprudence intensifying its role, welfare analysis has taken a prominent and growing place in Canadian competition policy. Although attractive for its perceived ability to simplify complex analysis, that simplicity masks distortions that will continue to shape the development of Canada's competition law. With an understanding of those potential distortions, international scholarship wrestling with the effects of the primacy of welfare analysis in other contexts is useful in charting a path forward that moves away from the attempt to maximize welfare and towards preserving the competitive process as a cornerstone of Canada's economic policy.

2. Where we are today

Today the predominance of the economic discipline in the area of antitrust and competition policy is clear, a role that has only grown in the past half century. Providing a concise summary of the status of this process in Canada, economists Boyer, Ross and Winter detail the rise of the economic frame of analysis across the primary areas of *Competition Act* enforcement, highlighting Canada's "trailblazing" role in introducing economic analysis, with an emphasis on merger enforcement.[2] But there is reason to believe that supposed economic sophistication has not translated into an effective framework for maintaining and encouraging competition.

Remaining focused on merger enforcement, Boyer Ross and Winter argue that the primacy of the economic frame is beginning to have harmful effects on the adjudication of the law.[3] In the reform efforts of the 70s and 80s, the status of Canada's merger provisions as effectively dead letter law were a motivation for the development and introduction of a completely new Act. Illustrating the point, the primer published alongside the proposed 1986 legislation pointed to the lack of a single successful merger challenge in the lifetime of the *Combines Investigation Act*.[4] Unfortunately the track record since those reforms has not been much better. In the four decades since the law's introduction there have been only two successful litigated challenges of a merger, with the recent win in *Secure Energy Services Inc*, barring successful appeal in front of the Supreme Court, occurring more than two decades after the first, and both taking place in the waste management space. Recent misses by the Competition Bureau such as the price increases following acquisitions by legal software provider Dye and Durham and the collapse of the Bell-MTS merger remedy raise questions about the Bureau's ability to detect and review harmful transactions and the power of negotiated settlements to truly protect competition.[5]

The perspective from inside the house is not particularly optimistic. Breaking with its usual silence on the competition policy file, the Competition Bureau has highlighted a number of challenges it sees interfering with its ability to police anticompetitive conduct in the Canadian economy.[6] Canada's abuse of dominance framework has been effectively dormant over the past six years, despite 2020 and 2021 announcements of ongoing investigations into Amazon and Google, respectively.[7] Amid the growth of the cost of groceries for Canadians, analysis by the Bureau pointed to decades of consolidation that occurred under its watch as a driver of the pricing power allowing retail chains to maintain strong profit margins and pass the cost of inflation onto customers.[8] Canada is not alone however in wrestling with a competition law framework that shows signs it is not delivering the desired results for their citizens, as peers like the United States ramp up enforcement of existing laws and the European Union develops new regulatory tools to address the power of dominant firms in digital markets.

Academics and practitioners in the United States in particular are grappling with what has become the dominant frame of analysis in their antitrust framework, the so-called consumer welfare standard. Though the definition of the standard has proven malleable, for the purpose of this discussion the consumer welfare standard will be defined as an enforcement framework that only intervenes when anticompetitive conduct is considered to generate a negative impact against the welfare of a group of consumers, however defined, often with higher prices as the north star.[9] Canadian competition law does not operate under a consumer welfare standard, but instead an analytic framework predating the consumer welfare standard that similarly relies on an accounting of the net effects on consumers and producers arising from anticompetitive conduct, most explicitly in the case of mergers.

Though the definition of the consumer welfare standard is contested, the nature of Canada's approach to welfare analysis is contested between approaches: a total welfare standard and a balancing weights standard. Under the former, the lens of the analysis is not limited to the aforementioned consumers, but also extended to producers. As an illustrative example, under a total welfare standard, the magnitude and scope of the price increases associated with a reduction in competition flowing from a merger would first be estimated, and then, using a demand elasticity, a reduction in consumer surplus is estimated. This would then be compared to the benefits arising from the merger flowing to the parties to the transaction and its shareholders, which are represented as an increase in producer surplus, possibly arising from cost savings and increased profits resulting from price increases, with both harms to consumers and benefits to producers weighted equally. The balancing weights approach is similar, with the key difference being an attempt by enforcers and adjudicators to determine the relative value of the wealth transfers from consumers to producers. This approach was applied most notably in *Superior Propane*, the case that introduced the test, with the argument by the Bureau that harms from price increases to relatively poorer Canadians should be weighted more heavily than benefits flowing to the on average wealthier shareholders of the merged firm. Both the total surplus and balancing weights approaches to merger analysis seek to quantify the harms and benefits of a given merger and use the results of that analysis to compare the harms arising from a substantial lessening or prevention of competition to the corresponding and offsetting efficiencies that might allow the transaction to proceed anyway.

Which of these approaches is appropriate under the *Competition Act* is contested, with respondents often arguing for a total welfare standard that is more generous to the arguments of merging parties. But beyond the relative merits of the two approaches to welfare analysis, this discussion argues that all welfare rooted approaches, consumer welfare, total welfare and balancing weights, suffer from a common set of deficiencies that interfere with the operation of a competition law framework that recognizes and protects the many benefits of competition

As the United States reconsiders its focus on consumer welfare, energy for reform is present in Canada, signaled by the federal government's incremental 2022 amendments to the *Competition Act* and the ensuing public consultation on broader reform to Canada's competition law. Though not driven by a single perceived shortcoming of the law, the government has shown an interest in a competition law with a notably broader scope than the current framework offers. The additional factors added to merger, competitor collaboration and abuse of dominance analysis are emblematic of this desire for a wider-ranging framework of analysis. Though likely not front of mind for policy makers at the time of the amendments, that desire will need to contend with the shaping power of the welfare frame in Canada's competition law, and its presence in Canada's merger law in particular. The welfare frame shapes what factors Canada's competition framework prioritizes and diminishes in attempting to achieve the multiple goals set out in the purpose clause of the *Competition Act*. Though versions of the welfare frame exist in peer jurisdictions, the development of Canada's approach to welfare analysis is distinct. Canada's welfare frame is the product of predominant economic thinking in Canada at the time of drafting, enshrined in the *Competition Act*, and more recently retrenched by jurisprudence that has raised the ire of even members of Canada's economist community. Before discussion of the potential limitations of the framework, it is worthwhile understanding the roots of this framework and its expression in law and recent jurisprudence.

A) Canada's Embrace of Williamsonian Welfare

In response to a request from his colleagues at the Department of Justice, in a 1968 paper Oliver Williamson laid out a possible test on which the agency could judge mergers centered on a trade-off between the deadweight loss associated with a merger and the efficiencies that could be expected to arise from the transaction.[10] Effectively the first iteration of the total welfare standard, under Williamson's cost-benefit test framework a merger is considered to substantially lessen competition if the total surplus is reduced as a result of the transaction, treating both consumer and producer surplus as equal in value. Though in the United States this test would evolve to eventually become the consumer welfare standard, placing increasing consumer surplus above that of the producer, Canada would go on to embrace a more straightforward Williamsonian approach to merger analysis.[11] Somewhat ironically, the total welfare standard embraced in Canada is more akin to Bork's originally proposed consumer welfare standard which despite the title more closely resembled Williamson's cost-benefit test given the loose definition of consumer that has been the subject of criticism.[12]

Williamson's approach would grow in popularity among the academic antitrust community in the coming decade, but the preference for this total welfare approach was already clear in the Economic Council of Canada's *Interim Report on Competition Policy* released the following year. Placing the achievement of efficiency as the suggested primary goal of Canada's competition law, the interim report took seriously the foundation of Williamson's analysis that straightforward increases in total welfare should be considered beneficial and that exchanges between producers and consumers should be treated neutrally.[13] That view would survive the over 15 year process that would lead to the introduction of the *Competition Act* in 1986 though the efficiency goal would end up as only one of the multiple stated goals of the legislation.[14]

The purpose clause of Canada's *Competition Act* would include goals beyond optimizing the supposed efficient use of resources in the Canadian economy, but the legislation's approach to consolidation is more ambivalent than American counterparts.[15] Unlike the *Sherman Act's* monopolization language and the *Clayton Act*'s focus on addressing monopoly in its incipiency, the Act's focus on maintaining and encouraging competition is relatively less focused on decrying its inverse. Canada's law has included a shifting set of per se provisions towards targeted conduct, but the Williamsonian conception of welfare balancing has been clearly present in Canada's merger law from its enactment. The stated goal of the law is to maintain and encourage competition, but the law begins from a neutral standpoint on the likely consequences of concentration. Discussion among policy makers along the road to the introduction of the Act would reflect the presence of Williamson's analysis but also the initial intention of the government to reflect a more consumer welfare standard-oriented approach to mergers. Introductory documents for the failed Bill C-256 discuss the need for the benefits from combinations to "be transmitted in substantial part and within a reasonable time to the public," and in response to reproach from the business community, Minister of Consumer and Corporate Affairs Ron Basford clarified that this would apply only to mergers "shown to have a restrictive effect on competition."[16] That intention however would not survive the rocky reform battle that resulted in the total welfare standard foundation and the most explicit commitment to the total welfare frame in Canada's competition law, section 96's efficiency exemption.

B) Section 96—Canada's Efficiency Exemption

The subject of much public debate, section 96 of the *Competition Act* is the clearest reflection of the long shadow of Williamson on Canada's competition law framework.[17] The exemption prohibits the Competition Tribunal from issuing an order enjoining a merger that would otherwise generate efficiencies greater than and offsetting the harms of any substantial lessening or prevention of competition. Based on the views reflected in the Economic Council of Canada's interim report, the assumption was that Canada's economy needed to accept degrees of lower competition through consolidation in exchange for a nebulous concept of offsetting efficiencies that would in some way benefit the Canadian economy as a whole. While peer jurisdictions accept efficiency arguments in judging whether a transaction is anticompetitive or not, Canada is alone in its commitment to preventing its competition law framework from intervening when an effective total welfare standard argument can be made in favour of an acquisition. Additionally, unlike jurisdictions such as the United States or the European Union, in Canada there is no requirement for the benefits of that efficiency to accrue to a particular group.[18] Though the language of offsetting could be read to imply a requirement to demonstrate benefit to the groups potentially harmed by a given transaction, consumers or otherwise, the exemption has not been interpreted as a departure from the supposed neutrality of the Williamsonian cost-benefit test.

Setting aside the debate on the fitness of the exemption as a part of an effective competition law framework, the exemption explicitly invites a surplus welfare-driven approach to the analysis of mergers, assessing the trade-offs under the presumption that offsetting efficiencies can excuse an otherwise harmful transaction. Though the concept leaves room for judicial interpretation of the hurdle to be met, the requirement for Canada's competition law to engage in some form of trade-off analysis points to a predominantly quantitative approach to assessing the consequences of a given transaction. Though qualitative aspects of efficiencies are considered, in particular attempting to import some consideration of the longer term notion of dynamic efficiencies, a clear preference for static quantitative welfare analysis is reinforced by the presence of the efficiency exemption in Canada's competition law.

However, the prominence of that quantitative analysis and the openness to efficiency arguments has not been static in the recent history of the competition law framework. Present in the *Competition Act* since its 1986 introduction, the role of the efficiency defense in Canada's merger framework has expanded in two important milestones in Canadian competition law. First, then Commissioner of Competition Sheridan Scott's 2003 decision to begin formally considering efficiency arguments put forward by parties following *Superior Propane* marked a shift in the openness of the enforcer to arguments for transactions it would otherwise attempt to challenge in court. More recently, and potentially more impactful to the role of the cost-benefit test was the Supreme Court's 2015 decision in *Tervita*.[19] Given the rarity of not only competition cases in general but those that reach the Supreme Court, it is not surprising that Tervita represents a landmark in Canadian competition law. Though the outcome of Tervita had a number of important consequences for merger law in Canada including a restrictive standard for prevention of competition arguments, its most controversial outcome for the purpose of this discussion is its impact on the welfare analysis framework. In his decision, Justice Rothstein elevated the already quantitative-oriented welfare trade off analysis and created an explicit hierarchy of quantitative over qualitative evidence in the consideration of harms and offsetting efficiency claims by merging parties. In her dissent, Justice Karakatsanis called out the improper hierarchy of quantitative over qualitative evidence, highlighting that "the statutory language of the Act does not distinguish between quantitative and qualitative efficiencies."[20]

In elevating the role of quantitative evidence, Rothstein's decision not only cemented the role of quantitative welfare trade-off analysis but also marked an important shift in the weighting of the relevant factors for merger enforcement decisions and a narrowing of the time scale relevant to that analysis. Regardless of their importance to the competitive process, static, easier to quantify factors in merger analysis now rise above factors that, while still important, depend on qualitative elements to guide decision-making. Looking at the additional factors added to merger analysis in the 2022 amendments, distance between the goals of policy makers and the decision of the Supreme Court begins to emerge. The role of network effects, entrenchment of a leading incumbent's position and non-price dimensions of competition like quality, choice and consumer privacy now pose a quandary for the Bureau. Either the Bureau can strain to force these often truly qualitative factors into a quantitative mold for a static welfare trade-off analysis, or risk the Tribunal diminishing their importance relative to more easily quantifiable efficiencies, regardless of their importance to the competitive process.

Though recently proposed legislation may strike the efficiencies exemption from Canada's competition law, today Williamson's brand of surplus welfare trade off analysis is alive and well in Canadian competition law.[21] The system is perpetuated not only by the structure of the law, but also the courts and the enforcers that operate within its framework. It has grown out of commonly-held economic beliefs in the latter half of the 20th century and the simplifications seen as necessary to the realities of Canada's adversarial competition law system. But any framework that attempts to simplify the messy complexity of reality must contend with the trade-offs resulting from that simplification.

3. The limits of welfare

In committing to a welfare trade-off based standard, whether under a total welfare or balancing weights approach, Canada's competition law imports shortcomings that have a material impact on the effectiveness of the law in maintaining and encouraging competition. This discussion will focus on three dimensions of the limits of a welfarist approach to Canadian competition law. First, in adopting the Williamsonian frame of welfare analysis, Canada's competition law ignores not only the modern field of welfare economics but also the original concerns that Williamson included as caveats to his proposed model. Second, by taking an already quantitative-leaning frame of analysis and further narrowing its analytic scope the welfarist frame discounts important qualitative aspects of competition and elevates an increasingly empirically suspect view of efficiencies. Finally, the practical realities of adversarial merger litigation not only erode the foundation of welfare trade-off analysis but result in an increasingly unwieldy system tilted in favour of large litigants at the expense of public enforcers and private plaintiffs.

A) An outdated and incomplete conception of welfare

The rhetorical draw of welfare standards in merger enforcement is clear. Through rigorous analysis, enforcers and adjudicators can determine the consequences of a merger and limit enforcement only to those that result in net harm to the economy and society. But looking beyond the level of rhetoric reveals issues with the application of the welfare frame in competition and antitrust analysis. The first hurdle to overcome is that what is being measured in the typical antitrust case is nowhere near a measure of welfare in the modern field of welfare economics. What is most frequently quantified in merger analysis are the price and non-price effects of competition. In the recent *Secure Energy Services* the Bureau put forward arguments related to non-price harms in the form of transportation costs, waiting times, capacity constraints, lower service quality and a reduced role of reputation in the market. These are traded off against what are referred to as efficiencies, frequently primarily cost savings resulting from the reduction of redundant assets and workforces. In *Secure*, labour and non-labour cost savings arising from the closure of waste management facilities were the primary components of the claimed efficiencies.

In order to create a social welfare function, a common component of modern welfare economics, analysts need to not only identify all individuals with standing, create a process for the aggregation of measures of individual wellbeing, and establish a utility function to convert those measures of wellbeing into a welfare figure.[22] Though the balancing weights approach attempts to remedy the situation, there is functionally no concept of utility in Canada's approach to welfare in antitrust analysis. Introduced in *Superior Propane*, the balancing weights approach takes a step towards a more modern understanding of welfare and seeks to apply a form of income distribution on which different transfers, such as those from poorer individuals to wealthier ones, might be judged. Instead of modern welfare economics, Canada's competition law framework remains squarely in the field of surplus theory of welfare, popular in the time of Williamson and taken further by Bork's proposed consumer welfare standard in the late 70s.[23] Despite the surplus theory of welfare losing favour with welfare economists, the approach has maintained a foothold in industrial organization economics.[24] But as Glick, Lozada, Govindan and Bush show, this approach to welfare has material issues that have led to the decline of its use elsewhere in the field of economics. First, surplus analysis that focuses only on output markets ignore the potential consequences on input markets, including labour markets, of the transaction. Particularly relevant to Canada's efficiency focus, cost savings that are the result of depressed wages or layoffs are not truly efficiencies but transfers, often assumed away in merger cases. Second, the view of the surplus theory is a partial analysis because surplus is only one dimension of welfare, something that the founding fathers of welfare economics Marshall and Pigou understood.[25] Third, discussed briefly in relation to the balancing weights approach, welfare analysis requires some form of distribution on which to base individual utility and its required aggregation, which the surplus theory of welfare ignores.

In arguing for a total welfare standard in opposition to a balancing weights standard, practitioners argue that there is no objective way to weigh the transfer of surplus from one party to another, no matter their economic circumstance. Accordingly, the transfers should be weighed equally. Litigation resources continue to be dedicated to reversing this introduced consideration for the differential value of transfers among individuals, most recently on display in *Rogers*.[26] Though the field of welfare economics disagrees, this equalization is seen as a necessary concession to the realities of antitrust enforcement. But this equalization is simply weighting by another name. To assign two values equal weight is to still assign them values, with even less thought than the balancing weights approach, which itself still falls short of modern welfare analysis. By assuming a constant marginal utility of money, the total welfare standard encodes the flaws of an outdated approach to welfare measurement into Canadian antitrust policy.[27] Though the balancing weights test attempts to create a framework for considering relative utility values of a given transfer between differentiated producers and consumers, it does not overcome the remaining flaws that dog the outdated welfare theory that antitrust analysis maintains.

Though practitioners may understand the limitations of the welfare approach used in antitrust analysis, it may still be seen as a necessary shortcut for the administrability of the law. A full social welfare analysis may be appropriate for discerning the true societal outcomes of a merger, but is effectively impossible given the data limitations and adversarial nature of the merger litigation process. But beyond its reliance on welfare measures that are unlikely to correspond to reality, the welfare frame also distorts the focus of the law away from important dimensions of competition and towards spurious but more easily measurable factors of analysis.

B) An incorrect devaluation of qualitative dimensions of competition

Through its growing focus on the quantifiable consequences of mergers, the welfare focus of Canada's competition law has steadily devalued important elements of competition that do not fit neatly into the framework. Canada's welfare frame has been shown to be capable of disregarding the value of competition entirely, an extreme situation relative to international peers. Though discussed in other jurisdictions as primarily a theoretical concern, Canada's competition law has allowed for a literal merger to monopoly in the case of *Superior Propane*, and no change in Canada's law since would suggest this outcome is no longer a possibility. Further, when paired with the improper elevation of quantitative above qualitative evidence, the Williamsonian trade-off approach shifts the focus away from qualitative elements of the competitive process and towards a definition of efficiency that appears increasingly narrow and spurious.

Hints at this distortion are present in Williamson's ambivalence in his original paper proposing the welfare trade-off approach. While Williamson noted that ignoring the potential welfare trade-off required a strong presumption on the consequences of mergers, he had serious concerns about the flattening effect of his proposed "naive model" on antitrust analysis. Not only did the model fail to examine the relationship of a given market to the rest of the economy, but considerations such as "enforcement expense, timing, incipiency, weighting, income distribution, extra-economic political objectives, technological progress, and the effects of the monopoly power on managerial discretion" were excluded from the analysis.[28] These considerations read as a list of the benefits of competition and reflect important aspects of an effective competition law enforcement framework. Rather than write them off, Williamson understood these considerations as important consequences of a merger. Reflecting the greater skepticism of concentration present in U.S. history, Williamson understood that mergers passing under this analysis could still generate social harms. Despite his own misgivings about the analysis, Williamson's original approach still looms large in Canadian competition law, with reference in the expert testimony of the recent *Rogers* merger litigation.[29]

The recently concluded *Secure Energy Services* case provides a window into the focus of the welfare frame in Canadian merger analysis today. It is not a coincidence that the two successfully litigated transactions for the Bureau have taken place in the waste management market, the other being Canadian Waste completed in 2001.[30] The characteristics of the market fit well into an analytic frame searching for clean, quantitative reasons to guide its decision making rather than one that places value on protecting the competitive process and the range of benefits that competition offers. The market has high barriers to entry, often including regulatory permit requirements. Relevant markets are tightly geographically constrained, with transportation cost contributing materially to the decision making of market participants. Output for facilities in question is relatively easy to quantify compared to more dynamic and quick-moving markets. The Bureau is drawn to these cases not because they are the most important markets in Canada but because they fit into the analytic frame the *Competition Act* has set out, the Tribunal has interpreted, and the Bureau is attempting to solve for when it chooses to pursue litigation it believes will be successful. Contrast this example with the digital markets that have captured the attention of competition and antitrust policy over the past decade in which consumers trade off privacy for prices, geographic boundaries are irrelevant and new entrants are counted on to unseat incumbents.

The third in a series of contested waste management consolidations, counting the aforementioned *Tervita* among them, *Secure* is an example of how the welfare balancing approach diminishes the role of preserving qualitative aspects of the competitive process. The Tribunal's opening assessment of the transaction is uniquely stark, remarking that "it is difficult to conceive of a more anti-competitive merger."[31] Clear competitive harms were identified from the beginning of the proceeding, but throughout the process Canada's total welfare standard threatened to allow those harms to occur if the Williamsonian trade-off could be argued in favour of the transaction. While the Tribunal recognized the Commissioner's arguments related to the qualitative evidence of the competitive harms of the transaction, they are clearly secondary to the Tribunal's final analysis of the transaction which largely hinges on the weighing of the predicted deadweight loss and Secure's corresponding efficiency arguments. The Tribunal finds that the $32 million of efficiencies argued by Secure are not sufficient to outweigh the $30 - $39 million of deadweight loss argued by the Bureau. In its own assessment, the Tribunal highlights the difficulty in quantifying non-price effects associated with the merger, rejecting attempts to quantify increased wait times, capacity constraints, reduced quality of service, and reputational factors, leaving only increased transportation costs accounted for. With the ultimate decision in mind, the Tribunal was not unanimous in its final accounting of the correct total of non-price effects that could be counted towards the Commissioner's argued deadweight loss estimates.[32]

Stemming from Williamson's critique, with their focus on the quantifiable, welfare standards will inherently discount the range of qualitative benefits that the competitive process can generate and harms which consolidation can generate. Commentary to this effect has come from members of the Canadian competition economics community, with Boyer, Ross and Winter (2017) noting that post-Tervita, "in terms of reliance on quantitative economic analysis, within the area of Canadian law on mergers the pendulum has, ironically, swung too far."[33] This growing predominance of the quantifiable effects of mergers and anticompetitive conduct in general is increasingly at odds with the aims of policy makers as review of the *Competition Act* is ongoing. This is clearest in the additional factors for consideration in merger analysis added in the 2022 amendments that include quality, a non-price factor recognized as difficult to quantify but still rejected by the Tribunal in *Secure*, but also in the language of the government's discussion paper related to the diminishment of qualitative evidence following the decision in *Tervita*.[34]

The situation is made worse by the element of welfare trade-off analysis that has become increasingly prominent in Canada, efficiencies. Canada's approach to efficiency makes nods to concepts such as productive, allocative and even dynamic efficiency, but what predominates is a "businessman's definition of efficiency" most often concerned with cost savings.[35] Canadian competition law analysis does not incorporate the concept of Pareto efficiency, whereby gains are only considered when no party is made worse off, inappropriate for the often zero-sum nature of merger assessment trade-offs.[36] Canada's focus on efficiency also rests on an increasingly fragile bed of motivated evidence, as studies reveal the overpromise and underdeliver nature of efficiency claims, and the corresponding material price increases they must theoretically offset. Quantitative study of claimed merger efficiencies frequently demonstrate that those claims are often overstated, misrepresented or paling in comparison to the harms resulting from a lax merger policy that has dogged peer jurisdictions.[37]

Though much has been made of the supposedly narrow application of the efficiency defense in public cases, the link between the efficiency defense and the stringency of Canada's merger law can be seen in commentary following the decision by then Commissioner Sheridan Scott to recognize efficiency arguments presented by merging parties.[38] Emblematic of the anticipated post *Superior Propane* merger environment, Mathewson and Winter note that "Prior to *Superior Propane*, competition lawyers would have properly advised clients not to pursue mergers that involved an obvious and substantial lessening of competition. After *Superior Propane*, such advice is too conservative for mergers involving significant efficiencies."[39]

Providing an example of the distorting effect of this efficiency focus at the heart of Canada's welfare frame of analysis, Chiasson and Johnson show how the efficiency exemption shifts the frame of merger analysis away from important but difficult to quantity benefits of competition. Instead of valuing the innovation that flows from the competitive process, Canada's law gravitates towards valuing short term static cost savings that are a better analytic fit regardless of their actual impact on the future of competition in Canada. They find the ironic conclusion that by devaluing innovation the efficiency defense may in fact represent a cost rather than a benefit to the long term efficiency of the Canadian economy.[40]

An analytic framework that seeks to address ambiguity with quantification will trend towards the devaluing of qualitative factors in its analysis. An issue present from the introduction of the welfare trade-off approach, Canada's framework has accelerated that trend through its unique commitment to using merger policy as a route to a kind of efficiency and the elevation of quantitative evidence above qualitative factors.

