
Centre for International
Governance Innovation

CIGI Papers No. 284 – September 2023

Fair Competition for an Evolving Economy

Keldon Bester



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67 Erb Street West
Waterloo, ON, Canada N2L 6C2
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About the Author

Keldon Bester is a CIGI fellow and an independent consultant and researcher studying issues of competition and monopoly power in Canada.

He has worked as a special adviser at Canada's Competition Bureau and as a fellow at the Open Markets Institute, and contributed to the UK Treasury's *Unlocking Digital Competition: Report of the Digital Competition Expert Panel*. Keldon holds a master of public policy degree from the Harvard Kennedy School.

Executive Summary

Policy makers around the world are grappling with a rise in the scope and scale of market power across their respective economies. Waking up from an economic approach that allowed for the accumulation of that power, governments are introducing new tools and reviving dormant ones to restore and enhance competition and dynamism. Fair competition, focused on preserving the competitive process and delineating beneficial from harmful competition, is a path forward to reverse the assumptions that led to the current monopoly moment. As international peers experiment with a range of policy tools with fair competition at their core, several paths are available for countries that wish to promote fair competition in their own economies. Learning from these experiments, Canada can incorporate fair competition into its own competition policy as it conducts a review of its competition policy framework. Moving away from a model resulting in limited and uneven enforcement, a framework rooted in fair competition is better suited for addressing the modern market power problem Canada faces.

Introduction

After a long period of hibernation, policy makers around the world are beginning to grapple with the consequences of concentrated economic power. The increasing recognition of a rise in corporate concentration and market power has sparked an international discussion on the appropriate limits of corporate power and the threat that the concentration of this power might pose to the future of competition and dynamism in economies around the world. But while much of this discussion stems from the rise of global technology firms, the issue of concentrated economic power is not limited to sectors. The Canadian economy, in particular, is characterized by a relatively small number of prominent firms in key markets, fostered by a permissive merger law increasingly focused on an outdated conception of economic efficiency.

In such an environment, Canada needs appropriate tools to police the conduct of dominant corporations and protect and promote competition.

As Canada embarks on a review of its competition laws, international peers are well on their way to creating new tools and rediscovering dormant ones to protect the kind of competition that sustains dynamic and prosperous economies. As part of that review, Canada should consider the role that fair competition, focused on the nature of the competitive process and fluent in differentiating beneficial and harmful competition, should play in its competition law framework. Although lacking an explicit focus on fair competition, Canada's current law has an idiosyncratic relationship with the concept. Absent from Canada's effects-focused abuse of dominance provisions, the concept of fair competition is found in the treatment of deceptive and misleading practices, as well as cartel conduct.

Despite a rise in international enforcement activity, there has been a relative lack of activity under Canada's abuse of dominance provision, a key tool in addressing the misuse of corporate power. Built around a three-part test, Canada's abuse of dominance provision requires finding not only that a dominant corporation has engaged in anti-competitive conduct, but also that the conduct has resulted in a substantial lessening or prevention of competition. Past cases have also narrowed the provision's focus on protecting new and emerging competitors, creating a higher bar to prove harm to the future of competition in a market. Rather than putting a stop to anti-competitive conduct before it can cause harm to the economy, Canada's abuse of dominance law creates a pain threshold for intervention and discounts the contributions of smaller competitors. Narrow in scope and unable to protect emerging competitors, Canada's abuse of dominance provision is ripe for retooling, especially as competition law authorities seek to address more novel forms of conduct by some of the world's largest corporations.

International peers are pursuing a range of approaches to introduce or reinforce the role of fair competition in their economies, each with different characteristics that Canada can take cues from in reform of its own system. The European Union's Digital Markets Act (DMA)¹ adopts a set of *ex ante*, or before the fact, obligations around what constitutes fair competition and limits its focus to major players in digital markets. Germany's section 19a amendments to its competition law bet

¹ EC, *Digital Markets Act*, [2022] OJ, L 265, online: <https://digital-markets-act.ec.europa.eu/index_en>.

that a less prescriptive scope for *ex post*, or after the fact, traditional competition law enforcement is more appropriate to tackle unfair competition in the digital economy. Taking a different tack on an *ex ante* model, a revived section 5 of the US Federal Trade Commission (FTC) Act seeks to take an open-ended approach to enacting rules against evolving and economy-wide methods of unfair competition.

Recognizing that the issue of market power extends well beyond the bounds of so-called digital markets, Canada can build on both emerging international approaches and existing institutions to promote fair competition. Canada can do so by expanding its existing *ex post* enforcement mechanisms to investigate new and novel conduct, and by introducing a system for creating *ex ante* boundaries on fair and unfair competition. To achieve this, Canada should:

- maintain the existing multiple goals of the purpose clause of the Competition Act and incorporate the protection and promotion of fair competition as one of those goals;
- shift the focus of its *ex post* abuse of dominance provision away from proving competitive effects and toward protection of the competitive process, with a focus on addressing the harms of abuse before substantial damage is done to the economy; and
- empower Parliament to create an evolving system of *ex ante* rules outlining economy-wide guardrails on what constitutes fair and unfair competition.

What Is Fair Competition?

A 2019 speech by Commissioner of Competition Matthew Boswell (2019) called out Canada as not having a “strong culture of competition,” and urged policy makers to focus on increasing competition in all aspects of their work. Amid a global movement in antitrust and competition policy sparked by the rise of giants in digital markets such as online search, online advertising and e-commerce, the speech drew on the 2008 panel commissioned by the federal government to improve the competitive intensity of the Canadian economy (Competition Policy Review Panel 2008).

But absent a brief mention that businesses should succeed on merit rather than anti-competitive behaviour, the speech gave little direction on what kind of competition was desired. Although policy discussion on the value of competition is common, these discussions often avoid the deeper question of the kind of competition desired in an economy.

Competition has several benefits, but it is a means to those benefits rather than an end, and not all kinds of competition are equally desirable. The ongoing revitalization of competition and antitrust policy is broadening the understanding of the benefits of competition beyond narrow price and efficiency effects, but also delineating between desirable and undesirable forms of competitive behaviour. This second strand is key as researchers explore the harms that a blind adoption of more competition as a goal have generated. In their respective books, Michelle Meagher (2020), and Maurice Stucke and Ariel Ezrachi (2020) outline the negative consequences from a half-century embrace of an uncritical promotion of competition, surprisingly paired with the retreat of assertive enforcement of competition laws with which countries are now grappling. Breaking from that trend, fair competition is a return to a willingness to make normative judgments on the kind of competition that ought to be encouraged and discouraged in an economy.

