Centre for International
Governance Innovation

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Merger Policy for a Dynamic and Digital Canadian Economy

Keldon Bester

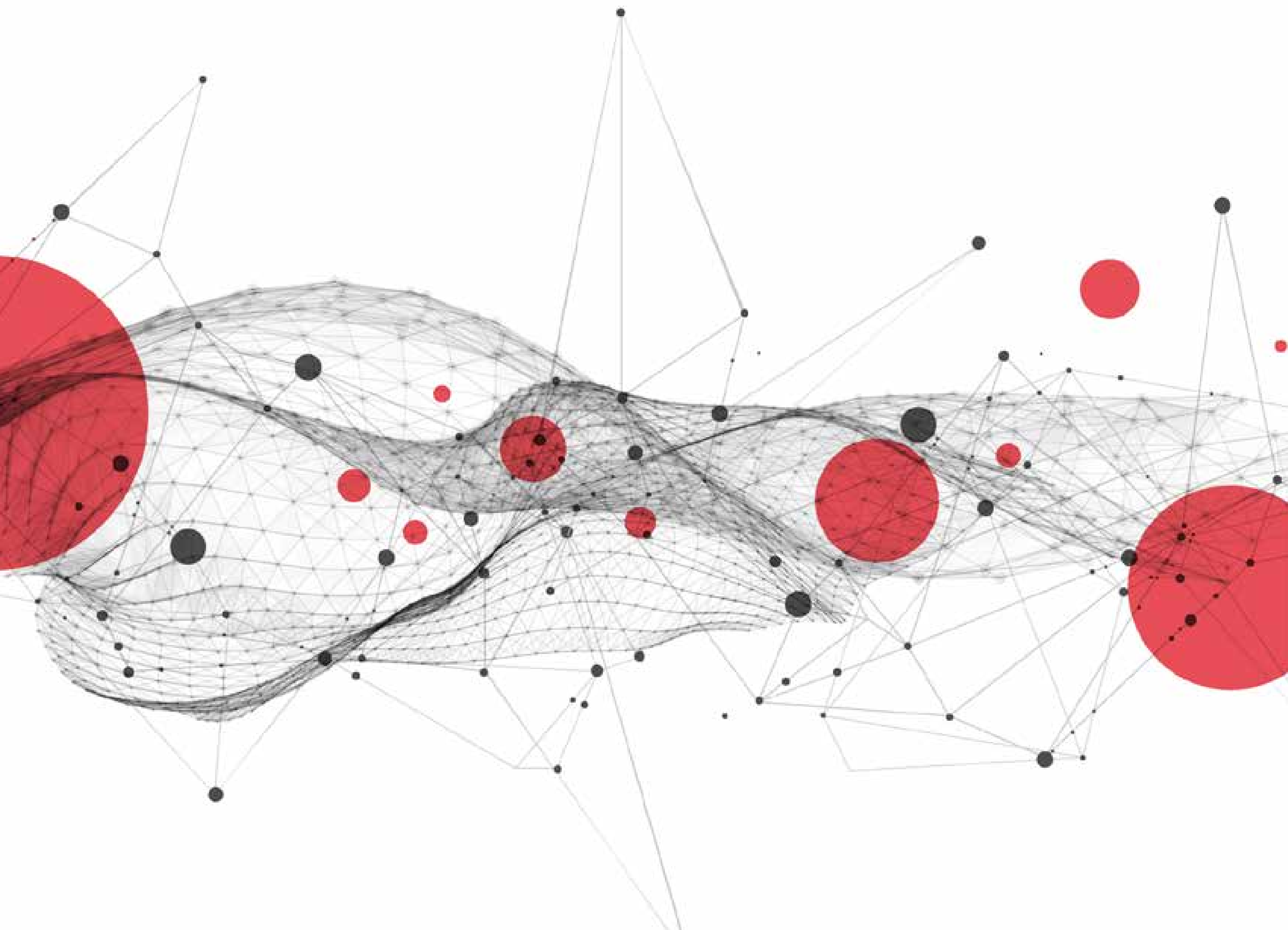

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Table of Contents

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

As an element of competition and antitrust law frameworks, merger policy plays an important role in preventing acquisitions that would otherwise allow incumbent firms to extinguish competitive threats and entrench their dominance. But evidence suggests that current approaches to merger law in Canada and abroad have underestimated the harms these transactions can pose to competition and overestimated the effectiveness of the remedies intended to mitigate those harms. Although relevant across the Canadian economy, this permissive treatment of mergers is particularly pronounced in digital markets, where platform business models, the importance of potential competitors and the role of intangible assets such as data as a barrier to entry test the assumptions underlying the country's merger law. Canada's current law and jurisprudence mean the Competition Bureau, Canada's sole competition authority, is limited in its ability to detect potentially harmful transactions, faces material barriers to intervening and fully remedying the harms of those transactions, and is unable to assess the outcome of previous action or inaction. These deficiencies make it unlikely that the Bureau will be able to effectively protect and promote competition in digital markets as the share of the country's economic activity related to these markets grows. To ensure Canada's merger law is calibrated for a modern economy, Canada should expand its detection capacity for potentially harmful mergers, lower the bar for interventions to protect emerging competition, create a preference for straightforward and effective remedies, and allow enforcers and policy makers to understand the effectiveness of Canada's competition tool kit.

Introduction

Competition is the foundation of a productive and fair economy. Canada, like many of its international peers, has struggled with the twin issues of enhancing productivity, and ensuring the benefits of productivity are experienced widely. To foster the kind of competition that delivers these benefits, countries enforce competition or antitrust laws to prevent and rectify anticompetitive conduct that mutes competitive intensity and favours entrenched incumbents. While anticompetitive conduct comes in many forms, anticompetitive mergers are unique in their ability to cause lasting structural damage to competitive markets and the individuals and organizations that rely on them.

Mergers are a common avenue for achieving dominance in a market, removing competitors and reducing competitive intensity. Despite the potential to generate economic harm, mergers are also seen as a natural and beneficial part of the competitive process, allowing businesses to quickly scale and reward shareholders of the acquired firm.

But there is evidence that the harms arising from anticompetitive mergers have been discounted, the potential benefits generated by them overstated and that the competition law remedies applied to address identified harms have been ineffective. Although these concerns have implications for the entire Canadian economy, they are particularly concerning for the current state and potential future of competition in digital markets. Differing from traditional markets, digital markets more frequently involve multi-sided platform market structures and corresponding network effects, are fast-moving and dynamic with potential competition playing an outsized role and are more likely to have vast holdings of data at the centre of business models. Following a decade of increased activity on the part of enforcers, academics and policy makers, multiple countries are moving to address concerns raised about the ability of their merger laws to protect competition in digital markets, and in their economies more broadly.

