

Examining the Canadian *Competition Act* in the Digital Era

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1. Introduction

It is obvious that digital technology has transformed the economic landscape in Canada and beyond. Such transformation has invited claims that the *Competition Act* is no longer up to the job in promoting competition and deterring the improper accumulation and exercise of market power.¹ Such debates about antitrust adequacy are not a Canadian phenomenon, but are taking place around the globe.² This paper will critically assess the case for reforming the Canadian *Act*, carefully considering the two kinds of claims that have been leveled at the *status quo* in the global debate over the future direction of antitrust.

The first kind of claim is that, accepting that existing, essentially economic objectives of competition policy are appropriate, the *Act* requires reform to carry out its existing mandate effectively. The argument here is that digital markets are sufficiently different from other economic settings that the *Act* is not as effective as it could be in addressing the economic harms of market power in digital settings. There are arguments that large digital firms hinder innovation in various ways that escape antitrust scrutiny presently; for example, a dominant tech platform may acquire nascent competitors before they become competitively significant, which is difficult at best for antitrust authorities to stop.³ Reform is therefore appropriate.

The second kind of claim is that the *status quo* objectives of competition policy, with their focus on efficiency and economic welfare, are no longer appropriate, if indeed they ever were.⁴ Critics assert that powerful digitally-driven firms have market power that creates political and other non-economic harms that competition policy ought to address.⁵ The concerns range from misgivings about the concentration of political power in a handful of companies, to economic inequality, to privacy, and more.⁶ The now-conventional economic focus of competition authorities around the world, including in Canada, the

¹ See discussion in, e.g., Hunter, Schwanen and Watson (2021); Barnett et al. (2020).

² See, e.g., Kerber (2019); Wu (2018); Crémer, de Montjoye and Schweister (2019); Salop (2021).

³ See, e.g., Cunningham, Ederer and Ma (2021); Kamepalli, Rajan and Zingales (2021); Bryan and Hovenkamp (2020); Sokol (2018).

⁴ See, e.g., discussion in Barnett et al. (2020).

⁵ See discussion in Shapiro (2018, 2019, 2021).

⁶ See, e.g., Ducci and Trebilcock (2019) (on increasing importance of “fairness” in competition policy discourse); Douglas (2021) (on privacy and antitrust).

argument goes, misses some of the especially troubling consequences of market power in digital markets.

This paper considers the case for amending the Canadian *Competition Act* under each of these perspectives: first, that it is not up to the task of mitigating economic harms from market power in digital markets; and second, that there are non-economic harms from market power in digital markets that the *Act* should address explicitly.

On the first issue, the paper concludes that the *Act* is generally well-suited to addressing economic harms in digital markets, essentially for the reason that it relies on general, flexible standards for assessing conduct, rather than specific rules that may have become outdated in a digital era. That said, there are some narrow areas for recommended reform to the statute in order to achieve better existing economic objectives for the *Act*. Some of those reforms can be made as a matter of enforcement choice. For example, the Canadian Competition Bureau may wish to diversify its attention from a focus on the conventional “substantial lessening of competition” concerns that arise in mergers review, to include more prominently concerns about “prevention” of competition, especially through the stifling of innovation. The *Act* and the Bureau are equipped to handle such a shift.⁷ It is possible that amendments that do not change the substance of the *Act*, but clarify that the Tribunal has the authority to make orders in certain circumstances, such as where conduct may stifle innovation, would be welcome. While the paper will briefly discuss enforcement priorities, and clarificatory amendments, the focus of this paper is on substantive amendments to the statute itself.

There is a good case for incrementally yet substantively amending the *Act* for economic reasons. The substantive, recommended amendments do not result necessarily from the emergence of digital markets, and would be appropriate in any event. Digital markets, however, often aggravate the *Act*’s pre-existing shortcomings (or at least aggravate the shortcomings of judicial interpretations of the *Act*). I recommend changes to the laws against horizontal conspiracy to include wage-fixing and no-poach agreements.⁸ The current legislation and case law on the efficiencies defence to mergers in s.96 also require amendments to the *Act*. Regardless of one’s views on the optimal efficiencies

⁷ See, e.g., Competition Bureau (2017).

⁸ See Glossop (2021). In the US, wage-fixing is *per se* illegal: see Polden (2019).

defence to mergers, the *status quo* is not satisfactory either from an economic or a non-economic perspective. The defence does not have a clear conceptual foundation at present. The purpose clause of the *Act*, Section 1.1, the defence itself in s. 96, and the *Superior Propane* case have failed to clarify *why* the efficiencies defence exists, which in turn have rendered its application subject to the individual policy preferences of the Tribunal members who may consider it in a given case. It is not appropriate to require legal adjudicators to answer on a case-by-case basis the question of what the fundamental objectives of competition policy are.⁹ I establish the shortcomings of the existing approach to the efficiencies defence in discussing economically-motivated changes to the *Act*, but leave important questions about the optimal approach to the efficiencies defence to the later discussion of non-economic values and the *Act*: the answer will depend on how the *Act* addresses non-economic-welfare values.

There is, however, one aspect of the efficiencies defence that the paper considers in the economic section: I recommend statutorily overturning the precedent set by *Tervita*, clarifying in the *Act* that the invocation of the efficiencies defence by merging parties does not require the Bureau to prove anticompetitive effects quantitatively.¹⁰

Finally, I also recommend amending the abuse of dominance provisions for economic reasons. Specifically, case law has determined that abuse of dominance requires conduct that is harmful to competitors, but there may be conduct that is beneficial to competitors but harmful to competition that the abuse provisions also should address.¹¹ In addition, while in general the paper will set to the side important procedural questions that pertain to competition policy enforcement, there is one issue that calls out for reform: Canada is a marked outlier internationally in respect of the maximum financial penalty that is associated with abuse of dominance, with a maximum administrative monetary penalty of \$10 million initially.¹² I recommend increasing this amount significantly. Again, these amendments do not *require* for their justification the transformation that digitization of

⁹ Iacobucci (2013); Ducci and Trebilcock (2019).

¹⁰ See Iacobucci (2015); Winter (2015); Ross (2016).

¹¹ See Iacobucci and Winter (2010); Iskander (2018).

¹² *Competition Act*, Section 79(3.1). Subsequent orders for the same conduct may attract AMP's of up to \$15 million.

certain markets has precipitated, but digitization has strengthened the case for the amendments, for reasons that I will explain.

After recommending incremental changes to the *Act*, the paper reviews legislative developments in other prominent antitrust jurisdictions, including the EU, US, UK and Australia. The paper discusses illustrative proposals and actual reforms in these jurisdictions, analyzing them critically in light of the Canadian regime and proposals for Canadian reform that this paper recommends.

The second section turns to the case for reform to account for non-economic objectives. The section makes three central observations.

First, the *status quo* fails to guide enforcers, adjudicators and private actors about the objectives that ought to prevail in Canadian competition policy. *Superior Propane* compelled a decision on this question, and the case stands for the proposition that fundamentally political questions are up to the discretion of the members of the Tribunal. This is troubling. Thus, regardless of one's political preferences, the *status quo* statement of objectives in Section 1.1 of the *Act* is problematic, and reform of some kind is appropriate. This would be true independently of the emergence of digital markets, but is especially so because digital markets are prone to market power, and in addition have invited greater political disagreement about the desirable objectives of the *Act*.

The particular nature of reform to s. 1.1, however, involves policy trade-offs. Given the trade-offs, it is impossible to prove conclusively that one approach is incontestably superior to others. The paper outlines options for different possible directions for reform, reviewing their strengths and weaknesses. It concludes that adopting clearly an economic efficiency goal is preferable, but acknowledges that there are reasonable arguments to the contrary. Critical to the analysis is that in considering whether and how exactly the *Act* should account for non-economic objectives, it is essential to consider how law, regulation and policy work holistically. To accept that economic redistribution matters, for example, says little about whether the *Competition Act* ought to account for redistribution -- income taxation, and government spending, for example, are two alternative mechanisms for economic redistribution that are better targeted and more systematically effective at redistribution than the *Competition Act*. The choice of policy instrument matters.¹³

¹³ Trebilcock, Hartle, Prichard and Dewees (1982).

Appreciating that there are a variety of policy instruments available to government for a variety of policy objectives undermines the case for radical reform to the *Act*.

The rest of the paper proceeds as follows. Before considering the questions of whether and how to amend the *Act* better to achieve economic and/or non-economic goals, Section 2 canvasses some of the most important reasons why digital markets present new challenges to competition policy when compared to traditional markets. It is not enough to say that digital markets are different from old-technology markets to say that the *Act* should therefore be amended; at minimum, it is essential to carefully assess why competitive conditions, and therefore competition policy, may be different in digital markets.

Following this discussion, Section 3 reviews the case for reforming the *Act* assuming that the objectives of competition policy do not change. While the emergence of digital markets may affect enforcement priorities, the *Act* is for the most part well-suited to address digital markets. That said, there are recommended changes to the *Act* that do not depend on digitization for justification, but the recommendations take on more urgency given digital markets. Section 3 includes discussion of a sample of legal developments in the EU, US, UK and Australia.

Section 4 considers reform in light of the push to include non-economic objectives in the application of competition policy. Much of the impetus for consideration of a broader array of objectives for competition policy originates in the digitization of the economy. Economic equality concerns, and privacy concerns, to take two examples, may be more acute given the emergence of prominent digital platforms. Section 4 provides reasons to reject sweeping changes to the objectives of competition policy despite the aggravation, if not creation, of new social concerns by digital markets. The scepticism of sweeping change does not rest on a claim that the alternative priorities such as privacy and economic equality are not matters of societal concern – they clearly are – but rather on the claim that competition policy is not suited to pursue multiple, incommensurable objectives simultaneously.

Section 5 summarizes and concludes.

2. Competition and Digital Markets

As a preliminary, it is necessary to review how competition and competition policy operate in digital markets. If digitally-based products did not differ from other, physical goods markets in economically or otherwise significant ways, the case for reform, if it had any force, would at the very least not depend on the evolution of the economy in recent years. Digital products are different, however, and are different in competitively significant ways.¹⁴ This section reviews some of the key differences.

Digital markets are data-driven. The growth of computing power and the power of the internet has led to an explosion in digital data,¹⁵ and the capacity of businesses to rely on those data for their profits. There exists not only a vast amount of data about people and products, but technology has increased enormously business' capacity to process, analyze and rely on those data as a critical input in their products.

Examples abound. Facebook has billions of users, who provide Facebook with vast amounts of personal information about themselves and their contacts, which Facebook then processes and relies upon to, amongst other things, sell advertisements to advertisers seeking to reach Facebook users. Google is relied upon by billions to search the internet. Google not only learns about their users through these queries, which in turn is valuable in selling advertising, but also uses data from the searches to refine and improve its search engine. Amazon provides an e-commerce platform for itself and other upstream sellers from which it gathers vast amounts of data that it relies upon for various purposes, including setting prices for its products based on its analysis of demand from user data.

There are several competitively significant differences between digitally-driven markets and other markets. First, there are often powerful network externalities.¹⁶ Network externalities exist when the value of a product to one user increases with the number of users of the product. Network externalities may be direct or indirect. Direct network externalities arise where there is a benefit in and of itself from adding a user to a network. A telephone is more valuable the more people have a telephone; a social media platform is more valuable the more users the platform has. Indirect network externalities

¹⁴ For an excellent analysis of competition in digital markets, see Crémer, de Montjoye and Schweister, (2019).

¹⁵ Ben-Shahar (2019).

¹⁶ See, e.g., Ducci (2020); Tucker (2019).

also exist in digital markets. For example, the more users an internet search engine has, the more data the engine has access to, and the better refined are its search algorithms.

Network externalities have profound competitive implications. In particular, they create a tendency towards dominance. The more customers a seller has, the more valuable is its product to customers, all things equal, which attracts more customers, etc. There is a positive feedback loop for sellers. Consequently, markets characterized by network externalities may have competition *for* the market, rather than *within* the market.¹⁷ This creates a tendency to higher concentration in digital markets, which has competition policy implications. It may also raise the stakes for anti-competitive behaviour as incumbents seek to protect the feedback loop that entrenches their dominance, perhaps by impeding nascent competitors who might start their own feedback loop to compete for the market.¹⁸

On a related note, digitally based firms may grow explosively. This may in part be because of the power of network externalities: as other people start using Tik-Tok, its value, hence user base, hence value etc., may grow exponentially. A firm that is a minor competitor in a market today, or even irrelevant today, may become a powerful competitor, and even potentially dominant, in short order.¹⁹ This dynamism complicates an assessment of predicted competition over time in a market.

Relatedly, digital products have often low or even zero marginal costs. Once Google invests in its algorithm, data storage and data processing, the costs of providing one more search and/or selling advertising to one more advertiser are vanishingly close to zero.²⁰ This contributes to the capacity of firms to grow very quickly, and to become very large in relation to the size of a market. Put another way, there are significant economies of scale in digital markets. Economies of scale may also work to limit competition in a given market, in that it may not be feasible for there to be multiple firms in a market where success requires large investments in data management.

Innovation is a critical aspect of digital markets. They are more likely to be prone to Schumpeterian “creative destruction,” according to which the prospect of dominance (even temporary dominance) creates incentives for competition for the market, rather than

¹⁷ See, e.g., Crémer, de Montjoye and Schweister (2019).

¹⁸ Ducci and Trebilcock (2018).

¹⁹ Manne and Rinehart (2013).

²⁰ Manne and Wright (2011).

competition within the market.²¹ While a comparative static assessment of prices and quantities to evaluate the state of competition may make sense in most physical markets, such an approach may not have much meaning in the digital space where much of the meaningful competition concerns innovation and displacement of older products and technologies.

Digital markets have a feature that most others do not. A seller may enjoy dominance in providing a particular product, yet that dominance could be imperilled not by a rival product that is clearly a substitute, which would be true in most markets, but by a product that emerges initially as a kind of complement to the dominant product, but may in time become a substitute. An excellent example of this was the assessment of the Department of Justice in the US that Microsoft Windows was a dominant operating system that sought to protect its dominance by gaining and preserving dominance in internet browsers.²² The argument was not that operating systems and internet browsers were competitive at the time that Windows sought to gain dominance in browsers by bundling Internet Explorer with Windows. Rather, the argument was that internet browsers could emerge as competitive with operating systems over time, with browsers essentially disintermediating operating systems and providing users with software applications. Microsoft, the DOJ successfully asserted, therefore sought to gain and preserve dominance in browsers in order to protecting its dominant position over time in operating systems.

In the digital platform space, a similar kind of argument could apply to allegations against Facebook in its acquisition of WhatsApp.²³ While the social networking services that Facebook provides to its users are not directly competitive with a text messaging service, there are allegations that Facebook made the acquisition to protect against impending competition from WhatsApp as it added features that would begin to resemble and compete with social networking services.²⁴ The argument could also apply to Facebook's acquisition of Instagram: a mobile phone photo-sharing service may not be a close competitor initially with Facebook, but might have added features (and indeed did, post-acquisition) that led it to become a substitute over time.

²¹ Gandal and Halaburda (2016).

²² *Microsoft* (2001).

²³ See, e.g., Federal Trade Commission's Facebook complaint.

²⁴ Stauber (2019).

Another competitively significant distinction of many digital markets is their two-sided nature.²⁵ Many digitally-driven firms provide a platform that serves as a nexus for different kinds of customer to connect. Google, for example, provides search services to customers looking to search the internet, while also providing advertising services to customers seeking to sell their products to Google searchers. Similarly, Facebook provides a social media network to one set of customers, while selling advertising services to customers seeking to sell to Facebook users. Amazon also involves a two-sided market, with Amazon providing a marketplace platform that connects buyers of goods with sellers of goods.

Two-sided markets change the competitive analysis of conduct significantly because of the interaction between two different sets of customers.²⁶ For example, lowering prices on one side of the market may increase the platform's overall profits by attracting customers to that side of the market, which in turn increases the value of the platform to customers on the other side of the market; this allows price increases on the other side of the market that increase overall profits. This dynamic has been critical in competition cases, including *Visa/MasterCard* in Canada. Google, as an illustration, charges zero prices for search to searchers, which helps attract searchers, which in turn increases the value of advertising on the Google platform. Similarly, Amazon may suppress prices through subsidized delivery to buyers of products on one side of the market in order to increase the value of selling on the Amazon platform to its customers on the sell-side of the market.

The two-sided nature of many digital markets has implications for competition policy.²⁷ It complicates the analysis of competitive effects given that regulators and adjudicators ought to consider not just the competitive impact of certain conduct on one side of the market, but must also consider the other side of the market. This renders questions like market definition potentially complicated.²⁸ Two-sided markets also give rise to externalities across users, with each additional user on one side of the market

²⁵ Ducci (2016, 2020); Iacobucci and Ducci (2018); Calvano and Polo (2021).