There is not a single fixed definition of fair competition, but the amorphous definition is a feature rather than a bug. When the US Congress created the FTC and gave it authority over unfair methods of competition (section 5 of the FTC Act), they never intended to “confine the forbidden methods to fixed and unyielding categories” (Stucke 2022, 7). They understood that a robust and long-standing approach to promoting fair competition would involve practices they could not envision in the economy of their day. They also saw the goals of that authority as political as well as economic. Fair competition would be a key lever in protecting consumers and producers, preserving the contestability of markets and preventing private concentrations of power (Vaheesan 2017).

In its recent policy statement revisiting that authority, the FTC provided two criteria for assessing what constitutes unfair competition. First, “conduct may be coercive, exploitative, collusive, abusive, deceptive, predatory, or involve the use of economic power of a similar nature”; second, “conduct must tend to negatively affect

competitive conditions,” with examples such as impairing entry and expansion by market participants, softening competition, reducing choice or harming consumers (FTC 2022, 9). This approach is not dissimilar from the language underlying Canada’s abuse of dominance framework, but the more expansive nature of the FTC’s authority and interpretation has material consequences. Although long dormant in US antitrust law, the FTC’s 2023 proposed ban on non-compete clauses in employment contracts under section 5 authority is the most recent elaboration of the agency’s definition of unfair competition (FTC 2023, 9).

European law includes twin approaches in terms of effects and processes, a split common to overlapping discussions of fairness and fair competition. In terms of effects, European competition law creates a carve-out for economic benefits arising from restraints on competition, so long as they “[allow] consumers a fair share of the resulting benefit,” and the prohibition on exploitative abuses through unfair purchase or selling prices makes clear a focus on the fairness of the distribution of gains from competition.² Less explicit, but still present, is a concern for fair competition and the protection of the competitive process, reflected by the EU competition law’s focus on protecting competitive entry and expansion, as well as expanding responsibilities as firms take on “gatekeeper or regulatory functions” with the potential to distort competition for their own gain (Schweitzer 2021, 9).

Definitions from the United States and Europe serve as guideposts for what a conception of fair competition might look like when translated to a Canadian context. In the context of this paper, fair competition is characterized by an emphasis on protecting the content of the competitive process rather than solely its effects and making normative judgments on whether certain kinds of competition are presumed to be beneficial or harmful. Not attempting to create a fixed definition, this discussion recognizes the continuously evolving nature of competition and the need for democratic institutions to work out their own judgments of what they see as constituting fair and unfair competition.

² *Treaty on the Functioning of the European Union*, 25 March 1957, OJ C 326/47 arts 101–2 (entered into force 1 January 1958).

Why Fair Competition?

An embrace of fair competition as a guiding principle is well suited to tackle the issues present in the current monopoly moment. Although often framed by the handful of firms that have come to dominate so-called digital markets, the past decade has generated a flurry of evidence pointing to the scope and depth of the competitive issues faced by economies around the world. In the lead-up to the recent global bout of inflation, studies revealed the global pervasiveness of market power and the corresponding returns to the firms that had been able to attain it (Akcigit et al. 2021; De Loecker, Eeckhout and Unger 2020). As the post-COVID-19 fight against inflation continues to motivate action by policy makers, evidence is growing on the role that market power is playing in prolonging that fight in some jurisdictions (Hansen, Toscani and Zhou 2023).

Although empirical evidence is limited, Canada does not appear to be exempt from these trends. The Canadian economy has historically been more concentrated than its international counterparts, often with reference to Canada’s remote and disparate population as a driving factor (Bawania and Larkin 2019; Duhamel and Crépeau 2010). One result of that consolidation appears to be a degree of price-setting power for major corporations, with analysis suggesting Canadian firms have largely been able to pass on the cost of inflation to consumers (Bilyk, Grieder and Khan 2023). Scrutiny of specific sectors, most recently a study of the retail grocery market by the Competition Bureau (2023a), provides a window into how consolidated markets have been able to not only weather inflation but also bolster product margins in the process, in contrast to more competitive jurisdictions such as the United Kingdom (Competition and Markets Authority [CMA] 2023).

The growth of market power corresponds with a decades-long move in competition and antitrust law toward a narrow focus on efficiency and competitive effects that allowed for waves of consolidation and excused the conduct of dominant firms. Placing intervention against dominant firms behind a threshold of substantial effects, the role of emerging and upstart competitors has been discounted and a gradual slide into monopoly permitted. To break with this trend, a competition law framework is needed that

appropriately responds to existing market power and protects the kinds of competition that might lead to its eventual dispersal. Absent sector-specific regulatory responses or proactive break-up efforts, the entrance and expansion of new competitors is the primary path to returning competition and dynamism to markets that have otherwise stagnated.

In its respect for preserving the competitive process, a framework of fair competition would protect the role of nascent competitors to grow, succeed or fail. Recognizing emerging competitors as core to market dynamism, efforts to unfairly quash this kind of competition by incumbents would be taken as seriously as the competitive interactions of established players, regardless of whether those upstarts have a material impact on market outcomes. More confident that the conduct preventing them from competing intensely will be addressed by regulators, firms that might otherwise suffer under anti-competitive conduct by dominant players would have increased leverage under a system focused on fair competition. By codifying normative judgments about the kinds of competition to be encouraged and discouraged, fair competition would shift from attempting to predict dynamic market outcomes in favour of more predictable guardrails on unacceptable conduct. These guardrails are more likely to deter unwanted conduct than a system that preserves space for that conduct to be excused and leaves intervention dependent on the extent of the contested harms to competition and competitors. Clear rules would give emerging competitors greater certainty in the face of suspect conduct when attempting the resource-intensive process of seeking redress via competition laws. This would rebalance a current state that favours incumbents by forcing upstart competitors to weigh their chances against a system where even plainly anti-competitive conduct can be considered benign and outside the reach of existing laws.