Formal consultation on the effectiveness of any aspect of Canada's competition policy in digital markets has been limited to date (the exception being now retired Senator Howard Wetston's largely unadvertised 2021 Competition Consultation). But this lack of action should not suggest that Canadians are well served by their existing laws. Canada's merger law is permissive, with a preference for allowing mergers to proceed with conditions attached to address competitive concerns if necessary. But beyond this general permissiveness, the ability of Canada's merger law to protect competition has three weaknesses. First, the method of notifying the Competition Bureau of potentially harmful mergers is misaligned with the characteristics of digital markets, and there is only a narrow window for the Bureau to intervene. Second, there is an overreliance on quantification, speculation and efficiency arguments to excuse harms to Canadian consumers and businesses. Third, the Bureau is unable to gather information on dynamic markets and understand the effectiveness of its own tools, particularly remedies to address identified harms.

Taken together, these factors make Canada's merger law ill-suited to protect competition in digital markets and allow mergers that weaken competition in markets across the economy. While weaknesses in Canada's merger law are exacerbated by characteristics of digital markets, maintaining the general applicability of the law means reform should strengthen the protection of competition in general, rather than carving out select markets. To address these issues, Canada should adopt a path of merger reform that:

- updates the pre-merger notification threshold to consider the actual value of an intangible asset, such as data in a transaction;
- reduces the need for speculation on the future of markets by moving from a restrictive one-year window to open-ended merger review;
- clarifies the importance of qualitative evidence by reinstituting the equal weight of qualitative and quantitative evidence in merger cases;
- prevents harms to Canadians being traded for cost savings by removing Canada's efficiency exception from merger analysis;
- protects potential competition and nascent competitors by reducing the evidentiary standard for prevention of competition arguments;
- creates a preference for straightforward and effective remedies that fully protect Canadians from competitive harms; and
- builds an informed understanding of the effectiveness of Canadian competition policy by providing the Bureau with the tools to assess past action, inaction and claimed efficiencies.

Canada can capitalize on being a laggard to the international conversation on competition in digital markets by learning from the international groundswell of energy, analysis and policy action on the future of competition policy. Canada should use this opportunity to reconsider its competition law as a whole, but a cornerstone of that reform must be bolstering its merger enforcement so that it truly protects Canadians and competition in and beyond digital markets.

Why Care about Merger Enforcement?

The scope of competition law in Canada covers a wide range of anticompetitive conduct, encompassing cartel behaviour, abuse of a dominant market position, deceptive marketing practices, and harmful mergers and acquisitions (M&A). While the increased attention on the effectiveness of competition law in digital markets is relevant to each of these areas, this paper focuses on the implications for the elements of the law designed to prevent harmful M&A. While all forms of anticompetitive conduct have the potential to harm Canadians, mergers are unique in their ability to permanently remove a source of competitive pressure when an incumbent is allowed to acquire a rival firm. Alongside the increased research and analysis on digital markets, scholars and policy makers have continued to investigate the consequences of M&A in both digital and traditional markets and consider whether re-evaluation of the assumptions underlying the treatment of mergers in general is due.

As with many topics in competition law, the effect of M&A on markets is highly contested. Mergers are seen as a way for companies to achieve scale benefits that can be passed on to consumers, but also as a route for the monopolization of markets that consumers and businesses depend on. Reviews of retrospective merger studies illustrate this dichotomy. Analysis of mergers frequently reveals resulting material price increases,[1] but the outcome is not categorical, and evidence exists of

1 "The empirical evidence that mergers can cause economically significant increases in price is overwhelming. Of the 49 studies surveyed, 36 find evidence of merger induced price increases" (Ashenfelter, Hosken and Weinberg 2014).

limited or even negative price effects.[2] The range of results illustrates the virtue of competition law's case-by-case discovery and analysis of facts specific to a given market. But that approach occurs within a framework of presumptions based on an evolving set of jurisprudence and research carried out by academics, policy makers and enforcers. The current intellectual moment in international competition law represents an assessment of the perspective common for the past four decades: that contrary to the evidence of resulting harms, most merger activity is benign or beneficial. This view is reflected in enforcement presumptions that make merger challenges rare and increasingly focused only on mergers that lead to extreme levels of market concentration.[3]

But the evidence to the contrary provides motivation to consider stronger prohibitions against mergers and to downplay worries about overenforcement chilling beneficial mergers (Baker 2016). The position that mergers are largely either benign or beneficial to consumers and businesses, or even the businesses that engage in them,[4] must contend with evidence that mergers generate substantial harms such as increased prices and reduced product quality and often do not produce the alleged efficiencies that might be argued to justify resulting harms.

In their 2016 study of the effect of mergers on market power and plant productivity in the United States, Bruce A. Blonigen and Justin R. Pierce (2016) found that while mergers have a statistically significant positive effect on average markups — the amount firms are able to charge over marginal cost — no statistically significant average effect on productivity could be found. While acquisitions were increasing the profit margins for the merged entity, these increases were unlikely to be the result of improvements in productivity or efficiency gains.

This finding is echoed by a recent retrospective study of merger policy in the European Union from 1990 to 2018, finding that the required efficiencies to offset estimated consumer harms from price increases were likely too large to be achievable through mergers (Affeldt et al. 2021). Accordingly, the study suggested that the European Commission's approach to merger enforcement — one that clears most horizontal mergers without conditions — has likely been too lax. The harms of mergers can also extend beyond price measures, such as reducing innovation that provides consumers and businesses with new products and services. Focusing on the pharmaceutical industry, which is similar to digital markets in its high levels of research and development spending (R&D), Justus Haucap, Alexander Rasch and Joel Stiebale (2019) found that mergers resulted in reduced investment in innovation not only within the merging parties, but also between other companies in the market. Returning to the lack of a categorical outcome of merger activity, while negative effects were pronounced in markets with high R&D intensity, markets with low pre-merger innovation could experience a boost in investment in innovation following a merger.

There is also reason for concern about the efficacy of the remedies employed when competition authorities do intervene against harmful mergers. When enforcers aim to alleviate the harms from an identified problematic transaction, they can either attempt to block a transaction outright or craft a remedy that addresses competitive concerns while allowing the merger to proceed. In creating these remedies, authorities have wide latitude in the solutions employed to ameliorate harms or restore lost competition. These remedies fall into two broad categories: behavioural remedies that impose commitments on how the merging parties operate going forward, often within a finite time frame, and structural remedies that alter the composition of the merger through tactics such as partial divestments.

Despite this latitude, the approach to remedies has been under fire for questions of their effectiveness in addressing competitive harms compared to outright blocks of transactions. Behavioural remedies are victim to deficiencies, including information asymmetries between authorities and merging parties, the required complexity of appropriately detailing restricted or required conduct, the incentives for the

2 "Studies find a wide range of price impacts. Some price[s] go up, at times by a lot. Others find no impact. Some find prices go down. The wide range of price outcomes reported following a merger is what we find most striking about these studies when examined collectively" (Asker and Nocke 2021).

