# THE FUTURE OF COMPETITION POLICY IN CANADA

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# EXECUTIVE SUMMARY

Competition law has been thrust into the centre of Canadian policy debate as concerns mount about affordability, market concentration and the enormous influence of new economic giants. Our economy has changed: the rise of digital commerce has upended the way Canadians do business and consume products, leading to a new class of dominant gatekeepers and uneven growth. Following the COVID-19 pandemic, an increasing cost of living threatens to worsen inequalities and has Canadians worried about their bottom line and the security of supply chains.

With the last comprehensive review of the *Competition Act* in 2007-08, there have been increasing calls to revisit the way this law operates, and how the Government can better protect markets that benefit Canada's economy and its participants. Although reform to this law is only one of several avenues that the Government has pursued to modernize our economic frameworks, it is committed to a renewed role for the Competition Bureau in protecting the public in our modern marketplace, in line with steps taken by many of Canada's key international partners.

In asking ourselves what works and what need improvement with the *Competition Act*, there are four key themes that emerge:

- The often narrow circumstances where the Competition Bureau can intervene;
- The constraints on what the Bureau can do once it does intervene;
- The sometimes unprincipled remedies available to address certain forms of anti-competitive conduct;
- The new challenges posed by how data-driven and digital markets operate.

While amendments to the *Competition Act* contained in 2022 Budget implementation legislation took initial steps to address aspects of the law where solutions to shortcomings in the law were readily identifiable, the Government

now seeks to improve the framework more fundamentally. As it considers further, more substantial reform, the Government is canvassing a wide variety of views on how to improve the framework most effectively.

This paper explores the main pillars of the *Competition Act*, and how its provisions may be modernized to better serve the public interest. Areas where the Government believes reforms may be warranted include the following:

- better addressing **potentially harmful mergers** that currently escape scrutiny or remedy, including through the operation of the efficiencies defence, in a timely fashion;
- ensuring the necessary elements are in place to remedy unilateral forms of anti-competitive conduct, such as **abuse of a dominant position**, notably with regard to large online platforms;
- more broadly recognizing and penalizing coordinated action between businesses that is harmful to competition, such as **competitor collaborations**;
- better considering **effects on labour** throughout the Act;
- taking into account the implications of new technology and business practices for **deceptive marketing** provisions;
- bolstering the effectiveness of the **Competition Bureau's powers** in today's economy, including the limits on its ability to make binding decisions or seek information within and outside enforcement; and
- potentially expanding the scope of **private recourse**, and ensuring the effective operation of the Competition Tribunal.

# INTRODUCTION

Competition law and policy are having a moment of reckoning. With views about affordability, concentration, market power and digital platforms regularly featured in the pages of newspaper op-ed sections, vigorous debate in legislatures around the world, and numerous expert reports helping to shape public understanding of an occasionally complicated concept, marketplace framework policies and antitrust law are under the spotlight. This trend has become even more pronounced in the wake of supply chain disruptions, rising costs of staple items, and worries about the fairness and dynamism of markets.

The Competition Policy Review Panel made various recommendations in its landmark report of 2008,[1] which were largely brought into the law the following year. However, the fundamentals of Canadian competition policy were forged in the 1970s and 1980s. The evolution of our world and our economy – the rise of free trade, the Internet, and new multinational giants – has many asking whether the system is still fit for purpose.

Some aspects of competition policy provoke very strong and broad public debate, while other elements of the law are limited to technical disputes among specialists. Competition policy's role in the economy can be simultaneously overstated and understated: although competition law itself seeks to address potentially anti-competitive instances of firm behaviour, a competitive economy depends on the contributions of numerous innovative and effective businesses, as well as appropriate business frameworks and regulations across a wide swath of domains. In discussion of competition, the line can become blurred between government policy on competition, competitiveness, consumer affairs, and market regulation, all of which are subject to various policy levers at different levels of government.

The federal *Competition Act* (the Act), Canada's antitrust statute, occupies only one, but an important, part of this landscape. Canada was the world's first country with antitrust legislation, and its approach has undergone many changes over the years to keep the Act effective and adapted to its environment. The Competition Bureau (the Bureau), as its enforcement agency, has similarly reshaped itself to remain responsive, most recently leveraging a significant

1 *Compete to Win*, Final Report of the Competition Policy Review Panel, June 2008.

increase in available resources following the 2021 federal Budget to step up its enforcement capacity, including the establishment of a Digital Enforcement and Intelligence Branch.[2]

The landscape nevertheless continues to change. Digital innovation is transforming Canada's economy and improving Canadians' quality of life by enhancing productivity, diversifying the consumer experience, connecting people, and opening up new markets. The COVID-19 pandemic only reinforced the extent to which Canadian businesses and consumers rely on digital commerce to meet their needs. The rising cost of living has led to appeals for any manner of intervention that may help to keep prices in check. As concerns about inequality and inclusive growth continue to surface, and concentration of economic power raises issues not only with respect to the marketplace, but also the health of Canada's social landscape and democracy, the importance of a fair and trustworthy marketplace, where all Canadians are able to share in the benefits of the traditional and non-traditional economy, remains paramount.

Canada's competition framework, the re-examination of which began in earnest with the launch of the Digital Charter,[3] has already come under increased scrutiny in Canada's Parliament, while new legislative approaches are being brought forward in the United States and Europe. The Government is now seeking feedback on Canada's competition law and policy framework. The Government aims to ensure that the regime remains fit for purpose, able to stand up to the new challenges brought about by a changing and more digital economy.

**2** Government of Canada, *Budget 2021: A Recovery Plan for Jobs, Growth, and Resilience*, April 19, 2021.

**3** On May 21, 2019, the then-Minister of Innovation, Science and Economic Development (ISED) wrote to the Commissioner of Competition requesting that the Bureau work with competition policy leads at ISED to examine whether Canada's competition law, policy, and practice are keeping pace with the dynamism of the marketplace and continuing to build a foundation of trust for Canadians. Many of the Department's observations and suggestions in this paper have been informed by this dialogue. See the Honourable Navdeep Bains, *Letter from Minister of Innovation, Science and Economic Development to the Commissioner of Competition*, Innovation, Science and Economic Development Canada, May 21, 2019.

# CONTEXT

The Act is one of a number of federal economic framework laws of general application. Its purpose is to maintain and encourage competition in Canada, in order to achieve an interrelated set of economic objectives set out in the Act's purpose clause.[4] These objectives are: promoting the efficiency and adaptability of the Canadian economy; expanding opportunities for Canadians in world markets while recognizing the role of foreign competition in Canada; ensuring that small- and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy; and providing consumers with competitive prices and product choices.

As the Act's enforcement agency, the Bureau protects competition and consumers by investigating and pursuing remedies against cartels, abusive conduct by dominant firms, anti-competitive mergers and competitor collaborations, and deceptive marketing. In addition to enforcement, the Bureau promotes competition through its advocacy role under the Act, helping to ensure that policy, legislative and regulatory approaches support competition and innovation as much as possible.

## An evolving world

Generally sector-neutral and principles-based, the Act has not, for the most part, been updated in any fundamental respect in response to the digitization of the global economy. Notably, apart from Canada's Anti-Spam Legislation (CASL),[5] it was not until 2022 that any amendment to the Act directly sought to address digitally-based challenges following the rise of the Internet. Some experts believe the Act's framework of general application is its strength, believing the law and associated policy toolkit to be sufficiently dynamic to address emerging competition law issues regardless of the changing context.

While the law's broad applicability and flexibility may be a strength, there are clear signs that more must be done to ensure that Canada's competition law, policy and tools are optimized and sufficiently agile to keep pace with a rapidly evolving economy. Indeed, internationally, peer countries are already well down the road towards re-examining their frameworks and approaches to competition

4 *Competition Act*, s. 1.1.

5 *S.C. 2010, c. 23*.

policy in light of the digital economy. The appropriate way forward must be top of mind in Canada as well. Digital markets have seen an unprecedented rise of network effects and the conversion of data into a tool of great commercial value, not only conferring early-mover advantages on incumbents, but also in some cases erecting significant barriers to entry and expansion for competitors. Moreover, large digital firms' expansion into adjacent markets and vertical integration are allowing these players to participate directly in the markets in which they also serve as intermediaries or gatekeepers.[6]

Even the nature of competition itself is changing as firms increasingly compete for consumers in dynamic ways and on features other than price, challenging some of the traditional methods of analysis.[7] Prominent examples come from two-sided, digital platforms, which often compete for consumers with free digital goods or services that they monetize in other ways, such as advertising, the leveraging of user data to sell products, or sale of the data outright.[8] Customer data can become akin to a currency, with consumers of a "free" service paying through rights to personal or behavioural data, making privacy safeguards themselves a dimension of competition.[9]

Competition law does not seek to punish success or invalidate the benefits of a free and innovative marketplace, and recognizes that competitive markets can and do yield some barriers to entry such as intellectual property, commercial secrets and network effects. It does, however, serve as a check against forces that may undermine the competitive process and harm consumer interests. As novel practices and new realities shape business and markets in ways that could not have been foreseen when the Act was crafted, it is necessary to ensure that the Act remains well equipped for the future.

## Heightened awareness here and abroad

There has been increasing Parliamentary scrutiny of the role of competition policy. In the spring of 2021, the House of Commons Standing Committee on Industry and Technology (INDU) undertook a study of Canada's competitiveness that had numerous stakeholders calling for a review of, and reforms to, the

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**6** See Becky Chao and Ross Schulman, "Promoting Platform Interoperability", *New America*, May 13, 2020.

**7** *Non-price effects of mergers*, OECD Roundtable, June 6, 2018. See also Competition Bureau, "Highlights from the Competition Bureau's workshop on emerging competition issues", March 2016.

**8** See Marc Jarsulic, *Using Antitrust Law To Address the Market Power of Platform Monopolies, Center for American Progress*, July 28, 2020.

**9** Nathaniel Popper, "A feisty Google adversary tests how much people care about privacy", New York Times, July 15, 2019. See also, Katherine DeClerq, "Billboard toting Apple's privacy policies is put up across the street from Sidewalk Labs", CTV News, July 4, 2019.

framework.[10] In June 2021, INDU considered issues in the grocery industry, including the possibility of employer wage coordination, culminating in a report with recommendations touching the Act.[11] In February 2022, the same committee met to examine the implications of the proposed merger between Rogers Communications and Shaw Communications, issuing a report in March of that year that expressed concern over the transaction and the framework under which it is reviewed.[12] In the spring of 2022, alongside consideration by several committees of draft amendments to the Act contained in Budget legislation, INDU undertook a study of small and medium enterprises, with a notable focus on the Act.[13]

Competition policy has arisen in other Parliamentary settings as well. The House of Commons Standing Committee on Access to Information, Privacy and Ethics issued a report in December 2018 recommending that potential economic harm caused by data monopolies be studied to determine if the Act remains sufficient to tackle these problems in Canada.[14] Competition issues have also arisen in the INDU Committee's review of the *Copyright Act*.[15] In September 2021, the Senate Action Prosperity Group recommended a review of the Act within one of its reports.

Soon thereafter, Senator Howard Wetston independently commissioned a consultation paper on the topic, authored by Professor Edward Iacobucci, attracting a great many submissions, including by the Bureau itself.[16] That consultation culminated in a report summarizing areas where there was substantial consensus on the need for reform and areas where further

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**10** House of Commons Standing Committee on Industry, Science and Technology, Competitiveness in Canada, April 13-22, 2021.

**11** *Wage Fixing in Canada: And Fairness in the Grocery Sector*, Report of the Standing Committee on Industry, Science and Technology, June 2021.

**12** *Proposed Acquisition of Shaw Communications by Rogers Communications: Better Together?*, Report of the Standing Committee on Industry and Technology, March 2022.

**13** House of Commons Standing Committee on Industry Technology, Small and Medium-Sized Enterprises, April 26 – June 21, 2022.

**14** *Democracy Under Threat: Risks and Solutions in the Era of Disinformation and Data Monopoly*, Report of the Standing Committee on Access to Information, Privacy and Ethics, December 2018.

**15** *Statutory Review of the Copyright Act*, Report of the Standing Committee on Industry, Science and Technology, June 2019, at 82.

**16** Senate Prosperity Action Group, *Rising to the Challenge of New Global Realities*, September 2021; The Honourable Howard Wetston, *Consultation Invitation - Examining the Canadian Competition Act in the Digital Era*, October 27, 2021 and Edward M. Iacobucci, *Examining the Canadian Competition Act in the Digital Era*, September 27, 2021.

consultation was needed.[17] A number of other Canadian commentators and think tanks have made similar recommendations for reform proposals or legislative review.[18]

In February 2022, Minister of Innovation, Science and Industry François-Philippe Champagne announced an intention to undertake a review of the Act, and explore more immediate improvements in certain areas where solutions were readily identifiable.[19] Informed by the Bureau's enforcement experience, international best practices, and a multitude of scholarship, articles and submissions to various public fora, including the consultation led by Senator Wetston, these and other areas were ultimately addressed in 2022 Budget legislation.[20] These amendments were designed to address concrete and well-recognized challenges in the legislation and to reinforce the Bureau's enforcement capacity following its 2021 budgetary increase. These changes were intended as a "down payment" prior to embarking on broader reforms. Indeed, a number of the consensus areas for reform identified by Senator Wetston were addressed in the amendments, while areas meriting further discussion are included in this consultation. Despite these amendments – outlined below – having already been passed into law, the Government fully expects and welcomes discussion on ways of improving or reinforcing them within the wider conversation on reform.

Interest in Canada to revisit principles of competition policy mirrors a global trend, as numerous other jurisdictions have examined various aspects of their competition frameworks in recent years, usually with a particular focus on digital challenges.[21] This approach has in many cases led to the development

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**17** The Honourable Howard Wetston, "*Commentary on the Public Consultation with Respect to Examining the Canadian Competition Act in the Digital Era*", April 2022.