As countries reinvigorate competition in their economies, the task should be to create systems and frameworks that encourage beneficial modes of competition while discouraging their harmful counterparts. Doing so will require normative judgments about the competitive process and frameworks that are predictable enough to support the entry and expansion of competitors, while allowing flexibility that recognizes the limits of policy-maker knowledge of the evolving

nature of commerce. With its emphasis on protecting and shaping the competitive process, the concept of fair competition is well suited for the task of wrestling with the current high-water mark of concentrated economic power and restoring contestability to markets.

Fair Competition in Canada's Competition Law

To what extent, then, is fair competition already present in Canada's competition law? Canada's competition law has multiple stated goals, but fair competition is not explicitly one of them. Instead, the purpose clause of the Competition Act includes the intersecting goals of promoting efficiency and adaptability, expanding Canadian participation in global markets, ensuring small businesses have an equitable opportunity to participate, and providing consumers with competitive prices and product choices.

Questions of fairness and fair competition were present in the debates leading up to the enactment of Canada's current competition legislation, with parliamentary discussion and early draft legislation including fairness and even the decentralization of economic power as potential goals.³ But these concepts would not survive the "political compromise between the conflicting interests of consumers and producers" that culminated in Canada's modern-day competition law (Gorecki and Stanbury 1984, xxi). Although not solely focused on efficiency, the view of the Economic Council of Canada (1969) that competition law's main purpose was to promote efficiency took precedence over questions of fairness or fair competition. Since then, the prominence of efficiency as the goal of the Competition Act has only grown, with recent jurisprudence pointing to expansion beyond the

3 House of Commons, Legislative Committee on Bill C-91, *An Act to Establish the Competition Tribunal and to Amend the Combines Investigation Act and the Bank Act and Other Acts in Consequence Thereof*, 1-11, No 1; House of Commons Bills, 28th Parl, 3rd Sess: C240-C258.

efficiencies defence for mergers in Canada.⁴ But a nod to fair competition remains in the purpose clause component, ensuring small and medium-sized businesses have an equitable opportunity in the Canadian economy. Far from the moral language underlying statutes such as the Sherman Act in the United States, this text speaks to some concern about fairness and the exercise of corporate power against small or emerging businesses (Vaheesan 2021). But the content of what constitutes equitable opportunity, and why it needs protection under the law, is not elaborated on in either the act or the cases that have taken place under it.

Recent Canadian policy commentary has focused on different conceptions of fair competition and its potential role in Canadian competition law, taking a broader view by incorporating different definitions of both effects and process-focused notions of fairness. In his discussion paper kicking off Senator Howard Wetston's 2021 consultation on the Competition Act, Edward Iacobucci (2021) constructs an alternative purpose clause rooted in a definition of fairness to contrast his preferred path of creating a solely efficiency-focused purpose clause. Iacobucci's definition is a nearly all-encompassing one that includes efficiency, distributional and political fairness goals, but notably no consideration of desirable and undesirable methods of competition. This definition of fairness is criticized as allowing competition authorities and adjudicators to import any policy goal in their decision making, generating uncertainty and indeterminacy. Understood as a non-economic goal, fairness is framed as a topic that judges in competition law cases are ill-equipped to adjudicate.

In their analysis, Francesco Ducci and Michael Trebilcock (2019) consider the potential role of what they call vertical and horizontal dimensions of fairness, as well as procedural fairness, in Canadian competition law. Although focused on the distributional outcomes of competition and price discrimination, the pair dismiss horizontal (the relationship between competitors) notions of fair competition outside of concern for exclusionary practices and barriers to entry. They regard fair competition as an outdated concept discarded by competition law practitioners and

economists, having waned in US competition law since the 1970s. They frame fair competition as a protectionist intervention in favour of less efficient competitors, seeing "no role for protecting competitors based on broader notions of fairness or equity" (ibid., 97). Similar to Iacobucci, fairness is described as non-economic in nature, contrasted with a narrower focus on efficiency goals.

A contrary perspective is provided by Jennifer Quaid in reply to Iacobucci in the same 2021 consultation. Responding to the criticism of incorporating non-economic goals into competition law, and, in particular, the idea that judges are less able to adjudicate them compared to economic ones, Quaid (2021) notes that the focus of the Canadian judicial system is more often questions of justice and fairness rather than economic or financial issues. Although quantification and a narrow focus on efficiency may create the perception of objectivity, Quaid posits that an efficiency lens remains a political choice that places a single objective above the existing multiple policy goals. Arguing for consideration of a range of policy goals beyond fair competition, Quaid suggests that the scope of competition law should be expanded to better fit a transversal approach to the regulatory challenges posed by digital markets.

But beyond the purpose clause, Canada's competition law already includes nods toward fair competition and a more explicit focus on the nature of the competitive process. The most frequently litigated example is the Competition Act's prohibitions on deceptive marketing practices. Fraud and deception are particularly clear-cut examples of unfair competition, and a useful starting point for a broader conception of fair competition. Deception and misleading consumers are understood as wrong on a normative level deeper than the value of competition. Still, this value can be imported into Canadian competition law by taking seriously attempts at deception as the basis for competition. Truth in competition is understood to lead to beneficial outcomes, but truth in the competitive process is valued beyond the outcome it produces, not requiring a weighing of the competitive effects of the conduct to intervene against it. Accordingly, Canada's deceptive marketing practices prohibitions do not include the requirement to prove a substantial lessening or prevention of competition, unlike other civil provisions such as abuse of dominance,

4 *Canada (Commissioner of Competition) v Secure Energy Services Inc*, 2021 Comp Trib 7, online: <<https://decisions.cttc.gc.ca/cttc/cdo/en/item/511952/index.do>>.

mergers, and agreements and arrangements that substantially lessen competition.

The case is the same for the cartel and bid-rigging provisions of the Competition Act, and their criminal per se treatment of post-2009 amendments to the act. Cartel conduct and bid rigging involve the private coordination among otherwise competitors of inputs to the competitive process, such as product prices, geographies or levels of supply. Coordination on dimensions of competition is treated extremely harshly under competition law domestically and internationally. Coordination between competing firms on inputs to the competitive process is considered harmful enough to the Canadian economy to justify criminal penalties, whether the firms are dominant or not, and whether the effect is substantial or not. Without using the language of fair competition, Canadian competition law is willing to comment on the nature of the competitive process without weighing the effects of that process, making clear the value it places on corporate entities acting independently in the competitive process.

