<u>**EXECUTIVE SUMMARY**</u>

Examining the Canadian Competition Act in the Digital Era

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Recent years have seen an upsurge in interest in competition policy, both in Canada and abroad. The emergence of powerful digital platforms such as Google, Facebook and Amazon has provoked commentators to call for profound changes to the laws governing competition. This paper examines how digitization of the economy affects competition, and asks whether these effects justify substantive amendments to the Canadian *Competition Act*. It considers amendments from two distinct starting points. First, do amendments make sense if the conventional economic objectives of competition policy continue to prevail? Second, how ought the *Act* be amended, if at all, to account for non-economic objectives? The latter question arises in light of recent activism and commentary calling for competition policy in the digital economy to address a myriad of social objectives, including promoting economic equality, environmental goals, privacy, freedom of expression, the diffusion of political power, and worker rights.

The paper concludes that while concerns about market power are growing in the digital era, assuming that conventional economic objectives prevail, there is no need for sweeping substantive reform to the *Act*. The *Act* is flexible and contextual, and readily applies to digital markets. The paper reviews three options for statutory reform that would respond to the call for an expansion of competition policy's goals, including a focus only on economic efficiency, a focus on general fairness, and a focus on economic efficiency but with a Cabinet appeal that may consider fairness. The paper favours the focus on economic efficiency, not because other social objectives such as economic equality and environmental goals are unimportant, but rather because competition law is not a suitable policy instrument to pursue these other objectives. Moreover, assigning multiple, unrelated goals to competition policy risks reducing it to an incoherent and unpredictable body of law.

The paper considers how the digitization of the economy predictably affects the nature of competition in many markets. There are often network externalities, which increase the value of a platform for one user as the total number of platform users grows. This creates a feedback loop that reduces the number of platforms and may create market power. The feedback loop may also create explosive growth, creating dominant firms out of minor competitors in a very short period of time, which complicates the analysis of competition over time in a market. Economies of scale also exist in digital markets, with many products, such as Internet search, turning on the more or less fixed costs of maintaining and organizing data, with zero marginal costs. This too tends to create dominance. Many digital markets have "winner-take-all" tendencies, with one or two firms gaining prominence. Innovation also complicates analysis of digital markets, with static pictures of the efficiency of a market not necessarily indicating what the future state of the market will look like. For example, complementary products, such as text messaging and social networks, may evolve quickly to compete with one another because of technological changes, such as the smart phone. Another complication in digital markets is the existence of two-sided markets, with a platform appealing to two (or more) distinct kinds of users. For example, a search platform sells advertising to advertisers on one side of the market, while providing search services to consumers on the other side of the market. Assessing competitive conditions in two-sided markets requires an accounting of effects on both sides of the market, which is frequently complex. As a final example of how digital markets have distinctive competitive features, many digital products may have significant switching costs, which gives incumbents an advantage over entrants.

Digital markets have features which also attract scrutiny on the basis of non-economic societal concerns. Certain large digital platforms may have political power, including the ability to affect the information set that many citizens acquire about political questions, and the ability to learn a great deal about citizens through their online activity. Digital platforms may also harm traditional news media by disseminating their work without compensation. Privacy is also a non-economic concern that emerges with the collection and analysis by digital platforms of troves of personal data from online activities. As a final example of how digital markets may aggravate or create new social concerns, digital markets with their winner-take-all characteristics

may contribute to social economic inequality, with vastly wealthy tech entrepreneurs growing in number while other members of society experience economic stagnation.

While there is little doubt that digital markets are distinct in important ways, it is a separate question whether the *Competition Act* requires substantive amendment to account for these distinctions. Assuming conventional economic objectives, the paper concludes that sweeping reforms to the *Act* are unnecessary. The principal justification for the statutory *status quo* even in the face of evolving markets is that the *Competition Act* is highly flexible and sensitive to context as written. It relies on general standards – such as whether a merger substantially lessens competition – not specific rules that compel conclusions with little accounting for specific market conditions. While the *Act* provides factors that the Tribunal may consider in the context of mergers and abuse of dominance, the list is non-exhaustive, and a consideration of context in its entirety is supported by the existing statute. Well before the emergence of digital markets, the *Act* was capable of examining a wide variety of competitive practices in markets as varied as artificial sweeteners, market tracking services in grocery retail, and pipe markets. Indeed, the Bureau has already considered innovative cases in digital markets, for example, rejecting claims that Google was improperly preferencing its own specialized search products over that of other search providers. The Tribunal also determined that the Toronto Real Estate Board improperly restricted access to data in its control and thereby substantially lessened competition. The *Act's* capacity to address digital markets because of its flexibility is not simply theoretical, but has been demonstrated repeatedly.