²⁶ Ducci (2016, 2020); Iacobucci and Ducci (2018); Filistrucchi and Klein (2013).

²⁷ Ducci (2016); Pontual and Golovanova (2020).

²⁸ The US Supreme Court made questionable assertions about market definition in *American Express*, including making the observation that only two-sided platforms can compete with two-sided platforms. See discussion of this precedent, and the difficulties it poses, in *Sabre*.

benefiting users on the other side of the market. As a consequence, network externalities on one side of the market might limit competition on the other side of the market: if Google attracts all the searchers, advertisers will be more likely to buy from Google than other platforms, all things equal.

Digital markets may also have non-trivial switching costs, where incumbent users of a platform may be reluctant to change platforms after they have used it even if they were close to indifferent when initially choosing a platform.²⁹ For example, a user of a particular browser may save passwords with that browser; choosing a different browser will require the user to re-enter the data in the new browser. Habit may also create switching costs.³⁰ Such effects also have competitive implications, with the value of incumbency rising with the level of switching costs. Switching costs impede new entrants.³¹

I have identified various ways in which digital markets have economically significant features that affect any analysis of competitive conditions in those markets. There are other important, non-economic characteristics of these markets that also have potential implications for competition policy. The political power of certain digital platforms is under increasing scrutiny around the world.³² Certain digital platforms are enormously valuable and important elements of the modern economy. There are concerns that this size conveys upon them a political power that is disproportionate and inappropriate.³³ Amazon, for instance, is often the target of ire for harming main street retailers and hollowing out communities as a consequence.³⁴ The fact that Google controls access to information on the internet for a very large percentage of the population also causes consternation in some quarters.

More specifically, there are also concerns that certain platforms have excessive control over political discourse because of their dominance.³⁵ As a reflection of these concerns, Facebook established a quasi-independent review panel to assess whether certain

²⁹ See, e.g., Kamepalli, Rajan and Zingales (2021); Gans (2018).

³⁰ Goh, Xin, and Jin (2019).

³¹ Gans (2018).

³² Klein and Muis (2019).

³³ Stawicki, Firstenberg, and Papadimos (2020).

³⁴ See, e.g., Nader (2017).

³⁵ Crilley and Gillespie (2019).

individuals or groups should be banned from Facebook, including, notably, Donald Trump.³⁶

There is also concern that major platforms may have a negative impact on traditional news media, and therefore political discourse, by sharing stories without compensating the media that invested in creating the content.³⁷ Australia has essentially required Google and Facebook to pay for news that they share.³⁸

Another major non-economic consideration that arises with digital markets and products is privacy.³⁹ Digital markets depend on the accumulation and assessment of vast amounts of personal data. There is a concern that dominant firms have excessive power over such private information. For example, German competition authorities challenged (ultimately unsuccessfully) Facebook for exploiting its market dominance by allowing personal data to be shared across its various business units.⁴⁰ Competition policy and privacy may also interact where privacy concerns may impede a sharing of data that might promote competition. In Canada, as in the UK and Australia, government has pushed an open banking initiative that ultimately may lead to requirements that banks share data with fintech companies despite the banks' expressed concerns about privacy interests in the data.⁴¹ In the *Toronto Real Estate Board ("TREB")* case, the Board argued that it could restrict the sharing of certain data because of privacy interests. The argument did not succeed before the Competition Tribunal on the facts, given that the Board failed to provide compelling evidence that privacy concerns were in fact the motivation behind its data-sharing restrictions. Privacy considerations will gain prominence in future competition policy cases given the rise of digital markets.

Finally, digital markets, with their winner-take-all characteristics, and their ability to scale quickly, may lead to astonishing accumulations of wealth in the hands of a small number of entrepreneurs. Jeff Bezos is one of the wealthiest people in the world because of Amazon's success, but he is obviously not alone among digital entrepreneurs. The

³⁶ Clegg (2021).

³⁷ Murschetz (2020).

³⁸ McGuirk (2021).

³⁹ See, e.g., Douglas (2021).

⁴⁰ See Kerber and Zolna (2020).

⁴¹ In Canada, see Advisory Committee on Open Banking (2021); Standing Senate Committee on Banking, Trade, and Commerce (2019).

soaring wealth of these founders often attracts scrutiny given the increases in economic inequality that have arisen in many western economies in recent years. Wu speaks of the “new gilded age,” for example, which he invokes in part as a reason for antitrust to become more interventionist.⁴²

The distinctive characteristics of digital markets give rise to distinctive competitive and political dynamics. These distinctions, however, do not in themselves justify a profound restructuring of competition policy. There are two critical questions that require attention before calling for significant amendments to the *Competition Act*: from an economic perspective, is the *Act* sufficiently tailored or at least flexible as written to account for competitively salient features of digital markets?; and, ought the economic paradigm, which has dominated competition policy in Canada for decades, to be revisited to account for non-economic matters such as freedom of expression, privacy etc.? The next two sections consider these questions.

3. Is the *Competition Act* Suitable for Digital Markets, Assuming Conventional Economic Objectives?

i) Introduction

Non-economic objectives for antitrust have been present historically and in different jurisdictions internationally.⁴³ Such objectives, however, have not been especially prominent in most important competition jurisdictions in recent decades.⁴⁴ The intellectual insights of the Chicago School have much to do with the sidelining of non-economic goals. The Harvard School of antitrust expressed concerns that concentrated structures lead to anticompetitive conduct and outcomes, and such economic concerns resonated with many of the non-economic concerns associated with concentrated markets. That is, conventional wisdom was that there were both economic and non-economic reasons to take a strict approach to antitrust. Chicago School theorists (and they were

⁴² Wu (2018).

⁴³ See, e.g., Ducci and Trebilcock (2019); Kloosterhuis (2017).

⁴⁴ For an excellent review of the evolution of antitrust economics, see Shapiro (2021).

mostly theorists, not empiricists⁴⁵) challenged the Harvard School, offering for example the important insight that vigorous competition could lead to concentrated structures, with the most successful competitors gaining significant market shares as a consequence of better economic performance. The Chicago School made the case that antitrust policy would harm those it was trying to protect by penalizing concentrated structures, or large firms, *per se*.

While this and other insights were critical in contributing to a less reflexively interventionist antitrust policy, some Chicago theorists were overly simplistic in their arguments, for example appreciating insufficiently the impact of imperfect competition in markets, rather than considering only perfect competition as a contrast to monopoly.⁴⁶ The so-called Post-Chicago School has retained the Chicago school's focus on economic questions, but has pointed out on the basis of theory and evidence many ways in which market power and its attendant harms to social welfare may be more prevalent and durable than the Chicago school contended.⁴⁷

The past few decades have brought compelling and interesting debates about how best to achieve the goal of promoting consumer welfare, but commentary and enforcement priorities have been consistently economic. The question of how best to address predatory pricing is an example. Chicago School theorists contend that predatory pricing is rarely tried and even more rarely successful⁴⁸, a contention adopted by the United States Supreme Court in *Brooke Group*, which required a plausible prospect of recouping the losses from predatory pricing for there to be legally problematic predatory pricing. Post-Chicago commentators rely on game theory to observe that gaining a reputation for predatory pricing may itself make predatory pricing successful, and would abandon the recoupment test.⁴⁹ Both sides of the argument accept the goal of promoting economic welfare and differ simply on the means to achieve it.

The competitively distinctive characteristics of digital markets have invited or at least encouraged commentary that calls for significant departure from conventional

⁴⁵ Shapiro (2021).

⁴⁶ See, e.g., Iacobucci and Winter (2010); Oinonen (2012); Wilson, Klotz, and Sandford (2018).

⁴⁷ Shapiro (2021); Piraino (2007).

⁴⁸ See, e.g., Easterbrook (1981).

⁴⁹ See, e.g., Shapiro (2021).

economic thinking that has dominated commentary and law in recent decades. Perhaps most significantly, as described above, there are several features of digital markets that tend to lead to dominant firms, and also very large firms. Network externalities, for example, contribute to dominance, with incumbent firms having the advantage of a feedback loop: more users increase value, which increases users, etc. Moreover, digital market participants often have very low marginal costs, which allows them to grow to very large sizes relative to their markets. Even a company like Amazon, which relies both on big data and on physical logistics, has a low marginal cost of data management, a key input, in selling one more online product. The size of digital platforms like Facebook, Google and Amazon have supported a re-examination of bigness as an antitrust consideration, with commentary frowning on size for its own sake.⁵⁰ Wu, for example, speaks of the “curse of bigness,” and calls for the break-up of large firms as consistent with the political goals of antitrust.⁵¹

The resurgence of interest in non-economic objectives for competition policy has been aptly described as antitrust through a populist lens.⁵² I consider this politically significant movement in detail in the next section of the paper. In this section, however, I consider a separate question: is the *Competition Act* well-equipped to handle digital markets assuming that the conventional economic objectives prevail? The next subsection concludes that the *Act* is generally suitable for the era, though makes some suggestions for reform in the following subsection that are not motivated by the distinctive character of digital markets *per se*, but take on greater urgency in the digital era.

ii) The *Act* is Economically Suitable for Digital Markets

Previous sections outlined a number of ways in which digital markets differ from conventional markets. This section considers whether these differences call for substantive changes to the *Competition Act*. While digital markets shine a brighter spotlight on some pre-existing deficiencies with the *Act*, they do not call for profound reform.

⁵⁰ Lamoreaux (2019).

⁵¹ Wu (2018).

⁵² Shapiro (2018).

The principal reason why digital markets do not require significant amendment is that the *Act* as written is highly flexible. It sets out standards to judge conduct, rather than a set of acontextual rules aimed at specific conduct. Section 92, for example, provides that a Tribunal should stop or modify a merger or a proposed merger where it “prevents or lessens, or would be likely to prevent or lessen, competition substantially...” This sets out a standard by which to judge a merger, but does not attempt to be specific in instructing adjudicators on how to assess whether there has been or is likely to be a substantial lessening or prevention of competition. Section 93 provides a non-exhaustive list of factors that the Tribunal “may” consider, including the existence of substitutes, the extent of effective competition remaining in the market, the nature of innovation in the market, and whether one of the parties is a vigorous and effective competitor. Even though this provision points to specific factors, it too is hardly restrictive: the list is non-exhaustive, with s. 93(h) providing that the Tribunal may consider “any other factor that is relevant to competition in a market that is or would be affected by the merger or proposed merger”; and the Tribunal “may,” and therefore need not, consider any of the factors, though ignoring certain factors may be unreasonable in some circumstances (for example, it would rarely if ever be appropriate not to consider barriers to entry). Specific potential factors are included in the *Act* as guidance for the Tribunal, but if a factor is not listed, there is no restriction on the Tribunal’s capacity to consider the entire competitive context to evaluate a merger.

Similarly, provisions that constrain dominant firms are, for the most part, flexible and contextual. Section 79 provides that where a dominant firm engages in a practice of anti-competitive acts that prevent or lessen competition substantially, or is likely to prevent or lessen competition substantially, the Tribunal may make an order prohibiting the practice. Section 78 outlines a series of “anti-competitive acts,” including such practices as establishing fighting brands, and pre-empting the use of scarce resources by competitors, but explicitly states that the list does not restrict the generality of the term, “anti-competitive act.” Again, the Tribunal is able to consider context in its entirety in order to evaluate whether a firm has abused a dominant position.

There is one qualification to the flexibility of the *Act* in addressing dominance. Case law in *NutraSweet* and *Canada Pipe* has held that because of the nature of most of

the anti-competitive acts included in s. 78, “anti-competitive acts” are required to have a negative, predatory, disciplinary or exclusionary effect on a competitor.⁵³ This leads to a peculiar result that a dominant firm could engage in anti-competitive behaviour that lessens competition substantially, but is not an abuse of dominance because it has a positive effect on competitors, not a negative one. I will return to this issue below.

There is one other potential qualification to the description of the *Act* as flexible and contextual. While there is a general abuse of dominance provision, there are also specific provisions in the *Act* addressing resale price maintenance, exclusive territories, exclusive dealing, tied selling, and refusals to deal. These provisions, while shading more to a codification approach, do not disturb the conclusion that the *Act* is sufficiently flexible to handle novel digital markets. First of all, the provisions (now⁵⁴) rely on a test that the practice prevents or lessens competition substantially, so do not depart substantively from the test applied in s. 79 for abuse of dominance. If a practice under ss. 75, 76 or 77 results in a substantial lessening of competition, it would almost certainly attract scrutiny under s. 79 in any event.

Second, the general concern around digital markets in recent commentary is that novel practices and markets are insulated from competition scrutiny by an allegedly outdated *Act*. The provisions in ss. 75-77 target specific practices, but do not limit the generality of the application of s. 79 to any kind of practice (so long as it has a disciplinary, predatory or exclusionary effect on a competitor). These other, more specific provisions do not limit the generality or flexibility of s. 79 to respond to novel circumstances.

⁵³ The case law has not been entirely consistent on the requirement that an “anti-competitive act” must have a negative effect on a competitor. *NutraSweet* held that an agreement between competitors could not be an anti-competitive act because it did not have the requisite disciplinary, predatory or exclusionary effect on a competitor. The Tribunal in *Laidlaw* cited *NutraSweet* but held that a series of acquisitions of competitors by a dominant firm could be a practice of anti-competitive acts despite not having a negative effect on a competitor. Without citing *Laidlaw*, the Federal Court of Appeal in *Canada Pipe* clearly set out the requirement of a negative effect on a competitor. Most recently, observing that one of the anti-competitive acts in s. 78, namely, where a dominant firm buys up products to prevent price erosion, does not harm competitors, *Toronto Real Estate Board* contained some language seeming to limit this requirement, but it was in *obiter dicta*, and moreover was only tentative. See Iacobucci and Winter (2010); Addy (2012). Thus, while there has been ambiguity, the best reading of the case law is that an anti-competitive act requires a negative effect on a competitor. A statutory amendment rejecting such a requirement, which I discuss and recommend below, would change the law, or at the very least provide a welcome clarification.

⁵⁴ Past versions of some of the provisions did not require a substantial lessening of competition.

What are the implications of the flexibility of the *Act* in its assessment of competition issues for digital markets? Digital markets present not only idiosyncratic competitive characteristics, as outlined above, but new product markets altogether. But this does not imply that the *Act* needs an overhaul. Well before the digital revolution, the *Act* applied to a wide variety of markets, each with idiosyncratic characteristics. Competition in artificial sweeteners⁵⁵ differs dramatically from market tracking services in grocery retail⁵⁶ which differs dramatically from pipe markets.⁵⁷ Yet the *Act* applied in each of these markets, with the Bureau making the case for abuse of dominance that turned on the particular practices and competitive conditions in each of those markets. The Bureau persuaded the Tribunal, for example, that NutraSweet was using market power derived from its US patents in aspartame to protect its dominance in Canada, where such patents had expired.⁵⁸ *Canada Pipe* involved allegations that a loyalty discount program was exclusionary. Most-favoured-customer clauses were held to be abusive in *Nielsen* by deterring entry. The list goes on.

Given the flexibility, there is no reason why the *Act* would not apply to new practices in new markets. To illustrate the flexibility of the *Act*'s framework, consider one complaint that has gained traction against large tech platforms such as Amazon and Google: the allegedly anti-competitive “self-preferencing” of goods or services.⁵⁹ Google, for example, provides both general search services and vertical or specialized search services (e.g., airline schedules).⁶⁰ There has been concern that Google gives a preference to its own specialized search services in listing general search results, which in turn disadvantages entrants and other competitors in specialized search. Similarly, Amazon may give preference to selling its own products, rather than those of its competitors, when providing results to searchers in its digital marketplace.⁶¹ Such a practice is easily accommodated within the *Competition Act*. If the practice results in a substantial lessening of competition, it could be an abuse of dominance under s. 79. And it could also be

⁵⁵ *NutraSweet*.

⁵⁶ *Nielsen*

⁵⁷ *Canada Pipe*.

⁵⁸ *NutraSweet*.

⁵⁹ Todd (2017).

⁶⁰ See Iacobucci and Ducci (2018); Yun (2018).

⁶¹ See, e.g., Petrov (2020); Hoppner and Westerhoff (2018).

understood as a kind of tied selling of the downstream product to the upstream product (e.g., specialized search to general search), as Iacobucci and Ducci (2019) observe.⁶² Indeed, not only could the practice attract scrutiny under abuse of dominance provisions in theory, it has in fact pursuant to similar provisions in Europe.⁶³ Canadian authorities also considered but did not pursue an abuse case against Google on these grounds.

