Senator Howard Wetston's Commentary on the Public Consultation with Respect to Examining the *Canadian Competition Act* in the Digital Era

INTRODUCTION

Competition law and its role within Canadian society are well accepted but rarely capture public attention in debate. Recently, however, there appears to have been a growing demand for more vigorous competition law enforcement in Canada. In October 2021, I invited Canadians to participate in a consultation to explore paths forward for Canadian competition law. One of the primary purposes was to ascertain whether the *Competition Act* (the "*Act*") remained fit for the purpose of maintaining and encouraging competition in Canada in the presence of a series of emerging digital platforms. In support of this consultation, I commissioned an expert in the field of competition law, Professor Edward M. Iacobucci of the University of Toronto Faculty of Law, to prepare a discussion paper (the "discussion paper") that examines whether digital markets have distinctive features that invite significant changes to our competition law.

This consultation was launched for the following reasons:

- To encourage a dialogue in Canada regarding developments in competition law
- To identify any areas of consensus that would facilitate the consideration of amendments to address what many commentators saw as challenges with the current *Act*.
- To identify issues related to the application of the *Competition Act* where further consultation is required before considering potential amendments.

This reasoning was supported by the submissions that were received. I wish to express my gratitude to the many Canadians, and others, who contributed their views by participating in this consultation. This collaborative effort has served to enhance the dialogue on the future application of the *Act* and its impacts on Canadians.

This commentary will proceed in four sections. First, I will provide a brief overview of the diverse range of perspectives on Canadian competition law that are contained in the submissions. While the discussion paper and submissions made recommendations about specific legal and policy matters, unsurprisingly, the basic perspectives of the participants clearly influenced these recommendations.

Second, I will review areas where the consultation process attracted consensus on specific reforms to competition law questions. For example, there was a consensus that s. 45 ought to be amended to treat wage-fixing as per se illegal, just as it presently is for price-fixing.

Third, I outline a number of areas where there is a need for further consultation. Most notably, there was little consensus on the basic question of what goals the *Act* should pursue. The discussion paper considered a range of possibilities, from a focus on efficiency (which the paper on balance leaned to), to a focus on fairness, to a focus on efficiency with a cabinet appeal. While

there was little support for the cabinet appeal, there was support for a variety of other approaches. On this and other important questions, I recommend further consultation.

The final section sets out my recommendations. On the matters attracting consensus on target reforms, I recommend that the government move to amend the statute accordingly. On the remaining matters, including issues of fundamental importance such as the goals of the *Act*, more consultation is appropriate. I recommend that the government strike a panel that is both expert in competition law and diverse in its perspectives to consult and consider the questions further. It should consult broadly and make recommendations to the government as soon as possible.

An overview of perspectives

1. The status quo ("targeted revisions")

Participants with this perspective generally agree that the *Act* is fit for purpose, and flexible enough to be adapted to mitigate the challenges emerging in digital markets, but emphasize improving the clarity of the *Act*'s purpose. The overriding purpose of the *Act* should be to pursue economic competition, and its attendant benefits, and should not be expanded to specifically address issues of privacy, inequality, or climate change.

The discussion paper, while setting out the advantages of different approaches, tended to favour the status quo with targeted revisions, even as it observed that digital markets may be particularly vulnerable to market power. The paper outlined various reasons why digital markets may raise the risk of market power, including the presence of significant economies of scale and network externalities (which arise when the value of technology increases to each user the more there are users). Digital markets are also complex to analyze for various reasons, including the presence of two-sided markets, and the importance and impact of innovation. Despite these features, the current competition law is generally suitable the discussion paper concluded, because the statute is flexible and relies on standards, not specific rules. An *Act* that has been successfully applied to artificial sweeteners, real estate associations, airports, waste collection, scanner-based market tracking data and many other markets, is sufficiently flexible to apply to digital markets.

Several participants who view the *Act* as substantially suitable for modern economies nevertheless recommend targeted changes, such as amending the abuse of dominance provisions of the *Act* to target conduct that harms competition. Commentators in this group argue that such changes would merely bring the law into clear alignment with the existing purposes of the *Act*. They are more resistant to profound changes to the foundations of the *Act*, expressing concern, for example, that populist reforms would tend to protect competitors but not competition, and thus will do more harm than good to consumers.

2. A Populist Position (Neo-Brandeisian)

Participants with this perspective tend to share the concerns of US antitrust enforcers such as Lina Khan, and to align with the kinds of reforms currently being pursued by Senator Amy Klobuchar and her colleagues. They believe that the unchecked dominance of large tech companies has stifled innovation, limited access to important new markets, and subjected small-business owners to flagrantly unfair anticompetitive conduct.

Proponents of this perspective argue that such abuse of dominance flows from the sheer size, power, and intelligence of the new tech giants, and cannot be effectively remedied by making amendments to the abuse of dominance provisions of the *Act*. The rising concentration of these markets, in combination with the associated economic and political inequality, represents a fundamental threat that requires a comprehensive overhaul of the *Competition Act*.

The discussion paper agrees that there is a range of values engaged by market conduct but hesitates to accept that competition law should pursue multiple objectives. Markets and competitive conditions have a range of social impacts that extend beyond the economic; privacy, political concentration, freedom of expression, economic inequality, and the environment are only some of the diverse considerations implicated by competition. The question is not whether there are a range of values at stake in competition, but rather whether *competition law* ought to address them simultaneously, or whether competition law ought to focus on economic gains and leave other policy instruments to pursue other goals. The discussion paper expresses concern that putting disparate objectives in a single law would lead to policy incoherence and ineffectiveness; there are advantages to having competition policy focus on economic objectives while leaving other objectives to other, better-calibrated areas of the law, such as privacy law, environmental law, income tax and spending, etc. This would not preclude Memoranda of Understanding (MOUs) between the Competition Bureau and federal departments and agencies.

3. Balancing priorities ("The European Model")

Proponents of this perspective point out that competition has become inextricably linked to a broad array of important social, political, and environmental problems. Data and its uses (which have been necessary for the continued dominance of big tech) has become linked to very serious problems involving privacy, mental health and phone addiction—even enabling foreign entities to interfere in democratic elections. The European countries on the forefront of progressive climate policy have contended that competition policy can be used to encourage innovation and the development of sustainable business practices. Canadian proponents with this point of view argue that competition law has been unduly hampering such progress.

Participants who share these perspectives also recognize that implementing such policies in the modern economy presents significant challenges. The technical sophistication with which large modern companies pursue profit make it nearly impossible for a competition authority to predict the effects of potentially anticompetitive conduct *ex ante*. Therefore, proponents have advocated for a fundamental shift from the traditional model of competition enforcement to a model of *ex ante* regulation. Under such a regime, regulations would be designed to encourage pro-competitive

or benign processes, instead of targeting outcomes. While several European countries have implemented it, such a policy would necessitate a dramatic overhaul of current Canadian competition law.

The discussion paper observes that market power in digital markets may be more likely to emerge than in other kinds of markets. Competition law is not itself well-calibrated to respond to the existence of market power *per se*, but rather addresses the accumulation and preservation of that power. It follows that there may be a stronger justification for *ex ante* regulation of digital markets than other markets. The discussion paper is concerned, however, that blanket *ex ante* prohibitions of certain conduct by digital platforms, such as self-preferencing, may do more harm than good; dominant digital firms will often have efficient reasons for pursuing certain conduct, and treating that conduct as categorically undesirable may harm consumers more than it helps. There are significant empirical questions about the wisdom of strongly interventionist *ex ante* regulation.

Areas with Substantial Consensus

The submissions highlight concerns with the *status quo* from a wide variety of perspectives. Many of the participants' proposals for reform conflict with one another. In other areas, however, there is greater agreement, even from participants with different initial perspectives. In this section I identify some of the proposed amendments that generally attract wide support in the submissions.

Revising s. 79

Several participants support revising the abuse of dominance provisions to address interpretations of the section that have limited its scope. In particular, there was support for expanding the abuse of dominance provisions to prohibit conduct that harms competition in a market without necessarily harming a specific competitor. The discussion paper outlined problematic judicial interpretations of s. 79 that held that an anticompetitive act must harm a competitor even if it does not harm competition, and an act that harms competition by facilitating greater cooperation between firms is not an anticompetitive act. The paper called for reform to clarify the abuse of dominance provisions on acts that harm competition. This approach was supported by a number of submissions. Such an amendment was submitted to mitigate the following concerns:

- Acts that harm competition but do not harm competitors are outside the scope of the abuse provisions at present, and an amendment would properly restore a focus on competition.
- It is difficult for the Commissioner to demonstrate anticompetitive effects in mergers on a balance of probabilities. This has led to an arguably permissive stance towards the acquisition of nascent competitors by dominant firms. Furthermore, the dynamic effects of such anticompetitive conduct are exceedingly hard to estimate *ex ante*. The discussion paper observed that revising abuse of dominance to focus only on harms to competition, not harms to competitors, would allow abuse of dominance to address a series of acquisitions of nascent competitors by a dominant firm.