3 "Merger enforcement [in the United States from 1996 to 2011] against all mergers in this moderately high to high concentration category had literally ceased, sending a green light to companies contemplating a merger of this sort" (Kwoka 2020).

4 "When a CEO wants to boost corporate performance or jump-start long-term growth, the thought of acquiring another company can be extraordinarily seductive....Yet study after study puts the failure rate of mergers and acquisitions somewhere between 70% and 90%" (Christensen et al. 2011).

merging parties to break the commitments of the remedies, and the corresponding cost and capacity required to effectively monitor and enforce compliance (Kwoka and Moss, n.d.).

As a result of these deficiencies, there is a general preference for structural remedies, often targeted asset divestitures, which are seen as more likely to generate the intended competitive benefits with reduced administrative complexity. However, public evidence, where it exists, suggests that the track record for structural remedies is also cause for concern. In the Federal Trade Commission's (FTC's) 1999 study of divestiture remedies, a quarter of divestitures did not result in viable operations in the relevant market (FTC 1999), and a 2017 study by the same authority found that 20 percent of structural remedies in horizontal cases were failures and a further 15 percent took beyond three years to restore competition, suggesting strengthened incumbent positions and harm to consumers and businesses persisting in the interim (FTC 2017). This evidence raises concern about the role of antitrust authorities in reaching these remedies as opposed to a system that more forcefully refuses to allow anticompetitive mergers in the first place (Kwoka and Waller 2021). More troubling perhaps is the relative dearth of public evidence on the efficacy of merger remedies,[5] and the fact that competition authorities in countries such as Canada lack the tools to understand whether remedies employed in mergers are protecting competition and Canadians.

As evidence on the outcomes of mergers and their attempted remedies grows, the presumptions underlying a permissive approach to mergers are ripe for reconsideration (Kwoka 2014). Although the evidence on the outcomes of mergers is international and jurisdictions build on the work of their global peers, Canada's competition law is unique and worthy of assessment considering this evidence.

5 "In light of their prevalence, it is surprising how little is known — theoretically and empirically — about merger remedies" (Asker and Nocke 2021).

Canada's Permissive Merger Law

Challenges to mergers in Canada are rare. Since the introduction of the Competition Act in 1986, the Competition Bureau has only filed 18 challenges, referred to as section 92 applications, and negotiated 81 consent agreements, which are used to either settle issues raised in a section 92 application or avoid an application entirely. In the past six years for which public data is available, there have been approximately 16,000 mergers in Canada.[6] Of that universe of mergers, the Bureau has concluded some form of review of roughly eight percent, which could range from simple recognition of pre-merger notification all the way to a challenge in front of the Competition Tribunal, Canada's specialized tribunal that serves as the first step for all civil competition law cases.[7] Within that eight percent, intervention on the part of the Bureau is scarce, with only two percent of reviews — 0.2 percent of all mergers — resulting in a consent agreement.[8] These figures exclude situations where the Bureau did not file a section 92 application but the parties abandoned a merger in response to threat of Bureau action; however, this has only occurred seven times since 2014 (Competition Bureau 2022a). These figures do not indicate whether Canada's merger law is overly permissive or aggressive, but they do highlight that action against mergers in Canada is rare and focuses on a narrow portion of merger activity.

What is cause for concern is the government's track record in front of the Competition Tribunal and Canada's court system to challenge a merger. Since the introduction of the Competition Act in 1986, the Bureau has never been successful in challenging a merger on a final judgment (Quaid 2021). When the Competition Act was first introduced, one of the motivating factors was that

6 Data covers calendar years 2015 to 2020, inclusively. See Institute for Mergers, Acquisitions & Alliances Canada — M&A Statistics, https://imaa-institute.org/mergers-and-acquisitions-statistics/canada-ma-statistics/.

7 See Competition Bureau, Monthly report of concluded merger reviews, www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04293.html.

8 The remaining 98 percent result in the issuance of either a no-action letter, which indicates the Bureau does not intend to challenge a merger, or an advanced ruling certificate (ARC), which prevents the commissioner from challenging a merger if the facts of the ARC remain valid.

under previous anti-combines legislation that existed for 75 years, the government had never been successful in challenging an anticompetitive merger.[9] Unfortunately, performance since then has not improved. As Roger Ware describes, Canada has maintained a "presumptively permissive" approach to mergers, which appears to rest on a limited body of evidence.[10] Further, many of these merger challenges occur in traditional markets with high barriers to entry and tight geographical bounds, relatively conservative targets for enforcement and, in at least one case, involved a merger resulting in literal monopolies — a single provider — in certain communities.[11] Worries about the permissiveness of Canada's competition law are reinforced by commentary from the Bureau itself. In a detailed submission to Senator Wetston's 2021 consultation on the adequacy of the Competition Act in digital markets, the Bureau highlighted multiple barriers the organization encounters to protecting Canadians from harmful mergers, a number of which will be explored in this paper (Competition Bureau 2022c).

The narrow historical focus of Canadian merger law, evidence of pro-merger presumptions and warning signs from the country's sole competition enforcer should be cause for concern for the applicability of the law to digital markets with characteristics that push the boundaries of traditional competition analysis. Merger law with a presumption against intervention in traditional markets where competition concerns are familiar and well-defined is likely to resist application to new and novel competition concerns, and competition authorities will act according to those incentives. Jurisprudence forms the boundaries within which authorities operate, and those boundaries remain in place regardless of changing market conditions and characteristics.

9 "The current Canadian merger law is generally considered to be ineffective. There has never been a conviction in a contested merger case in the 75-year history of the law" (Consumer and Corporate Affairs Canada 1985).

10 "It is commonplace in antitrust commentary to say that 'the vast majority of mergers are either pro-competitive or competitively neutral.' What evidence do we have for this? I doubt that this is true" (Ware 2021).

11 *Superior Propane Inc. - Notice of Application (amended) under section 92 of the Competition Act supersedes document #6* (23 December 1998), CT-1998-002, online: Competition Tribunal <https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/464741/index.do>.

What Are the Characteristics of Digital Markets?

But what are the characteristics of digital markets, and why have they resulted in the recent wealth of research and analysis on their intersection with competition law? Although evidence of phenomena such as the global rise in market power (International Monetary Fund 2021) has drawn attention on broader issues of the role of competition in economies, digital markets have been the clear motivator for the increased attention. In a decentralized and concerted push, several countries have engaged in an assessment of the fitness of their competition laws in response to the perceived competitive challenges in digital markets. The result has been an array of research, analysis and policy thinking from governments, competition authorities and academics now being translated to policy action in those same jurisdictions.[12] This phenomenon is likely the product of a number of factors.

