Submission made in response to the consultation invitation – *Examining the Canadian Competition Act in the Digital Era*

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As an academic and researcher who teaches and writes about competition law and policy, I am pleased to make a submission in response to this consultation invitation. Much has changed in the 12 years since the last major amendments were enacted and the time is ripe consider ways to improve the *Competition Act* (*Act*) particularly in response to the transformational change brought on by the digital era.

Overview and scope of the submission

Scope

In this submission, I have divided my discussion of the key challenges facing competition law in relation to the digital economy in two parts. In the first, I present three preliminary matters that should be considered before any discussion of specific proposals for legislative amendments: (1) the need for a transversal coordinated approach to economic regulation in the digital age and to evaluate the current objectives of competition policy in light of that approach; and (2) the impact of the enforcement environment in Canada on its capacity to discharge its mandate and to promote these objectives. In the second part of the submission, I provide comments on the merits of the specific amendments that have been put forward by the Commissioner in his public remarks, as well as those proposed by Prof. Iacobucci in his report.

Given the nature of this consultation and its intended audience, my comments provide an overview of issues and identify questions to assist policy makers as they consider the future direction of Canada's competition policy. I have also limited the number of references to formal legal sources to lighten the text. I would be happy to provide more detailed analysis at a later stage.

Summary of submissions

For ease of reference, here is a summary of the points I make in this submission:

Responding to the challenges of the digital age requires a coherent, coordinated and transversal approach to economic policy and regulation: Discussion of amendments to the *Act* should be situated within a larger public consultation about how to shape the direction and the goals of Canada's socio-economic policies in ways that promote and protect our core values in the age of pervasive surveillance, digitization, big data, artificial intelligence and accelerating technological change. Without this first critical step, it is hard to see how enacting limited and highly technical legislative tweaks in specific legislation like the *Act*, such as those contemplated both by the Commissioner of Competition and Prof. Iacobucci are going to have much impact in the larger picture of Canada's response to the digital economy.

Legislative amendments to the Act may not resolve some of the enforcement challenges faced by Canadian competition authorities. When considering the merits of different proposals, policymakers should be aware that legislative changes may not be sufficient to address the institutional culture,

geopolitical and structural factors that contribute to some of the persistent problems that have plagued enforcement of the *Act* over the years.

Any reconsideration of the objectives of the Act must reflect a social and political consensus. Just as I believe that the digital transformation ought to trigger a serious discussion about how to ensure economic policy is consistent with the core values held by Canadians, so should the more specific matter of which objectives should inform the application and enforcement of competition policy. These objectives should be arrived at through a process of extensive public consultation that explores all serious and feasible options.

Comments on principal amendments to the *Act* currently under discussion:

Criminalize buy-side cartels with care (s. 45): 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.

Eliminate or change the efficiencies defence (s. 96): There are serious problems with the way the efficiencies defense has evolved in Canadian law. At a minimum, the quantification requirements should be removed as well as the implicit endorsement of the total welfare standard as the preferred analytical framework for efficiencies. However, the merits of retaining the defense should be further examined in light of the enforcement history of s. 96 and the impact this has on merger review of notifiable transactions. Moreover, given some of the additional challenges raised by digital markets, such as assessing the anticompetitive impact of acquisitions of nascent competitors, it would be preferable to consider whether s. 92 also requires adjustment.

Private right to bring applications for abuse of a dominant position (s. 79): creating a private right to bring applications may allow some competitors to bring cases where the Commissioner cannot, but it is unlikely to increase enforcement significantly given the evidentiary requirements under s.79.

Eliminate need for proof of harm to competitors under s. 79: this proposal by Prof. Iacobucci would eliminate a problematic condition under the current terms of s. 79 which would be particularly useful in cases involving abuse of a dominant position in digital markets. It might provide a way of reviewing patterns of acquisitions of nascent competitors by dominant firms, though this would be an *ex post* review and thus, in my view, less effective. It is unclear if changes to s. 79 would provide an effective way to sanction consumer harm caused by dominant firms. At present the misleading advertising provisions are used as a workaround, but they can only be used to target a lack of transparency, rather than the substance of the practices themselves.

Increasing the minimum amounts of fines and administrative monetary penalties. 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, such as how to promote better compliance with privacy and data protection obligations.

Preliminary remarks on the nature of the consultation process

I commend Sen .Wetston for preparing a formal letter of invitation in both French and English, along with copies of Prof. Iacobucci's original report, an executive summary of the report and French translations of both. I am concerned, however, that this letter and the report were initially distributed unevenly. I learned of the email because a colleague, a director of a research centre on Law and Technology, received the email and was kind enough to forward it to me. Though there is a discrete section on Sen. Wetston's Senate page that provides links to the letter, executive report and summary, only those already looking for the consultation materials would find them. I have spoken to others who are active in competition law who only found out about the consultation indirectly. I believe it would have been better to send out the invitation in public forums accessible to all, rather than a group of selected recipients.

I appreciate that the Senator is conducting a consultation that is not an official government consultation and as such, does not benefit from the same visibility and resources to make it as widely available as possible. However, to the extent that this consultation is designed to collect comments that will later be made public in some form, this consultation may be treated as equivalent to an official government consultation and there may be no further consultation on the topic. Given this, I worry that the distribution method used will have the effect of not reaching all interested parties who wish to provide feedback and proposals of their own, especially civil society groups and those who are not specifically associated with competition policy.

The Need for a Transversal Approaches to Economic Policy and Regulation

The scope of this consultation is focused on whether Canada's competition policy and in particular the *Act*, remains appropriate in the "digital age." Though we are invited to put forth proposals on any aspect of competition law, this consultation is firmly anchored to the idea that when it comes to the digital transformation of the economy, it still makes sense to look at competition policy on its own, in isolation from Canada's socio-economic policy in general.