- The *Act* arguably does not effectively prohibit many of the problematic abuses of dominance we observe in big tech. These companies employ novel, very technically sophisticated strategies for promoting dominance contrary to the purpose of the *Act*. In many cases, these corporate policies are implemented by the owner of an exclusive "ecosystem," such as the Apple App Store, and can be properly characterized at targeting the competitive conditions of such markets. An abuse provision that does not focus on the exclusion of any given competitor, but rather on harmful effects on competition more generally, may be more effective in addressing these concerns.

Private access to the Competition Tribunal

Many participants argue that private access to the Competition Tribunal ("Tribunal") should be promoted with respect to several different provisions of the *Act*, including abuse of dominance (s 79), and, more controversially, merger control (s 92) and reviewable competitor agreements (s 90.1). Furthermore, private parties should be able to refer a question of law to the Tribunal. While the discussion paper did not focus on practice and procedure, it expressed some support for enhanced private access. Such an amendment has been argued to mitigate the following concerns:

- Private access would allow more disputes to be litigated. Due to the paucity of litigation, there is uncertainty about the application of important aspects of competition law. Bureau guidelines assist, but are no substitute for legal clarity when firms seek to balance vigorous competitive activity with their obligations under competition law.
- In relation to the scope of his mandate, the Commissioner has limited resources. The cost and technical requirements associated with bringing civil cases are daunting, and the Commissioner is largely responsible for bringing any such case, wherever it appears in the economy. As a result, the Commissioner must be very selective in choosing cases, leaving arguably problematic behaviour unchecked.

Efficiencies defence to mergers

Many participants commented on the efficiencies defence to mergers. There was no consensus on a preferred approach to s. 96, largely because there exists significant disagreement about the objectives of competition law; an efficiency objective for the *Act* would imply a different approach to the efficiencies defence than a fairness objective. I return to the important question of the optimal objectives of the *Act* below. Regardless of the objectives of the *Act*, however, there was a consensus that the defence as presently applied should be amended. While there was no consensus on the specific amendment, there was, with some exception, general disapproval of the requirements set out in *Tervita* that the Bureau must quantify quantifiable anticompetitive effects of the merger as a preliminary matter before the merging parties must prove the existence of merger-related efficiency gains. The discussion paper recommended statutory amendments that clarify that the Bureau need not quantify anticompetitive effects before the parties have to prove any efficiencies, but rather that the Bureau ought to bear the onus of proving a substantial lessening or prevention of competition, and the parties may then choose to invoke the efficiencies defence,

bearing the onus of demonstrating that the efficiency benefits of the merger outweigh the costs. In other words, the burden of proof under s. 92 of the *Act* rests with the Commissioner, but the burden of proof under s. 96 rests exclusively with the respondents. Amending the efficiencies defence was argued to have the following benefits:

- The application of the efficiencies defence is uncertain at present, lacking clarity over the precise determination of what constitutes an "anticompetitive effect" to be weighed against efficiency gains.
- There is widespread controversy about the efficiencies defence generally, and a consultation to determine its appropriate role in Canadian competition law would be welcome.
- Whatever the defence ultimately becomes, *Tervita* has created a very challenging enforcement environment for the Commissioner, and at minimum an amendment that rejects the requirement that the Bureau as an initial matter must quantify quantifiable effects would strike a more appropriate balance.

Criminalizing wage-fixing

There was a consensus that the exclusion of wage-fixing agreements from the criminal conspiracy provision, s. 45, is unjustified. Broader questions about buy-side agreements between competitors invited less consensus, but an amendment to address wage-fixing, in particular, attracted widespread support. The discussion paper noted that an amendment to treat wage-fixing in the same manner as price-fixing is warranted from an economic perspective in that the economic harms of wage-fixing are analogous to the harms from price-fixing. Deterring both would bring benefits. The discussion paper also noted that, aside from its efficiency benefits, many regard it as unfair to labour not to criminalize wage-fixing just as the law criminalizes price-fixing over products. Buy-side agreements, more generally, may also be suspect, but there was disagreement over the particulars on the appropriate approach. More consultation on questions such as the appropriate role of buyer groups for small businesses would be beneficial.

Increasing maximum AMPs for abuse of dominance

At present, the maximum Administrative Monetary Penalty ("AMP") for an abuse of dominance is initially $10 million. The discussion paper recommended an increase to this amount, and there was a consensus that this amount is insufficient to deter dominant firms from taking actions that harm competition. This lack of deterrence may especially be true for dominant digital platforms, who may seek to protect profits that greatly exceed $10 million.

- Increasing the maximum AMP would have the benefit of promoting greater deterrence.
- The optimal maximum penalty was not the subject of consensus. Some commentary, including the discussion paper, did not make a specific recommendation about the appropriate maximum AMP. Some recommend maximum AMP's similar to those in Europe, which are based on company turnover. While there is a consensus that it should increase, the appropriate level of a maximum AMP may appropriately be the subject of further consultation.

Areas without consensus

While there were a number of specific areas of consensus, there were other significant areas where views diverged considerably. I will note in this section some examples of the areas of disagreement, and then the concluding section will comment on the need for further consultation to consider these issues.

The goals of competition law

There was no consensus on the basic question of what the *Act* should strive to achieve. Some participants endorsed the conventional economic approach to competition policy, with a focus on economic efficiency. The discussion paper, while canvassing a range of options and their advantages and disadvantages, including the options of a broad "fairness" objective, and a cabinet appeal option, leaned to recommending a focus on economic efficiency. The paper did not lean to this recommendation out of disregard for alternative values, but rather because other legal instruments are better calibrated to pursue non-efficiency objectives. For example, income tax and government expenditures are better targeted at economic equity than competition law. Moreover, the pursuit of multiple objectives fails to guide legal decision-makers and risks indeterminacy and incoherence.

Others recommended the *status quo* in s 1.1 of the *Act*, which includes an objective of economic efficiency, but also includes distributional issues such as concern for competitive prices independent of efficiency, and concern for the welfare of small and medium-sized enterprises (SMEs). Still others would recommend a much broader approach to the application of the *Act*, taking into account matters such as privacy, the environment, worker welfare, freedom of expression, and more.

Again, identifying the goals of the *Act* invites an assessment of whether it ought to have multiple goals, or whether it should have a sharper focus while deferring to other policy instruments to promote goals, such as privacy law, environmental law, and labour law. There are different views on this question.

Whatever the approach, clearly identifying the goals of the *Act* is essential. It was not surprising or inappropriate that participants' perspectives on many particular matters turned on their views of the proper objectives of the *Act*. Without affirming the *Act*'s, purpose or purposes, answers to controversial reform questions are unavailable, and there would be policy option benefits from further consultation.

The efficiencies defence

While related to the goals of the *Act*, there is an independent question of how to address the efficiencies defence. Aside from amending the statute to overturn the burden that *Tervita* puts on the Bureau to quantify anticompetitive effects, as discussed above, other options include the following: amend the *Act* to clearly adopt an efficiency-oriented total welfare standard; keep the

defence substantially as it is following *Superior Propane*, leaving the questions of how much to weigh efficiency and fairness considerations up to the individual discretion of the Tribunal members; abolish the efficiencies defence altogether; require efficiencies to be large enough to lower prices post-merger even if there is an increase in market power; treat efficiency gains as a factor to be considered in merger analysis, but not a defence.

While the discussion paper leaned to the total welfare approach, consistent with its leaning to the pursuit of economic efficiency as the goal of competition law, there was no consensus on the appropriate approach. A broad range of possibilities are apparent, and further consultation would be required.

Protecting competitors and abuse of dominance

Abuse of dominance at present requires harm to competitors as well as to competition to justify an order. There is consensus that the focus should be on harm to competition, as noted above, whether or not it harms competitors. There is a distinct question, however, concerning the potential for digital markets to provide harmful environments for SMEs and whether this is problematic for competition. The perspective of the Populist Position, described above, is that digital platforms have in different ways used their dominance, including access to data, to disadvantage SMEs in competition with them. Some would view these disadvantages as itself sufficient for antitrust intervention, while others would argue that such disadvantages are problematic because it necessarily hurts competition, perhaps in the longer run. Others would disagree, adhering to the conventional view that competition law should protect competition, not competitors, that aggressive competition is not problematic, and that only exclusion that harms competition ought to be subject to intervention. The discussion paper did not favour the protection of SMEs as a goal in its own right, but rather would only regard harm to SMEs as relevant if this harm could be shown to harm competition. For example, a prophylactic rule against self-preferencing of its own products by a dominant digital platform would be welcomed by some in the populist camp, but the discussion paper and others would view this is as protecting competitors, not competition, and potentially harmful to consumers and economic efficiency. This is a critical question on which there are different views, and further consultation would be beneficial.