First, digital markets play an increasingly prominent role in global economies. Statistics Canada data suggests that 5.5 percent of Canada's 2019 GDP could be attributed to digital economy activities[13] and that between 2010 and 2017, sectors included in the digital economy had grown by 40 percent compared to 28 percent for the broader Canadian economy.[14]

12 A non-exhaustive list of hallmark examples of this work from governments, competition authorities and academia includes the UK Treasury's report *Unlocking digital competition* (Digital Competition Expert Panel 2019), the US House Judiciary Subcommittee's *Investigation of Competition in Digital Markets* (Nadler and Cicilline 2020), the Australian Competition and Consumer Commission's *Digital Platform Inquiry* (Australian Competition and Consumer Commission 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). The results of much of this work have been recently catalogued in the Group of Seven *Compendium of approaches to improving competition in digital markets* (Group of Seven 2021).

13 Statistics Canada, Digital supply and use tables, 2017 to 2019, www150.statcan.gc.ca/n1/daily-quotidien/210420/dq210420a-eng.htm.

14 Statistics Canada adopted a products-based framework for the digital economy based on the Organisation for Economic Co-operation and Development's (OECD's) digital economy framework, which includes digitally enabled infrastructure, digitally ordered transactions (e-commerce) and digitally delivered products (Sinclair 2019).

Second, prominent companies in digital markets have attained their current scope and scale at a speed beyond that which is possible in traditional, more physically oriented markets. A companion result is that key digital markets such as search, social media and e-commerce also appeared to be dominated by one or two of these prominent companies. While industry concentration is contentious as a measure of competitive intensity, market share statistics such as Google's above 90 percent share of the search market in a number of countries became lightning rods for media, policy-maker and academic attention.[15]

Third, until the outcome of the European Commission's first Google investigation in 2018, the major companies in digital markets had largely avoided antitrust scrutiny, creating at least the perception of underenforcement. Major players in digital markets made more than 700 acquisitions in the past three decades, with only one encountering a challenge in US courts (Moss 2019). Google had been investigated in both the United States and Canada; however, those investigations were discontinued without evidence of wrongdoing (although later leaked documents on the former showed this decision was controversial internally) (Nylen 2021).

Underlying each of these factors is the idea that digital markets, while not a distinct sector, exhibit characteristics that allow for differentiation from traditional markets. These characteristics that led to the rapid expansion and delivery of innovative products, may have also facilitated the challenges to competitive markets seen today. A focus on characteristics rather than a strict market definition is more useful to recognize differences between companies in the digital economy and as business models common in digital markets begin to permeate more traditional markets.

Rather than attempt to create a new definition of digital markets, this paper focuses on a subset of the characteristics identified by the United Kingdom's 2019 "Furman Report" (Digital Competition Expert Panel 2019) and the OECD's 2022 *Handbook on Competition Policy in the Digital Age* (OECD 2022).

Platform Structure, Network Effects and Economies of Scope and Scale

Many of the most prominent firms in digital markets have a platform structure, acting as an intermediary between different types of users, with more traditional telecommunications and financial networks as useful comparisons. Inherent to these platform structures is the presence of network efforts, where the value of a product or service to users increases as the number of users increases. These platforms are often multi-sided in nature, providing different value propositions to different sets of users, and are often linked with the quantity of users on another side of the platform (for example, advertisers and users of a social media platform). While these structures and the corresponding network effects provide benefits to consumers and businesses, they also create the conditions for a small number of firms or even a single firm to establish dominance of a market, building on the twentieth-century competition concerns regarding major communication networks.[16]

Dynamism and the Role of Potential Competition

Major firms in digital markets are also categorized by their rapid rise and expansion, both within and across product and geographic markets. Without the constraints of bricks and mortar businesses, companies in digital markets can scale at much greater speeds. Although this suggests incumbents in digital markets are more vulnerable to disruption than their traditional market counterparts, it increases the relevance of new and nascent competitors that have not yet established a foothold in a given market (OECD 2021). A small pre-revenue and low-asset firm could represent short- or medium-term potential competition that might otherwise be missed by traditional competition authority analysis focused on the current level of competition in a market when evaluating a transaction. Although there is evidence that killer acquisitions, the acquisition of a competitor to terminate development and prevent future competition, may represent

15 "[In Australia] Google has also been the dominant search engine provider for the past decade...enjoying a market share of 93 per cent or more since 2009" (Australian Competition and Consumer Commission 2019, 95).

16 "Today, network effects and returns to scale of data appear to be even more entrenched and the market seems to have stabilised quickly compared to the much larger degree of churn in the early days of the World Wide Web" (Digital Competition Expert Panel 2019).

a unique harm in digital markets, this paper considers this a subset of broader concerns with the treatment of potential competitors in digital markets (Cunningham, Ederer and Ma 2021).

Data as an Asset and Possible Barrier to Entry

While firms in traditional markets have long made use of business and customer data to improve their products and operations, the scope and scale to which the collection and use of data forms the core of many digital market business models is unique. While the data itself is effectively non-rivalrous, it is excludable through contractual, technical or regulatory means, allowing a firm to gain competitive advantage by producing innovative products and services that rely on that data (Digital Competition Expert Panel 2019). While similar to investments in physical capacity and infrastructure in that data holdings can represent a barrier to entry, data is unique in that it allows the firm to build power in markets adjacent to those in which the firms currently compete, complicating analysis of potential competitive harms.[17]

Although not an exhaustive list of the characteristics of digital markets, these characteristics have been at the heart of the international evaluation of the fitness of competition laws taking place over the past decade. Returning the focus to Canada, consideration can be given to the intersection of these characteristics and an already permissive merger framework to understand the consequences for the Competition Bureau's ability to protect and promote competition.

How Does Canadian Merger Law Intersect with the Characteristics of Digital Markets?

Pre-merger Notification, Detection and the Window of Intervention

A competition authority cannot investigate a merger it is not aware of. While approaches to addressing this issue vary country by country, Canada's approach combines a pre-merger notification threshold with broad but time-bounded jurisdiction for the review powers of the Bureau (Bester and Byers 2020). Although Canada's notification threshold is often referred to as a "transaction size threshold," this is a misnomer. While in the United States notification is required if the value of what is being acquired in the transaction surpasses US$200 million,[18] in Canada notification is required if:

→ the acquired assets in Canada or revenue from sales in or from Canada exceed CDN$93 million, or

→ when the combined Canadian assets or sales of the merging parties exceed CDN$400 million (Competition Bureau 2022b).

Although the value of a transaction is likely to be linked to the book value of assets and revenues being acquired, and the combined assets and sales threshold can identify large acquirers, Canada's pre-merger notification threshold does not directly recognize the size of the transaction itself and is mismatched with the characteristics of digital markets in two ways.

17 "By acquiring Fitbit, Google would acquire (i) the database maintained by Fitbit about its users' health and fitness....By increasing the already vast amount of data that Google could use for the personalisation of ads, it would be more difficult for rivals to match Google's services in the markets for online search advertising, online display advertising, and the entire 'ad tech' ecosystem" (European Commission 2020).