I will comment on the appropriateness of that narrow ambit within the context of existing competition policy when discussing the suggestion by Prof. Iacobucci that an even more singular focus on efficiency be expressly adopted through an amended purpose clause. For now, however, I want to highlight the fact that segregating economic regulation into distinct siloes seems particularly ill-suited to the times we live in. Indeed, many of Canada's key trading partners and allies are actively developing policy and legislative tools tailored to the plurality of issues raised by digitization not just of the economy, but of all aspects of society.

The spirit of the current international trend is reflected in a recent report prepared by the UK Competition and Markets Authority summarizing the main takeaways from a meeting of G7 competition authorities, in which Canada participated:

> … governments and authorities are reflecting on the interaction of different disciplines within their jurisdictions. Competition issues rarely arise in a vacuum and many of the concerns highlighted are inextricably linked with other regulatory and policy areas, such as privacy, consumer protection and media sustainability. To better understand and manage these challenges, competition authorities are regularly working closely with

> other government departments and regulators to tackle these systemic issues in holistic ways.[1]

Despite endorsing the report's conclusions on this point, 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. Rather, enforcement actions tend are anchored to specific regulatory regimes, each with its own focus and isolated from other, something which tends to segment the legal and enforcement heft available, diminishing its effectiveness.

No doubt disrupting the tidy categories and areas of specialization of the past will require a new mindset and an openness to different ways of regulating. It will also require considerable collaboration among regulators, subject matter specialists, policy makers and stakeholders, as no one can be expert in all the countless ways that the digital economy influences the lives of Canadians. To arrive at a consensus on this larger vision requires a broader consultation that breaks out of the narrow silo-ed approach to economic regulation that has characterized Canada's approach in the past.

Without going into detail, at a minimum, Canada needs to develop a legislative/policy framework that coordinates the mandates of several regulatory regimes where these overlap with and intersect in relation to digital issues. For example, in the previous Parliament, Bill C-11 proposed that the Commissioners of Competition and Privacy should collaborate, where appropriate. This may seem obvious, but this is not a well-established practice in Canada. Indeed, in relation to enforcement efforts involving Facebook, they took different approaches. And while coordination does not necessarily mean convergence of enforcement, there should nevertheless be a concerted effort made to identify where there is alignment in the response to conduct that may raise multiple, and sometimes conflicting, concerns.

Though not yet in existence, the spring budget statement, much of which is being taken up post-election, proposed the creation of a Data Commissioner. The specific mandate of this hypothetical Commissioner was never specified, but it seems inevitable that this Commissioner will deal with matters that will also interest the Commissioners of Competition and Privacy. The intersection between the concerns that might arise in competition, consumer protection, privacy and data protection areas are simply the most obvious examples of where regulatory coherence will be critically important. This will require provincial cooperation too as some of these areas are not exclusively federal.

Coherence does not mean a single strategy, nor a single focus of regulation. Those with expertise in these areas concede that trade-offs will be required in individual cases. How can access to data sets to encourage innovation and competition be given to market participants while ensuring individuals give meaningful consent to how their data is used? How can concerns about data security and privacy be assessed in the context of transactions that concentrate large amounts of data within the control of dominant firms? How can interoperability be promoted without removing incentives to develop new technologies? There are no easy answers to these questions in the abstract and there is not one solution. In Canada, we have not yet had a discussion about how best to ensure that digitization, digital markets and digital business practices evolve in ways that protect the fundamental values of Canadians.

[1] *Compendium of approaches to improving digital markets* (29 November 2021). Online (UK Government): https://www.gov.uk/government/publications/compendium-of-approaches-to-improving-competition-in-digital-markets, at 6-7.

Beyond this, there are other parametres that ought to be brought to bear on an overall digital regulatory strategy, some of which may chafe at conventional ideas of what is "economic" regulation. For reasons of space, I will only touch on them briefly. The first and most obvious element is the connection between Canada's commitments on climate change and the promotion of sustainable economic practices (the green economy). The second concern the equitable sharing of the costs and benefits associated with economic activity, be it digital or conventional (the fair economy). Beyond this, there is a pressing need to tackle systemic barriers to full participation in the economy and in society by groups that have historically faced discrimination (the inclusive economy). This element takes on an added importance in relation to the imperative of reconciliation with Indigenous peoples.

There has been a historical reluctance to recognize the connections between economic performance and performance on other measures. This is, however, giving way in other areas, for example corporate and securities law. Though not universal and not yet fully implemented into hard law, expectations around corporate governance and risk management are shifting away from models that favored analytical simplicity to models that acknowledge that responsible business practices require a sophisticated understanding of many factors. Though this imposes a heavier burden on corporate decision-makers in terms of the information to be considered and the factors to be weighed, the consensus is that decisions made in this way are better, on a number of metrics, including long term profitability and the robustness of the business as a going concern. Even so, one of the central challenges of corporate law going forward will be finding ways to modulate the pursuit of private economic interest in ways that align with the needs of the collective public interest, where the benefits of business decisions extend outside the firm and cannot be fully recouped. My point here is that despite the immense challenges ahead, there is a recognition that business decision-making cannot be divorced from the broader context where sustainability and a fair and inclusive economy are core values. The same should be true of competition law and policy. I readily concede that integrating goals that have been historically excluded because they were seen as outside the ambit of economic matters will be difficult. They will require changes to how we think about the role of competition and markets in supporting societal well-being. But this does not mean they should not be attempted.

I am keenly aware that in the current political context, it is probably unrealistic to imagine a minority government will undertake a broad discussion of economic policy. I nevertheless believe that until a consensus emerges on how to bring together the many pressing concerns of our time (the climate emergency, equity, diversity and inclusion, fair distribution of the costs and benefits of growth, reconciliation with Indigenous peoples, fostering innovation and creativity) into a coherent economic policy, Canada will be less able to reap the rewards of digitization and to direct its transformational power to promoting the public interest. It will also be less effective at enforcing existing laws and policies, including the Competition Act.

Overview of Competition Law and Enforcement in Canada

Canada's competition policy is a reflection of Canada's place in the world – a mid-sized political power and a trade-dependant economy with a high level of integration into the US and North American economy. It is important to keep this in mind when looking at the current structure and goals of competition law. It is also against this backdrop that we need to think about how best to protect and promote Canada's interests within the limits on our capacity to do so.