While the fundamental approach of the *Act* is suitable for digital markets, incremental change to the *Act* and its enforcement is appropriate. Because of the tendency of digital markets to create market power, it is predictable that competition law enforcement will grow in social importance, and moreover, the complexity of cases will grow. Both changes support greater funding for the Bureau, and justify the Federal government's recent increase to the Bureau's budget. Enforcement may also shift emphases from a focus on price increases from a reduction in competition, to displaying increased concern in digital markets about harms to innovation, to quality degradation rather than price increases, and/or to potential competition. Similarly, given that the *Act* at present sets out factors that the Tribunal may consider in mergers and abuse of

dominance, it may be appropriate to add clarificatory amendments to call attention to new emphases in digital markets. For example, abuse of dominance could refer specifically to the anti-competitive withholding of access to data, a potential barrier to entry in digital markets, and the merger provisions could refer specifically to the removal of a *potentially* effective competitor, especially if a nascent acquire is not yet active and influential, but could be. Another legal change that does not involve amendments to the *Competition Act* that may be appropriate given market power in digital markets is an increased presence of regulation. Competition policy is not suitable to deal with practices that merely take advantage of, but do not create, market power, such as setting high prices, and as market power in digital markets emerges, it may be appropriate (or may not be given the complexity involved) to implement sectoral regulation to address market power. Open banking provides an example of sector-specific regulation that may be required to promote greater competition in the financial sector.

Aside from these non-statutory changes, substantive, focused amendments to the *Competition Act* are also appropriate. The paper recommends changes that are appropriate independent of the prominence of digital markets, but given market power and other considerations, may take on greater importance in a digital world. For one, the *Act* at present does not criminalize buy-side agreements between competitors, including wage-fixing and no-poaching agreements, even though buy-side agreements create the same kind of economic harms as sell-side conspiracies. This omission has no economic or other justification and should be corrected by statutory amendments, especially given the risk of monopsony power in markets with dominant digital firms. The efficiencies defence to mergers in s. 96 also invites amendment. For example, a statutory amendment to address the quantification requirement in *Tervita* would be appropriate. *Tervita* requires the Bureau to quantify the “quantifiable” anti-competitive effects of a merger before the merging parties bear any burden of proving future efficiency gains. For a variety of reasons, including the impossibility of sharply delineating “quantifiable” from “non-quantifiable” effects given that all effects are in principle quantifiable, amendments should overturn such an approach and put the onus on the parties to prove future efficiency gains once the Bureau has established that a merger is likely to lessen competition substantially.

Three amendments to the abuse of dominance position provisions are appropriate. While there is some inconsistency in the case law, cases have tended to require that an anti-competitive act that may form the basis for an order of the Tribunal must have a negative impact on a competitor. Conduct that benefits competitors but harms competition escapes scrutiny on this reading of the *Act*, which escape has no economic or other justification. An amendment to address this is appropriate. Digital markets add to the urgency of this amendment. At present, serial acquisitions of nascent competitors by a dominant firm in a digital or otherwise innovative market might escape scrutiny under the merger provisions because of the difficulties of demonstrating a substantially lessening or prevention of competition in any given merger. If the abuse provisions were amended to include acts that may benefit competitors but harm competition, there would be support for relying on abuse of dominance to make an order against a practice of anti-competitive acquisitions, with remedies ranging from divestiture at the most interventionist end, to injunctions against future acquisitions at the other end of the spectrum. Another appropriate amendment is to clarify that an act that benefits consumers ought not to be characterized as an anti-competitive act, even if the act is harmful to competitors. *Canada Pipe* read the statute very formalistically to reach such a conclusion, and a statutory amendment that outlines that acts must harm competition to be characterized as anti-competitive acts would clear up the confusion. Finally, especially in a digital era with platforms realizing multi-billion dollar profits, a maximum Administrative Monetary Penalty of $10 million for abusing dominance is grossly inadequate to achieve deterrence and out of step with international comparators. While in general this paper focuses on substantive amendments to the *Act*, not on financial penalties, remedies or procedures, this recommendation is an exception. The paper also suggests expanding private rights of action to buttress the Bureau’s enforcement activities.