**18** See for example: Derek Ireland and Michael Jenkin, "Embedding consumer protection in competition policy", *Policy Options*, June 18, 2018; *At the Crossroads: Innovation and Inclusive Growth*, Remarks by Carolyn A. Wilkins, Senior Deputy Governor of the Bank of Canada at the G7 Symposium on Innovation and Inclusive Growth, February 8, 2018; Public Policy Forum, *A New North Star: Canadian Competitiveness in an Intangibles Economy*, April 2019; Mowat Centre, *New Rules for the Game: Rebooting Canada's competition regime for the digital economy*, May 28, 2019; Vass Bednar and Robin Shaban, "Creating a more competitive country", *National Post*, April 9, 2021.

**19** *Minister Champagne maintains the Competition Act's merger notification threshold to support a dynamic, fair and resilient economy*, Innovation, Science and Economic Development Canada, February 7, 2022.

**20** *Budget Implementation Act, 2022, No. 1*, assented to June 23, 2022.

**21** See, for example: *Unlocking digital competition, Report of the Digital Competition Expert Panel* [United Kingdom], March 2019 (Furman Report); *Competition policy for the digital era*, Special Advisers' Report to the European Commission's Directorate-General for Competition, April 2019; *Common Understanding of G7 Competition Authorities on "Competition and the Digital Economy"*, June 5, 2019; *Digital platforms inquiry - final report*, Australian Competition & Consumer Commission, July 26, 2019; *Stigler Committee on Digital Platforms - Final Report*, Stigler Center for the Study of the Economy and the State, September 16, 2019; *Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations*, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary [United States], October 2020; *Power to the People: Stronger Consumer Choice and Competition so Markets Work for People, Not the Other Way Around*, an Independent Report by MP John Penrose [United Kingdom], February 2021. In late 2021 the G7, under the United Kingdom's presidency, published a compendium of member approaches: G7, *Compendium of approaches to improving competition in digital markets*, November 29, 2021.

of legislative proposals to modernize competition laws or enact new rules governing the conduct of digital giants, the creation of specialized units, as well as numerous high-profile investigations under the existing frameworks.[22] Given the worldwide presence of the firms in question, and the borderlessness of their commercial activity, the Canadian marketplace is undoubtedly affected by each of these developments. The issues surfacing in the interconnected, modern economy are global in scope, placing an emphasis on international coordination and convergence. This means that Canada must also do its part to ensure that our rules facilitate not only a dynamic, competitive economy at home, but also equip us to continue as a capable partner in the global push for fairness, inclusion and prosperity in the world's new marketplace.

This groundswell of international interest in the role of competition law and policy in making a better marketplace suggests that a critical examination is timely. The interest with which many Canadians observe the rapidly changing economy, and the impact felt by consumers, businesses and workers in all sectors, has increased the urgency for the Government to take appropriate action. With economic fundamentals being reconsidered and new dynamics apparent in the marketplace, the time to reflect and act is now.

## The question at hand

The fundamental question may be: what is competition law for? To some the answer is straightforward (e.g. pursuit of efficiency or a check against market power), while others may perceive competing or diverse goals that may need to be reconciled. The Act's purpose clause, noted above, has established general direction since the law took effect in its current form in 1986. As the Act is opened for comprehensive review, many submissions will undoubtedly explore whether this approach remains fit for purpose, and such views are welcome. That said, debating the purpose clause and its potential impact cannot be divorced from the rules set out in the Act and how they can be enforced. For ease of discussion, this paper assumes that the objectives of the *Competition Act* have for the most part not changed, and focuses on how the substantive provisions of the law could be improved to better achieve them in the current environment.

**22** Paul Mozur, Cecilia Kang, Adam Satariano and David McCabe, "A Global Tipping Point for Reining in Tech Has Arrived", *Competition Policy International*, April 21, 2021; Jonathan Keane, "The EU's new sweeping rules for Big Tech could soon be reshaped and look different", CNBC, April 21, 2021; Bill Baer, "How Senator Klobuchar's proposals will move the antitrust debate forward", Brookings, February 8, 2021; Cecilia Kang, "Lawmakers, Taking Aim at Big Tech, Push Sweeping Overhaul of Antitrust", *New York Times*, June 11, 2021; "ACCC mandatory code of conduct to govern the commercial relationship between digital platforms and media companies", Joint media release with the Hon. Paul Fletcher MP, Minister for Communications, Cyber Safety and the Arts, April 20, 2020;

In Canada's enforcement framework, the Bureau acts as a law enforcement agency, investigating instances of alleged anti-competitive or otherwise unlawful conduct. In the civil enforcement context, the Bureau's chief, the Commissioner of Competition, seeks remedies as a party to the proceeding before an external adjudicator in a court-like process, while in a criminal context the matter is transferred to the Public Prosecution Service of Canada for prosecution in the criminal court system. Most – but not all – of the Act's enforcement provisions are principles-based, tied to the establishment of harm, or potential harm, to competitive intensity through select forms of conduct. The Act does not proactively dictate how to conduct business, allocate resources among stakeholders, or designate entrants, participants, winners or losers in the free market. Direct management of business conduct, through codified rules or *ex ante* structures or regulation – while tremendously influential to the state of competition – fall generally outside the Act's purview, and in many cases are reserved for provincial and territorial jurisdiction in Canada's federal system.

This consultation considers potential improvements to the above system of competition law enforcement, be it in the content of specific enforcement provisions or within the system as a whole. While competition policy, in today's economy especially, intersects with other areas of focus – privacy, security and disinformation, among others – the required government response to the challenges of the information age is multi-faceted, and happening across numerous areas.

The intersection of privacy, personal information and competition, including data mobility, have long been the subject of interest and debate.[23] The Government's designs on reform to the handling of information in commercial contexts has served as the centrepiece of the Digital Charter, ultimately culminating in the Government's introduction of Bill C-27, the *Digital Charter Implementation Act* to ensure the privacy of Canadians, introduce new rules to strengthen trust in the development and deployment of AI systems, and establish the Personal Information and Data Protection Tribunal.[24] Communications policy faces not only questions of a competitive marketplace, but the proliferation of social harms, with some observers suggesting that the market power and opacity

**23** In Canada, compliance with federal privacy law was raised as a potential justification for anti-competitive conduct in a prominent competition law case, *The Commissioner of Competition v. The Toronto Real Estate Board*, 2016 Comp. Trib. 7. In Germany, a breach of privacy rules has been also pursued as a violation of competition law: *Bundeskartellamt prohibits Facebook from combining user data from different sources*, February 7, 2019. See also, *Digital Citizen and Consumer Working Group Report on the Collaboration between Data Protection, Consumer Protection and other Authorities for Better Protection of Citizens and Consumers in the Digital Economy*, International Conference of Data Protection & Privacy Commissioners, October 2018; Competition Bureau Submission to the OECD Competition Commission, Roundtable on Consumer Data Rights: Impact on Competition, June 12, 2020; OECD, *Quality considerations in digital zero-price markets*, Background note by the Secretariat, November 28, 2018.

**24** Bill C-27, *Digital Charter Implementation Act, 2022*.

of unregulated digital platforms may be contributing factors,[25] and calling for the Bureau to be among the agencies involved in a regulatory solution.[26] The Government has introduced Bill C-11, the Online Streaming Act, reforming the Broadcasting Act for the Internet age,[27] and established an expert advisory group on online safety to provide advice on how to design the legislative and regulatory framework to address harmful content online.[28] The Online News Act, Bill C-18, seeks to rebalance the relationship between digital platforms and news providers.[29] Competition policy in other specific sectors, such as banking,[30] implicates a diverse array of federal, provincial and territorial actors. Even at the macroeconomic level, the Bank of Canada has suggested that the transmission and conduct of monetary policy is linked with the contestability of markets in the digital age.[31]

These issues cross paths with competition policy and may in certain cases be addressed incidentally, or in part, by competition law enforcement.[32] As the Government advances its policy objectives in the various forms and fora outlined above, however, the below discussion zeroes in on the Act as the next piece of a holistic puzzle that shapes the way Canadians buy, sell and thrive in today's economy.

## A taxonomy of challenges

In launching this consultation, the Government ultimately seeks to identify the best ways to modernize Canada's competition law framework, and address the above challenges in a way that creates the greatest benefit for the greatest number of Canadians – consumers, businesses and workers alike, across sectors. The high level objective of the Act – to maintain and encourage competition in Canada – remains uncontroversial, but the tools and processes in place to realize the end goal remain subject to competing views.

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**25** *Digital Platforms Inquiry Final Report*, note 21. See also Sally Hubbard, "Fake News is a Real Antitrust Problem", *Competition Policy International*, December 2017.

**26** *What We Heard Report*, Broadcasting and Telecommunications Legislative Review Panel, June 2019.

**27** Bill C-11, *An Act to amend the Broadcasting Act and to make related and consequential amendments to other Acts*, introduced February 2, 2022.

**28** *Backgrounder: Government of Canada announces expert advisory group on online safety*, Heritage Canada, March 30, 2022.

**29** Bill C-18, *An Act respecting online communications platforms that make news content available to persons in Canada*.

**30** *Open Banking: What it Means for You*, Report of the Senate Standing Committee on Banking, Trade and Commerce, June 2019.

**31** *Why Do Central Banks Care About Market Power?*, Presentation by Carolyn A. Wilkins, Senior Deputy Governor, Bank of Canada, April 8, 2019.

**32** See, for example, the 2020 consent agreement between the Bureau and Facebook for misleading claims with respect to its privacy and personal information policies. The settlement concerned deceptive marketing by Facebook about these policies, but not Facebook's handling of this information as such.

The Government wishes to optimize the functioning of this framework, ensuring that the Bureau is in the best position to protect dynamic markets without impinging on the innovation and creativity that shape those very markets. Such markets should also ensure an equitable opportunity for small- and medium-sized enterprises to participate, while providing consumers with the best product choice and quality at reasonable prices, and workers the best prospects of mobility and prosperity.

In considering the need for reform to the Act, four central themes emerge based on enforcement experience to date, stakeholder commentary and international best practices:

- **A high bar for intervention:** the Bureau may not be able to take action against potentially harmful forms of conduct because of the specific legal tests to be met. While overenforcement is not desired, the field cannot be tilted too steeply against necessary intervention if an effective watchdog is to function.
- **The extent of the Bureau's role:** even where the law gives the Bureau licence to investigate and seek remedies, the Bureau remains subject to a number of constraints that limit its ability to act in an authoritative and timely fashion.
- **Consistency in enforcement and remedies:** some forms of conduct can be dealt with criminally or civilly, while others cannot; there are different forms of sanctions and different forms of public and private recourse that should be reconsidered to best serve the public.
- **The challenge of data and digital markets:** unsurprisingly given the above discussion, questions continue to arise with respect to the interaction of a fast-evolving economy and a competition statute that emerged in the 1980s. What new understanding of harmful conduct, if any, must a competition enforcer have?

These themes run throughout the following discussion, which examines various aspects of the law in considering to what extent reform is needed.

Submissions are welcome both on the directions presented and questions raised within this paper, as well as on other suggestions and recommendations that stakeholders may find relevant. Experiences of a wide variety of businesses, consumers and workers, and what impact the current system and potential changes may have upon them, will particularly help inform Government decision-making.

Given the economic interests at stake in competition policy and the many ways in which changes to the framework can affect those interests, the Government does not expect a consensus will be reached among all actors on all elements of reform, and that is not the objective of the consultations undergirded by this paper. Decisions will need to be made as to how best to balance the many interests at stake in a changing economy, with those of Canadians placed at the centre. Consultations will help ensure that reforms are well-considered and well-designed.

After a recap of the 2022 amendments, the following five sections of this paper address the main pillars of the Act: merger review; unilateral conduct; competitor collaborations; deceptive marketing; and administration and enforcement processes. The discussion highlights various issues or shortcomings, particularly as they relate to the rise of new business models and practices. Throughout the discussion, where issues or shortcomings with the Act are identified, proposed pathways forward are discussed, including those drawn from international practice.

# 2022 AMENDMENTS

Bill C-19, the *Budget Implementation Act, 2022, No. 1*, contained amendments to the Act as "a preliminary phase in modernizing the competition regime" (hereinafter the "BIA Amendments"). Foreshadowed by the Minister's announcement of February 7, 2002, the amendments sought to address "shortcomings in the Act that can easily be addressed and move Canada in line with international best practices."[33] The changes built on many years of enforcement experience and public debate to address issues that lessened the effectiveness of competition enforcement and helped make preliminary improvements in advance of consultation on deeper reform. These included:

- Criminalizing naked wage-fixing and no-poaching agreements among employers in recognition of their manifestly anti-competitive effect on the labour market;
- Broadening the definition of an "anti-competitive act" for the purposes of abuse of dominance to ensure that it includes intended harm directed both toward a competitor as well as toward competition itself. This helps capture forms of unilateral anti-competitive conduct that previously could not be addressed due to case law.
- Allowing private parties to bring cases before the Competition Tribunal for abuse of dominance, so as to supplement public enforcement and better hold dominant firms accountable;
- Clarifying that "drip pricing," where unattainable prices are advertised without obligatory fees, is understood as a form of conduct that can be addressed under the Act's deceptive marketing provisions;
- Removing the maximum value of criminal penalties for cartel offences, and reformulating civil administrative monetary penalty maximums based on benefit derived, to better reflect the tremendous volumes of commerce that can be affected by anti-competitive or deceptive conduct, removing arbitrary caps;

**33** Bill C-19, *An Act to implement certain provisions of the budget tabled in Parliament on April 7, 2022 and other measures*; Budget 2022: *A Plan to Grow Our Economy and Make Life More Affordable*, section 2.2.

