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Re: SUBMISSION: Examining the Canadian Competition Act in the Digital Era

Introduction

I would like to thank Senator Wetston for opening a public consultation on such an important and understudied area of policy. Competition is a critical component of a fair and dynamic economy, and Canadians deserve laws that promote competition and protect them from abuse by concentrated economic power, a topic particularly relevant in light of evidence of an ongoing global rise in market power.[1]

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. While Canada can benefit and build on the work of other countries, Canada's competition law and jurisprudence is unique, and we should not use this international effort as an excuse to preserve the understudied nature of our own laws.

Further, while digital markets may pose new challenges to Canadian competition law, this focus should not close off assessment of the performance of Canada's competition laws in all markets. Consultations like this expand the range of perspectives contributing to the discussion and debate over whether Canada's competition laws are providing Canadians the protection they deserve.

Although certainly not inclusive of all issues fit to be raised regarding Canada's competition laws, this submission aims to make three points:

- Canada is increasingly late to an assessment of the performance of its competition laws
- Canada's merger law is permissive of consolidation at the expense of Canadians
- Fairness should play a role in the future of Canada's competition law

Canada has yet to do its homework

Canada is one of a shrinking number of peer countries that have not conducted a formal review of the effectiveness of its competition laws in light of the rise of digital markets, with the last

[1] IMF, Rising Market Power—A Threat to the Recovery? (2021)

formal review of the Competition Act releasing its final report in 2008.[2] Governments and regulators across the world, in the United States, European Union, United Kingdom, and Australia to name a few, have conducted in-depth analyses of their competition laws in relation to digital markets. That analysis now forms the basis for legislative, fiscal and staffing actions in support of more vigorous enforcement of competition laws, with increased scrutiny of dominant players as a common theme.

While in 2019 Navdeep Bains, then Minister of Innovation, Science and Economic Development, requested that Commissioner Boswell work with his staff to review the fitness of Canada's Competition Act for digital markets[3], more than two years later there have been no public outputs from that request, and no timeline for them to emerge. This is the case despite repeated calls from the Commissioner for a comprehensive review of Canada's laws to address issues in decidedly non-digital markets such as waste management.[4] While commentary by the Commissioner suggests public servants at the Competition Bureau and Innovation, Science and Economic Development Canada are working on this file,[5] Canadians must be brought into the process to understand the work done to date and to provide the perspectives of those directly impacted by Canada's competition laws.

The current government is balancing a number of legitimate policy priorities, particularly in the digital space, including broadcasting policy, online harms, news media funding, and privacy. Rather than worry about an apparent lack of short-term focus on competition, this should be seen as an opportunity for deeper investigation and reflection on the soundness of our laws. There are a number of voices in Canada in favour of preserving the status quo, but we should be wary of that confidence in lieu of humility and introspection. While Canada may be a smaller economy with a less active enforcement regime to date, this does not mean we should remain in the dark on the adequacy of our laws.

Canada's merger law framework is permissive of consolidation

One reason for this introspection are concerns about the fitness of Canada's merger enforcement regime. An effective merger control regime is critical to a country's competition law framework. Mergers have the potential to harm Canadians by removing vigorous competitors and consolidating power within entrenched incumbents. Extinguishing this competition can have long-lasting negative effects, well within the bounds of traditional competition analysis, such as higher prices, lower quality, and stagnating innovation for Canadians that relied on

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[2] Competition Policy Review Panel, Compete to Win (2008)
[3] Competition Bureau, Letter from Minister of Innovation, Science and Economic Development to the Commissioner of Competition (2019)
[4] Competition Bureau, Canada needs more competition (2021)
[5] "The legislative policy function is with our friends and colleagues at ISED, and obviously with the minister at ISED, but the minister, in a letter to me in May of 2019, invited me to consider these issues to make sure that the act and the framework and the investigative and prosecutorial processes were fit for purpose. We've been engaged in that work with the department since that time."
Matthew Boswell, Standing Committee on Industry, Science and Technology, Evidence Wednesday, April 7, 2021 (2021)

once-competitive markets. There is also evidence internationally that the costs of under enforcing mergers is higher than assumed in recent decades,[6] that the efficiencies allegedly generated by them are often overstated,[7] and accordingly that current merger enforcement may be too lax.[8]