C) An unwieldy and inequitable body of law

Beyond the flaws of an outdated conception of welfare and the narrowing of analysis to the exclusion of important qualitative dimensions of competition, the welfare frame also affects the administrability and equity of Canada's competition law. Since its 1986 introduction, the complexity and level of legal and economic resources associated with a Canadian competition case has continued to increase, a trend not unique to Canada but most recently exemplified in the *Rogers* merger with the merging parties claiming fees north of $22 million, millions more than the Bureau's entire merger filing fee revenue for fiscal 2021-2022.[41]

Before the exemption was introduced, there was skepticism of the operability of welfare trade-off analysis. A 1981 consultation document on proposals for amending the *Combines Investigation Act* prepared by the federal government shows concern for the administrability of efficiency exemptions core to the welfare trade-off analysis that would eventually be incorporated into the law. While highlighting their theoretical attractiveness, the proposal noted that such tests are "very difficult to apply in practical terms," creating "uncertainty as to the application of the law and rais[ing] the prospect of very uneven enforcement."[42] This concern was echoed by Williamson himself in a follow up to his 1968 paper in which he cautioned against the introduction of a "full-blown trade-off assessment" into a merger enforcement framework.[43] Reporting on its experience as Canada's sole antitrust enforcer, the Bureau describes the efficiency trade-off analysis as a "incredibly complicated and expensive undertaking" and requiring a "large number of assumptions to implement."[44] Focusing on the consequences of *Tervita* on the administrability of Canada's competition law, Ross points out that "[w]hile surely positive for the employment of economists, it may lead to a merger review process that is slower, costlier and no more capable of selecting out the right transactions."[45]

Stepping outside the welfare frame briefly, beyond relying on a crude and outdated definition of welfare, this shortcut definition of welfare is weakened further by the attempts to place a truth-seeking exercise within an inherently adversarial process. Either party to the litigation is attempting to model a version of reality that best adheres to the case they are trying to make, with the clearest financial interest present for the merging parties and their representatives. Analysis proffered by either party will never run counter to their position in the litigation, and the task of the judge, though specialized in the case of the Canadian framework, is to wade through which of these motivated models appears a more plausible representation of the past, present and future of a market. The adversarial nature of the process has implications for the practical process of economic modeling as well. The quality of an economic model is dependent on the quality of data available to the modeler, both to generate simulations and to check their performance against reality. Though merging parties have the incentive to cooperate with the enforcer to a point, the incentive will remain to frustrate the analysis of the enforcer by withholding information that would be detrimental to the case of the merging parties. This limitation is made worse by the lack of retrospective evaluation in Canadian competition law. Today there is practically zero retrospective analysis of the accuracy of arguments accepted in merger litigation, or the consequences of merger enforcement decision or indecision. This is the case because the Bureau's limited information gathering powers do not permit analysis of the actual outcomes following a challenged or permitted merger. The sole public evidence of an attempt at this is the Bureau's 2011 Merger Remedies Study in which the Bureau conducted 135 interviews with parties related to 23 merger cases that painted a mixed picture of the perceived effectiveness of the remedy process but no firm conclusions.[46]

The focus on quantification inherent in the welfare frame, intensified in the case of efficiency arguments, also raises equity implications in its ability to address disputes between disparately resourced parties. Parties are increasingly reliant on a fleet of legal and economic resources to conduct the trade-off analysis on which merger decisions hinge. In the case of the government versus large defendants, the primary mode of litigation given the narrow private access to the *Competition Act,* the enforcer's budget is highly constrained compared to the resources available to large defendants, of which there could be many in a time of high merger activity. In fiscal 2021-22 the Bureau's total budget was $59.5 million, of which $18.4 million was generated by the user fees intended to support the merger review program.[47] This is compared to the $33 million in costs claimed by the respondents in Rogers-Shaw, of which approximately $13 million was comprised of expert fees.[48] By taking a benign position in its analysis of mergers and lacking structural presumptions against mergers in concentrated industries, the resource constraint is likely to dampen the assertiveness of the enforcer. As Woodcock explains, by adopting a relatively neutral view, a competition law framework can create a bias against enforcement by increasing the cost of investigation and litigation against the budget constraint of enforcers.[49] But as private access to the *Competition Act* begins to open and become more relevant to the evolution of the Canadian competition law landscape, the requirement to commit vast resources to mount an argument against anticompetitive conduct will exacerbate existing inequalities between smaller plaintiffs and their opponents, likely dominant in their respective markets.

4. Potential paths forward for Canada

With energy for reform building, Canada has the opportunity to turn away from its commitment to a flawed welfare frame of analysis and re-center the value of preserving competition and the competitive process as the goal of its competition law. As the global rethink of antitrust policy shows at an international level, and the 2022 amendments to the *Competition Act* show at the domestic level, there is appetite for a competition law that considers a broader conception of the benefits of competition. By forging a different path forward, Canada can leave behind the outdated conception of welfare, the distortions that diminish the important qualitative dimensions of competition and the complexity foreseen prior to the introduction of the *Competition Act.*

As an incremental improvement, Canada should do away with the *Tervita* jurisprudence that has created an undesirable preference for quantitative over qualitative evidence. There is an understanding even in the economic community that while the intention of the decision may have been noble, it is ill-suited to the reality that important qualitative factors comprise the benefits of competition.[50] But undoing *Tervita* would leave in place the efficiency exemption that lies at the heart of Williamson's surplus welfare analysis, keeping Canada's competition law framework rooted in an analysis that was held with appropriate skepticism nearly a half century ago, and whose base of support is eroding under empirical study. To remedy the situation the Bureau has suggested repealing the efficiencies exemption while keeping it a factor in the assessment of mergers. However, this would ignore the building evidence that narrowly defined efficiencies are largely illusory and that by prioritizing short term benefits they may cause long term harm to the Canadian economy. It would also invite a return to form for the legal, economic and financial institutions that have grown up around the adjudication of Canada's competition law framework and have expanded the consideration of efficiencies to other areas of the Act. There should remain a place for arguments about the procompetitive possibilities of select mergers, but the idea that competitive harms should be traded off for what are essentially short term cost savings at the expense of output should be discarded. Adopting this clean break approach, the federal government's recently proposed Bill C-56, framed as a response to affordability concerns in the housing and grocery, aims to strike the efficiencies exemption from Canadian competition law.[51]

Though these changes would contribute to invigorating Canada's competition law framework, they would be unlikely to truly diverge from the welfare frame that has characterized the country's approach since 1986. Looking to a peer jurisdiction wrestling with the consequences of its own brand of the Williamsonian-Borkian welfare frame, alternatives proposed in the United States are useful for motivating consideration of potential directions for Canada's law in the future. Two potential paths emerging from the post-consumer welfare discussion south of the border are driven by professors Tim Wu and Eric Posner. Both see the consumer welfare standard as neutering a once assertive body of law with interlocking economic and political goals at its heart. To remedy the situation, both put forward alternatives that may better capture the full range of benefits of maintaining and encouraging competition in their execution.

A) Wu's Competitive Process Standard

The first potential path forward is what Wu refers to as the preservation of competition or the protection of the competitive process standard.[52] Finding the consumer welfare standard "too tainted," Wu proposes a model that takes the focus of antitrust back to the role of referee in markets, setting and enforcing the rules on which the game of competition is played.[53] Through the metaphor of sport, Wu notes that the purpose of rules is not to maximize output, but to create the conditions for the benefits of healthy competition to arise. Wu distinguishes a law that intends to maximize some value, in Canada's case total welfare, from one that is designed to protect a process. Highlighting issues noted earlier in this discussion, the limitations inherent in measuring a concept as abstract as welfare place judges in a position that even their specialized colleagues will struggle to execute properly. For the consumer welfare standard Wu sees the primary challenge as the restrictiveness of the approach in comparison to wide-ranging goals of antitrust in the United States.

Wu's criticism of the consumer welfare standard rings true to Canada's implementation of the total welfare standard, with a bias towards quantifiable and static harms, often limited to effects on prices. This is to the detriment of more qualitative and dynamic harms to the competitive process such as blocking potential competition, slowing the process of innovation, and reduction in product or service quality. , Even though these may be more important to the long term flourishing of an economy, especially compared to static cost savings, their role in analysis under the consumer welfare standard is diminished. Wu's commentary on the indeterminacy of the consumer welfare standard in U.S. antitrust law despite claims to the opposite also has applications for its northern neighbour. Despite the Tribunal's commentary on the severity of the anticompetitive nature of *Secure* it could have been excused had the Tribunal's acceptance of harms and efficiencies differed. This remains the case despite the Tribunal going out of its way to explain that the trade-off in *Secure* would have been found in favour of the Bureau if the analysis had been "close."[54] Canada's total welfare standard generates its own indeterminacy through the ad hoc comparison and equal weighting, which still constitute value judgments, of disparate factors of competition shoved into attempts at quantification under the headings of deadweight loss and efficiency. Wu's critique of the consumer welfare standard extends to the political goals of the American antitrust framework, but while an important recognition of the political dimension of antitrust and competition policy the criticism is less relevant to Canada's more ambivalent approach to consolidation and monopoly taken in its competition law.

In place of consumer welfare Wu argues for "preservation of competition" or "protection of the competitive process" to be recognized as the end goal of antitrust policy. Wu's key distinction is the shift away from the maximizing of some value towards the protection of a process, namely through a focus on preventing conduct meant to "suppress or even destroy competition," relying on language from 1918's *Chicago Board of Trade*.[55] Rather than threats to a nebulous definition of consumer welfare, the standard would focus on addressing subversions of competition on the merits such as sabotage, exclusionary deals, or predation. Returning briefly to Woodcock's analysis of the consequences of the rule of reason approach that has coincided with the rise of the consumer welfare standard, Wu's standard implies a return to a greater use of per se rules around conduct understood to be harmful to competition instead of fishing for a potentially efficiency-motivated explanation to excuse them.[56]

Wu's analytic framework guides enforcers to ask a series of questions to determine whether the conduct in question is the beneficial competition on the merits that enforcers seek to protect, or an attempt to subvert that process. The framework makes explicit the consideration of the relative position of the parties to the conduct, asking whether the alleged violator or victim is a long-standing incumbent or a challenger attempting to disrupt a stagnant status quo. Of the conduct itself the question remains a familiar one, whether the conduct represents competition on the merits or an attempt to subvert that process through illegitimate methods, allowing for arguments that the nature of the conduct is in fact procompetitive. Wu's framework then seeks out evidence of the distortion or suppression of the competitive process, which he defines as competition on the basis of price and quality. Here Wu allows for consideration of harm to consumer welfare to enter the analysis, but it remains subordinate to the concern over suppression of competition, and does not invite a welfare balancing exercise. Finally, reflecting the ongoing conversation in the United States considering a return to the political goals of antitrust law, enforcers consider implications for non-economic values which could include policy goals like the preservation of the marketplace of ideas.

B) Posner's Market Power Test

In a similar vein, Posner takes his critique of the consumer welfare standard with a familiar foundation to a different endpoint.[57] Like Wu, Posner laments the narrowing focus that the consumer welfare standard has had on American antitrust to the detriment of important benefits of competition such as innovation and contrary to the stated goals of policy makers and jurisprudence prior to the 1970s. Posner's starkest critique of the focus on price and efficiencies in the current American framework is that it opens the door to excusing literal mergers to monopoly, as discussed previously something that has already been allowed to occur in Canada. Charting the evolution from the Williamson-Bork cost-benefit test that lives on in Canada towards the price test that underpins the current iterations of the consumer welfare standard in the United States, Posner identifies a unifying critique that both tests focus their analysis on a narrow band of participants, namely those that interact with the merger participants. In doing so, important social costs such as the increased political clout and ability of firms to abuse and shape regulations are ignored, a critique even Williamson raised in relation to elevating private efficiency claims above social costs. To illustrate this point, Posner notes that the growth in predominance of the consumer welfare standard tracks with a progressive decline in confidence in big business in the United States from 1975 to 2020.[58]

Posner offers that contrary to the consumer welfare standard, these social costs of excessive concentration should be taken seriously. Expanding the frame of analysis, the social costs of mergers can include rising social discontent, disadvantaged small and medium sized businesses, increased ability for monopolists to shape political outcomes, and inequity in market outcomes. Each of these potential costs exist outside the frame of the deadweight loss triangle of traditional cost-benefit analysis but have important implications for the political goals of antitrust and competition law, echoing elements of the *Competition Act*'s purpose clause such as preserving equitable opportunity for small and medium-sized businesses and competitive choice for consumers.

Responding indirectly to discussion in Canada about the supposed creep of other important policy goals into competition laws, Posner does not believe that mergers should be evaluated on their social costs on a case by case basis, but rather the standard or test for evaluating mergers should incorporate measures that can internalize these costs. To do so, Posner suggests that market power rather than the price test, or cost-benefit test for that matter, is a better north star for regulators to aim for in constructing a merger enforcement framework. In doing so, Posner hopes to move the focus of American antitrust law away from price and back towards competition, recognizing the attraction of the alleged simplicity that the consumer welfare standard's price test offered. Market power is offered as a useful representation of the rivalry that comprises competition, with its presence signaling a failure of competition that regulators should focus their attention on. Offering more precision than the more nebulous concept of competition, market power is seen as a useful guide for merger analysis while still requiring a determination of substantiality to guide intervention. Under such a standard a merger that increases industry-wide average market power would be understood to lessen competition substantially, reflecting the consequences of depressed competitive intensity.

The test Posner proposes to operationalize this market power "north star" does not rely on introducing new tools to the merger analysis toolkit but rather refocusing the core of that analysis. Whether a merger is anticompetitive or procompetitive is determined by assessing its impact on industry-wide margins. If industry-wide margins increase beyond a given threshold the merger is blocked, but if margins are decreased by the creation of a more efficient competitor that exerts pressure on other industry players the merger is allowed to proceed. In this way efficiency arguments can be introduced without them becoming an excuse for an otherwise anticompetitive merger. An important departure from the price test of the consumer welfare standard, a situation where prices decline but margins increase would be blocked under the margin test by using the increase in market power to reflect the broader social costs not captured by the short term price effects of the merger. Understanding the analytic limitations of incorporating individual social costs into merger analysis, the broader lens of market power is an attempt to reflect the potential harms of a merger beyond price without wading into the trade-off analysis that Williamson cautioned against decades ago.

Posner recognizes that measuring a true reflection of marginal cost needed to calculate margins is no easy task but notes that approaches taken by academics such as De Loecker and his coauthors show promise and that margin calculation often already occurs in merger analysis.[59] Recognizing the data limitations inherent to the adversarial process of antitrust enforcement, Posner places margin data as the ideal guiding quantitative factor for the determination of market power but notes that a cruder version of the test based on HHI thresholds as an indicator of competition or other qualitative measures will have an important role to play when data limitations are present. Returning to Posner's "north star" language, the core point is of the market power focus is a movement away from the measure of prices as the core dimension of competition and the corresponding welfare effects towards direct measures of the intensity of competition, in this case market power and its various indicators.

5. Conclusion

The energy for reform of Canada's competition law provides an opportunity to review the nearly four decade performance of the existing framework and the assumptions that guided its creation and evolution over that time period. While consideration of the appropriate powers and provisions is important, even more important are the underlying assumptions and analytic tools that guide the exercise of those powers. An assumption ripe for this kind of consideration is the welfare trade-off analysis at the heart of Canada's approach to merger enforcement. Though concerns about the efficacy and administrability of the framework were present at its outset, the decades since the introduction of the *Competition Act* provides the grounds on which to assess its performance at home and internationally.

The aim of allegedly maximizing welfare rather than valuing and protecting the competitive process is increasingly suspect as a goal for competition policy. Rooted in a long-outdated conception of welfare, the total welfare standard aims to quantify and weigh disparate consequences to achieve the appearance of objectivity in its analysis. In the process, important dimensions of competition, both the benefits from its presence and the harm of its absence, are diminished in favour of short-term factors that fit neatly into the analytic framework. This is made worse by the continued commitment to a narrow definition of efficiencies, the evidence base for which has been steadily eroded by empirical study. Finally, the elevation of quantitative over qualitative evidence has increased the burden on parties to merger litigation at the expense of public enforcers with constrained budgets and future private plaintiffs seeking relief from anticompetitive conduct.

To overcome the flaws baked into the welfare analysis frame and invigorate its competition law, Canada should instead focus its efforts on creating a framework that values the protection of competition over attempts to maximize an outdated and limited definition of welfare. Looking to lessons from the consumer welfare debate in the United States, Wu and Posner provide two potential paths forward that recenter competition as the goal of competition policy rather than the flattening goals of prices and abstract notions of welfare. Though Canada's answer to this provocation will necessarily reflect its own peculiarities, both proposals provide inspiration for frameworks that appreciate a broader sense of the benefits of competition, rather than prioritizing the dimensions that best fit the flawed analytic tools used to date.

ENDNOTES

[1] Competition Bureau Canada, "Guide to the 2022 amendments to the Competition Act" (24 June 2022), online (pdf): Government of Canada <ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/publications/guide-2022-amendments-competition-act#sec06>.

[2] Marcel Boyer, Thomas W. Ross & Ralph A. Winter, "The Rise of Economics in Competition Policy: A Canadian Perspective" (2017) 50:5 The Can J of Economics 1489.

[3] Ibid.

[4] Consumer and Corporate Affairs Canada, "Combines Investigation Act Amendments 1984—Background Information and Explanatory Notes" (1984) online (pdf): Government of Canada <publications.gc.ca/collections/collection_2019/isde-ised/RG52-45-1984-eng.pdf>.

[5] Sean Silcoff & Jaren Kerr,"'It's disgusting': Legal professionals outraged as Dye & Durham sharply hikes prices for critical software" Globe and Mail (11 November 2021), online:< www.theglobeandmail.com/business/article-its-disgusting-legal-professionals-outraged-as-dye-durham-sharply/>. See also: The Canadian Press, "Xplore Mobile, Manitoba wireless carrier created after MTS sale, shutting down in August" (15 July 2022), online: CBC News < www.cbc.ca/news/canada/manitoba/xplore-mobile-shutting-down-1.6522052>.

[6] Competition Bureau Canada, "Examining the Canadian Competition Act in the Digital Era" (8 February 2022), online: Government of Canada <ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/promotion-and-advocacy/regulatory-adviceinterventions-competition-bureau/examining-canadian-competition-act-digital-era>. See also: Competition Bureau, "The Future of Canadian Competition Policy" (15 March 2023), online: Government of Canada <https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/promotion-and-advocacy/regulatory-adviceinterventions-competition-bureau/future-competition-policy-canada>.

[7] Competition Bureau, "Competition Bureau seeks input from market participants to inform an ongoing investigation of Amazon" (14 August 2020), online: Government of Canada <www.canada.ca/en/competition-bureau/news/2020/08/competition-bureau-seeks-input-from-market-participants-to-inform-an-ongoing-investigation-of-amazon.html>. See also: Competition Bureau, "Competition Bureau obtains court order to advance an investigation of Google" (22 October 2021), online: Government of Canada www.canada.ca/en/competition-bureau/news/2021/10/competition-bureau-obtains-court-order-to-advance-an-investigation-of-google.html>.

[8] Competition Bureau, "Canada Needs More Grocery Competition" (27 June 2023), online: Government of Canada <ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/canada-needs-more-grocery-competition>.

[9] Johnathan Kanter, "U.S. Department of Justice Office of Public Affairs: Assistant Attorney General Jonathan Kanter Delivers Remarks at New York City Bar Association's Milton Handler Lecture" (Lecture delivered at the New York City Bar Association's Milton Handler Lecture (18 May 2022) [unpublished]: "At the end of the day, if you ask five antitrust experts what the consumer welfare standard means, you will often get six different answers. To me consumer welfare is a catch phrase, not a standard."

[10] Oliver E. Williamson, "Economies as an Antitrust Defense: The Welfare Tradeoffs" 58:1 (1968) American Economic Association 18.

[11] Eric A. Posner, "Market Power, Not Consumer Welfare: A Return to the Foundations of Merger Law" (2023).

[12] Robert H. Bork, "The Antitrust Paradox" 13:1 (1978) 198.

[13] Government of Canada, "Economic Council of Canada, Interim Report on Competition Policy" (1969), online (pdf): Government of Canada <publications.gc.ca/collections/collection_2018/ecc/EC22-12-1969-eng.pdf>.

[14] Paul K. Gorecki & W.T. Stanbury, "Objectives of Canadian Competition Policy, 1888–1983" (1984) Institute for Research on Public Policy. See also: W.T. Stanbury, Business Interests and the Reform of Canadian Competition Policy, 1971–1975 (1977) Toronto: Carswell/Methuen.

[15] "Purpose of Act
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." Competition Act, R.S., 1985, c. 19 (2nd Supp.), s. 19.

[16] Gorecki & Stanbury, supra note 14.

[17] "Exception where gains in efficiency
[96] (1) The Tribunal shall not make an order under section 92 if it finds that the merger or proposed merger in respect of which the application is made has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger and that the gains in efficiency would not likely be attained if the order were made." Competition Act, R.S., 1985, c. 19 (2nd Supp.), s. 45.

[18] See "Likewise, EU competition law clearly reflects fairness concerns, as both the prohibition of exploitative abuses and the "fair share for consumers"-criterion in Art. 101(3) TFEU show." In Heike Schweitzer, "The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair: A Discussion of the Digital Markets Act Proposal" (2021):

[19] Tervita Corporation v Commissioner of Competition, 2015 SCC 3.

[20] Ibid.

[21] First Session, Forty-fourth Parliament, 70-71 Elizabeth II – 1-2 Charles III, 2021-2022-2023, House of Commons of Canada, Bill C-56 An Act to amend the Excise Tax Act and the Competition Act, First Reading, September 21, 2023. Online: Parliament of Canada <www.parl.ca/DocumentViewer/en/44-1/bill/C-56/first-reading>.

[22] Mark Glick et al, "The Horizontal Merger Efficiency Fallacy" (2023) Institute for New Economic Thinking Working Paper No 212.

[23] Ibid.

[24] Elizabeth Popp Berman, Thinking like an Economist: How Efficiency Replaced Equality in U.S. Public Policy (Princeton: Princeton University Press, 2022).

[25] Arthur Pigou, The Economics of Welfare (Routledge, 2017).

[26] Rogers-Shaw—Expert Report of David S. Evans (20 October 2022), online (pdf): Competition Tribunal <decisions.ct-tc.gc.ca/ct-tc/cdo/en/521140/1/document.do>.

[27] "… in order to eliminate preference reversals and intransitivities, all households must have almost identical quasi—homothetic preferences—a condition that is not satisfied in real economies" in Charles Blackorby & David Donaldson, "A Review Article: The Case Against the Use of the Sum of Compensating Variations in Cost-Benefit Analysis" (1990) 23:3 471.

[28] Williamson, supra note 10.

[29] Witness Statement of Roger Ware, Commissioner of Competition and Rogers Communications Inc. and The Attorney General of Alberta and Videotron Ltd., online (pdf): Competition Tribunal <decisions.ct-tc.gc.ca/ct-tc/cdo/en/521118/1/document.do>.

[30] Canadian Waste—Reasons and Order 2001 Comp Trib 3.

[31] Secure Energy Services Inc—Order and Reasons for Order (Public) 2023 Comp Trib 2.

[32] "One member of the panel is of the view that the Commissioner's economic models were sufficient to demonstrate, on a balance of probabilities, a higher amount of demonstrated Non-Price Effects" in Secure Energy Services Inc—Order and Reasons for Order (Public) 2023 Comp Trib 2.

[33] Boyer, supra note 2.

[34] Innovation Science and Economic Development Canada, The Future of Competition Policy in Canada (2022), online: Government of Canada <ised-isde.canada.ca/site/strategic-policy-sector/en/marketplace-framework-policy/competition-policy/future-competition-policy-canada#IV>.

[35] Glick, supra note 22.

[36] See "In economic theory, an alteration in the allocation of resources is said to be Pareto efficient when it leaves at least one person better off and nobody worse of" in Oxford Reference "Pareto Efficiency", online: Oxford University Press <www.oxfordreference.com/display/10.1093/oi/authority.20110803100306253>.