- Adding new considerations for the Competition Tribunal when weighing applications for abuse of dominance, mergers, and competitor collaborations, to explicitly recognize emerging features of the digital economy such as non-price competition, including through consumer privacy, and barriers to entry such as network effects;
- Instituting an anti-avoidance provision for merger notification to respond to transactions structured so as to avoid mandatory notification;
- Ensuring consistency in the application of production orders to foreign corporations and affiliates; and
- Improving clarity in certain areas, such as how time is computed for merger review, or better describing the conditions for an interim merger order.

While making more immediate updates to the Act, several of these changes are associated with broader questions, and potential further avenues of reform, that arise in the following sections.

# MERGER REVIEW

Excessive corporate consolidation lessens competition, potentially raising prices and harming consumer choice and innovation. The Act's merger review regime dates from 1986, with the most substantial recent reform related to the process for notifiable mergers, a key part of the 2009 amendments that followed recommendations of the Competition Policy Review Panel.[34] While all mergers are reviewable by the Bureau to ensure that they will not cause a substantial lessening or prevention of competition (SLPC), only those that surpass a $400-million threshold for the size of parties, and an annually-indexed threshold for the size of the transaction ($93 million in 2022), are required to provide advance notification to the Bureau and delay closing until the lapse of statutory waiting periods.

While mergers are reviewed by the Bureau on a case-by-case basis and competitive threats addressed, lawful concentration can continue to occur in the economy.[35] There may be several reasons for this through merger activity, including the cumulative effect of acquisitions that do not surpass the SLPC test on their own, mitigating factors at the time of merger such as market-wide change or potential new entrants, or the operation of the Act's efficiencies defence. Even without mergers, concentration can increase when businesses exit, or when some businesses gain share from others by offering better products and services, a natural and expected result of the competitive process.

Concerns have been raised with respect to the reach of the Act's remedial framework, given the potentially harmful effects of concentration. The more prominent role of innovative start-up firms in the digital economy has also accelerated calls for reform. Non-notifiable, yet ultimately important acquisitions may evade detection, while even known mergers may cause competitive harm that is too difficult to forecast with precision at the time of acquisition, yet too late to remedy once it becomes apparent.

Some considerations that have stoked debate in recent years are outlined below.

**34** *Compete to Win*, note 1.

**35** See Ray Bawania and Yelena Larkin, "Are Industries Becoming More Concentrated? The Canadian Perspective", SSRN, March 20, 2019.

# FOCUS ON

## Acquisition of potential innovators

The digital economy has undoubtedly lowered certain barriers to starting a business, contributing to competition and innovation. For example, a new e-commerce business can "set up shop" online and ship its products directly from manufacturer to client, eliminating the need for a physical location to sell or store its products, and saving significant time and money. Similarly, apps can be developed by small teams with limited overhead and made available to millions of users through mobile devices.

In the face of this reality, however, there is concern that incumbents are seeking to acquire new and potentially innovative firms with the hope that this investment will help them stay on the right side of any disruptive technology or suppress it outright. This may be done when start-ups are still in their early stages with no or minimal revenues, but showing potential for significant growth. Incumbents may acquire these smaller innovative firms in overlapping or adjacent markets, resulting in a loss of existing and/or future competition.

While acquisitions can be used strategically to suppress competition, they can also provide the incentive or capital investment necessary for new firms to innovate in the first place. For example, the prospects of an eventual sale to a large incumbent may be an end-goal and a means by which an innovative start-up intends to gain significant returns for its investors or bring its innovation to a larger customer base.[36] The merging of two firms can lead to lower prices and allow for faster adoption of innovative products and services given the incumbent's financial means, economies of scale, existing distribution networks, as well as brand familiarity. Alternatively, selling one venture could ultimately fund subsequent start-up activity. The concern is not with acquisitions per se, but on their potential to suppress or eliminate competition.

**36** The opposite effect on innovation incentives could also be imagined, where a "kill zone" is "established by the large digital firms in which start-ups hesitate to invest due to an anxiety that successful innovation might be copied or bought up easily." See *Competition policy for the digital era*, note 21, at p. 117.

## Ability to Take Timely Action

### Evolution of markets

Concern about pre-emptive acquisitions of innovative or disruptive firms is not unique to the digital economy. However, the likelihood that such acquisitions will fall below pre-merger notification thresholds, or otherwise avoid sufficient scrutiny, is particularly acute in this realm.[37] A nascent digital competitor may not yet have significant Canadian assets or sales at the time of acquisition but nevertheless be a promising future competitor. While the Bureau may, through its own diligence, identify and thereafter review non-notifiable mergers, timely detection remains an issue, given the Bureau's limited options for redress after the expiration of the one-year statutory limitation period, described below.[38] This is compounded by the possibility that firms will behave strategically, for example by not publicly announcing mergers or altering business practices until the capacity of the Bureau to act has expired.

Additionally, even where detection is not an issue, it would seem that there are at least two possible substantive challenges to applying the merger provisions' competitive effects test to acquisitions in fast-moving digital markets. The first concerns where harms to non-price dimensions of competition, such as innovation, may be difficult to quantify and are, accordingly, given less weight by the Competition Tribunal or appeal courts. The second challenge is the substantive requirement that the Bureau show, on balance of probabilities, that harm to competition is "likely" to happen within a "discernible" time frame, and that this harm would likely be "substantial".[39] Given the complexity, dynamism and pace of change in many markets, especially digital ones, these specific tests may be highly impractical.

The importance of taking remedial action in advance of a transaction cannot be understated, not only because of the inherent difficulties in unwinding a consummated merger, but also because of the one-year limitation period established by the 2009 amendments. Where harmful competitive effects do not become apparent within the first year after completion, an increasingly likely scenario in the dynamic markets that typify the digital economy, the only means

**37** The UK's Furman Report found that the five largest digital firms had made more than 400 acquisitions in the previous decade, with none blocked, and few subject to scrutiny or conditions. See *Unlocking Digital Competition*, note 21, at p. 12; See also Chris Alcantara, Kevin Schaul, Gerrit De Vynck and Reed Albergotti, "How Big Tech got so big: Hundreds of acquisitions", Washington Post, April 21, 2021.

**38** To mitigate this problem, the Bureau has expanded its merger intelligence gathering activities. See, *No River too Wide, No Mountain too High: Enforcing and Promoting Competition in the Digital Age*, Remarks by Commissioner of Competition Matthew Boswell, Canadian Bar Association Competition Law Spring Conference, May 2019.

**39** *Tervita Corp. v. Canada (Commissioner of Competition)*, [2015] 1 SCR 161, at paras 67-79.

to address the consequences of the concentration would arise under the Act's anti-competitive conduct provisions, such as abuse of dominance.[40] Some have argued that the difficulty of predicting future events necessitates that this be the solution.[41] Note, however, that this approach cannot remedy consequences of concentration, such as higher prices, that are not themselves an abuse. Even in true cases of abuse, the more specific criteria associated with these provisions and their jurisprudence form some of the most complex and costly matters addressed by the Bureau, and contain a three-year limitation period of their own. Moreover, the ability to impose structural remedies such as divestiture is considerably more difficult, as the law requires that abuse orders be limited to what is "reasonable and … necessary to overcome the effects of [a] practice".[42]

Some proposals have surfaced to better address the challenge of addressing uncertain competitive harm before it happens. One suggestion put forth by the UK's digital competition expert panel[43] is to take a "balance of harms" approach when assessing a merger, where both the likelihood *and* magnitude of the potential impacts of a merger are weighed in considering whether to block or allow a merger. The panel claimed that this approach would allow for a more sound economic assessment of the future impact of digital mergers, although it may not be practical in all cases.[44] Australia's Digital Platforms Inquiry produced the recommendation that certain considerations be made more explicit in the law's merger review provisions, including the likelihood that the acquisition would result in the removal from the market of a potential competitor, and the nature and significance of assets being acquired, including data and technology.[45] The outgoing head of its competition authority subsequently made further suggestions, including a more flexible definition for "likelihood" of effects, presumptions for already-dominant firms, and special tests for digital platforms.[46]

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**40** Compare, for example, the litigation launched by the U.S. Federal Trade Commission in December 2020 portraying Facebook's acquisitions of Instagram and WhatsApp as a form of monopolistic strategy, with the transactions already been cleared under merger review. See Federal Trade Commission, "FTC Sues Facebook for Illegal Monopolization", December 9, 2020; Alexei Oreskovic, "Facebook says WhatsApp deal cleared by FTC," Reuters, April 10, 2014; Federal Trade Commission, "FTC Closes its Investigation into Facebook's Proposed Acquisition of Instagram Photo Sharing Program", August 22, 2012.

**41** See C.D. Howe Institute Competition Council, "Krane, Musgrove – The Danger of Precautionary Principle Challenges to Nascent Mergers", Intelligence Memo, February 24, 2021.

**42** Compare *Competition Act* s. 79(2) to s. 92(1).

**43** *Unlocking digital competition*, note 21.

**44** Charley Connor, "CMA responds to Furman report", *Global Competition Review*, March 22, 2019.

**45** *Digital platforms inquiry - final report*, note 21, at p. 105. The BIA amendments partially embraced this approach in Canada, making certain considerations such as network effects and entrenchment of incumbents explicit.

**46** Rod Sims, Chair of the Australian Competition & Consumer Commission, "Protecting and promoting competition in Australia," August 27, 2021.

One of the antitrust reform bills before the U.S. Senate would modify the legal test for merger intervention from substantial lessening of competition to "an appreciable risk of materially lessening competition".[47] Some have suggested reversing the burden of proof for certain types of mergers.[48] In the proposed U.S. Senate bill, these would be based on significant increases in concentration, acquisitions by dominant firms, or mergers with a value that surpasses U$5 billion. Similar measures could be considered in Canada either for transactions or firms of certain sizes, or in particularly concentrated industries. Alternatively, a more stringent competition test, or threshold for notification, could be the state of affairs for designated sensitive sectors, comparable to the *Investment Canada Act* before 2009 amendments.[49]

Whatever path forward, there would be an accompanying advantage in enabling the Bureau to conduct more merger retrospectives, as a means of refining analytical approaches and applying lessons learned to future cases. This could potentially occur with the aid of new information-collection tools for this purpose.[50]

In considering how merger review law could be modified, expanded or updated to ensure its ongoing relevance in the modern context, care will need to be taken to avoid business uncertainty or the discouragement of investment. Regardless of the approach, the challenge will be to ensure a clear, forward-looking framework to assess mergers that looks beyond current market conditions, and examines how transactions may affect the future welfare of market participants.

## Timing and thresholds – revisiting 2009

In spite of the above considerations, in both traditional and emerging markets, advance remedial action will not always be possible, and the Bureau may be required to address a completed merger, as appears to be increasingly the case. In 2009, the limitation period was reduced from three years to one, to complement the new two-stage merger review system that allowed the Bureau to receive more vital information earlier and as a matter of course. However, no such consideration applies to non-notifiable mergers, which also benefited from the shortened period. The result is that parties to non-notifiable transactions need only wait for one year after completion – much of which

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**47** *Competition and Antitrust Law Enforcement Reform Act of 2021*, SIL21191, 117th Cong. (2021).

**48** See *Stigler Committee on Digital Platforms - Final Report*, note 21, at p. 98.

**49** See Innovation, Science and Economic Development Canada, *Investment Canada Act: Annual Report – 2009-10*.

**50** Such studies can be resource intensive and difficult to conduct in the absence of good public data or formal information-gathering powers. For some additional considerations, cf. U.S. Federal Trade Commission, *FTC Hearing on Merger Retrospectives*, Hearings on Competition and Consumer Protection in the 21st Century, April 2019.

may be spent reorganizing the new company in any event – before reaping the benefits of diminished competition, such as by raising prices. It is precisely these structural effects, which may be unreachable by anti-competitive conduct investigations, that merger control is meant to guard against. There is thus a case that the merger limitation period should be readjusted, whether absolutely or conditionally, at least for non-notifiable mergers. One suggestion worth noting would be to make the expiration of a limitation period conditional on notification on a voluntary basis, thus ensuring that the Bureau is either aware of, or will later have the opportunity to address, potentially harmful transactions.[51]

Despite the adoption of two-stage merger review in 2009, which conditioned the parties' ability to close a transaction on the fulfilment of a request for more information, remedial timelines remain problematic. By statute, the Bureau only has 30 days from the provision of information to decide whether a merger must be challenged, at which point it can also seek interim relief to prevent the merger pending litigation (s. 104). However, the bottom line is that the increased complexity of mergers has made it challenging or impossible to review all of the new information, prepare court filings, obtain a hearing date, and complete the hearing all within the 30 days, with the result that parties can still close – and potentially harm the market irreversibly – before the opportunity for interim relief even arises. The alternative is to seek, pre-emptively, an interim order that does not depend on an intent to challenge (s. 100), but likely based on insufficient information, and without any certainty that it will be granted or even heard in time. In practice, the statutory timelines offer very little leverage, and the Bureau therefore depends on the willingness of the parties to enter into timing agreements to allow a full review. If the parties are willing to risk an intervention after closing, there may be little that the Bureau can do to safeguard the marketplace.[52] It is worth investigating whether a more practical mechanism could be put in place for short-term interim relief, from the time that the Commissioner declares an intent to seek an injunction pending a challenge, to the time the injunction is decided.

The BIA Amendments added an anti-avoidance provision to ensure that transactions structured for the purpose of evading notification thresholds are in fact treated as notifiable. Similar anti-avoidance or "creeping acquisition"

**51** Cf. the voluntary notification scheme for airline joint ventures in the *Canada Transportation Act*, S.C. 1996, c. 10, ss. 53.7 – 53.84; see also Aldo González and Daniel Benítez, "Optimal Pre-Merger Notification Mechanisms: Incentives and Efficiency of Mandatory and Voluntary Schemes," Policy Research working paper no. WPS 4936, World Bank, 2009.