The paper considers and assesses various proposals for reform that have emerged abroad. There are too many in circulation to be comprehensive, but the paper reviews a sample of proposals from the U.S., E.U., U.K. and Australia. In the U.S., some proposals call for more active enforcement of existing laws, including greater funding for antitrust authorities. Such calls resonate with the analysis in this paper, given that digitization will increase concerns about market power. More radical reforms in the U.S. include lowering the required standard for interventions from a substantially lessening of competition to “an appreciable risk” of harming

competition. The paper does not endorse this proposal, noting amongst other things that it could conceivably imply that a practice that is probably good for consumers could be prohibited; the costs of such overenforcement are not just bad for corporations, but bad for consumers. Similarly, prophylactic bans on certain practices, such as "self-preferencing" by dominant digital platforms, threatens harm to consumers: vertical integration is typically efficient and beneficial for consumers; only when it is shown to be harmful should there be intervention. Similarly, the proposed *Digital Markets Act* and *Digital Services Act* in the EU set out significantly interventionist approaches to dominant platforms, including broad prohibitions of practices, such as self-preferencing, or banning off-platform connections between sellers and buyers. Such categorical rejection of certain practices by dominant firms is misguided and risks harm to consumers. Given the variation of relevant considerations, and the risk of harm to consumers as well as firms from such an approach, it is better to consider each case on its own terms as current law does.

Proposals that the paper supports include a push in the E.U., U.K. and elsewhere to greater data portability across digital platforms, something that regulation may be required to achieve, as with open banking. Access to data will facilitate competition, though will require careful calibration of the regulatory environment. The U.K. and Australia have proposed lowering pre-notification levels for mergers, given concerns about the potential acquisition of presently nascent, but imminently significant competitors. The paper is open to such a change, but concludes that this would depend on the costs of expanded pre-notification of competitively benign mergers (the vast majority of mergers are competitively benign) versus the potential benefits of more timely examination of the acquisition of nascent competitors. The paper is sceptical that the benefits outweigh the costs. The U.K. has also created a Digital Markets Unit within its competition authority, which is an enforcement change that the paper endorses. Digital markets have idiosyncratic features, and creating a unit within the Competition Bureau with specialized expertise makes sense; the recently established Digital Intelligence and Enforcement Branch is intended to do just that.

Following review of international developments, the paper turns to the surge in political support for an overhaul of competition policy in response to digital markets, including expanding

dramatically the kinds of social objectives that competition policy enforcement pursues. As a starting point, the paper observes that the objectives for Canadian competition policy are presently far from clear under the *status quo*. While the case law, statute and enforcement have largely focused on economic efficiency as the objective, s. 1.1 of the *Act* sets out a variety of objectives for competition policy, including competitive prices, equitable opportunities for small and medium sized businesses to participate in the Canadian economy, as well as economic efficiency. These objectives are typically not in tension, but rather call for the same enforcement response. They will, however, conflict on occasion, and the law in Canada is not clear what should happen when they do. Given that the merger was found to be likely to raise prices, yet also to increase total welfare by reducing costs, the efficiencies defence in *Superior Propane* presented a conflict between efficiency on the one hand, and low prices for consumers on the other. The Federal Court of Appeal did not set out a clear, predictable standard or rule, but left the question of how to weigh the different objectives up to the Tribunal, perhaps on a case-by-case basis. Such an approach provides little certainty and depends uncomfortably on the policy preferences of the Tribunal members. Given the internal conflicts within s. 1.1., and the indeterminacy of precedent in *Superior Propane*, reform to the objectives set out in s. 1.1 is justified regardless of digital developments.

Moreover, s. 1.1 singles out some groups as objects of concern, such as consumers, but excludes other groups that might also reasonably be subjects of concern, such as workers. If distributive concerns justify concern for consumers independent of efficiency considerations, then it is not clear why similar reasoning does not also apply to workers. It also designates as an objective allowing small and medium sized businesses an equitable opportunity to participate in the economy. While clearly SME's are vital to the economy, it is not obvious why competition policy includes them as objects of concern *per se*. Clearly, where they are excluded from markets by inefficient, anti-competitive behaviour, the law ought to act; but this is covered by an efficiency objective. In addition, small businesses may in fact benefit from other kinds of anticompetitive behaviour by other firms. For example, price-fixing conspiracies, and anti-competitive mergers, provide a congenial environment for small and medium sized businesses, but these lie at the core of activities that competition policy prohibits. Section 1.1, in summary,

includes internally inconsistent objectives, and includes some objectives that do not have obvious justifications.