Consider another, thorny issue in digital markets: access to data. Again, the *Act* is equipped to handle the competitive considerations associated with data access, at least from the economic perspective that is the focus of this subsection. It is clear that privileged access to data on the part of an incumbent may create barriers to entry for the purposes of competition analysis. *Nielsen*, for example, turned in part on the dominant firms' exclusive contracts for the supply of an essential input, grocery retail data. The Tribunal concluded that the exclusive contracts with the data suppliers were an abuse of dominance, given that they denied potential entrants access to an essential input. It ordered that the contracts cease to be exclusive. More recently, *TREB* considered whether the Toronto Real Estate Board's decision to limit access to certain kinds of data that it controlled amounted to an abuse of a dominant position. The Federal Court of Appeal concluded that it did and ordered broader access to the data. There are a host of difficult policy questions associated with ordering access to data, or any other essential input. For example, what is the appropriate price for access? Who is allowed access? What security protocols apply to the transfer of data? These questions, though vitally important, go to answering whether the Tribunal *ought* to order access, and are beside the basic point for present purposes, which is to show that the *Act* is sufficiently flexible in considering competition policy matters to accommodate digital markets and to address the novel economic issues that they present: under the *Act*, the Tribunal *could* order access to data for competition reasons.

While wholesale changes to the *Act* are not necessary from an economic perspective, there are modest changes that are appropriate, especially in light of competitive conditions in digital markets. But, aside from the substantial suitability of the *Act* as written, modest change makes sense in digital markets given that they are

⁶² Simpson and Wickelgren (2007).

⁶³ See Iacobucci and Ducci (2018), Daly (2017) for discussion of Google, and Petrov (2020), Khan (2018) for discussion of Amazon.

remarkably volatile, and there is much that we do not know about them. Innovation and creative destruction in these markets are critical, and there is much that we do not know about these processes as well. Sweeping change to the *Act* in the name of promoting economic benefits from competition in digital markets is not only unnecessary, but risks doing damage to the very interests the *Act* seeks to protect. In light of uncertainty, modesty is appropriate. The next subsection considers and recommends incremental changes to the *status quo*.

iii) Incremental Reform

While the statutory fundamentals are in place from an economic perspective, improvements of a non-fundamental nature are appropriate, perhaps in any event, but especially in light of digital markets.

a) Enforcement, and Possible Clarificatory Amendments

The Competition Bureau has considerable discretion over what cases to bring. It can and does set enforcement priorities for the kinds of practices and harms it will emphasize in its choice of cases to pursue. The flexible nature of the *Act* offers the Bureau wide latitude in identifying and pursuing competitively harmful conduct, and allows it to prioritize. Digital markets invite stronger consideration of certain factors than traditional markets. The Bureau is aware of these differences, and circulated a draft paper in 2017 that makes several sensible observations about the need to re-examine enforcement in the digital era.⁶⁴ This subsection reviews some of the ways in which enforcement ought to change in digital markets, and acknowledgement of this by the Bureau in “Big Data.”

Non-price competition is essential in many digital markets. In internet search, for example, the price of search to the searcher (but not the advertisers) is typically zero. A harmful, anticompetitive impact in search is therefore unlikely to involve higher prices to searchers, but may well involve a degradation of the quality of the search. The search may not optimize, for example, in order to emphasize the search provider’s preferred results, rather than a typical user’s preferred results. From an economic perspective, the

⁶⁴ Competition Bureau (2017).

degradation of quality is analogously harmful to an increase in price, and ought to be given strong consideration in digital markets given the limitations on price competition in those markets.

This potential shift in enforcement attention to quality degradation, rather than price increases, does not require a change in the law, legislative or otherwise: The *Act* speaks of a substantial lessening or prevention of competition as being the harm to mitigate, and does not privilege price effects as the only, or even primary, locus of concern from the diminishment of competition. It is appropriate for the Competition Bureau in its enforcement actions to give the attention to quality degradation that digital markets invite. And there are examples that show that the Bureau has done this, whether or not one agrees with the particular outcomes of its reviews. For example, the Bureau reviewed and ultimately did not accept a complaint that Google had degraded its search by giving preferences to its own results, as in its listing of specialized search results. It concluded that there was insufficient evidence to show a substantial lessening or prevention of competition from self-preferences in search.⁶⁵ The focus on quality in this case was appropriate.

Innovation in digital markets may be critical to enforcement priorities as well, especially where competition is “for-the-market,” perhaps because of network externalities. For example, a social network may acquire a nascent rival in order to preserve its incumbency and attendant network externalities, even if the nascent rival has a technology and user experience that would be superior.⁶⁶ Digital markets are prone to disruption and incumbents may seek to stifle innovation through mergers or other conduct. Especially where nascent or potential competition is affected, it may be that this conduct tends to *prevent* competition rather than *lessen* competition. Again, the *Act* is equipped to address the harms that result from the loss of potential competitors. Indeed, the *Act* explicitly contemplates orders in the face of conduct that prevents competition.⁶⁷ In digital markets, it is appropriate for the Bureau to emphasize the importance of prevention rather than lessening of competition. The Bureau’s 2017 “Big Data” discussion paper did exactly

⁶⁵ <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04066.html>.

⁶⁶ See, e.g., discussion in Church and Gandal (2004).

⁶⁷ See, e.g., s. 79 and s. 92.

that, though aptly noted the difficulty of determining in practice when entry would otherwise have occurred but for certain conduct.

Two-sided markets are common in digital markets, and also invite a different enforcement approach. In determining whether competition has been prevented or lessened, authorities must examine not just results on one side of the market, but on both sides. Again, the Bureau is aware of the distinctions of this aspect of digital markets, discussing in its “Big Data” paper the subtleties of defining markets where there are two-sided markets, and the importance of appreciating the consequences of conduct across the two-sided market and not just on one side of it.

There are other economic distinctions of digital markets that affect enforcement priorities, but these are the most significant ones, and the central point for present purposes is that the *Competition Act* as written is flexible enough to accommodate a range of enforcement priorities. These priorities ought to change, and have changed in practice, in addressing conduct in digital markets.

Given that the *Act* addresses substantively many of the concerns that might arise in light of digital markets, specific amendments to address these concerns, if they happen at all, would be clarificatory and not substantive. But this does not imply that there is no case in favour of such amendments. Both the mergers provision and the abuse provision rely on a general, flexible standard, yet also include provisions that refer to a list of specific factors for consideration. As noted above, the Tribunal may prohibit a merger that prevents or substantially lessens competition pursuant to s. 92, while s. 93 outlines a number of factors that the Tribunal may consider in reaching that conclusion. As observed, s. 93 does not require the Tribunal to consider the factors it sets out in every case, nor is it exhaustive. Rather, s. 93 lists a number of factors that are likely to be relevant, depending on the circumstances, to a determination of the crucial question in s. 92: whether the merger substantially lessens or prevents competition. It may be appropriate to add to the list of factors in light of digital markets – this would not change anything substantively to the critical question of whether the merger prevents or substantially lessens competition, but would highlight certain concerns that arise in digital markets and provide better guidance to parties and the authorities. For example, s. 93 could invite the Tribunal to consider whether an acquisition would entrench or enhance the market position of a leading firm,

including leading firms in the digital sector.⁶⁸ Section 93(f) presently provides that the Tribunal may consider whether a merger removes a vigorous and effective competitor. Given concerns about acquisitions of nascent competitors in digital markets, it may be better for s. 93(f) to include as a factor in the analysis of whether a merger prevents competition or lessens it substantially the question of whether a merger removes a vigorous and effective competitor, *or a potentially vigorous and effective competitor*. Section 93 could also include as a factor whether a merger would result in the degradation of quality of a product, including products offered by firms in the digital sector.

Similarly, the abuse of dominance provisions set out general language in s. 79, and examples of possible anti-competitive acts in s. 78. Amendments to s. 78 could set out examples from the digital sector. For example, a firm unreasonably withholding access to key inputs, including data, could constitute an anti-competitive act.

Whether or not these, or other, clarificatory additions are made the *Act* is not of critical importance: the *Act* as written is flexible enough to account for the additional anticompetitive threats that digital markets present. Given the existing role in the statute of lists of factors that provide guidance to competition authorities, however, there is a basis for considering such amendments. The fundamental requirements to stop or modify a merger, or find an abuse of dominance, do not change either way – there must be a substantial lessening or prevention of competition – but the amendments may provide useful guidance to private parties, the Commissioner, Tribunal and courts.

Before turning to recommendations for more substantive, but incremental change to the *Competition Act*, there are two remaining points worth noting in this subsection on enforcement priorities. First, while this paper focuses on substance and not procedure, I make the following observation: there is not simply the question of whether the *Act* is capable in the abstract of addressing specific competitive features of digital markets, there is also the question of the vigour of competition enforcement in the presence of digital markets. Digital markets, for a variety of reasons, including network externalities, and obstacles to access to data, are more likely to include firms that accumulate market power, which in turn increases the social importance of competition enforcement. This invites enforcers to scrutinize conduct in digital markets carefully, which is often complex, and as

⁶⁸ Lawson Hunter suggested such an amendment in a speech to the Canadian Bar Association

digitization becomes important in more and more markets, it will be appropriate to increase enforcement activity: if markets prone to market power become more economically significant in an economy, it stands to reason that antitrust activity ought to increase.

Such a change in enforcement activity requires resources. Canada has moved in that direction, increasing the Competition Bureau's budget by \$96 million over the next five years, and a steady state increase after that.⁶⁹ But resource constraints on the enforcement side may call for other changes to ensure that scrutiny of anti-competitive behaviour remains suitable in the digital era, including perhaps liberalizing private rights of action for damages in order to draw on private as well as public resources to enforce the law.⁷⁰

There is another implication of the vulnerability of digital markets to market power. Whether or not a market is digital, there is a considerable range of economically harmful conduct resulting from market power that competition policy is ill-suited to address. To take perhaps the most significant example, if firms in an oligopoly refrain from engaging in vigorous price competition not because of an explicit conspiracy to fix prices, but rather because of a recognition that tacit cooperation with a rival will be more profitable than fierce rivalry, such parallel conduct is outside the scope of competition enforcement in Canada.⁷¹ And rightly so. To require firms to set vigorously competitive prices no matter their self-interest is ultimately to require the competition authorities to engage in price regulation, an enormously complex task to do well in any given market, let alone in every sector of the economy that is not highly competitive. Similarly, Canadian competition law seeks to deter the improper accumulation or preservation of market power, but does not penalize a dominant firm that sets high prices, or degrades its product, in order to *exploit* market power.⁷²

To take an example resonant with digital markets, as discussed above, *Nielsen* was an abuse of dominance case that included concerns about exclusive contracts for grocery retail data that an analyst of data, Nielsen, had struck with the sole suppliers of that data, grocery stores. The Tribunal found that the exclusive contracts prevented entry of a rival

⁶⁹ Financial Post Staff (2021).

⁷⁰ C.D. Howe Institute Competition Policy Council (2016); Ducci and Trebilcock (2019).

⁷¹ *Atlantic Sugar*.

⁷² *NutraSweet*.

analyst into the market and ordered Nielsen to discontinue exclusivity. There was an argument that such an order may not have been sufficient to induce the grocery stores to sell their data to a competitor of Nielsen, and therefore was not a satisfactory order. The Tribunal concluded that while its order may not have been *sufficient* to provoke competition in the market, it was *necessary* for competition to have a chance of emerging, and that was all it could ask of a remedy in the context at hand. Again, this was appropriate given that the only alternative would be to order the grocery stores to provide their data to a competitor, which would potentially be problematic because of the difficulties in regulating conduct of parties not subject to the antitrust complaint.

Recognizing that, from an economic perspective, competition policy is limited in what it can do to require competitive conduct in settings where there is market power, and recognizing that digital markets will often include firms with market power, it may be appropriate for government to consider whether regulation of certain digital markets is warranted. Ordering access to data held by others, for example, is something that competition authorities are empowered to do, as noted above, but there would be challenges for non-sectoral authorities like the Bureau or Tribunal to order such access, given difficulties in pricing such access, and potential implications for other legal and regulatory priorities, such as privacy. It therefore follows that as digital markets become more economically significant, in part because more markets will be digitally-driven, it may be appropriate for government to examine sector-specific regulation to address entrenched market power unassociated with exclusionary or other explicitly anticompetitive conduct. Regulation of any firm, digital or not, is challenging and it is far from obvious that pursuing a regulatory strategy would be optimal, but it may be the only tool available in a growing number of contexts to address market power. For present purposes, any move to increase regulatory scrutiny of digital markets would be independent of change to the *Competition Act* itself, given its appropriate and longstanding focus on anticompetitive conduct, not uncompetitive outcomes that result from market conditions.

An example of the potential for beneficial regulation that is informed by competition principles, but may not rely on the *Competition Act* itself, is open banking.⁷³

⁷³ Standing Senate Committee on Banking, Trade and Commerce (2019); Advisory Committee on Open Banking (2021).

Open banking requires financial institutions to make a customer's data transferable to other financial firms at the request of the customer. A financial institution may not have incentives to create such transferable data options for its customers given that so doing may empower its competitors; moreover, intensified competition lowers industry profits overall, so the competitor may not be in a position to compensate the institution for access to data.⁷⁴ Given the complexities in mandating transferable data, including the probable need for some kind of oversight, it may be better to establish a standing regulatory regime for open banking than to rely on *ad hoc* competition law cases.⁷⁵

b) Statutory Reform

Maintaining the economic perspective that applies throughout Section 3, this subsection outlines a number of recommended amendments to the *Competition Act*. While the fundamentals in the *Act* are suited to digital markets, there are flaws in the *Act*, at least as it has been interpreted, that require attention. I outline four recommended reforms in this subsection. Each of these reforms would be justified from an economic perspective regardless of the impact of digital markets, but are especially suitable in light of that impact.

b.i) Wage-Fixing and No-Poaching Agreements

As the paper discusses in detail below, Section 1.1 includes a potpourri of objectives of the *Competition Act*. The objectives include attention to economic distributive issues, with s. 1.1 identifying low prices to consumers as a goal of the *Act*, independent of (but often consistent with) the goal of economic efficiency.⁷⁶ Section 1.1 does not, however, identify competitive pay for workers as an objective of the *Act*, perhaps anomalously given the distributional focus on consumers in the section.⁷⁷ The paper discusses how this omission may have influenced the interpretation of the efficiencies defence below. This subsection focuses instead on the *Act*'s failure to treat wage-fixing and no-poach agreements among employers similarly to price-fixing and non-compete agreements among sellers of products. Given that wage-fixing and no-poach agreements

⁷⁴ See, e.g., discussion in *Nielsen*; Rubinfeld and Gal (2017).

⁷⁵ Blyth (2019).

⁷⁶ See discussion in Iacobucci (2013); Crampton (1992).

⁷⁷ Iacobucci (2013); Cengiz (2021).

have the same efficiency shortcomings as price-fixing and non-compete agreements, and similarly perverse distributive properties, this is a failure that deserves attention.⁷⁸

While s. 1.1 omits labour from the distributive goals of the *Act*, the conclusion that the *Act* does not apply to wage-fixing turns even more on the wording of s. 45 of the *Act*. Section 45, a criminal provision, prohibits agreements among competitors to fix prices or to allocate markets or customers in the sale of products. It does not, however, prohibit agreements amongst competitors that relate to the *purchase* of products.⁷⁹ As such, the Competition Bureau has announced that while it may consider such buy-side agreements under the civil provisions governing agreements between competitors, s. 90.1 in particular, it will not pursue such agreements under s. 45. Such an interpretation is likely correct, but means, however, that there would be no private right of action for damages for such buy-side agreements, since s. 36 requires actions for damages to relate to criminal offences, nor would there would be a financial penalty levied by the Tribunal since s. 90.1 does not provide for financial penalties. That is, there is no financial deterrence at present in the *Act* against wage-fixing, no-poaching or other buy-side agreements. This should change.

Wage-fixing or other conspiracies in purchasing is just as harmful from an economic efficiency perspective as price-fixing in sales. Price-fixing increases the price of a product to consumers, which increases the sellers' profits but creates efficiency losses by pricing some potential consumers out of the market. Wage-fixing suppresses wages, which increases profits to the conspirator-purchasers of labour by keeping costs down, but also creates efficiency losses by pricing some potential labourers out of the market. Monopsony is just as economically inefficient in principle as monopoly. It follows that deterring wage-fixing and other buy-side agreements ought to attract the same legislative attention as price-fixing and other sell-side agreements. From an efficiency perspective alone, s. 45 of the *Act* ought to be amended to apply to buy-side agreements. There may be distributive arguments in favour of labour that provide further support such amendments, but they are not necessary for the case for change to succeed.

This recommended change, like other recommendations addressed below, does not strictly depend for its justification on the increased digitization of markets. Even “old”

⁷⁸ See, e.g., Glossop (2021); Pecman, Margison and Spillette (2021).