18 The FTC's pre-merger notification test also includes provisions for transactions valued at above US$50 million but below US$200 million if one party has sales or assets of at least US$100 million and the other has sales or assets of at least US$10 million (FTC 2009).

First, asset and revenue thresholds discount the role of potential competition by focusing on established market participants with sizable revenue and tangible asset bases. By focusing on tangible asset values instead of the value placed on the transaction by the merging parties, the threshold ignores the value of intangible assets (Meredith 2022). This would include the unprecedented data holdings that form the basis of many digital markets business models and that may justify an outsize purchase price for an otherwise pre-revenue or low tangible-asset firm.[19] Second, as highlighted by the Bureau in its submission to Senator Wetston's consultation, the current threshold ignores sales into Canada when they cannot be attached to Canadian assets, ignoring the international nature of major digital firms providing services to Canadians (Competition Bureau 2022c, section 2.7). In the same submission, the Bureau illustrates the consequences of this narrow view of value and domestic focus: out of the hundreds of acquisitions by firms such as Google, Apple, Amazon, Facebook and Microsoft, the Bureau has only been notified of five (ibid., section 2.6).

But no matter the characteristics of a given transaction, the Bureau has the power to investigate and challenge a merger, should it have competitive concerns. However, that power is time limited, and expires one year after the close of the merger transaction, down from the original three years following the 2009 amendments to the Competition Act.[20] Merger challenges are complex, requiring large volumes of information from merging parties and other market participants, as well as the time and resources to use that information to conduct economic and legal analysis that will hold up in court. While the process for exchange of information between the merging parties and the Bureau is well defined when merging parties qualify for pre-merger notification, where the Bureau is not notified it must rely on either voluntary production of information from the parties or court orders, often referred to as "section 11s" (Competition Bureau 2022d). With the relatively narrow window of time, parties are incentivized not to cooperate with the Bureau and instead "run out of the clock" until the Bureau's jurisdiction lapses.[21]

Although the challenges of a compressed window of intervention affect all markets, in digital markets, where early-stage competitors can have an outsized influence on uprooting entrenched incumbents, the Bureau is even less likely to be able to identify a threat to competition before an acquisitive incumbent.[22] Even if identified, the Bureau is then tasked with making an argument centring on potential competition — already difficult in traditional, less dynamic markets — on that compressed time frame. With an open-ended window of intervention, firms are disincentivized from engaging in harmful acquisitions knowing there is the potential for the transaction to be reversed on the grounds of anticompetitive outcomes. A longer window of time may also be more appropriate in situations where harms develop over the long term. As Vass Bednar, Ana Qarri and Robin Shaban (2022) discuss, harms arising from monopoly leveraging in cases with a more conglomerate structure such as Google-Fitbit are more likely to play out on longer time horizons. With a short window of intervention, the Bureau is forced to choose between irreversible inaction in light of uncertain harms or attempting to mount a more speculative argument within an already conservative body of law.

The Primacy of Quantification, Efficiencies and Predicting Outcomes

Once the Bureau is made aware of a merger, the decision to intervene and the outcome of that intervention depend on the goals and assumptions on which Canadian competition law and jurisprudence is based. Although the Competition Act outlines multiple goals for the legislation in its purpose clause, efficiency has

19 "Data is not only one of the key ingredients of Artificial Intelligence but also a crucial input to many online services, production processes, and logistics. Therefore, the ability to use data to develop new, innovative services and products is a competitive parameter whose relevance will continue to increase" (Crémer, Montjoye and Schweitzer 2019).

20 *Competition Act*, RSC 1985, c C-34 ("[n]o application may be made under section 92 in respect of a merger more than three years after the merger has been substantially completed", s 97).

21 "Parties to a non-notifiable merger lack a strong incentive to cooperate with the Bureau. They have no obligation to notify the Commissioner of their merger. They may also gain by closing their merger as quickly as possible and seeking to 'run out the clock' in order to reach the one-year limitation on the Commissioner's power to address the merger. Indeed, the Bureau has heard allegations that a merged firm waited approximately one year after closing their non-notifiable transaction to impose a significant price increase" (Competition Bureau 2022c, section 2.6).

22 "Identifying these so-called nascent competitors...represents a challenge unlike ordinary goods and services....The result is that an incumbent firm can perceive a nascent threat and acquire that firm before it is widely apparent that such a firm poses a competitive threat" (Kwoka 2020).

become the dominant goal of Canada's competition policy. This focus on efficiency is most explicit in section 96 of the Competition Act, often referred to as either the efficiencies exception or defence.[23] The exception stops the Competition Tribunal from making an order that would intervene in a merger that demonstrates efficiencies — essentially cost savings — attributable to the merger and greater than the anticipated harm from a lessening or prevention of competition. Although initially rare, efficiency arguments justifying otherwise anticompetitive mergers are increasingly commonplace in mergers contested by the Bureau.[24]

The primacy of the efficiencies defence was further entrenched in the Supreme Court of Canada's 2017 decision in *Tervita Corp. v. Canada*, a case concerning competition among landfills in British Columbia, where the court ruled that the failure of the commissioner of competition to quantify "quantifiable" anticompetitive effects would result in them being uncounted against quantified efficiency claims by the merging parties.[25] In her dissent, Justice Andromache Karakatsanis called out the improper hierarchy of quantitative over qualitative evidence this decision created, highlighting that "the statutory language of the Act does not distinguish between quantitative and qualitative efficiencies,"[26] a point echoed by economists Marcel Boyer, Thomas W. Ross and Ralph A. Winter (2017), who comment that "in terms of reliance on quantitative economic analysis, within the area of Canadian law on mergers the pendulum has, ironically, swung too far."

The platform structure common to firms in digital markets, and the associated alleged benefits of network effects and economies of scope and scale, means that firms will likely have sizable efficiency claims against any allegations of harms from the Bureau, likely the product of the very network effects at issue.[27] Incumbent platforms will argue that the benefits of incorporating a firm into a broader ecosystem outweigh the harms of removing competition from the same or adjacent markets, particularly if the competitor is in the early stages of its existence.[28] Meeting these claims with quantitative evidence presents a challenge for the Bureau in traditional markets, and that difficulty is increased when assessing innovative markets where efficiencies core to a merger argument are dynamic rather than static in nature. The more forward-looking the harms from a merger, the more likely the Bureau is to need to rely on qualitative evidence to bolster its claims of harms to Canadians.[29] This preference for quantification may also discount qualitative harms that are more relevant in digital markets, such as the potential for the erosion of privacy protections arising from a merger. By elevating efficiencies, and creating a preference for quantitative evidence, Canada's competition law becomes increasingly hostile to merger enforcement that could protect Canadians in digital markets.