The paper considers in detail the role of non-efficiency objectives in deciding the *Superior Propane* case, concluding that it is a case study that supports amendment to s. 1.1 and s. 96. The paper also discusses how policy values other than efficiency sometimes rise to the fore in particular cases, such as *Superior Propane,* but other times are sidelined without explanation. A merger of newspaper companies in *Southam*, for example, did not consider concentration in editorial content as a factor, but rather focused only on advertising competition. The regulated conduct defence, which often leads to competition policy yielding to other sources of law, also gives rise to the occasional influence of non-efficiency objectives on competition policy under the *status quo*.

The arbitrary and internally inconsistent approach to non-efficiency values under the *status quo* implies that the question is not whether s. 1.1 should be amended – it should – but rather how it should be amended. Should it focus only on economic efficiency, or consider a variety of policy objectives, such as advancing privacy, economic equality, the diffusion of political power, etc.? As a vitally important preliminary consideration, there is no compelling argument against the idea that there is a wide range of values at stake in relation to the kinds of conduct that the *Competition Act* addresses. Privacy, freedom of expression, editorial diversity, economic equality, are only some of the values at stake when companies compete. It cannot be, therefore, that the *Act* should focus only on one goal, such as economic efficiency, because that is the only policy value at stake. On the other hand, it is also incorrect to observe that since many values are implicated by market conduct, many values ought to be pursued simultaneously by the *Act*. The critical question is whether multiple, incommensurable values ought to be pursued within a single policy instrument, competition policy, or whether multiple values ought to be pursued with multiple instruments, competition policy plus privacy law plus progressive income tax plus, etc. There are important disadvantages from the all-things-matter approach.

First, pursuing multiple goals risks unpredictability and arbitrariness since outcomes may turn, as in *Superior Propane*, on the policy preferences of adjudicators. Second, while pursuit of

economic efficiency will lead to a consistent approach to competition across contexts, pursuit of other goals will lead to seemingly perverse outcomes for competition policy. For example, if economic equality were a primary goal, mergers of luxury cruises ought to be encouraged: shareholders are likely less well off than customers, and an increase in prices will lead to more economic equality. Third, while economic efficiency is always at stake in assessing competition, other values, such as privacy, or freedom of expression, are only occasionally relevant. Competition policy is a remarkably unreliable means to achieve the systematic protection of privacy, for example. Fourth, focusing on a single goal such as economic efficiency allows competition institutions to build specialized expertise, while asking competition authorities to be expert in all policy goals that might be relevant to an assessment of competition is not realistic. Conversely, relying on multiple instruments allows different institutions to build expertise in different areas. Fifth, while different objectives may have conflicting implications in many settings, such as economic efficiency and economic equality in *Superior Propane*, in most settings the promotion of economic efficiency will promote other values; competition implies both maximized social welfare and lower prices in most contexts, for example. Finally, some values that are invoked are not necessarily compelling social goals. It is not clear, for example, why the promotion of small business is socially valuable if doing so would be economically inefficient. Similarly, some commentary appears to take the position that “big is bad”, which also is not compelling without some articulation of why big firms are socially undesirable.

On the other hand, there are some arguments in favour of competition policy pursuing multiple objectives. First, some objectives may benefit from having many policy instruments pursue them. Given the economic costs of progressive taxation, it may be better to pursue redistribution with taxation and other instruments, for example. Second, given the clear democratic legitimacy of many of the alternative values that have been proposed as motivations for competition policy, the law will have to reckon with trade-offs between values at some point. Designating different agencies and different bodies of law as responsible for different objectives does not eliminate the trade-offs that the law must confront.

The paper considers three options for reform to the approach to the *Act’s* objectives in s. 1.1. One possibility would be to have *Act* pursue fairness, without specifying what that means.