Unfortunately, a scan of Canada's enforcement track record leaves reason for concern. For one, Canada's law allows for literal mergers to monopoly. This was the case for propane markets in a number of communities following the Superior Propane decision nearly 20 years ago,[9] an outcome labelled in a dissent by Justice Létourneau as "the ultimate adverse, anti-competitive effect which defeats the very purpose of the Act".[10] Further, in the nearly twenty merger challenges in front of the Competition Tribunal, the Competition Bureau has only been successful in a single challenge.[11] While there is no magic number of cases for the government to win to prove our competition regime is performing adequately, a regime where interventions are practically never successful, particularly those where the stakes are high enough for parties to engage in litigation, should be cause for further investigation.

It makes sense then that, instead of taking these potentially harmful transactions to court, the Competition Bureau is more likely to negotiate consent agreements with merging parties to remedy the harmful effects of a merger. But there are two issues with Canada's current approach to merger remedies.

First, the standard for remedies is not preserving competition, but removing the "substantial" from a "substantial lessening or prevention of competition."[12] This means that even a successful remedy accepts some loss of competition, a lower bar for the procompetitive arguments merging parties must make to justify the transaction. Canada, a country with industries more concentrated than our peers,[13] and where recent research suggests concentration levels have been on the rise,[14] should not be satisfied with a competition law framework that sets the bar at only making the situation in a given market less-worse.

Second, there is little public evidence on the efficacy of these remedies in addressing the alleged harms caused by the merger. Unlike enforcers in the United States,[15] the Competition Bureau cannot collect the data needed to assess whether remedies have had their intended

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[6] Hovenkamp, Antitrust Error Costs (2021)
[7] Rose and Sallet, The Dichotomous Treatment Of Efficiencies In Horizontal Mergers: Too Much? Too Little?
Getting It Right (2020)
[8] Affeldt et al, Assessing EU Merger Control through Compensating Efficiencies (2021)
[9] The Globe and Mail, Robin Shaban, Canada's efficiencies defence may enable Rogers-Shaw merger (2021)
[10] Rosenfeld, Superior Propane: the case that broke the law (2003)
[11] Competition Tribunal, Canadian Waste - Reasons and Decision regarding remedy
[12] Competition Bureau, Competition Bureau submission to the OECD Competition Committee roundtable on Agency Decision-making in Merger Cases: Prohibition and Conditional Clearances (2016)
[13] Duhamel and Crépeau, Competition Intensity in Canada: A Critique of Recent OECD Findings (2010)
[14] Yelena Larkin and Ray Bawania, "Are Industries Becoming More Concentrated? The Canadian Perspective," (2019)
[15] Federal Trade Commission, Merger Retrospective Program

effect, or whether the decision not to challenge a merger missed harms to Canadians. While the ability to compel information outside the enforcement context is often derided as a "fishing expedition,"[16] it creates a barrier to understanding the effectiveness of our enforcement regime. Instead, the Competition Bureau must rely on voluntary interviews of individuals and organizations affected by a given merger, the last study of which was published in 2011.[17] This remains the case as research in other jurisdictions raises concerns about the efficacy of merger remedies, particularly those that rely on behavioural rather than structural solutions to addressing the harms caused by problematic transactions.[18]

There is also anecdotal evidence of the consequences of enforcement misses in the digital space, such as Dye and Durham's recent price hikes on critical legal software, some as high as 563 percent, following what has been described as a "string of acquisitions."[19] Outcomes like these, companies drastically raising prices for Canadians after cornering a market through acquisitions, are well within the bounds of traditional competition analysis and should give us pause before claiming all is well under our current laws. Companies like Dye and Durham are simply following a strategy encouraged by Canada's lax approach to merger enforcement, and we should consider whether this is the kind of competition we are looking to promote in Canada.