Related to its impact on the primacy of quantification in Canadian competition law, the Supreme Court's decision in *Tervita* also set out a high bar for the commissioner of competition to prove that a transaction prevents future competition focused on predicting the future outcomes in a market. Core to Canada's effects-focused view of competitive harms is the idea of a likely substantial lessening or prevention of competition, the bar that must be met by the commissioner of competition for the Competition

23 *Competition Act, supra* note 20 ("[t]he Tribunal shall not make an order under section 92 if it finds that the merger or proposed merger in respect of which the application is made has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger and that the gains in efficiency would not likely be attained if the order were made", s 96(1)).

24 Efficiencies arguments have been raised in every merger challenge in the past decade for which there is a public response of the merging parties to the Bureau's section 92 challenge.

25 *Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3 [*Tervita*], online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14603/index.do>.

26 *Ibid.*

27 "Network effects often make the structure of digital markets quite concentrated and barriers to entry rather high, making competition for the market the main mechanism left to discipline incumbents and potential competitors particularly valuable" (Lear 2019).

28 "A large firm's acquisition of a small, highly innovative firm can raise serious long run competition issues, even if the two firms are not competitors at the time of the acquisition. Such an acquisition may not have an immediate impact on price. Further, many of them have an efficiency justification — namely, that adding a complementary technology to the acquiring firm's product is good for consumers" (Hovenkamp 2018).

29 As quoted in Competition Bureau (2022c). *The Toronto Real Estate Board - Reasons for Order and Order* (27 April 2016), 2016 Comp Trib 7, online: Competition Tribunal <https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/462979/index.do> ("[t]he Tribunal also recognizes that there may be a greater need for the Commissioner to rely on qualitative evidence in innovation cases like this one. This is because dynamic competition is generally more difficult to measure and to quantify. Indeed, when dealing with innovation, reliable statistical or empirical evidence is sometimes not available and the Commissioner may need to resort to more qualitative tools and instruments to demonstrate the competitive effects of a challenged conduct" at 471).

Tribunal to render an order in a merger or abuse of dominance case. Although both forward-looking in the case of a merger challenge, conceptually a lessening of competition is focused on the ability of the merging firm to increase its market power by removing competition, whereas a prevention of competition is focused on the ability of the merging firm to maintain its current level of market power by foreclosing future entry.[30] In *Tervita*, the Supreme Court laid out the test for a successful prevention of competition argument, requiring the commissioner to not only identify firms the merger would prevent from entering the market, but also to show that but for the merger, the entry would be not only likely, but likely to have a substantial effect on competition within a discernible time frame. This standard creates a high evidentiary bar for the commissioner and focuses attention on predicting the future outcome of a market rather than simply preserving the potential for competition.[31] Although the Supreme Court agreed with the Tribunal's conclusion that the merger was likely to prevent competition in *Tervita*, the facts of the case created a more clearly defined picture of the future of competition in that market.

It is unclear that the Bureau would ever be able to mount a successful prevent challenge in fast-moving and largely unregulated digital markets, in spite of the outsized role played by potential competitors in displacing entrenched incumbents benefiting from characteristics such as network effects (Lear 2019). When considering the case of an innovative pre-revenue firm with a small but growing user base, the Bureau will not be able to rely on factors such as geographic markets, regulatory approvals and production capacity to argue that the upstart firm will be able to have a substantial effect in the market in a reasonably defined time frame. In its treatment of potential competition, *Tervita* has narrowed the path for the Competition Bureau to challenge such a merger, while peer countries have sought to expand it in response to competitive challenges in digital markets. While other jurisdictions are appreciating the uncertainty and need for flexibility in protecting potential competition,[32] Canadian jurisprudence has raised the bar for speculation on market outcomes necessary to do so. Although the standard has yet to be tested in a digital market, the view of the Bureau on its prospects for success is not encouraging. In assessing the impact of the current prevent standard on its ability to intervene in the acquisition of a potential competitor, the Bureau suggests it would be "difficult — if not impossible," particularly in fast-moving and innovative markets (Competition Bureau 2022c, section 2.3).

Remedies and the Limits on Understanding the Effectiveness of Competition Policy

To effectively challenge a merger, the Bureau needs not only a theory of competitive harm and evidence to support that theory, but also a remedy that addresses those harms that can be consented to by the parties or ordered by the Competition Tribunal. The Bureau has four options when intervening in a merger: block the merger outright, require a structural remedy such as the divestment of assets, impose behavioural conduct remedies on the parties, or a combination of structural and behavioural responses. Beyond the limitations of behavioural and structural remedies discussed above, Canada's law is unique in that it includes barriers to both enacting truly effective remedies and retrospectively understanding their effectiveness.

Canadian law has a preference against decisive remedies that fully address the competitive harms brought about by a merger, stemming from 1997's *Southam* Supreme Court decision.[33] First, the standard for remedies is understood to be not the restoration of competition to pre-merger levels but the reduction of harm such that it can no longer be considered a "substantial" lessening or prevention of competition. *Southam* has also been read to guide the Bureau and the Competition Tribunal to pursue the least intrusive method of addressing the competitive harms resulting

30 *Tervita*, *supra* note 25.

31 "Even when the antitrust agency can envision how one technology might evolve into a potential competitor to the tech company, it lacks any reliable way of assessing the probability that might happen" (Kwoka 2020).

32 In the United States, the House Judiciary Subcommittee's majority report recommended "strengthening the Clayton Act to prohibit acquisitions of potential rivals and nascent competitors" (Nadler and Cicilline 2020, 394) and the proposed Platform Competition and Opportunity Act would prohibit acquisitions of nascent or potential competitors by covered platforms.

33 *Canada (Director of Investigation and Research) v Southam Inc*, [1997] 1 SCR 748, online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1493/index.do>.

from a transaction (Competition Bureau 2022c, section 2.4). This has created a preference for narrow remedies, and an acceptance that some degree of competitive intensity is to be lost even in a successful merger challenge. This means that Canadian competition law is averse to outright blocks of mergers. No such remedy has ever been ordered despite requests from the Bureau; instead, Canada's framework relies on a combination of the divestiture of assets to competitors and behavioural commitments.[34] An example of Canada's distaste for straightforward remedies is the 2017 Bell-MTS consent agreement, where instead of blocking a transaction it understood to be harmful, the Bureau crafted a remedy combining structural and behavioural commitments to attempt to recreate the fourth wireless competitor lost by allowing the merger to proceed (Competition Bureau 2017). Unfortunately, the fruits of this remedy approach are now clear, with the Bureau's selected hopeful competitor exiting the market soon after the expiry of the asset sale restrictions included in the consent agreement, disproving the Bureau's prediction of future performance (Posadzki 2022). This aversion also extends to temporary injunctions (pauses to stop firms integrating while a challenge to their merger is heard), with the Competition Tribunal recently refusing to order an injunction where it agreed irreparable harm was likely to take place as a result of the integration.[35] Despite agreeing on the likelihood of harm, the Tribunal rejected the request because the Bureau did not provide an initial estimate of those harms prior to the closing of the 30-day time period provided by law, an extremely narrow window in which to conduct complex economic analysis subject to adversarial scrutiny.