This would allow adjudicators to consider matters such as economic equality, as in *Superior Propane* under s.96 and the efficiencies defence, as well as efficiency, privacy, freedom of expression, the diffusion of political power etc. This avoids over- or under-inclusion of policy values, and instead leaves flexibility. For example, privacy historically was not nearly the social priority that it is today because of the evolution of digital markets, and a "fairness" standard could incorporate it as a priority seamlessly. On the other hand, a "fairness" standard creates uncertainty, and legal indeterminacy, leaving fundamental policy questions up to the Bureau and Tribunal to decide, perhaps on a case-by-case basis. It requires competition authorities to be expert in all policy values that may relate to competition policy.

A possibility at the other end of the spectrum is to have the *Competition Act* focused exclusively on economic efficiency. This avoids the uncertainty, unpredictability and indeterminacy associated with "fairness" as a purpose. It would clarify that anticompetitive effects in s. 96 relate only to efficiency losses, not distributional concerns. It would promote predictability by leaving intact much of the case law that has developed since the *Act* was first passed in 1986 (though not all; *Superior Propane* would not apply, for example). It would also allow institutional expertise to focus on efficiency. The efficiency model does not imply that non-efficiency objectives have no role. First, other policy instruments, such as privacy legislation, can advance other objectives, and can do so in a much more systematic way than competition policy, where the other values may only be relevant in subset of contexts. Second, the regulated conduct defence requires the *Competition Act* to yield to other policy instruments in many contexts (indeed perhaps to yield too easily). The drawbacks of the efficiency model are that some important values, such as the diffusion of political power, may not have effective policy instruments in place that promote them. Moreover, the regulated conduct defence will create space for other values, but not as a result of careful consideration of competing values, which might result from a fairness approach.

There is a vast range of possible institutional arrangements between the fairness and efficiency standards. The paper considers one possibility. This possibility emphasizes economic efficiency as the objective of the *Act*, which would guide the Bureau and Competition Tribunal, but leaves open the possibility of a Cabinet appeal. The Cabinet would be authorized to decide

the appeal based on whatever fairness ground they believe ought to apply. The central advantage of this approach is that an explicitly political body, the Cabinet, would have the authority to choose what policy options ought to be pursued in a given case, which is a political, not a technical, exercise. It also allows the Bureau and Tribunal to focus on, and develop expertise in, efficiency analysis. There are, however, significant, even overwhelming, disadvantages with the hybrid approach. Uncertainty and indeterminacy at the Cabinet level remain. Cabinet may be subject to lobbying and so-called "rent-seeking" by private parties that is costly and not obviously socially productive, and Cabinet may be motivated by political expediency rather than principle. Another procedural layer would add time and cost to the adjudication of competition matters. Cabinet appeals arise in other settings where there is political oversight of a sector. The Minister of Finance, for example, has broad authority over the financial sector. In contrast, Cabinet brings no expertise to the wide range of sectors that competition policy oversees. Moreover, many matters in competition policy are of local, but not regional let alone national importance; it is not obvious why Cabinet resources should be devoted such to local questions.

There are advantages and disadvantages to each of the options. The fundamental tension is between clarity, predictability and determinacy on the one hand, and the risk of marginalizing social values other than efficiency on the other. The fairness approach allows the broadest range of values to influence competition policy, but at the cost of legal certainty. The Cabinet appeal approach appropriately assigns authority for policy choices to a politically accountable body but has little else in its favour. For example, it preserves legal uncertainty while adding a costly layer of procedure, as well as costly rent-seeking.

The paper concludes that the efficiency option is the preferred policy approach. It is not unambiguously ideal, in that it presents risks that the law will pay insufficient attention to values other than efficiency, but its advantages outweigh this possible drawback. It creates a clear guide for adjudicators and businesses, avoiding the indeterminacy of the other options. In addition, striving for efficiency often promotes other values (low prices are both efficiency and distributively attractive, for example), and other policy instruments may promote other values where this is not true. Moreover, unlike other values, efficiency is always relevant to competition analysis.

Digital markets have put pressure on competition policy by being prone to market power, and by raising a wide variety of policy questions. While incremental amendments to the *Act* would be welcome, in part because of digital markets, sweeping recalibration of the *Act* is not appropriate. Aside from recommending changes to specific substantive provisions, the paper provides options for addressing the fundamental question of what goals competition policy should have, and concludes that a focus on efficiency is the best, though not perfect, option.