The standards of proof under s 79 should be moderated

Like mergers, the Commissioner carries the burden of predicting an anticompetitive effect with enough certainty to satisfy the burden on a balance of probabilities. In the context of sophisticated and dynamic new markets, some contributors argue that the burden to demonstrate "prevention" of competition should be moderated so that the Commissioner can meet it. There was disagreement about modifying the burden on the Commissioner. The risk of lowering the requirements is that procompetitive conduct, especially procompetitive conduct that is good for consumers and efficiency, but nevertheless harms competitors and/or SMEs, will be deterred.

Mergers review and the acquisition of nascent competitors

There was disagreement about what to do about the following problem: a dominant firm acquires a nascent competitor in an acquisition that is more likely than not to be competitively benign, but if it is harmful to competition, it could have a profound effect by eliminating a competitor that could have evolved to challenge the dominant firm. As the discussion paper outlines, abuse of dominance, should it address competition without requiring harm to competitors, could apply, but merger enforcement would probably not be suitable under the *status quo* given that the merger, by definition, is not likely to prevent or lessen competition substantially. Some commentary describes this as a mistake that requires correction, calling for an Act that would allow intervention to stop a merger at a lower threshold, perhaps where a merger has something like a reasonable prospect of reducing competition; this is similar to the call for a different or lower burden on the Commissioner in abuse of dominance cases outlined immediately above. Others would reject such an approach out of concern that a lower threshold to intervention would stop socially desirable mergers and would do more harm than good. Further consultation would be appropriate on this subject as well.

The Bureau's submission on procedure

The Bureau made several significant recommendations concerning procedure in its submission. The discussion paper largely did not address practice and procedure issues, though did touch on private access and increasing AMPs. Submissions by participants did not address many of the issues that the Bureau raised. The Bureau, for example, seeks an amendment to the *Act* that would require any remedy to a merger to restore pre-merger competition, not just eliminate the substantial lessening of competition. The Bureau also recommends that it not be liable for cost orders in the event that it is unsuccessful in litigation. As a final example, the Bureau calls for reconsideration of pre-notification thresholds for mergers. The Bureau's recommendations would have a significant impact on competition practice and procedure, were not subject to extensive comments in the consultations to date and would benefit from consideration.

Conclusion: The Need for an Independent Review

As this dialogue has highlighted, there are many areas where further consultation would be appropriate. There are two reasons why this would be welcome. First, further consultation will shed more light on a number of complex questions. A multi-stakeholder independent panel broadly soliciting and considering views will be better equipped to make reasonable recommendations on a number of difficult current competition law challenges. Second, in advancing the democratic process with respect to the current interest in competition law, the panel would benefit from hearing from diverse constituencies.

I recommend that the government establish a multi-stakeholder independent panel to embark on a broad consultation to consider reform of the *Act*. I also recommend that the government establish

a specific mandate for the panel, focusing on controversial areas of reform, including those identified in the consultation and outlined in this commentary.

In conclusion, I offer this commentary as a contribution to enhancing Canada's economic performance through greater competition that will benefit all Canadians. We need to position ourselves to adopt a 21st Century Competition Law. I wish to once again express my gratitude for the submissions to this consultation.

Appendix

Summary of submissions

The consultation paper, *Examining the Canadian Competition Act in the Digital Era*, provided a basis to observe the strengths and shortcomings of existing competition law in numerous areas without limiting the scope of the dialogue.

The purpose of this appendix is to reflect the various perspectives of those individuals and organizations who participated in this consultation. These submissions addressed matters raised in the consultation paper, as well as additional items of importance related to the effective application of Canada's competition law.

The scope of the review

We need a comprehensive structural review of Canadian competition law

Several contributors argue that we need to conduct a comprehensive review of the Act across all sectors of the economy, as well as a comprehensive review of the tools and procedures that define the enforcement of the Act in practical terms.

> *Canada's Competition Commissioner has called for a review of the Act. For me, that's the strongest indicator that a comprehensive review would be worthwhile. I see no reason to delay such a review. – V. Bednar*

> *Without a government-wide effort to take the challenges of concentrated markets seriously, Canada will continue to lose its place in the global economy, while its citizens are simultaneously subjected to higher prices, less innovation, and a more stagnant economy. – AELP*

> *These transformative changes necessitate a thorough review of the Competition Act, which should be undertaken by bringing in a wide range of experts and civil society. – CIGI*

> *The challenges to competitive markets posed by digital giants may provoke an examination of the Competition Act, but any examination has to go beyond the immediate issues and look more fundamentally at the structure of the Competition Act and its place in ensuring effective competition in the Canadian economy. - ISCC*

Such a review is motivated by a concern that Canada has developed economic concentration, and low rates of entrepreneurship and innovation.

> *Canada has a longstanding industry concentration problem, which has played a role in falling and below OECD average entrepreneurship rates, low business dynamism, stifled innovation, and harm to consumers and workers. Covid-19 has only supercharged concentration, with cheap debt from central banks and Private Equity firms sitting on record amounts of cash. – AELP*

> *The COVID-19 pandemic helped expose the weaknesses due to concentration at processing stage of the value chain, most notably in meat processing. Nearly all of the beef sold in Canadian grocery stores and exported from Canada comes from these three high-volume, high-throughput meat packing plants. – Mr. A. Nixon*

Additionally, several contributors have argued that any fundamental review of the Act must be the product of a broad-based democratic process. To allow this review to be conducted exclusively by the traditional Canadian competition law establishment would be counter-productive and undemocratic.

> *The issues engaged by competition policy are vital to the interests of Canadians. They must be engaged in a manner that permits a sounding of their views on issues that affect their well-being and the health of the Canadian economy. – ISCC*

> *Ultimately, what we would like to see in the Canadian competition policy space is further discussion and engagement on the purpose and design of competition law that extends beyond the traditional players that have informed competition policy in this country for the last several decades. This engagement could include a citizen's assembly (we credit Vass Bednar with this idea) that enables non-experts to engage with the issues and discuss what the purpose of the Act ought to be. - Vivic Research*

Alternatively, some contributors argue that the present framework of Canadian competition law is flexible enough to deal with challenges emerging from the modern digital economy, and that any amendments should be precisely targeted.

> *The CBA Section agrees with the Iacobucci Paper's overall assessment that the Act is largely fit for purpose. – CBA Competition Section*

> *We agree that the Competition Act is well suited to promote the competitiveness and efficiency of the Canadian economy in its current form without the need for significant reforms. – Blake's*

> *Canada's competition law framework is capable of adequately discouraging anti-competitive behaviour by digital platforms. The Competition Act is sufficiently flexible to deal with anti-competitive conduct. – Niblett & Sokol*

Issues stemming from digital markets, such as privacy and data dominance, or labour relations should be dealt with first through the government agencies to whom those duties have been delegated, or in coordination with them.

> *To the extent that concerns about no-poach and wage-fixing agreements are primarily animated by the desire for worker protection, those distributive concerns are likely more appropriately addressed through laws and regulations on employment standards. – CBA Competition Section*

> *Issues such as privacy, data security, labour protection, and political power, demand their own policies. – Ms. K. Karvala*

> *The overlapping regulatory nature of digital markets calls for a cooperative process from regulators. This will help to ensure a holistic and consistent approach to digital regulation to the benefit of competitive markets, consumer welfare, and the protection of privacy rights. – OPC*

The purpose provision (s 1.1)

The purpose provision is muddied and unclear

Some contributors argue that the purpose clause contains too many elements, resulting in uncertainty and indeterminacy in the application of the Act.

> *The objectives of the Competition Act are, as Prof. Iacobucci rightly observes, extraordinarily muddled – to the point of policy incoherence. – ISCC*

The purpose clause could be clarified

In order to provide clarity, and to be consistent with the principles at play in the framework, some contributors argue that the purpose clause should be amended to place a focus on economic competition or efficiency.

> *"Whatever is ultimately chosen, the emergence of digital markets, and the emergence of new economic and political concerns associated with competition policy, have put greater importance on amending the Act to clarify its purpose." – CIGI (Restatement)*

The purpose clause should be preserved

Several contributors argue that the purpose clause should be maintained as is. They argue that a purpose clause focused exclusively on competition will not necessarily be indeterminant, and that the flexibility offered has allowed us to apply the policy to novel situations.