An effective and assertive merger enforcement regime is a key lever against further monopolization of Canadian markets. Rather than laws that settle for lessening the negative impact of harmful mergers, Canadians deserve laws that preserve competition and dissuade firms from pursuing anticompetitive mergers in the first place.

The future of Canada's competition law should embrace fair competition

Shifting from discussion of Canada's merger enforcement regime, I would like to address a point raised by Professor Iacobucci in his report commissioned by Senator Wetston. While Iacobucci's report recommends a number of sensible reforms to the Competition Act, including amendments to s.45 to capture wage-fixing and to s.96 overturning the precedent set by *Tervita*, his report muddies a more nuanced but worthwhile conversation on the issue of fairness and fair competition in Canada's competition law.

In his consideration of potential non-economic aims of competition law, Iacobucci proposes, although does not endorse, an amended purpose clause of the Competition Act to "promote a fair and productive society by advancing valuable social objectives that include but are not limited to efficiency, distributional fairness, and political fairness."[20] Iacobucci suggests that in evaluating cases, adjudicators would select whichever policy goals they deemed relevant, with preserving privacy or preventing job losses as examples, and balance them in their assessment.

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[16] C.D. Howe, Grant Bishop - Ministerial Mandate Letters: Minister of Innovation, Science and Economic Development (2019)
[17] Competition Bureau, Competition Bureau Merger Remedies Study (2011)
[18] Kwoka and Waller, Fix It or Forget It (2021)
[19] The Globe and Mail, Jaren Kerr and Sean Silcoff, 'It's disgusting': Legal professionals outraged as Dye & Durham sharply hikes prices for critical software (2021)
[20] Iacobucci, Examining the Canadian Competition Act in the Digital Era (2021)

This approach is compared to a proposed efficiency-focused clause, and criticized for promoting uncertainty, indeterminacy, and leaving important policy questions to competition authorities and adjudicators, requiring them to be "expert in all policy values that may relate to competition policy enforcement."[21]

By constructing an all-encompassing definition of fairness, and categorizing it as a non-economic concept, Iocabucci undercuts the role that competition law already plays, and should play going forward, in determining the bounds on fair competition in Canada. Not all competition is beneficial, and under our current laws we already deem certain methods of competition to be undesirable, some as per se offences and others only when they result in a substantial lessening or prevention of competition.

In the United States, there is a building discussion on reviving the role of competition authorities in addressing unfair methods of competition, a core but underutilized authority held by the Federal Trade Commission (FTC).[22] Sandeep Vaheesan points out three potential policy areas for FTC rulemaking to clarify the bounds of fair competition, including a ban on exclusive dealing and exclusionary contracts by dominant firms, below-cost pricing by near-dominant firms, and the violation of other existing laws, suggesting examples of environmental and labour, to gain a competitive edge.[23]

The merit of each of these and other potential boundaries on unfair competition is worth debating, but Vaheesan's example provides a model of how an expanded competition law could be more prescriptive in addressing conduct determined to be unfair and detrimental to Canadians. Instead of relying predominantly on case by case determinations, a set of civil per se provisions, for example, could provide greater certainty as to what Canadians consider to be fair competition.

Rather than an amorphous and all-encompassing concept, fairness can be tailored to discourage methods of competition we find harmful to consumers, businesses and our economy more broadly. In its current state Canada's competition law already comments on what constitutes fair and unfair competition, and in considering the future of Canada's competition law, an expanded conception of fairness should be at play.

Conclusion

I repeat my thanks to the Senator for opening a conversation into the fitness of Canada's competition laws. There are legitimate questions to be raised on the effectiveness of our laws in protecting and promoting competition to the benefit of Canadians in all markets, not just digital ones. Rather than resting on the assumption our status quo is serving us well, Canadians deserve a deeper assessment of the limits of laws that should be protecting us from the harms of monopoly power, and what the future of those laws could be.

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[21] Ibid.
[22] 15 U.S. Code § 45 - Unfair methods of competition unlawful; prevention by Commission
[23] Vaheesan, Antitrust Law's Unwritten Rules of Unfair Competition (2021)

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