Canada's competition law is confident that a select group of practices, deceptive marketing and cartel conduct, merit exclusion from economic life without the need to balance their effect on the economy, often with strict penalties. But for conduct outside these examples, the law retreats from a defence of the competitive process with the application of effects tests and higher evidentiary bars for more forward-looking views of harms to competition. This is clearest in Canada's abuse of dominance provisions, the primary tool for addressing anti-competitive conduct outside of deceptive marketing.

An abuse of dominance finding requires that the commissioner of competition satisfies a three-part test for the Competition Tribunal, Canada's expert competition law adjudicative body and first stop for all civil competition cases, to issue an order to remedy the conduct. The commissioner must establish that:

- one or more persons must substantially or completely control a class or species of business throughout Canada or any area thereof;
- that person or those persons must have engaged in (within the previous three years) or be engaging in a practice of anti-competitive acts; and

- the practice must have had, be having or be likely to have the effect of preventing or lessening competition substantially in a market. (Competition Bureau 2019, 1)

The bureau must prove not only that a firm or firms are dominant and that they are engaged in anti-competitive conduct, but that the anti-competitive conduct is having a substantial negative impact on competition. The Competition Act provides guidance to the scope of anti-competitive conduct, describing it as conduct with the intent or reasonably foreseeable effect of predatory, exclusionary or disciplinary consequences for competitors or competition, and provides a non-exhaustive list of specific acts deemed anti-competitive. Predatory conduct is aggressive conduct designed to prevent the entry or expansion of competitors with the understanding that the costs incurred will be recouped by preserving weakened competition. Exclusionary conduct involves a dominant firm making its competitors less effective, including through refusals to deal, the most common foundation of abuse of dominance claims, although not occurring under section 75, the act's refusal to deal provision.⁵ Finally, disciplinary conduct punishes competitors from competing fiercely, often in pursuit of preserving a status quo under which competition is softened.

Despite a lack of explicit mention of fair competition, each category reflects commentary on the nature of competition that Canadian policy makers are attempting to cultivate in the economy. While viewed as abusive in the context of the act, each represents ways in which intense rivalry could play out between corporations, although ultimately with a detrimental rather than beneficial impact on the economy. Taking the example of predatory conduct, while consumers might appear to benefit in the short term from predatory pricing, this type of conduct trades a short-term price decrease for the many benefits of sustained competition that a firm subject to predatory conduct could provide absent the conduct. Although narrower in scope, so far Canada's abuse of dominance framework echoes the language of the FTC's definition of unfair methods of competition, suggesting at least superficial closeness of the approaches. But the act departs from principles of fair competition in

5 *Competition Act*, RSC 1985, c C-34, s 75, online: <https://laws-lois.justice.gc.ca/eng/acts/c-34/page-14.html#h-89563>.

the final step of the abuse of dominance test: the requirement to show effects on competition. In Canada, a dominant corporation can engage in anti-competitive conduct, but it is only considered problematic if the effects of that conduct clear a threshold of substantiality. This effects-focused approach of the Competition Act makes the abuse of dominance provisions effectively silent on the nature of the competitive process itself, absent a substantially negative outcome such as a lessening or prevention of competition.

Canada's competition law framework generates limited enforcement action, and this holds true for its abuse of dominance provisions. Despite being the predominant tool to address anti-competitive conduct outside the scope of deceptive marketing practices, since 1986 there have been only 16 abuse of dominance applications brought before the Competition Tribunal, including where the bureau was able to avoid litigation by reaching settlement agreements with the parties. But this figure skirts the uneven pace of abuse of dominance enforcement. There was a six-year gap between the last application brought to the Competition Tribunal since 2016, and similar gaps in filings have occurred between 1995 and 2001 and between 2002 and 2009.⁶ Unlike merger challenges, however, when the bureau does bring an abuse of dominance case in front of the tribunal, it is far more likely to be successful, with the Vancouver Airport Authority's 2016 loss an outlier in the bureau's track record. While jurisdictions such as the United Kingdom maintain a record of ongoing investigations, there is no such record in Canada. Accordingly, the public is unaware of the scope of ongoing abuse of dominance investigations that the bureau is currently pursuing, although press releases from 2020 and 2021 suggest there could be ongoing investigations into Amazon and Google under the provision at time of writing (Competition Bureau 2020; 2021).

Recent policy commentary from the bureau, however, suggests expectations should be managed regarding the outcomes of these investigations. In both its submission to Senator Howard Wetston's 2021 consultation and the 2022 consultation by Innovation, Science and Economic Development (ISED) Canada on the future of the Competition

Act, the bureau outlined the issues it saw with the abuse of dominance provisions, with a focus on the protection of emerging competitors in dynamic markets. The bureau spells out a core issue with the effects-focused approach to abuse of dominance, noting that even the "deliberate destruction" of competitor facilities cannot be presumed to be harmful under Canada's law without a showing of substantial effects (Competition Bureau 2023b, section 2.1). In condoning anti-competitive conduct with an acceptable level of harm to competition, Canada's competition law takes an unprincipled approach to the defence of competition and invites conduct that rides the line of substantiality. Even when substantial competitive effects can be shown, Canada's approach is needlessly harmful to the competitive process. Rather than addressing anti-competitive conduct before it can cause harm, a priority referred to as incipiency in US antitrust statutes such as the Clayton Act, Canadian law waits for a monopoly to establish a damaging foothold before beginning the multi-year process of intervening while competitors and consumers remain subject to the harmful conduct.

By shifting its focus away from the remediation of effects and toward the protection of the competitive process, a framework rooted in fair competition would remove this gap in enforcement against anti-competitive conduct by dominant corporations. In its place, it would introduce a system for creating evolving presumptions and prohibitions against clearly suspect conduct to provide clarity and predictability (Vaheesan 2017). This could build on Canada's existing *ex post* enforcement framework by preserving the fact-finding process of abuse of dominance investigations for new and novel conduct, broadening the application of the provision and removing unpredictability in the treatment of anti-competitive conduct. For conduct found to be widespread, reoccurring or particularly egregious, a fair competition approach would create presumptions or prohibitions clarifying the law's position that the conduct is deemed unfair and a violation of Canada's competition law. A framework that closes the existing substantiality gap and aims to deter all kinds of anti-competitive conduct by dominant players is better suited to the task of responding to the elevated levels of market power that have accumulated in Canada and peer economies.