> *We submit that this attempt to redefine the competition framework, which in effect makes economic efficiency its sole purpose, must be rejected. – PIAC*

> *Changing the purpose clause risks fundamentally altering the Act, upending decades of established case law, and threatening the Bureau's ability to protect consumers and businesses from anti-competitive conduct. The Act should retain its existing focus of maintaining and encouraging competition in Canada in furtherance of a broad range of economic objectives. – Competition Commissioner*

Contributors point out that while the purpose clause has several elements, they flow from and are viewed in relation to the overarching goal of maintaining and encouraging competition.

> *The Act is designed to maintain and encourage competition, recognizing that a diverse array of economic benefits flow from the competitive process. – Competition Commissioner*

> *The various listed objectives that he refers to are the desired results of the competitive environment that the Act seeks to maintain and encourage.* Hence, s.1.1

> does not require the Tribunal members to decide among the various objectives listed therein when they adjudicate. – *Mr. L. Schwartz*

- Superior Propane offers a clear interpretation of the purpose clause that prioritizes competition.
- The Act is designed to maintain and encourage competition, recognizing that a diverse array of economic benefits flow from the competitive process.
- A competition policy accounting for a broad range of values puts pressure on the Bureau to assume expertise on a wide range of issues.
- A clear focus on domestic competition avoids the trap of protecting domestic firms against foreign competition.
- Historically, antitrust enforcement has pursued a set of objectives.

Competition Bureau and Tribunal effectiveness

The Bureau should be empowered to conduct market studies

Several contributors agree that the Bureau should be empowered to conduct market studies. The Bureau's mandate, to encourage and enforce competition in Canada, depends on the Bureau's ability to collect information.

> *This shortcoming prevents the bureau from monitoring the digital landscape for anti-competitive conduct. If the Competition Bureau had the power to get information from businesses outside the context of a formal investigation, like authorities in the U.S. can, perhaps it would be more proactive. – Prof. V. Bednar*

> *It is clear that competition authorities face many challenges especially since this environment likely calls for more bespoke analysis thus placing a larger weight on the need for suitable resources and skills to carry out market studies to assist in enforcement and abuse of dominance cases. – CIGI*

> *Market studies can be of great importance for informed policymaking. For example, the Bureau's 2016 market study on technology-led innovation in the Canadian financial services sector prompted significant regulatory action to support greater innovation and competition. – Competition Commissioner*

Such powers would allow the Bureau to study challenging new markets, and to access the information necessary to place them on an even footing with private parties.

> *In Canada, the Competition Bureau does not have this power. The only way it can compel information from businesses is if it is undertaking a formal inquiry. To get a company's data, the bureau must get a court order. And to get that kind of order, the bureau must provide some evidence that the behaviour it wants to investigate has already occurred. – Prof. V. Bednar*

- Market studies are necessary to fulfil the Bureau's mandate, and useful in determining the effects of enforcement.

- Peer countries have the power to conduct market studies.
- Market studies empower the government to study problematic markets.
- The results of market studies should not be ignored by regulators.

Private access to the Tribunal should be significantly expanded

Several contributors advocate for granting private parties an expanded right of access to the Tribunal in a variety of contexts, including abuse of dominance, merger review, and competitor collaborations.

> *Private action has the potential to be a useful and complementary tool in the Competition Act, but it should not replace public enforcement efforts by the Bureau. Instead, private access will be most successful as an additional tool for deterrence and enforcement only if it is combined and complemented by public enforcement. – Prof. V. Bednar*

Advocates argue that such expanded access will lighten the load on the Bureau and level the playing field in resource-intensive and time-sensitive proceedings.

In addition, serval contributors argued that private parties should have the power to refer questions of law to the Tribunal, as the Bureau can under s 124.2(2).

> *If amendments are made to the Competition Act, consideration should be given to also granting private parties a right to refer questions of law to the Competition Tribunal, particularly with respect to mergers given their time sensitivity. – Blake's*

Canadian companies often operate in the shadow of the law. Given the paucity of caselaw, parties should be able to seek clarity by referring questions to the Tribunal.

> *Allowing private parties to bring applications to the Competition Tribunal on questions of law relating would help address this imbalance. It would provide private parties a way to obtain greater legal certainty without the risk of delaying the achievement of synergies or other important business objectives, and it would bring important legal questions before the Competition Tribunal that may never otherwise be considered. – Blake's*

Providing private access should be done with caution

While interested in its potential benefits, contributors identify certain risks of private access to the Tribunal.

> *Extending a private right of action to these provisions would risk promoting unmeritorious litigation between competitors. Private litigation could also have a chilling effect on otherwise pro-competitive conduct as companies would be incentivized to commence or threaten to commence meritless lawsuits against competitors in response to aggressive competition that actually benefits consumers. – Blake's*

The Competition Tribunal has been ineffective

Several contributors argue that the Tribunal has not been an effective vehicle for enforcing competition law. Tribunal cases are costly, slow, and appeal courts show little deference to their decisions.

> *The Tribunal has turned out to be an ineffective decision-making body. It takes an inordinate amount of time to arrive at decisions on the merits, moving as slowly or slower than regular courts. It is also subject to a generous right of appeal that means its decisions are afforded little to no deference under the rules which govern judicial review of federal administrative tribunals. […] So long as the Tribunal retains exclusive jurisdiction over certain matters, amendments designed to improve enforcement will be limited by the structural inefficiencies of the Tribunal. – Prof. J.A. Quaid*

> *Is a specialized tribunal the answer to remediation of competition harms? Has the Tribunal functioned as intended? Do its processes yield timely and predictable results? Has the Tribunal created a coherent body of competition jurisprudence? Does it further competition policy? – ISCC*

> *Competition litigation in Canada can be a time-consuming and resource-intensive process that can take several years. Litigation should be simplified and accelerated wherever possible, while maintaining procedural fairness and due process, so that both the Commissioner and private businesses can quickly obtain the certainty necessary to operate in a rapidly changing world. – Competition Commissioner*

The Commissioner faces the same cost risks as a private litigant.

> *The Commissioner, who acts in the public interest, faces the same cost risks as a private litigant. The Act should explicitly immunize the Commissioner against cost awards. – Competition Commissioner*

- The Bureau has been criticized for giving overly demanding information requests, and the Tribunal could provide oversight.
- Cabinet involvement with the Tribunal would be infeasible.
- Procedural requirements relating to the Commissioner's current information gathering powers under the Act have become disproportionate, and risk unduly delaying investigations.
- The power of the Bureau to make orders in resect of a foreign person, and to deny parties the right to attend examination of witnesses, should be expanded to allow for effective enforcement.
- Non-compliance with consent agreements can currently only be addressed on a criminal standard.

Welfare standards, quantitative analysis and the efficiencies defense

The efficiencies defense should be eliminated

Several contributors argue that the efficiencies defense should be eliminated from the Act.

> *So not only is it necessary to remove the efficiencies defense from the Act, but it is incumbent upon enforcers and the antitrust establishment to move beyond economic efficiency as the highest aim of antitrust law. Instead, focusing on the abuse of dominance by incumbent players and reviving antitrust law as a true challenge to concentrated private power, is of paramount importance. – AELP*

> *Canada is the only G7 country that has this defense in its competition framework, which has continued to allow increased market concentration, price hikes and lower competition, as long as the efficiencies defence is met. It is high time that this outdated defence is removed from our competitive framework. – PIAC*

The requirement that the Commissioner quantify any anticompetitive effects when the defense is invoked puts the Commissioner at a serious disadvantage with the Tribunal.

> *While [the Commissioner of Competition] has talked about a number of provisions, he has singled out the efficiencies defense, set out in s. 96 of the Act, as a key impediment to enforcement, particularly in light of a recent Tribunal decision denying the Commissioner an interim injunction in the Secure Energy Services-Tervita Corp merger case. – Prof. J.A. Quaid*

> *While we agree that the current situation in which enforcement agencies have to prove the validity both of their own claims and of the defence is absurd, we disagree that the burden of proof should be on the defendants.26 We believe that the party making a claim concerning a company's efficiency—or lack thereof—should be the one that has to prove it. – MEI*

> *The Supreme Court's decision Tervita Corp. v. Canada (Commissioner of Competition) that places onerous requirements such as the quantification of anticompetitive effects to block mergers, has pushed the Canadian competition law further back by making it harder to block mergers and has in effect, enabled a path for significant market concentration. – PIAC*

In addition to placing the Commissioner at a disadvantage with respect to the information required to demonstrate such effects, the modeling required to accurately estimate them *ex ante* is extremely resource intensive.