[37] See "We calculate the compensating efficiencies that would prevent a merger from harming consumers for 1,014 mergers affecting 12,325 antitrust markets

scrutinized by the European Commission between 1990 and 2018. Compensating efficiencies seem too large to be achievable for many mergers …We highlight concerns about the Commission's merger enforcement being too lax" in Pauline Affeldt et al, "Assessing EU Merger Control Through Compensating Efficiencies" (2021) DIW Berlin Discussion Paper. See also: "We find that M&As significantly increase [manufacturing] markups on average, but have no statistically significant average effect on productivity" in Bruce A. Blonigen & Justin R. Pierce, "Evidence for the Effects of Mergers on Market Power and Efficiency" (2016) Finance and Economics Discussion Series 2016-082; John Kwoka, Mergers, Merger Control and Remedies: A Retrospective Analysis of U.S. Policy (Boston: MIT Press, 2015); David J. Ravenscraft & F.M. Scherer, Mergers, Sell-Offs and Economic Efficiency (Brookings Institution Press, 1987).

[38] See "Motivations aside, Ms. Scott's announcement is music to the competition bar's ears. For years, the consensus among practitioners has been that merger restrictions in Canada generally should be relaxed to permit larger and more efficient domestic players." In Beppi Crosariol, "Merger milieu is suddenly a lot friendlier" Globe and Mail (4 October 2006), online: <www.theglobeandmail.com/life/merger-milieu-is-suddenly-a-lot-friendlier/article732204/>

[39] Frank Mathewson & Ralph Winter, "The Analysis of Efficiencies in Superior Propane: Correct Criterion Incorrectly Applied" (2000), online (pdf): <homes.chass.utoronto.ca/~rwinter/papers/efficienc.pdf>.

[40] Matthew Chiasson & Paul A. Johnson, "Canada's (In)Efficiency Defence: Why Section 96 May Do More Harm Than Good for Economic Efficiency and Innovation" (2018).

[41] Rogers-Shaw—Rogers, Shaw and Videotron's Cost Submissions (30 December 2023), online (pdf): Competition Tribunal <decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/521168/index.do>. See also Competition Bureau, "Building a More Competitive Canada" (12 October 2022), online: Government of Canada <ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/publications/building-more-competitive-canada#sec02-3>.

[42] Department of Consumer and Corporate Affairs Canada, "Proposals for Amending the Combines Investigation Act: A Framework" (5 July 1985), online (pdf): Government of Canada <publications.gc.ca/collections/collection_2019/isde-ised/RG52-45-1984-eng.pdf>.

[43] Oliver E. Willliamson, "Economies as an Antritrust Defense Revisited" (1977) 125:4 University of Pennsylvania LR 699.

[44] Competition Bureau, supra note 6.

[45] Thomas W. Ross, "Competitive Effects and Efficiencies: The Canadian Supreme Court Decision in Tervita" (2016) 2:1 Competition L and Policy Debate 48.

[46] Competition Bureau, "Competition Bureau Merger Remedies Study" (2011), online (pdf): Government of Canada <ised-isde.canada.ca/site/competition-bureau canada/sites/default/files/attachments/2022/cb-merger-remedy-study-summary-e.pdf>.

[47] Competition Bureau, "Building a More Competitive Canada" (30 December 2022), online (pdf): Government of Canada <ised-isde.canada.ca/site/competition-bureau-canada/sites/default/files/attachments/2022/CB-AnnualReport-2021-2022-Eng.pdf>.

[48] Rogers-Shaw—Rogers, Shaw and Videotron's Cost Submissions (30 December 2022), online (pdf): Competition Tribunal <decisions.ct-tc.gc.ca/ct-tc/cdo/en/521168/1/document.do>.

[49] Ramsi A. Woodcock, "The Hidden Rules of a Modest Antitrust" (2021) 105 Minnesota LR 2095.

[50] Innovation, Science and Economic Development Canada, "Submissions: Consultation on the future of competition policy in Canada: Academic experts" (20 June 2023), online: Government of Canada <ised-isde.canada.ca/site/strategic-policy-sector/en/marketplace-framework-policy/competition-policy/submissions-consultation-future-competition-policy-canada/academic-experts>.

[51] Parliament of Canada, supra note 21.

[52] Tim Wu, "After Consumer Welfare, Now What? The "Protection of Competition" Standard in Practice" (2018) Columbia Public Law Research Paper Working Paper No 14-608.

[53] Tim Wu, "The Consumer Welfare Standard is Too Tainted" Promarket (19 April 2023), online: <www.promarket.org/2023/04/19/the-consumer-welfare-standard-is-too-tainted/>.

[54] Secure Energy Services Inc. Order and Reasons for Order (Public) 2023 Comp Trib 2.

[55] Chicago Board of Trade v. United States, 246 U.S. 231 (1918).

[56] Woodcock, supra note 49.

[57] Posner, supra note 11.

[58] See "existing surveys already show that many people dislike big business (53% of Americans had a "negative image" of big business in 2021), but they do not estimate preference intensities" in Posner, supra note 11.

[59] Jane De Loecker, Jane Eeckhout, & Gabriel Unger, "The Rise of Market Power and the Macroeconomic Implications" 135:2 (2020) Quarterly J of Economics 561.

A THUMB ON THE SCALE FOR INNOVATION

Anthony Niblett*

In this paper, I argue that a thumb should be placed on the scale for innovation in competition law. Innovation helps improve Canadians' lives by fostering economic growth, a key driver of wellbeing and living standards. I suggest that the long run welfare gains from focusing on dynamic efficiencies outweigh the welfare gains from focusing on reducing short run inefficiencies.

The balance between different types of efficiencies in competition analyses—allocative, productive, and dynamic—should be adjusted. Greater emphasis should be given to dynamic efficiencies. I am not arguing for any change in the law. Nor am I arguing for an expansion in the goals of Canadian competition law. An emphasis upon innovation falls squarely within the objective of efficiency.

A thumb on the scale for innovation may lead to different outcomes in merger reviews. Mergers that do not suggest any short run deadweight losses may still be blocked on the grounds that the merger stifles incentives to innovate. On the other hand, mergers that result in short run market power may be permitted on the grounds that innovation synergies will be created, leading to innovation-driven welfare gains.

When assessing acquisition of start-ups by large incumbents, the impact upon innovation should be given special attention. A nuanced approach is necessary to avoid stifling innovation, especially if merger review impacts the exit option for founders of start-ups.

Retrospective assessments of mergers may be used to verify alleged innovation benefits. An ex post approach may better evaluate whether mergers genuinely fostered innovation or if they instead were 'killer acquisitions' that harmed long-term economic dynamism.

Dans cet article, l'auteur maintient qu'il faudrait sciemment faire pencher la balance en faveur d'innovation en droit de la concurrence. L'innovation profite aux Canadiens puisqu'elle stimule la croissance économique, entraînant avec elle une hausse du bien-être et du niveau de vie. Il avance que sur le long terme, le bénéfice collectif que l'on pourra retirer des gains d'efficiences dynamiques surpassera celui de la chasse aux inefficiences de nature immédiate.

La pondération entre les différents types d'efficience dans les analyses concurrentielles—efficience d'allocation, efficience de la production, efficience dynamique—devrait être rajustée de façon à accorder plus d'importance aux gains d'efficience dynamique. L'auteur ne plaide pas ici pour une modification à la loi ni pour l'élargissement des visées du droit canadien de la concurrence. La mise de l'avant de l'innovation cadre déjà parfaitement avec le principe d'efficience.

Si l'on accorde plus de poids à l'innovation, cela peut nous mener à des jugements différents dans l'analyse des fusions. En effet, on pourrait bloquer une fusion, même si elle ne laisse pas présager de pertes à court terme pour l'économie, parce qu'elle viendrait étouffer l'incitation à innover. Ou inverse¬ment, un projet de fusion qui entraînerait une emprise à court terme sur le marché pourrait être admis au motif qu'il créerait des synergies propices à l'innovation pour le mieux-être général.

Ce souci de l'innovation est particulièrement important dans le cas de la potentielle acquisition par une grande entreprise d'une jeune pousse prometteuse. Il faut en faire une évaluation nuancée pour ne pas tuer l'innovation dans l'œuf, surtout si la situation se répercute sur les avenues de sortie des fondateurs de la société qui serait ainsi acquise.

On pourrait également mener l'évaluation rétrospective d'anciennes fusions pour juger si leurs avantages allégués sur le plan de l'innovation se sont matérialisés. Il sera probablement plus facile de juger après-coup si celles-ci auront été bénéfiques sur ce plan, ou encore anticoncurrentielles et nocives pour le dynamisme à long terme de l'économie.

1. Introduction

The 2022 amendments to the Canadian *Competition Act* attracted some controversy. The lack of consultation and the way in which the amendments were rushed through—via the *Budget Implementation Act*—were arguably the most contentious aspects of the amendments. The process was decried by former Commissioner John Pecman as "reckless and anti-democratic."[1] But the changes to the substance of the *Act* were also not without controversy. The criminalization of wage fixing and no-poach agreements, the significantly increased penalties, and the introduction of private rights to access to the Tribunal for abuse of dominance cases were not greeted with universal approval.

A less controversial change to the *Competition Act* added new language to the provisions dealing with abuse of dominance, competitor agreements, and mergers. These amendments changed the set of factors which explicitly may be considered in determining whether there has been a substantial lessening or prevention of competition. These factors now specifically include "nonprice competition (including quality, choice, or consumer privacy)" and "innovation." These changes to the statutory language were largely met with indifference. Put simply, these amendments did not represent a substantive change to the law. The "new" factors are those that the Competition Bureau and the Competition Tribunal already consider when assessing unilateral conduct, competitor agreements, and in merger analysis.

But there is a more positive interpretation of these additions to the statutory language. While the changes may have appeared to simply codify current practice, the introduction of these factors into the legislative language perhaps suggest that the federal government is concerned that too much focus had hitherto been placed on price effects, and not enough on nonprice effects, including innovation. In this paper, I argue that *if* this seemingly anodyne statutory language nudges Canada toward a more innovation-centric competition policy, then this change would be good for Canadians.

I argue that policymakers and lawmakers *should*, in principle, place greater emphasis on innovation. There should be, as the title suggests, a thumb on the scale for innovation when weighing factors in competition analyses. More precisely, the *incentive* and the *ability* of firms to innovate should be given greater weight in abuse of dominance cases and merger review. Innovation, in this sense, can be thought of broadly. It does not just mean novel processes and products. It encompasses a range of improvements and efficiencies that may emerge over time.

I start with the premise that the purpose of law, *generally*, should be to make people's lives better. This includes competition law. When economists talk of the objectives of competition law being efficiency or welfare maximization, these are not narrow objectives that relate only to dollar values, prices, or squeezing the last juice out of every input. Rather, an efficient economy and maximizing welfare is about making people better off. It is about improving the livelihood of Canadians.

Countries that have higher economic growth have higher living standards. And innovation is the primary driver of economic growth. By promoting and fostering a culture of innovation, Canada can pave the way for continuous advancement in the quality of life for citizens. Consistent with this aim, I posit that Canadian competition law should put extra weight on innovation.

There are a couple of different ways to view the argument I am raising in this paper.

First, the paper presents an argument for adjusting the weight that policymakers place on the different types of efficiency: allocative efficiency, productive efficiency, and dynamic efficiency. *Allocative efficiency* looks at the optimal allocation of economic resources at a particular point in time, ensuring that resources are used where they are most valued and can provide the most benefit to consumers. *Productive efficiency* is when goods and services are produced at the lowest possible cost. Output is as high as it can be given the inputs, or the amount of inputs used is as low as possible for a given output. In other words, the economy utilizes resources—such as labour, capital, technology—most effectively. Resources are not wasted. Productive efficiency is associated with allocative efficiency, but the two are distinct. An economy can be productively efficient while still allocating resources in a manner that does not align with consumer preferences, resulting in allocative inefficiency.

Dynamic efficiency refers to the optimal allocation of resources over time, considering improvements in production processes and technological advancements.[2] It considers the long-term adaptation and progression of the economy, ensuring that resources are allocated effectively not just at a single point in time, but across future periods. By focusing on dynamic efficiency, policy makers aim to continuously enhance the productive capabilities of the economy, adopting new technologies and fostering innovation to produce more and better goods and services over time.

The argument made here is that decision makers should put a thumb on the scale for dynamic efficiency. The competitive analysis in Canadian competition law and policy currently focuses heavily on short run allocative efficiencies. I argue that less (relative) weight should be placed on these allocative efficiencies in this competitive analysis. For the most part in this paper, I will leave productive efficiencies to one side, but if there are trade-offs between short-run productive efficiencies and long-run dynamic efficiencies, then the argument follows that less weight should be placed on the short-run effects.

None of this should be taken to say that allocative efficiency is not important. Short run welfare losses from market power are indeed costly. Reduction in output is harmful to society. But if there is a welfare loss today, it needs to be balanced against the potential for welfare gains in the future from innovation. Should we be willing to incur 1% increase in welfare losses from deadweight losses today if it were to lead to an 10% increase in welfare gains from innovation in the future? I argue that we should.

The potential welfare gains that can be realized by technological progress and dynamic efficiency outstrip the potential welfare gains from a short run focus on allocative efficiency. A policy designed to encourage innovation would help the Canadian economy evolve and advance over time, leading to sustained improvements in societal welfare. Putting too much emphasis on short-run allocative efficiencies could have a negative impact on welfare in the long run.

Second, a different way to view the arguments in this paper is that law (generally) and competition policy (specifically) should use a lower discount rate than currently used. Every time a policy maker balances short-run effects and potential long-run effects a discount rate is being applied. This discount rate may be implicit. A lower discount rate signifies placing greater value on future benefits and outcomes. It demonstrates a commitment to ensuring the welfare of future generations. It helps shape policies that prioritize inclusive growth, rather than focusing heavily on immediate economic gains. A lower discount rate aids in the formulation of polices that promote a holistic long-lasting societal growth. In the context of competition policy, it would mean giving extra weight to welfare and efficiencies in the future, achieved through innovations, and putting less weight on the deadweight losses of today.[3]

In this paper, I explore how putting a thumb on the scale for innovation could affect merger review. I do not offer specific policy prescriptions. Nor do I put forward any precise rules or guidance on how to incorporate innovation into competition analysis in merger review. Rather, the central purpose of this paper is simply to reinforce the importance of innovation in competition policy. The example of merger review is offered as an illustration of how this might play out in practice. A more detailed exposition of the types of tools used by the Competition Bureau in incorporating innovation as a factor in merger review can be found in Andy Baziliauskas's paper in this volume.[4]

Placing a thumb on the scale for innovation means having a greater appreciation of the *incentives* for firms to innovate and the *ability* of firms to innovate. Merger review will be impacted in the following ways:

- A thumb on the scale for innovation may result in some mergers being blocked *even if* there are no concerns about increases in deadweight loss in the short run. There may be evidence that the merger will dull the incentive to innovate, which would have negative consequences in the long run.

- A thumb on the scale for innovation may result in some mergers being allowed *even if* there are concerns about increases in market power in the short run. There may be evidence that a merger will create synergies that will lead to welfare gains from innovation. These positive long run gains may outweigh the negative short run consequences of reduced output and higher prices.

- A thumb on the scale for innovation could affect how we view acquisitions of small potential competitors. Start-ups are crucial for innovation. They bring fresh ideas to the market, but they may not have the ability to commercialize these innovations. Greater weight should be given to evidence about whether the acquisitions of start-ups are good for innovation or not. A more aggressive merger policy could stamp down on genuine killer acquisitions (those acquisitions that stifle innovation.) But by the same token, a more aggressive merger policy may have the effect of reducing the exit option for start-ups, thus quelling the incentive to innovate.

- A thumb on the scale for innovation may counsel in favour of an ex post approach to mergers. It may suggest a greater role for merger retrospectives. If the merging parties claimed that significant research synergies would emerge as a result of the merger, did these synergies *actually* emerge? Or was the acquisition a genuine killer acquisition that stifled the innovation of the acquired party? If the latter can be shown, this would provide additional evidence of an abuse of dominance.

At this point, it is also important to spell out what I am not arguing in this paper.

First, I am not arguing for any change to the law. Indeed, no change in the law is required. Placing less emphasis on allocative efficiency and greater emphasis on dynamic efficiency—or lowering the discount rate—does not require any legislative change. If the 2022 amendments were aspirational and signposted "innovation" as something that requires additional weight in the analysis of competitive effects, then this is a positive change. But such re-weighting could have easily been done without any intervention from the legislature. Canada's *Competition Act* and the institutions that administer and enforce the law are sufficiently flexible in order to make such a shift.

Second, I am not advocating for an expansion in the goals of competition law. An emphasis upon innovation falls squarely within the objective of efficiency. The debate over the appropriate goals of antitrust has been particularly boisterous in the United States. Commentators have sought to expand the considerations of antitrust beyond efficiency, arguing that antitrust should seek to achieve other socio-political objectives. These commentators argue that there are other ills that emerge when economic power is concentrated in the hands of a few private corporations. These harms include the political influence of large corporations and the concomitant adverse impact upon democracy. But they also extend to the impact upon income inequality, effects on the rights of workers, environmental sustainability, the protection of smaller businesses, and the protection of local champions.[5]

While these objectives of policy are important and worthy, integrating them into antitrust laws poses significant challenges. Competition law would be a blunt instrument in seeking to achieve these objectives. Using competition law to try and reduce these harms can backfire. Using them may end up hurting those whom competition law is designed to protect. There are better, cleaner ways to achieve these diverse objectives. Competition law is just one of a whole suite or patchwork of laws and policies.[6]

If the criticism of contemporary competition policy is limited to the idea that competition law and policy should not focus too heavily on short term price effects or restrict itself to concerns over the immediate impact upon consumers, then I agree. An emphasis on such effects represents too narrow a view of efficiency. A focus on short-term price effects would ignore the very important compounding impact of long run growth. But it does not necessarily follow that we should introduce other (non-efficiency) objectives into competition law and policy.

Third, I am not arguing that innovation is not currently or already an important part of Canadian competition policy. Indeed, recent cases illustrate a willingness on the part of the Competition Bureau and the Competition Tribunal to engage with the harms to innovation that may emerge in abuse of dominance and merger cases.[7] I am simply noting that there are good reasons to put a thumb on the scale for innovation when analyzing competitive effects, and that involves analyzing both the harms and the benefits to the incentive and ability to innovate.

Fourth, I am not arguing that innovation should *trump* price effects. Rather, I am simply arguing that the weighting of dynamic efficiencies and allocative efficiencies should be adjusted in order to better promote welfare in the long run.

Fifth, the call to put a thumb on the scale for innovation in merger review is not a call for a more aggressive merger policy *per se*. It may be that some mergers that would be permitted under our current approach will be blocked when we emphasize the harms to the incentive to innovate or the ability to innovate. But there may be situations where a merger promotes innovation. There are potential synergies for innovation that may emerge from acquisitions. And, moreover, a more aggressive merger regime may dull the incentive for entrepreneurs to innovate and blunt the incentive of those who funds entrepreneurship.

Sixth, nothing in this paper should be taken as a call for the burden of proof in competition law to be shifted. Some authors have argued for a rebuttable presumption against allowing a merger if the merger is between two of very few firms competing over research and development.[8] The debate over whether merging entities should be tasked with rebutting a presumption that the merger substantially hinders competition and innovation is outside of the scope of this paper. That debate essentially refers to the quantum of proof required in a close case, whereas I am arguing that different weights should be placed on efficiencies that improve welfare in the long run. My argument is orthogonal to the question of who bears the burden.

* * *

The paper proceeds as follows. In Part 2, I lay out the claim that innovation improves welfare. I argue the law should be geared towards fostering innovation. In Part 3, I argue that Canadian competition policy should place greater emphasis on innovation. The welfare gains from increases in dynamic efficiency likely outweigh the welfare gains from increases in allocative efficiency. In Part 4, I discuss how putting extra weight on innovation may affect merger review in practice. While the paper does not offer specific policy prescriptions, it would be remiss to advocate in favour of increased focus on innovation without acknowledging some of the difficulties of this approach in practice.

2. The connection between innovation and welfare

Innovation has always been a driving force behind the advancement of civilizations. Innovative processes and ideas have led to monumental shifts in our way of life. To appreciate the importance and power of innovation, one only needs to journey back to the past and consider how far our society has come. We live in a world that turned the science fiction of yesteryear into the science fact of today. Compare Canada today to that of 100 years ago and, even, 50 years ago.

Compared to previous generations, Canadians today live longer lives. The changes in life expectancy are remarkable. In 1889, when Canada passed its first competition law statute,[9] life expectancy was just 44.9 years. By 1920, life expectancy had risen to 59.7 years. By 1970, the number had increased to 72.5 years. Today, life expectancy of a Canadian at birth is 82.8 years, nearly double that of 130 years ago.

Importantly, far fewer Canadian children die. Child mortality informs part of the story of our increased life expectancy. In 1889, nearly 200 out of every 1,000 children born would not survive until their first birthday. By 1920, this number was 150 out of every 1,000 children. The number had plummeted to 21 out of every 1,000 children by 1970. Today, that number is fewer than four out of every 1,000 children. Again, how low we can push this number in the future—and how much suffering we shall avoid—will be a function of innovation.

Canadians today are not just living longer lives than previous generations. They are living better lives. The world of 1900 was characterized by horse-drawn carriages, limited medical knowledge, lack of sanitation, little access to electricity, less access to drinking water, and only rudimentary communication tools. Today, we are in an era of fast and cheap transportation, lifesaving and life-extending medical technology, and instantaneous global communication. This transformation was a culmination of successive innovations, each building upon the last, leading us to a world that our ancestors could only dream of. It is a testament to the endless possibilities that innovation can bring, enhancing the quality of human life.

The magnitude of the change is often underappreciated. The innovations of the 20th Century have had an enormous impact upon the lives of today's Canadians. Few people would seriously opt for the life of an average Canadian in 1900 compared to today.

Innovation is a key determinant of sustained economic growth. As economist Nathan Rosenberg noted: "It is taken as axiomatic that innovative activity has been the single, most important component of long-term economic growth."[10] In historical studies from the United States, at least half of the growth rate in real output was attributable "solely" to technological and scientific progress.[11]

Economic growth, as measured by gross domestic product, is not the same thing as welfare or wellbeing. It is not an attempt to measure the wellbeing of a society. There are many things that contribute to economic growth that may not improve wellbeing. And there are many activities that promote wellbeing that do not factor into the economy. But as economist Tim Harford notes:

> "it is striking how countries with high GDP also have flourishing citizens. Pick your issue, from life expectancy to child mortality, from opportunities for women to protection of basic human rights, cleaner streets, lower crime, even better-quality art, from TV to opera. Somehow, people who live in richer countries are likely to be enjoying more of the good stuff."[12]

Countries that prioritize research, development, new ideas, new processes, and new products tend to outpace those that do not in terms of economic expansion and welfare.[13] Real GDP per capita in Canada has doubled over the past 60 years.[14] This growth of the Canadian economy has translated into real, meaningful impacts upon the day-to-day welfare of Canadians.

Across nearly all dimensions, from access to drinking water to sanitation, from food insecurity to access to capital, to access to life saving drugs and leisure time, the life of the average Canadian citizen is much better than it was 50 or 100 years ago. Medical innovations such as vaccines have eradicated some diseases and dramatically reduced the adverse impacts of other diseases.

Innovations in engineering and our understanding of safety have led to fewer injuries and deaths from accidents and even natural disasters. Other innovations have resulted in other beneficial social changes. The transcontinental railroad ushered in new innovations such as standard time zones.[15] And consider the impact of the contraceptive pill upon gender equality and women's access to the labour force.[16]

In short, innovation improves the lives of Canadians. And it can continue to do so. New technologies such as generative artificial intelligence and quantum computing may herald other innovations that result in enormous welfare gains. In the same way that today's science fact is the science fiction of yesteryear, today's science fiction may be the science fact of the near future.

But innovation does not emerge out of a vacuum. Innovation needs to be fostered and supported by government policy. Innovation is a function of the institutions that our government sets up. These institutions provide the necessary incentives and scaffolding to support innovative business conduct, new ideas, and ability to execute on these new ideas. Law is one such institution.

Government policy that promotes innovation is key. One obvious starting point is enforcing intellectual property rights. Intellectual property policy seeks to incentivize innovation by granting successful innovators monopoly power over their innovations. Such regimes help solve a public good problem when it comes to inventions and creative activity. But poorly calibrated and overly protective property rights regimes can stifle innovation. Patents and copyright, for example, can create or heighten barriers to entry. They can hinder the incentive of businesses to generate or utilize innovations that build upon the innovations of others.

The suite of policies used by a government to foster innovation should go beyond simply recognizing and enforcing intellectual property rights. Government prizes and research grants, funding innovative research in universities and by start-ups are also important. Unnecessarily red tape should be limited and regulatory barriers to innovation should be lowered.