A shift toward fair competition would also address another deficiency in Canada's abuse of dominance

⁶ See <https://decisions.ct-cc.gc.ca/ct-cc/en/d/s/index.do?cont=&ref=&d1=&d2=&p=&d=1823&d=1824&f1=&f2=&f3=&su=6760&su=7626&or=>

framework: the bias against the role played by new and emerging competitors. In its recent policy commentary, the bureau highlights the higher evidentiary bar required for arguments of prevention of future competition where conduct by a dominant firm is preventing new competitors from entering or expanding (Competition Bureau 2022). Doubling down on the effects focus of the abuse of dominance provisions, prevention of competition arguments require the bureau to forecast the future of a market and show that potential competitors are not only ready to enter, but also that they will have a material effect on competition within a reasonable time frame, most recently present in *Vancouver Airport Authority*⁷ but imported from the *Tervita* merger case. An emerging or potential competitor developing new products and services can only expect protection from anti-competitive conduct by a dominant firm if the enforcer can convince a judge of its predicted substantial effect on the future of a market. This is problematic in an economy already characterized by fewer participants and higher levels of industry concentration than peer jurisdictions, and where business dynamism has halved since the 1980s, making up-and-coming competitors able to disrupt stagnant markets few and far between (Leduc 2017).

The primary tool for addressing the exercise of monopoly power in Canada contains material gaps in its ability to adequately protect and promote competition. Reforms that centre the role of fair competition are a solution, reaffirming a commitment to the competitive process and creating guardrails for fair and unfair competition. But as the policy action of international peers shows, how fair competition is incorporated in Canada's framework could take several forms.

7 *The Commissioner of Competition v Vancouver Airport Authority*, 2019 Comp Trib 6, online: <<https://decisions.crtc.gc.ca/cttc/cdo/en/item/465215/index.do>>.

Emerging Approaches to Protecting Fair Competition

What a defence of fair competition could look like in Canada can be informed by a survey of emerging approaches to introducing or revitalizing its role in competition policy internationally. The growing global antitrust movement is entering the second phase of its development. The first was characterized by a flood of investigation and study of the competitive challenges in digital markets, and the role that lax enforcement of competition laws played in allowing these challenges to take root.⁸ In response, countries and their competition enforcement agencies have now updated or proposed updates to the frameworks governing competition in their economies, expanding the tools at their disposal to protect and promote competition. Several of these updates include a greater focus on the foundations of fair competition, although with important distinctions across approaches. Generalizing for classification, three emerging avenues for the protection of fair competition are categorized in Table 1 based on the nature of their approach and its scope. New policy actions to bolster existing competition policy tools are considered either *ex ante* (before the fact or based on the proactive application of rules or regulation), or *ex post* (after the fact or based on investigation and case-by-case analysis). The approaches are then delineated by their intended scope, whether limited to corporations in predominantly digital markets (for example, online search, social media, e-commerce and so forth) or extended economy wide.

8 Commonly referred to examples of this first phase include the UK Treasury's report *Unlocking digital competition* (Digital Competition Expert Panel 2019); US, Subcommittee on Antitrust, Commercial, and Administrative Law of the Committee on the Judiciary of the House of Representatives, *Investigation of Competition in Digital Markets*, Committee Print 117-8 Part 1 (2020); the Australian Competition and Consumer Commission's (ACCC's) *Digital Platforms Inquiry* (ACCC 2019); the European Commission Directorate-General for Competition's *Competition policy for the digital era* (Crémer, de Montjoye and Schweitzer 2019); and the University of Chicago's *Stigler Committee on Digital Platforms: Final Report* (Stigler Committee on Digital Platforms 2019).

Table 1: Emerging Approaches to Protecting Fair Competition

	<i>Ex Ante/Ex Post Approach</i>	<i>Digital/Economy-Wide Focus</i>
Europe’s DMA	<i>Ex ante</i>	Digital focus
Germany’s section 19a	<i>Ex post</i>	Digital focus
Section 5 of the FTC Act	<i>Ex ante</i>	Economy wide

Source: Author.

Setting the Rules for Fair Competition in Digital Markets

The European Union’s DMA

The most prominent move internationally to create fairer competition between digital giants and the market participants that depend on them has been the European Commission’s DMA. Aimed at regulating the gatekeeper power of major digital platforms, the DMA creates a designation for a company offering a “core platform service” to fall under the DMA based on three cumulative criteria of revenue or market cap, size of user base, and an entrenched and durable position.⁹

Meeting these three criteria confers upon companies gatekeeper status and imposes on them obligations in the DMA with the intention of increasing the contestability of the markets in which they operate. These obligations form a list of “dos” and “do nots” for the platforms, with a sample of these obligations including:

- allowing the installation of third-party apps and app stores within gatekeeper operating systems;
- allowing third parties to interoperate with the services of a gatekeeper; and

- banning gatekeepers from using data generated by business users to compete against said business users.

The DMA comes in response to the perceived deficiencies of existing competition policy tools to address competitive challenges in digital markets, due to the time-consuming and uneven nature of enforcement. Despite the European Union being one of the first jurisdictions to bring major antitrust cases in digital markets to court, beginning with the 2010 Google Shopping abuse of dominance case, competitive challenges in key digital markets remain (European Commission 2010). The concept underlying the DMA is one of fairness: that when undesirable conduct by powerful actors is well known, an approach based on regulation rather than competition law enforcement is more efficient and effective. In setting the boundaries of fair competition on the part of gatekeepers in digital markets, the European Commission hopes to create a new baseline where entry and expansion into these markets is encouraged. This approach to protecting fair competition rests on two assumptions: first, that these behaviours are primarily relevant in digital markets for what are called core platform services; and second, that once these gatekeepers have reached a certain size, there are not meaningful distinctions between them.