> *[M]any of the beneficial impacts of a merger on innovation and productivity are also very challenging for merging parties to quantify because the exact nature and timing of new or better products and processes – and the extent to which they will benefit consumers and/or result in cost savings – may not be known or quantifiable in advance. – Blake's*

> *The concern of courts has been that qualitative evidence of effects is less reliable than quantification where the rigour of econometrics gives the allure of accuracy and mathematical truth. This kind of association of quantification and numbers with reliability and objectivity should be resisted because it obscures the fact that the kind of "quantitative" evidence produced in competition analysis is inherently uncertain. […] At present, contested mergers are fought with armies of economic experts on either side. This adds to the expense and the complexity of these cases without necessarily leading to better results. – Prof. J.A. Quaid*

Some contributors argue that any such quantitative analysis will fail to sufficiently capture the dynamic consequences of an action. This problem is felt most acutely in dynamic and innovative industries, like tech.

> *Unfortunately, this approach to enforcement is underpinned by a static model of economic efficiency. Modern industrial economies including Canada are characterized by network effects, innovation, and scale effects to such a major extent that the static efficiency calculus, while not irrelevant or technically incorrect, may not be all that important. – Prof. R. Ware*

> *For far too long, increasing concentrations of corporate power have been allowed due to supposed 'efficiency gains' which are notoriously difficult to predict and are often illusory. – AELP*

> *In the digital economy, efficiencies analysis will become increasingly problematic. – Competition Commissioner*

Several contributors argue that a single-minded focus on efficiency will allow conduct that hurts consumers and competition. Efficiency should instead be treated as one of a number of factors to be considered, and no longer given primacy.

> *The Act may permit anti-competitive mergers when the private benefits of merging outweigh the broader economic harm of the merger. The efficiencies exception should be eliminated, and instead efficiencies should be considered as a factor when considering the effects of mergers. – Competition Commissioner*

> *It is incumbent upon enforcers and the antitrust establishment to move beyond economic efficiency as the highest aim of antitrust law. Instead, focusing on the abuse of dominance by incumbent players and reviving antitrust law as a true challenge to concentrated private power, is of paramount importance. - AELP*

- The efficiencies defense is at odds with international best practices.
- It permits mergers that would harm Canadians.
- The original intent was misguided.
- Digital markets make the necessary quantitative analysis even less feasible.

The efficiencies defense should be maintained

Contributors argue that the efficiencies defense forms a key part of Canada's comprehensive competition policy, which has a distinct commitment to quantitative analysis and the total welfare standard.

> *Canadian competition law has polished a diamond in the form of the total surplus model, the closest available approximation to a standard based on economic efficiency and applied welfare economics. – Prof. R. Ware*

> *Economically, it doesn't matter if the gain goes to the consumer or the producer, as long as there is a gain. Any other standard would simply end up hurting Canadian wealth creation in the long term. As antitrust laws aim to ensure a fairer and more efficient economic system, it is vital to maintain this standard. – MEI*

> *The Canadian Competition Act has been described as one of the most economically sophisticated competition laws in the world largely due to its efficiencies provisions. These provisions ensure that the positive impacts of mergers and other competitor collaborations on the Canadian economy are appropriately taken into account when reviewing transactions. – Blake's*

> *[T]he Efficiencies Defence is appropriate for Canada's economy, that it is illustrative of the importance of economic efficiency as an underpinning of the Competition Act, and that it represents an example of Canadian leadership in the competition law area. – CBA Competition Section*

The requirement that the Commissioner quantify the claimed anticompetitive effects promotes objectivity and clarity in the application of the law.

> *[Eliminating the effectives defense] risks making the application of the Efficiencies Defence less objective, and creates uncertainty for merging parties when determining the case they must meet. – CBA Competition Section*

> *[A]s stated by the Supreme Court of Canada, the assessment of the efficiencies trade-off should be as objective as possible. As a matter of procedural fairness, merging parties must know the case they have to meet. Requiring the Commissioner to quantify the anticompetitive effects that are quantifiable merely provides an objective basis to compare the positive and negative impacts of any merger. – Blake's*

Canada has a unique economy, and many Canadian companies need to achieve economies of scale to compete internationally.

> *[K]ey Canadian industries that are the bedrock of the Canadian economy, including aerospace manufacturing and AI technology in Quebec, advanced manufacturing in Ontario, oil & gas in Alberta, and shipbuilding in Atlantic Canada […] may find themselves with a need to enter into mergers or other collaborations in order to*

> *achieve the scale necessary to innovate, improve productivity, compete internationally, and adapt to changing economic conditions. – Blake's*
>
> *Efficiencies can lead to significant benefits for the Canadian economy by generating cost savings, increased economies of scale and innovation. – CBA Competition Section*

There would be no need for an amendment to require the Tribunal to consider qualitative factors, as this was made clear in *Tervita*. The inclusion of objective factors shouldn't diminish the importance of qualitative factors.

> *The Supreme Court of Canada's decision in Tervita requires that "qualitative efficiencies should be balanced against the qualitative anti-competitive effects, and a final determination must be made as to whether the total efficiencies offset the total anti-competitive effects of the merger at issue."15 This gives the Competition Tribunal a significant degree of discretion to take qualitative evidence into account. – Blake's*
>
> *As per Tervita, the balancing test under s.96 requires the Tribunal must determine both quantitative and qualitative aspects of the merger and then weigh and balance those aspects. – PIAC*
>
> *[T]he current law as expressed by the Supreme Court in Tervita provides that anticompetitive effects and efficiencies should be quantified where it is possible to do so, and that qualitative effects and efficiencies should also be taken into account. – CBA Competition Section*
>
> *The burden of proof on the Commissioner of Competition in s. 92 of the Competition Act is a different burden of proof than that stipulated in s. 96 of the Act. Section 92 of the Act is concerned with the market-power issue…However, s. 96 of the Act concerns the effects of any prevention or lessening of competition that will result or is likely to result from the merger and the offsetting efficiencies therefrom.*
>
> *In our view, the burden of proving a substantial lessening of competition ("SLC") or prevention and all elements as per s. 92 rests with the Commissioner of Competition, as always. However, the burden of proving the efficiency defence of s. 96 should rest exclusively with the respondents in a one-step process whereby quantitative efficiencies and qualitative efficiencies are balanced against the quantitative anti-competitive effects and qualitative anti-competitive effects to enable a final determination as to whether the total efficiencies exceed and offset the total anticompetitive effects of the merger. - Calvin Goldman and Richard Taylor, The Law Office of Calvin Goldman, Q.C., Nicholas Cartel, Cartel & Bui LLP and Larry Schwartz, Consulting Economist*

- Promoting efficiencies does not necessarily imply siding with the more powerful party or exacerbating economic inequality.

Enforcement

The monetary penalties available to the Tribunal should be greatly expanded

Several contributors agree that the monetary penalties associated with violations are too small to represent effective deterrence and should be raised.

> *Monetary penalties provided under the abuse of dominance provision are often too small to effectively deter anti-competitive conduct. These penalties should be adapted to ensure that they can achieve their intended purpose of achieving compliance with the Act. – Competition Commissioner*

> *It is hard to see how the payment of penalties, especially given the current maximum amounts and how courts tend to determine AMP amounts, would serve as much of a deterrent for dominant firms, particularly large digital platform operators. – Prof. J.A. Quaid*

> *Canada also lags its peers in terms of severity of remedies, with the maximum fine penalties hopelessly low. – AELP*

Monetary penalties are fundamentally incapable of such deterrence

Some contributors argue that to increase the monetary penalties sufficiently to create effective deterrence would impose unacceptably high business uncertainty and cost of compliance, having a chilling effect on business in Canada.

> *While increasing minimum amounts may allow for the imposing of more significant financial consequences on firms that violate the provisions of the Act, these alone are unlikely to have much impact. […] Rather than increasing fine amounts, a more productive strategy would be to use consent agreements and prohibition orders as a mechanism for developing new preventive measures and behavioural remedies to address some of the particular compliance challenges raised in cases involving digital markets. – Prof. J.A. Quaid*

> *The CBA Section believes that if businesses will be liable for significant financial penalties, the legal standard they are being asked to comply with must be clear. That would not be the case if the Iacobucci Paper recommendations are followed. Although there may be ways to amend the Act and maintain legal certainty, for example by introducing a scheme of notification or binding case-specific advisory opinions, those alternatives have not been proposed and involve a host of complexities that would also have to be considered. – CBA Competition Section*

Digital markets

Competition law needs to account for privacy and data

Some contributors argue that in order to implement effective competition policy in a modern economy, the legislative framework needs to account for the use of data and the effects of competition on consumer privacy.