In 2015, the Liberal federal government under Justin Trudeau prioritized innovation as part of its agenda. They introduced a raft of policies that funded innovative research, and emphasizing that "innovation is the path to inclusive growth."[17] The federal budget of 2017 described this aspirational vision in the following terms:

> "Innovation is, simply put, the understanding that better is always possible. It is the key that unlocks possibilities and opportunities. From urban centres to rural farms, from researchers looking to secure new patents to entrepreneurs working to bring their products to market, innovation is what allows Canadians to adapt to change and prepare for the future."[18]

* * *

In the next part of the paper, I argue that the emphasis on innovation should extend beyond simply those government policies that are set up to *directly* promote inventive and creative activities. Competition policy should also place a thumb on the scale for innovation. In examining competitive effects, the Bureau and the Tribunal should place less focus on static efficiencies related to today's prices and today's output. They should be prioritizing analysis that explores about how the unilateral conduct or the merger will impact upon the incentives to innovate and the ability to innovate. In short, if Canadian competition policy focuses on allocative efficiency and fails to emphasize innovation and dynamic efficiency, it would overlook the greatest source of social welfare enhancement.

3. Canadian competition policy should place greater emphasis on dynamic efficiency

The argument that competition policy should place greater emphasis on dynamic efficiencies or should be more innovation-centric is not a particularly novel argument. Several prominent legal and economic commentators have suggested that the weights currently placed on allocative, productive, and dynamic efficiency by antitrust authorities may not be optimal. These calls have been particularly prominent in the United States. When compared to Canadian competition law, antitrust law in the United States has been more explicitly focused on consumer welfare.

Take, for example, the work of Joseph Brodley. In a 1987 article, Brodley called for a reevaluation of the objectives of antitrust. Brodley argued that the antitrust policy of the United States had its "priorities backwards."[19] He contended that the focus on allocative efficiency in United States antitrust, emphasizing price competition, will not always best serve consumers or society in the long run. Instead, antitrust policy should "give priority to innovation and production efficiency."[20] Antitrust law, Brodley posited, should ensure that market structures and business conduct are conducive to innovation. Brodley contended:

> "Of the three types of efficiencies, innovation efficiency provides the greatest enhancement of social wealth, followed by production efficiency, with allocative efficiency—the main focus of current enforcement efforts—ranking last. Innovation efficiency or technological progress is the single most important factor in the growth of real output in the United States and the rest of the industrialized world."[21]

Brodley's argument can be read as a call to reduce the emphasis on allocative efficiency and short run effects on price and output. Allocative efficiency seeks only to maximize the consumption value of the existing stock of resources. But productive and dynamic efficiencies seek to increase the size of the pie.

> "As compared with allocative efficiency, production and innovation efficiencies make a more powerful contribution to social wealth because they comprise the growth factors by which social wealth increases over time."[22]

Brodley noted that the empirical evidence available at the time suggested the welfare losses from allocative inefficiencies were small compared to the potential welfare gains that emerge if the economy focused on dynamic efficiency and productive efficiency:

> "The conclusion that allocative efficiency is of lesser importance than the two other types of efficiencies is supported by empirical assessments of the estimated losses from monopoly pricing. While estimates vary, there is perhaps a consensus that the loss from monopolistic pricing is considerably less than one percent of the gross national product—a fraction of the welfare at stake in technological progress and productive efficiency."[23]

Richard Gilbert has also argued in favour an innovation-centric approach to antitrust in the United States. In his 2020 book, *Innovation Matters: Competition Policy for the High-Technology Economy*, Gilbert argues that antitrust enforcement should be more innovation focused than price focused.[24] Gilbert argues that "consumer welfare" should still be the main focus of antitrust, but the focus should be on consumers in the long run. To achieve this, regulators and courts should focus more heavily on innovation, rather than low prices in the short term. Gilbert spends little time defending the proposition. Much of the book focuses on the ways in which regulators and courts have considered innovation—or could consider innovation—in their analysis of anticompetitive conduct. Gilbert suggests innovation-centric competition policies are essential in order to better regulate the high-tech digital economy, while retaining the focus on consumer welfare.

In Canada, too, commentators have argued in favour of a greater emphasis on dynamic efficiency. For example, in a recent article in this journal, Ken Jull and Adil Abdulla, argue that dynamic efficiencies are given too little weight in the consideration of the efficiencies defence under section 96. They argue:

> "the most important efficiencies in the modern economy are dynamic efficiencies, which are arguably undervalued in the analysis. If we are serious about achieving the original purpose of the efficiencies defence, then the analysis should be refocused on those efficiencies, in recognition of the evolving Canadian economy including the new digital world."[25]

As noted above, there are good arguments for the government to place greater emphasis on innovation when developing policy. The government should provide legal infrastructure and support for innovative activities that will lead to longer term growth and welfare. I argue that this should include competition policy. When analyzing the likely effects upon competition from unilateral conduct, competitors' agreements, and mergers, the Bureau and Tribunal should take care to make decisions that promote dynamic efficiency.

But some commentators have questioned whether antitrust policy is the appropriate venue to achieve greater innovation. Dennis Carlton and Robert Gertner, for example, suggest that there will be situations in which such concerns are more appropriately addressed through the lens of intellectual property policy rather than through merger review.[26] Competition policy may be a blunt tool to try and achieve the broader goals of improving innovation. According to Carlton and Gertner, attempts to adapt static antitrust analysis to a setting of dynamic R&D competition through the use of "innovation markets" are likely to lead to error. Antitrust is just part of a patchwork of tools used by the government that are geared towards greater dynamic efficiency.

While IP rights are crucial for incentivizing innovation, they can also be used anti-competitively, such as in strategic patenting to block rivals or in patent thickets that raise rivals' costs. As Richard Gilbert notes, an innovation-centric approach to antitrust would need to recognize this balance and should aim to ensure that IP rights promote innovation without stifling competition.

* * *

At this point, I wish to reiterate: Nothing in this paper should be taken as an argument that Canadian competition policy currently does *not* take innovation into account. As noted in the Introduction, the Competition Bureau and the Competition Tribunal already take innovation into account when examining the non-price effects on competition in abuse of dominance cases and in merger review. Two recent abuse of dominance cases and a recent merger case illustrate the point.

Innovation was a crucially important factor in the competition analysis in *Canada (Commissioner of Competition) v. Toronto Real Estate Board*.[27] There, the Competition Tribunal found that the Toronto Real Estate Board ("TREB") restricted access to certain Multiple Listing Services information on the password-protected virtual office websites of its real estate brokers and salesperson members and also restricted the manner in which these members could display and use the information. The Tribunal held that this conduct constituted an abuse of dominance under section 79. The harms to innovation were a core component of the Tribunal's reasoning.

The Tribunal noted that the disputed data was "very important, if not critical" in assisting innovative brokerages from distinguishing themselves from more traditional brokerages. The restriction on data represented a barrier to entry for innovative brokers in the real estate market in the Greater Toronto Area. The inability of innovative brokers to display and use these disputed data resulted in an inability to create and develop new and innovative products. The restriction prevented new and innovative players from entering the market. It hindered the growth and expansion of players who were already in the market from re-inventing their business model.

The Tribunal noted that market power was the ability to control price or non-price dimensions of competition for a significant time. And these non-price dimensions of competition included innovation.[28] The Tribunal ruled that, but for the restrictions, the overall level of innovation would be "considerably increased." The restrictions "stifled innovation" in the supply of Internet-based real estate brokerage services in the GTA.[29] These innovations would have resulted in benefits such as a more diverse range of products, improved versions of existing products, and lowered operating costs.

The Commissioner's argument was primarily concerned with dynamic competition and innovation. The Tribunal acknowledged that this innovation allowed newcomers to compete in the market, but it was also "forcing traditional brokerages to respond" to this new type of dynamic competition.[30]

The Tribunal reached its conclusion that there was a substantial lessening or prevention of competition despite the fact that the quantitative evidence on commission rates did not indicate that prices had been adversely affected. Net commissions for real estate brokerage services were not shown to be materially higher than in the absence of the restrictions on data.[31] The Tribunal decided the matter on the (mostly) qualitative evidence about exclusion and innovation.

Innovation was also raised as a factor of non-price competition in *Canada (Commissioner of Competition) v. Vancouver Airport Authority*.[32] There, the Commissioner claimed that, by limiting the number of providers of in-flight catering services, the Vancouver Airport Authority had engaged in a practice of anti-competitive acts that had prevented or lessened competition substantially.

The Commissioner noted that innovation should be interpreted broadly, encompassing a wide range of improvements and efficiencies, not just the development of novel processes and products:

> "The Tribunal also does not dispute that innovation can take multiple incarnations and that it encompasses more than the development of new products or novel processes or the introduction of cutting-edge new technology. It can indeed extend to competing firms coming up with different or improved business models."[33]

Ultimately, the Tribunal held that the Commissioner's claims about harms to innovation failed:

> "[T]he evidence pertaining on innovation falls short of the mark. The Tribunal is not persuaded that the evidence on the record demonstrates that, 'but for' the Exclusionary Conduct, there would likely have been, or would likely be, a realistic prospect of material changes in innovation linked to the arrival of new entrants in the Galley Handling Market."[34]

Innovation has also been examined in merger cases. In *Canada (Commissioner of Competition) v Rogers Communications Inc. and Shaw Communications Inc.,*[35] the Tribunal explored the effects of the merger on non-price competition, including innovation. The Tribunal concluded that there would not likely be a substantial lessening of competition over innovation in the provision of wireless services in British Columbia and Alberta. The Tribunal held that the evidence shows that the market is already in a "highly dynamic state," with innovative carriers "rapidly positioning themselves" for 5G.[36] The reasons behind these conclusions about innovation were not, however, fleshed out in detail.

Innovation was further discussed as an important factor in the context of the potential removal of a vigorous competitor. Shaw's success in the market for the provision of wireless services was in no small part due to innovation. The innovations were not limited to scientific or technological innovations. The Tribunal notes that Shaw offered new products and contracts, enabled customers to access free Wi-Fi in numerous locations, $0 contracts, and WiFi hot spots. These innovations forced the competition to change practices.[37] While the Tribunal accepted that Shaw has been a vigorous and effective competitor, they were persuaded by evidence that suggested Shaw was unlikely to be making similar investments in innovation in the wireless services market in the future.[38] The potential impact of the merger upon research and development of the two parties and how the merger would affect their incentive to innovate was again not discussed in detail.

4. Innovation as a factor in merger review

A) Market power and the incentive and ability to innovate.

It is one thing to contend that the law should be geared to achieve some objective, such as encouraging innovation to maximize welfare in the long run. It is quite another, however, to explain how this objective should be achieved in practice. I turn now to some of the issues that may arise when putting a thumb on the scale for innovation in merger review.

In this Part of the paper, I explore the academic literature illustrating the inherent complexity in finding a relationship between market structure and innovative activity. A thumb on the scale for innovation *may* result in a more aggressive merger policy. But, on the other hand, it *may* result in a more permissive merger regime.

Two large competitors in a concentrated market decide to merge. In the absence of any synergies resulting in productive efficiency, the impact upon prices and output will be fairly easy to forecast. We have a good sense that output will be restricted and that prices will rise. This will result in a short-run deadweight loss. Consumers lose out. Society is harmed. The link between market structure and allocative efficiency is well known. There is a typical, unidirectional relationship.

But what is the impact of this merger on innovation? Here, economics has provided a less clear answer. What impact will the merger have on the *incentives* of the merged entity to innovate? What impact will it have on the *ability* of the merged entity to innovate? And, more generally, what is the relationship between market structure and dynamic efficiency? Numerous empirical studies do not suggest a simple, unidirectional relationship. And much of the debate has been framed around the views of two prominent economists: Joseph Schumpeter and Kenneth Arrow.

Joseph Schumpeter argued in his 1942 book, *Capitalism, Socialism and Democracy,* that larger firms are more conducive to innovation than firms that operate in highly competitive markets. In describing the likely causes of innovation, progress, and growth, Schumpeter notes that:

> "a shocking suspicion dawns upon us that big business may have had more to do with creating that standard of life than with keeping it down."[39]

Firms with market power, according to Schumpeter, had the ability to attract superior talent and secure a high financial standing. He perceived technical innovation to be risky, and risk-bearing was more likely when firms could deploy an array of restrictive practices to protect their investments.[40] Schumpeter's view was controversial. It challenged prevailing notions regarding the virtues of free-market capitalism. Schumpeter went beyond the accepted view that the *expectation* of a monopoly position (i.e., with patents) was necessary to make the venture worthwhile. Rather, he argued that monopoly power *already held* supported investment in technological progress.

Twenty years after Schumpeter's book, Kenneth Arrow took a different position. Arrow argued that a monopolist has less incentive to innovate than a firm in a competitive market.[41] A monopolist with lower costs will simply replace itself, whereas a competitive firm that is able to innovate and produce at lower costs will take the entire market, reaping profits where none had previously been forthcoming. Monopolists, therefore, have greater incentive to maintain the status quo than firms that compete with each other. By this theory, disruptive technological advances are, thus, more likely to come from competitive firms.

Arrow's theory implies that competition and rivalry are good for innovation. Incumbents may fear that introducing new innovations will take away sales from their existing product lines.[42] Disruptive entrants can shake up a market, bringing new fresh new ideas and enormous benefits to customers. The mere threat of competition can generate the incentive for incumbents to innovate.

The Arrow and Schumpeter debate sparked a large theoretical and empirical literature exploring the relationship between market structure and the incentive to innovation.[43] I shall not attempt a survey of this literature here, but suffice to say, the research is often described as not being conclusive either way. Massimo Motta summarizes a commonly-accepted view of the literature:

> "Both theoretical and empirical research on the link between market structure and innovation is not conclusive, even though a 'middle ground' environment, where there exists some competition but also high enough market power coming from the innovative activities, might be the most conducive to R&D output."[44]

Richard Gilbert contends that much of the empirical literature that seeks to measure the link between market structure and innovation fails to take into account the different market and technological conditions:

> "[The incentives to innovate] depend on many factors, including: the characteristics of the invention, the strength of intellectual property protection, the extent of competition before and after innovation, barriers to entry in production and R&D, and the dynamics of R&D. Economic theory does not offer a prediction about the effects of competition on innovation that is robust to all of these different market and technological conditions."[45]

But Gilbert continues, noting:

> "The many different predictions of theoretical models of R&D lead some to conclude that there is no coherent theory of the relationship between market structure and investment in innovation. That is not quite correct. The models have clear predictions, although they differ in important ways that can be related to market and technological characteristics. It is not that we don't have a model of market structure and R&D, but rather that we have many models and it is important to know which model is appropriate for each market context."[46]

Carl Shapiro offers reasons why the economics literature may lead some to incorrect conclusions.[47] The conflation of "more competition" with other phenomena such as "less product differentiation" or "more imitation" or "lower market concentration" has muddied the waters in the debate.[48] Instead, Shapiro contends, three important principles help explain the incentive and the ability to innovate:

1) **The Contestability Principle.** Firms are more likely to innovate if they have the prospect of increasing or protecting sales by providing additional value to consumers. If sales are highly contestable, the incentive to innovate will be greater.

2) **The Appropriability Principle.** Firms are more likely to innovate if they can capture the social benefits of their innovation, perhaps through intellectual property rights. (But note that greater appropriability by one firm can reduce appropriability of other firms, thus potentially stifling or harming innovation.)

3) **The Synergy Principle.** Firms are more likely to innovate if combining complementary assets enhances innovation capabilities. The Synergies principle emphasizes that firms generally cannot innovate in isolation.

The first two principles relate to the incentive to innovate. The Synergy principle relates to the ability to innovate. But, as Shapiro notes: "*None* of these principles relates directly to market structure."[49] This does not mean that competition analysis has nothing to say about the effects on innovation from a merger. Shapiro contends that these three principles allow us to understand when "a merger between two of a very few firms who are important, direct R&D rivals in a given area is likely to retard innovation in the area."[50] And, moreover, Shapiro suggests we have a good enough understanding of the circumstances when innovation will be promoted and furthered by allowing two important, direct R&D rivals to merge.

Shapiro argues, in line with Arrow's theory, that "rivalry" is an important component of innovation. Shapiro's framework illustrates that there are potential harms to innovation from two competing firms merging. But the framework also suggests that there are circumstances when a merger between two firms with complementary R&D departments may result in greater innovation. This may arise where the two firms are not direct R&D rivals for a specific innovation, such as a drug designed to treat a specific disease.

A merger policy that puts greater weight on long run innovation will differ from a merger policy that puts greater weight on short run prices and output effects. In the remainder of this part, I illustrate situations where the two differ.

B) A thumb on the scale for innovation *may* block mergers that would otherwise be permitted to proceed.

Traditional antitrust analysis of mergers primarily focuses on overlaps in existing products and potential price and output effects. Richard Gilbert critiques this approach. He argues that the way in which courts have interpretated merger law in the United States likely downplays the potential harms to innovation. For example, merger analysis requires the explicit definition of a "relevant market." Gilbert contends that:

> "a rigid interpretation [of this market definition exercise] is fatal for the evaluation of mergers that may affect innovation or future competition in markets that do not presently exist. R&D is not bought and sold in a market, apart from contracted R&D, but that does not mean that mergers cannot harm innovation by reducing incentives to invest in R&D for new or improved products."[51]

An innovation-centric competition policy, on the other hand, would place greater emphasis on how the merger will impact the incentive and ability to innovate. A merger that reduces the incentives of the merged entity to innovate might be harmful even if it does not raise immediate concerns about market concentration in terms of existing products.

Suppose two firms merge but there is no immediate adverse impact upon price or output. Under a merger review that focuses on the short-run effects such a merger would likely not be challenged. But under an innovation-centric approach, this merger could face additional scrutiny if likely harms to innovation can be shown. Richard Gilbert offers an example from his time with the Antitrust Division of the U.S. Department of Justice where a more innovation-centric approach was taken. In 1993, General Motors proposed to sell its Allison Transmission Division to ZF Friedrichshafen AG. ZF and Allison were the two largest manufacturers of automatic transmissions in the world, but ZF was not a major presence in the United States. The merger was therefore unlikely to significantly impact prices in the United States market. But the DOJ was concerned that eliminating competition between ZF and Allison in Europe would reduce their motivation to innovate. This would likely have a negative impact on United States consumers in the longer run. The DOJ challenged the proposed merger, and the parties dropped their merger plans in response.

Carl Shapiro offers an example of a merger where innovation harms were not fully considered, to the detriment of welfare. The Federal Trade Commission reviewed the merger between Genzyme and Novazyme in 2003 and 2004. The two firms were the only pharmaceutical firms developing a treatment for Pompe disease, a rare but potentially fatal disease that affects mostly infants and children. The FTC elected not to bring any enforcement action, noting that "economic theory and empirical investigations have not established a general causal relationship between innovation and competition."[52] But Shapiro argues that where we have a merger to monopoly over R&D efforts in a given market, there should be a presumption that the merger will harm innovation. Applying the Contestability principle here, there will be less incentive for the merged entity to innovate. Prior to the merger, all sales and profits were contestable. But afterwards, far fewer sales are contestable. Innovation and progress will be slowed down under Shapiro's theory.

C) A thumb on the scale for innovation *may* permit mergers that would otherwise be blocked.

But mergers may also promote innovation. The two merging parties may have synergies from complementary assets that enable them to conduct research and development more efficiently and more effectively. The two firms' research teams may complement each other well, and combining the two may spark innovative activity, what Carl Shapiro refers to as "cross-fertilization" of the research teams.[53] Further, the internalization of involuntary spillovers may result in increased investment in innovation. Claude d'Aspremont and Alexis Jacquemin illustrate how a merger can increase R&D investment and benefit consumers if the internalization of technological spillovers is large.[54] Synergies also arise when a merger facilitates voluntary technology and information transfers.[55]

Suppose a merger between two firms resulted in a substantial lessening of competition under our current approach to mergers. Let's say that a material increase in prices and reduction in output is likely. But also suppose that the synergies in terms of innovation that emerge from this collaboration are substantial. The Canadian efficiencies defence may offer some respite for the merging parties, but it may be difficult for the merging parties to quantify these effects.

By placing a thumb on the scale for innovation, and taking a more holistic view of innovation, one might imagine that merging parties could present arguments that the post-merger market power creates an incentive to innovate, if sufficient rivalry in the market remains. The long run welfare impacts of the dynamic efficiencies outweigh the short-run adverse competition effects.

Taking this more permissive approach to dynamic efficiencies in merger review would seem to run counter to the current direction being taken by the Canadian federal government.[56] Of course, as Shapiro notes, "merger synergies are far easier to claim than to achieve."[57] Further, one would need to ask whether a merger is needed in order to realize these synergies. Could, for example, the two firms realize these benefits through a joint research venture?

D) How a thumb on the scale for innovation would affect acquisitions of small potential competitors.

Start-ups are crucial for innovation. They introduce fresh ideas and create market dynamism by challenging established entities. They disrupt concentrated markets and force inefficient incumbents to improve operations or exit. But competition policy has, at least in the recent past, been quite permissive in relation to the acquisition of (relatively) small start-up firms. Courts in other jurisdictions have viewed the presence of start-ups primarily as indicators of low entry barriers or emerging competitiveness in a market. Raising alarms regarding the purchase of innovative start-ups was deemed speculative and possibly seen as obstructing innovation, as the exit strategy of many, if not most, entrepreneurs is to sell to an incumbent.

But these views have come under fire of late. The concern about the serial acquisition of start-ups has been particularly acute in the context of big tech. Firms buy up other new firms before the newcomers have had a chance to become serious competitors. This has raised concerns about the stunting of innovation. For example, when Facebook bought Instagram in 2012 for $1 billion, Instagram only had 13 employees and no advertising revenue. The UK allowed the acquisition as it believed Instagram was not uniquely placed to compete against Facebook. But by 2018 Instagram was generating $7 billion in advertising revenue. Lear conducted an ex post assessment of merger by the Competition Markets Authority (CMA) in the United Kingdom.[58] Lear noted that Google, Amazon, and Facebook made a combined total of 299 acquisitions between 2008 and 2018 and very few of these mergers were reviewed by the CMA.[59] Similarly, very few were examined by the EU Commission.[60]

Concerns have also been raised in the pharmaceutical industry. Suppose a pharmaceutical company acquires a small competitor. The smaller company is in the process of developing a drug that could potentially compete with the products of the acquiring company. Given the uncertain future of the drug in development, proving that the merger stifles potential competition becomes a difficult task, as courts require clear and convincing evidence. Colleen Cunningham, Florian Ederer, and Song Ma provide evidence of incumbent pharmaceutical companies engaging in "killer acquisitions," where the smaller target firm is purchased by the incumbent and the target's innovative projects are discontinued in order to preempt competition.[61]

Putting the thumb on the scale of innovation in merger review may affect the way we think about the acquisition of start-ups. Currently, the Commissioner has a heavy burden to show that such a merger will substantially prevent or lessen competition in these types of cases. But if one takes the position that effects on innovation should be more heavily weighted, then the burden may be lighter. There may be cases where there is no effect on output or prices in current product markets, but there may be an effect on future markets. If the Commissioner can show that there is a likely harm to research efforts or likely harm to future inventive output—as was posited by Shapiro in the Genzyme / Novazyme merger—then this would counsel in favour of a finding that competition has been substantially prevented or lessened. That is, it may be easier to show that a particular, specific innovation will likely be delayed as a result of a merger.

But while it may be easier to show harms to innovation in this specific sense, a more aggressive policy against acquisitions of innovative potential competitors may itself cause harm to innovation in a more general sense. Acquisitions of start-ups can have pro-competitive effects. Start-ups may struggle to develop and maintain a product development and distribution strategy.[62] Large firms have a greater capacity to invest in development and to commercialize innovative ideas. These large firms may be able to carry out projects that start-ups would not be able to do on their own. One might view the acquisitions of start-ups by larger incumbents to be a fertile source of commercializing the ideas, ensuring that these innovations are acted upon sooner.[63]

Additionally, research has shown that founders of innovative start-ups are themselves incentivized by the prospect of being acquired by a large incumbent.[64] Innovative entrepreneurs may not be interested in running a company that competes in a fragmented and rapidly evolving market. The goal of being acquired may be the necessary incentive to innovate.

Research has also shown that the prospect of acquisition by a big tech firm also influences the ability of entrepreneurs to attract venture capital funding, without which an innovation may never see the light of day.[65] A merger policy that is more aggressive when it comes to the acquisitions of start-ups may cause harm to innovation by dulling the incentive of entrepreneurs and those that fund entrepreneurs.

There is, of course, great uncertainty in forecasting what the harms to innovation may be when a large incumbent acquires a small potential innovator. The specific harms to innovation may be speculative at the time of the merger. And, even if they are shown, the potential costs of a more aggressive merger policy here would need to be considered in light of the broader impact on the incentive to found an innovative start-up.