Even before the DMA came into effect, reactions to the complementary regulatory approach to protecting competition were coming into view. Apple announced its intention to allow for the installation of third-party app stores for European customers, something it long derided publicly as a security and safety risk (Peters and Clark 2022). Whether as a win for proponents of the DMA or as a government relations move, the announcement has implications for the future of the global regulation of digital giants. Apple’s

⁹ Core platform services include online intermediation services, online search engines, online social networking services, video-sharing platform services, number-independent interpersonal communication services, operating systems, cloud computing services, advertising services, web browsers and virtual assistants.

announcement suggested that while it would allow for the installation of third-party app stores, it would retain approval for individual applications, possibly setting up a future fight over the boundaries of DMA enforcement. More relevant for non-European citizens is that Apple has so far indicated it would only be making these third-party app stores available to European customers.

Variations Emerging in the United States, the United Kingdom and Australia

Across the Atlantic, policy makers in the United States took a similar tack in the effort to enact the American Innovation and Choice Online Act (AICOA).¹⁰ Introduced following the House Subcommittee on Antitrust's investigation into digital markets, AICOA created the category of covered online platforms based on monthly active users in the United States, a threshold based on annual revenue or market capitalization, and a definition of critical trading partner based on the ability to restrict or impede the access of other businesses to their customers. Pursuing materially similar conduct as the DMA, the AICOA centred the protection of fair competition in online markets with a focus on prohibiting self-preferencing behaviour and limits on the ability of businesses to compete with a covered platform on which they depend. Although AICOA was ultimately unable to pass through the US Senate, it is another example of the rules- or code of conduct-based approach to protecting fair competition in digital markets emerging in other jurisdictions, although with nuances in each approach.

Proposed in 2023, the United Kingdom's Digital Markets, Competition and Consumers Bill has hallmarks of the DMA approach with an important caveat. Informed by both the 2019 Furman Report and the CMA's Digital Markets Taskforce, the bill will create a dedicated Digital Markets Unit within the CMA and task it with the identification of firms with "strategic market status" and the development and implementation of codes of conduct for identified corporations (CMA 2020). Differing from both the DMA and AICOA, however, the intention of the CMA is to create codes of

conduct tailored to individual firms, rather than across categories such as core platform services or covered online platforms. At the opposite end of the spectrum, while in Australia the ACCC has identified a range of unfair competitive practices in digital markets, the enforcer has been clear that it believes these practices are not limited to only these markets. Accordingly, the ACCC publicly supports economy-wide adoption of prohibitions on unfair practices not currently covered by the country's competition law (ACCC 2022).

Bolstering Enforcement of Fair Competition in the Digital Economy: Germany's Section 19a

But there is further variation to the proposed approaches to the protection of fair competition emerging in Europe. While the European Commission is complementing existing competition law enforcement with a set of rules with which digital giants must comply, Germany is implementing rules of fair competition in digital markets through an expansion of its existing abuse of dominance framework. With 2021 amendments to its competition law, Germany added section 19a for what it considers "undertakings of paramount significance for competition across markets," introducing prohibitions on a wider range of conduct for these firms.¹¹ Although similar to the approach taken with qualification for DMA regulatory obligations, the criteria for being considered such an undertaking is more qualitative in nature, focusing the criteria on questions of dominance, financial strength, level of vertical integration, access to data and its ability to influence the activity of third-party businesses.

Adopting a similar in tone but less prescriptive list of conduct than prohibited under the DMA, Germany's section 19a also aims to address the power over the infrastructure of the digital

¹⁰ *American Innovation and Choice Online Act* (as introduced to Senate), 117th Cong, S.2992, online: <www.congress.gov/bill/117th-congress/senate-bill/2992/text/is>.

¹¹ *Competition Act, Gesetz gegen Wettbewerbsbeschränkungen – GWB*, online: <www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html#p0071>.

economy that so many businesses rely on, and the incentives for gatekeeper firms to exert that power at the expense of fair competition. Like the DMA, section 19a also moves away from an effects-based approach, allowing for investigation and intervention without a showing of competitive effects, although allowing for an objective justification for the conduct to be provided. But rather than including a set of positive and negative obligations with which gatekeepers must comply, section 19a instead represents an expanded scope of the traditional *ex post* competition law enforcement. Rather than constructing a new regulatory apparatus, Germany's approach is to be less prescriptive and preserve the investigative process that might uncover novel conduct falling under the broader prohibitions. While still elaborating guardrails for fair competition in digital markets, by keeping their approach rooted in a traditional *ex post* competition law framework, German authorities are betting that case-by-case analysis remains preferable to a widely applied set of regulatory obligations. Flipping the usual contention that competition law is a cumbersome and one-off process compared to regulation, commentary from German competition authorities suggests that the move to reform their law will allow the authority to commence more rapid action than the DMA (Espinoza 2023).

Since its enactment in early 2021, Germany has launched proceedings against Meta (then Facebook), Alphabet/Google, Amazon and Apple under the provision to determine whether the corporations qualify as undertakings of paramount significance, a designation which, at time of writing, Alphabet/Google, Meta and Amazon now hold (Bundeskartellamt 2022a; 2022b). The German approach of stepped-up enforcement under the new provision has yielded some results to date, notably Meta's agreement to allow use of its virtual reality (VR) headset product without a corresponding Facebook account (Bundeskartellamt 2022c). But the transformative enforcement imagined in response to the competitive challenges outlined in the flood of study and investigation of digital markets has yet to bear fruit. A strategy that continues to embrace the case-by-case nature of competition law still demands substantial time and resource requirements. To this point, the Meta VR agreement came nearly two years after the Bundeskartellamt first opened its investigation, and two proceedings brought

against Amazon before the 2021 introduction of section 19a have yet to be concluded.

Reinvigorating a Dynamic Approach to Fair Competition: Section 5 of the FTC Act

Beyond the introduction of new tools, there are also efforts to rediscover existing powers and authorities that have fallen by the wayside. Returning to the United States, in concert with efforts to introduce new legislative tools such as AICOA, advocates and regulators in the United States are reviving a century-old tool at the heart of the FTC: its authority over unfair methods of competition.¹²

Introduced in 1914, section 5 of the FTC Act grants the agency the broad power to prohibit unfair methods of competition, an open-ended prohibition with political economic goals articulated by Congress including the protection of consumers and producers, the preservation of open markets and the prevention of the concentration of private power (Vaheesan 2017). Rather than attempt to lay out a comprehensive set of prohibitions, policy makers at the time understood the value of an open-ended and flexible authority in ensuring the power stayed relevant as the economy evolved. By understanding that the economy and the expressions of corporate power within it would change in ways they could not imagine, the architects of the FTC Act provided a guiding moral vision that an expert agency would be able to execute in detail. Policy makers also intended section 5, like other areas of US antitrust law such as the Clayton Act, to address monopoly in its incipiency, acting before it can cause competitive harms rather than once economic power has been established and exercised.