Before commenting on the substance of the report and the proposals that have been put forward by prof. Iacobucci and the Commissioner of Competition, I think it I useful to set out the basic features of what competition law and policy in Canada looks like today that should be top of mind as we consider amendments:

The approach to ensuring compliance with, and enforcement of, the Competition Act is structured as a continuum

In a continuum approach to regulation, responses range from education and voluntary actions on the one end to formal procedures before the courts in civil or criminal courts. This approach, outlined in the Bureau's *Competition and Compliance Framework*[2], is heavily reliant on a culture of cooperation between the Competition Bureau and "stakeholders", for the most part those who might be subject to enforcement under the Act. Though the Bureau does general outreach to the public and does hold public events, much of the meat of its cooperative approach is sustained through formal and informal exchange between the Bureau and those who advise stakeholders. Because inquiries under the Act are private and the lion's share of enforcement, even where initially contested, is ultimately resolved through settlement, much of the details of how this cooperation occurs (both procedural and substantive) remain confidential and inaccessible to the public or anyone outside the case. Short press releases are often the only window the public has into the actual workings of competition enforcement.

This lack of transparency reduces the effectiveness of enforcement because the details of the analysis of competitive harm and the compromises made to reach a resolution are not open to outside scrutiny, nor can they serve as useful precedents to guide future behaviour for those who are not insiders to competition enforcement. This further entrenches the power of those who have frequent access to the Bureau and creates significant information asymmetries between those who advise clients subject to enforcement, on the one hand, and public interest and civil society groups on the other.

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.

Enforcement practice differs between matters that are local to Canada and those that have an international dimension

The Act does not distinguish between enforcement directed at small, local market participants and that which targets large foreign multinationals. 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. Unfortunately, this means that Canada is not always in a position to demand Canada-specific provisions in joint settlements or Canadian settlements flowing from similar conduct in other countries.

A recent example is Canada's consent agreement with Facebook (now Meta). Aside from the $9 million fine and a generic prohibition on engaging in similar conduct (almost meaningless), the Canadian order

[2] *Competition and Compliance Framework* (10 November 2015). Online (Competition Bureau): https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03982.html

simply accepts the terms of the US order as a substitute for compliance under Canadian rules.[3] While the US order against Facebook is very comprehensive and highly original in parts (notably for the compliance obligations it creates in relation to privacy), it is based on US law. It may not always be the case that US rules will be sufficient to address the harms to Canadians flowing from conduct that violates the provisions of the *Act*.

In recent years, Canadian competition officials have been active participants in discussions among the competition authorities in the G7, the Five Eyes and the OECD aimed at increasing international collaboration and alignment of approaches on enforcement in the digital economy. However, while Canada endorses the principles developed in these multilateral fora, at home it has been slow to implement concrete measures aimed at tackling the challenges of applying competition analysis to digital markets and practices.[4] There seems to be a disconnect between the principles that Canadian officials commit to in international arenas and their ability to make good on those undertakings when applying the law to stakeholders in Canada.

It is important to distinguish between the law on the books and the law as applied

Enforcement policy and practice is framed by the expectations of the parties of what outcomes are probable should they end up in court. Unfortunately, there are very few judicial interpretations of the provisions of the Act, which means it is not always possible to know whether a plausible interpretation of a rule is actually going to be endorsed by a court. This uncertainty contributes to a reluctance on the part of the Commissioner and prosecutors to bring cases unless they are very confident of the outcome since there is little public or institutional tolerance for losing cases (even if this is a completely unrealistic standard to which to hold public enforcers). One of the results of this is that those cases that do end up before the courts are extremely high stakes because the precedent could stand, unchallenged, for years until another contested case arises. Moreover, because competition cases are rare, there are few judges, even in higher appellate courts, with enough expertise to cast an independent eye on the submissions of the parties, especially the complex economic evidence that has come to be the norm in competition cases.

An illustration of this phenomenon is the Tervita case. In that case, the Commissioner made a strategic decision in relation to the efficiencies defense not to lead any quantitative evidence of the anticompetitive effects of the merger (in essence the deadweight loss). The position of the Commissioner was that the parties should first quantify their efficiency gains to establish the defense has merit before the

[3] For a discussion of this case and its implications for Canadian competition law, see: J.A. Quaid: "AI and Competition Law" in F. Martin-Bariteau and T. Scassa, *Artificial Intelligence and the Law in Canada*, Toronto: Lexis-Nexis, 2021, 159-168.

[4] See for e.g. the recent report summarizing the key developments in relation to competition policy and digital markets in the G7 countries as well as Australia, South Korea and South Africa, published by the UK Competition and Markets Authority: *Compendium of approaches to improving digital markets* (29 November 2021). Online (UK Government): https://www.gov.uk/government/publications/compendium-of-approaches-to-improving-competition-in-digital-markets. The Canadian submission, by the Competition Bureau, is set out at 39-46. When compared to other jurisdictions, Canada is only just starting to develop specialized capacity aimed at addressing issues specific to digital markets and its digital strategy remains an abstract enumeration of general principles. It has undertaken few enforcement actions in response to digital markets and remains very vague on how it plans to address current enforcement challenges. Though it references existing regulatory cooperation with other agencies on issues like privacy and digital markets, there is little detail on how systematic this cooperation is, nor how it is operationalized.