**52** This was one of the central issues in CT-2021-002, *The Commissioner of Competition v. Secure Energy Services Inc.* While the Federal Court of Appeal would later affirm the Tribunal's jurisdiction to provide short-term interim relief even pending the hearing for an interim injunction under s. 104, the same challenges of needing to build an urgent case in the short time period afforded still apply. See *Canada (Commissioner of Competition) v. Secure Energy Services Inc.*, 2022 FCA 25.

mechanisms can be found in both U.S. and EU law.[53] However, the formula for calculating notification thresholds themselves has not been altered since 2009, when the "size of transaction" threshold, based on the assets or revenues (from sales in or from Canada) of the parties being acquired, was indexed to growth in the gross domestic product and updated annually. The "size of parties" threshold remained fixed at $400 million in assets or revenues in, from or into Canada. The methods of calculation can lead to some unprincipled results, such that a foreign merger that affects a great deal of commerce into Canada may fail to surpass the size of transaction threshold, while a sale to a completely new entrant can be notifiable due to the acquired company alone. When combined with observations that the Canadian thresholds are higher even than in the United States – despite a much smaller economy – it is clearly time to re-examine notification criteria, even beyond the above-noted concerns with respect to nascent firms.[54]

## Efficiencies

The Act's merger efficiencies defence (s. 96), permitting otherwise anti-competitive mergers to withstand legal challenge where they generate sufficient efficiencies to exceed and offset the competitive harm, was adopted with the passage of the Act in 1986.[55] It was intended to represent a trade-off between domestic concentration and international competitiveness for Canadian firms. It is a provision arguably unique among the competition frameworks of Canada's peers, the effect of which, owing in part to jurisprudence, is to allow mergers to proceed even where they lead to significant harm to consumers in the form of higher prices and/or reduced choices. Transformation of the Canadian economy through trade agreements and globalization since the mid-1980s, as well as subsequent cases allowing for significant concentration even where the need for a Canadian "champion" in the market was not evident, have undermined a key rationale for the defence. Critics note its potential for adverse impact on consumers without necessarily generating any of the intended benefits in global markets.

Canada is in fact one of only a few countries worldwide where efficiencies are a full defence to otherwise anti-competitive mergers. In the United States, Australia, the European Union and the United Kingdom, efficiencies may be considered as part of the competitive effects of a merger, but efficiency gains do

**53** See 16 CFR § 801.90 in the U.S., based on an avoidance purpose, or article 5(2) of the EU's *Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings*, which takes a time-based approach.

**54** See the submission of Jason Gudofsky and Kate McNeece to the House of Commons Standing Committee on Industry, Science and Technology's study, "Competitiveness in Canada", May 28, 2021.

**55** While the defence exists both for mergers and competitor collaborations, the latter has never been tested since its introduction in 2010, and thus commentary has focused exclusively on the application of the defence in merger review.

not form a full statutory defence.[56] Additionally, Canada's approach is relatively unique in terms of how the efficiencies are measured and weighted against anti-competitive effects when the defence is invoked – the so-called "welfare standard".

Price increases following a merger may result both in a deadweight loss to the economy, as well as a transfer of income from consumers to producers. Canada's major trading partners take a "consumer surplus" approach to the welfare standard, under which wealth transfers from consumers to producers are seen as an anti-competitive effect of the merger – *i.e.* a merger's resource savings must ultimately result in an overall consumer benefit (such as strengthening competitive pressure upon a non-merging incumbent) for the merger to proceed.[57] Until the seminal 2001 *Superior Propane* appeal,[58] Canada's approach was one of "total surplus", meaning that the wealth transfer is considered to be a neutral effect. However, the court in *Superior Propane* did not prescribe a single standard, preferring instead to allow for flexibility depending on the facts of a given case.[59]

Canada's unusual approach, and the negative competitive effects that it can promote, became particularly noteworthy following the Supreme Court of Canada's 2015 *Tervita* ruling, which placed a tremendous emphasis on quantification of efficiency considerations, noting that qualitative effects would "assume a lesser role in the analysis in most cases".[60] The Court permitted that even marginal efficiencies could salvage an otherwise anti-competitive merger,

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**56** The OECD has produced a direct comparison in *The Role of Efficiency Claims in Antitrust Proceedings*, May 2, 2013. For example, in the United states, efficiencies must ultimately be pro-competitive: "Efficiencies from the transaction may increase the firm's ability to compete, and may benefit consumers through lower prices, improved quality, enhanced service, or new products" (p. 189); in Australia, efficiencies need not be taken into account although may be considered if they will lead to greater competition (p. 63); in the U.K., efficiencies may be considered at the competitive effects analysis and remedies stages, *e.g.* if rivalry will be enhanced or consumers will benefit, but they do not work as a defence on their own (p. 173); in the EU, the role of efficiencies in competitive effects analysis is circumscribed, and they will generally be required to benefit consumers and not to limit competition (p. 89); in Germany, the effects of efficiencies on the market under scrutiny can be considered, but "[m]ere cost savings or improved capacity utilization are not sufficient" (p. 98).

**57** The label "consumer" surplus is understood as a rhetorical simplification as it includes not just end consumers, but also business customers. Moreover, competition agencies can and do pursue cases that reduce competition among competing buyers resulting in harm to upstream suppliers. Some have therefore suggested a move to broader, more accurate terminology such as "trading party" standard or "protecting competition" standard to encompass the broad range of competitive injury about which competition law is concerned. See, for example, Carl Shapiro, "Antitrust: What Went Wrong and How to Fix It", *Antitrust Magazine,* Vol. 35, No. 3, Summer 2021.

**58** *Commissioner of Competition v. Superior Propane Inc.* 2001 FCA 104.

**59** Once reheard, the *Superior Propane* case itself made use of a "balancing weights" standard, which allows for differential weights on the loss in consumer surplus relative to the gain in producer surplus to determine whether the balance is reasonable. See *Competition Bureau submission to the OECD Competition Committee roundtable on Public Interest Considerations in Merger Control*, June 14, 2016.

**60** *Tervita Corp. v. Canada (Commissioner of Competition)*, note 39, at paras. 146-151.

despite non-quantified evidence raised. With the added importance of non-price competition in the digital economy, the burden of litigating an efficiencies claim is likely to become even more of a significant challenge for both firms and the Bureau, particularly with more abstract concepts such as privacy or innovation.[61]

Unsurprisingly, against this backdrop, the defence continues to be the subject of much debate among observers, striking at the heart of the Act's purpose and enforcement structure, and on whom the benefits versus harm may be conferred.[62] As a key part of this consultation, the Government is resolved to examine possible reform of the efficiencies defence. Possible ways forward could run a gamut from reform of aspects of the defence to its abolishment. Tailored approaches alone or in combination could include: considering efficiencies within the competitive effects test rather than as a full defence; shifting the elements or procedure required for establishing or contesting efficiencies; weighting the factors differently or fully adopting a consumer surplus standard; increasing the role of unquantified evidence; or limiting the application of the defence only to mergers or markets with certain characteristics.

## Merger effects on workers

The Act considers the effect of a merger or proposed merger on competition and, as discussed above, on efficiency gains. With the importance of human capital as a unique input, and Canada's commitment to inclusive growth, one may fairly question whether effects on labour ought to have a more prominent role in the equation.

Across the world, labour effects are seldom examined as determinant or relevant factors in assessing a merger's effect on competition.[63] International commentators have noted that traditional competition analysis has focused on consumer welfare and prices in particular, which may represent a narrowing of the original sociopolitical goals that led to the introduction of antitrust policy to

**61** Vass Bednar and Robin Shaban argue that "[n]ot only are many markets different (e.g., zero cost) but notions of efficiency seem outdated in a world with zero or close-to-zero marginal cost and the most valuable capital being intellectual property and human capital." Vass Bednar and Robin Shaban "The State of Competition Policy in Canada: Towards an Agenda for Reform in a Digital Era", Centre for Media, Technology and Democracy, April 21, 2021.

**62** See, *e.g.*, Ralph Winter, "Tervita and the Efficiency Defence in Canadian Merger Law", *Canadian Competition Law Review* 28:2 (October 2015): 133, versus Brian Facey and David Dueck, "Canada's Efficiency Defence: Why Ignoring Section 96 Does More Harm Than Good for Economic Efficiency and Innovation", *Canadian Competition Law Review* 32:1 (May 2019): 33.

**63** According to an OECD study, "In their merger control activity, competition authorities do not seem to have conducted in-depth analysis of monopsony power in labour markets." OECD, *Competition in Labour Markets*, February 26, 2020, p. 9. A notable outlier is the 2021 challenge of the U.S. Department of Justice to the proposed merger between publishing houses Penguin Random House and Simon & Schuster, which is largely based on concerns of monopsony power affecting authors' benefits. See Joseph M. Miller and Tinny Song, "Stop the Presses: DOJ Sues to Prevent Monopsony Resulting from Penguin Random House Acquisition of Simon & Schuster", *National Law Review* vol. XI, no. 313, November 9, 2021.

limit corporate concentration. Some have made the case that the overwhelming focus on product markets in antitrust analysis is unprincipled or the product of outdated assumptions.[64] As concentration in labour markets has been blamed for the failure for wages to keep pace with economic growth following the Great Recession, there have been calls for a more holistic analysis of merger reviews, whether within the existing framework or through new tools.[65]

In a paper commissioned by Innovation, Science and Economic Development Canada, economist Marcel Boyer notes various challenges and pitfalls of applying competition law to labour markets. These include how to integrate the role of technological change and "creative destruction", which will inevitably have an adverse effect on certain jobs, into the analysis. Another includes how to evaluate wages holistically, including insurance, pensions, training, non-static compensation, and benefits. A third involves market definition where labour is concerned, given the fluidity of labour competencies and worker mobility, among other things. Finally, the role of countervailing worker power, including through unions and recruiters, must be considered.[66]

While thought continues to evolve as to what methodology would be appropriate to evaluate labour effects in merger review,[67] there are at least two points in the Canadian system where a closer examination of labour effects could occur. First, labour could arise in the evaluation of competitive effects, namely as to whether mergers may result in distortions to the labour market, even if there are no harmful competitive effects downstream (*i.e.* an exercise of monopsonistic power rather than monopolistic). Secondly, it could be relevant in the evaluation of efficiencies, in which reduction of labour may be viewed as efficient or pro-competitive, even though workers may not be as easily redeployed as other inputs and come under obviously different, human pressures.[68]

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**64** See Suresh Naidu, Eric A. Posner and Glen Weyl, "Antitrust Remedies for Labor Market Power," 132 Harvard Law. Review 537, 2018.

**65** See, for example, José A. Azar, Ioana Marinescu, Marshall I. Steinbaum and Bledi Taska, "Concentration in U.S. Labor Markets: Evidence from Online Vacancy Data", NBER Working Paper No. 24395, March 2018, Revised February 2019; Hiba Hafiz, "Interagency Merger Review In Labor Markets", 95 Chi.-Kent L. Rev. 37, 2020; Ioana Marinescu and Herbert J. Hovenkamp, "Anticompetitive Mergers in Labor Markets", *Indiana Law Journal* 94:3, Article 5.

**66** See Marcel Boyer, *Comments on Competition Policy and Labour Markets*, CIRANO, July 26, 2022, pp. 29-36.

**67** For example, European consulting firm Oxera highlights how a pure competition policy approach would treat labour markets as analogous to product markets of their own, whereas an industrial policy approach calls for competition authorities to assess the impact of their decisions on workers as citizens and consumers rather than inputs. Oxera, "Labour markets: a blind spot for merger control?", September 30, 2019.

**68** These considerations are explored in greater detail in Russell Pittman and Chris Sagers, "A Proposed Pro-Labor Step for Antitrust", *Competition Policy International*, February 2021.

It is worth considering whether amendments to the Act could give labour a more central role in competition analyses. This could include, for example, modifying the Act's purpose clause; the addition of a consideration in the competitive effects test in s. 93 of the Act that would expressly consider monopsony power and labour effects; or modification of the efficiencies defence to address employment-based efficiencies more directly. At the same time, it is important to note that competition policy is but one tool at the Government's disposal. Employment and Social Development Canada is responsible for federal labour policy, while direct regulation occurs primarily at the provincial and territorial level. While the Act recognizes the importance of collective bargaining for the protection of workers, incorporating additional labour considerations into competition policy would be novel and, if pursued, the impact on the Act's traditional focus would need to be considered.

## FOR DISCUSSION

The Government is considering the following possible reforms and would welcome input:

- The revision of pre-merger notification rules to better capture mergers of interest.
- Extension of the limitation period for non-notifiable mergers (***e.g.*** three years), or tying it to voluntary notification.
- Easing of the conditions for interim relief when the Bureau is challenging a merger and seeking an injunction.
- Changes to the efficiencies defence, ***e.g.*** restricting its application to circumstances where consumers or suppliers would not be harmed by the merger.
- Revisiting the standard for a merger remedy, ***e.g.*** to better protect against prospective competitive harm, or to better account for effects on labour markets.

# UNILATERAL CONDUCT

The digital economy has given rise to some of the largest corporations on the planet.[69] These companies have quickly come to populate the upper ranks of stock market capitalizations and command annual profits in the tens of billions of dollars.[70] Beyond their sheer size and global reach, large digital players are integrated into nearly every facet of our daily social and economic interactions, including how we access information and what information we access on nearly any topic. With digital economic activities in Canada growing roughly 30% faster than the economy as a whole, this trend shows no sign of slowing.[71] The COVID-19 pandemic, in particular, has highlighted the extent to which digital commerce and platforms have been integrated into the mainstream economy and are heavily relied upon to conduct business and procure goods and services. In the face of widespread physical shutdowns and restrictions, e-commerce filled a void that would have been unimaginable in a pandemic response just a generation earlier.[72]

**69** Jonathan Ponciano, "The World's Largest Technology Companies In 2021: Apple's Lead Widens as Coinbase, DoorDash Storm into Ranks", *Forbes*, May 13, 2021.