E) Demonstrating harms to innovation—an argument for an *ex post* approach?

The problem of ex ante demonstrating harm to innovation is pervasive. Dynamic efficiencies are difficult to prove. This is especially true when compared to productive efficiencies. While dynamic efficiencies are the "most important" to Joseph Brodley, he readily acknowledged the practical difficulties in trying to measure them. It is not only difficult to forecast how innovation will be affected, but it is also difficult to ex post assess the impact of a merger on innovation:

> "The measure of a transaction's innovation efficiency [is] the superiority of the observed research outcome over the research outcome that would have resulted if the transaction had been barred. It follows that assessment of innovation efficiency, even after the fact, requires a difficult comparison between actual and hypothetical events. Moreover, innovation is highly stochastic, so that the absence of innovation success from a single undertaking does not necessarily indicate that the original prospects of success were not high."[66]

Richard Gilbert also acknowledges that acquiring credible empirical data on the future impact of a merger on innovation is often not feasible. This, Gilbert argues, is problematic because the current approach in U.S. antitrust law leans heavily on the quantitative analysis of competitive effects. This quantitative bias can lead to overlooking the subtle yet substantial impacts on innovation, allowing anticompetitive practices and harmful mergers to fly under the radar.

A similar argument has been raised by Matthew Chaisson and Paul A. Johnson in the context of Canada's efficiencies defence.[67] Chaisson and Johnson argue that the defence has a perverse impact, allowing mergers that harm innovation to proceed because of the way that the efficiencies defence has been interpreted. Chaisson and Johnson argue that when two firms merge, this will dull the incentive of the merged entity to engage in innovative activities (under Shapiro's Contestability principle above). The merged entity will become "sluggish or complacent with less competitive pressure."[68] But given the jurisprudence of section 96, they argue that the benefits to innovation that competition brings are often overlooked "because the dynamic process through which they occur makes them less susceptible to ex ante prediction or quantification."[69] Productive efficiencies are easier for the merging parties to identify. As such, Chaisson and Johnson argue that too many mergers that harm innovation will be allowed. But this is likely the case even if section 96 is repealed as mergers without short-run price and output effects may be allowed, even if they are likely to harm innovation, unless close attention is paid to the harms to innovation. The 2022 amendments to the *Competition Act* directed the Tribunal to pay close attention to these innovation effects.

If the effects on innovation are inherently difficult to ex ante forecast, does that mean that we should give up on this objective? Absolutely not. Perhaps a better path forward, then, is one suggested (separately) by Edward Iacobucci[70] and Gordon Milne.[71] It may be fruitful to use the abuse of dominance provisions to challenge the acquisition of potential innovative competitors, rather than relying on speculation with merger review.

There may be an argument here for greater use of merger retrospectives and ex post audits to assess how innovation has been affected by allowing mergers where innovative synergies were claimed. Joseph Brodley advocated for ex post audits of mergers in 1996:

> "A two-stage procedure is especially necessary for innovation efficiencies. If efficiencies review is limited to ex ante determination, the antitrust decisionmaker faces the heroic task of predicting whether a new combination of inputs will produce knowledge that does not yet exist. It is precisely in this situation that an ex post audit can make recognition of innovation efficiencies prudent. If, despite ex ante promise, efficiencies are not forthcoming, the transaction can be restructured to remove antitrust risk."[72]

Of course, the problem of the counter-factual remains, but an ex post review likely provides more clarity than the inherent difficult of ex ante predicting whether incentives and ability to innovate will be affected. The ex post audit might involve an assessment of how the two research departments were integrated. It might involve an assessment of the different innovations that the merged entity undertook. If it is the case that the acquisition was a genuine "killer acquisition," then this would counsel in favour of finding that there was an abuse of dominance.

5. Conclusion.

Suppose the potential welfare gains in the long run from innovation and technological progress vastly outweigh any welfare losses from allocative inefficiency. In this world, there would be good reasons to put a thumb on the scale for innovation when making policy decisions. This, I believe, is the world we are in.

Innovation should play a greater role in the competition analysis of merger review and unilateral conduct cases. In the context of merger review, this may result in a more aggressive regime, with the Commissioner challenging mergers that would otherwise be permitted. But situations where the dynamic efficiencies from synergies are sufficiently compelling to permit what would otherwise be anticompetitive may also arise. The focus on harms to innovation does not necessarily suggest a more aggressive approach to acquisitions of nascent competitors.

Much of the debate on Canadian competition policy in recent years has been about the *purpose* of competition law. But there is a starting point where most of us would agree: Competition law in Canada should be geared toward improving the livelihood of Canadians. I argue that the best way to achieve this is to put greater focus on innovation. The payoffs from fostering innovation in the past have been great. And the law should be geared to ensuring that the payoffs are realized to an even greater extent in the future.

ENDNOTES

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[1] John Pecman, "Rapid passage of Competition Act amendments through Budget Implementation Act process can cause more harm than good" (10 June 2022), online: *Competition Chronicle* <https://www.competitionchronicle.com/2022/06/rapid-passage-of-competition-act-amendments-through-budget-implementation-act-process-can-cause-more-harm-than-good/>.

[2] In this paper, I use the term 'dynamic efficiency' as used in the economic literature. It is not limited to the way in which it may have been defined under section 96 of the *Competition Act.*

[3] Deadweight loss refers to the reduction in economic efficiency that occurs when a market is not in competitive equilibrium due to market power (amongst other inefficiencies.) When firms have greater market power, they cut back on output to maximize profits. Cutting back on output is privately optimal, but socially sub-optimal. The deadweight loss is surplus that is not realized by consumers or producers, as it is neither consumed nor provided, that results from cutting back on output.

[4] Andy Baziliauskas, "Innovation Effects in Canadian Merger Analysis", Can Competition L Rev [forthcoming in 2023].

[5] See e.g. Lina Khan, "The New Brandeis Movement: America's Antimonopoly Debate" (2018) 9 Journal of European Competition Law & Practice 131; Lina Khan, "Amazon's Antitrust Paradox" (2017) 126 Yale LJ 710; Sandeep Vaheesan, "The Evolving Populisms of Antitrust" (2014) 93 Neb L Rev 370; Antirust Chronicle – Hipster Antitrust" (April 2018), online: Competition Policy International <www.competitionpolicyinternational.com/wp-content/uploads/2018/08/AC_APRIL.pdf>; Ioannis Lianos, "Polycentric Competition Law" (2018) 71 Current Legal Problems 161; "What More Should Antitrust Be Doing?" (7 August 2020), online: *The Economist* <www.economist.com/schools-brief/2020/08/07/what-more-should-antitrust-be-doing>.

[6] See Susan M. Hutton & Lawson A. W. Hunter, "In favour of a Doctrinal Approach to Canada's Competition Act Reforms" (2023) 67:1 Can Bus LJ.

[7] See e.g. *The Commissioner of Competition v The Toronto Real Estate Board*, 2016 Comp. Trib. 7 [*TREB*]; *The Commissioner of Competition v Vancouver Airport Authority*, 2019 Comp. Trib. 6 [*VAA*]; *Canada (Commissioner of Competition) v Rogers Communications Inc and Shaw Communications Inc*, 2023 Comp. Trib. 1 [*Rogers and Shaw*]. For deeper discussion of cases and consent agreements in Baziliauskas, *supra* note 4.

[8] See e.g. Carl Shapiro, *Competition and innovation: Did Arrow Hit the Bull's*

Eye? in Josh Lerner & Scott Stern, eds, *The Rate and Direction of Inventive Activity Revisited*, (Chicago: University of Chicago Press, 2012).

[9] *Anti-Combines Act*, SC 1889, c 41.

[10] Nathan Rosenberg, "Innovation and Growth" (2004), OECD Working Paper, online (pdf): <www.oecd.org/cfe/tourism/34267902.pdf>.

[11] Joseph F. Brodley, "The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress" (1987) 62 NYL Rev 1020 at 1026; E. Denison, *Accounting for U.S. Economic Growth, 1929-1969*, (Washington: The Brookings Institution, 1974) at 131-37. See also Moses Abramovitz & Paul A. David, "Reinterpreting Economic Growth: Parables and Realties" (1973) 63:2 American Economic Review 428.

[12] Tim Harford "Liz Truss's Growth Delusion", *The Financial Times* (27 October 2022), online: <www.ft.com/content/08a7134c-7a40-4bfd-b85d-a8f52208143c>.

[13] See e.g. UNCTAD, "Technology and Innovation Report 2021", online (pdf): <unctad.org/system/files/official-document/tir2020_en.pdf>.

[14] See World Bank. In 2021, GDP per capita was $51,988 (in 2021 US dollars). In 1960, GDP per capita was $2,256 (using the same measure). At 2021 prices, 1960 GDP per capita was therefore $23,582.

[15] Peter Wylie, "Infrastructure and Canadian economic growth" (1995) Canadian Business Economics at 39-52.

[16] See Claudia Golden & Lawrence F. Katz, "The Power of the Pill: Oral Contraceptives and Women's Career and Marriage Decisions" (2002) 110:4 Journal of Political Economy 730; Martha J. Bailey, "More Power to the Pill: The Impact of Contraceptive Freedom on Women's Life Cycle Labor Supply" (2006) 121:1 Quarterly Journal of Economics 289.

[17] Canada, Innovation, Science and Economic Development Canada, *Positioning Canada to Lead: An Inclusive Innovation Agenda*, "Budget 2016" in Sessional Papers No. 8570-421-2 (Ottawa: ISED, 2016) at 111.

[18] Canada, Trade Commissioner Service, *Canada's Innovation Strengths and Priorities*, online: <www.tradecommissioner.gc.ca/innovators-innovateurs/strategies.aspx?lang=eng>.

[19] Brodley, *supra* note 11.

[20] *Ibid* at 1026.

[21] *Ibid* (emphasis added).

[22] *Ibid* at 1027.

[23] *Ibid*, citing F.M. Scherer, *Industrial Market Structure and Economic Performance*, 2nd ed (Houghton Mifflin, 1980) at 460-71 & Lance Davis, *The New Palgrave: A Dictionary of Economics* (New York: Stockton Press, 1987) sub verbo "west" & "monopoly".

[24] Richard J. Gilbert, *Innovation Matters: Competition Policy for the High-Technology Economy*, (Cambridge: MIT Press, 2022).

[25] Ken Jull & Adil Abdulla, "A Justice as Fairness Framework for a Revised Efficiencies Defence" (2023) 36:2 Can Competition L Rev 88 at 89 (emphasis added).

[26] Dennis Carlton & Robert H. Gertner, "Intellectual Property, Antitrust, and Strategic Behavior" (2003) 3 Innovation Policy and the Economy 29.

[27] *TREB*, *supra* note 7.

[28] *Ibid* at para 165.

[29] *Ibid* at para 27.

[30] *Ibid* at para 662.

[31] *Ibid* at paras 484-99.

[32] *VAA*, *supra* note 7.

[33] *Ibid* at paras 783-84.

[34] *Ibid* at para 785.

[35] *Rogers and Shaw*, *supra* note 7.

[36] *Ibid* at para 388.

[37] *Ibid* at para 367.

[38] *Ibid* at para 385.

[39] Joseph Schumpeter, *Capitalism, Socialism and Democracy*, (New York: Harper & Brothers, 1942) at 82.

[40] F.M. Scherer, "Schumpeter and Plausible Capitalism" (1992) 30:3 Journal of Economic Literature 1417.

[41] Kenneth Arrow, *Economic Welfare and the Allocation of Resources to Invention* in Universities National Bureau Committee for Economic Research and the Committee on Economic Growth of the Social Science Research Councils, eds, *The Rate and Direction of Inventive Activity: Economic and Social Factors* (Princeton, NJ: Princeton University Press, 1962) at 609-26.

[42] See e.g. Clayton M. Christensen, *The Innovator's Dilemma* (Boston: Harvard Business School Press, 1997).

[43] Jonathan Baker, "Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation." (2007) 74 Antitrust LJ 575-602.

[44] Massimo Motta, *Competition Policy: Theory and Practice* (Cambridge: Cambridge University Press, 2004) at 54.

[45] Richard Gilbert, *Looking for Mr. Schumpeter: Where Are We in the Competition-Innovation Debate* in Adam Jaffe, Josh Lerner & Scott Stern, eds, *Innovation Policy and the Economy*, vol 6, 159–215 (Chicago: University of Chicago Press, 2006) at 162.

[46] *Ibid* at 164-65.

[47] Shapiro, *supra* note 8.

[48] *Ibid* at 370-76.

[49] *Ibid* at 365.

[50] *Ibid*.

[51] Gilbert, *supra* note 45 at ch 2.

[52] US, Federal Trade Commission, *Statement of Chairman Timothy J. Muris in the Matter of Genzyme Corporation/Novazyme Pharmaceuticals Inc.*, (13 January 2004), online: < www.ftc.gov/system/files/attachments/press-releases/ftc-closes-its-investigation-genzyme-corporations-2001-acquisition-novazyme-pharmaceuticals-inc./murisgenzymestmt.pdf>, citing FTC (1996) vol I, ch 7, at 16.

[53] Shapiro, *supra* note 8 at 393.

[54] Claude d'Aspremont & Alexis Jacquemin, "Cooperative and Non-cooperative R&D in Duopoly with Spillovers" (1988) 78:5 American Economic Review 1133.

[55] Giulio Federico, Fiona Scott Morton & Carl Shapiro, *Antitrust and Innovation: Welcoming and Protecting Disruption* in Josh Lerner & Scott Stern, eds, *Innovation Policy and the Economy*, vol 20, 125-89 (Chicago: University of Chicago Press, 2020)

[56] See Bill C-56, *An Act to Amend the Excise Tax Act and the Competition Act,* 1st Sess, 44th Parl, 2023, cl 10 (repealing section 96 of the *Competition Act*).

[57] Shapiro, *supra* note 8 at 394.

[58] Elena Argentesi et al, "Ex post Assessment of Merger Control Decisions in Digital Markets: Final Report" (9 May 2019), online (pdf): <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803576/CMA_past_digital_mergers_GOV.UK_version.pdf>.

[59] *Ibid.*

[60] See OECD, "Start-ups, Killer Acquisitions and Merger Control" (2020), online (pdf): <https://www.oecd.org/daf/competition/start-ups-killer-acquisitions-and-merger-control-2020.pdf>.

[61] Colleen Cunningham, Florian Ederer & Song Ma, "Killer Acquisitions" (2021) 129:3 Journal of Political Economy 649.

[62] Franziska Günzel & Helge M. Wilker, "Beyond high tech: The pivotal role of technology in start-up business model design" (2012) 15:1 International Journal of Entrepreneurship and Small Business 3.

[63] See e.g. Maria Urbaniec & Agnieszka Żur, "Business model innovation in corporate entrepreneurship: exploratory insights from corporate accelerators" (2021) 17:3 International Entrepreneurship and Management Journal; Tobias Weiblen & Henry William Chesbrough, "Engaging with Startups to Enhance Corporate Innovation" (2015) 57:2 California Management Review 66.

[64] See e.g. Xinxin Wang, "Ctering Innovation: Entrepreneurship and the Acquisition Market" (2018) Kenan Institute of Private Enterprise Research Paper No. 18-27, online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=3247274>.

[65] See e.g. Tiago S. Prado & Johannes M. Bauer, "Big Tech platform acquisitions of start-ups and venture capital funding for innovation" (2022) 59 Information Economics and Policy art 100973.

[66] Brodley, *supra* note 11 at 1029.

[67] Matthew Chaisson & Paul A. Johnson, "Canada's (In)efficiency Defence: Why Section 96 May Do More Harm Than Good for Economic Efficiency and Innovation" (2018), online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=3293790>.

[68] *Ibid* at 2.

[69] *Ibid.*

[70] Edward M. Iacobucci, "Examining the Canadian Competition Act in the Digital Era" (2021), Legislative Comment on Competition Act, RSC 1985, c C-34 at 8.

[71] Gordon Milne, "Nipped in the Bud: Applying Abuse of Dominance

to Facebook’s Nascent Competitor Acquisitions”, Can Competition L Rev [forthcoming in 2024].

[72] Joseph F. Brodley, “Proof of Efficiencies in Mergers and Joint Ventures” (1996) 64:3 Antitrust LJ 575 at 581.

PUBLIC INTEREST AND NON-PRICE CONSIDERATIONS IN MERGER CONTROL

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There has been an increasing trend recently in subjecting merger control assessment to factors that are not merger specific per se. Such factors relate to public interest considerations, national security considerations, as well as other types of factors that competition authorities take into account in assessing a merger's competitive impact. In a number of cases, merger control has been used to introduce or complement wider industrial policy or other priorities that are unrelated to the economic impact of the mergers in question. This paper will examine the question of competition law objectives in regard to their theoretical coherence and consistency and will in that context investigate whether the introduction of a wide range of considerations could possibly have a detrimental effect and ultimately possibly be at the expense of transparency, practical applicability, predictability and justiciability. It undertakes in-depth analysis of the role of public interest considerations such as national security and media plurality in EU and UK merger control, as well as recent attempts to consider non-price considerations such as privacy under the guise of the competitive effects of the transaction in question in the EU, the UK, the US and elsewhere. Ultimately, the author concludes that in the interests of practicality, predictability and justiciability, merger control for competition law purposes should focus on the market impacts of the transaction, in both price and non-price dimensions, but that other factors that may well feature in conceptions of the "public interest" writ large ought to be addressed pursuant to separate legislation and by other law enforcement agencies.

On observe dernièrement une tendance croissante à soumettre l'évaluation du contrôle des fusions à des facteurs qui ne sont pas propres aux fusions en tant que telles. Ces facteurs sont liés à des considérations d'intérêt public, de sécurité nationale, ainsi qu'à d'autres types de facteurs que les autorités de la concurrence prennent en compte pour évaluer l'incidence d'une fusion sur la concurrence. Dans un certain nombre de cas, le contrôle des fusions a été utilisé pour introduire ou compléter une politique industrielle plus large ou d'autres priorités qui ne sont pas liées à l'incidence économique des fusions en question. L'auteur du présent article examine la question des objectifs du droit de la concurrence sous l'angle de leur cohérence théorique et, dans ce contexte, se demande si l'introduction d'un large éventail de considérations pourrait avoir un effet préjudiciable et, en fin de compte, se faire au détriment de la transparence, de l'applicabilité pratique, de la prévisibilité et de la justiciabilité. Il entreprend une analyse approfondie du rôle des considérations *d'intérêt public comme la sécurité nationale et la pluralité des médias dans le contrôle des fusions de l'UE et du Royaume-Uni, ainsi que de récentes tentatives de considérer des facteurs autres que le prix, comme la vie privée, sous le couvert des effets concurrentiels de la transaction en question dans l'UE, au Royaume-Uni, aux États-Unis et ailleurs. En fin de compte, l'auteur conclut que, dans l'intérêt de l'applicabilité pratique, de la prévisibilité et de la justiciabilité, le contrôle des fusions aux fins du droit de la concurrence devrait se concentrer sur les effets de la transaction sur le marché, tant en ce qui concerne les prix que les aspects non tarifaires, mais que d'autres facteurs susceptibles de figurer dans les conceptions de l'« intérêt public » au sens large devraient être traités dans le cadre d'une législation distincte et par d'autres organismes chargés de l'application de la loi.*

1. Introduction

There has been an increasing trend recently in subjecting merger control assessment to factors that are not merger specific *per se*. Such factors relate to public interest considerations, national security considerations, as well as other types of factors that competition authorities take into account in merger assessment. This trend has been intensifying across many jurisdictions. From the perspective of businesses and their private legal practitioners, the desirability of this trend is to be assessed first and foremost by its impact on the transparency, practicability, predictability and justiciability of the merger control process. All of these factors are at risk under this increasing trend of focusing on non-economic issues when transactions are being assessed. In a number of cases, merger control has been used to introduce or complement wider industrial policy or other priorities that are unrelated to the impact of the merger in question on competition in the affected markets. Such priorities have given rise to complicated remedies, potentially exceeding the scope of the theory of harm.[2]

The analysis will consider whether a possible multiplicity of aims for competition law merger control would constitute a desirable state of affairs, and if so, how the hierarchy of objectives should be addressed in cases where they conflict. Analysis thereof should ideally demonstrate how multiple aims do/may coexist in and inform antitrust enforcement and provide valuable insights into whether the process and the resulting outcome(s) can be deemed satisfactory in terms of transparency, practicability, predictability and justiciability. For this purpose, the necessary contextualisation will focus on the European Union ("EU") and United Kingdom ("UK") landscape and further undertake some comparisons between United States ("US"), EU and other competition jurisdictions where appropriate.

The paper will examine the theoretical coherence and consistency of competition law objectives and investigate whether the introduction of a wide range of considerations could possibly be at the expense of the transparency, practicability, predictability and justiciability of competition law in the merger control context. The analysis will reflect on whether the widening of the scope of merger control to include non-price considerations such as privacy, and public interest considerations such as national security and media plurality could have an adverse impact on these factors. Ultimately, the author concludes that in the interests of transparency, practicality, predictability and justiciability, merger control for competition law purposes should focus on the market impacts of the transaction, in both price and non-price dimensions, but that other factors that may well feature in conceptions of the ”public interest” writ large ought to be addressed pursuant to separate legislation and by other law enforcement agencies. If competition authorities are to be asked to address such conceptions, this needs to be done pursuant to appropriate legislative interventions and be kept to the necessary scope that a competition authority is equipped to address.

2. Competition law objectives

The consumer welfare paradigm, and its corollary focus on economic efficiency, has been gradually increasing in significance in EU competition law and policy. This has been manifested, for example, in the European Commission’s application of a more economics-based approach (“MEA”) to merger review since reforms announced in 2002,[3] which saw a turn away from structural presumptions and a rules-based approach toward an assessment of the economic impact on a case-by-case basis. The application of the MEA in Europe resulted in the introduction of a single economic goal—the consumer welfare (allocative efficiency) standard—and an increased reliance on econometric methods for determining whether to block a merger or to impose conditions. The debate over the suitability of that standard in the US therefore has implications for the recent EU debate over the appropriateness of the MEA, and the recent announcement in the EU of a swing back toward more rules-based and structural approaches to competition law enforcement.[4] Furthermore, the discussion is taking place in the light of the emergence of suggestions for a widening of the scope of relevant competition objectives and calls for taking into account considerations that were hitherto not included in what was traditionally perceived as the scope of EU competition law goals.

The debate about the definition and interplay of the current goal(s) in EU competition law and policy has never been a muted one. This had already been so before the shift towards "economisation" that picked up speed in the aftermath of transatlantic divergence in dealing with prominent cases,[5] and before the rise to (apparent) prevalence of the consumer welfare standard. The particularity of EU competition law lay in its also being perceived as a means to achieve (internal EU-wide) market integration. This was explicitly reflected in primary EU law,[6] so that the common/internal market integration goal was considered prevalent compared to other objectives. The latter have for example included promoting the protection of small and medium-sized undertakings; safeguarding economic freedom (of market participants)[7] bearing the influence at least to a certain extent of the ordoliberal school of thought; non-discrimination and fairness. In that sense it could be argued that the market integration goal was *ab initio* neither an exclusive goal nor a strictly economic one, certainly not in the sense of a fixation on price-related criteria similar to that prevailing in the US.

With the drive for an MEA, the European Commission seemed to have embraced the consumer welfare (allocative efficiency) paradigm in what appeared to be an effort to emulate *mutatis mutandis* the US antitrust approach that had been dominant for several years at that time.[8] As will be shown below, there are a number of concerns in relation to the adequacy of the consumer welfare test. Indeed, this discontent has been reflected most recently in the announcement by the EC[9] of a return to a more rules-based and structural approach to abuse of dominance law and one wonders whether merger control is next.

A) Roots of discontent with consumer welfare

Any examination of the consumer welfare criterion must first acknowledge a certain controversy surrounding its proper definition as an antitrust goal. The resulting lack of clarity regarding its meaning is accentuated through inconsistent judicial application both terminologically and substantively.[10]

B) Consumer Welfare capturing only price effects of a static nature?