⁷⁹ Competition Bureau (2020).

economy businesses create harmful economic distortions when conspiring in labour markets, and the *Act* should be amended for all contexts. But digitization may create a new impetus for such changes for efficiency reasons. As noted above, market power is more probable in digital markets, and the risks that there may be buy-side market power, and hence potential profit in wage-fixing conspiracies, increase. If, for example, Amazon and Wal-Mart were dominant online retailers, whose dominance were entrenched and protected by data analytic advantages, it is conceivable that they may have monopsony power in some labour markets, perhaps in smaller geographic centres that are logistically attractive locations for warehouses. Banning wage-fixing agreements would be efficient in such circumstances.

There are distributive reasons to support amendments to the buy-side conspiracy provisions in the digital era. There is an argument that digital markets, in part because of market power, aggravate growing economic inequality in society.⁸⁰ Wage-fixing agreements are distributively perverse in most markets, shifting economic resources from relatively less prosperous workers to more prosperous shareholders. The paper considers non-efficiency policy values in greater detail below, and the sometimes difficult policy trade-offs they raise, but where efficiency and non-economic values both support change, the argument is especially compelling. This is the case with adding buy-side conspiracies to s. 45.

b.ii) Section 96

Section 96 of the *Competition Act* provides that the Tribunal shall not make an order against an anti-competitive merger where the efficiency gains from the merger are greater than and offset the anticompetitive effects of the merger. The section has been the subject of considerable interpretive debate; indeed, within the litigation of *Superior Propane*, the Competition Commissioner changed his own position on its proper interpretation.⁸¹ The debate has focused significantly on the meaning of “anticompetitive effects.” In particular, are the negative anticompetitive effects from a merger derived only from losses in economic efficiency, such as where buyers are priced out of the market, or do the effects include some accounting for efficiency-neutral transfers from consumers to producers,

⁸⁰ See, e.g., Wu (2018).

⁸¹ See discussion in Iacobucci (2013); Ahmed (2006).

such as where buyers continue to purchase the product but pay more for it? This interpretive question raises an equity-efficiency trade-off: efficiency may recommend the allowance of the merger because of the economic benefits of cost savings, while equitable concerns about economic distribution may recommend the disallowance of the merger because profits to shareholders at the expense of high prices to consumers. This kind of reckoning between non-economic and economic considerations is the focus of Section 4 of this paper, and the interpretation of s. 96 will be an element of that discussion. This subsection, on the other hand, focuses on a separate issue that has arisen in the application of s. 96: the requirement set out by the Supreme Court in *Tervita* that the Bureau quantify anticompetitive effects if the merging parties invoke the efficiencies defence. Such a requirement is inappropriate and a statutory amendment to abolish it makes sense.

Merging parties in *Tervita* relied on the efficiencies defence to seek approval of a merger that the Bureau and Tribunal found would substantially lessen competition. The Tribunal accepted the Bureau's contention that price increases in the 10% range from the merger were likely, and the Supreme Court accepted that the merger would substantially lessen competition. While the Bureau did not specifically quantify the negative, anticompetitive effects of the merger, the Bureau and Tribunal agreed that any efficiencies from the merger were likely to be negligible, and therefore the merger could not go ahead: the negative effects from the merger could not be offset by negligible efficiency gains. The Supreme Court ultimately ruled, however, that it was incumbent on the Bureau to quantify the quantifiable anticompetitive effects from the merger such that the merging parties would know the case against them when invoking the efficiencies defence. As the Bureau had not quantified anticompetitive effects, the parties could successfully rely on the efficiencies defence to the merger.

The particular case outcome was clearly undesirable from an efficiency perspective: a predicted price increase of 10% would inevitably create some deadweight losses from buyers priced out of the market, and these losses would not be offset by efficiency gains that were found to be negligible. The efficiency argument in favour of the *Tervita* ruling therefore must rest on the idea that the quantification rule that the case created is optimal for future cases. This is not, however, convincing.⁸²

⁸² Winter (2015); Iacobucci (2015); Wilson, Klotz, and Sandford (2018).

Tervita requires only “quantifiable” effects to be quantified. But econometricians can in principle quantify any kind of effect, not just relatively obvious ones like price effects. A degradation in quality, for example, reduces consumer surplus, but may increase profits, both of which effects are in principle quantifiable. The economic impact of a prevention of competition, rather than a lessening of competition, would also be conceivably subject to quantification. Even the economic impact of a chilling effect on innovation, and attendant losses to consumer surplus could be quantified in principle. For example, recent developments in empirical methods have enabled economists to turn their attention to the quality of political information. Such studies have identified connections between the information environment and political outcomes.⁸³ Furthermore, researchers have linked growing market concentration in media with a degradation in the quality of political information, which is, in turn, associated with increasing polarization and other changes in voting behaviour.⁸⁴ It is unclear, therefore, what conceptual boundaries *Tervita* establishes between “quantifiable” and “non-quantifiable.” This implies that it will be open to merging parties always to advance a credible argument that the Bureau has failed to meet its burden of quantification, and therefore to invoke the efficiencies defence successfully, unless the Bureau successfully quantifies all economic effects of the merger.

It is possible, of course, that case law will clarify the quantification requirement over time, establishing the kinds of effects that require empirical estimates, and those that do not. But *Tervita* was decided in 2015, and there still is no clarification; litigated cases in Canadian competition policy are rare, especially in mergers given their time-sensitivity and the parties’ consequential reluctance to litigate. Moreover, any clarification will be arbitrary: if there is a good reason to require quantification of some effects, it is not obvious why there ought not to be a requirement to quantify all effects, given that all effects are theoretically quantifiable. The potential argument that it is easier in practice to quantify some effects than others, and therefore it is reasonable to require quantification of some effects rather than others, is not especially persuasive. Proving the quantitative impact of a merger is highly challenging and contestable in almost every case for almost every kind

⁸³ Peterson (2017).

⁸⁴ Moskowitz (2021); Arceneaux et al. (2020).

of effect. The Bureau is predicting the future in merger cases and proving the future quantitative impact of the merger on any dimension is not ever a straightforward exercise.

On a related note, allowing the parties to require quantification of anticompetitive effects simply by invoking the efficiencies defence risks relieving the merging parties of the burden of proving that efficiency gains are likely to materialize, yet they are in the best position to do so. Efficiency gains from mergers are easily asserted, but may not materialize.⁸⁵ Given the ease with which they can be asserted, and the dubious record of the realization of efficiencies, it is inappropriate to have the onus shift to the Bureau to prove quantitative anticompetitive effects merely by asserting efficiencies, and thereby excuse the parties from proving them, despite their having the best information on the probable outcome. If the Bureau proves that a merger will prevent or substantially lessen competition, the onus ought to be on the merging parties to prove that the merger will lead to efficiencies that are greater than and offset the anticompetitive effects. If the parties prove that efficiencies are likely to be realized, there at least will be a tactical requirement for the Bureau to respond, including perhaps with quantitative evidence, that the gains are insufficient to offset the harms.

Another problem with the *status quo* is that there is a danger that the priority on quantification that the Supreme Court displayed in *Tervita* might spread into other areas of competition policy. For example, could parties argue that, before they have to show that an allegedly anticompetitive practice has an efficiency explanation pursuant to s. 79, the Bureau ought to quantify the anticompetitive effects of the alleged abuse of dominance? This kind of question was considered in *TREB*, with the Federal Court of Appeal concluding that there was no such quantification requirement, but only because the Supreme Court decision in *Tervita* explicitly confined itself to s. 96. That is, the Court was sympathetic to the quantification requirement, which would be as inappropriate in the abuse (or any other setting) as it is in mergers policy. An amendment would better ensure that the ill-conceived approach in *Tervita* does not influence other competition law issues.

By establishing a requirement that the Bureau prove quantitative effects in the face of the invocation of the efficiencies defence, *Tervita* puts grit in the gears of the already

⁸⁵ See, e.g., Roller, Stennek and Verboven (2000); Craswell (1982).

complex machinery of proving that a merger is anticompetitive.⁸⁶ Parties have nothing to lose and something significant to gain by advancing an efficiencies defence, and then contesting the Bureau's attempts to quantify anticompetitive effects. Even where efficiencies are negligible, as in *Tervita* itself, such a strategy may be successful in defending an anticompetitive merger. If the Commissioner establishes qualitatively or quantitatively that a merger will likely prevent or substantially lessen competition, it should be up to the merging parties to prove efficiencies are greater than and offset the anticompetitive effects from the merger. An amendment to the *Act* should make this clear.

The fact that the parties would not have a precise quantitative target to overcome when invoking the efficiencies defence is not especially troublesome for the following reasons. First, on *Tervita*'s logic, the Commissioner need only quantify "quantifiable" effects, and need not quantify other effects. The Supreme Court already accepts, therefore, that the merging parties may be required in some circumstances to establish efficiencies that overcome unquantified anticompetitive effects. The Tribunal must exercise its judgment to weigh anticompetitive harms against efficiencies even if the former are not quantitatively specified.

Second, there is a question whether the efficiencies defence ought to be retained at all, even from an economic perspective, perhaps especially in the digital era. There is some evidence in the US that market power is increasing, which is consistent with what one would predict given the rise in digital markets and their vulnerability to uncompetitive conditions.⁸⁷ Given the rise in market power generally, and the difficulties of identifying efficiency gains that will truly materialize *ex post*,⁸⁸ especially in dynamic and innovative markets,⁸⁹ it would not be unreasonable to recommend the abolition of the efficiencies defence altogether on the basis of economics, let alone political considerations. While it is necessary for the *Act* to clarify its political and economic objectives, as the next section outlines, from an efficiency perspective, the efficiencies defence ought not to be abolished altogether. Canada is a relatively small economy with the scale disadvantages that this implies – borders still matter in determining competitive conditions – and there will be

⁸⁶ Chiasson and Johnson (2019).

⁸⁷ Shapiro (2018).

⁸⁸ See, e.g., Roller, Stennek and Verboven (2000).

⁸⁹ Chiasson and Johnson (2019).

cases where the country is better off allowing a merger and attendant efficiencies even if prices might rise as a consequence. But putting a burden on the Commissioner to prove quantitatively anticompetitive effects shifts the balance much too far in favour of producers over consumers, especially in light of the challenges of quantifying the kinds of anticompetitive effects that are more likely to occur in digital markets, such as harms to innovation or product quality. *Tervita* itself demonstrated this by perversely allowing an anticompetitive merger with negligible efficiency gains because of the efficiencies defence.

A third reason why it would not be overly troubling following an amendment that the Bureau would not be required to assess quantitatively anticompetitive effects is that, at present, there is no clear definition in the case law about the kinds of anticompetitive harms that s. 96 addresses. *Superior Propane* concluded that these harms could include both efficiency losses and efficiency-neutral transfers from consumers to producers, and it was up to the Tribunal to exercise its discretion about what matters in any given case. The paper returns to the problems for indeterminacy that such reliance on the Tribunal's preferences generates, but notes here the peculiarity of requiring the Bureau to quantify the anticompetitive effects of a merger when the conceptual foundation of what counts as an anticompetitive effect is undefined.⁹⁰

For all these reasons, a legislative amendment to s.96 ought to provide that the Commissioner need not rely on quantitative evidence to establish a probable substantial lessening or prevention of competition from a merger. Once the merger is established as anticompetitive, the merging parties ought to bear the onus of showing that efficiencies outweigh the anticompetitive effects of the merger. Just as it would have to do under *Tervita* in respect of "unquantifiable" effects, the Tribunal will exercise judgment to reach conclusions about the gains and losses from the merger, even if those gains and losses are not completely quantified.

b.iii) Abuse of Dominance

This subsection recommends three amendments to the abuse of dominance provisions. The statute should clarify that an anti-competitive act does not require a negative effect on a competitor. The statute should also clean up the quirky (at best)

⁹⁰ Iacobucci (2015); Wilson, Klotz, and Sandford (2018).

relationship between s. 79(1)(b) on anti-competitive acts and s. 79(1)(c) on the competitive impact of a practice. Finally, the Act should allow Administrative Monetary Penalties that exceed \$10 million.

b.iii.1) Harm to Competition, Not Competitors

Case law has concluded that anti-competitive acts that may constitute an abuse of dominance under s. 79 require a negative impact on a competitor; specifically they must have an exclusionary, predatory or disciplinary character. This was the conclusion in *NutraSweet* because the list of examples of anti-competitive acts found in s. 78 generally have a negative impact on a competitor. While the Tribunal in *Laidlaw* concluded that a series of acquisitions of competitors could be “anti-competitive acts,” despite not having negative effects on a competitor, the requirement of a negative effect on a competitor in *NutraSweet* was affirmed by the Federal Court of Appeal in *Canada Pipe*.⁹¹

In light of s. 78(1)(f), which speaks of buying up product to preserve pricing, and therefore does not have a negative impact on a competitor, the Federal Court of Appeal in *TREB* concluded that the negative impact could fall on someone who competes in a relevant market even if that person is not a direct competitor of the person alleged to have abused dominance. Thus, TREB could have engaged in a practice of anticompetitive acts by restricting the dissemination of data even if the acts had an exclusionary effect on realtors who did not directly compete with TREB. The conclusion in TREB is surely correct. An organization of realtors may harm competition amongst realtors even if the organization itself and realtors do not compete. As the Federal Court of Appeal itself recognized in *obiter dicta*, its reasoning in *TREB* calls into question the longstanding case law holding that an anti-competitive act requires a negative effect on a competitor: it would be reasonable to conclude that the existence of s. 78(1)(f) contradicts case law that holds that anticompetitive acts under s. 79 require a predatory, exclusionary or disciplinary effect on competitors.⁹²

Aside from the precedential tension between *TREB* and cases such as *Canada Pipe*, the interpretation of s. 79 to require harm to competitors does not make economic sense. It is not difficult to imagine acts that are beneficial, not harmful, to competitors that harm

⁹¹ Ducci and Trebilcock (2018).

⁹² Iacobucci and Winter (2010); Gal (1998).

competition.⁹³ Iacobucci and Winter (2010) offer the example of a practice that facilitates supra-competitive pricing amongst jointly dominant firms. To take a specific example from the case of *Atlantic Sugar*, the practice of one firm amongst three jointly dominant firms of posting its prices in its lobby might well have facilitated cooperative pricing amongst the firms, even if the practice did not amount to an unlawful (either criminal or civil) agreement. Iacobucci and Winter (2010) also conjecture that exclusive contracts might facilitate cooperative pricing amongst jointly dominant firms by limiting the gains to each firm from cheating on a cooperative equilibrium: exclusive contracts limit the additional sales that cutting prices attracts. They cite the consent agreement in *Waste Management*, a waste removal case involving two duopolists each relying on exclusive contracts, possibly to allocate parts of the market to each duopolist and preserve high prices.

The clarification that s. 79 should be amended clearly to prohibit acts that are beneficial to competitors but harmful to competition is appropriate regardless of digital developments. But the prevalence of market power in digital markets, and the potential for harmful, cooperation-promoting acts by jointly dominant firms, increases the urgency of the amendment. Moreover, Iacobucci identifies another enforcement objective for s. 79 that is especially relevant in digital markets, and that current interpretations of the section could foreclose.⁹⁴ There is an enforcement challenge associated with acquisitions of nascent firms by dominant firms in digital markets. Nascent firms may pose potential threats to dominant digital firms, and may do so in a short period of time given the potential for exponential growth, yet discerning and proving that an acquisition of a very new firm with small or non-existent sales is a threat to competition may be challenging. Such proof is especially difficult given that the products offered by the merging firms may not compete at a given point in time, but may have evolved to compete but for the acquisition. Facebook's acquisition of WhatsApp could fit this pattern, with text message services of WhatsApp potentially evolving to compete with social networking services.

⁹³ Iacobucci and Winter (2010); Craswell (1982).

⁹⁴ Iacobucci, (2021) work in progress; Gerard and Lianos (2019); Yun (2020).

Various suggestions have been made to confront such acquisitions.⁹⁵ An extreme version is that certain firms should be prohibited from making acquisitions. The obvious shortcoming of such an approach is that acquisitions can benefit consumers, not hurt them, perhaps because of expanded product features that the acquisition facilitates. Another approach would be to review a merger *ex post*, when the competitive implications of the acquisition are clearer. The Federal Trade Commission in the US has done just that in respect of Facebook's acquisition of WhatsApp and Instagram. This allows the benefit of hindsight, but creates remedial challenges as breaking up firms is clearly more difficult than preventing a merger.

An approach that Iacobucci (2021) identifies is to examine a series of acquisitions and understand them potentially as a practice of anticompetitive acts. Suppose a dominant digital firm acquires 10 nascent firms. While the Bureau might not have been able to establish that any of the acquisitions would have been likely to prevent or lessen competition substantially at the time, in hindsight, it may become apparent that the dominant firm had adopted a strategy of acquiring nascent competitors.⁹⁶ If, and only if, the *Act* prohibits anticompetitive acts that benefit competitors but harm competition, the *practice* of acquisitions could amount to an abuse of dominance under s. 79. This would have critical advantages from an enforcement perspective relative to relying on the mergers provision to review acquisitions of nascent competitors.