**70** Jeff Desjardins, "How the Tech Giants Make Their Billions", *Visual Capitalist*, March 29, 2019.

**71** Statistics Canada, *Measuring digital economic activities in Canada, 2010 to 2017*, May 2019.

**72** Statistics Canada, *Retail e-commerce and COVID-19: How online shopping opened doors while many were closing*, July 24, 2020.

# FOCUS ON

## The rise of 'Big Tech'

The digital economy and the rise of data as a valuable currency has brought to the forefront concerns that a select few tech firms substantially control a number of core digital markets, such as online search, social media and e-commerce, and that these companies are de facto "gatekeepers" with the power to decide who is allowed to compete in a market and the terms upon which such competition will occur.[73] This power has the potential to extend further into the physical economy with the growth of the "Internet of Things".[74]

Much of the success of large digital platforms is the reward for innovation and producing compelling goods and services, offered in many cases at zero monetary cost to the consumer, and enhanced by critical network effects. While such forms of gaining scale are not problematic, the size and breadth of activities of digital firms raise questions about the efficacy of Canadian competition enforcement in the event of anti-competitive conduct by these firms.

Another issue raised is that these companies have both the means and opportunity to forgo profits to enable aggressive expansion and increased diversification.[75] While this type of behaviour may benefit consumers in the short run, the impact is less clear in the long run if markets become harder to contest and incentives for innovation dim.

It is still fiercely debated whether digital markets and their 'Big Tech' industry leaders present new or unique challenges under the unilateral conduct provisions of the Act. What seems apparent, however, is that some issues previously identified with these provisions may be of even greater concern in the digital era. For instance, a company that controls a platform may also compete on it, and may push users towards purchasing its own products and services, rather than those offered by rivals. This conduct,

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**73** The UK's digital competition expert panel recently expressed concern about three distinct forms of gatekeeping power that large digital platforms may have, namely "the ability to control access and charge high fees; the ability to manipulate rankings or prominence; and the ability to control reputations". See *Unlocking digital competition*, note 21, at p. 41. See also Lina M. Khan, "The Separation of Platforms and Commerce", *Columbia Law Review* 119:4 (2019): 973.

**74** Louis Columbus, "2018 Roundup of Internet of Things Forecasts and Market Estimates", *Forbes*, December 13, 2018; *Unlocking digital competition*, note 21, at 47; *Competition policy for the digital era*, note 21, at 33-34, 105-06.

**75** Lina M. Khan, "Amazon's Antitrust Paradox", *Yale Law Journal* 126:3 (February 2016): 710. See also *Stigler Committee on Digital Platforms - Final Report*, note 21.

known as "self-preferencing", is likely to be one of the most hotly contested competition law issues in the coming years with respect to digital platforms. It is notable that the potential for this form of conduct may take on added importance for the Bureau when considering vertical mergers that lead to common ownership of different stages of a supply chain, in recent decades often considered by many to be benign.[76]

The current state of play has led to international debate not just about market power in a strictly economic sense, but also its spillover into other realms and the negative externalities of having large amounts of influence concentrated in the hands of a very few firms. Indeed, it has been suggested that the potential may exist for a pernicious cycle in which such power can be wielded at the policy level to gain further economic advantage.[77] Given the indispensability of the Internet as a medium for modern-day commerce, the situation has been likened to the early railroad oligopoly in the United States that led to the advent of antitrust law.[78]

The Act addresses unilateral conduct that may distort markets in a variety of ways. First and foremost is the general provision on abuse of a dominant position in ss. 78 and 79, setting out principles-based limits on the behaviour of firms that hold substantial market power. However, other provisions of the Act specifically address refusal to deal (s. 75) and price maintenance (s. 76), as well as exclusive dealing, tied selling and market restriction (s. 77). Not all of these provisions have a rich history of judicial consideration, but at present all are subject to civil enforcement, with some variation of a competitive effects test.

Some issues for potential reform in the area of unilateral conduct follow.

**76** See, *e.g.*, Jeffrey Church, "Vertical Mergers", *Issues in Competition Law and Policy* 2: 1455 (ABA Section of Antitrust Law 2008).

**77** For example, in his recent book, *The Curse of Bigness* (Columbia Global Reports, 2018), Tim Wu (now advising the Biden administration) argued that increasing corporate concentration contributes to regulatory capture, the process by which private interests are able to unduly influence the direction of public policy.

**78** Rana Foroohar, "Big Tech is America's new 'railroad problem'", *Financial Times*, June 16, 2019. See also, Alex Boutilier, "Freeland says today's big tech firms are like the monopolies of a century ago", The Star, May 1, 2019.

## The legal underpinnings of abuse of dominance

Abuse of a dominant position, alternately referred to as monopolistic conduct, may be the most inaccessible aspect of antitrust policy to lay observers, and the most liable to be misunderstood. Shaped in Canada by an atypically detailed set of statutory provisions and interpreted through a thick lens of case law, administration of this part of the Act can depend heavily on complex economic modelling and the making of distinctions that may seem, to some, arbitrary or unduly narrow.

On its face, s. 79 of the Act requires the fulfilment of a three-part test before a remedial order can be issued: (i) substantial or complete control of a market; (ii) a practice of anti-competitive acts; and (iii) an actual or likely SLPC. An illustrative, non-exhaustive list of anti-competitive acts is set out in s. 78, helping to inform the second part of the test.

When brought before the Competition Tribunal and courts, the criteria for each of these elements have been extrapolated further, as now reflected in the Bureau's *Abuse of Dominance Enforcement Guidelines*.[79] A dominant market position concerns a substantial degree of market power in a product and geographic market as established through, for example, market share and barriers to entry. In rare cases, this can be jointly held by more than one firm. Following the BIA Amendments, an "anti-competitive act" that could form part of the practice in the second part of the test is now explicitly defined as an "act intended to have a predatory, exclusionary or disciplinary negative effect on a competitor, or to have an adverse effect on competition". This drew from, and broadened, prior case law, while continuing to list illustrative examples in s. 78. Both subjective intent and reasonably foreseeable consequences are relevant, and distinguish truly anti-competitive behaviour from justifiable business decisions that nevertheless may prejudice a competitor. Finally, the SLPC test is conducted similarly to other effects analyses in the Act, such as for mergers, comparing the level of competition with and without the alleged conduct.

Before the BIA Amendments, the second part of the s. 79 test was likely the most problematic, given the need to demonstrate an intention of harm to a competitor in order to establish a practice of anti-competitive acts.[80] Despite the plain text

**79** Competition Bureau, *Abuse of Dominance Enforcement Guidelines*, March 7, 2019.

**80** See Ralph Winter, "The Gap in Canadian Competition Law Following Canada Pipe", *Canadian Competition Law Review* 27:2 (Fall 2014). See also *A New Competition Act for a New Federal Government*, Eleventh Report of the C.D. Howe Institute Competition Policy Council, April 28, 2016.

of the provision, this interpretation unduly limited the Bureau from taking action against recognized anti-competitive conduct where it was not strictly directed against a competitor.[81]

For instance, "facilitating practices" arise where firms take unilateral steps to soften the relationship with competitors without necessarily requiring an agreement. This may include the publication of price lists, or the use of price-matching guarantees or most-favoured-nation clauses. Some such practices may be pro-competitive, but they can also serve to dampen competition in certain settings, at the expense of consumers or suppliers rather than fellow competitors.[82]

While recent case law even before the BIA Amendments broadened the interpretation of abuse slightly,[83] the three steps taken together can result in a relatively onerous burden on the Competition Bureau, and this may limit the Bureau's ability to consider seeking remedies in cases where competition appears to be threatened.[84] There are regularly calls for the Bureau to intervene in areas where certain businesses believe they are less able to compete due to the actions of powerful competitors, suppliers or customers. However, the specific circumstances often do not lend themselves to the entirety of the three-part test needed to demonstrate abuse of dominance within the Act's meaning.[85]

There are, of course, valid reasons to limit grounds for intervention in private commerce, even where certain parties may be aggrieved. However, the very narrow application of these provisions may become more problematic as the economy grows more complex and intertwined, with the rise of digital commerce and its new forms of competition. This includes up-to-the-minute pricing adjustments and heavily personalized algorithms, in addition to non-

**81** A notable case where the Competition Tribunal recognized conduct that was anti-competitive, yet the Bureau was powerless to address it under s. 79 at the time, was its 2013 case against Visa and Mastercard. This involved each company imposing restrictive terms of service on its merchant clients, with consumer harm resulting. The BIA Amendments have filled this gap. See *The Commissioner of Competition v. Visa Canada Corporation and MasterCard International Incorporated*, 2013 Comp. Trib. 10, at paras. 137-39.

**82** See Edward M. Iacobucci and Ralph A. Winter, "Abuse of Joint Dominance in Canadian Competition Policy", *University of Toronto Law Journal* 60:2 (Spring 2010): 219.

**83** Since a case against the Toronto Real Estate Board in 2016, even an entity that does not strictly compete in a market, but has a "plausible competitive interest" in adversely impacting competition, can find itself subject to an order. See *The Commissioner of Competition v The Toronto Real Estate Board*, note 32, at paras 279-282.

**84** Former Commissioner of Competition Melanie Aitken has described the Act as "code-like" and unnecessarily technical versus a broader, more principles-based approach under which businesses manage to operate without undue uncertainty in jurisdictions such as the U.S. or EU. Note, for example, comments made at the Competition and Growth Summit, June 2, 2021.

**85** Note, for example, key findings in the Bureau's investigation of Loblaw, or the Competition Tribunal's ruling in the matter taken against the Vancouver Airport Authority. See Competition Bureau, *Alleged anti-competitive conduct by Loblaw Companies Limited*, November 21, 2017; *The Commissioner of Competition v Vancouver Airport Authority*, 2019 Comp Trib 6.

price competition discussed above, all of which are likely to obfuscate traditional competition analysis.[86] In order to emphasize their increasing importance, the BIA Amendments enshrined the notion of non-price elements of competition as factors for the Competition Tribunal to consider, including the emerging dimension of competing on the basis of protecting consumer privacy. This makes it no less a challenge to measure or appraise them, however. The public interest is not well-served if competitive harm is identifiable but the Bureau is not sufficiently empowered to intervene, or if the prospects for success in any enforcement action are too low, as cases become more costly and time-consuming to carry out.

Increasingly, legislators are turning to the possibility of preventive rules or presumptions applied to dominant firms or platforms, with respect to both acquisitions and business practices such as self-preferencing and data use, rather than conducting extensive economic analyses in each case.[87] Indeed, in a paper commissioned by Innovation, Science and Economic Development Canada, scholars David Wolfe and Mdu Mhlanga go further, distinguishing between the traditional focus of antitrust enforcement on preventing anti-competitive conduct, versus the need for more proactive encouragement of competitive alternatives, such as through the growth and scale-up of new firms. This, they argue, may be what is necessary "to counter the inherent tendency of the platform economy towards producing winner-take-most results in digitally intensive sectors of the economy."[88] While such structural and proactive approaches remain under consideration in Canada, the below discussion concerns the elements of the current abuse of dominance approach in s. 79.

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**86** Consider predatory pricing, which requires below-cost pricing with the plan of recouping losses once market competition is weakened. In many digital markets prices may be dynamic and difficult to track; the nature of product markets may be unclear; firms often have very low marginal costs; they may sacrifice recoupment in favour of expansion; and may choose to offer some of their products and services below cost or for free for reasons unrelated to recoupment. It may therefore be especially difficult to apply the law or distinguish predatory pricing from normal competition on the merits. Another matter to consider is firm intent, an element of the test for a practice of anti-competitive acts, when conduct is algorithmic or automated.

**87** Five bills introduced in the U.S. in June 2021 (see Kang, note 22) would restrict the types of business a dominant firm could own, outlaw discriminatory or self-preferencing behaviour by them, make their acquisitions rebuttably unlawful, and impose data portability standards upon them, among other things. See Lauren Feiner, "Lawmakers unveil major bipartisan antitrust reforms that could reshape Amazon, Apple, Facebook and Google", CNBC, June 11, 2021. See also European Commission, "The Digital Services Act package", updated July 5, 2022; *Competition and Antitrust Law Enforcement Reform Act* of 2021, note 47.

**88** David A. Wolfe and Mdu Mhlanga, *The Platform Economy and Competition Policy: Options for Canada*, Innovation Policy Lab Working Paper Series 2022-02, Munk School of Global Affairs & Public Policy, University of Toronto, April 2022, at pp. 18-19.

## Dominance

Harm to competition can arise through the actions of firms that may not be unmistakably dominant, but together exert substantial influence on the market, whether as vendors or purchasers.[89] Where coordinated behaviour arises from an agreement or arrangement, the Act can address this as a competitor collaboration. However, reduced competition in a market may instead be the product of copycat strategies, conscious parallelism (where reciprocal action is expected but not enforced), or through "facilitating practices", discussed above. The Act recognizes the possibility of multi-firm dominance, but as illustrated in the Bureau's enforcement guidelines, this requires more than simply parallel or similar cases of unilateral conduct, and in practice has rarely been identified.