Until recently, section 5 had been a victim of the general retreat of antitrust law in the United States occurring since the 1970s. Pointing to three section 5 losses in the 1980s and subsequent

¹² See www.law.cornell.edu/uscode/text/15/45.

narrowing of the application of the authority, Sandeep Vaheesan shows the FTC's 2015 policy statement on section 5 as the nadir of the provision, with the agency voluntarily limiting the scope even further, defying congressional intent by adopting an outcomes-focused approach in its application, emphasizing the consumer welfare standard and a focus on efficiency (FTC 2015).

But recent actions by the competition authority are set to make section 5 an active piece of the US effort to rein in monopoly power in all markets, not just those considered to fall within digital markets. Rescinding the 2015 policy statement in 2021, the FTC released an updated policy statement in late 2022, reflecting a much more expansive interpretation of the authority in line with congressional intent (FTC 2022). In the statement, the agency articulates a clear vision of constructing the rules for fair competition, with an explicit focus on the nature of the competitive process above an effects-based approach. The statement also signalled a renewed focus on addressing monopoly in its incipiency, before it can cause harm, with the FTC suggesting that the need to show current effects “would undercut Congress’s hope to prohibit unfair business practices prior to, or near, monopoly power” (ibid., 5). Beyond incipiency, the agency’s policy statement points to the narrowing that an effects-focused approach can have on the scope of conduct addressed by competition law enforcement, noting that practices considered by Congress as patently unfair at the time do not necessarily result in measurable effects. The FTC has moved quickly to put the new policy statement to work, with a rule prohibiting non-compete clauses in employment contracts under section 5 authority proposed in early 2023 (FTC 2023). Rather than consumer welfare or efficiency considerations, the grounds for the ban are addressing the exercise of power against workers, building on themes of anti-coercion and anti-domination that have been absent in American antitrust for the last half-century.

Section 5 shares similarities with the previously discussed approaches to supporting fair competition, including its reorientation away from the effects-focused, case-by-case approach that has dominated traditional competition law. But the FTC’s revival of section 5 is a third model for protecting fair competition in the economy. First, it is not geared toward digital markets, aligned with the Joe Biden administration’s

whole-of-government approach to promoting competition (White House 2021). Second, it does not single out individual firms or a class of firms as the target for application, although rules could be tailored to only apply to the conduct of firms determined to be dominant (Paul 2021). Third, it does not presuppose a fixed menu of problematic conduct it wishes to address. Section 5 presumes that unfair competition occurs throughout the economy, and that the responses to it will need to keep pace with its developments.

What Could the Future of Fair Competition Look Like in Canada?

With energy building for review and reform, Canada should embrace fair competition as a more promising path for the future of its competition law framework than the current efficiency and effects-focused model. After the long dominance of a narrow interpretation of the role of competition policy and corresponding growth of monopoly power, protecting fair competition is at the forefront of international policy discussions and action. But it is an unwise assumption that without domestic action, Canadians will benefit from these international actions (Wheeler 2022).

Canvassing the emerging approaches to fair competition internationally, Canada can develop an approach that suits its own economy. Each model involves important choices guided by the perceived scope of competitive issues and the appropriate policy mechanism to address them. Europe’s DMA limits its focus to “core platform services” in digital markets and assumes fair competition can be restored by obligating a discrete set of conduct. Germany’s section 19a bets that with reform to broaden the focus and increase the timeliness, its core mechanism of traditional *ex post* competition enforcement is up to the challenges present in the digital economy. Taking a different tack on an *ex ante* rules-based model, a revived section 5 of the FTC Act seeks to implement a more open-ended approach to what it sees as economy-wide issues beyond digital markets and assuming methods of unfair competition will continue to evolve.

The effectiveness of each model depends on the confidence that the full scope of unfair conduct is known, and whether it primarily arises in digital markets. If competitive challenges are already well defined and contained within digital markets, then the FTC's unfair methods of competition approach may seem cumbersome and overly broad relative to the DMA, taking time to pursue questions already answered through study and investigation in other jurisdictions. If the full extent of the conduct is not known but believed to be the province of only a handful of digital platforms, then the German approach streamlining targeted enforcement of abuse of dominance provisions is merited. If the full extent of the conduct is not known and is likely present across the economy, then the FTC's approach is a better fit, reducing the risk of artificial market delineations masking more widespread conduct. The FTC's approach is also better aligned with an understanding of fair competition as the guardrails for competitive behaviour writ large. If conduct is deemed unsuitable for a dominant firm in one sector, it should be unsuitable for dominant firms elsewhere in the economy.

Accordingly, Canada has multiple avenues available to pursue for the future of its own competition law. It can maintain the current state under the strong assumption that the existing framework is serving Canadians well, in the digital economy or otherwise, and hope that it shares in the benefits of international peers pursuing issues in digital markets. It could also proceed with the more incremental but important changes such as those proposed by the Competition Bureau in its recent policy commentary, reducing the emphasis on efficiency, simplifying the test for abuse of dominance, and addressing procedural issues that hamper the progress of investigation and litigation (Competition Bureau 2023b). These would no doubt help to improve the current state where cases are seldom brought and investigations into critical markets appear to languish for years. But a more material change to Canada's competition law is necessary to reverse the narrow focus and low enforcement activity that has characterized the current framework. A deeper commitment to protecting and promoting fair competition is a promising path for that material change.

Working within and augmenting Canada's existing competition law framework, an effective approach to fair competition would balance providing the competition law authority with

the flexibility to address conduct in an evolving marketplace while over time outlining conduct settled as unfair for more rapid and wide-ranging remediation. Reforms toward such an approach would have three core components: affirming fair competition as a goal of the Competition Act, shifting the focus of abuse of dominance to protecting the competitive process, and creating a system to introduce presumptions and prohibitions against unfair methods of competition.