Although they represent a blunt instrument, the virtue of outright blocks of mergers is their simplicity and effectiveness. On the assumption that a competition authority is correct in their assessment of the potential for harms arising from a transaction, no other remedy is more straightforward or likely to be effective than an outright block of a merger. Although the alleged merger efficiencies are not attainable in a block, efforts to salvage these efficiencies while preventing competitive harm with structural or behavioural remedies reduces the prospect of accomplishing either goal. The intricacy of either type of remedy is magnified when the market in question is not a traditional, geographically bounded one such as landfills or grain elevators, but instead is a dynamic market based on platform business models[36] and mediated only by a consumer's access to the internet.[37] Although the Bureau was recently able to negotiate a structural consent agreement with private equity firm Thoma Bravo to divest an oil and gas industry software offering from one of its portfolio companies, other digital markets firms may be less able to cleanly delineate product offerings for divestment (Competition Bureau 2019). As the complexity and dynamism of markets increases, Canadian competition law's preference for more elaborate remedies rather than straightforward solutions appears increasingly out of step with the realities of digital markets.

This issue is compounded by the lack of a mechanism in Canadian competition law for either the Bureau or the public to understand the effect of the Bureau's own action or inaction, and opportunities to course correct in the event of an ineffective remedy. Outside of investigations, the Bureau cannot compel market participants to provide information to the enforcer. Although more frequently discussed as the inability of the Bureau to conduct non-enforcement studies of markets in Canada, this also means that the Bureau does not have the power to assess the effectiveness of any remedies implemented, or the consequences of the decision not to intervene in a merger. If an issue with the effectiveness of a remedy were to be found, the Bureau is also limited in its ability to course correct. Although the Bureau is able to request the Competition Tribunal to alter consent agreements, this requires a change in the circumstance that led to the

34 Most recently in the Bureau's ongoing section 92 application against the Rogers-Shaw merger. *Rogers-Shaw - Notice of Application pursuant to s 92 – Public* (9 May 2022), CT-2022-002, online: Competition Tribunal <https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/520922/index.do>.

35 *Secure Energy Services Inc. - Reasons for Order and Order regarding the Commissioner's request for an interim order* (16 August 2021), 2021 Comp Trib 7, online: Competition Tribunal: <https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/511952/index.do>.

36 "Structural remedies and line of business restrictions remain the simplest to monitor and arguably most effective approach to anticompetitive mergers and conduct. However, they may not be feasible in digital markets, particularly when they are incompatible with platform business models and rely on unsupported conclusions about the source of market power" (OECD 2022, 53).

37 "Antitrust conduct remedies would be even less effective in the DBE [digital business ecosystem] context than they are in more traditional, non-digital sectors....As applied in the DBE context, antitrust conduct remedies would be particularly ineffective. Complexity, market failures, and the opacity of complex technology systems make antitrust conduct remedies poor candidates for addressing the root problems that create anticompetitive incentives" (Moss 2021).

making of the agreement, and it is unclear if finding a remedy to be ineffective would qualify as such a change.[38] An inability to understand the effectiveness of remedies and revisit them if necessary is particularly problematic for dynamic markets where novel anticompetitive harms may be arising, and where the Bureau has yet to establish a knowledge base through previous investigations in those markets. To that end, UK competition authorities have suggested that the likelihood of increasingly technical behavioural remedies in digital markets, such as interoperability and data portability requirements, means that an iterative rather than one-off approach to remedies will become even more important (UK Digital Markets Taskforce 2020). Beyond being limited in the ability to alter remedies over time, Canada does not have the tools to understand when remedies might need to be altered in the first place.

Where Should Canadian Merger Law Go from Here?

Canada's permissive approach to mergers, based on the assumption that they enable efficiencies needed to support domestic and international scale, stands at odds with both recent scholarship on the costs and benefits of mergers, and the competitive challenges associated with the characteristics of digital markets. While Canada has been a latecomer to assessments of the fitness of its laws in digital markets, policy makers can benefit from the learning and actions taken to date by international partners. Although Canada has a unique set of circumstances to address, in updating its approach to merger enforcement, Canada can not only catch up to the current state of international partners, but also to learn from the future directions those same partners are headed.

Reconfigured Pre-merger Notification and Open-ended Review

Canada's current merger pre-notification system is ill-suited for digital markets in two ways: its reliance on revenue and asset size to determine whether a merger should be notified, and the Canadian focus of the revenue and asset calculations. Like international commentary on turnover thresholds in the European Union (Crémer, Montjoye and Schweitzer 2019), Canada's notification threshold misses pre-revenue and low-asset companies and the value of intangible assets such as critical data holdings, even if they are highly valued by incumbents. This is especially the case if the presence of those incumbents in Canada is not recognized by the current threshold. To remedy this, Canada should incorporate transaction value into its notification threshold akin to the existing approach in the United States, and recent moves by Germany and Austria (OECD 2020), understanding these thresholds have their own limitations and should be calibrated accordingly.[39] By using the acquirer's assessment of the acquisition, the threshold can focus on a closer approximation of at least the perceived value of the transaction. The threshold should also reduce the emphasis on Canadian revenue and assets to reflect the global nature of the firms relevant to Canadian markets. Beyond the general threshold, policy makers should also consider requiring firms previously found to be dominant, and any firm that has been the subject of a previous merger challenge, to notify the Bureau of any upcoming transactions. Understanding that any pre-merger notification threshold will have gaps, the Bureau should take advantage of its broad merger jurisdiction and increase the flow of information related to merger activity in Canada, possibly through partnering with Corporations Canada and provincial equivalents. Although the Bureau may be moving in this direction with the establishment of the Digital Enforcement and Intelligence Branch, specifically the Intelligence

38 *Competition Act*, *supra* note 20 ("[t]he Tribunal may rescind or vary a consent agreement...if the Tribunal finds that (a) the circumstances that led to the making of the agreement or order have changed and, in the circumstances that exist at the time the application is made, the agreement or order would not have been made or would have been ineffective in achieving its intended purpose", s 106(1)).

39 "In addition, because small acquisitions are not subject to pre-merger review under the Hart-Scott-Rodino Act, agencies are often unaware of the acquisitions until after they are consummated. The threshold for pre-merger notification was raised in December 2000 from $10 million to $50 million... After the filing threshold increase, there was a sharp uptick of newly non-notified mergers (between $10 and $50 million) between direct competitors — the type of mergers that likely would have been blocked during HSR review, had it occurred" (Stigler Committee on Digital Platforms 2019).

Directorate, there is limited public information on the scope and purpose of that intelligence.[40] To promote accountability, parliamentarians, in particular the minister of innovation, science and industry, should push the Bureau to be more concrete on its public plans to improve the volume and granularity of information related to M&A activity in Canada being used by the enforcer.