The civil enforcement scheme within the Act is primarily geared toward correcting competitive harm for the good of the market; in contrast to criminal enforcement or tort law, assigning responsibility for its origins is secondary, and tied chiefly to being able to direct a remedial order appropriately. In certain other unilateral conduct provisions, for example, even the fact of conduct being "widespread in a market" without a solely responsible party is sufficient grounds for intervention. As long as firm actions are able to limit competition, a certain degree of influence in the marketplace is implied, and it may be fairly asked how laborious the dominance test need be.[90]

## Substantial lessening or prevention of competition

The requirement for the Commissioner to prove that the anti-competitive practice is resulting in, or likely to cause, an SLPC may be unduly strict. For similar reasons that market dynamics in an evolving economy may complicate merger analysis (such as disruptive but small start-ups, zero-revenue or low-asset models), the assumptions behind competitive effects may need to be revisited.

In a paper commissioned by Innovation, Science and Economic Development Canada, authors Vass Bednar, Ana Qarri and Robin Shaban considered various unilateral actions that dominant firms and platforms may take in a data-driven economy that can ultimately entrench their market power and harm competition,

**89** Note concerns raised by food suppliers with respect to the practices of retail grocers enabled by high concentration. See Food, Health and Consumer Products of Canada, *Priorities for healthy homes, healthy communities, and a healthy Canada*, September 2020.

**90** The Act has, since 2009, permitted administrative monetary penalties to accompany remedial orders against dominant firms for abuse, designed to promote future compliance. While the fixed maximum amounts were replaced in the BIA Amendments by three times the value of benefit derived (or potentially 3% of revenues of the firm targeted by the order, where benefit cannot be reasonably calculated), the penalty amount is subject to various statutory considerations to ensure that it is appropriate. In the event that a test for dominance were relaxed, the application of penalties could be tailored as necessary.

such as imposing limits as a gatekeeper, self-preferencing, or duplicating the products of platform users with their own. The authors express concern about the reach of the current Act, noting that

> it may be difficult to establish anti-competitive effects from some behaviours given the high evidentiary standards needed to establish a substantial lessening or prevention of competition. [...] At present, the Commissioner is required to show, on a balance of probabilities, that the abusive conduct has led to specific negative outcomes (the consequentialist approach). The effects that are typically considered include higher prices, lower quality, or less innovation. However, the law in other jurisdictions, particularly the EU, requires that authorities show primarily that the conduct in question has taken place, and there is less emphasis on demonstrating that the conduct has caused certain harms (the deontological approach, or what some in Canada call a *per se* approach).[91]

Inspired by the European example, an alternative approach the Government intends to examine would involve showing only that conduct is *capable* of having anti-competitive effects, or *has as its very object* an anti-competitive outcome, regardless of whether it is achieved. EU law recognizes some circumstances where forms of exclusionary conduct are presumptively unlawful, whereas Canadian law includes both intent and (likely) effect as elements of the test in every case. Indeed, some have suggested removing examination of intent entirely, merely defining an anti-competitive act with reference to its SLPC.[92] The reference to an "appreciable risk" of competitive harm, in the U.S. Senate proposal aimed at dominant American firms, is also worth noting as a possible model.

## Other restraints of trade

As noted above, the Act contains other provisions that address specific forms of conduct that may constitute restraints of trade or harm competition, in ss. 75-77 and 80-81. Some of the activity that they cover may also constitute an abuse of dominance where the relevant conditions are met, although some substantive differences include alternatives to the need for a fully dominant firm; non-application to purchaser activity; and a less stringent test than an SLPC. Procedurally, the key difference from s. 79 is that only abuse can lead to administrative monetary penalties (AMPs). Prior to the BIA Amendments,

**91** Vass Bednar, Ana Qarri and Robin Shaban, *Study of Competition Issues in Data-Driven Markets in Canada*, Vivic Research, January 2022, at p. 24.

**92** *Undo Haste: Rushed Competition Act Reforms Warrant Further Examination*, Twenty-third Report of the C.D. Howe Institute Competition Policy Council, June 7, 2022, at p. 3.

uniquely ss. 75-77 allowed for the possibility of privately-initiated cases brought before the Competition Tribunal, although such a procedure is now available for abuse as well.

| SECTION | ACTIVITY | VERTICAL DIRECTION | DOMINANCE THRESHOLD | COMPETITIVE EFFECTS TEST | REMEDY | PRIVATE TRIBUNAL ACCESS |
|---|---|---|---|---|---|---|
| 75 | Refusal to deal | Supply-side | N/A | Adverse effect on competition | Accept customer | Y |
| 76 | Price maintenance | Supply-side | N/A | Adverse effect on competition | Prohibition order/accept customer | |
| 77 | Exclusive dealing, tied selling or market restriction | Supply-side | Major supplier or widespread in a market | Substantially lessen competition | Prohibition order, or order to "restore or stimulate competition" | Y |
| 79 | Abuse of dominance | Supply-side or buy-side | Substantial or complete control of class or species of business | Substantially lessen or prevent competition | Prohibition order/prescriptive remedy (incl. divestiture), AMPs | Y as of 2022 |
| 81 | Delivered pricing | Supply-side | Major supplier or widespread in a market | N/A | Prohibition order | N |

The resulting patchwork raises questions as to the usefulness of the multitude of provisions or whether their prescriptive nature may lead to narrower interpretations of Parliamentary intent when applying the various provisions.[93] Practitioners have debated whether the best approach is to consolidate the existing unilateral conduct provisions along with abuse of dominance into a singular, broadened unilateral conduct provision, more akin to the U.S. and Europe.[94] Alternatively, some have expressed concerns about gatekeeping industry giants being able to leverage their market power in ways viewed as unfair or damaging to less powerful businesses, even where a strict antitrust approach may not provide a remedy.[95]

**93** Paragraphs 110-139 of the Visa/Mastercard decision (note 81) are devoted to establishing the boundaries of s. 76 of the Act through statutory interpretation, including citing the principle that words must be read in their entire context, including "harmoniously with the scheme of the Act".

**94** *A New Competition Act for a New Federal Government*, note 80.

**95** Complaints have arisen in the global grocery and media sectors in recent years, while some third-party vendors have accused digital platforms of unfair or capricious treatment. See "Disfunction in Canadian grocery business 'needs attention,' government probe finds" *Financial Post*, March 4, 2021; Rosa Saba and Alex Boutilier, "Canada watching 'closely' after Google ordered to work out repayment to French news organizations, publishers" *Toronto Star*, April 13, 2020; Aditya Kalra, "Amazon documents reveal company's secret strategy to dodge India's regulators", Reuters, Feb. 17, 2021.

Noting the Act's multi-faceted purpose clause, including the participation of small and medium enterprises in the economy, the Government believes it would be worth exploring whether these (or potentially other) provisions may be repositioned as "fair competition" provisions with less focus on competitive effects, in the interests of maintaining a level playing field and checking gatekeepers with monopolistic or monopsonistic power. It is worth noting that not all civil provisions in the Act require proof of broader competitive harm, including deceptive marketing, delivered pricing and, before 2002 amendments, refusal to deal,[96] while some foreign competition authorities administer "unfair competition" provisions, such as with respect to unconscionable conduct in Australia, or abuse of superior bargaining position in several jurisdictions.[97]

## FOR DISCUSSION

As the world's largest companies grow ever more powerful, the Act's abuse of dominance legal tests are ripe for re-examination. The Government is considering the following possible reforms and would welcome input:

- Better defining dominance or joint dominance to address situations of ***de facto*** dominant behaviour, such as through the actions of firms that may not be unmistakably dominant on their own, but which together exert substantial anti-competitive influence on the market.
- Crafting a simpler test for a remedial order, including revisiting the relevance of intent and/or competitive effects.
- Creating bright line rules or presumptions for dominant firms or platforms, with respect to behaviour or acquisitions, as potentially a more effective or necessary approach, particularly if aligned with international counterparts and tailored to avoid over-correction.
- Condensing the various unilateral conduct provisions into a single, principles-based abuse of dominance or market power provision. Alternatively, the unilateral conduct provisions outside of abuse of dominance could be repositioned for different objectives of the Act, such as a fairness in the marketplace.

**96** *An Act to amend the Competition Act and the Competition Tribunal Act*, S.C. 2002, c. 16.

**97** *Competition and Consumer Act 2010*, Schedule 2, Chapter 2, Part 2-2; *Differences and Alignment: Final Report of the Task Force on International Divergence of Dominance Standards of the ABA Antitrust Law Section*, September 1, 2019, pp. 73-81.

# COMPETITOR COLLABORATIONS

The 2009 amendments to the Act divided Canada's enforcement approach to horizontal competitor collaborations into a *per se* criminal regime for "hardcore cartel" conspiracies, and a civil competition review for all other forms of collaboration. The first category encompassed bid-rigging, price-fixing, market allocation and output restriction coordination on the supply side, and punishes such conduct in itself with substantial penalties, without requiring any proof of competitive effects. The latter category included all other forms of agreement, such as buy-side coordination or joint ventures, reviewing them to ensure that competition is not harmed as a result of otherwise lawful activity. The BIA Amendments created a new per se criminal offence to address certain forms of employer collusion, namely agreements or arrangements to fix wages and similar terms of employment, or not to poach employees. However, other purchase-side coordination remains outside the scope of criminal or *per se* prohibition.

Some additional issues in the area of competitor collaboration are discussed below.

# FOCUS ON

## Algorithmic conduct

A prominent feature of the digital economy is the growing use and increasing sophistication of artificial intelligence (AI), including algorithms, automation, machine learning and language recognition. AI has the potential to foster innovation in virtually every industry. Alongside its benefits, however, AI raises new challenges for competition law.

One of the most prominent theoretical challenges discussed to date relates to potential for "algorithmic collusion" – the idea that automation could make it easier for firms to arrive at or sustain collusive outcomes with no or minimal human interaction.[98] Companies may be able to cloak agreements to collude in complex computational patterns, making detection a challenge. This threat has some suggesting that algorithms should be subject to some oversight or audit,[99] while practitioners are already developing compliance tips for businesses.[100] In Canada, the role of the AI and Data Commissioner, currently contemplated in Bill C-27, will provide a complementary framework by requiring ongoing mitigation measures for certain organizations and enabling the government to seek further information and corrective measures when necessary.

As ways of doing business continue to evolve rapidly, so too must all forms of competition analysis, as some suggest that traditional approaches may need to be reconsidered or refocused on outcomes.[101]

**98** See Ariel Ezrachi and Maurice E. Stucke, "Artificial Intelligence & Collusion: When Computers Inhibit Competition", *University of Illinois Law Review* (March 2017): 1775. See also OECD, *Algorithms and Collusion: Competition Policy in the Digital Age*, June 2017.

**99** See the U.S. bills in each chamber of Congress, H.R.6580 and S.3572, *Algorithmic Accountability Act of 2022*; see also UK Competition and Markets Authority, *Pricing algorithms research, collusion and personalised pricing*, October 8, 2018.

**100** *Algorithms: Challenges and Opportunities for Antitrust Compliance*, ABA Compliance and Ethics Spotlight Special Report, Fall 2018.

**101** See Terrell McSweeny and Brian O'Dea, "The Implications of Algorithmic Pricing for Coordinated Effects Analysis and Price Discrimination Markets in Antitrust Enforcement", *Antitrust* 32:1 (Fall 2017); Rosa M. Abrantes-Metz, "Pricing Algorithms and Implications for Competition," *Competition Policy International* (May 2019).

## Horizontal coordination without an agreement

Conduct by non-human actors may raise a number of enforcement challenges. While it is clear that the law would apply where competitors agree to fix prices using an algorithm – indeed such conduct has already been prosecuted in the U.S.[102] – it is less clear how traditional cartel concepts such as "agreement" and "intent" would apply to situations where algorithms learn through mere trial-and-error to achieve joint profit-maximizing outcomes, absent any human involvement. The criminal standard of proof for the Act's conspiracy and bid-rigging provisions (ss. 45 and 47) require not only an agreement between competitors, but as with criminal offences generally, also require *mens rea*, an intention to agree to target these outcomes. This can lead to evidentiary obstacles where AI has undertaken much of the process. While human action is required to set some chain of events in motion, it is not clear that programming an algorithm merely capable of initiating coordination with competitors could always be addressed under these criminal provisions, and upcoming AI legislation may be better positioned to address concerns.[103]

The concept of agreement also spills over into civilly-reviewable coordination under s. 90.1 of the Act. While intent is not an element in this case, an "agreement or arrangement" is still required. This gives rise to a broader question that goes to the heart of civil enforcement: should it matter whether a discrete meeting of the minds can be clearly established?

The argument has been made that the introduction of algorithms may necessitate a shift toward addressing more tacit forms of collusion.[104] While non-human actors may pose legal and philosophical challenges to criminal prosecutors, civil enforcement is instead mostly focused on the health of the market, rather than on what its participants were trying to do. If harmful competitive effects can be established from coordinated firm conduct whatever the origin (including via algorithms), the case can be made that the Bureau should have grounds to intervene to protect the marketplace. If the law were to deem or infer the existence of an agreement in more circumstances,

**102** *Former E-Commerce Executive Charged with Price Fixing in the Antitrust Division's First Online Marketplace Prosecution*, US Department of Justice, April 2016.

**103** The *Artificial Intelligence and Data Act*, if passed by the enactment of Bill C-27, may provide an avenue to address harm caused by algorithms even where criminal intent cannot easily be proven under the Act. That law would define harm as including economic loss, and require those responsible for "high-impact systems" to assess and mitigate the risk of such harm, monitor compliance with mitigation measures, and undertake transparency safeguards. The future AI and Data Commissioner, if so designated ministerially, will be able to seek records or order an audit to ensure compliance with the law and harm prevention. Both civil and criminal penalties are available for non-compliance, and the AI and Data Commissioner will be empowered to disclose information to the Bureau as necessary.