First, it would allow enforcers to take a bigger, better informed picture of the dominant firm's approach to acquisitions of nascent competitors. Second, it would expand remedial flexibility despite the *ex post* nature of the review. For example, if the Tribunal concluded that a dominant firm had engaged in a practice of anticompetitive acquisitions, it could impose an administrative monetary penalty rather than attempting to undo any given merger. Or it could restrict the dominant firm's ability to make acquisitions in the future, which naturally follows from a finding that the dominant firm has engaged in a practice of anticompetitive acquisitions.

The approach of relying on s. 79 to address the acquisition of nascent competitors has some support in existing case law: the Tribunal in *Laidlaw* found that a practice of

⁹⁵ Cunningham, Ederer and Ma (2021).

⁹⁶ Hemphill and Wu (2019).

acquisitions of small competitors could amount to an abuse of dominance, and ordered a remedy of a three-year ban on further acquisitions. However, *Laidlaw* glossed over the *NutraSweet* precedent, and was decided before the Federal Court of Appeal's clear adoption of the *NutraSweet* requirement of a predatory, exclusionary or disciplinary effect on a competitor in *Canada Pipe*. The possibility of relying on s. 79 to address acquisitions of nascent competitors (or a cumulative pattern of acquisitions of established but small rivals as in *Laidlaw*) thus depends on a statutory clarification that abuse of dominance includes acts that harm competition regardless of the impact on competitors.

b.iii.2) Anticompetitive Acts Harm Competition

The second recommended amendment to s. 79 concerns the relationship between s. 79(1)(b) and s. 79(1)(c). Section 79(1)(b) provides that, for the Tribunal to make an order, it must be that the dominant firm has engaged in a practice of anti-competitive acts, while s. 79(1)(c) provides that the practice must lessen competition substantially. Rather than interpreting the subsections together in a purposive way, the Federal Court of Appeal in *Canada Pipe* interpreted them in a formalistic, and strained manner.⁹⁷ The parties in *Canada Pipe* argued that the practice in question in that case, loyalty discounts, benefited consumers and therefore could not be an anticompetitive act under s. 79(1)(b). The Federal Court of Appeal rejected this argument, concluding that a benefit to consumers does not negate a predatory, disciplinary or exclusionary impact on competitors, which is the requirement to find an anticompetitive act. The analysis under s. 79(1)(c) is where the assessment of competition takes place.

The net result of *Canada Pipe* is that there can be a practice of “anticompetitive acts” that not only do not harm competition, but benefit consumers. This is a peculiar understanding of “anticompetitive acts.”

Section 79 should be amended to avoid confusion. One approach would be to combine ss. 79(1)(b) and 79(1)(c) to allow the Tribunal to make an order where a dominant firm is engaging in a practice that prevents or substantially lessens competition. Whatever the specifics, it would be useful to clarify that the abuse provisions cover acts that harm competition, whether or not they harm competitors. Again, such a clarification makes

⁹⁷ Trebilcock (2007).

sense in any event, but especially in light of digital markets where dominance will be more common.

b.iii.3) Administrative Monetary Penalties

While in general this paper will focus on substantive provisions in the *Competition Act*, there is one procedural matter relating to abuse of dominance that invites a statutory amendment. At present, as set out in s. 79(3.1), the maximum AMP for abusing dominance is \$10 million, at least initially (the AMP could increase on subsequent orders). In many markets today, especially digital markets where winner-take-all and other characteristics imply very high stakes, the threat of a \$10 million AMP is not a strong financial deterrent to potentially anticompetitive conduct. This is especially so when the firm discounts the threat of the AMP by the relatively low probability that the Bureau will detect and challenge its behaviour, and that the Tribunal will find that it abused dominance. The small financial penalties for abuse of dominance in Canada contrasts starkly with the nine, and even ten, digit fines that are not uncommon in the EU, and also contrasts with the prospects of treble damages and fines in the US (there is no statutory possibility in Canada of a private action for damages resulting from an abuse of dominance⁹⁸). Given the high stakes of digital markets especially, the maximum AMP for abusing dominance should be considerably higher than \$10 million. The *Act* should be amended to allow for financial penalties that would generate meaningful deterrence.

iv. International Developments

I have recommended narrow reforms to specific provisions in the *Competition Act* that respond to the emergence of digital markets and to pre-existing shortcomings of the *Act*, at least as it has been interpreted. Reform of competition policy is a politically salient issue internationally, and there are proposals and reforms in significant antitrust jurisdictions that are intended to respond to the challenges of digital markets. While there is a very wide range of proposed reforms internationally, I critically review in this subsection a sample of some of the more significant proposals.

⁹⁸ Perhaps there should be. See, e.g., Ducci and Trebilcock (2019).

a) United States

Several proposals have circulated in the US, ranging from a radical rejection of the consumer welfare standard to conceptually modest recommendations that federal agencies enforcement agencies receive more funding.⁹⁹ As an example towards the modest end of the spectrum, President Biden recently signed into law an *Executive Order on Promoting Competition in the American Economy*.¹⁰⁰ The Order creates a White House Competition Counsel to “coordinate, promote, and advance Federal Government efforts to address overconcentration, monopolization and unfair competition.” It also requires Federal agencies enforcing antitrust to take a more aggressive stance on matters such as mergers, and unfair competitive practices in pharmaceutical and digital industries. Similarly, Senator Klobuchar proposed the *Competition and Antitrust Law Enforcement Reform Act of 2021*,¹⁰¹ which also calls for more intense enforcement of antitrust laws, and supports this by proposing an increase to the relevant agencies’ budgets.

These calls for greater enforcement are consistent with the analysis in this paper. Digital markets will be prone to market power, which will put more pressure on the Competition Bureau to enforce the *Act*. Calls for more resources to accomplish this are justified by digital markets, and have been met with the recent increase to the Bureau’s budgeting discussed above. Whether the increases are sufficient, it is too early to say.

Senator Klobuchar’s proposal also recommends significant, substantive legislative changes. One would be to lower the threshold of the anticompetitive threat required for government intervention. For example, a merger or practice by a dominant firm that creates an “appreciable risk of harming competition” could be subject to an order, rather than the present requirement that the practice “may substantially lessen competition.” Moreover, her proposal would create a rebuttable presumption against proposed mergers by certain large firms or firms with large market shares.

I would not recommend changing the current test in the *Competition Act* that requires the conduct in question to have or to be likely to have the effect of preventing or lessening competition substantially. First, it is not obvious what difference an “appreciable

⁹⁹ See, e.g., Barnett et al. (2020); Lancieri and Sakowski (2021).

¹⁰⁰ July 9, 2021.

¹⁰¹ February 2021.

risk” test would have relative to the status quo. One could construct a difference conceptually, but in practice cases are typically assessed on the basis of whether a merger or practice is either probably anticompetitive, or probably procompetitive or otherwise economically benign. Assessing different levels of competitive risk (“appreciable risk” versus “may substantially lessen competition” versus “likely to lessen competition substantially”) is not that finely tuned in practice, and requiring decisions to turn on the exact degree of risk assumes an unrealistically precise assessment of competitive impact.

Of course, much would turn on the meaning of “appreciable risk.” It could set such a low threshold that it would snare entirely benign conduct. In dynamic digital markets, there is inevitably uncertainty about the future, and a low threshold for “appreciable” would inappropriately encompass almost every kind of conduct by a dominant firm. On the other hand, if “appreciable” requires something significant, it would in practice tend to collapse into the current test of “may substantially lessen competition.”

Second, to the extent that the proposal would change to the degree of competitive harm required to intervene, it is far from clear that this is appropriate either from a legal perspective or an economic one. From a legal perspective, it is at the least a jarring result for a firm to be subject to an order requiring or banning conduct, and possibly subject to AMPs or other financial penalties, even its conduct is probably benign. Economically, the question is whether lower thresholds for enforcement promote or detract from economic well-being. Ultimately, this is an empirical question.

One empirical observation worth making is that the Competition Bureau at present challenges a vanishingly small proportion of mergers and possible abuses of dominance. Part of the explanation of such a small proportion could result from inadequate enforcement, but the much more powerful explanation is that a vanishingly small proportion of conduct is even potentially problematic from a competitive perspective.¹⁰² A significant departure from the status quo, both in departing from the usual legal maxim that holds that “they who assert must prove,” and in departing from the usual presumption that most choices by private firms (even big ones, who in fact may be big precisely because of their ability to cater to consumers) are economically beneficial, ought only to take place, in my view, in the face of evidence that this would improve enforcement. At the very least,

¹⁰² See, e.g., Iacobucci and Winter (2010); Hawk and Motta (2008).

conclusory indictments of digital firms are insufficient. What conduct that is presently permitted would not be permitted under the lower standards, what would the benefits be of this deterrence be, what benefits from benign conduct are forgone from this stricter enforcement approach? Until these questions are answered in careful, even if inevitably contestable, ways, I would not support lowering thresholds for enforcement.

Finally, the conduct that has probably attracted the most attention and concern about inadequate enforcement is the acquisition of nascent start-ups that prevent or lessen competition. It may be difficult to prove that the acquisition of a nascent start-up is competitively harmful, yet if these acquisitions are approved routinely, there is a danger that dominant platforms will protect themselves against competition through a series of small acquisitions.¹⁰³ Acquisitions of nascent competitors are indeed potentially problematic, but do not require lowering enforcement thresholds or shifting the onus of proof. As discussed above, abuse of dominance would be a highly suitable provision for addressing a practice of acquisitions that prevent or lessen competition. In Canada, as discussed, this requires amendments to s. 79 that clarify that actions by a dominant firm that harm competition but benefit competitors are potentially anticompetitive acts. By assessing a practice of transactions, rather than any given transaction, the authorities are better able to establish a substantial lessening of competition from an acquisition strategy without lowering the requisite burden of proof.

There is another set of more aggressive proposals authored by the US House of Representatives Subcommittee on Antitrust, Commercial and Administrative Law Report, *Investigation of Competition in Digital Markets*.¹⁰⁴ This Report expressed deep concern about the alleged market power of Google, Apple, Amazon and Facebook, and offered a number of recommendations to deal with them. Amongst other things, the Report recommends that the law prevent “self-preferencing” by dominant firms, which occurs where vertically integrated platforms privilege their own products in the downstream market, and even could require divestiture of certain assets of vertically integrated firms to disintegrate them.

¹⁰³ See, e.g., Hemphill and Wu (2019); Yun (2020).

¹⁰⁴ October 2020.

I do not agree with such an approach. Dominant firms, including platforms, may be able to offer better products downstream than stand-alone firms. Indeed, a dominant firm like Amazon may have become successful because it is excellent at catering to customers on both sides of the platform, providing sellers with access to buyers, and directly selling products to consumers itself. Because of the possible efficiencies of vertical integration, a prophylactic rule forbidding any kind of vertical integration would undoubtedly be costly to consumers in many settings, even if beneficial for small competitors.

This is not to say that dominant platforms ought not to be subject to antitrust scrutiny if they extend their product range vertically in a manner that undermines competition; they can, and should be, subject to scrutiny.¹⁰⁵ Indeed, I am personally sceptical of some of the arguments that have been made to defend practices like tying specialized, vertical search to general search.¹⁰⁶ But it would be economically ill-informed to conclude that self-preferencing is categorically bad for consumers and therefore ought to be banned.

b) European Union

The European Union has initiated a series of consultations and proposals concerning digital markets, including proposals for the *Digital Markets Act* and the *Digital Services Act*. The former would designate certain dominant platforms as “gatekeepers”, which designation would arise if the platform were dominant, the dominance is durable, and the platform serves an intermediation function.¹⁰⁷ Gatekeepers would be required to take some actions, and would be forbidden from others. Self-preferencing, for example, would be prohibited, which was discussed (and rejected) above. Gatekeepers would also be required to allow sellers and consumers to connect outside the platform.

The requirement of allowing connections outside the platform poses a problem common in the more intrusive antitrust reform proposals: it offers a broad condemnation

¹⁰⁵ The Bureau examined, for example, Google’s self-preferencing of its vertical search results. That it concluded that there was not an abuse of dominance does not imply the toothlessness of the present approach; rather, it demonstrates that careful analysis may not turn up competitive problems despite superficially troubling facts.

¹⁰⁶ Iacobucci and Ducci (2018).

¹⁰⁷ Vezzoso (2021).

of a practice that may, in some circumstances, be problematic, but may in many others be entirely benign. There are potential harms from requiring off-platform connections between sellers and consumers. There is a significant investment in building a platform which is recouped through transactions that take place on the platform. There is a risk that the choice by some users to conduct transactions outside the platform would undermine investment in the platform. A seller may rely on the platform to build its brand, and then disintermediate the platform if and when its product is successful. If successful products routinely avoided the platform, this would undermine incentives to build successful platforms. That being said, it could well be that in some circumstances it would benefit consumers, not just competitors, to permit off-platform transactions. This variability is why case-by-case examination of the matter under existing, flexible competition laws would be suitable. A categorical approach to conduct is misguided.

The *Digital Markets Act* also contains a proposal that gatekeepers provide its users with their personal data that would be portable to other platforms. This portability is also envisioned by the European *General Data Protection Regulation*. It resonates with the open banking initiative in Canada.

There are reasons to conclude that regulation of data portability may be appropriate, given that existing incumbents with market power may resist promoting competing platforms by creating portability. Regulation may also be appropriate because of the complexity of the data environment, with matters such as security and privacy requiring attention and, probably, coordination and standardization. This is where sustained oversight by an expert sectoral regulator would be appropriate, rather than enhanced antitrust scrutiny by a competition authority. The latter's expertise is not in supervising and regulating behaviour, but in reviewing conduct on an *ad hoc* basis.¹⁰⁸ While enforcing data portability may have beneficial competitive effects, I would not recommend changes to the *Competition Act* as a consequence, but would rely on regulatory solutions instead.

¹⁰⁸ Trebilcock (2004).

c) United Kingdom

The UK has proposed creating a Digital Markets Unit (DMU) within the Competition and Markets Authority (CMA). The DMU would have the authority to proactively adopt and enforce competition-oriented rules within digital markets. Firms with “strategic market status” would be subject to a set of conduct rules that would not necessarily apply to other firms in other markets. The code of conduct would include rules against self-preferencing, and weaker thresholds for preventing mergers, both of which have been discussed (and rejected) above. The strategic designation would also give rise to mandatory merger notifications, something not required for non-strategic firms.

Expanding mandatory notification, rather than changing the substantive rules governing mergers, might be justified. There are competing considerations. On the one hand, as discussed, acquisitions of currently insignificant competitors in digital markets may have the effect of stifling competition and innovation given the potential for nascent competitors to grow quickly to challenge an incumbent. This would push for expanded notification requirements in order to better equip the authorities to scrutinize the inhibition of future competition through acquisition. On the other hand, notification is not costless, nor is the review of the notifications by the authorities. Again, the decision rests on an empirical question: is there at present a persistent problem of underenforcement against anticompetitive mergers in the digital space that expanded pre-notification requirements would address? Given the capacity of the authorities in Canada to challenge mergers that have not been pre-notified, and to challenge them after the fact, and a recommendation that acquisitions of nascent competitors be in part addressed through abuse of dominance provisions which allow the Bureau to examine a series of acquisitions as a practice, I am doubtful that expanding notification requirements in Canada would be beneficial.

The idea of establishing a DMU within the CMA is not (necessarily) relevant to amendments to the Competition Act, but as an enforcement matter may be a welcome development in Canada. Digital markets are more likely to be prone to market power, are growing in economic importance, and have distinct characteristics that render them competitively idiosyncratic. The Competition Bureau recently established the Digital Enforcement and Intelligence Branch which ought to facilitate the development and application of sectoral expertise to competition policy in digital markets.

d) Australia

A possible compromise route to legislatively expanded pre-notification is found in Australia. The Digital Platforms Inquiry Final Report¹⁰⁹ recommended that “large digital platforms” agree to a pre-notification protocol for proposed mergers with the Australian Competition and Consumer Commission (ACCC). If the platforms and the ACCC cannot reach an agreement, the Report recommends exploring mandatory changes to the notification regime. While this approach has a clear coercive element given the threat of legislation, it attempts to promote cooperation around notification, at least in the first instance. If it were advisable to expand notification requirements, something about which I am dubious but would not rule out, this might be an appropriate approach. Especially if there were a differential benefit from pre-notifying for the merging parties, such as a commitment to provide a timely review of any voluntarily pre-notified merger, it may be that the large platforms would be willing to pre-notify even in the absence of additional formal requirements.