Commissioner must take on the burden of quantification of the anticompetitive effects. No quantification of anticompetitive effects is required to prove the merger is likely to lead to a substantial lessening or prevention of competition under s. 92 of the *Act*. Quantification is needed when those effects must be compared to the efficiency gains claimed by the parties. Quantification of anticompetitive effects, especially non-price effects, tends to be more difficult than quantification of efficiency gains. The courts disagreed with the Commissioner and the net result was that no quantitative evidence of the anticompetitive effect was put in the record. While the lower courts (Competition Tribunal and Federal Court of Appeal) tried to give some weight to the fact that the merger was anticompetitive, drawing on qualitative evidence when evaluating the efficiencies defence, the majority of the Supreme Court of Canada disagreed. This led to the curious outcome of a finding that the Commissioner had established the merger would lead to a substantial prevention of competition in the relevant market but that the failure of the Commissioner to quantify that effect meant that *for the purposes of the efficiencies defense* the weight awarded to the anticompetitive effect was ZERO. As a result, the numerically small efficiency gains quantified by the merging parties were nevertheless found to outweigh and offset the anticompetitive harm. The Supreme Court asserted that there is no minimum threshold amount required to claim the efficiencies defense, though they acknowledged that the outcome in Tervita was hard to square with the ostensible justification for adding the defense in 1986.

The point here is not to judge whether or not the strategic decision by the Commissioner was right or wrong – indeed there is an argument to make that given the burden of quantification, the Commissioner should not have to undertake that exercise in every case without regard for the strength of the efficiencies defence being argued, a point that Prof. Iacobucci makes in support of his proposal to modify this aspect of the decision in Tervita. Rather, it shows that when there are few contested cases, the consequences of an adverse ruling like in Tervita can be significant and the opportunities for a correction almost nil.

The Competition Tribunal is a dysfunctional decision-making body that offers none of the benefits of a specialized administrative tribunal

Enforcement of the restrictive trade practices provisions of the Act (Part VIII of the Act), such as abuse of dominance and merger cases, are brought before the Competition Tribunal. Created in 1986 the Tribunal was supposed to be a specialist administrative tribunal that would provide expert decisions in a timely manner, thereby generating a body of case law that would contribute to the development of competition law and policy. Unfortunately, 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 (most recently set out in the Supreme Court decision in *Vavilov*). This creates an incentive for parties to appeal in the hopes of a reversal, a trend that only further extends the time for cases to be decided.

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.

Comments on specific proposals currently being put forward

In recent weeks, the Commissioner of Competition has been speaking publicly about the need for amendments to the Act. In a speech given on October 20, he specifically mentioned four areas that require attention:

- Weak maximum available criminal fines and civil penalties. These fines and penalties don't meaningfully deter anti-competitive conduct or promote compliance for large companies in today's digital marketplace, they are merely the cost of doing business
- Overly strict and impractical legal tests to prevent anti-competitive mergers
- The absence of private enforcement tools to deter anti-competitive behaviour such as abuse of dominance
- Gaps in our cartel law, which means that existing conspiracy provisions do not protect workers from egregious agreements between competitors that fix employees wages and restrict workers' job mobility[5]

Prof. Iacobucci's report adds to this discussion of the strengths and weaknesses of the Act, and the adequacy of the current state of competition law and policy in Canada to respond to the economic and market transformations brought about by "digitization". The first part of the report concludes that, aside from a few tweaks, the tools of competition law and policy are flexible enough to be adapted to enforcement in the digital era. Prof. Iacobucci's proposals overlap to some extent with the proposals of the Commissioner of Competition.

Prof. Iacobucci devotes the second part of his report to a long-standing and unresolved question about the overarching policy objectives that should frame the interpretation and application of competition law. Though this question has been debated for years, the features of the digital economy have prompted a re-evaluation of the objectives of competition law and policy in other jurisdictions, such as the United States and Europe. Though Prof. Iacobucci does not believe digitization demands a review of the objectives set out in the purpose clause of the Act, he nevertheless evaluates the merits of expanding the objectives of competition policy to include what he calls "non-economic" objectives, such as promoting economic equality, reducing the political power of large firms, protecting privacy and environmental protection, etc. He concludes that non-economic objectives, though important, are inherently political and thus best left outside of competition policy. He further argues that competition policy would be more effective if limited to a single objective of economic efficiency.

I will address this latter point first, as the proposal that competition policy be guided by economic efficiency alone would be a significant shift for Canadian competition, and one that is at odds with international trends. In keeping my view that the goals of economic policy and regulation should be broader rather than narrower, I believe it would be a mistake for Canada to narrow its already narrow competition policy even further. I would stress, however, that should policy makers believe the time has come to modify s. 1.1 of the Act, the identification of new objectives should be determined, not by my views or by those of any expert, but rather through a process of extensive public consultation. Whatever the objectives, they must be the product of a broad consensus.

[5] "Canada Needs More Competition", speech given by Matthew Boswell (20 October 2021). Online (Competition Bureau): https://www.canada.ca/en/competition-bureau/news/2021/10/canada-needs-more-competition.html

Efficiency as an overarching objective of competition policy

In the interests of space, I will make only a few observations on Prof. Iacobucci's analysis in support of economic efficiency as the single objective of Canadian competition law.

First, from his tone in his report, it seems that Prof. Iacobucci undertakes his analysis reluctantly. He notes that the debate over the merits of including non-economic objectives in competition analysis has been prompted by others, particularly in recent years as the digital economy has become THE economy. What is startling is how Prof. Iacobucci uses this analysis of whether one should *add* to the objectives of competition law to argue for a *reduction* in the objectives of competition law. While it can certainly be said that s. 1.1 is not perfectly logical, and that perhaps it is incomplete because it selectively identifies who should benefit from competition (consumers but not workers is the example Prof. Iacobucci provides, though I do not find this point very convincing), courts have managed to work with the provision and have drawn on each of the objectives at different times.

Second, in undertaking his analysis, Prof. Iacobucci compares efficiency as an objective to two other scenarios: one in which co-called "non-economic" objectives are fully integrated into competition policy and one where efficiency is the default objective but there is scope to consider other objectives on a case--by-case analysis. Since, in his view, non-economic objectives are inherently political, only elected officials should determine how these objectives are pursued. Given this, he suggests that competition cases that raise fairness and justice concerns be put to the Cabinet for determination. Such a suggestion is completely impractical and a departure from normal competition analysis where in contested cases, courts weigh the relative importance of the objectives set out in s. 1.1 in the case before them. By proposing a Cabinet consultation for non-economic objectives, Prof. Iacobucci has created a "straw man" proposal that cannot be seriously compared to the efficiency-only option.