**104** Emilio Calvano, Giacomo Calzolari, Vincenzo Denicolò, Sergio Pastorello, "Algorithmic Pricing: What Implications for Competition Policy?", *Review of Industrial Organization* 55:1 (August 2019).

competitive harm could be addressed more flexibly. Algorithmic conduct is an obvious candidate for such a reform, but potentially other horizontal "facilitating practices", alluded to above, could be addressed between firms of any size sufficient to affect the marketplace.[105] Alternatively, this may once more be an area where AI legislation provides a better form of oversight.

## The scope of civil enforcement

Unlike the Act's other civil enforcement provisions, s. 90.1 only applies to ongoing and future conduct, but not past events. In principle, this approach is consistent with the civil approach to protect markets rather than discipline its actors. However, while s. 90.1 can apply even to purely unintentional conduct, it remains relevant for more deliberate actions as well.

Not all anti-competitive forms of collaboration are necessarily caught by the criminal conspiracy provisions in s. 45, which is tightly circumscribed to avoid unintended criminal consequences. Civil enforcement thus remains an important tool to address other forms of anti-competitive collaboration. Firms may be well aware that their anti-competitive behaviour would be remediable under the civil provisions of the legislation, but so long as the Act cannot examine past behaviour or impose penalties, they may be incentivized to cross the line until required to stop. Even then, only the breach of a fully litigated s. 90.1 remedial order or consent agreement will incur legal consequences, and thus a return to ceased anti-competitive conduct may also be invited in many cases. An additional concern is that a future-looking prohibition order may not easily be tailored to address all forms of coordination, such as an agreement among competitors to cease certain behaviour. The ability to address past conduct, and impose penalties appropriate to the form of conduct, therefore must be considered.

Another question that arises concerns the strictly horizontal scope of s. 90.1. The Act's former conspiracy provision that was amended in 2009 applied to agreements between any two or more persons. Following the amendments, which took effect in 2010, both the revised s. 45 and s. 90.1 were then limited to coordination between competitors specifically. In the criminal context, this requirement may help to ensure that vertical coordination – such as resale price maintenance – is not treated as a naked cartel under the law. Civilly, however, the limit to horizontal coordination generally falls outside the norm of international practice.[106] This requirement shields potentially anti-competitive conduct in

**105** An efficiencies defence in s. 90.1(4), paralleling that of merger review, ensures that net economic positives will be taken into account, even when a distortion is observed.

**106** Consider, for example, s. 1 of the *Sherman Act* in the U.S., article 101 of the *Treaty on the Functioning of the European Union*, or s. 45 of Australia's *Competition and Consumer Act 2010*.

vertical contexts (such as supply, licensing or franchise agreements) from the Bureau's scrutiny, unless they fall under a different provision of the Act, such as tied selling. There is thus a case for the expansion of s. 90.1 to encompass more than just direct competitor collaborations.[107]

Finally, much as in the merger context, detection of anti-competitive collaborations remains a challenge, particularly as the only formal notification mechanism concerns airline joint ventures, which is a voluntary path to gain public interest consideration by the sector regulator. One notable area that the Bureau has highlighted for a number of years is that of patent litigation settlement agreements in the pharmaceutical industry, or so-called "pay for delay" arrangements between patent-holders and generic manufacturers.[108] Given the substantial commercial impact of such instruments, and noting the mandatory notification system in the U.S.,[109] this and other areas could benefit from being subject to a notification, or potentially a voluntary clearance, mechanism.

## Buy-side coordination

In the summer of 2020, allegations were examined in Parliament with respect to the major retail grocers all ending their COVID-19 pay bonuses for employees on the same date, and this led to calls for Bureau intervention.[110] As labour is an input to production rather than a good or service offered by vendors, coordination to suppress its cost – such as through wage-fixing or "no poaching" agreements – is known as "buy-side" coordination. The purest forms of supply-side collusion, *i.e.* vendor cartels, have been treated as *per se* criminal violations under s. 45 of the Act since 2010, following the 2009 amendment package. However, the Bureau ultimately issued a statement recognizing that the narrowed version of s. 45 that stemmed from those amendments – the ones creating the two-track civil/criminal approach – excluded "buy-side" coordination.

The result is that such agreements were left to the realm of civil review, and remediable only where competition is harmed – an interpretation since confirmed by the courts.[111] This outcome led to an INDU report recommending

**107** See the submission of Jason Gudofsky and Kate McNeece, note 54.

**108** Competition Bureau, "Patent Litigation Settlement Agreements: A Canadian Perspective," prepared for the Global Antitrust Institute, George Mason University School of Law Conference: Global Antitrust Challenges for the Pharmaceutical Industry, Tuesday, September 23, 2014.

**109** Brad Albert, Armine Black and Jamie Towey, Federal Trade Commission Bureau of Competition, "MMA Reports: No tricks or treats—just facts", October 27, 2020.

**110** "Enough evidence for Competition Bureau to investigate grocers for ending pandemic pay, MP says", *Financial Post*, July 14, 2020.

**111** *Competition Bureau statement on the application of the Competition Act to no-poaching, wage-fixing and other buy-side agreements*, November 27, 2020; *Latifi v. The TDL Group Corp.*, 2021 BCSC 2183; *Mohr v. National Hockey League*, 2021 FC 488.

the reinsertion of buy-side collusion into the criminal conspiracy provision in s. 45.[112] Ultimately, to address the committee's direct concern over wage-fixing, the BIA Amendments added a provision specifically on employer collusion into that section. The provision is targeted and there are clear exemptions and defences for legitimate agreements that arise from a collective bargaining process, or that are ancillary to a broader collaboration among employers. Other forms of buy-side collusion still remain subject only to civil review.

It should be clarified that while buy-side agreements (including with respect to labour) were formerly under the purview of s. 45, they have never been *per se* unlawful under Canadian law, even prior to the 2009 amendments. The former s. 45 still required the establishment of undue harm to competition, and beyond a reasonable doubt moreover. The effects analysis (sometimes known as "rule of reason") has since been adapted to civil enforcement, while the new *per se* conspiracy provision was limited to the worst forms of supply-side cartel conduct that never hold an economic justification.[113] Buy-side coordination, by contrast, presents different incentives for participants and more economic ambiguity, as such activity may be seen to reduce costs, increase efficiency and deliver consumer benefit.[114]

The BIA Amendments have addressed certain forms of labour collusion, but the optimal approach to these and other forms of buy-side coordination continues to stoke debate, and there appears to be no global consensus in enforcement.[115] Labour market restraints have been found capable of economic harm comparable to those in product markets, even though a traditional focus on price may sometimes seem to place consumer and worker interests at odds with one another.[116] It is not a stretch to apply the same logic to other forms of naked buy-side coordination that distort markets to the detriment of suppliers.

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**112** See *Wage Fixing in Canada: And Fairness in the Grocery Sector*, note 11.

**113** See, for example, Competition Bureau, *Frequently asked questions—Amendments to the Competition Act*, March 2009.

**114** Peter C. Carstensen, "Buyer Cartels Versus Buying Groups: Legal Distinctions, Competitive Realities, and Antitrust Policy", 1 Wm. & Mary Bus. L. Rev. 1 (2010), pp. 20-33.

**115** OECD, *Competition in Labour Markets*, note 63.

**116** Herbert Hovenkamp, *Competition Policy for Labour Markets*, OECD Roundtable on Competition Issues in Labour Markets, June 5, 2019. Note also that the U.S. Department of Justice maintains that labour market distortions represent the same form of marketplace threat as those in product markets, and have begun to pursue criminal cases against them. See Remarks of Richard A. Powers, Acting Assistant Attorney General of the Department of Justice, Antitrust Division, U.S. Department of Justice, Fordham Competition Law Institute 48th Annual Conference on International Antitrust Law and Policy, October 1, 2021; Karen Sharp and Jeff VanHooreweghe, "Update on DOJ 'No-Poach' and 'Wage-Fixing' Criminal Antitrust Prosecutions", Wilson Sonsini Alert, December 7, 2021.

Conversely, others have cautioned that buy-side agreements, even with respect to labour, can be economically ambiguous and should still be approached with more caution than traditional cartels.[117]

The appropriate treatment of buy-side collusion therefore remains an open question. S. 45 could be returned to its former scope of including all forms of buy-side agreements, now under the *per se* offence. Such a modification would likely subsume the employer-specific amendments of 2022. To alleviate concerns over forms of collaboration that may be seen as pro-competitive, appropriate exemptions could be fashioned – *e.g.* where group purchasing is conducted openly and made known to the vendor, and does not generate dominance. Conversely, a civil approach that does not require proof of an SLPC – a true non-criminal counterpart to the per se conspiracy prohibition – may strike the balance of addressing problematic conduct more nimbly without introducing criminal consequences.

## FOR DISCUSSION

The Government is considering the following possible reforms and would welcome input:

- Deeming or inferring agreements more easily for certain forms of civilly reviewable conduct, such as through algorithmic activity, especially given the difficulty of applying concepts like "agreement" and "intent" in the age of AI.
- Broadening and/or strengthening the Act's civil competitor collaboration provisions to discourage more intentional forms of anti-competitive conduct, including through examining past conduct and introducing monetary penalties.
- Making collaborations that harm competition civilly reviewable even if not made between direct competitors.
- Introducing mandatory notification or a voluntary clearance process for certain potentially problematic types of agreement.
- Reintroducing buy-side collusion – beyond only labour coordination – into the Act's criminal conspiracy provision, or considering a civil ***per se*** approach to it.

**117** John M. Taladay and Vishal Mehta, "Criminalization of wage-fixing and no-poaching agreements", *Competition Policy International*, August 24, 2017; see also Alan B. Krueger and Eric A. Posner, "A Proposal for Protecting Low-Income Workers from Monopsony and Collusion", *The Hamilton Project*, February 27, 2018, at pp. 12-13.

# DECEPTIVE MARKETING

The emergence of new technologies and digital platforms in recent years has created new opportunities for businesses to sell their products, while also giving rise to the potential for novel deceptive marketing practices. While deceptive marketing is by no means unique to the digital economy, the limitless volume and numerous forms of data that can be communicated to any number of users at any moment via the Internet, combined with the added dimension of interactivity that did not exist in more traditional media, means that new avenues of concern arise.

When online price comparisons can be made by consumers in a matter of minutes or less, simply by opening multiple windows, even a small distinction, whether by way of a specific representation or a general impression conveyed, may ultimately serve as a 'tie-breaker'. Vendors have an added incentive to ensure that their price appears to be the lowest by any means possible in this dynamic environment, and this may include misleading approaches to marketing their goods and services.

For instance, "drip pricing" misleads consumers by advertising prices that ultimately do not take into account additional compulsory fees that are only revealed later in the purchasing process, sometimes even after the transactions have been processed. The BIA Amendments helped to address this practice by designating the representation of prices that are unattainable in light of mandatory fixed fees as a form of false or misleading representation under the Act's existing provisions. However, some additional forms of potentially deceptive conduct include:[118]

- when information is actually advertising (*e.g.* native advertising; influencer marketing; online reviews);
- hiding the true cost of a product (*e.g.* fine print disclosure); and
- inadequately disclosing terms and conditions (*e.g.* subscription traps; free trial offers; deception for the purpose of collecting consumer data).

**118** See Competition Bureau, *The Deceptive Marketing Practices Digest*, Volume 1, June 2015.

The line between the Act's provisions on deceptive marketing in the promotion of a product, provincially-regulated consumer protection measures,[119] communications regulation, and outright fraud under the *Criminal Code* is blurred at times, and any or all of these may be implicated in any given case. Nevertheless, the Act's deceptive marketing provisions have been interpreted broadly and apply to all manner of business promotion in Canada, and in this sense can serve as a powerful tool in the digital economy.

The passage of CASL, which took effect in 2014, inserted civil and criminal deceptive marketing provisions specific to electronic media into the Act for the first time. Given the breadth of the Act's existing deceptive marketing provisions on which they were based, however, these amendments did not dramatically alter the legal landscape with respect to false and misleading representations.[120] The tackling of drip pricing in the BIA Amendments, similarly, largely enshrined the Bureau's existing approach,[121] helping to simplify enforcement by removing doubt about the misleading nature of the practice while otherwise maintaining the existing requirements of the provisions, such as materiality and consideration of the general impression given. The question is therefore raised whether the Act may benefit from further clarifications such as these, or newer tools or conceptions of deceptive conduct altogether.

## FOR DISCUSSION

The Government is considering reforms in the following areas and would welcome input:

- Adopting additional enforcement tools suited for modern forms of commerce, given the nature and ubiquity of digital advertising. For example, further amendments to better define false or misleading conduct, such as the 2022 drip pricing amendments, could be considered.

**119** In general, the *Competition Act* could be said to approach deceptive marketing from the standpoint of preserving the integrity of the market, in that the competitive process can be disrupted by misinformation, while pure consumer protection rests with the provinces.

**120** The legislation did, however, include provisions for information sharing and coordination between the Competition Bureau, the CRTC and the Office of the Privacy Commissioner, as well as relevant authorities in foreign jurisdictions. See CASL, ss. 56–61.

**121** See Competition Bureau, "Discount car rental penalised for advertising unattainable prices", news release, October 11, 2018; Competition Bureau, "StubHub to pay $1.3 million penalty for advertising unattainable prices for event tickets", news release, February 13, 2020.

# ADMINISTRATION AND ENFORCEMENT OF THE LAW

The consideration of new regulatory schemes and oversight roles continues to form a part of Canada's strategy for the largest actors in the modern, data-driven economy, including reform to commercial privacy law, a framework for remuneration of news publishers by digital platforms, and the development of an Artificial Intelligence and Data Commissioner.[122] Ongoing debate nevertheless continues internationally as to the reach and deterrent value that competition enforcement may have, often tied to calls for *ex ante* regulatory rules or calls to "break up" digital giants.