> *In the digital age, where public confidence in the capacity of authorities to respond to and reign in anticompetitive or otherwise harmful behaviour is low, enforcement transparency as to how competitive effects are assessed in relation to digital markets and data-driven businesses should be increased. – Prof. J.A. Quaid*

> *Given the increasing dominance of large digital platforms, consider including explicit protections in Canada's competition framework to protect user privacy and data. – PIAC*

> *We need to regulate the collection and use of personal data assets in ways that both respect privacy and open up their use beyond the current data hoarding by Big Tech. – Prof. K. Birch*

The overlapping regulatory nature of digital markets calls for a cooperative process from regulators. This will help to ensure a holistic and consistent approach to digital regulation to the benefit of competitive markets, consumer welfare, and the protection of privacy rights.

> *Issues such as the intersection of privacy and competition should be dealt with in coordination with the OPC, or equivalent. – OPC*

> *We view reliance on other policy instruments for protecting non-economic objectives, particularly those that conflict with economic efficiency, as highly problematic. This is because different agencies and their legal and/or policy framework do not have the same powers as the Commissioner or the Tribunal under the Competition Act, particularly, enforcement powers, and in the absence of such an overarching regime with uniform powers, this approach cannot work. – PIAC*

The intersection of data and privacy in digital markets should be pursued distinct from the main competition law

Contributors argue that the emerging issues surrounding privacy and data in digital markets should be dealt with through targeted laws, enforced by the departments of the government with expertise in those areas.

> *Canada has not developed a clear and integrated approach to regulating economic activity and economic actors across regulatory regimes to meet the challenges of the digital economy in a meaningful and coordinated way. – Prof. J.A. Quaid*

> *The UK provides an approach to consider. It has created the Digital Regulation Cooperation Forum. It brings together the Information Commissioner's Office (responsible for privacy regulation); Office of Communications (the telecoms and media regulator responsible for content and online harms regulation); and the Competition and Markets Authority (responsible for competition and consumer policy). The goal is to ensure cooperation and strong working relations between the three independent bodies and reflects the interconnected nature of their mandates. – CIGI*

> *Given this tension, we believe that concerns about privacy are best dealt with through specific laws and regulations separate from the Competition Act framework. – Blake's*

We have seen significant recent efforts to amend the laws of privacy and data governance in recent years, and these efforts should continue.

> *For example, in November 2020, the Canadian government proposed two bills dealing with privacy law and social media companies. Bill C-10, An Act to amend the Broadcasting Act and to make related and consequential amendments to other Acts was introduced to broaden the scope of broadcasting legislation to require digital media broadcasters to contribute to Canada's broadcasting system, supporting Canadian content producers and creators. Bill C-11, the Digital Charter Implementation Act, 2020 was introduced to address concerns about the collection, use and dissemination of personal information and data by large technology companies. In particular, it would enact the Personal Information and Data Protection Tribunal Act, establish an administrative tribunal to hear appeals of certain decisions made by the Privacy Commissioner of Canada, and impose penalties for contravention of certain of its provisions. – Blake's*

> *With these multiple examples of cross-collaboration in mind, I would encourage you to consider, where appropriate, amendments to the Competition Act that would enable, or strengthen, cooperation with all regulators who share responsibility for overseeing digital markets. Just as I have recommended that Bill C-11, the Digital Charter Implementation Act, 2020, be amended to enhance my Office's ability to work and/or share information with other government authorities, I similarly believe that the Competition Bureau should retain that ability pursuant to section 29 of the Competition Act, or see it strengthened. – OPC*

<u>*Canada should implement ex ante regulation for big tech*</u>

Several contributors argue that enforcing the tools necessary to remedy anticompetitive conduct *ex post* in big tech would create too much business uncertainty and cost of compliance. Instead, Canada should adopt an *ex ante* regulation of these markets.

> *It may be, that within the current tech driven dynamic economy, it is preferable to referee the competitive landscape, the terms under which competition takes place, rather than to focus in a minute legalistic way on the outcomes of particular cases. – Prof. R. Ware*

> *"[T]he concern that the inherent dynamics of these markets can generate competition concerns, even absent strategic anticompetitive behaviour, is a key rationale for potential EC and UK pro-competitive regulation that goes beyond standard antitrust." – CIGI (restatement)*

<u>*The Act is flexible enough to deal with digital markets*</u>

Several contributors argue that the current framework is sufficiently flexible to be applied to the new issues of digital markets.

> *Canada has an opportunity to prove that the effective enforcement of its current competition framework is flexible enough to accommodate and address the challenges of the digital era. – Ms. K. Karvala*

> *The CBA Section agrees with the Iacobucci Paper's overall assessment that the Act is largely fit for purpose. We specifically endorse the following conclusions: "[T]he Act as written is flexible enough to account for the additional anticompetitive threats that digital markets present […]" – CBA Competition Section*

> *Similarly, in a recent publication for the MacDonald-Laurier Institute, Anthony Niblett and Daniel Sokol reviewed a number of proposed legislative changes to address the growth of tech platforms and concluded that significant amendments or an overhaul of the Canadian competition policy framework "would be counterproductive. Canada's competition law framework is capable of adequately discouraging anti-competitive behaviour by digital platforms. The Competition Act is sufficiently flexible to deal with anti-competitive conduct." In addition, changes that fail to take into account the way digital platforms compete and innovate risk chilling innovation and ultimately harming consumers. – Blake's*

The focus should be in applying existing law to the new emerging business models in the digital space.

> *The horizontal approach to regulating "big-tech" fails to capture the different business models and monetisation strategies that these companies operate under or the market in which they offer their services or products. – Ms. K. Karvala*

> *Changes could be made to section 78 of the Act to name anticompetitive conduct that is specific to digital markets. –Prof. V. Bednar*

We must establish different standards in the face of competition "for the market"

Several contributors argue that the tendency toward a single dominant firm in digital markets is associated with distinct competitive dynamics and should be analyzed under a distinct standard.

> *I'll mention a problem I perceive to be important that is not addressed in the paper. It concerns the balance of probabilities legal standard as applied to prevent cases where there is competition for the market. […] Many people agree that due to very large economies of scale and scope as well as network effects, competition in digital markets is sometimes characterized as winner-take-all competition for the market. I believe that problems for enforcement arise in these situations. – Mr. P. Johnson*

Other observers argue that this idea is overblown.

> *This is a catchy phrase, stemming from the contestability era in industrial organization economic theory, but it is rarely substantiated in practice. Is Amazon afraid of competition "for" its market? I don't think so. The same is true for Google and Facebook. – Prof. R. Ware*

Merger control provisions

The tools of merger review are insufficient to mitigate emerging challenges

Some contributors argue that the present framework for merger review cannot effectively predict and mitigate the dynamic effects of mergers. As a result, the merger review process should de-emphasize quantitative *ex ante* analysis.

> *Ex-post reevaluation of mergers should not be seen as undoing the rules of the game, but rather as part of the rules of the game in a dynamic economy where the impact of the merger may only be felt years down the road and where the impact may have evolved in a substantially different manner than anticipated at the time of the merger. To foresee and estimate these dynamic changes is extremely difficult especially when new market structures emerge as a result. – CIGI*

> *In the digital economy, efficiencies analysis will become increasingly problematic. The Tribunal has recognized that: "… dynamic competition is generally more difficult to measure and 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." – Competition Commissioner*

To challenge a merger, the Commissioner must meet the standard of a substantial lessening or prevention of competition (SLPC) on a balance of probabilities. This standard is unsuited to managing the acquisition by dominant firms of nascent competitors with explosive innovative potential, and a different standard should be applied in these circumstances.

> *To illustrate further, suppose the entrant is successful with only probability 10% but, conditional on that success, the benefits to competition is $X. The curious thing is that $X can be arbitrarily large but will never meet the requirement of the balance of probabilities legal test. Anticompetitive effects are never "likely" even though in "expected value" (defined in the mathematical effect) the anticompetitive act could have huge anticompetitive effects (e.g., set X equal to a trillion dollars). – Mr. P. Johnson*

> *To obtain a remedy, the Commissioner must have sufficient evidence to prove these elements on a balance of probabilities. While this may be possible in a traditional industry, such a task may be particularly difficult—or even impossible—when it involves the acquisition of a firm that is still developing the products that would challenge other competitors. – Competition Commissioner*

> *Several sections of the Act outline the substantive test by which civil anticompetitive conduct is evaluated for the purposes of enforcing the Act. Specifically, the Act requires that the Commissioner find that the conduct leads to a "substantial lessening or prevention of competition". We propose that the Bureau consult with the Consumer Protection leaders in each of the provinces to consider changes to Canada's substantive test to bring it into alignment with a new standard: the "balance of harm test". – Prof. V. Bednar*

Alternatively, the Bureau should adopt a presumptively hostile stance towards mergers on the basis of market concentration.