Finally, I find it very odd that Prof. Iacobucci believes that giving courts the power to determine when non-economic objectives like distributive fairness and justice are relevant to competition law would place them in a position where they have to make political decisions best left to elected officials. Courts deal in justice and fairness all the time. If anything, courts are less conversant in economic and financial matters. Beyond this, however, making decisions informed by economic efficiency is not somehow more neutral than decisions about justice and fairness. Quantification may make the process of assessing efficiency seem like an objective exercise and may provide greater certainty about the outcome of cases, but that obscures the fact that an efficiency lens is still a lens that reflects a political choice. There is nothing inherently obvious about preferring a single clear, but sometimes unfair, objective that allows market participants to structure their business affairs with confidence over balancing a plurality of objectives that must be weighed based on the facts and circumstances of the case. Indeed, Prof. Iacobucci argues one of the virtues of the Act is a flexibility and adaptability to cases. Why is this any different in relation to the way courts give meaning to the objectives of the Act?

The narrow ambit of competition policy in Canada should be broadened not further narrowed

Though the labels differ, Canada's approach to competition policy is informed by the law and economics approaches that emerged from the Chicago School. Under this view, competition policy is focused on the price effects of anticompetitive conduct on aggregate economic welfare. In lay terms, it focuses on the overall economic pie rather than how the pie is cut up. It also does not concern itself with what kind of economic activity goes into the pie so long as it produces economic benefits. The focus on the economic aspects of a market economy is believed to keep competition policy *neutral* and free from less clearly

defined values such as fairness and justice. The exclusion of distributive and other effects (such as environmental impact or equality) has been justified as a strength because it provides clarity and considerable certainty to how the Act will be interpreted and applied. The economic emphasis on this area of law is reflected in the specialised expertise of the principal actors in this area: the Competition Bureau, the lawyers and economists who advise business and to a lesser extent the Competition Tribunal and the courts.

As I noted earlier, as digital markets have grown, and gained prominence in the overall economy, this view of competition policy is under challenge. Some of the voices calling for a greener, fairer and more inclusive economy come from outside traditional competition law circles. These voices may be less well-versed in the technical language of the specialists of competition law, something which can put them at a disadvantage. There is a certain amount of paternalism exhibited toward those who challenge core economic concepts or classical assumptions (like rational behaviour, or the focus on quantification), largely along the lines of "they don't understand basic economics". However, as developments in other jurisdictions have shown, the momentum driving the desire for change in competition law is not uninformed populism directed at "economic power." Rather, it is the product of the increasing awareness of policy-makers and governments that competition policy, and economic policy in general, must be in the service of the core values on which a society is built. Growth and productivity that occur at the expense of considerations such as distributive fairness, equality, protection of human dignity and democratic freedom provide a weak foundation for a society.

One of the strongest objections to taking on the challenge of including non-economic objectives is that it will upset a system of economic regulation that works well. Opinions differ, however, as to whether the competition regime works well. How the efficiencies defence is applied provides an illustration. The efficiencies defence is relevant only where a merger has been found to substantially lessen competition in one or several markets. This means that the merging parties will be in position to exercise market power sufficient to sustain a non-transitory price increase or other anticompetitive effect, like a reduction in choice or quality. Where the price increases are borne by economically vulnerable persons, the rationale is that we should not take into account the fact that benefits will be concentrated in the hands of the merging parties at the expense of consumers so long as aggregate economic welfare is higher (ie the pie bigger). Two justifications are offered. The first is that other stakeholders, like employees and pension funds, will benefit from the merger and so the benefits of the merger are more widespread than might appear at first blush. This can be true but depends a lot on the size of the business, whether employees share in profits and how fairly benefits are distributed within the business entity.

The second justification is that where there are indeed people who suffer a net negative impact through higher prices (without any increase in income), the offset of those price increases should be provided for in other mechanisms like tax policy. This is certainly possible, but there is no assurance that anticompetitive effects that are borne by a specific constituency affected by a merger will merit the legislative attention needed to modify the Income Tax Act or to create a social benefit program. Moreover, it is unlikely that a specific program will be developed in response to a single merger. So while in theory socio-economic policy should make sure that the effects of a price increase (which transfers benefits from consumers to producers) are mitigated, the chances that they actually will be are vanishingly small.

One further note: it would be a mistake to conclude that because there are few contested mergers, that the efficiencies defence, and the rules that govern how it applies, are of no consequence. This is one of

the features of Canadian competition law that is not apparent to those who are not familiar with the way the Act is enforced. The vast majority of cases that might raise anticompetitive concerns are resolved, either formally through settlements or consent decrees, or informally through voluntary cooperation, discussions and negotiations. In the case of mergers, the influence of the efficiency defense lies in the way it shapes expectations about the plausible bounds of merger review. These expectations are what create the incentive for parties to proactively propose solutions to possible anticompetitive concerns. Since the Tervita case, the plausible bounds for merger review have shrunk because the Commissioner bears a heavy burden of quantifying the anticompetitive effects as much as possible. This is far more difficult than it may appear. Against that backdrop, parties may be less inclined to resolve Bureau concerns related to alleged anticompetitive effects if they are confident of the ability to quantify efficiency gains.

Wage-fixing and buy side cartels

Since the start of the global pandemic, there has been increased attention placed on the exclusion of what care called "buy side" cartels from the ambit of s. 45 of the Competition Act. Buy side cartels are agreements between buyers who would otherwise compete for the supply of goods or services. These agreements seek to fix the prices at which buyers will purchase a product or service, restrict the "supply", which in the context of buy side cartel is the available supply of **purchasers** for the good or service being offered or to implement market allocations that prevent sellers of a product of service from accessing buyers outside those allocations.