In its present form, the Act does not permit the Bureau to impose or enforce mandatory codes of conduct for industries. Divestitures, meanwhile, are limited to select circumstances, most notably in merger review.[123] There are nevertheless a number of corrective orders and monetary sanctions at the disposal of the state.

In an age of ever more well-resourced and sophisticated global firms, there is a growing need to consider whether the Act's investigative procedures, remedies and private enforcement mechanisms are fit to hold these organizations and the individuals who run them accountable. Consequences for anti-competitive conduct, whether in the form of monetary sanctions, behavioural or structural remedies or damages, must be meaningful to the parties involved, feasible to administer, and proportionate to the negative impact of the conduct identified. Any change in approach would also have to consider important issues such as clarity, predictability, ease of compliance for businesses, and the enforcement agency's transparency and accountability. The possibility of balancing any increase in enforcement flexibility in specific instances against new or different accountability measures for the Bureau's overall activity, *e.g.* to the Department or to Parliament, could be explored.

**122** See notes 24 and 29; see also Prime Minister of Canada, "Minister of Innovation, Science and Industry Mandate Letter", December 16, 2021.

**123** Although theoretically possible as a remedy for abuse of dominance if "reasonable and necessary" to overcome the effects of the practice, this has never occurred before the Competition Tribunal.

The BIA Amendments made two important changes to the Act's sanctions regime to remove fixed maximums that could limit the effectiveness of a remedy. For criminal cartel matters, the $25-million maximum fine was removed, instead allowing the court to set an amount in accordance with usual sentencing principles, as was the case for bid-rigging. This prevents the imposition of an arbitrary limit in cases where immense volumes of commerce may be affected, such as international cartels.

For civil AMPs (both abuse of dominance and deceptive marketing) the fixed maximums were replaced by a more principled calculation similar to the model in Australia, namely three times the benefit derived from the conduct. If such an amount cannot be reasonably determined, the maximum is instead set at 3% of annual worldwide revenues, mirroring sanctions proposed in the *Digital Charter Implementation Act, 2022*.[124] Once more, the reformulation prevents the constraint of an artificial cap where a higher amount may be needed to ensure compliance rather than absorption as a cost of doing business. Despite concerns over AMPs reaching disproportionate or punitive levels,[125] it must be stressed that the actual amount of an AMP remains set by the Competition Tribunal or court based on the circumstances and criteria set out in the law, and not simply inferred from the maximum allowable.

In an era of cross-border conduct and investigations, both the means and pace of enforcement take on added importance, as competition authorities must often work together to coordinate investigative activity. This may be, for example, through cooperation instruments or mutual legal assistance agreements, but the ability to amass evidence and respond quickly relies on a dependable domestic enforcement framework. Ineffective or inefficient procedures can risk making Canada a weak link in the global effort.

The BIA Amendments improved the Bureau's ability to seek information from foreign affiliates, better aligning the threshold for, and content of, orders with those of target firms. They also added clarity as to the applicability of information-seeking orders to firms located abroad. However, many more questions remain about optimizing investigative and enforcement mechanisms. A discussion about the adequacy of the Act's processes ensues.

**124** *Digital Charter Implementation Act*, 2022, note 24, s. 95(4). Note also that where the calculation in question leads to a maximum lower than the current fixed amounts (generally $10 million for a first order or $15 million for a subsequent one), then those fixed maximums remain in place instead.

**125** See, for example, *Undo Haste: Rushed Competition Act Reforms Warrant Further Examination*, note 92.

## Enforcement Mechanisms

Competition law enforcement, in most cases conducted *ex post facto* and dependent on a plethora of economic evidence, does not generally provide a rapid response to urgent marketplace issues. If enforcement moves too slowly in dynamic digital markets, in particular, the harm resulting from the conduct may be irreversible.

In a prosecutorial system such as Canada's, the pace of enforcement is dictated not only by the length of time it takes the Competition Bureau to investigate matters but also the length of time it takes for matters to work their way through the Competition Tribunal and court system, including appeals as necessary.[126] The slow pace of competition law enforcement is one reason why some jurisdictions are considering strengthening or making greater use of "interim measures" – available but seldom used under the Act – to halt potentially anti-competitive conduct pending a final decision.[127] The pace of competition law enforcement has undoubtedly contributed to leading some jurisdictions, such as the European Union, toward clear *ex ante* regulatory rules for large digital platforms (*e.g.* codes of conduct) to complement its antitrust approach.[128]

Canada's system is highly adversarial and adjudicative: the Bureau must seek authorization to compel any form of information other than a supplementary information request in merger review, and it has no ability to render binding decisions or set down rules. Such measures are the exclusive purview of the Competition Tribunal or court system, or must be the product of a party's consent. In any disputed civil matter, the Bureau acts as a pure litigant. For criminal matters, it leaves the fate of the matter to the discretion of prosecutors, who must balance it against a host of other priorities.

The limits on the Bureau's room to manoeuvre stand in contrast to many important international comparators, such as the European Commission, which acts as the decision-maker of first instance on both interim and remedial measures, and has extensive powers to collect information.[129] The U.S. antitrust agencies likewise hold wide-ranging information-collection powers, including

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**126** By way of illustration, three consecutive fully litigated unilateral conduct cases under the Act have taken approximately 7 years (*Toronto Real Estate Board*), 3 years (*Visa and Mastercard*) and 5 years (*Canada Pipe*) to reach final decisions, respectively.

**127** Rochelle Toplensky, "Vestager revives dormant antitrust weapon against tech groups", *Financial Times*, June 27, 2019. See also Competition and Markets Authority, *Letter from the Chair of the UK Competition and Markets Authority to the Secretary of State for Business, Energy and Industrial Strategy outlining proposals for reform of the competition and consumer protection regimes*, February 25, 2019.

**128** European Commission, "The Digital Services Act package", note 87.

**129** *Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty*, articles 7-10, 17-24.

subpoenas and civil investigative demands for information, without third-party authorization, while the Federal Trade Commission can even set out enforceable marketplace rules with respect to deceptive practices or unfair methods of competition.[130] In Australia, the competition authority can receive applications for certain forms of conduct that may harm competition, and independently authorize them on a public interest basis.[131]

The experience of peer jurisdictions suggests the Bureau could be afforded greater leeway to intervene as necessary to protect the marketplace. Negotiation of consent agreements and the granting of advance ruling certificates for mergers that it does not intend to challenge are currently two of the few resources it has at its disposal, but an ability to act decisively or provide more certainty without resorting to litigation may be beneficial.

Relatedly, ways to expedite litigation before the Tribunal and courts will always be a topic for inquiry, and suggestions have traditionally included limiting the circumstances where an appeal lies to the Federal Court of Appeal, different mediation procedures and more rigid timelines. The Tribunal's 2019 Practice Direction on an Expedited Proceeding Process took some steps in this direction.[132] The addition of more civil forms of enforcement (such as through per se civil prohibitions, as discussed above), as an alternative or complement to cumbersome or potentially undesired criminal enforcement, may also be worth exploration.

Another important consideration for effective enforcement stems from how cases are initiated, whether through private action or public enforcement by the Bureau. While jurisdictions such as the United States allow private actors to bring competition law matters directly to court separately from state or federal regulators,[133] the opportunity to do so is significantly constrained in Canada.

Since 2002, private parties have been able to bring cases directly to the Competition Tribunal when granted leave, under certain, limited reviewable conduct provisions of the Act. This process does not afford the applicant any compensation for damages, but rather simply takes the Commissioner's place in initiating a proceeding that may ultimately result in a remedial order. No successful case has been mounted by a private party to date, and one significant reason is that private access was not historically available for abuse of

**130** See 15 U.S. Code § 1312; U.S. Federal Trade Commission, "A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority", revised May 2021.

**131** See Australian Competition & Consumer Commission, "Guidelines for Authorisation of conduct (non-merger)", March 5, 2019.

**132** Competition Tribunal, *Practice Direction Regarding an Expedited Proceeding Process Before the Tribunal*, January 2019.

**133**For example, see Lauren Feiner, "App makers sue Apple and claim it uses 'monopoly power' to charge fees", *CNBC*, June 5, 2019.

dominance cases,[134] widely regarded as the Act's cornerstone unilateral conduct provision. The BIA Amendments have now permitted such private cases, which may help alleviate hardship suffered by aggrieved parties in compelling dominant firms to alter their behaviour. Absent the possibility of damages, however, a strong incentive for private cases does not appear to be present.

The Act's s. 36 allows a civil cause of action for damages suffered due to conduct that is subject to criminal prosecution, such as cartels or deceptive telemarketing, or the breach of an order. There is no equivalent to s. 36 for civilly reviewable conduct, however, and the fact that such conduct is not actually deemed unlawful under the Act (merely subject to a remedial order upon review) prevents civil recovery in tort for losses suffered.

A more robust framework for private enforcement, encompassing both 'private access' to the Competition Tribunal and 'private action' to provincial and federal courts for damages, would complement resource-constrained public enforcement by the Bureau, clarify aspects of the law through the development of jurisprudence, and lead to quicker case resolutions.[135] It may also lessen the effect of any strategic litigation on public resources. At the same time, changes in this regard would have to be designed to avoid unmeritorious or strategic litigation, or an unmanageable number of actions for the Competition Tribunal or courts to process.

## Collection of information outside of enforcement

While most of the above discussion concerns enforcement of the law against potentially anti-competitive or deceptive conduct, the importance of the Bureau's role as competition advocate should not be understated, and markets both in Canada and abroad have often been well served by timely interventions outside of pure enforcement action.

For example, the absence of public information on the conduct of digital platforms and the functioning of digital markets is a challenge for effective advocacy as much as enforcement, where grounds for an inquiry may not easily arise in the absence of critical information voluntarily provided by a source in possession of it. This challenge has prompted competition authorities in other countries, on their own initiative or at the request of government, to conduct market studies into digital markets as a means of uncovering possible

**134** *Damage Control: Abuse of Dominance and the State of Private Remedies in the Competition Act*, 12th Report of the C.D. Howe Institute Competition Policy Council, October 2016. See also Paul Erik Veel, "Private Party Access to the Competition Tribunal: A Critical Evaluation of the Section 103.1 Experiment", *Dalhousie Journal of Legal Studies* 18 (2009).

**135** See the submission of David Vaillancourt to the House of Commons Standing Committee on Industry, Science and Technology's study, "Competitiveness in Canada", April 26, 2021, as well as the submission of Jason Gudofsky and Kate McNeece, note 54.

competition problems, proposing pro-competitive solutions, and at minimum informing public debate through an airing of evidence.[136] Market studies can be equally valuable in other sectors where competition does not appear to be working well but where root causes are not obvious, or where identified market failures would require a regulatory solution. While the Bureau has conducted market studies without compulsory powers, the Organisation for Economic Co-operation and Development (OECD) and other commentators have recommended the Bureau be granted formal market study powers like its G7 counterparts.[137] Others (including former Commissioners and some private practitioners) have cautioned that such powers could result in increased burden on business or protracted litigation.[138] Formal study powers were removed from the Act's predecessor law once the new Act came into effect in 1986.[139]

Canada could join its peers in accepting such potential risks as part of the functioning of a healthy economy. Alternatively, the collection of information outside of the enforcement context need not be an all-or-nothing affair. Study powers could be made subject to specific triggers or oversight mechanisms, such as a request from an outside authority or judicial authorization, as with section 11 orders. Likewise, the manner, quantity or use of information collected could be circumscribed. Studies could also be subject to statutory notice requirements, published terms of reference and timeframes for completion. There is no shortage of international practice to draw from in this regard.

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**136** See, for example: *Digital Platforms Inquiry*, note 21; Competition and Markets Authority [United Kingdom], *Online Platforms and Digital Advertising Market Study*, July 3, 2019; and European Commission Directorate-General for Competition, *Commission Decision of 6.5.2015 initiating an inquiry into the e-commerce sector pursuant to Article 17 of Council Regulation (EC) No 1/2003*.

**137** See, for example, James Mancini, *Market studies: Time for Canada's Competition Policy Framework to Catch Up*, C.D. Howe Institute, January 10, 2019.

**138** *Competition Bureau Should Not Have Power to Compel Information for Market Studies*, 13th Report of the C.D. Howe Institute Competition Policy Council, May 4, 2017.

**139** Joshua Krane, Mark Opashinov and William Wu, "Vigorous enforcement, not studies, are what Canada's competition laws need", *National Post*, April 13, 2021. The authors note that studies under the previous statute "led to multi-year investigations into industries perceived to be the giants of the day — most famously the petroleum inquiry — but produced few economically positive outcomes."

## FOR DISCUSSION

The Government is considering reforms in the following areas and would welcome input:

- Making the administration of the law, and enforcement before the Competition Tribunal or courts, more efficient and responsive whether public or private, without unreasonably compromising procedural fairness. For example:
    - Giving the Bureau more leeway to act a decision-maker, ***e.g.*** through simplified information-collection, or a first-instance ability to authorize or prevent forms of conduct;
    - Introducing new forms of civil enforcement as alternatives to criminal prosecution for certain actions;
    - Allowing private parties to seek compensation for damage suffered from civilly reviewable (non-merger) conduct under the Act.
- Pursuing a reasonable path with respect to the collection of information outside of the enforcement context, such as for the purpose of market studies, taking both public value and private burden into account.

# CONCLUSION AND NEXT STEPS

The Government is resolved to ensure that the Canadian competition framework is fit for purpose and sufficiently agile to govern a modern and rapidly evolving economy. It seeks to create a principled, evidenced-based approach to competition law, policy and practice that balances the need to encourage innovation and the need to ensure a level competitive playing field. All input is welcome on the analyses and proposals set out in this paper. It is recognized that not all feedback may relate directly to the *Competition Act* or to competition enforcement policy, but will be valued for its contribution to Departmental and governmental priorities and undertakings, including other evolving areas of federal policy.