> *As a result, there is a case for a presumptively hostile approach to mergers, as has been suggested by several US commentators in recent years. The approach advocated several decades ago by Farrell and Shapiro3, but not confirmed by any changes in enforcement, was for a presumptively hostile approach with only well verified cost synergies arising from a merger as a justification for allowing a merger. – Prof. R. Ware*

The remedy standard established in the caselaw is too weak and doesn't require competition to be restored to its prior state. This should be brought in line with the other provisions in the Act.

> *Remedies can be obtained whenever a merger is likely to lessen or prevent competition substantially. However, the terms of that remedy need only be sufficient to "restore competition to the point at which it can no longer be said to be substantially less than it was before the merger."55 Furthermore, the case law permits only the "least intrusive" remedy that meets the standard.56 Accordingly, a merger remedy can leave a marketplace in a state where competition is still lessened or prevented to a degree—that degree merely cannot be considered substantial. – Competition Commissioner*

> *Additionally, the remedial standard available under other sections of the Act is more consistent with these international best practices. For example, remedies issued under subsections 77(2) and 79(2) of the Act must restore competition. Even though the issue addressed by each of those provisions is competition being lessened substantially—similar to the issue addressed by the merger provisions—the remedial standards under sections 77 and 79 are stricter. – Competition Commissioner*

- The limitation period should be extended, especially for new dynamic markets.
- The pre-merger notification regime has several loopholes, including anti-avoidance and the accounting of foreign sales into Canada, which should be closed.
- Some mergers escape detection.
- The ability of the Commissioner to pause completion of a merger pending a legal proceeding should be clarified and strengthened.

Abuse of dominance provisions

The Abuse of Dominance provisions under s 79 should be expanded to include conduct that harms competition itself, without necessarily harming a competitor

Several contributors agree that s 79 presently allows for firms to engage in anticompetitive conduct and escape scrutiny.

> *The abuse of dominance provision may allow dominant firms to escape scrutiny even when their conduct softens competition. – Competition Commissioner*

> *We believe that a re-evaluation of section 79 of the Act would be timely because of its importance to competition issues in the digital economy in addition to its role and core element of competition law applicable to all sectors. – CBA Competition Section*

> *Requiring the Commissioner to prove not only that conduct is preventing or lessening competition in some abstract way but that there is a clear anticompetitive "effect" of this conduct (e.g., a reduction social welfare from a deadweight loss) would ensure conduct that does not harm competition and benefits consumers is not inadvertently captured by the abuse of dominance provisions. – Blake's*

Furthermore, the standards established when applying this provision to more traditional industries are not suited to addressing the anticompetitive conduct observed in new digital markets.

> *[T]he Act requires that the Commissioner find that the conduct leads to a "substantial lessening or prevention of competition". We propose that the Bureau consult with the Consumer Protection leaders in each of the provinces to consider changes to Canada's substantive test to bring it into alignment with a new standard: the "balance of harm test". – Prof. V. Bednar*

Commentators suggest that the serial acquisition of nascent competitors, which serves to maintain a "moat" or "kill-zone" around the market, could be considered an anticompetitive practice and prohibited under such an expansion of s 79.

> *The approach as suggested by Iacobucci to examine a series of acquisitions by a firm to determine whether it engages in anti-competitive practices (abuse of dominance) also deserves consideration. – CIGI*

> *Professor Iacobucci proposes an innovative approach to dealing with the "acquisition of nascent competitors" problem. He proposes that it should be rolled into s.79 as an anticompetitive act. This sounds promising, but I do wonder if enforcement is realistic – it would require the Tribunal to take a long retrospective view of a large company and judge the competitive effects of whole sequence of acquisitions. – Prof. R. Ware*

> *Prof. Iacobucci's suggests that one way to address the challenge of evaluating acquisitions of nascent competitor within current merger review provisions – which require a prediction as to the likely competitive impact of the loss of the nascent*

> *competition – is to use s. 79 as a means of conducting an ex post assessment of a pattern of acquisitions of smaller firms by a dominant firm. This approach avoids the need to modify existing merger review rules and also takes the guesswork out of cases where the competitive potential of firms may be hard to evaluate, but it does limit the available remedies. – Prof. J.A. Quaid*

Considering the dynamic and unpredictable nature of emerging markets, some contributors argue that the authorities should not shy away from imposing penalties *ex post*.

> *One example where the perspective may need to be changed relates to ex-post evaluation of mergers. Because of the economies of scale and scope associated with data, new data may lead to innovations, and issues that may have not been foreseen in an original merger decision. Ex-post reevaluation of mergers should not be seen as undoing the rules of the game, but rather as part of the rules of the game in a dynamic economy where the impact of the merger may only be felt years down the road and where the impact may have evolved in a substantially different manner than anticipated at the time of the merger. – CIGI*

If the government is to undertake an expansion of s 79, it should do so with caution. For example, the effect of such a change on business certainty and compliance costs must be carefully considered.

> *Assessing in advance the competitive impact of a range of business strategies and actions is inherently difficult. It is fact-intensive and can be an economically and legally complex exercise. In practice, many businesses comply with section 79 by ensuring that their conduct is not predatory, exclusionary or disciplinary. In doing so, businesses and their legal advisors rely on jurisprudence clarifying the scope of the anticompetitive act requirement in section 79. Removing this element of the abuse of dominance provision, which the Iacobucci Paper recommends, would make compliance assessments enormously difficult. Section 79 would become a freestanding provision that makes any action by a firm that has a dominant position open to enforcement activity if there are likely anticompetitive effects. – CBA Competition Section*

> *A material difference between section 79 and other reviewable practices that have a substantial lessening of competition (SLC) test is that businesses can be subject to significant penalties for section 79 contraventions, penalties that the Iacobucci Paper believes should be increased. The CBA Section believes that if businesses will be liable for significant financial penalties, the legal standard they are being asked to comply with must be clear. – CBA Competition Section*

These issues may be mitigated by the implementation of a scheme of notification or binding case-specific advisory opinions.

> *Although there may be ways to amend the Act and maintain legal certainty, for example by introducing a scheme of notification or binding case-specific advisory*

> *opinions, those alternatives have not been proposed and involve a host of complexities that would also have to be considered. – CBA Competition Section*

S 79 currently suffices to address problematic conduct by big firms

Several contributors argue that the current law is sufficient to address these issues. Under a proper interpretation, the provision would recognize the need to demonstrate the *effects* of an SLPC. Contributors argue that this would accomplish the objectives of an expanded s 79.

> *In our view, a proper interpretation of section 79(1)(c) that recognizes the need to demonstrate the "effects" of a substantial prevention or lessening of competition would avoid the need for any substantial amendments to the abuse of dominance provisions in sections 78 and 79. – Blake's*

> *While regulatory intervention that facilitates data sharing mechanisms as a way to confer value to competitors remains highly controversial, situations where the refusal to provide access to such data heightens barriers to entry can be addressed by the Competition Act under Section 79 (abuse of dominance). – Ms. K. Karvala*

The standards of proof under s 79 should be moderated

Like mergers, the Commissioner carries the burden of predicting an anticompetitive effect with enough certainty to satisfy a balance of probabilities. In the context of sophisticated and dynamic new markets, some contributors argue that the burden to demonstrate "prevention" of competition should be moderated so that the Commissioner can meet it.

> *The standards established from analysis of more traditional industries are not suitable for assessing anti-competitive conduct aimed at emerging competitors in the digital economy. A more workable standard would provide additional flexibility to protect the competitive process. – Competition Commissioner*

> *In the U.S., one legislative proposal would allow competition authorities to intervene whenever there is an "appreciable risk" that business conduct could "materially" lessen competition. – Competition Commissioner*

> *[T]he Act requires that the Commissioner find that the conduct leads to a "substantial lessening or prevention of competition". We propose that the Bureau consult with the Consumer Protection leaders in each of the provinces to consider changes to Canada's substantive test to bring it into alignment with a new standard: the "balance of harm test". – Prof. V. Bednar*

- While the correct interpretation of s 79 would mitigate many of the issues discussed above, for clarity's sake we should consider an amendment.

Buy-side agreements

Harmful buy-side conspiracies should be criminalized

Several contributors argue that the criminal provisions in s 45 should be extended to apply to buy-side conspiracies. In particular, contributors argue that harmful agreements should be subject to criminal sanctions.