Buy side cartels were explicitly excluded from s. 45 when it was amended in 2009. A press release issued by the Commissioner of Competition in November 2020 indicated that the Bureau had sought legal advice from the Public Prosecution Service of Canada as to whether s. 45 could be extended to include buy-side agreements, including no-poach and wage-fixing agreements. The answer was no. As such, the Commissioner indicated that agreements between buyers would be assessed under 90.1 of the Act, a civil provision that applies to current or proposed agreements that substantially lessen or prevent competition.

A recent judicial decision rendered in a motion to strike confirmed the view set out in the Commissioner's press release – that the legislative history and the current wording of s. 45 could not be framed to include buy side cartels.[6] In this decision, Chief Justice Paul Crampton explains that s. 45, as amended, was intended to focus on "hard core cartels", which are collaboration among competitors with no redeeming features, that are, from a competitive perspective unambiguously harmful – he concluded that the exclusion of buy-side cartels from s. 45 was an indication that these agreements are not unambiguously harmful in the same way that supply-side cartels are. Justice Crampton's view is not, however, universally held. For example, in the United States, joint guidance by the Federal trade Commission and the Department of Justice was issued in 2016 in which they indicated that, going forward, buy side cartels could be investigated as criminal "naked restraints of trade", which are per se illegal under s. 1 of Sherman Act. The OECD Guidelines on Hardcore Cartels are silent on the precise ambit of a naked restraint of trade, leaving room for interpretation.[7]

[6] Mohr v. National Hockey League, 2021 FC 488 (CanLII), par. 57-60.

[7] In its latest update of *Recommendation of the Council concerning Effective Action against Hard Core Cartels*, adopted 01/07/2019, the OECD used the following definition: "Hard core cartels refers to anticompetitive agreements, concerted practices or arrangements by actual or potential competitors to agree on prices, make

Both the Commissioner of Competition and Prof. Iacobucci are supportive of a legislative amendment that would explicitly extend the ambit of s. 45 to buy-side cartels. The Commissioner has indicated in his recent public remarks that he is most concerned about wage-fixing and no-poach agreements. This is understandable since there was considerable public outcry at what appeared to be agreed reductions in bonus payments to front line workers in traditionally low-paying jobs, such as those in the grocery sector. However, the appeal of responding to this situation, where there is a clear asymmetry of power between employers and employees, may not be the most robust basis on which to expand s. 45. The Commissioner has not been clear about whether the ambit of s. 45 should be limited to certain buy-side agreements or only to those related to employment conditions.

Prof. Iacobucci supports the expansion of s. 45 to buy side agreements on the basis that monopsony is "just as economically inefficient" as monopoly. Though costs go down when employers reduce wages, this creates an overall inefficiency because those lower wages will push workers out of that job market completely. This causes a distortion in the labour market that will ultimately increase prices for those who purchase the products produced by those workers (the anticompetitive effects could also take the form of reduced quality. For e.g. in the grocery sector, fewer available employees might reduce the hours that stores are open).

While I am very sympathetic to the rationale for extending the ambit of s. 45 to buy-side cartels, policy-makers should consider the following questions before modifying the wording of s. 45:

Amending s. 45 is unlikely to address the underlying harm raised by wage-fixing:

The underlying concern that is being raised in relation to wage-fixing, as least the kind that emerged in the pandemic, is the ability of the economically powerful to extract wage concessions from vulnerable employees, those earning wages at or close to the low end of the earnings spectrum. There is little doubt that these situations raise serious fairness concerns.[8] It is unclear, however, whether amendments to s. 45 will address these concerns about unequal bargaining power. S. 45 creates a serious criminal offence that is sanctioned by heavy fines and imprisonment. It is not a remedial provision that offers compensation to those affected by the cartels nor does it provide for corrective measures to prevent future harm. Though prosecutors can, through s. 34 of the Act, seek compliance type measures from parties that are convicted[9], there is little precedent for addressing victim concerns this way, outside of the misleading advertising context. Recent trends in sentencing for economic crime strongly suggest it is

rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by, for example, allocating customers, suppliers, territories, or lines of commerce. They do not include: (a) agreements, concerted practices, or arrangements that are reasonably related to a legitimate efficiency-enhancing integration of economic activity; (b) agreements, concerted practices or arrangements that might otherwise qualify as hard core cartels, which are directly or indirectly exempted from the coverage of Adherents' competition laws or are mandated in accordance with Adherents' laws.". Online (OECD): https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0452

[8] It is important to stress, however, that negotiation power does not always favour employers.

[9] Section 34 has two paragraphs : the first applies where a party has been convicted of an offence. The second applies in proceedings commenced by information where it appears to the court that a party has done or is about to do or likely to do something that would constitute an offence under one of the criminal provisions of the Act. The second paragraph has been used to settle criminal investigations without a guilty plea, most recently a sextet of bid-rigging cases settled in 2019-2020 involving the following companies: Dessau Inc, Genviar (now WSP Inc), Roche Inc, SNC-Lavalin Inc, Génius Conseil Inc and Cima+ senc.

unlikely that greater attention to victim concerns will occur in the absence of a specific legal obligation to do so.[10] It is also unclear whether criminal sentencing is the correct forum in which to develop meaningful remedies, given that most criminal competition cases are settled through a plea and joint submission on sentence to which courts owe substantial deference.[11] Beyond that, there is a practical concern about the enforceability of compliance obligations related to labour relations overseen by criminal courts.

Employment and labour law are specialized areas that may not be best regulated by competition enforcement:

Leaving aside the matter of whether prosecution is the best way to address the harm caused, if s. 45 is expanded to include wage-fixing, this raises the issue of whether competition regulators are in the best position to assess labour and employment relations, even in the limited context of competitive impacts, particularly as currently the Act does not apply to collective bargaining activities (s. 4 of the *Act*). Labour and employment law is a highly specialized area that is overseen by specialized regulators and adjudicated for the most part before expert administrative tribunals protected by strong privative clauses that limit court oversight. Beyond this, there is a serious question of legislative jurisdiction that arises as labour relations and employment law fall under provincial jurisdiction, except in relation to employers that fall under federal jurisdiction.