4. Non-Economic Objectives

The emergence of dominant digital platforms has provoked critics to argue that competition policy’s current focus on economics and consumer welfare is misguided, and that there is a much wider range of values that ought to be influential in its enforcement.¹¹⁰ The critics are not always precise, but some of the values include promoting economic equality, dissipating the political power of big firms, protecting privacy, especially personal data, protecting competitors not just competition, protecting the environment, freedom of expression, full employment and worker well-being, and others. This section considers how the *Competition Act* should respond to the push for greater sensitivity to these non-economic values.

The section proceeds as follows. First, it reviews the status quo. While certain non-economic, or at least non-efficiency, considerations are not presently influential in

¹⁰⁹ June 2019.

¹¹⁰ See, e.g., discussion in Shapiro (2018); First (2019).

Canadian competition policy, some other such considerations are present and meaningful. Indeed, there are areas where the range of potential considerations at play have rendered Canadian competition policy virtually incoherent. Because of this lack of clarity, reform of the *Competition Act* about its fundamental goals is appropriate; the only question is how to do so. Second, the section considers the extent to which non-efficiency factors *should* influence Canadian competition policy. Most of the values that critics of efficiency offer as alternatives are undoubtedly socially worthy objectives. The right question, however, is not whether they are worthy, but whether *competition policy*, as opposed to other legal or policy instruments, ought to account for them. Third, recognizing that political values may have some role to play in competition enforcement, the section considers options for reforming the *Competition Act*.

i) The Status Quo

Even a casual reading of the Competition Bureau's various enforcement guidelines, or the case law from the Competition Tribunal and various courts, reveals the unambiguous importance of economic analysis to the enforcement of competition policy. Cases not only consistently rely on the logic and language of economics, but also often turn on the competing theories of expert economists about certain conduct, or a proposed merger.¹¹¹ The *Competition Act* also reflects the language and logic of economics, requiring, for example, the Tribunal to consider the existence of substitutes in assessing a merger, and the existence of barriers to entry to a market.¹¹² Promoting economic efficiency goals will often incidentally protect non-economic interests; for example, encouraging competitive pricing is both economically efficient and often distributively advantageous; similarly, encouraging competition in digital markets may better encourage service providers to compete to protect privacy, or preventing collusion on restricting emission-reducing technology in automobile production may protect the environment and promote efficient competition.¹¹³ But this harmony does not always hold, and economic objectives are not

¹¹¹ See, for example, *Nielsen*, in which the Tribunal ultimately accepted the anticompetitive theory of exclusivity in that case offered by one expert over that of others.

¹¹² Section 93.

¹¹³ The EU recently fined manufacturers 875 million euro for colluding over emissions technology: European Commission (2021).

the only important goals in either the *Competition Act* or the case law. Rather, the *Act* outlines a variety of objectives, and the case law sometimes reflects this variety (though not always). Indeed, the largest problem with the statutory *status quo* is not an overly narrow focus on economics, but a framework that is on occasion dangerously indeterminate in its reliance on various policy objectives. The balance of this subsection substantiates this conclusion.

a) Section 1.1

In considering the objectives that presently govern Canadian competition policy, it is essential to start with the statement of objectives in the *Act* itself. Section 1.1 is worth reproducing in its entirety. It provides:

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

While economic efficiency is included, so too are the goals of expanding exports, ensuring that small and medium-sized businesses have an equitable opportunity to compete, and providing consumers with competitive prices and product choices. These goals often align in respect of a particular matter. Preventing anticompetitive, exclusionary conduct increases efficiency *and* may protect small and medium-sized enterprises. Preventing price-fixing is efficient *and* promotes competitive prices for consumers. But the goals may point to different outcomes in particular cases. A merger that results in lower costs and less competition may increase efficiency from the lower costs, and also lead to higher, uncompetitive prices from the reduction in competition. Assigning an exclusive territory to a downstream firm by an upstream firm may promote competition and efficiency by encouraging investments in promotion by the downstream firm, but may harm a small business seeking to sell the upstream firm's products in the territory in question. Section 1.1, which simply lists various objectives, provides no guide to private parties or adjudicators when the goals point in different directions.

Aside from its indeterminacy, there is another shortcoming of s. 1.1 that deserves attention: it is oddly specific in some of its goals, and thereby arbitrarily excludes possibly analogous considerations from competition policy analysis. For example, as noted above, the section speaks of a goal, *independent of efficiency*, of competitive prices. The best explanation of having an independent goal of competitive prices is that the *Act* seeks to promote the well-being of consumers as a goal in and of itself. The best explanation for seeking to promote the well-being of consumers is that it will, in general, promote a kind of distributive justice: producers (shareholders) are on average better off than consumers, so to the extent that keeping prices low results in a transfer of wealth (relative to a counterfactual of uncompetitive prices) from producers to consumers, this is positive from a distributive perspective.

Such a distributive goal for competition law is defensible as a general policy matter, and reflects objectives elsewhere in the law, perhaps most obviously in progressive income taxation. But by singling out competitive prices as the specific distributive objective, it neglects other possible distributive concerns. For example, it reflects no distributive concern for workers. Consistent with this omission, elsewhere in the *Act*, the efficiencies defence treats cost savings, including savings on labour costs, as positive impacts of a merger, yet this could result in hardship to labourers that might be worthy of distributive justice concerns. Labour markets are not frictionless, and losing a job will on average negatively impact labourers' economic well-being, but distributive concerns for labour are not found within s. 1.1 and the case law has accordingly not taken such distributive concerns into account.¹¹⁴

It is also not clear why concern for small and medium-sized businesses *per se* is included as a motivation for the *Act* in s. 1.1. SME's are clearly essential to the Canadian economy, but it does not necessarily follow that competition policy should seek to promote their well-being. For one thing, some anti-competitive conduct, such as price-fixing conspiracies or anti-competitive mergers, may *benefit* small businesses, which will often have higher costs and prefer high market prices. For another, promoting economic efficiency will protect SME's and other businesses from other anti-competitive conduct,

¹¹⁴ *Superior Propane* includes extensive discussion about distributive concerns to consumers, but not about workers who might lose their jobs. See discussion in Iacobucci (2013).

such as predatory pricing, but does not require singling out SME's in the objective clause given that efficiency is already a stated goal. Put another way, if protecting SME's does not promote efficiency, it is not clear what value is at stake; why would competition policy consider sacrificing efficiency to promote the well-being of SME's? Again, SME's are vital engines of economic growth in Canada, but competition policy protecting economic efficiency appropriately protects them.

In summary, s. 1.1 as written is both overinclusive, in that it includes a grab-bag of occasionally conflicting and sometimes puzzling goals, and underinclusive, in that it includes specific concern for some matters but not others, despite their similarity on relevant dimensions.

b) *Superior Propane*, Policy Values and the Efficiencies Defence

While it is not unusual for competition regimes to adopt a variety of orthogonal objectives,¹¹⁵ what is more unusual is a prominent litigated case that requires adjudicators explicitly to make a choice between different goals that point in different directions in the matter at hand. *Superior Propane* was one such case in Canada.

Superior Propane involved a merger that was found to have two effects: it would lessen competition substantially and therefore increase prices; and it would lead to efficiency savings. The case generated a rich and detailed litigation record, given that it was argued before the Tribunal twice, and the Federal Court of Appeal twice. A critical question in this litigation was the appropriate interpretation of the s. 96 efficiencies defence. Section 96 requires the Tribunal to allow a merger where efficiency gains are greater than and offset the anticompetitive effects of the merger. There was little controversy about the efficiency gains: any cost savings resulting from the merger would count as efficiency gains that weigh in favour of the merger. There was considerable controversy, on the other hand, about what counts on the negative side of the ledger. What, exactly, are the anticompetitive effects of the merger?

Higher prices induce consumers to exit the market relative to a competitive equilibrium, and the forgone gains from trade from this exit, also known as deadweight

¹¹⁵ Ducci and Trebilcock (2019); Iacobucci and Trebilcock (2021); Hawk and Motta (2008).

losses, are clearly a negative, anticompetitive effect of the merger. The disagreement in *Superior Propane* focused on the question of whether it ought to be considered a negative, anticompetitive effect of the merger that consumers who would continue to purchase the product would pay higher prices. The efficiency-based argument that this is not a negative effect is that competition policy authorities and adjudicators should not pass judgment on who is more worthy of receiving a dollar, a consumer or a producer/shareholder. The transfer of a dollar from consumers to producers, the argument runs, ought to be treated as neutral; only where a dollar is lost to society, as with deadweight losses, is there a negative, anticompetitive effect of the merger.

The counter-argument is not efficiency-driven, but based in equity. If consumers are worse off economically in comparison to shareholders, and if society ought to view as inequitable a transfer of resources from the relatively poor to the relatively wealthy, then a transfer from consumers to producers ought to be understood as a negative anticompetitive effect from a merger. Both positions find support in s. 1.1, which includes both efficiency and competitive prices as goals of competition policy.

At first instance, the Tribunal in *Superior Propane* rejected the distributive concerns, holding that the efficiencies defence was only about efficiency, not other objectives that are found in s. 1.1. It concluded that efficiency gains were greater than the deadweight losses from the merger, and would have allowed it as a consequence.¹¹⁶ The Federal Court of Appeal overturned on appeal. It emphasized that s. 1.1 not only identifies efficiency as a goal, but also identifies competitive prices as a goal. Given the equity concerns associated with the independent goal of competitive prices in s. 1.1, it would be inappropriately narrow to conclude that only efficiency matters for s. 96 analyses. Rather, the Federal Court of Appeal left it to the discretion of the Tribunal to weigh distributive and efficiency objectives in applying the efficiencies defence, perhaps even varying its approach on a case-by-case basis.¹¹⁷

¹¹⁶ Note that there is controversy whether efficiency gains were in fact greater than deadweight losses: Mathewson and Winter (2000) points out that accounting for pre-existing market power implies that the deadweight losses may have been greater than the proven efficiency gains.

¹¹⁷ In applying the Federal Court of Appeal's instructions in a rehearing, the Tribunal concluded that even when accounting for distributive concerns, the merger should go ahead.

While accounting for distributive concerns is clearly defensible given s. 1.1, the approach that the Federal Court of Appeal adopted provides little guidance. Leaving a policy trade-off – how to weigh equity versus efficiency – to the discretion of adjudicators on a case-by-case basis is problematic.¹¹⁸ Legal outcomes should not depend on the idiosyncratic policy preferences of adjudicators. Yet such a result finds support in s. 1.1 as presently written. *Superior Propane* put pressure on Canadian competition policy to identify what goals it is seeking to promote, and the answer is: it all depends on the policy goals of the Tribunal. This is troubling and calls for reform.

As noted above, there is another arbitrary aspect to s. 1.1 and *Superior Propane*.¹¹⁹ Distributive concerns about consumers were central and influential in the interpretation of s. 96 in that case. Distributive concerns about workers, on the other hand, were irrelevant; the fact that cost savings were in part from reduction in employee numbers was not regarded as a negative feature of the merger. While such an approach is largely arbitrary, given that layoffs undoubtedly harm workers, it is entirely defensible given the statute: s. 1.1 makes no mention of employee welfare, and ignoring it is therefore understandable, even if inconsistent with analogous values from a policy perspective.¹²⁰

c) Other Political Values

Section 1.1 provides a potpourri of values that fail to provide meaningful guidance on the foundational question of what competition policy in Canada should seek to achieve. The case law is also wanting, even setting aside *Superior Propane*, in that while there is a general focus on economic values, other political values occasionally rise to the fore, and on other occasions could be relevant, but are set to the side. This subsection reviews a couple of examples of the potential encroachment of political values in other cases, and how the courts have responded. The examples provide more reason for reform: the influence of non-economic objectives is unpredictable, or at least varies irrationally, and the statute should consequently be amended.

¹¹⁸ Iacobucci (2013); Casey and Niblett (2016).

¹¹⁹ Iacobucci (2013); Lianos (2014).

¹²⁰ Iacobucci (2013). It is true that there are other public policy instruments available to protect worker interests, such as employment insurance and welfare, but that is true of other objectives found in s. 1.1, such as progressive income taxes to promote economic equity.

Southam was a mergers case from the mid-nineties that was eventually decided by the Supreme Court of Canada. It involved the acquisition of community newspapers in Vancouver by a prominent daily newspaper in Vancouver. The product market in question was found to be newspaper advertising. There was considerable debate about whether community and daily newspapers competed for advertisers, with the Tribunal concluding that they did not compete, and the Supreme Court holding that appellate courts owed deference to this finding. The acquisitions were permitted to go ahead as a result.

Conspicuously missing from the competitive analysis was a meaningful assessment of whether the merger would have an impact on competition for newspaper readership. Newspapers are a kind of two-sided market, selling to readers on one side of the market, and advertisers on the other. The merger analysis by the Bureau, and in the litigation, focused on the advertising side of the market, but not the readership side of the market. One of the interesting aspects of that omission is the potential for political values to have been prominent. Section 1.1 mentions the objective of providing competitive product choices to consumers, and it would have been reasonable for the authorities to consider whether the merger might have led to a narrowing of editorial content. Such a narrowing would have not only potentially reduced consumer choice in a conventionally harmful economic way in a differentiated product market, but also may have had undesirable social consequences by narrowing editorial discourse in Vancouver. That is, there were arguably relevant political aspects of the case that were overlooked. Given the emphasis on economic analysis in Canadian competition policy, this was not an error, but does call attention to the unpredictable reliance on non-economic policy values in the law, especially when contrasted with a case like *Superior Propane* where such values were of potentially pivotal significance.

Other policy values also influence Canadian competition policy through the regulated conduct defence.¹²¹ According to this doctrine, the *Competition Act* will not apply where certain conduct has been authorized by a regulatory framework. Given that regulation has a wide variety of policy objectives, the regulated conduct defence provides another avenue for competition policy in Canada to be guided by non-economic policy values.

¹²¹ Trebilcock (2004).

An excellent example is found in *TREB*. The relationship between privacy and competition policy has been the focus of many recent conversations about the objectives of competition policy in a digital era.¹²² Some suggest that competition policy ought to protect consumers from the exploitation of their personal information by digital firms with market power. And the issue is more than just the subject of commentary. Facebook was subject to a competition complaint in Germany that its practice of aggregating the personal information of its users across various platforms was an improper exploitation of its market power. The case was successful in the first instance, but eventually overturned on appeal.¹²³

The public release of potentially private information was an issue in *TREB*. *TREB* argued that the Bureau's insistence that it make certain information about real estate listings more broadly available was not compatible with privacy legislation. The Tribunal ultimately did not accept that privacy rules created a constraint on the release of such information, given that *TREB* was already disseminating the information widely, but just not as widely as the Bureau was advocating. While privacy was not a pivotal factor in the case, it illustrates the potentially important role of the regulated conduct defence, and therefore of alternative policy objectives, in the administration of competition policy in Canada. Had the privacy legislation prohibited the release of the information, there would have been a strong argument that the Tribunal could not order *TREB* to distribute the information more broadly. Privacy and other non-economic considerations are therefore influential in Canadian competition policy: competition policy has tended to concede the primacy of other policy objectives whenever there is a potential conflict between regulation and competition.

Such deference to alternative policy goals by competition policy is not necessarily justifiable as a matter of policy.¹²⁴ Privacy legislation, for example, has a presumably laudable set of goals, but so too does competition policy. It is not clear why privacy, or other regulation, ought always to hold the trump card. There may be constitutional and federalism issues that constrain matters, but from a pure policy perspective, whether

¹²² See, e.g., Douglas (2020, 2021); Buiten (2020).

¹²³ Kerber and Zolna (2020).

¹²⁴ See, e.g., Trebilcock (2004); Gifford (1995).

privacy should dominate competition, or competition should dominate privacy, is not answerable *a priori*, involving as it inevitably does a weighing of policy choices. If, for example, there were a minor infringement of privacy legislation from the broader dissemination of information, yet such dissemination would intensify competition in a market with significant economic benefits, it is not obvious why competition policy should take a back seat to privacy. The case law around the regulated conduct defence introduces another element of uncertainty to the importance of alternative policy objectives in Canadian competition policy under the *status quo*.

i) Should the Competition Act Incorporate Non-Economic Policy Values?

There are several problems with the identification of non-efficiency, non-economic priorities in Canadian competition policy under the *status quo*. Section 1.1 establishes several different policy goals for competition policy, which may conflict depending on the circumstances. Moreover, by identifying specific goals (e.g., low prices for consumers; protecting small businesses), the *Act* fails to identify the underlying values that the *Act* is seeking to promote (e.g., distributive justice), which further undermines the guidance that the *Act* provides to businesses, enforcers and adjudicators. When cases have required adjudicators to account for two inconsistent goals found in s. 1.1, the courts have decided to leave any trade-off to the Tribunal to determine, perhaps differently on a case-to-case basis (*Superior Propane*). This leads to indeterminacy. Finally, other policy goals, including editorial diversity (*Southam*) or privacy (*TREB*), arise in unpredictable ways, including through the regulatory conduct defence, which for the most part has competition values cede priority to other values that sector-specific regulators have established. Reform to the *Competition Act* is required to address these shortcomings.