There have been a significant number of criticisms of consumer welfare and its appropriateness as an antitrust goal.[11] Doubts have been expressed as to whether adequate solutions can be expected either from invoking consumer surplus to measure consumer welfare (in light of the limitations this would have in the case of industries characterised by dynamic rather than static price competition) or from seeking to "equate a reduction of consumer welfare with an increase in price or reduction in quality" (as in that case other aspects of competition, such as variety or innovation, are not reflected).[12]

The critique relates to the perceived focus of consumer welfare on price as well as on detrimental conduct of a static rather than a dynamic nature. Seeking to identify quantifiable harm to consumers causes the focus to move towards harms of a static nature and away from dynamic issues such as, for example, innovation, quality and potential competition. The net effect of a focus on consumer welfare, according to critics, has been to distract competition law enforcers from addressing exclusionary conduct—including mergers - that ought to be at the forefront of antitrust enforcement.[13]

C) Consumer Welfare and 'indeterminacy'

A further recurring criticism regarding consumer welfare relates to what detractors of the paradigm refer to as its 'indeterminacy'.[14] The critique focuses on the link between consumer welfare and the enhanced certainty that it should ideally deliver, as argued by its proponents. According to critics, the certainty achieved by the reliance on the consumer welfare paradigm is below expectations in light of the particularly abstract nature of the key notions of 'welfare' and 'efficiency' that lie at the heart of the concept.[15]

The latter point, that is, the fashioning of the concept as an 'economic abstraction'[16] is further linked to the perception of consumer welfare as an exclusionary tool that allegedly does not allow for anyone else other than overwhelmingly economists to put forward convincing and credible consumer welfare arguments in the majority of (at least the demanding) cases. The projection of this argumentation extends to issues of legitimacy, exclusion and ultimately democracy[17] to the extent that the consumer welfare standard is perceived as ultimately allowing economists and lawyers to 'advanc[e] their own self-referential goals, free of political control and economic accountability'.[18] Referring to (US) antitrust enforcement in general, Wu states that the dominance of the consumer welfare standard 'has led enforcers to place an emphasis on price-fixing cases or horizontal mergers that can be shown to have clear price effects over more complex, but potentially much more important cases.'[19]

Irrespective of the discussion on the desirability of a widening of the range of the aims of competition law, and echoing critique on US antitrust policy in this regard—and most, if not all, proponents of alternative paradigms seem to agree on this, regardless of how intensive a broadening of antitrust objectives, to include non-economic ones, they may propose—the quest for economic efficiency (and its beneficial impact on citizens) in the author's view remains and should remain the primary concern for antitrust policy across jurisdictions.

A possible benefit for both proponents of consumer welfare as the sole goal of EU competition law and policy, as well as possibly for the whole of the competition law community and the consumers themselves, could lie in the need to re-approach consumer welfare more rigorously. Consumer welfare has already been at the centre of a certain degree of controversy in EU law,[20] and current developments might contribute to seeking further and in-depth adjustment of the concept to the particularities and specific concerns of EU competition law and policy.

D) A move towards competition law embracing multiple objectives?

As EU competition law and policy has been applied against the backdrop of a multiplicity of goals for a considerable time, experience may prove to be beneficial in balancing possibly conflicting objectives. Nevertheless, in that regard, conceptual and terminological clarity of the paradigm, sound economics and legal analysis and awareness that the weighing process might bear implications on the degree of justiciability and the effectiveness of institutional design, are of the essence. This is even more so in light of the recurring criticism regarding the perceived inconsistency in enforcement generated by the multiplicity of aims in the past.

The discussion of the suitability of EU competition goals and the pursuit of non-economic goals in EU competition law can be fruitful as a means of both identifying misconceptions of the notion of consumer welfare as well as areas in need of clarification and improvement.[21] It will be interesting to observe which direction the discussion will take in the near future. One implication is already obvious: what could, in the recent past, be interpreted and criticised as an EU law-specific discussion against the backdrop of the creation of the internal market and away from focusing on solely economic objectives and the application of up-to-date economics, is now openly discussed on both sides of the Atlantic. Criticism and/or discomfort regarding the alleged "pollution" or "dilution" of EU competition law by to a greater or lesser extent "political", "social", "moral" or at least not "purely" economics-related (*stricto sensu*: price- and efficiency-related) considerations (such as the ones related to, *e.g.,* ordoliberal school of thought insights, internal market integration, protection of small- and medium-sized enterprises *etc.*) seems to originate rather more from a practical point of view than from a fixation on a so-called purity of EU competition law. The discussion about the merits of and the problems associated with an approach towards competition law objectives that encompasses multiple goals will have to provide satisfactory answers to these criticisms.

Issues relating to the feasibility of a multi-faceted approach need to be addressed. For example, according to Lianos,[22] a shift (or more precisely, an examination of the possibility to shift) to a 'polycentric' competition law, *i.e.*, a competition law embracing more than a single aim and going beyond the boundaries and the constraints posed by the perceived reliance of 'monocentric' competition law on 'the price-based revealed preference approach of a representative consumer on a specific relevant market, without factoring in the analysis the action and interests of real individuals simultaneously active in various social spheres',[23] should not be considered as a call for an overextension of competition law objectives in the direction of an all-encompassing strive for covering a heterogeneous multitude of aim-related considerations. As Lianos correctly points out in reference to Judge Easterbrook, this would ultimately lead to a loss of relevance and of focus in the quest to identify what needs to be governed and taken into account by the law.[24] Lianos admits that the question as to whether the move from monocentric to polycentric competition law can be achieved is pretty much an open one at this stage. Whilst his main argument focuses on the stance and resistance to such a move to be expected from competition authorities and academic commentators, the main concern should rather be primarily linked to the feasibility and desirability of such an endeavour. The emergence of elements relating to various aims that are not necessarily optimally covered within the scope / under the consumer welfare paradigm and the price theory approach (and the perceived willingness of competition authorities in Europe to take the elements in question into account) is far from being straightforward and even less so from being tantamount to an affirmation of a perceived necessity to abandon the primary role that the orientation towards consumer welfare has played in competition law enforcement in Europe so far. Furthermore, enforcement in this context (cf. *e.g.*, the German Competition Authority—Bundeskartelamt or "BKA" - decision in *Facebook*)[25] is not necessarily uncontroversial and in some cases with good reason.

This is not to suggest that the discussion in question should be muted. It needs, however, to be framed in such a manner as to not be conducted in a way that can potentially jeopardize the predictability of enforcement for market participants.

3. Antitrust populism

The purpose of the present section is to shed some light on the concept of populism and how it has been manifested in the antitrust / competition law context. The discussion will take into account the current debate in US antitrust and seek to contextualise its relevance against the specific backdrop of EU competition law and the discourse on competition law objectives, particularly the suitability of the consumer welfare paradigm.

In terms of its historical background, the rise of populism in the US in an antitrust context has been widely associated with the prior or concurrent emergence or strengthening of—mostly politically influenced—populism.[26] The difficulty in defining populism has been manifest and does not necessarily point in a single direction: populist trends have been identified in both the left as well as the right part of the political spectrum and each has different implications for antitrust law generally, and for merger review in particular.

The main 'populist' trends in US antitrust result at the moment in calls against 'bigness' on the one hand, and against enforcement on the other.[27] As noted by Lao,[28] certain proponents of antitrust populism in the US seem to be critical of size as such. Reference seems to be usually made to new economy, digital and high-tech markets, with a view to advocating a move away from the consumer welfare standard to the extent that the latter does not accommodate an approach attacking the size of the undertakings in question *per se* and which could possibly consist in interventions of a structural kind without the need to demonstrate additional anti-competitive conduct or effects as identified by the current standard.[29]

Although the public discussion in Europe regarding the best way to address the challenges posed by tech giants and increased market power has been intense, it is rather doubtful whether the impact of similar thinking is nearly as significant as its US counterpart: populism in the EU-related/centered discussion, at least in an academic context, does not occupy centre stage (yet); it is, however, possible/conceivable that there is a surge of populist approaches in the EU as well, if the discussion on competition aims and policy in general is conducted along the lines of the US debate.

On the other hand, in light of the fact that to a certain extent the challenges posed by digital markets and platforms are largely *terra incognita* for competitive assessment, it is necessary cautiously to refrain from turning the discussion into a polarizing binary argument. Further caution is advisable against an overreach of attributing populist tendencies to parties and practices concerned, as name-calling would in all likelihood have a stifling and counterproductive effect on the ongoing discussion.[30]

A) Caution should be exercised with regard to the potential emergence of populism in the present debate

In a sense, the recent intensification of the discussion on the widening of the scope of competition law objectives is not surprising: the financial and economic crisis and its effects as well as the continuing rise of global market players and new economy markets have also increased expectations—particularly of consumers and the public in general—with regard to more ample as well as more effective enforcement of competition rules. The recent resurgence of populism, particularly in the US, seems—despite the differences between the two major competition law regimes in the US and the EU respectively—to have led to a strengthening of a widely shared perception that competition rules and the enforcement thereof are or should be a panacea that should successfully address all concerns and issues that can be *prima facie* even remotely linked to the size and power of big enterprises: the chief implication of such a stance is a call for a wider perception of competition law aims.

As mentioned above, the discussion about the merits of a wider set of competition law objectives should not be considered concluded in light of the present challenges. It is also advisable to exercise caution with regard to the framing of the discussion in terms of populism, at least in the sense of the term employed in relation to the respective debate in US antitrust. However, it is far from certain that, should more extreme positions occupy the forefront of the debate, the risk of populist notions having an impact on the ongoing discussion could be successfully averted. In any case, as further discussed below, a complete move away from consumer welfare or a significant dilution thereof vis-à-vis other objectives might prove to be more disruptive than seeking to continue applying the standard in question and possibly supplementing enforcement through specific regulation regarding digital markets/platforms where appropriate.[31]

B) The discussion should not refrain from identifying possible areas for improvement

Consumer welfare has proven to be a rather flexible tool/standard and has—successfully—been employed to address anti-competitive practices in an EU context. The risks of abandoning or weakening the consumer welfare standard are considerable; in this author's view they should not be underestimated and they do not for the time being seem to offset the perceived/

expected advantages of such a shift. Furthermore, the widening of the range of competition law objectives entails certain risks and can lead to a dilution of competition enforcement that is not facilitated sufficiently by the tools traditionally considered to pertain to competition law. This is not to say that the particularities and challenges stemming from the emerging digital markets are to be overlooked: the economic analysis of these markets is far from having been concluded and it is hence advisable to refrain from engaging in drastic changes with regard to the identification of the optimal (in the case of multiple aims: balance of) competition law objective(s), particularly in light of the fact that the enforcement by the Commission does not seem to suffer greatly from dealing with the competitive issues under the consumer welfare paradigm. However, if the challenges in question are proven to be insurmountable, an entrenchment and opposition to a possible rethinking of the need to introduce specific legislative improvements and/or examine the approach to enforcement should not be ruled out.

We turn now to traditional facets of non-price competition before looking into public interest considerations such as national security and media plurality as well as privacy considerations. As we will see, the current consumer welfare paradigm seems ably to address traditional facets of non-price competition when viewed in a broader context that permits non-econometric evidence. That being said, the examination of national security, media plurality and privacy concerns appears to be at odds with the expertise of competition law enforcement agencies, and sometimes the goals of consumer welfare.

4. "Traditional" facets of non-price competition

A deterioration of a firm's competitive offer to consumers may take several forms. The most usual form will be an increase in the price of the relevant products. In addition to price, competitive harm as a result of a merger can arise in relation to relatively short-term non-price parameters such as the quantity sold, service quality, and geographic location, as well as relatively longer-term parameters such as product range,[32] product quality,[33] productive capacity and innovation.[34] The ability of firms to adjust these elements, and also the time within which they can do so, will depend upon the market concerned.[35]

The importance of non-price factors in the assessment of competitive effects can be pronounced. For example, in the assessment of coordinated effects in mergers, tacit collusion in cartels, and abuse of collective dominance, coordination is thought to be facilitated to the extent that the products are homogenous, or where the level of differentiation between firms is stable. In such a context, there are limited non-price incentives for buyers to switch while price differentials are fixed and prices are raised. If the non-price (differentiation) factors are not immediately observable, then coordination using non-price focal points, combined with the required information gathering can be difficult to do tacitly. If there are too many non-price differentials that must be kept constant in a coordinated outcome it can be difficult to agree rules without explicit communication even if the features can be monitored.

Non-pricing factors of competition have been incorporated in legislative texts as well. On August 19, 2010, the US FTC and US DOJ issued their revised Horizontal Merger Guidelines. These updated Guidelines incorporated non-price considerations in merger analysis. The revised Guidelines stated at the outset that "[e]nhanced market power can also be manifested in non-price terms and conditions that adversely affect customers, including reduced product quality, reduced product variety, reduced service, or diminished innovation. Such non-price effects may coexist with price effects, or can arise in their absence."[36] They also added that a merger that results in "a reduced incentive to continue with an existing product-development effort or reduced incentive to initiate development of new products" may constitute a substantial lessening of competition.[37]

While price is certainly an important factor for many consumers, a simple focus on price presents a number of problems. Consumers may face a non-price-related detriment such as access, poor quality, lack of information, reduced choice, or less innovation. Price may not be the primary factor in determining consumption decisions in all markets. Price may not be the main means of competition between the incumbents in the market. A single consumer may suffer different detriments in different markets.

Thus, alternative means of competition can range from entirely non-economic ones to those that retain focus on economic objectives without however focusing exclusively on the price criterion.

The UK merger guidelines have also incorporated consideration of both price and non-price parameters in their assessment of the competitive impact of a merger on customers:

- price and output—generally, it is thought to be easier for firms to adjust price than to adjust output;
- other non-price short-term decision variables such as service quality

and product range[38] (the authorities may often treat these as being determined simultaneously with price and output[39]);

- medium-term decision variables such as product quality; and
- long-term decision variables such as geographical location, capacity and innovation.[40]

Theories of harm may also set out the aspects of competition which the authorities expect to worsen as a result of the merger. A firm's competitive offer to consumers may take several forms: in addition to price, non-price parameters might include the quantity sold, service quality, product range,[41] product quality,[42] geographical location, productive capacity and innovation.[43] The ability of firms to adjust these elements, and also the time within which they can do so, will depend upon the market concerned.

Averitt and Lande illustrate the importance of non-price factors in competition assessment by giving the example of a merger in the book publishing sector. They note that, while such a concentration may not necessarily result in higher prices, it is likely to lead to a decrease in editorial diversity and 'thus, to a narrowing of the competing marketplace options expressed in terms of the types of titles offered' which can be challenged under the 'ordinary, universal standards of Section 7, once that Section has been properly construed to recognize the role of options and of non-price competition.'[44] Stucke and Grunes take the same position in discussing how US antitrust law can be modified so that it can include in the relevant analyses the marketplace of ideas.[45] These arguments, which suggest a change in approach and thus a different interpretation of the relevant legislative instruments in order to assess the impact of a concentration on editorial competition, are equally valid for the Commission's relevant decision-making.

The Commission itself acknowledges in its Guidelines on the assessment of horizontal and non-horizontal mergers the non-price dimensions of effective competition such as high quality, a wide selection of goods and services, and innovation, and takes the stance that its mission is to prevent mergers that would be likely to deprive customers of these benefits by significantly increasing the market power of firms. An increase in market power in that regard refers to 'the ability of one or more undertakings to profitably increase prices, *reduce output, choice or quality of goods and services or diminish innovation*' [emphasis added].[46] It has convincingly been argued that these dimensions of competition are 'of particular importance in the Internet, broadcast television, and radio industries, where the competition extends beyond advertising prices.'[47] In that respect, considering the inclusion in a merger analysis of markets in which the quality rather than the price of the products offered is relevant and examining the impact of a concentration on non-price competition are legitimate subjects for competition law inquiries.

A focus on non-price factors of competition as essential in assessing consumer harm has also been incorporated in the debate regarding the aims of competition law. The proponents of the "consumer choice" standard (as opposed to the consumer welfare standard), for example, argue that it would better accommodate medium term aspects such as variety and long term aspects such as innovation that seem to pose difficulties when assessed by means of the consumer welfare standard.[48] Proponents have referred to particular cases in which the "consumer choice" criterion would seem to be crucial, such as *Microsoft*,[49] where in its media player tying decision the European Commission focused on the anti-competitive effect stemming from preventing customers to base their choices on their non-price preferences, hence taking into account factors the consideration of which would be rendered easier if a consumer choice paradigm were explicitly introduced. Similar traits are detected by the proponents of the switch to a consumer choice goal in EU[50] and US cases.[51]

Because the consumer welfare standard encompasses both price and non-price elements, the two standards diverge when there is a deterioration of the quality of the post-merger product, even if there is no price increase.

In another alternative to the consumer welfare standard (which effectively ignores any improvement to the welfare of producers), we could consider also producer surplus, and would assign weights to the benefits to consumers and producers respectively, with each effect weighted according to its impact on the social welfare. Benefits to consumers are generally weighted more heavily than benefits to producers.[52] This so-called "balancing weights" approach was adopted, for example, by the Competition Tribunal in Canada in its re-consideration of the *Superior Propane* case in 2002.[53]

5. Public interest as non-price competition consideration

The concept of public interest varies considerably from one jurisdiction to the other. There is wide diversity of what jurisdictions consider to be relevant to the public interest, starting from total welfare criteria to economic and non-economic (*e.g.*, plurality of media, public security) considerations. The concept of public interest differs from one legal system to the other: some jurisdictions use a very precise and narrow definition, while others use an open list of public interest considerations, or a broader, more flexible definition. There is no exact definition of what public interest is, and, therefore, the interpretation is left to the relevant authority.

Pursuant to an OECD report,[54] the public interest is assessed by either the competition authority, which also conducts the substantive competition test (single authority model) or by another institution or body, like a sectoral regulator or a government department (dual responsibilities model). The different institutional settings lead to different enforcement challenges.

To illustrate these challenges, we provide below a brief account of the approaches that some of the main regimes take in relation to national security and media plurality.

6. Proliferation of National Security Considerations

A) European Union

In the EU regime, Article 21 of the EU *Merger Regulation* ("EUMR") allows Member States to adopt, with regard to concentrations with an EU dimension, measures to protect certain interests other than competition, as long as these measures are necessary and proportionate to their aim and compatible with EU law. Article 21 EUMR distinguishes between "recognised interests" (all of which are considered *prima facie* legitimate), namely security of supply, plurality of the media and prudential rules, and "other public interests", which require *ex ante* review by the Commission.

Examples of Member States attempting to intervene under Article 21 in the Commission's review of a proposed merger include the following:

- Spain cited Article 21 as justification for imposing certain conditions on E.ON's bid for Endesa (*Case COMP/M.4110*), as well as on Enel and Acciona's bid for Endesa (*Case COMP/M.4685*), although both transactions had already been cleared unconditionally on competition law grounds by the Commission.

- Poland imposed divestment conditions on the *Unicredito/HVB* merger (*Case COMP/M.3894*) under Article 21, despite the fact that the full transaction had already been authorised by the Commission on competition law grounds.

- Italy cited Article 21 as justification for refusing to authorise the *Albertis/Autostrade* merger (*Case COMP/M.4249*), based on public concerns unrelated to competition law. This occurred during the Commission's review of the transaction, which was subsequently cleared.

Furthermore, nearly half of the Member States[55] have screening mechanisms in place to assess non-competition law considerations of concentrations focusing on national security aspects. That being said, the existing screening mechanisms are characterised by differences in scope and procedure: ex-ante/ex-post; voluntary/mandatory notification general/sectoral coverage; companies/assets; applicable to investments from other Member States and third countries or third countries only, *etc.*[56]

The Commission has suggested taking further measures as regards those investments from third countries that may raise security and public order concerns. First, an EU Communication has suggested further concrete steps for Member States and, where relevant, the Commission, to screen certain foreign direct investments into the EU.[57] The Commission recently issued a Regulation[58] in order to establish a framework for the Member States, and in certain cases the Commission, to screen foreign direct investments in the European Union, while allowing Member States to take into account their individual situations and national circumstances.[59] The Regulation provides that the Commission may carry out a screening on the grounds of security and public order, in cases where a foreign direct investment may affect projects or programmes of Union interest. It also establishes essential elements of the procedural framework for the screening of such foreign direct investments by Member States, including transparency obligations and the obligation to ensure adequate redress possibilities with regard to decisions adopted under these screening mechanisms. At the same time, it maintains the necessary flexibility for Member States in screening foreign direct investments, allowing them to adapt to changing circumstances and their specific national context. Finally, the Regulation sets up a mechanism for cooperation between Member States, notably for the cases where foreign direct investment in one or more Member States may affect the security or public order of another Member State.

These changes may introduce an additional roadblock in the approval of concentrations and risk predictability, increasing the level of complexity and causing legal uncertainty. While beyond the scope of this paper, future research could assess the impact of the Regulation and also incorporate all assessments made under the new regime. In addition, such research could analyse all decisions under Article 21, whether based on security of supply, plurality of the media, prudential rules, or "other public interests." It will be interesting to determine what facets of the public interest, beyond competition, will come to be protected, as well as the extent to which political and other subjective concerns may (or may not) creep into the analysis.

B) United Kingdom

In the UK, prior to the entry into force of the *Enterprise Act 2002*, mergers were reviewed under a broad public interest test, which included competition considerations. With the adoption of the *Enterprise Act 2002*, two significant changes took place. Firstly, the primacy of a competition-based test was stated. Secondly, a list of public interest considerations that could be taken into account in merger assessment was included in the Act. The UK merger control regime thus explicitly allows for intervention in mergers by the Secretary of State on national security and media plurality grounds; also, there is a safeguard procedure, under which ministers can give notice of an additional public interest ground, if it happens to arise in a particular case, and seek the approval of Parliament to use it. The Secretary of State can also intervene in a very limited number of cases on public interest grounds where the jurisdictional thresholds for merger review are not met.

A recent case, Hytera's proposed acquisition of digital radio manufacturer Sepura, invoked a public interest intervention notice on national security grounds. There have been six other such interventions on national security grounds, including defence mergers *General Dynamics/ Alvis*,[60] *Finmeccanica/ AgustaWestland*,[61] *Finmeccanica/ BAE Systems*,[62] *Lockheed Martin/ Insys*[63] and *General Electric/ Smiths Aerospace*.[64] Those transactions were ultimately cleared by the Office of Fair Trading after the parties offered remedies.

The current UK merger control system does not apply, however, to:

- Mergers involving most small businesses;
- Investments in new projects, such as new-build nuclear power stations—until they begin operation; or
- Transfers of "bare assets", such as machinery or intellectual property, which do not amount to an "enterprise".

In a recent significant legislative development,[65] the UK government addressed these gaps in the applicability of the regime and amended the turnover threshold and share of supply tests within the *Enterprise Act 2002*.[66] This is to allow the government to examine and potentially intervene in mergers that currently fall outside the thresholds in two areas: (i) the dual use and military use sector, and (ii) parts of the advanced technology sector. For these areas only, the Government proposes to lower the turnover threshold from £70 million to £1 million and to remove the current requirement for the merger to increase the share of supply to or over 25%.[67]

In the longer term, the government intends to follow the example of other developed countries and make more substantive changes to how it scrutinises the national security implications of foreign investment. The reforms have a particular focus on ensuring adequate scrutiny of whether significant foreign investment in critical businesses raises any national security concerns and providing the ability to act in circumstances where this might be the case. The expectation is that the need to act would be relatively rare, but the risk that this can turn into a tool to implement industrial policy and other political considerations does exist.

The proposals are concerned only with national security, and arguably are designed to be focused and proportionate in their scope and application. The potential reforms in the UK regime include:

- an expanded version of the 'call-in' power, modeled on the existing power within the *Enterprise Act 2002*, to allow the government to scrutinise a broader range of transactions for national security concerns within a voluntary notification regime and/or;

- a mandatory notification regime for foreign investment into the provision of a focused set of 'essential functions' in key parts of the economy. Mandatory notification could also be required for new projects that could reasonably be expected in future to provide essential functions and/or foreign investment in specific businesses or assets.

A research project as mentioned above would assess these proposals and all assessments made under the new regime. The impact of Brexit could also have a bearing on the approach of the Competition and Markets Authority in the UK (responsible for merger control) and the government under the new regime and the research project could endeavour to assess whether Brexit is contributing to a more insular and protectionist approach by the UK regime, or to divergence from EU and other international norms. Already, the proposals put forward for the proliferation of grounds upon which a merger can be reviewed have led to uncertainty in those areas—clear guidance as to the grounds upon which additional discretion will be exercised will be important in order to ensure that such reviews remain practicable (to the extent possible), predictable and capable of judicial review.

C) USA

United States agencies do not consider public interest factors beyond the interest in the enforcement of the antitrust laws, and believe that enforcement decisions should be based solely on the competitive effects and consumer benefits of the transaction under review.

However, the Committee on Foreign Investment in the United States (CFIUS) is an inter-agency committee authorized to review transactions that could result in the control of a U.S. business by a foreign person in order to determine the effect of such transactions on the national security of the United States. During the review period, CFIUS members examine the transaction in order to identify and address, as appropriate, any national security concerns that arise as a result of the transaction. CFIUS can decide within an initial 30-day review period but in certain circumstances CFIUS may initiate a subsequent investigation, which must be completed within 45 days (or within 60 days if complex), but only once the formal notice has been accepted.[68] These deadlines affect the timing of the approval of transactions and can be extended by questions and in practice the process can take several months.