First, fair competition should be made an explicit goal of the country's competition law, setting the tone for enforcement of the act going forward. Rather than the narrowing conception of the purpose of competition, Canada's competition law should reflect the full range of potential benefits of competition. Although less direct in its impact on the direction of competition law, the purpose clause of the Competition Act is an important tool for laying out the priorities of Canada's competition law to be interpreted by enforcers and adjudicators. Reflecting the range of benefits of competition, the purpose clause of the Competition Act should remain multifaceted, but protecting and promoting fair competition should be a predominant goal of that revised purpose clause if Canadians wish to see the concept reflected in the enforcement of the Competition Act.

In enacting that reformed purpose clause, Canada should take a page from both German and US approaches and refocus its effort to the protection of fair competition and the prohibition of unfair competitive practices, moving away from the effects-based approach that has led to narrow and uneven enforcement. Adopting a path for reform raised by the bureau, the effects test should be removed in favour of a two-part test for dominance and anti-competitive conduct. This change should emphasize addressing the development and exercise of monopoly power in its incipiency, and better protecting emerging challengers to the oligopoly markets that characterize the current state of competition in the Canadian economy. Rather than waiting for harm to not only occur but also rise to the level of substantiality, reform to enact a prohibition on anti-competitive conduct by dominant firms is more likely to protect emerging competitors that could threaten that dominance. Canada should build on the case-by-case approach that allows new and novel methods of anti-competitive conduct to be studied and adjudicated, with procedural reforms as suggested by the

bureau to speed the pace of investigation and resolution. Paired with a purpose statement rooted in fair competition, this change would expand the range of anti-competitive conduct pursued by the bureau and reverse the act's current bias against harm to new and emerging competitors, as well as the trend of quantification and prediction that increasingly drives the existing system.

But the outcomes of the case-by-case evaluation should also become inputs to more assertive guardrails on the kind of competition Canadians wish to see in their economy. Where conduct is determined to be unfair or in violation of fair competition, Canada can augment its existing system with a process for establishing the rules of fair competition. Taking a path between models currently under way in the European Union and the United States, Canada should adopt a deeper and more far-reaching role in addressing detrimental forms of competition in its own economy. Where the bureau has found particularly egregious or widespread methods of unfair competition, the authority should use its findings to inform legislative recommendations to policy makers to deem that conduct unfair and subject to a lower and more rapid standard of intervention akin to a section 5 rulemaking. Unlike the FTC in the United States or sectoral regulators such as the Canadian Radio-television and Telecommunications Commission, however, the bureau was not designed to be a rule maker in the Canadian economy, and the implications of that institutional change require discussion beyond the scope of this paper. But even in its current form, the bureau would play an important role in gathering and synthesizing information on competition for policy makers to formulate the rules on what constitutes fair and unfair competition.

Without redrawing the bureau as a rulemaking body, Canada should pursue a path that keeps Parliament at the heart of determining the rules of fair competition for the Canadian economy, balancing the role of the expert administrative agency with the democratic accountability of an elected government. In keeping with the current federal predominance in competition law but diverging from the approaches taken elsewhere such as the DMA, the rules for fair competition should apply to all sectors of the economy. Although the ways in which unfair competition manifests continue to evolve, the hallmarks of control over economic bottlenecks are widespread

in the Canadian economy, and the focus should not be limited to the markets occupying the policy discussion of the day. Depending on the severity of the conduct, these rules could take the form of either presumptions against the conduct, which defence must rebut through legitimate business justification, or per se provisions deeming conduct patently unfair. The scope of these rules can also be built on the existing framework by applying to all firms or limiting their application to firms considered dominant in their relevant markets. A starting point for these rules could be the existing but underutilized restrictive trade practices under sections 75, 76 and 77 of the Competition Act, including refusal to deal, price maintenance, exclusive dealing, tied selling and market restriction. The list of anti-competitive acts under section 78 provides a similar template for potential codification as unfair methods of competition, including practices such as predatory pricing. By creating presumptions against these kinds of conduct, Canadian policy makers would take a stronger stand against already suspect competitive conduct, more likely to be harmful when engaged in by dominant firms.

The economy-wide scope means that the decision to declare a practice unfair, particularly with blanket application, should not be taken lightly, and corresponding systems for public input and accountability should be incorporated into the development of the rules of fair competition in Canada. The current institutional structure of the Competition Bureau places it within ISED under the purview of the minister of innovation, science and industry, but an expanded role as Parliament's eyes and ears on competition throughout the economy could justify converting the bureau into an agent of Parliament, akin to institutions such as the Office of the Privacy Commissioner, and clarifying its responsibility to Parliament as a whole, not just the government of the day.

Conclusion

Canada is taking the first steps to reform its competition laws. Although a latecomer to grappling with the limitations of its competition framework, Canada should use this opportunity to learn from peers and create its own path

forward for the role of competition in its economy. International and domestic policy discourse points to a range of potential responses, from complacency to a root-and-branch rethink of the role of government in fostering competition and its many benefits.

But the revitalization of competition law risks glossing over the question of the nature of competition Canadians wish to encourage in their economy. Fair competition, with its willingness to make judgments on the kinds of competition that ought to be promoted and discouraged in an economy is promising an answer to that question. A victim of the dominant mode of thinking in competition policy over the past 50 years, fair competition is seeing a renaissance, particularly in discussions of promoting competition in digital markets. Although Canada's current framework includes nods to fair competition, it takes a back seat to an increasingly effects- and efficiencies-focused interpretation of competition policy. With its emphasis on valuing the nature of the competitive process, not just the effects resulting from it, and bringing normative judgments into a policy area often miscast as objective, fair competition represents a material departure from the current state in Canada.

But an explicit endorsement of fair competition would drive a more active and far-reaching approach to protecting competition in Canada, one able to address problematic conduct before it can cause substantial harm to Canadian businesses and consumers. Canada can make such an endorsement by reorienting the purpose of its law toward fair competition, expanding the existing enforcement framework with a principled stand against dominant firms abusing that dominance, and introducing new tools to allow policy makers to codify unfair conduct. Learning from its peers, Canada can create a competition law framework capable of addressing both present and future competitive challenges by protecting and promoting fair competition.

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67 Erb Street West
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