This section reviews the arguments for and against incorporating broader policy goals into the operation of the *Competition Act*. The first point is that there is no compelling argument against the idea that there is a wide range of values at stake in relation to the kinds of conduct that the *Competition Act* and competition policy addresses. Privacy, freedom of expression, editorial diversity, the equitable distribution of economic resources for consumers and workers, and concentrations of political power are only some of the values at stake when companies compete, or protect themselves against competition,

especially in digital markets. Such values are critical to democratic polities, and it would be absurd to make the case that they ought not to count in Canadian competition law because the only policy value that matters is economic efficiency. In addition, because the different values are incommensurable, there is nothing but tautology to support the idea that efficiency ought to be privileged over the other values: it is true that accounting for a value that is not based on efficiency, such as privacy, will prevent policy from maximizing efficiency, but that is neither surprising nor probative of anything important.¹²⁵ Efficiency cannot be invoked to reject privacy, nor is the converse true.

That being said, it is insufficient to accept the social importance of non-economic values to argue that the *Competition Act* ought to account for them. The correct question is whether competition policy, and the *Competition Act*, ought to include multiple objectives within the *Act*, or whether multiple policy instruments ought to account for the variety of objectives at stake in certain conduct.¹²⁶

Consider, for example, economic distribution. *Superior Propane* decided that the efficiencies defence in s. 96 includes consideration of both economic efficiency and equitable economic distribution. Even if an anticompetitive merger is on net efficient because of cost savings, *Superior Propane* concluded that the Tribunal could make an order against a merger out of distributive concerns about consumers: it may be that a merger increases overall well-being, but if the benefits accrue to relatively well-off shareholders, and the harms of higher prices to relatively worse-off consumers, the Tribunal could decide to prohibit the merger. Such an approach potentially results in greater economic equality, a widely accepted political objective, relative to an efficiency-only approach. But the all-things-considered approach has significant shortcomings as well.

First, as noted above, considering a range of objectives as independent inputs into a competition case renders the application of the *Act* unpredictable, and risks arbitrariness: ultimately competition policy outcomes turn on the personal choices of Tribunal members about how much to weigh distribution (or other values) as opposed to efficiency (or other values). Given that there is no single metric along which to measure the social benefits of many alternative objectives, the personal choices of decision-makers will dominate. As

¹²⁵ Kaplow and Shavell (2006) outline the tautological argument in great detail.

¹²⁶ Trebilcock et al (1982); Shapiro (2018).

Hunter aptly puts it, a wide-ranging set of objectives for competition policy present the risk that matters before the competition authorities will not be justiciable.¹²⁷

Second, while economic efficiency considerations will tend to have similar implications across contexts, other policy questions like distribution could have implications that, if they are not outright inconsistent case to case, sit uncomfortably together. For example, following the logic of Ross and Winter, if economic redistribution were the primary objective of competition policy, it would follow that the law ought to *encourage* a subset of inefficient, anticompetitive mergers that increase prices.¹²⁸ Suppose two luxury resorts owned by pension funds compete with one another: an anticompetitive merger between the two that increases prices may result in a more equitable economic distribution of resources given that the shareholders of the merging parties may be less well off than the customers; therefore competition policy ought not just to permit, but to welcome such a merger if distributive concerns were paramount. Such an approach seems perverse for competition policy.

Similarly, suppose that many consumers choose to multi-platform across two jointly dominant firms providing a particular digital service. The platforms propose a merger that would lessen competition substantially for the digital service, but would reduce the risk of a breach of privacy, given that customers will now only deal with one platform, not two. Ought competition policy to welcome such a merger in order to promote privacy? Again, this would be a jarring outcome for competition policy.¹²⁹

Third, as a means of achieving many alternative goals, competition policy is an unreliable instrument. Economic efficiency is always at stake in competition policy matters, while other values only occasionally arise. Consider economic inequality. Under *Superior Propane*, on the rare occasions when a merger raises prices and increases efficiency, attention to distributional concerns in competition policy may contribute to economic equality in society. This is far from a systematic approach to redistribution.

¹²⁷ Hunter (1987).

¹²⁸ Ross and Winter (2005) observe that, if anything, the distributive effects of a merger of luxury cruise lines would call for the merger to be allowed.

¹²⁹ Johnson (2021) provides yet another example concerning the goal of protecting the environment. High prices for oil discourage consumption of oil. Ought competition policy to welcome an anti-competitive merger of oil companies because it would raise prices for oil, and thus discourage consumption, in the name of environmental protection?

Other instruments, such as income or wealth taxation, and/or progressive government spending, are much better targeted and efficacious in promoting equitable economic distribution.¹³⁰ Similarly, promoting privacy by allowing or preventing a merger (or other pro- or anticompetitive conduct) in the relatively uncommon case where privacy is at stake is a much less reliable and systematic instrument for promoting privacy than establishing legislative regimes intended specifically to protect privacy.¹³¹

Fourth, there is an important institutional question.¹³² Competition authorities under the status quo are experts in the economic analysis of market conduct. If competition policy were to take on a wide range of values as enforcement priorities, however, the Bureau would be under institutional pressure to assume expertise in a wide range of areas. If, for example, privacy values became an essential consideration in the evaluation of conduct in a digital market, the Bureau would require expertise not only in the economic analysis of the conduct, but on how privacy legislation and privacy values ought to be respected.¹³³ The same goes for expertise in the political concentration of power, the equities of full employment, the importance of freedom of expression, etc. It is asking a great deal of a single organization to become experts in such a range of fields. Greatly aggravating the challenge, the values in which the Bureau would have to be expert are incommensurable, making its enforcement decisions ultimately the expression of policy preferences.¹³⁴

Alternatively, responsibilities for promoting particular values could be allocated to different government agencies. The Privacy Commissioner, for example, could review privacy matters, while the Competition Bureau focuses on the economic impact of potentially anticompetitive conduct. While ultimately there will remain the difficulty of a trade-off of incommensurable values – something the paper considers in more detail in the following section – allocating the protection of different values to different agencies allows the institutions to build up specific, focused expertise.

¹³⁰ See, e.g., Shapiro (2018); Atkinson (2016).

¹³¹ Moreover, because access to data may be critical to competition, protecting privacy in some cases may undermine competition.

¹³² For discussion of Canadian competition institutions, see Iacobucci and Trebilcock (2011).

¹³³ The Bureau's decision in *Southam* not to consider editorial diversity may have reflected an aversion to considering political, non-economic issues.

¹³⁴ See, e.g., Hunter (1987).

Fifth, while conflicts between widely varying objectives are inevitable, it is also important to appreciate that attention to efficiency will in many instances also promote other values incidentally. For example, competitive prices promote efficiency and equitable distribution. Competition may also promote better privacy policies of digital platforms, or better environmental features of automobiles. A focus on efficiency is far from consistently antithetical to other values.

Finally, while many values are potentially relevant to competition policy, some objectives that commentary, and even legislation, invoke have a questionable basis. As noted above, while SME's are vital to the Canadian economy, it is not clear why competition policy ought to promote their interests even if doing so were economically inefficient, especially given that SME's will often benefit from uncompetitive conditions.

In addition, some commentary takes the position that "big is bad," objecting to large, digital platforms simply because they are large¹³⁵; it is difficult, however, to see why big is bad *per se*. Perhaps the true goal likely rests on distributive concerns, or widespread employment objectives, or political concerns, but not the protection of small businesses, or condemnation of big business *per se*. The underlying values should be taken seriously, but not the arbitrary singling out of particular entities or practices. In other words, while a range of values are at stake in competition policy and enforcement, not everything should be treated as a value worthy of attention.

There are, to be sure, competing arguments in favour of including a variety of objectives in the *Competition Act*. First, there may be some objectives that benefit from having government rely on a variety of instruments to achieve them. Redistribution, for example, is difficult to achieve without creating market distortions and attendant economic costs. High, progressive marginal tax rates help governments raise revenues to redistribute, but also create disincentives for wealth creation in the first place. Consequently, having a variety of government instruments focussed at least in part on redistribution may have some efficiency benefits: rather than creating large distortions in income tax, spreading distributive objectives to other regulatory and economic oversight spheres may achieve better distributive outcomes at lower cost.

¹³⁵ Wu (2018); Bogus (2015).

In addition, given that there is clear democratic legitimacy to values such as privacy, economic equity and the diffusion of political power, it will be necessary for the law at some point to reckon with the challenges associated with the relevance of, and potential conflicts between, different, incommensurable values. Designating different agencies as primarily responsible for promoting certain values does not avoid the necessity ultimately of deciding between different values. Designating a single agency, the Bureau, as responsible for promoting all the relevant values recognizes that there will need to be a decision-maker over the values at some point, and simply designates the Bureau as that decision-maker. While it ladens the Bureau's work with difficult policy choices, some decision-maker must make those choices in any event.

On balance, there are strong arguments for competition policy to continue its present focus on economic efficiency, especially given the indeterminacy of competition law that potentially attempts to account for all values in every case.¹³⁶ But there is little reason to reject the conceptual relevance of other issues and values, and there is therefore an argument that competition policy itself ought to account for these values. The next section presents options for reform.

ii) Options for Reform

It is clear that there are significant problems with the approach to the objectives of competition policy as found in the *Competition Act* at present. The objectives it provides potentially conflict, are sometimes difficult to understand as important on their own terms – why, for example, is protecting small and medium-sized businesses *per se* a worthy objective? – and are potentially underinclusive – why, for example, is the protection of workers omitted as a goal when the protection of consumers and small business is included?

The emergence of digital markets has increased the importance of revisiting how the *Act* should outline its objectives. The size and importance of digital platforms has encouraged a political backlash against them, with critics calling for competition policy to take a much more muscular and political stance in addressing them. This political

¹³⁶ Shapiro (2018).

phenomenon alone increases the urgency of statutory clarification. But in addition, digital markets have properties that also increase the importance of statutory amendment. Digital markets are prone to market power, which naturally increases the importance of competition policy as a general proposition, even without accounting for the specific features of those markets that relate to matters such as privacy and freedom of expression.

The question of how to reform the *Act*, on the other hand, is not as straightforward as the conclusion that it needs reform. There is a spectrum of possible approaches, from broad to narrow. This section reviews three potential options for reforming the purpose clause of the *Competition Act*. At one end of the spectrum is a purpose clause that captures a variety of objectives for competition policy. At the other end is a clause that reflects the practical reality of much of the *status quo*; that is, a purpose clause that is focused on economic efficiency. There are, of course, a variety of possibilities in between these endpoints. For purposes of discussion, the paper proposes one such intermediate possibility, with a purpose clause focused only on economic efficiency, but an *Act* that allows for an appeal to Cabinet by either the Bureau or a private party to permit or prohibit certain conduct, perhaps for non-economic, political reasons. The paper considers each possibility in turn, describing them in greater detail and outlining their advantages and disadvantages.

a) Fairness as a Purpose

One possibility would be to formulate a purpose clause that identifies fairness as the goal of competition policy. For example, s. 1.1 could say something like the following: “The purpose of this Act is to maintain and encourage competition in Canada in order to promote a fair and productive society by advancing valuable social objectives that include but are not limited to efficiency, distributional fairness, and political fairness.” When the question of the fundamental purpose of the *Act* arises, the authorities and adjudicators have broad discretion to rely on whatever policy objectives they would like to decide a particular case. For example, the efficiencies defence in s. 96 refers to “anticompetitive effects,” and just as *Superior Propane* invoked s. 1.1 to justify the relevance of distributive questions, a broad, fairness purpose clause would justify the inclusion of a wide variety of policy objectives and values in considering s. 96. If a merger threatened privacy for any reason,

for example, this could rest on the negative side of the ledger in weighing anticompetitive effects against the benefits of the merger. Indeed, decision-makers could rely on s. 1.1 to conclude that concern for workers losing their jobs nullifies the benefits of efficiency savings.

Such a clause avoids some of the problems associated with the multi-objective purpose clause as written. It does not single out some objectives, while omitting others that would appear to share the same underlying values. (Why are competitive prices to consumers an objective of the current provision, while competitive wages are not?) It also avoids unexplained specificity in setting out certain objects. (Why exactly is the protection of small and medium-sized businesses an objective of the current provision?) It also allows flexibility. Prior to the emergence of digital markets, privacy was a much less prominent policy and social issue, yet has become highly relevant and significant in the digital era, including potentially to competition policy. Finally, the provision, by invoking the broad concept of fairness, explicitly invites competition authorities and adjudicators to exercise judgment in deciding particular matters. It does not attempt to disguise policy choices in spurious technocratic language, but makes plain that enforcement of the *Act* will depend on the assessments of adjudicators about what is fair in a given set of circumstances.

While a “fairness” purpose clause avoids ossifying an over- and underinclusive set of policy objectives within the legislative objectives of competition law, it has many disadvantages relative to a focus on efficiency, as discussed above. For example, it perpetuates uncertainty, and legal indeterminacy, leaving fundamental policy questions up to the discretion of the Bureau and the Tribunal. Also, while economic efficiency is always significant in competition policy matters, other values, such as privacy, or freedom of expression, only occasionally arise, leaving competition policy an unreliable instrument to promote these alternative goals. Moreover, the pursuit of values other than efficiency may result in a push to perverse results, such as welcoming an anticompetitive merger of luxury goods suppliers because consumers in this market may be better off financially than shareholders. Institutionally, a fairness approach would require the Bureau and Tribunal to be expert in all policy values that may relate to competition policy enforcement, from economic efficiency to privacy values to the social benefits from the diffusion of political power and beyond. Such a broad mandate is the logical endpoint of an ecumenical

Competition Act, and avoids arbitrary limitations of objectives in the current s. 1.1, but invites indeterminacy and asks a great deal of competition law and its institutions.

b) Economic Efficiency

The other end of the spectrum is occupied by an approach to the *Competition Act* that focuses exclusively on economic efficiency as the sole objective. Section 1.1 would read something like, “The purpose of this Act is to maintain and encourage competition in Canada in order to promote the economic efficiency of the Canadian economy.”

This clause avoids the uncertainty, unpredictability and indeterminacy associated with fairness as a purpose. It would revisit the key case on the values of Canadian competition policy, *Superior Propane*, by clarifying that “anticompetitive effects” in s. 96 refers only to efficiency-related deadweight losses to the Canadian economy, not the equitable effects of any transfers. It provides the Bureau and Tribunal with a clear mandate, and allows them to benefit institutionally from greater specificity in their expected expertise. It also has some benefit in promoting predictability by allowing much of the case law and institutional memory developed over the years since the *Competition Act* was enacted in 1986 to continue to apply, with some exceptions such as the case law around the efficiencies defence. This contrasts with a “fairness” purpose clause, which has the potential to lead to disputes over the relevance of past cases: once “fairness” writ large is explicitly the foundation for the *Act*, complainants may have strong grounds for distinguishing the efficiency-minded case law and practice of the past.

The efficiency model does not imply that non-efficiency objectives have no place in influencing policy where competition issues are involved. First and foremost, there is a wide range of policy instruments available to pursue non-efficiency objectives.¹³⁷ Privacy legislation and regulation advances privacy objectives, for example. Progressive income tax and progressive spending advances economic equity. Political spending limits reduce the political influence of corporations. And if there is at present no effective policy

¹³⁷ Note further that the Competition Bureau can coordinate and cooperate with other regulatory bodies to ensure that a competition policy perspective is considered in other regulatory choices. For example, the Bureau and the Canada Transport’s Policy Group have a Memorandum of Understanding that better ensures that competition expertise will inform Canada Transport’s approach to mergers. See <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04096.html>.

instrument designed to advance a given objective, one could be established. For example, if freedom of expression on the internet were problematic because of the dominance of a platform, a specific body with appropriate expertise could be established to address the problem. Asking the Bureau to pick up these issues *ad hoc* will lead to indeterminacy, and the sub-optimal exercise of expertise.

There is another, related way in which non-efficiency concerns will influence competition outcomes: the regulated conduct defence. As noted above, under the *status quo*, case law has established that competition policy will defer to other regulatory regimes.¹³⁸ Indeed, it is arguable that the case law has established too deferential an approach to non-competition legislation and regulation, with the valuable social goals of competition policy deferring to the valuable goals of other legislation/regulation without analysis.¹³⁹

Whatever the optimal approach to these trade-offs between competition policy and different regulatory regimes, it is clear that a narrow focus on efficiency within competition policy itself does not imply that competing values will be uninfluential. Other policy instruments are available to promote other values, and the regulated conduct defence helps ensure that other regulatory regimes influence (perhaps unduly) competition policy outcomes.