> *Section 45 of the Act is a criminal provision that was amended in 2009 to prohibit agreements among competitors to fix prices, allocate markets, or limit the supply of a product. Since then, it has become apparent that the provision does not adequately address harmful agreements among competitors. While this provision applies directly to conspiracies among sellers, it does not presently address conspiracies related to purchasers. – Competition Commissioner*

Our peer countries have criminalized such conduct.

> *The absence of criminal liability for so-called "buyer cartels" sets Canada apart from many other countries. Most notably, buyer cartels have been subject to increased interest in Canada since 2016, when US antitrust regulators announced that employment-related buy-side agreements could attract criminal prosecution. It is necessary (but difficult) to distinguish such harmful agreements from reviewable agreements that may be pro-competitive or benign. Prof. V. Bednar*

Supporters admit that distinguishing between benign or pro-competitive agreements and criminal agreements will be difficult.

> *It is difficult to draw a bright line separating buy-side conspiracies that deserve criminal scrutiny under the Act, and buy-side arrangements that may be pro-competitive or benign. Both no-poaching and wage-fixing agreements are examples of harmful buy-side conspiracies that should be subject to the criminal provisions of the Act. However, further work should be done to identify whether other types of buy-side agreements—such as large purchasers agreeing on a price to purchase from small suppliers—warrant similar treatment. – Competition Commissioner*

Buy-side conspiracies should not be criminalized

Several other contributors agree that it would be unwise to extend s 45 to buy-side agreements.

> *The Iacobucci Paper cites cases where buy-side arrangements could have anticompetitive effects. We agree that such agreements could be anticompetitive. (That supports the existing structure of the Act pursuant to which competitive effects of buy-side agreements need to be assessed.) To make the case for criminality, the question is whether such conduct is always anticompetitive. That question is not answered in the Iacobucci Paper. – CBA Competition Section*

> *Criminal penalties are too blunt an instrument to deal with agreements or arrangements between competitors that do not fall into the "hardcore" cartel category.42 The Competition Act should only criminalize such agreements or*

> *arrangements where they clearly and unambiguously always harm competition, which is not the case with buy-side agreements. – Blake's*

Such a change would not rectify the wage-fixing and no-poach agreements that are a major source of concern in this area, or remedy low wages.

> *Expanding the ambit s. 45 to include of buy-side cartels can be defended based on anticompetitive effects, but it is unlikely that a criminal provision will address the underlying concerns about unequal bargaining power specific to wage-fixing. – Prof. J.A. Quaid*

Many of these issues fall into categories with dedicated government regulators, such as labour.

> *To the extent that concerns about no-poach and wage-fixing agreements are primarily animated by the desire for worker protection, those distributive concerns are likely more appropriately addressed through laws and regulations on employment standards. – CBA Competition Section*

The approach to reviewable agreements should be strengthened in several ways

Several contributors argue that the Bureau's approach to such a review can offer effective enforcement, but may need to be strengthened.

> *The CBA Section believes that the reviewable practice provision in section 90.1 is an appropriate framework to examine buy-side agreements. This section is specifically designed to enable the Commissioner of Competition to take enforcement action and obtain remedies against competitor agreements that lead to a substantial lessening or prevention of competition. This allows a nuanced and fact-specific evaluation of the effects of specific agreements, which is preferable to the blunt instrument of a per se criminal offence. – CBA Competition Section*

> *The standards established from analysis of more traditional industries are not suitable for assessing competitor collaborations that harm emerging competitors in the digital economy. A more workable standard would provide additional flexibility to protect the competitive process. – Competition Commissioner*

The primacy of efficiencies should be eliminated.

> *The competitor collaborations provision contains an efficiencies exception, similar to the merger provisions, that is equally unsuitable for maintaining and encouraging competition. This exception should be eliminated, and efficiencies should be properly considered as a factor when considering the effects of a competitor collaboration. – Competition Commissioner*

The standard of proof is too high to ever demonstrate the effects of agreements designed to eliminate nascent competitors.

> *In the context of a competitor collaboration that harms an emerging business,119 the Commissioner must demonstrate that such collaboration has halted the development*

> *of a significant competitive force.120 Proving that an emerging business, at the early stages of developing the products that would challenge other competitors, would play a significant competitive role can be difficult. However, even when it is uncertain, or where there is only a low probability that an emerging firm would develop a competitive product, an agreement between competitors that harms that business can completely extinguish this possibility.121 Accordingly, this means that such a collaboration may escape scrutiny under the Act not because it does not materially reduce competition, but rather because the extent of its impact is difficult to prove. – Competition Commissioner*

- Presently the Bureau can only review current or planned agreements: they should have the power to assess past agreements and past harms.
- The "made-known" defense to bid-rigging should be codified.

Policy in the international context

We should be making our competition laws in coordination with our peer countries

Several commentators argue that making policy in line with other western democracies is valuable.

> *While we agree, in principle, with some of the thoughtful recommendations in the paper, the overarching conclusion to retain status quo legislation and enforcement regimes reflects Canada's ongoing record of lagging its global peers in taking domestic competition matters seriously. – AELP*

> *Canada is increasingly behind as international peers move forward with legislative and fiscal action informed by assessments of the state of competition in digital markets, and their law's ability to protect and promote competition within them. – Mr. K. Bester*

Many dominant firms are global, and coordination between countries allows for more effective enforcement. Coordination and collaboration provides the opportunity to solve daunting problems shared by many countries.

> *In practice, however, Canadian enforcement in matters that cross borders or that involve large, non-Canadian-based multinationals is done in collaboration with agencies in other countries. While international collaboration in these matters is not unique to Canada, Canada tends to be more reliant than its economic peers on the enforcement heft of others (usually the US or Europe) in order to obtain concessions from international players. – Prof. J.A. Quaid*

The need to protect Canadian competitiveness by promoting efficiencies is misguided.

> *Even when the merging parties participate in international markets, restricting domestic competition does not support the productivity and competitiveness of the Canadian economy. In his study of international competitiveness, Michael Porter explained that: "creating a dominant domestic competitor rarely results in*

> *international competitive advantage. Firms that do not have to compete at home rarely succeed abroad." Other economic research has reached similar conclusions about the importance of domestic competition. – Competition Commissioner*

Canada should have a unique competition law tailored to its specific circumstances

Other contributors argue that there are good reasons not to simply bring our policy into alignment with our peers. First, amendments to the Act should be the product of a broad-based and inclusive democratic dialogue, and to adopt the law of another country without a substantive debate would be undemocratic.

> *The issues engaged by competition policy are vital to the interests of Canadians. They must be engaged in a manner that permits a sounding of their views on issues that affect their well-being and the health of the Canadian economy. – ISCC*

> *Canadian competition policy must continue to be designed and implemented taking into account the unique facets of the Canadian economy. It is therefore crucial that Canadian policy makers resist temptations to follow current antitrust policy proposals being considered in other jurisdictions that are not necessarily relevant nor applicable for the Canadian Competition regime. – Ms. K. Karvala*

Canada has a unique economy, and a unique position in the global context. The Canadian economy has strengths, weaknesses, needs and ambitions unique to us, and our policy should be tailored to reflect that.

> *Canadian competition policy must also be tailored to the unique facets of the Canadian economy, rather than simply following the lead of antitrust reform abroad.6 For example, many Canadian industries face a smaller economic base and operate over wider geographic areas compared to many businesses in the U.S. and Europe. These industries need to remain efficient to remain competitive internationally while also adapting to longer term economic trends. – Blake's*

The uniquely Canadian emphasis on efficiencies, for example, reflects a need for Canadian companies to gain scale in order to compete internationally.

> *[M]any Canadian industries need to operate with economies of scale to maximize productivity, remain competitive internationally, adapt to changing economic conditions, and invest in innovative and environmentally sustainable technology. For this reason, the Canadian government has made achieving economies of scale, efficiency, and adaptability a key policy goal. – Blake's*

Non-economic issues

The Act prohibits sustainability agreements that would benefit the environment

Contributors suggest that the Act should not prohibit agreements between competitors aimed at reducing carbon emissions.

> *Environmental benefits such as reduction of greenhouse gas emissions or other forms of pollution have important economic and social welfare benefits. Because these benefits are unlikely to be taken into account fully or effectively as productive or dynamic efficiencies, we believe it is important to establish a separate environmental defence that would allow the environmental benefits of competitor or industry collaborations to be weighed against anti-competitive effects that may arise from a sustainability agreement. – McMillan*

Several other countries have already implemented this change.

> *Other countries are recognizing the importance of adjusting competition laws to remove impediments to legitimate competitor collaboration on environmental issues. – McMillan*

- The ARD is insufficient to protect such conduct.
- The environmental defense removed in 2010 should be reintroduced.
- May want to specifically allow for input/output restrictions.
- Agreements will be prohibited if they produce SLPC under current standards.