If CFIUS finds that the covered transaction does not present any national security risks or that other provisions of law provide adequate and appropriate authority to address the risks, then CFIUS will advise the parties in writing. If CFIUS finds that a covered transaction presents national security risks and that other provisions of law do not provide adequate authority to address the risks, then CFIUS may enter into an agreement with, or impose conditions on, parties to mitigate such risks or may refer the case to the President for action.

Where CFIUS has completed all action with respect to a covered transaction or the President has announced a decision not to exercise his authority with respect to the covered transaction, then the parties receive a "safe harbour" with respect to that transaction.

Again, a potential research project could discuss the cases that have been assessed by CFIUS as well as by FTC/DOJ and analyse the approach they took. It could focus on CFIUS assessments and the implications they can have for consolidation in various industries. and discuss recent caselaw with a view to assessing whether the US regime is unduly protectionist when it comes to merger control, or if the CFIUS process is transparent, practicable, predictable and capable of judicial review.

D) China

Since the *Anti Monopoly Law* (AML) [69] of the People's Republic of China came into force in 2008, China's competition law authority, the State Administration for Market Regulation ("SAMR"), has reviewed over 750 merger cases. It is noteworthy that there have been a number of merger cases that show the use of antitrust law for political or other extraneous purposes. In 2013, the competition authority at the time,[70] the Ministry of Commerce ("MOFCOM") published four conditional clearance decisions: *Glencore/ Xstrata*, *Marubeni/Gavilon*, *Baxter/Gambro* and *MediaTek/MStar*. Each decision turns on its own facts but recurring themes have been identified:[71]

- SAMR has shown itself prepared to find market power notwithstanding relatively low market shares;
- there is a continued attraction for the imposition of elaborate and onerous hold-separate arrangements as a condition for clearance;
- as a precondition to clearance, SAMR has sought commitments to supply key products to the Chinese market on favourable terms;
- SAMR will not shy away from imposing extraterritorial remedies even where the competition economics basis for seeking the commitment might not be that clear-cut; and
- coordinated-effects theories of harm arise with some regularity in the published decisions.

All foreign investment in China is subject to discretionary approval by SAMR or one of its local branches. In some sectors, special regulatory approvals may be required by other administrative agencies as well. Foreign investment is also regulated on a sector-by-sector basis by SAMR as outlined in the Foreign Investment Industrial Guidance Catalogue, which has periodically been revised in recent years. Under the Foreign Investment Industrial Guidance Catalogue, some sectors are closed to foreign investment or subject to foreign ownership restrictions, while foreign investment in certain industries is encouraged through preferential policies.[72]

China also has a national security review regime, which is relevant if the transaction will result in the acquisition of "actual control" by the foreign investor of a Chinese domestic business involved in the military sector (including enterprises located near key and sensitive military facilities and other enterprises active in connection with national defence), key agricultural products, as well as sectors involving key energy infrastructure, transport, technology and equipment manufacturing. If a transaction needs to be reviewed on national security grounds, it will be conducted by an inter-ministerial committee, which will be led by the NDRC as well as SAMR.

In addition, the *Rules on Mergers with and Acquisitions of Domestic Enterprises by Foreign Investors* (the M&A Rules) also require a notification to SAMR where a transaction will result in a foreign investor obtaining a controlling equity interest in a domestic Chinese enterprise under any of the following circumstances:

- the domestic target operates in a 'key industry';
- the transaction has an impact on state 'economic security'; or
- the domestic target possesses a well-known trademark or established Chinese brand.

Under the *Security Review Circular*, whether a proposed M&A transaction constitutes a threat to national security will be determined by looking at its potential impact on:

- The production and supply of products and services and the relevant facilities necessary for national defence within China;
- National economic stability;
- Order within society;
- China's ability to research and develop key technologies relating to national security.[73]

The national security review is conducted in two phases: a 'general review' (Phase I), which lasts up to 30 working days and a 'special review' (Phase II), which lasts up to 60 working days. Where the Committee cannot reach consensus, the transaction may be referred to the State Council for final determination, for which there is no time limit for a decision. Where the Committee determines that a transaction gives rise to national security concerns, parties may be required to abandon or (in cases where completion has already occurred) unwind the transaction, or to put in place remedial measures to address the concern.

MOFCOM's[74] decision in *Maersk/MSC Mediterranean Shipping/CMA CGM* is an example of industrial strategy infiltrating merger control decision making. In June 2014, MOFCOM declared its decision to block the network centre jointly established by A.P. Møller—Maersk A/S, MSC Mediterranean Shipping Company SA and CMA CGM SA.[75] This was the second prohibited case[76] since the *Anti-Monopoly Law of the PRC* came into effect in 2008. MOFCOM argued that the network centre constituted a merger under China's anti-monopoly law.[77]

MOFCOM was concerned that the establishment of the network centre would eliminate or restrict competition in the Asia-Europe Route container liner shipping service market.[78] More specifically, MOFCOM observed that the transaction would strengthen the merged entity's controlling power over the market, significantly increase market concentration, and further raise entry barriers, to the detriment of rivals, consignors, port operators and other stakeholders.[79]

The US Federal Maritime Commission (FMC)[80] had approved that same transaction, however, in March 2014, holding that the agreement would neither reduce competition, unreasonably increase transportation costs nor reduce transportation services.[81] In June 2014, the EC decided not to open an investigation into the proposed alliance.[82] Under European competition law, shipping alliances, such as those discussed in this case, do not qualify as mergers but are subject to Article 101 of the *Treaty on the Functioning of the European Union*. Besides, certain consortium activities benefit from a block exemption.[83]

There have been criticisms that MOFCOM's decision to block the transaction was largely motivated by industrial policy.[84] Competition concerns played an important but not necessarily a decisive role in MOFCOM's review process. The China Shipowners' Association proactively lobbied MOFCOM to block the deal.[85] Before making the final decision, MOFCOM consulted with the Ministry of Transportation and the NDRC.[86] The lack of transparency in the rationale of MOFCOM to block this transaction can fuel concerns of industrial policy inappropriately influencing merger control decisions. This in turn impacts adversely on the transparency, predictability and justiciability of merger review.

Globally, there is therefore potentially a degree of overlap between national security reviews and review under the competition law regimes, and the relationship between these potentially overlapping review regimes is yet to be clarified in a number of jurisdictions. What is clear, however, is that national security reviews are typically not undertaken solely—or in some cases at all—by the competition law enforcement agencies that are typically responsible for merger review, and that the criteria on which national security is judged are not related to competitive effects.

We turn now to media plurality as a non-price competition element that is taken into account in merger assessment under the public interest umbrella. As media plurality assessment is quite jurisdiction specific, we will discuss the approach in the UK regime.

7. Media plurality as a public interest consideration in the UK

As noted above, prior to the entry into force of the *Enterprise Act 2002*,[87] mergers were reviewed in the UK under a broad public interest test, which included competition considerations. With the adoption of the Act in 2002, the primacy of a competition-based test was made explicit, but a list of public interest considerations that could be taken into account in merger assessment includes media plurality grounds. In the case of a media merger for which a public interest intervention notice is issued, the Office of Communications (OFCOM) should provide a report to the Secretary of State on "the effect of the consideration or considerations concerned on the case."[88]

The public interest regime created by the 2002 act represents a paradigm shift in several respects. Firstly, the notion of public interest under the 2002 act basically excludes the competition law-based 'substantial lessening of competition' (SLC) test from its scope. In other words, the Act draws a clear distinction between competition law considerations and other 'public interest considerations' in merger control, instead of an overarching notion of public interest. Secondly, from an institutional point of view, while the Act leaves no room for political intervention with respect to SLC-based merger assessments, it mainly preserves the former institutional approach regarding public interest assessments. Arguably, the earlier institutional setting "protects" the competition law regime from political interventions.[89] However, it also strengthens the idea that public interest interventions are mainly political, thereby not objective.[90] Finally, the Act sets public interest criteria as an exceptional intervention mechanism. The latter is two-folded. Firstly, the Act limits its public interest considerations to particular concerns specifically listed under the Act. Secondly, it confers an exceptional power on the Secretary of State to seek subsequent parliamentary approval in order to add a new public interest criteria to the list. [91]

The considerations currently listed under section 58 of the 2002 act consist of national security, media plurality and the stability of the UK financial system. Originally, national security was the only public interest consideration listed in the act. Subsequently, media plurality was added as a public interest consideration by the *Communications Act* in 2003. Finally, the stability of the financial system was added by order as a public interest concern during the *Lloyds/HBOs* merger in 2008.[92]

Media plurality is not a pre-defined concept under the *Enterprise Act 2002*. The term is mostly described in statutory texts, court decisions, reports and policy papers with reference to its attributes and functions. In its lexical meaning, it is simply the state of being "more than one".[93] However, in the context of media plurality, the term also resonates with 'pluralism' which is defined as 'the existence of different types of people, who have different beliefs and opinions, within the same society'.[94] In that sense, it can be said that media pluralism is more than just counting the number of media owners but is also about a variety of other factors which come into play such as diversity of sources and range of content available to society.[95]

Media plurality assessment in the UK is essentially equivalent to what is meant by "*media pluralism*".[96] Nevertheless -surprisingly - the distinction between the terminology (namely, between "pluralism" and "plurality") has not been greatly debated in the decisions of UK courts and enforcement authorities.[97] Instead, media plurality has been understood as a very broad concept. For example, Lord McIntosh[98], during the parliamentary debates of the *Communications Act* in 2003, interpreted the term as follows:

> "Plurality is a very subjective notion. It is not susceptible to the same kind of economic analysis as competition issues. It is very much a matter of judgment of what "feels" right. For this Bill, our approach has been to examine each media audience, including cross-media audiences, and to judge the level of plurality that we consider necessary. It is important to recognise that setting artificial limits on markets can make them economically less efficient. But we need to protect plurality and recognise that there is a minimum level of plurality below which we must never go."[99]

Protecting media plurality is clearly associated with preserving the democratic process and the functioning of political institutions,[100] including protecting and promoting diversity within and amongst media enterprises.[101] In its 2015 Framework, OFCOM stated that "plurality is not a goal in itself, but a means to an end."[102] Taking these points together, media plurality in the legal context can be defined as the existence of a sufficient number of different types of people who have different beliefs and opinions in control of media enterprises with a view to ensure diversity within and amongst media enterprises and to prevent too much influence of a person on public opinion and the political agenda.

8. Measuring Plurality

In *BskyB/ITV*, the UK Competition Commission (CC), one of the predecessor competition authorities to the Competition and Markets Authority,[103] took the concept of 'plurality' as referring to both the range and the number of persons in control of media enterprises.[104] Significantly, as stated above, CC made a distinction between 'internal' and 'external' plurality.[105] 'External plurality' was defined as plurality which could be described by the range of information and views across different media groups, while 'internal plurality' was defined as plurality which could be described by the range within individual media groups.[106]

CC measured plurality of news in three steps. Firstly, it attempted to analyse the existing level of plurality by using certain indicators such as market shares and surveys.[107] Secondly, it tried to identify the contribution of merging parties (as distinct entities) to that level of plurality. In its analysis, CC gave particular regard to the combined market shares of the parties in the market for 'television news viewing' and cross-media ownership. Finally, it accounted for the degree of internal plurality, particularly editorial independence in media enterprises under common ownership.[108]

In *Fox/Sky,* OFCOM's 2015 Framework was used as the principal framework to define substantial quantitative and qualitative criteria. Quantitative criteria were listed as availability, consumption and impact.[109] In its decision, CMA referred to availability as meaning "the number of providers at the relevant consumption point." Consumption was used in reference to the "frequency with which these sources are used and the time spent using them". Lastly, impact referred to the way the content of the news affected the "formation of people's opinions" (*e.g.*, trust). As stated in *Fox/Sky,* the problem with quantitative metrics is that they are not sufficient in themselves to establish a theory of harm.[110] CMA, in that regard, made a distinction between the "contextual factors that provide background to inform the availability, consumption and impact metrics" and "qualitative evidence, being evidence that is relevant to our assessment and is not easily quantifiable."[111]

CMA's detailed analysis on the assessment of diversity in the viewpoints that are available and consumed basically takes account of availability, reach, consumption and multi-sourcing pre- and post-transaction.[112] As for availability, CMA decided that there were a significant range of news sources available. However, it also pointed out that merely counting numbers would not give any insight on influence.[113] As for reach, CMA concluded that Sky reached 9 percent of the population in the UK. Its primary competitors were BBC (62%) and ITN (43%). Significantly, the CMA employed a cross-platform reach metric, allowing it to measure the total Fox, News Corp and Sky reach of 31 percent of the UK population.[114] According to that metric, the combined entity would be the third biggest in terms of reach, coming after BBC (77%) and ITV (39%).[115] CMA defined consumption as "frequency with which they access [a particular media source] and the length of time [viewers] spend reading or viewing it."[116] In terms of consumption criteria, CMA stated that Sky was only slightly less consumed than ITV. The CMA said that it noted "Sky News has been seen by third parties as a positive competitive force in the provision of news."[117] According to share of reference for consumption criteria, BBC accounted for 42 percent of the population, followed by ITN (11%) and Sky (6%) in 2016.

Internal plurality issues were also discussed in detail for the first time in *Fox/Sky*. The discussion in the decision provided an in-depth view of the content of internal plurality. In its analysis, CMA firstly discussed a board resolution adopted by Fox that aimed to prevent editorial influence on Sky News by Fox.[118] CMA stated that such a board resolution would be insufficient to prevent a reduction of internal plurality because the board resolution could be easily revoked, there were unclear procedures on appointing the head of Sky News (who might therefore be worried about having to please Fox), and the body which would have enforced such rules was inexperienced.[119]

In the second place, CMA looked into the culture of editorial independence at Sky News.[120] The Authority, while admitting the existence of such a culture, pointed out that as the appointment of the senior staff could be influenced by the Murdoch Family Trust (MFT) the said culture could be changed over time.[121] Thirdly, CMA assessed audience expectations and commercial incentives. The parties put forward the idea that a change in editorial matters did not make sense from an economical point of view because customers would switch upon such change.[122] However, CMA concluded that influence as such may be subtly exercised in a way that it would not change viewers' perception of the channel's impartiality, because, it asserted, the channel could attract other viewers following a change in editorial matters.[123] Finally, the Authority considered regulatory restrictions which would preserve internal plurality within the organization. However, it found that protection against editorial alignment was limited, as the Broadcasting Code allowed for a significant margin of discretion in editorial matters.[124] The Authority, in particular, underlined the indirect ways Fox could influence Sky News on editorial matters.[125]

The common criticism for the assignment of the CMA to media plurality cases is that the CMA does not have extensive expertise in such cases.[126] On the other hand, CMA's media merger inquiries are examples of CMA's ability to assimilate and analyse extensive amounts of data. The 411-page *Fox/Sky* final report in particular, illustrates CMA's maturity in conducting a Phase-2 public interest inquiry as well as its ability to build upon insights from the previous case-law in media mergers. A second criticism is that the CMA's role in media plurality cases contradicts its statutory duty to promote competition.[127] The balancing act of competition concerns and media plurality considerations is not a straightforward task.[128]

However, it must be emphasised that the CMA does not make the final decision on such considerations. It is for the Secretary of the State to balance the various public interests at stake. The Secretary of State's decision-making role in media plurality cases can also be criticised on multiple grounds.[129] The first and the most obvious problem is the high risk of politically biased decision making. NewsCorp's bid to acquire the full control of BskyB in 2010 was highly illustrative of that point. The immediate comments after the announcement of NewsCorp's bid to acquire 60.9% of BskyB shares[130] suggested that the bid was problematic, at least on political grounds.[131] The initial concern for the regulators was on cross-media ownership issues. This was mainly because NewsCorp was then the biggest newspaper company in the UK, accounting for one third of the whole market, and Sky was the biggest broadcaster. However, eventually, two other incidents determined the fate of the case. Firstly, the then-Secretary of State Vincent Cable stepped down because of a statement to some reporters, indicating that he had "declared war on Rupert Murdoch"[132] just after he issued a European Intervention Notice[133] on 4 November 2010. Secondly, a phone-hacking scandal within the "News of the World", a subsidiary of NewsCorp, was uncovered during the investigation which eventually led to the withdrawal of the bid.[134] The latter also provoked a public inquiry led by the Lord Justice Leveson ("Leveson Inquiry").[135]

To a certain degree, the appointment of the CMA to assess the public interest in media cases creates a measure of consistency and continuity,[136] and therefore alleviates somewhat the extent of concerns of unpredictability in political decision making.[137]

After discussing the approach taken to media plurality in the UK, we turn below to the approach competition authorities take to privacy considerations in merger assessment.

9. Privacy as a non-price competition parameter

Privacy considerations as a competition assessment factor are a recent development in the substantive assessment of mergers, and one that is likely to become increasingly relevant as a non-price consideration.

The incorporation of data privacy into a competition assessment usually follows two approaches. The first approach is based on the theory of considering privacy as a fundamental right and how privacy can constitute a unilateral theory of harm in merger assessment by focusing on the impact of the merger on privacy.[138] On this theory, the competition authorities can restrict and block mergers on the basis that they threaten the data privacy of individuals and refuse to allow the merger until the parties ensure the implementation of data safeguards. That is, the competition authorities themselves would protect privacy rights in personal data.

A second, more common, approach has been the incorporation of data privacy into the competition effects analysis. This approach looks at the protection of personal data as one of the parameters of competition: will the merger lead to reduced privacy protection as a form of quality and is this relevant as a choice criterion for consumers?[139] To the extent that privacy concerns motivate consumer behaviour, this approach fits privacy into the traditional competitive effects framework.

The OECD report on 'Data-Driven Innovation: Big Data for Growth and Well-Being' highlighted a significant uptick in data-driven mergers.[140] Prime examples of such mergers include *Google/Double Click*, *Facebook/Whatsapp*, and the recent acquisition of LinkedIn by Microsoft.[141] Such mergers are partly driven by the desire to acquire and combine new data assets viewed as a key source of competitive advantage in developing and providing digital services.[142]

10. The role of 'privacy' in merger control proceedings

The European Commission considers that 'price' is not the sole criterion of merger review but on the other hand, there are inclusions of some 'non-price competitive' parameters that need careful consideration while reviewing any merger.[143]

In the data-driven economy, where the products are often free (*e.g.*, Internet searches), then the competition effects analysis shifts necessarily towards non-pricing parameters. However, the competition authorities seem to lack the tools and methodologies to assess privacy as a non-price parameter of competition. This is because the dominance of 'neoclassical price theory' for the normative understanding and methodological tools of competition analysis focuses only on price.[144]

The assessment of non-pricing parameters especially 'privacy' in mergers seems well accepted theoretically, but there are practical impediments to its application. Firstly, how to measure a reduction in privacy is uncertain. Secondly, even if such measures would exist, it is not for a competition authority to define an optimal level of privacy or to judge what reduction in privacy is acceptable. Thirdly, the linkages between data-sets would mean that other efficiencies would have to be balanced against any intrusion on privacy. Fourthly, the potential remedies companies would offer to relieve the competition concerns, or to safeguard a specific level of privacy, could lead to uneven restrictions on privacy on actors in the same market, thus itself distorting competition.[145] For this reason, some jurisdictions such as Canada, for example, have established a separate authority responsible for data protection as such, while the competition authorities examine privacy only insofar as it is seen as a parameter of competition.

The inclusion of privacy and protection of personal data in the current merger review framework as a non-price parameter of quality is very much in consonance with the consumer welfare goal. The devaluation of quality is readily understood as a factor that lowers consumer welfare. That being said, there exists an issue of evaluating and assessing competition based on non-price factors such as quality, which differ according to different consumers. How to measure the market's collective perception of quality, when money is not changing hands?

When a merger is price-centric the competition authorities can readily formulate a theory of harm, but the same has been difficult where the merger is found to be non-price-centric.

The earlier formed and tested theories of harm, in the Commission's decisions, usually focus on the customer side of the multi-sided market. Privacy considerations arise in data markets which frequently relate to two-sided markets (*e.g.*, platform-based markets), however. Any harm to consumers on that side comes about indirectly through the raised prices of the customers to the merged entity.[146] In a number of two-sided markets, consumers do not face a monetary payment (*e.g.*, the online marketplace).[147] If it is possible to come to terms with the notion that access to personal data can be seen as the price the consumer pays to access a zero price service, and not just an aspect of the quality of that service, as has been traditionally the analytical perspective of non-price considerations, a theory of harm can then be formulated.[148]

The assessment of privacy in merger control seems acceptable as a matter of principle but no success has yet been achieved in assessing privacy as a theory of harm in a merger case. Firstly, how to measure a reduction in privacy is uncertain. Secondly, even if such measurement techniques were to exist, a competition authority has no expertise to define an optimal level of privacy or to judge what reduction in privacy is acceptable. Thirdly, the potential remedies companies would offer to address the competition concerns from merged data, or to safeguard a specific level of privacy, could pose significant implementation challenges as a remedy.[149] The latter challenge could be addressed through the requirements imposed on a number of companies in the big tech sector by the recent regulatory initiatives in the EU and elsewhere.[150] Competition authorities will need to address these challenges in order to incorporate privacy considerations in merger assessment in a way that will be transparent and will not adversely affect legal certainty.

11. Conclusion

There are increasing calls for the expansion of merger analysis beyond price, to take into account non-price aspects of competition, as well as non-competition related considerations such as national security and media plurality. It is important to assess whether such considerations are indeed competition law concerns or present an opportunity to achieve other policy aims by using the merger control regime. In some cases (*e.g.*, data privacy) this approach is justified on the basis of "traditional" competition/merger control analysis. In some cases, the legislation mandates the competition authorities to consider factors outside of the competition sphere (*e.g.*, issues of media plurality). Finally, there are some cases where merger control has been used as a pretension for achieving or contributing to other policy aims (*e.g.*, industrial policy such as the *Maersk/MSC Mediterranean Shipping/CMA CGM* case in China).

It is unclear whether at this stage of the development of competition law and policy in the EU the question of identifying the central objective of competition law matters [that much] in terms of the actual enforcement and if it does so, to what extent this is the case.[151] A possible answer to this query needs to take into account institutional aspects and identify possible repercussions and from adding non-competition related factors into the competitive analysis. Ultimately, in the interests of transparency, practicality, predictability and justiciability of competition laws, I have concluded that merger control for competition law purposes should focus on the market impacts of the transaction, in both price and non-price dimensions, and that other factors that may well feature in conceptions of the "public interest" writ large, such as national security or media plurality or privacy as a fundamental right, ought to be addressed pursuant to separate legislation and by other law enforcement agencies.

ENDNOTES

[1] Chair, Competition Law and Economics, and Director of the Centre for Commercial Law Studies at Queen Mary University in London, England. The views expressed in this paper are those of the author alone.

[2] See *e.g.* MOFCOMS's assessment of Seagate/Samsung (Seagate Technology/Hard Disk Drive Business of Samsung MOFCOM Conditional Clearance Notice [2011] No 90 of 12/12/2011, online: <fldj.mofcom.gov.cn/article/ztxx/201112/20111207874274.shtml> accessed 15 September 2023> and Western Digital/Hitachi (MOFCOM Conditional Clearance Notice [2012] No 9 of 02/03/2012, online: <fldj.mofcom.gov.cn/article/ztxx/201203/20120307993758.shtml> accessed 15 September 2023).

[3] Mario Monti, Merger control in the European Union: a radical reform (Speech delivered at European Commission/IBA Conference on EU Merger Control, 7 November 2002), online (pdf): <ec.europa.eu/commission/presscorner/api/files/document/print/en/speech_02_545/SPEECH_02_545_EN.pdf>.

[4] Communication for the Commission, "Amendments to the Communication from the Commission Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings", C(2023) 1923 final.

[5] See *e.g. GE/Honeywell*, COMP/M.2220.

[6] *Cf* former Art. 3 g) EC—despite the omission of the explicit reference to the aim of ensuring undistorted competition from the TFEU treaty post-Lisbon it is suggested that no significant change has occurred regarding the relevance of this goal as a means to achieve market integration.

[7] *Cf* in this respect Laura Parret, "Do we (still) know what we are protecting?" (2009), TILEC Discussion Paper No 2009-010 at 14ff.

[8] US, Department of Justice & Federal Trade Commission, *Horizontal Merger Guidelines* (Washington DC: US Government Printing Office, 1992).

[9] Communication for the Commission, "Amendments to the Communication from the Commission Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings", C(2023) 1923 final.

[10] *Cf* Maurice E. Stucke, "Reconsidering Antitrust's Goals" (2012) 53:2 Boston College L Rev 551, at 571.

[11] See *e.g.* Eleanor Fox, "The Modernization of Antitrust: A New Equilibrium" (1981) 66 Cornell L Rev 1140 at 1173; Herbert Hovenkamp, *The Antitrust Enterprise* (Cambridge, MA: Harvard University Press, 2005) at 35-36.

[12] Stucke, *supra* note 10.

[13] *Cf* in a US context, Jonathan B. Baker, "Exclusion as a Core Competition Concern" (2012) 78 Antitrust LJ 527.