No-poaching agreements should be distinguished from wage-fixing:

Unlike wage-fixing agreements, no-poaching agreements tend to be used where markets participants are competing for talent in knowledge-based industries. From a competition perspective, these agreements do seem to raise greater anticompetitive concerns, because they can reduce or eliminate competition for a valuable resource (knowledge workers), which may have impacts that extend beyond the salary and working conditions of employees. No-poach agreements may entrench the position of dominant market participants by preventing normal labour mobility. Where the intellectual contributions of workers are a valuable asset to market participants, this can amount to a form of non-compete that is not only restrictive of worker liberty but may also stifle innovation and disruption from competitors who might otherwise seek to attract those workers away from their employers. In addition, where no-poach agreements suppress wages and benefits, these may cause skilled workers to leave the market, which could, as Prof. Iacobucci indicated, lead to a net loss for the economy if they no longer use those productive skills.

The efficiencies defence

The Commissioner of Competition has focused many of his recent public remarks on how judicial interpretations of certain provisions of the Act have created excessively stringent legal conditions for the Commissioner to meet when enforcing the Act. While he 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[12] denying the Commissioner an interim injunction in the Secure Energy Services-Tervita Corp merger case. The Commissioner has argued that the efficiencies defence in Canada, as it has been interpreted and applied, should be abandoned because it imposes an unreasonable burden on the Commissioner to prove the anticompetitive effects of a merger. In

[10] J.A. Quaid, « The Limits of Legislation as a Tool of Reform: A Study of the Westray Reform to Organizational Sentencing." (2020) 54 *Revue juridique Thémis*, 511, 550-554.
[11] *R. v. Anthony-Cook*, SCC 41, par. 25, 35.
[12] *Canada (Commissioner of Competition) v Secure Energy Services Inc.*, 2021 Comp Trib 7.

advocating for change, he is unclear as to whether he would simply repeal s. 96 or re-fashion it in a way that is more congruent with the promotion of the goals of competition, as currently set forth in the Act.

The Commissioner's observations underscore the harsh reality of merger enforcement in Canada where fully contested merger cases that do not settle are exceedingly rare. These cases are typically massive undertakings that require many human and financial resources and take years to conclude. They are characterized by countless interlocutory and preliminary matters, and many delays. They almost inevitably involve appeals to the Federal Court of Appeal and sometimes to the Supreme Court of Canada.

It may surprise those not familiar with merger enforcement that the subset of merger cases that have been fully contested are, except for the Superior Propane case, smaller transactions involving a limited number of local markets. And yet, to date, the Commissioner has never prevailed in a contested merger case that ended in a final judgment. In the two cases where the efficiencies defense was at issue, Superior Propane and Tervita, the courts ultimately concluded that the anticompetitive effects were outweighed and offset by the efficiency gains. In Tervita, because the Commissioner had not quantified the anticompetitive effects, a numerically small amount of efficiencies was sufficient in that case to allow the merger, despite the finding under s. 92 that there was a substantial lessening of competition. Though the Supreme Court noted that this result was not consistent with the underlying rationale behind the addition of the defense in 1986, it nevertheless allowed the merger to proceed in an 8-1 decision.

Prof. Iacobucci, for his part, believes that the efficiencies defence as set in in s. 96 should be retained. However, he suggests that certain problematic aspects of the efficiencies defense that have emerged in the wake of the Supreme Court decision in Tervita, should be corrected.

In considering whether and which modifications to the efficiency defense are required, policymakers should consider the following issues:

The existence of the efficiencies defence has tended to fuel a belief that economic efficiency should take priority over the other effects of competition identified in s. 1.1. While courts have refused to allocate a priority among these 4 goals, the key decisions rendered in merger cases where efficiencies have been at issue, Superior Propane and Tervita, show that the economic efficiency concerns tend to receive more attention since merger analysis is divided into two clear steps: first, the assessment of competitive effects and second, if substantial lessening or prevention of competition is found, a weighing of the efficiencies of the transaction against those anticompetitive effects. The other goals of competition are folded into the anticompetitive effects portion of the analytical framework. This can give the impression they are subordinate to efficiencies.

Though it is not entirely clear how, Prof. Iacocbucci proposes that the burden of the efficiencies defense fall entirely on the parties to the transaction. They would need to establish that the efficiency gains attributable to the merger outweigh and offset the anticompetitive effects established by the Commissioner under the s. 92 analysis, which the Commissioner would not be required to quantify.

What Prof. Iacobucci does not directly address is how this shift in the burden of proof would alter the attitude of courts, who have been reluctant, or even hostile, to giving the same weight to qualitative effects on competition (like reduced innovation or lower quality) as they do to quantitative effects (price impacts). 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. It is a predictive exercise that attempts to determine what will happen in the future. It is dependent on assumptions about markets and the behaviour of market participants that can be contested and are not universally "true" in the way one could say that the speed of light of gravity is. 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. It is unclear to me whether Prof. Iacobucci's suggestion would reduce the insistence on quantification that has emerged in practice. It seems inevitable that the Commissioner would have to provide quantification of anticompetitive effects to respond effectively to the merging parties, who will necessarily claim that their efficiency gains outweigh and offset the anticompetitive effects.

Modifications to the abuse of dominance provisions

The abuse of dominance provision, s. 79 of the Act, has been the subject of debate and criticism over the years for several reasons. Much of the popular dissatisfaction with s. 79 flows from a misunderstanding of its narrow scope. Without getting into too much technical detail, s. 79 sanctions conduct by dominant firms against their competitors that is *predatory, exclusionary or disciplinary* and also results in a substantial lessening or prevention of competition. It does not sanction conduct by dominant firms that might be characterized as abusive of consumers nor does it sanction conduct that causes anticompetitive effects where the firm has no intention to harm its competitors.