Whether involving pre-merger notification or not, in its current state, Canada's law creates a tight window for intervention on the part of the Bureau. In its contribution to Senator Wetston's consultation on the future of the Competition Act, the Bureau suggested widening the window for intervention to three years post transaction close (Competition Bureau 2022c, section 2.6), bringing Canada back to its pre-2009 amendments approach and to the current state of peers such as Australia.[41] But an open-ended window for the retrospective evaluation of mergers is a more appropriate response to the dynamic characteristics of digital markets (Fay 2021). This would align Canada with the United States, which recently put this power to use conducting *ex post* assessments of past mergers by major digital firms, remove the incentive for firms to game the system with otherwise anticompetitive transactions, and reduce the need for the Bureau to engage in speculation regarding the future of these markets (OECD 2020).

Flexibility to Protect Competition in Dynamic Markets

But improving the ability of the Bureau to detect potentially anticompetitive mergers in digital markets is only useful if the law that evaluates these claims appreciates the value of potential competition in dynamic and fast-moving markets and does not trade away harms to Canadians in exchange for alleged benefits. Three discrete actions can ensure this is the case.

First, reforms should overwrite *Tervita* and do away with the hierarchy between quantitative and qualitative evidence and return the equal balance intended in the Competition Act. Although all merger cases are forward-looking, this is particularly relevant in cases involving potential competition. The existing preference for quantitative evidence shifts the balance toward merging parties where quantitative evidence is difficult or impossible to attain,[42] and reduces the importance of evidence that may be most helpful in understanding the future of competition in a market or more novel aspects of competition such as protection of privacy.

Canada should also remove its focus on efficiencies to reorient Canada's merger law toward the protection of consumers and businesses from harm, and away from what is now effectively boosting further concentration. Mergers may indeed generate efficiencies, but the role of Canada's competition law should be to prevent harms to Canadians and deter businesses from attempting to achieve those efficiencies at the cost of competition. By doing away with Canada's unique efficiency exception, the Bureau would have wider latitude to protect competition in general, and particularly in digital markets where alleged benefits of network effects and economies of scope and scale are likely to excuse competitive harms under the current framework. Accordingly, section 96, Canada's efficiency exception, should be removed from the Competition Act.

Canada should reform the test for finding a substantial prevention of competition and focus the Bureau on protecting the nascent competitors that characterize digital markets, instead of predicting the future outcomes of markets. Reforms should emphasize flexibility in the analysis of dynamic markets, rather than requiring precise but likely inaccurate forecasting of market outcomes.
In considering the effect of an acquisition on preventing future competition, Canada should lower the threshold for intervention away from a likely substantial prevention of competition, and enact a standard akin to that proposed in the United Kingdom focusing on the "realistic prospect" of preventing competition (UK Secretary of State for Digital, Culture, Media and Sport and the Secretary of State for Business, Energy and Industrial Strategy 2021). Combined with the rebalancing of the role of qualitative evidence, a lower standard for prevention of competition arguments will ensure Canada's laws are better able to prevent the maintenance of dominance in

40 See www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/00018.html.

41 *Competition and Consumer Act* (Australia) 2010, s 81, online: <www.legislation.gov.au/Details/C2011C00003>.

42 "As a matter of law, *Tervita* would appear to weaken the restriction against anticompetitive mergers in markets where data are scarce relative to markets such as in retail settings where scanner data often allow accurate estimation of the necessary parameters" (Winter 2015).

dynamic markets through the acquisition of firms that may not yet represent a competitive challenge.

Straightforward, Effective Remedies and Retrospective Assessment

In spite of the above recommended changes, it will remain the case that the Bureau can challenge only a handful of exceptionally harmful mergers that occur. Given the finite reach of competition law enforcement, it is critical that interventions not only fully address competitive harms, but also effectively deter companies considering engaging in anticompetitive mergers.

Building on the growing understanding of the limitations of behavioural and even structural remedies, especially in digital markets, reform of Canada's competition law should override *Southam* and instruct the Competition Tribunal to favour straightforward and effective orders that generate minimal administrative burden. The goal of these changes would be to create a future state where outright blocks of harmful mergers are the preferred path for addressing competitive harms, and narrower structural remedies are pursued rarely. By reversing the existing preference for allowing anticompetitive mergers to move forward with dubious conditions, merging parties will be deterred from proposing harmful mergers in the first place.

But a preference for straightforward remedies does not guarantee their effectiveness, and Canada must address its inability to learn from the actions and inaction of its competition authority and respond appropriately to dynamic market conditions. Greater emphasis on retrospective study of action and inaction on mergers, whether resulting in Bureau intervention or not, is required to ensure that Canada's competition laws are able to adapt to changing market conditions without the need for legislative intervention. Along with greater powers related to conducting retrospective studies, the Bureau should be required to make routine presentations of the results of these studies to Parliament. To assuage concerns about the incentives of the Bureau to be forthcoming about failed remedies, the ability of independent third parties to conduct these analyses in parallel should be explored, akin to the process undertaken by the UK's Competition and Markets Authority in the Lear study (Lear 2019).

Conclusion

Countries are in the process of rediscovering not only the value of competition in their economies, but also that fostering that competition takes a modern set of competition laws. Over the past decade, digital markets centred on platform business models, dynamic upstart competitors, and the use of unprecedented volumes and granularity of data have tested the assumption that competition laws have done an effective job protecting and promoting competition and led reconsideration and reform of legal frameworks in a number of countries. Although this reconsideration touches many aspects of competition policy, the flurry of digital market acquisitions with little to no scrutiny by competition authorities has drawn specific attention to the areas of law intended to deter anticompetitive mergers. This occurs as competition scholarship calls into question the presumptions that have supported a permissive approach to mergers, and views consolidation largely as either benign or beneficial. Evidence of harms to price, quality, and innovation, and increased doubt of the efficiencies alleged to be unlocked as a result of these combinations, shows that a rebalance toward a more skeptical view of M&A is now called for.

Canada's permissive merger law is overdue for this kind of rebalancing. If Canada wishes to protect competition, it will need to overcome not only a general permissiveness, but also factors that exacerbate its ineffectiveness when combined with the characteristics of digital markets. Canada's pre-merger notification regime and window of intervention are misaligned with the realities of nascent competitors, the value of intangible assets and the potential for long-term harms. An overreliance on quantification and prediction, and the elevated value of suspect efficiency claims, makes protecting potential competition in dynamic markets a formidable task and allows harms to be traded off for network effects that can further entrench incumbents. In the rare event that a merger is challenged, Canada's law favours narrow and complex remedies over decisive responses and provides no tools to assess the effectiveness of these remedies and course correct in fast-moving markets.

The attention garnered by the prominence of digital markets provides Canada with an opportunity to revisit its merger laws and ensure the protection they provide — and the benefits they generate — are experienced widely by Canadians. Canada's competition law is applied generally throughout the economy, and Canada can create a more robust competition law framework that benefits all markets by addressing the weaknesses highlighted by the rise of digital markets.

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