[14] Tim Wu, "After Consumer Welfare, Now What? The "Protection of Competition" Standard in Practice" (2018) CPI Antitrust Chronicle at 5.

[15] *Ibid* at 3.

[16] *Ibid* at 6.

[17] *Ibid.*

[18] Harry First & Spencer Weber Waller, "Antitrust's Democracy Deficit" (2013) 81:5 Fordham L Rev 2543.

[19] Wu, *supra* note 14 at 6.

[20] As highlighted above in this section.

[21] The caveat to this statement would lie in a possible takeover of the discussion by populist discourse.

[22] See Ioannis Lianos, "Polycentric Competition Law" (2018) Centre for Law, Economics and Society Research Paper Series 4/2018 at 43.

[23] *Ibid.*

[24] *Cf* Lianos' reference to the position of Judge Easterbrook in this respect: 'When everything is relevant, nothing is dispositive.' (Frank H. Easterbrook, "Limits of Antitrust" (1984) 63 Tex L Rev 1.)

[25] B6-22/16, Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing, online: <www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html;jsessionid=AF36596BA38A737406752C1250C13FD8.1_cid389?nn=3591568>.

[26] See *e.g.* Barak Orbach, "Antitrust Populism" (2017) 14 New York University Journal of L & Business 1. For the EU context see Joshua Wright & Aurelien Portuese, "Antitrust Populism: Towards a Taxonomy" (2020) 21:1 Stan JL Bus & Fin.

[27] *Cf* Orbach, *supra* note 26 at 108.

[28] Marina Lao, "Strengthening Antitrust Enforcement within the Consumer Welfare Rubric", (2019) CPI Antitrust Chronicle at 7.

[29] *Cf e.g.* suggestions to embrace divestiture/structural separation vis-à-vis tech/digital giants on the sole basis of the latter's size. See *e.g.* Elizabeth Warren, 'Here's How We Can Break Up Big Tech' (8 March 2019), online: *Medium* <medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c>, with a particular focus on the US digital giants. For a rejection of arguments involving structural separation remedies in the *Google Search (Shopping)* case—albeit in relation to an affirmation of abusive conduct by Google and not on the sole grounds of its sheer size, see *e.g.* Daniel Zimmer, "Google zerschlagen?" (2014) 10 *Wirtschaft und Wettbewerb* 923.

[30] *Cf e.g.* Wright & Portuese, *supra* note 26.

[31] Lao, *supra* note 28 at 7. Consider also Podszun arguing in favour of a so-called 'more technological approach' (Rupprecht Podszun, "The More Technological Approach: Competition Law in the Digital Economy" in Gintare Surblytė, (ed) *Competition on the Internet: MPI Studies on Intellectual Property and Competition Law, vol 23*, (Heildelberg/New York: Springer, 2015).

[32] See *e.g.* Proposed acquisition of Ottakar's plc by HMV Group plc through Waterstone's Booksellers Ltd, CC, May 2006, and Anticipated acquisition by Boots Group plc of Alliance UniChem plc, OFT decision ME/2134/05, May 2006.

[33] See *e.g.* Proposed acquisition of Ottakar's plc by HMV Group plc through Waterstone's Booksellers Ltd, CC, May 2006.

[34] See *e.g.* Carl Zeiss Jena GmbH and Bio-Rad Laboratories Inc: a report on the

proposed acquisition of the microscope business of Bio-Rad Laboratories Inc, CC, May 2004.

[35] Government of the United Kingdom Competition & Markets Authority, Merger Assessment Guidelines (18 March 2021), online (pdf): <assets.publishing.service.gov.uk/media/61f952dd8fa8f5388690df76/MAGs_for_publication_2021_--_.pdf.>.

[36] *Supra* note 8.

[37] *Ibid.*

[38] See *e.g.* Proposed acquisition of Ottakar's plc by HMV Group plc through Waterstone's Booksellers Ltd, CC, May 2006, and Anticipated acquisition by Boots Group plc of Alliance UniChem plc, OFT decision ME/2134/05, May 2006.

[39] See *e.g.* Somerfield plc/Wm Morrison Supermarkets plc: a report on the acquisition by Somerfield plc of 115 stores from Wm Morrison Supermarkets plc, CC, September 2005.

[40] See *e.g.* Carl Zeiss Jena GmbH and Bio-Rad Laboratories Inc: a report on the proposed acquisition of the microscope business of Bio-Rad Laboratories Inc, CC, May 2004.

[41] See *e.g.* Proposed acquisition of Ottakar's plc by HMV Group plc through Waterstone's Booksellers Ltd, CC, May 2006, and Anticipated acquisition by Boots Group plc of Alliance UniChem plc, OFT decision ME/2134/05, May 2006.

[42] See *e.g.* Proposed acquisition of Ottakar's plc by HMV Group plc through Waterstone's Booksellers Ltd, May 2006.

[43] See *e.g.* Carl Zeiss Jena GmbH and Bio-Rad Laboratories Inc: a report on the proposed acquisition of the microscope business of Bio-Rad Laboratories Inc, CC, May 2004.

[44] *Ibid*, at 753.

[45] Stucke & Grunes, *Big Data and Competition Policy* 1st ed., (Oxford, UK: Oxford University Press, 2016), at 15, 298.

[46] EU, *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings* [2004] OJ C 31/3, at para. 8 and EU *Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings* [2008] OJ C 265/7, at para. 10.

[47] Stucke & Grunes, *op cit* note 45, at 279.

[48] Neil W. Averitt, Robert H, Lande & Paul Nihoul, "'Consumer choice' is Where We Are All Going—So Let's Go Together" (2011) University of Baltimore Law 1; Neil W. Averitt & Robert H, Lande., "Using the 'Consumer Choice' Approach to Antitrust Law" (2007) 74 Antitrust LJ 175.

[49] COMP/C-3/37.792.

[50] See *e.g.* France Telecom (C-202/07 P [2009]; T-340/03 [2007]); Wanadoo (COMP/38.223); and Paul Nihoul, "Freedom of choice: The Emergence of a Powerful Concept in European Competition Law" (2012) SSRN Electronic Journal, online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=2077694>.

[51] See *Realcomp II, Ltd, Petitioner, v. Federal Trade Commission* (US 6th Circ 2010).

[52] Charles Luescher, “Efficiency Considerations in European Merger Control—Just Another Battle Ground for the European Commission, Economists and Competition Lawyers” (2004) European Competition LR 72.

[53] *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2002 Comp. Trib. 16, aff'd [2003] FCJ No. 151, 2003 FCA 53, [2003] 3 FCR 529 (FCA).

[54] OECD, Summary of Discussion of the Roundtable on Public Interest Considerations in Merger Control (2017), online (pdf): <one.oecd.org/document/DAF/COMP/WP3/M(2016)1/ANN4/FINAL/en/pdf>.

[55] EU *Regulation 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union*, [2019] OJ, L 79.

[56] *Ibid.*

[57] European Commission, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, Welcoming Foreign Direct Investment while Protecting Essential Interests, (2017), online (pdf): <eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017DC0494>.

[58] *Supra* note 55.

[59] The specific objectives to be achieved are the following:

- provide a coherent framework to screen foreign direct investment in the EU on grounds of security or public order, without impinging on Member States’ national prerogatives.
- facilitate close and systematic cooperation among Member States and between Member States and the Commission with regard to the screening of certain foreign direct investment when these raise security or public order concerns, including strengthened exchange of information.
- increase transparency of foreign direct investment that may have an impact on security or public order.
- effectively address cases of foreign direct investment raising security or public order concerns in relation to projects or programmes of Union interest.
- prevent circumvention of national foreign direct investment screening mechanisms.

[60] ME/1029/04.

[61] ME/1235/04.

[62] ME/1531/05.

[63] ME/1472/05.

[64] ME/2940/07.

[65] Government of the United Kingdom Department for Business, Energy & Industrial Strategy, National Security and Infrastructure Investment Review (October 2017), online (pdf): <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/652505/2017_10_16_NSII_Green_Paper_final.pdf>.

[66] See *e.g.* European Commission, Consultation on Evaluation of procedural

and jurisdictional aspects of EU merger control (2017), online: <ec.europa.eu/competition/consultations/2016_merger_control/index_en.html>.The EU Commission issued a Consultation in 2017. The scope of the evaluation focused inter alia on the effectiveness of the turnover-based jurisdictional thresholds of the EU Merger Regulation. A debate has recently emerged on the effectiveness of the purely turnover-based jurisdictional thresholds, specifically on whether they allow to capture all transactions which can potentially have an impact in the internal market. This may be particularly significant in certain sectors, such as the digital and pharmaceutical industries, where the acquired company, while having generated little turnover as yet, may play a competitive role, hold commercially valuable data, or have a considerable market potential for other reasons.

[67] *Supra* note 65.

[68] CFIUS may also refer a transaction to the President for decision and the President has to announce a decision with respect to a transaction within 15 days of CFIUS's completion of the investigation.

[69] Standing Committee of the National People's Congress (NPCSC), *Anti-Monopoly Law of the PRC* (AML), effective as of 1 August 2008 and amended in June 2022.

[70] Prior to 2008, the Chinese competition regime was administered by three different agencies/ministries: Ministry of Commerce or MOFCOM (for mergers), the State Administration for Industry and Commerce (the SAIC), the National Development Reform Commission (the NDRC). Their competition law powers were allotted to the State Administration for Market Regulation, or SAMR, in 2008.

[71] See *e.g.* Charles McConnell, "Glencore/Teck would face significant foreign investment scrutiny" (4 May 2023), online: </globalcompetitionreview.com/gcr-fic/article/glencoreteck-would-face-significant-foreign-investment-scrutiny>. This note also adds that although neither Glencore nor Xstrata own or operate productive assets in the relevant markets in China, MOFCOM took great interest in the transaction, focusing on the importance of China as a major market for the parties and China's reliance on imports of raw materials of central importance to the wider Chinese economy.

[72] Qian Zhou, "China Further Expands the Encouraged Catalogue to Boost Foreign Investment" (1 November 2022), online:<www.china-briefing.com/news/china-2022-encouraged-catalogue-updated-implementation-from-january-1-2023/>.

[73] Lehman Brown, "China's New National Security Review Procedures for Mergers and Acquisitions Involving Foreign Investors" (2011), online (pdf): <www.lehmanbrown.com/wp-content/uploads/2014/12/Insights-2011-4.pdf>.

[74] As noted above (*supra* note 69), the Ministry of Commerce (MOFCOM) was one of three predecessors to the State Administration for Market Regulation (SAMR), in charge of merger control.

[75] *Maersk/MSC Mediterranean Shipping/CMA* CGM MOFCOM Block Notice [2014] No 46 (2014), online: <fldj.mofcom.gov.cn/article/ztxx/201406/20140600628586.shtml>.

[76] The first merger blocked by MOFCOM was *Coca-Cola/Hui Yuan* MOFCOM Block Notice [2009] No. 22 (2009), online: <fldj.mofcom.gov.cn/article/ztxx/200903/20090306108494.shtml>.

[77] *Supra* note 75, see Substantive Competition Analysis—(1) The Transaction Constitutes a Close Joint Venture, Essentially Different from Traditional Shipping Alliance.

[78] *Ibid.*

[79] *Supra* note 75, see sec 4 Substantive Competition Analysis—(2)~(5).

[80] See *e.g.* Federal Maritime Commission, "About the Federal Maritime Commission", online: <www.fmc.gov/about-the-fmc/>. The FMC's Mission Statement is to ensure a competitive and reliable international ocean transportation supply system that supports the U.S. economy and protects the public from unfair and deceptive practices. It ensures competitive and efficient ocean transportation services by:

- Reviewing and monitoring agreements among ocean common carriers and marine terminal operators (MTOs) serving the U.S. foreign ocean borne trades to ensure that they do not cause substantial increases in transportation costs or decreases in transportation services
- Maintaining and reviewing confidentially filed service contracts to guard against detrimental effects to shipping
- Providing a forum for exporters, importers, and other members of the shipping public to obtain relief from ocean shipping practices or disputes that impede the flow of commerce
- Ensuring common carriers' tariff rates and charges are published in automated tariff systems and electronically available to the public
- Monitoring rates, charges, and rules of government-owned or controlled carriers to ensure they are just and reasonable
- Taking action to address unfavorable conditions caused by foreign governments or business practices in U.S.-foreign shipping trades

[81] Federal Maritime Commission, , "P3 Agreement Clears FMC Regulatory Review" (20 March 2014), online: <www.fmc.gov/p3-agreement-clears-fmc-regulatory-review/>.

[82] Chris Dupin, "No Challenge to P3 in Europe" (4 June 2014), online: <www.freightwaves.com/news/no-challenge-to-p3-in-europe>.

[83] EU, *Regulation No 906/2009 of 28 September 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies* [2009] OJ, L 256.

[84] Hill Dickinson, "Proposed P3 Alliance between the Maersk Line, CMA CGM and MSC Mediterranean Shipping has been prohibited" (19 June 2014), online: *Lexology* <www.lexology.com/library/detail.aspx?g=6c99651b-0c2f-47bc-845a-8ee96ba3c00b>.

[85] Carlos Tejada, "China Shows Regulatory Heft by Sinking Shipping Deal" (17 June 2014), online: *Wall Street Journal* <www.wsj.com/articles/china-shows-regulatory-heft-by-sinking-shipping-deal-1403033524>.

[86] Frederic Depoortere, Andrew Foster & Ingrid Vandenborre, "Navigating

Chinese Merger Control: MOFCOM Prohibits P3 Shipping Alliance" (20 June 2014), online: *JDSUPRA* <www.jdsupra.com/legalnews/navigating-chinese-merger-control-mofc-63495/>.

[87] *Enterprise Act* 2002, C. 40.

[88] *Supra* note 35 at para 16.7. Federico Mor & Steve Browning, "Contested Mergers and Takeovers" (October 2018) Briefing Paper 5374,7, online (pdf): *House of Commons* Library <researchbriefings.parliament.uk/ResearchBriefing/Summary/SN05374>; John Fingleton, "Mergers and the Public Interest: A Wolf in Sheep's Clothing?" (2018) 3-4, online (pdf): *Fingleton associates* <www.fingletonassociates.com/publications/mergers-and-the-public-interest-a-wolf-in-sheeps-clothing/>, ; Andreas Stephan, "Did Lloyds/HBOS Mark the Failure of an Enduring Economics Based System of Merger Regulation?" 62:4 (2020) Northern Ireland Legal Quarterly, online (pdf): <papers.ssrn.com/abstract=1931007>; David Reader, 'Revisiting the Role of the Public Interest in Merger Control' (Doctoral Thesis, University of East Anglia 2015) [unpublished] at 93.

[89] Federico Mor & Steve Browning, "Contested Mergers and Takeovers" (October 2018) Briefing Paper 5374,7, online (pdf): *House of Commons Library* <researchbriefings.parliament.uk/ResearchBriefing/Summary/SN05374>; John Fingleton, "Mergers and the Public Interest: A Wolf in Sheep's Clothing?" (2018) 3-4, online (pdf): *Fingleton associates* <www.fingletonassociates.com/publications/mergers-and-the-public-interest-a-wolf-in-sheeps-clothing/>; Andreas Stephan, "Did Lloyds/HBOS Mark the Failure of an Enduring Economics Based System of Merger Regulation?" 62:4 (2020) Northern Ireland Legal Quarterly, online (pdf): <papers.ssrn.com/abstract=1931007>; David Reader, 'Revisiting the Role of the Public Interest in Merger Control' (Doctoral Thesis, University of East Anglia 2015) [unpublished], at 93.

[90] David Reader, 'Revisiting the Role of the Public Interest in Merger Control' (Doctoral Thesis, University of East Anglia 2015) [unpublished] at 106.

[91] *Ibid* at 96.

[92] Office of Fair Trading, *Lloyds TSB plc / HBOS plc Final Report* (2008), online: *Government of the United Kingdom* <www.gov.uk/cma-cases/lloyds-tsb-plc-hbos-plc>.

[93] "Plurality", online: *Cambridge Dictionary* <dictionary.cambridge.org/dictionary/english/pluralism>.

[94] *Ibid.*

[95] European Commission, "'Media Pluralism in the Member States of the European Union" (2007) Commission of the European Communities, Commission Staff Working Document SEC (2007) 32 5, online (pdf): <https://ec.europa.eu/information_society/media_taskforce/doc/pluralism/media_pluralism_swp_en.pdf>. Zrinjka Peruško, "The Link That Matters: Media Concentration and Diversity of Content" in Beata Klimkiewicz, *Media Freedom and Pluralism: Media Policy Challenges in the Enlarged Europe* (Central European University Press 2013) at 17.

[96] Craig Arnott, "Media Mergers and the Meaning of Sufficient Plurality: A Tale of Two Acts" (2010) 2 J of Media L 245, 263.

[97] The debate mostly revolved around the meaning of plurality, rather than a comparison. In *BskyB/ITV* judgement, Court of Appeal confirmed that Competition Commission's assessment of plurality could not depend on a mere quantitative criteria or a simple headcount. (See *British Sky Broadcasting Group Plc v The Competition Commission* (Court of Appeal) [114]).

[98] The then Parliamentary Under Secretary for the Department for Digital, Culture, Media and Sport.

[99] Parliament of the United Kingdom, Hansard Volume (2 July 2003), Col 913, online: <publications.parliament.uk/pa/ld/ldse0203.htm>.

[100] Competition Commission, Final Report on the Acquisition by British Sky Broadcasting Group plc of 17.9 Per Cent of the Shares in/ ITV plc [2007] at para 5.9, online: </webarchive.nationalarchives.gov.uk/ukgwa/20140402192942/http://www.competition commission.org.uk/our-work/directory-of-all-inquiries/bskyb-itv/final-report-and-appendices-glossary>.

[101] OFCOM, "Measurement Framework for Media Plurality Ofcom's Advice to the SoS for Culture, Media and Sport" (2015), online (pdf): <www.ofcom.org.uk/__data/assets/pdf_file/0024/84174/measurement_framework_for_media_plurality_statement.pdf>.

[102] *Ibid.*

[103] Office of Fair Trading was the "first phase" authority for merger assessment and the Competition Commission was the "second phase" authority. The two authorities were merged to form the Competition and Markets Authority.

[104] *Supra* note 100.

[105] *Ibid* at para 5.11.

[106] *Ibid.*

[107] *Ibid* at para 5.45.

[108] *Ibid* at para 5.39.

[109] See *e.g.*, para 6.57 in Competition & Markets Authority, "21st Century Fox, Inc and Sky Plc", online (pdf): *Government of the United Kingdom* <www.gov.uk/government/publications/cma-phase-2-report>.

[110] *Ibid* at para 6.58.

[111] *Ibid* at para 6.63.

[112] *Ibid* at para 10.6.

[113] *Ibid* at para 10.14.

[114] *Ibid* at para 10.25.

[115] *Ibid* at para 10.5.

[116] *Ibid* at para 10.27

[117] *Ibid* at para 10.31.

[118] *Ibid* at para 8.6.

[119] *Ibid* at para 8.5.

[120] *Ibid*, at para 8.13.

[121] *Ibid* at para 8.20.

[122] *Ibid* at para 8.24.

[123] *Ibid* at para 8.25.

[124] *Ibid* at para 8.41.

[125] *Ibid* at para 8.46.

[126] Bruce Lyons, David Reader &Andreas Stephan, "UK Competition Policy Post-Brexit: In the Public Interest?" (2016) Centre for Competition Policy Working Paper 16-12.

[127] *Ibid.*

[128] The *Lloyds/HBOs* case illustrates the difficulties associated with the mentioned balancing exercise.

[129] Ioannis Kokkoris, "Media Plurality Assessment as a Public Interest Concern in UK Merger Control" (2023), Competition and Regulation in Network Industries.

[130] At the time of the bid, R. Murdoch had already owned 39.1 percent of the BskyB shares and 40 percent of the NewsCorp shares.

[131] See *e.g.* "Murdoch unveils plan to take full control of BskyB" in Daily Mail Reporter (16 June 2010), online: *Daily Mail* <www.dailymail.co.uk/news/article-1286957/Murdoch-unveils-plan-control-BSkyB.html>; "Murdoch's News Corporation in BSkyB takeover bid", BBC (15 June 2010), online: *BBC News* <www.bbc.com/news/10316087>; Helia Ebrahimi et al, "BSkyB takeover: Rupert Murdoch moves towards full BSkyB takeover" (14 June 2010), online: *The Telegraph* <www.telegraph.co.uk/finance/newsbysector/epic/bsy/7827991/BSkyB-takeover-Rupert-Murdoch-moves-towards-full-BSkyB-takeover.html>. For example, BBC editor's opinion on the bid was as following: "… any agreed deal between News Corporation and BSkyB may cause problems for the UK's coalition government. … because while the Conservatives had benefited from the support of News Corporation's newspapers during the general election, the Liberal Democrats were far more hostile to Mr Murdoch's media empire."

[132] BBC News, "Cable: I have declared war on Murdoch" (21 December 2010), online: *BBC News* <www.bbc.com/news/av/business-12053175/cable-i-have-declared-war-on-murdoch>.

[133] See *e.g.* European Intervention Notice in Government of the United Kingdom, Notice: European Intervention Notice, online: </www.gov.uk/government/publications/european-intervention-notice>.

[134] BBC News, "News Corp withdraws bid for BskyB" (13 July 2011), online: BBC News <www.bbc.com/news/business-14142307>.

[135] "The Levenson Inquiry: Culture, Practice and Ethics of the Press" (archived on 22 January 2014), online: *The Leveson Inquiry* <webarchive.nationalarchives.gov.uk/20140122144906/http://www.levesoninquiry.org.uk/>.

[136] David Reader, "Accommodating Public Interest Considerations in Domestic Merger Control: Empirical Insights" (2016) SSRN Electronic Journal 45, online: <papers.ssrn.com/abstract=2736917>.

[137] David Reader, 'Revisiting the Role of the Public Interest in Merger Control' (Doctoral Thesis, University of East Anglia 2015) [unpublished] at 105.

[138] Complaint and Request for Injunction by EPIC to the US Federal Trade Commission, April 20 2007, Request for Investigation and Other Relief in the Matter of Google and Double Click, online (pdf0:<epic.org/wp-content/uploads/privacy/ftc/google/epic_complaint.pdf>).

[139] See *e.g.* Testimony of Peter Swire, Submission to the Federal Trade

Commission Behavioural Advertising Town Hall on Google/DoubleClic', (18 October 2007). Pamela Harbour and Tara Koslov, "Section 2 in a Web 2.0 World: An Expanded Vision of Relevant Product Markets" (2010) 76:3 Antitrust LJ, 769. See also EDPS Preliminary Opinion, "Privacy and Competitiveness in the Age of Big Data: The Interplay between Data Protection, Competition Law and Consumer Protection in the Digital Economy" (26 March 2014).

[140] OECD Report, Data-Driven Innovation, 2015, online (<www.oecd.org/sti/data-driven-innovation-9789264229358-en.htm>).

[141] See *e.g.* the proposed merger of Microsoft/Yahoo!, the merging parties put forth efficiency gains resulting from access to large pools of search data, which was accepted by the European Commission. See Case M 5727 Microsoft/Yahoo! Search Business decision of 18 Feb 2010, at para 163.

[142] *Ibid.*

[143] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertaking, [2004] OJ C 31, 5.2.2004, at p. 5–18.

[144] Maurice Stucke and Allen Grunes, *Big Data and Competition Policy* 1st ed., (Oxford, UK: Oxford University Press, 2016), at 15.

[145] Nils-Peter Schepp & Achim Wambach "On Big Data and Its Relevance for Market Power Assessment" (2015) 7:2 Journal of European Competition L & Practice 120 at 121.

[146] Oskar Törngren, Mergers in big data-driven markets - Is the dimension of privacy and protection of personal data something to consider in the merger review? (Thesis in EU Law, Stockholm University, 2017) [unpublished].

[147] OECD, Consumer Protection and Competition committees, Quality considerations in the zero-price economy, online: <www.oecd.org/competition/quality-considerations-in-the-zero-price-economy.htm> (2019).

[148] *Ibid.*

[149] Schepp & Wamback, *supra* note 145 at 121.

[150] See *e.g. Digital Markets Act*, Regulation (EU) 2022/1925.

[151] For a perspective introducing an element of relativization with regard to the aims question as such see *e.g.* Pablo Ibanez Colomo & Alfonso Lamadrid, , "'Forget about consumer welfare: it's the law vs discretion divide that will mark the future of competition law (my presentation at the IEE in Brussels)", (14 September 2019), online (blog): Chillin' Competition <chillingcompetition.com/2018/09/13/forget-about-consumer-welfare-its-the-law-vs-discretion-divide-that-will-mark-the-future-of-competition-law-my-presentation-at-the-iee-in-brussels/>.