While the efficiency-oriented purpose clause creates clarity, builds on and encourages institutional expertise, while allowing other values to influence through other instruments, it is not without its drawbacks. Some values, such as the diffusion of political power, may not have existing effective policy instruments promoting them (at least at present). Moreover, the regulated conduct defence will imply that other values will override efficiency values found in the *Competition Act*, but not necessarily as the consequence of a thoughtful weighing of political values. An approach that requires an express weighing of the different values at stake will take context into account in a manner that the existing regulated conduct defence does not.

¹³⁸ See, e.g., Trebilcock (2004).

¹³⁹ Trebilcock (2004); Mysicka (2011).

c) Economic Efficiency, with Cabinet Oversight

Under the *status quo*, economic efficiency tends to dominate competition policy, with other policy objectives only occasionally assuming a central role in the case law (e.g., *Superior Propane*), though they are increasingly prominent in competition policy commentary. A third possible revision to the *Act* continues to emphasize economic efficiency, but creates an explicitly political process to account for other policy objectives. Under this proposal, section 1.1 of the *Act* would be revised to identify economic efficiency as the sole objective of the *Act*. A separate provision, however, would establish an appeal right to Cabinet in respect of any decision, an appeal that could turn on non-efficiency, political grounds. For example, a Cabinet appeal is found in the *Telecommunications Act*, s. 12(1):

12. (1) Within one year after a decision by the Commission, the Governor in Council may, on petition in writing presented to the Governor in Council within ninety days after the decision, or on the Governor in Council's own motion, by order, vary or rescind the decision or refer it back to the Commission for reconsideration of all or a portion of it.

The specific proposed revisions in the *Competition Act* would be something like the following. Section 1.1 would be revised to provide, "The purpose of this Act is to maintain and encourage competition in Canada in order to promote the economic efficiency of the Canadian economy." A different provision, perhaps section 1.2, would provide,

1.2(1) Within one year of any decision by the Commissioner of Competition not to challenge a merger under the *Competition Act*, or any decision by the Competition Tribunal, the Governor in Council may, on petition in writing presented to the Governor in Council within ninety days after the decision by the Commissioner or Tribunal has been made public, or on the Governor in Council's own motion, by order, vary or rescind the decision or refer it back to the Commissioner or Tribunal for reconsideration of all or a portion of it.

1.2(2) Notwithstanding the economic efficiency objective of this Act, the Governor in Council may consider any fairness or other social objective in reconsidering a decision of the Commissioner or Tribunal.

Notice that the provision refers to a decision of the Commissioner not to challenge a merger. This is the proposal because there is no private right of action on mergers: the decision of the Commissioner not to challenge conduct is a final decision for mergers under the *status quo*. There is a knock-on procedural requirement implied by these provisions:

the Commissioner must make public every decision not to challenge a merger. The Commissioner regularly releases press reports after deciding not to challenge potentially contentious cases, and it presumably would not be an unreasonable additional burden to require them to issue a press release or otherwise publicize any decision not to challenge a merger. Reasons need not be required, especially since a Cabinet appeal would typically rest on non-efficiency policy grounds that the Commissioner would not have the mandate to consider.

The details of the procedural aspects of the proposal are not of central importance for this paper; suffice it to say that while there would be complicated implications for procedure from a Cabinet appeal, there are other, more glaring weaknesses with the Cabinet oversight approach. The key element is that while the Bureau and the Tribunal would be required to follow the efficiency objective in interpreting and applying the *Competition Act*, an explicitly political body, the Cabinet, would have the authority to reconsider decisions of the competition authorities on any grounds they see as relevant. That is, the Commissioner and Tribunal would focus on efficiency, while the Cabinet would be free to rely on any number of policy objectives to vary or rescind an order. The Cabinet could also conceivably send a matter back for reconsideration, but given that the Commissioner and Tribunal are the experts in efficiency analysis, the expectation would be that if the Cabinet were to intervene, it would be on broader, non-efficiency grounds, which in turn implies that there would be little purpose to remand a matter for further consideration. Rather, the Cabinet would vary or rescind a decision by the Commissioner or Tribunal.

This hybrid approach to considering non-efficiency objectives has some advantages relative to both the efficiency-only approach in the second proposal, and the all-things-are-relevant approach in the first proposal. Like the efficiency-only approach, institutionally, it allows the Bureau and the Tribunal to focus on, and develop expertise in, competition policy from a consumer welfare/economic efficiency perspective. Moreover, also like the efficiency-only approach, there is predictability in the competition authorities' decision-making: parties before the Commissioner or the Tribunal understand that their case will depend on the efficiency criterion, and not others. Finally, the most important advantage of the approach is that while the Cabinet may consider a range of policy objectives in its

decision-making, Cabinet is an elected body subject to political accountability and is an appropriate locus for such consideration, unlike an unelected Commissioner or Tribunal.

There are, on the other hand, significant, even overwhelming, disadvantages of the hybrid approach. Parties arguing their case before the Cabinet will not have certainty about what factors might be relevant, let alone how best to structure their arguments. While there is greater legitimacy in allocating decision-making over fundamental policy values to politicians than to the Competition Commissioner or Competition Tribunal, it remains problematic to have unpredictable, *ad hoc* policy considerations drive outcomes.

On a related note, subjecting competition decision-making to Cabinet oversight invites political lobbying, or “rent-seeking,” by private parties that is socially costly and not obviously socially productive. Cabinet members, while ultimately accountable to the electorate, may be influenced by political expediency more than principle. Hunter observed in the early years of the *Competition Act* that it was designed expressly to give the Director of Investigation and Research (as the Commissioner was then known) law enforcement authority based on justiciable questions, and did not adopt a politically broad approach, in order to avoid the dangers of political lobbying and uncertainty associated with other, more politically oriented regimes such as those concerning foreign investment reviews.¹⁴⁰ Cabinet oversight would resurrect these concerns.

Another disadvantage is the very significant cost of adding another procedural layer to the review of competition matters, including the litigation process. The time required to review a decision of the Commissioner or Tribunal is especially problematic in a matter like a merger review, which may be highly time-sensitive. Compounding the matter, the parties would be uncertain about the criteria that the Cabinet would rely on in whatever process it follows. Aside from raising the spectre of indeterminacy, this would add complexity, cost, and delay as the parties seek to determine the criteria and then respond to them.

It is instructive to consider the kinds of examples of Cabinet appeals that exist at present, and note the contrasts with competition policy. At present, Cabinet appeals from an adjudicative process, or authority over particular matters that would otherwise be decided by an administrative agency or court, generally occur in respect of specific sectors.

¹⁴⁰ Hunter (1987); Hunter (2012).

For example, the Minister of Finance has considerable oversight over Canadian banks, and she correspondingly has authority to consider bank mergers, not the Competition Bureau or Tribunal. As another example, there is an appeal from decisions of the Canadian Radio-television and Telecommunications Commission (CRTC) to Cabinet in respect of decisions in that sector. Moreover, as in the case of the CRTC, the sector in question may have law that depends on general “public interest” language that is suited to political oversight, rather than better defined, and more clearly justiciable, factors.

Competition policy decision-makers are not sectorally confined, but rather have authority that stretches across the economy, overseeing price-fixing between two gas stations in a small town as well as abuses of dominance from multi-billion dollar technology companies. Why would Cabinet be well-positioned to consider a merger with very little national importance, such as two cement producers in a rural market?

In his critique of existing CRTC appeals, Ryan cites Justice Estey in the Supreme Court case, *Attorney General of Canada v. Inuit Tapirisat* as follows: “it may be thought by some to be unusual and even counter-productive in an organized society that a carefully considered decision by an administrative agency, arrived at after a full public hearing in which many points of view have been advanced, should be susceptible of reversal by the Governor in Council.”¹⁴¹ Justice Estey makes an important point in respect of CRTC appeals, which applies with even greater force to the idea of an appeal to Cabinet in respect of cases across the Canadian economy.

d) Analysis

This section has outlined three options for identifying the goals of competition policy: include a wide array of fairness concerns within the legislation’s mandate; include an exclusive objective of efficiency within the legislation’s mandate; and include an exclusive focus on efficiency for the Bureau and Tribunal, and also a Cabinet appeal that may consider any number of fairness grounds. Other options are possible, but these points on the spectrum represent categories of approaches that cover an appropriately broad range.

¹⁴¹ Ryan (2014), citing *Inuit Tapirisat* at 756.

The basic tension is between clarity and certainty on the one hand, and the risk of marginalizing socially important values on the other. The exclusive efficiency mandate provides the greatest clarity and certainty, potentially at the expense of advancing broader notions of fairness – it depends on the advancement of other values by other policy instruments, and the influence of those instruments. The fairness approach incorporates the fullest range of values, at the expense of clarity and certainty.

The Cabinet appeal option allows the Bureau and Tribunal to operate with clarity and certainty, but introduces greater uncertainty alongside broader recognition of fairness at the Cabinet level, invites political lobbying for particular results in particular cases, creates very significant and problematic costs of procedural delay in time-sensitive matters such as mergers, potentially devotes Cabinet to matters that may have very little national significance, and relies on Cabinet to oversee matters across the economy rather than particular sectors.

The choice between options rests significantly on the relative importance of clarity and certainty that accompanies a focus on efficiency versus the importance of plurality. Ultimately this is a choice that itself rests on policy preferences: is the clarity, certainty and predictability of legal standards more socially valuable than having competition policy that reflects a gamut of social objectives? Given that this itself is a policy question, there is no unambiguously best option.

That being said, my own view is that prioritizing efficiency within the *Competition Act* over other objectives, and a deference to other policy instruments to account for other social objectives, is the clearly preferred option. There is a price to be paid for such focus, in that other values will not be incorporated within competition law and policy, and thus a risk of insufficient attention to these other social goals. But there are many counter-considerations: for example, striving for efficiency will often advance other policy objectives (for example, low prices may be “fair” and efficient); and there are other instruments that exist to advance other values – if they do not exist, they can be established.

The efficiency approach avoids the indeterminacy of an all-things-considered approach. *Superior Propane* illustrates the shortcomings of accounting for a broader range of potentially inconsistent values within a single legal instrument: the approach to policy

objectives may vary case to case and will depend on the policy preferences of adjudicators. Such an outcome is problematic.

The intermediate, Cabinet appeal approach appropriately allocates authority over the choice of policy objectives to a politically accountable body. Its shortcomings, however, are overwhelming. The option continues to risk indeterminacy because of uncertainty about what fairness values might prevail at Cabinet, while adding a layer of political oversight that may be affected by lobbying, and that clearly adds undesirable delay.

Indeed, the Cabinet appeal option usefully illustrates the unavoidable problems that result from attempting to account for a wide range of incommensurable values within an institutionally appropriate framework. If competition policy were to focus on a wide range of goals, the institutional arrangement that appropriately allocates responsibility for weighing different policy objectives, a political question, is the Cabinet appeal option, with the Bureau and Tribunal focusing on economic/legal questions, and the Cabinet considering broader public interest matters. But this option ultimately remains subject to harmful uncertainty, and adds additional concerns including political lobbying, costs and delay.

5. Conclusion

The emergence of digital markets invites a reassessment of competition policy in Canada. This is so for at least two kinds of reasons. For one, digital markets are vulnerable to market power, which implies the greater public importance of competition policy. For another, digital markets raise a range of policy questions, from privacy to the concentration of political power in digital firms to economic inequality, and more. Consequently, competition policy has attracted political and public policy interest that is unusual in recent history.

There are some enforcement choices that the Bureau ought to (and does) consider in the context of digital markets, such as a greater focus on the prevention of competition, or on product quality degradation rather than price increases. The Bureau, following a similar idea in the UK, has also sensibly established the Digital Enforcement and

Intelligence Branch within the Bureau. Moreover, there are clarificatory amendments to the merger and abuse provisions that would not change substantive standards, but might provide useful guidance to competition authorities in reviewing conduct in digital markets. For example, in considering whether a merger substantially lessens or prevents competition, s. 93(f) could provide that the Tribunal may consider whether a merger would remove a potentially effective and vigorous competitor.

Setting aside enforcement and amendments that help clarify existing statutory provisions, this paper focuses on statutory amendments to the *Competition Act* that concern substantive competition provisions. The proposed amendments fall into two categories: ones that are appropriate from an economic perspective; and ones that are contingent on the particular objectives that Canadian competition policy adopts.

In the first category, section 45 at present fails to prohibit conspiracies amongst buyers of products, including amongst employers in respect of no-poaching and wage-fixing agreements. Even setting aside public policy distributive concerns about workers, something that is not at present found in s. 1.1 in any event, efficiency analysis would call for an amendment to s. 45 to ensure that it applies to buy-side agreements. Buy-side agreements such as no-poaching and wage-fixing create the same harmful deadweight losses as sell-side agreements and should be treated similarly. Civil review of these agreements is possible at present under s. 90.1, but fails to generate the deterrence that criminalizing the agreements does: not only could there be personal criminal liability, but criminalizing gives rise to the possibility of fines and private actions for damages under s. 36. Section 45 should be amended to include, and therefore deter, buy-side agreements.

There are two aspects of the efficiencies defence to mergers in s.96 that deserve attention. First, the multiplicity of economic and policy objectives in s. 1.1 led to a decision in *Superior Propane* that essentially leaves the question of how to value efficiency and distributive issues up to the subjective choices of the Tribunal. This is problematic, not least because of indeterminacy. What exactly ought to be weighed in the application of the efficiencies defence depends on the choice of objective(s) for the *Act*, which I return to below. Second, regardless of objective, the precedent in *Tervita* that requires the Commissioner to quantify anticompetitive effects even in the face of negligible efficiency gains ought to be overturned statutorily.

There are three recommended amendments to the abuse of dominance provisions. First, the statute should state clearly that an anticompetitive act for the purposes of s. 79 need not have an exclusionary, predatory or disciplinary effect on a competitor. An act that benefits a competitor but harms competition, such as possibly a practice of acquiring nascent competitors, is also harmful to society and ought to be subject to scrutiny under s. 79. Second, the act should clarify the relationship between, s. 79(1)(b) and s. 79(1)(c). *Canada Pipe* concluded that an anticompetitive act in s. 79(1)(b) could be good for consumers and not harmful to competition, while leaving the fuller competitive analysis to the assessment of a substantial lessening of competition in s. 79(1)(c). It is an odd result to say that an anticompetitive act need not harm competition. Better to amend and merge the subsections such that a practice of anticompetitive acts that substantially lessen competition is subject to an order. Third, the maximum Administrative Monetary Penalty ought to be higher than the present \$10 million for an initial finding. This maximum, combined with the absence of private rights of actions for damages for abuse of dominance, implies minimal financial deterrence of abuse. This is problematic, especially in digital marketplaces where dominance will be more common. It is also out of step with other antitrust jurisdictions, such as the EU where billion-dollar fines are commonplace.

The other amendments concern a revisiting of the purposes of the *Act*. At present, s. 1.1 is possibly overinclusive, and also underinclusive. It provides that the *Act* seeks to pursue a series of potentially inconsistent goals, which in turn puts pressure on adjudicators to make policy value choices as in *Superior Propane*. It is in this sense overinclusive. It is also underinclusive in that it specifies certain objects, such as competitive prices to consumers, while omitting analogous objects that share the same underlying values, such as competitive wages to workers. This stems from a specificity of objective that also creates puzzling questions about why certain objectives are included at all, including the protection of small and medium-sized businesses as a stand-alone purpose of the *Act*. The *Act* also fails to account for the concerns that have arisen especially in the digital era, such as the protection of privacy. Amendment of s. 1.1 is appropriate.

The paper set out three options for reform along a spectrum. At one end of the spectrum, the purpose of the *Act* could be to promote competition in order to promote a fair and productive society. On the other, the purpose could be to promote to promote

competition in order to promote economic efficiency. The former ensures that valuable social objectives are potentially influential in enforcing competition policy, but lacks clarity and determinacy/predictability; indeed it ultimately relies on legal adjudicators to weigh policy objectives according to their own individual sense of what is best. The latter option is clear and more predictable, and leaves the promotion of non-economic objectives to other regimes, which risks the marginalization of other, non-economic social values. A compromise proposal is to have the *Act* emphasize economic efficiency, and mandate the Bureau and Tribunal to focus on efficiency, while creating a right of appeal to Cabinet. While a Cabinet appeal appropriately allocates responsibility for value choices to a politically accountable body, it is subject to indeterminacy, the risk of rent-seeking, and cost, including significant costs of delay.

The choice across options itself is a policy question: it depends on the value of legal determinacy versus the inclusion of a multiplicity of values. My own view is that the efficiency option has the advantages of legal clarity, while not ignoring other values: efficiency and other values often point in the same direction, and when they do not, other policy and legal instruments are available to promote those other values. Whatever is ultimately chosen, the emergence of digital markets, and the emergence of new economic and political concerns associated with competition policy, have put greater importance on amending the *Act* to clarify its purpose.

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