There has been increased interest in s. 79 since the Commissioner of Competition successfully brought an application against the Toronto Real Estate Board (TREB). This case was noteworthy for several reasons, three of which have been described as evidence of successful application of competition law to a case with digital aspects. Frist, the case was brought against an industry association, not an actual participant in that industry. This extension of s. 79 has been described as evidence that the provisions of the Act can be adapted to novel commercial situations created by the importance of control over data, in this case control exerted by an association over access to a key information resource (certain nonpublic data in the MLS database). Second, TREB's conduct was directed a particular group of brokers, those operating only virtually, without a physical office, and thus the conduct could be seen as an attempt to stifle innovation and disruption within the real estate broker services market. Finally, the case raised a question about the intersection of privacy and competition because TREB argued that privacy obligations prevented it from providing virtual brokers access to nonpublic MLS data it sought. It should be noted that this aspect of the case is less important than it appears since there was evidence that TREB did not in fact adhere to its privacy obligations, fatally discrediting their claim.

The success in TREB stands out because it is rare. The most recent case brought by the Commissioner, against the Vancouver Airport Authority was unsuccessful. Though not a case involving features of the digital economy, it nonetheless underscored the high bar that the Commissioner has to meet to establish abuse of dominance, in particular because intentional exclusionary conduct that has a plausible business justification does not meet the requirements for abuse of dominance. In the context of the digital economy, exclusionary practices are routinely defended as commercially necessary to protect data integrity, privacy, quality control and investments in technical innovations. Deciding when exclusionary practices are motivated by anticompetitive intentions is not necessarily straightforward.

The Commissioner has proposed that one way to support enforcement against dominant firms that abuse their position is to allow affected competitors to being cases directly against the dominant firm where the Commissioner is not bringing an application. S. 103.1 of the Act already establishes this right for refusal to deal (s. 75), price maintenance (s. 76) and exclusive dealing/tied selling/market restriction (s. 77). Private access may enable more cases of abuse of dominance to be brought, which could in turn generate more case law and help the law evolve, especially in relation to new practices, among them those in digital markets, though I expect the number of cases would still be small. Regardless, it leaves unaddressed the limited ambit of the provision.

Prof. Iacobucci has proposed that s. 79 be amended to eliminate the need to establish harm to competitor and focus rather on conduct by dominant firms that harms competition. I believe this would be a helpful change, though policymakers should be cognizant that this is unlikely to bring about a flurry of new enforcement actions. Connecting the conduct of a dominant firm to a substantial lessening or prevention of competition, particularly in digital markets where network effects and two-sided markets are common, will still require considerable time and effort. When one considers the size and financial heft of the major dominant digital firms who might face such proceedings, these cases will remain challenging for Canadian enforcers.

In terms of addressing the harm to consumers from dominant firms, something s. 79 is not designed to do, it remains to be seen whether eliminating the requirement to prove harm to competitors would make much of a difference. The Facebook consent agreement was framed as a misleading advertising case, which is significant since misleading advertising is presumed to be anticompetitive; there is no need to establish a substantial lessening or prevention of competition where a representation is found to be misleading in a material respect. While using misleading advertising to target practices by dominant digital firms against consumers or other end users seems like a good workaround, policymakers should be mindful that misleading advertising can only be used to sanction a lack of transparency, it cannot be used to sanction abusive conduct itself. In the Facebook case, therefore, the issue to be resolved was the failure of Facebook to inform users about how their data was being shared and with whom. It did not sanction the practice of sharing itself, nor did it address the lack of choice and bargaining power that consumers have to modify the terms of use set by platform operators.

Proposal for addressing the "nascent competitor" issue in mergers through ex post review via abuse of dominance

In addition to the proposed changes to s. 79, Prof. Iacobucci also sets out an original idea for using s. 79 (if amended as he suggests) to address one of the most pressing issues in competition policy: how to evaluate the anticompetitive impact of acquisitions of nascent competitors, market participants that are still small but have the potential to develop into serious competitors of established market players. They are particularly present in knowledge-based and digital markets where original innovative and disruptive ideas are developed in startup firms. These firms are often funded by venture capital, which creates an incentive for the founders to sell their ideas to larger players in the medium term as a way to realize the returns expected by investors.

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. Iacobucci suggests that administrative monetary penalties could take the place of structural remedies like divestitures and break ups. 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. Moreover, it is unclear how the payment of money would compensate for the loss of potential competitors that might have challenged established firms.

Beyond these comments, using s. 79 would be helpful only where the acquiring firm can be shown to be dominant. Acquisitions of nascent firms may raise competitive concerns even where the acquiring firm is not dominant. This is particularly the case in digital markets where the delineation of the relevant market and who is a potential competitor can be complex.

Increasing the maximum amounts of fines and administrative monetary penalties

It is far from clear that increases in the amount, even multiples over the current maxima, will trigger a corresponding increase in deterrence. The Act does not at present impose differential fines adapted to the size and financial capacity of the party subject to the fine or AMP. This may be something to consider, as it is practice used in European jurisdictions. Tying fine amounts to the size and dominance of a firm is also under consideration in the antitrust bills before the US Congress.

The larger issue, however, is whether it makes sense to focus on financial penalties when the central goal of competition enforcement is the promotion of business practices and polices that comply with the *Act* and the prevention of future anticompetitive misconduct by market participants.

Though I have only studied criminal fines in detail, my research suggests that fines are of limited effect as tools of deterrence; they tend to be more effective as symbols conveying censure of blameworthiness. First, the calculation of fines is difficult – methods of determining harm and ability to pay are fraught with difficulty. Moreover, since most fines are negotiated, there is little transparency about how final amounts are arrived at. Second, even where fines are contested and there is sufficient evidence to make calculations, judges are reluctant to impose the level of fines needed to create a deterrent effect, especially where these amounts would push the defendant into financial difficulty. Finally, the emphasis on dollar figures shifts attention away from other sanctions with a greater prospect of promoting compliance, such as probation orders and consent agreements. To the extent that the digital economy has created novel issues in relation to compliance, these agreements have much more potential to change practices and behaviours than simply demanding a one-time payment. The Facebook settlement is, in my view, an example of a lost opportunity for the development of novel compliance measures that could have ensured Facebook developed new privacy and data policies tailored to Canada.