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Skating on Thin Ice: Why Canadian Competition Policy Should Not Be Determined by U.S. Antitrust Enforcement

By Navin Joneja & Matthew Prior | Blake, Cassels & Graydon



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The Biden Administration's approach to aggressive antitrust enforcement is by now well documented, and serves as a stark reminder that U.S. policies can swiftly follow changing political administrations.² Each new administration appoints leaders of the U.S. agencies who, while insisting they are applying the law, have enforcement inclinations that mirror and emphasize the objectives of the political winds of the time.³ By this token, the outcome of the next U.S. Presidential election in 2024 could again alter the course of U.S. antitrust policy.

What is surprising is that the Canadian Competition Bureau seems keen to track the current political trends in the United States. Public reporting suggests that the Canadian Commissioner of Competition is arguing for a U.S.-styled makeover of Canadian competition laws.⁴ This would be short sighted: adopting any changes to Canadian competition laws without independently and thoroughly analyzing whether they are well suited for the Canadian economy is ill-advised.

For decades, Canadian competition policy has been appropriately tailored to unique facets of the Canadian economy, recognizing the fact that Canadian industries start from a smaller economic base relative to jurisdictions such as the United States and the European Union, and need to remain competitive in the global economy while adapting to longer term economic trends. These are important

considerations for Canadian competitiveness, efficiency, and adaptability, and would result in better outcomes for Canadian consumers.

Recent Trends in U.S. Antitrust Enforcement and Policy

In the United States, there has been a growing chorus of calls for a shift in antitrust policy to address perceived increases in the power of large companies. These calls have focused on large technology companies whose businesses have changed the American competitive landscape.

President Biden has actively pushed for antitrust reform and aggressive enforcement. In July 2021, his office issued a wide-ranging executive order which focused on encouraging greater scrutiny of mergers in the technology space as well as other issues such as competition in labor markets.⁵ The Biden Administration supported these policy shifts with personnel changes at key U.S. enforcement agencies, including the appointment of Lina Khan as Chair of the FTC and the nomination of Jonathan Kanter as lead of the DOJ's Antitrust Division.⁶

Both Khan & Kanter have clearly suggested the direction in which they intend to take antitrust enforcement in the near term. In a September 22, 2021, memo to FTC staff and commissioners, Chair Khan laid out the her enforcement priorities for the FTC, which include reducing concentration and dominant

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² E.g. Jim Tankersley & Celia Kang, *Biden's Antitrust Team Signals a Big Swing at Corporate Titans*, NEW YORK TIMES (July 24, 2021), <https://www.nytimes.com/2021/07/24/business/biden-antitrust-amazon-google.html>; Brent Kendall, *Justice Department Makes Quiet Push on Antitrust Enforcement*, WALL STREET JOURNAL (Oct. 9, 2021), <https://www.wsj.com/articles/justice-department-makes-quiet-push-on-antitrust-enforcement-11633800598>.

³ Steven C. Salop, *What Consensus? Why Ideology and Elections Still Matter to Antitrust*, 79 ANTITRUST L.J. 601 (2014); William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377 (2003).

⁴ Jaren Kerr, *Competition commissioner says Canadian laws need U.S.-style makeover*, GLOBE & MAIL (Nov. 8, 2021).

⁵ President Joe Biden, Executive Order on Promoting Competition in the American Economy (July 9, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

⁶ E.g. Jacob M. Schlesinger, *The Return of the Trustbusters*, WALL STREET JOURNAL (Aug. 27, 2021), <https://www.wsj.com/articles/the-return-of-the-trustbusters-11630076102>.

firm power in U.S. markets by addressing dominant intermediaries and extractive business models including the growing role of private equity and other investment vehicles and contract terms perceived to be abusive.⁷ In a similar vein, in remarks during his confirmation hearing before the Senate Judiciary Committee on October 6, 2021, Kanter expressed skepticism regarding the use of economic analysis in antitrust enforcement, arguing that this approach is inconsistent with U.S. antitrust legislation as written.⁸

Several recent actions by the U.S. antitrust agencies evidence more aggressive and rigorous antitrust enforcement. Over the past year, the FTC has changed course on four policies that had provided more clarity for merging parties. In each case support or disapproval proceeded along party lines, with the two Republican commissioners opposing deviation from prior practice.

In February 2021, the DOJ and FTC announced a pause on the use of early termination, thus requiring that all mergers subject to Hart-Scott-Rodino reporting requirements wait out the full 30-day⁹ waiting period before closing, even where transactions are highly unlikely to raise any competitive concerns.¹⁰ The change appears to impact approximately half of all deals filed with the antitrust agencies, creating greater uncertainties for merging parties and particularly those engaged in transactions which do not raise serious antitrust issues.

In July 2021, the FTC voted to rescind its 2015 policy statement concerning “standalone”

Section 5 of the Federal Trade Commission Act.¹¹ Section 5 provides the FTC with certain enforcement authority because the agency is not authorized to bring cases violating some of the “traditional” antitrust laws, such as the Sherman Act, which prohibits collusive conduct and monopolization. Section 5 declares “unfair methods of competition in or affecting commerce” to be unlawful and is widely viewed as encompassing the traditional antitrust laws, as well as other undefined conduct that contravenes the spirit of the antitrust laws. The 2015 policy statement had established that, when interpreting standalone section 5, (1) the Commission would be guided by the public policy underlying the antitrust laws, namely, the promotion of consumer welfare; (2) the act or practice would be evaluated under a framework similar to the rule of reason, that is, an act or practice challenged by the Commission must cause, or be likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications; and (3) the Commission would be less likely to challenge an act or practice as an unfair method of competition on a standalone basis if enforcement of the Sherman or Clayton Act is sufficient to address the competitive harm arising from the act or practice.¹² The prevailing Democratic majority believed that this policy statement unduly limited the FTC’s ability to rely on this section both by tying enforcement under Section 5 to the Sherman Act and by requiring a rule of reason analysis, which the Democratic majority considered toothless and “unwieldy.”¹³

⁷ See Memorandum from Lina M. Khan, Chair, Fed. Trade Comm’n, to Comm’n Staff and Comm’rs (Sept. 22, 2021), <https://www.ftc.gov/public-statements/2021/09/memo-chair-lina-m-khan-commission-staff-commissioners-regarding-vision>.

⁸ Ben Remaly, *Kanter Underscores Scepticism of Antitrust Economics*, GLOB. COMPETITION REV. (Oct. 7, 2021), <https://globalcompetitionreview.com/gcr-usa/departments-of-justice/kanter-underscores-scepticism-of-antitrust-economics>; *Hearing on Pending Nominations Before the S. Comm. On the Judiciary*, 117th Cong (Oct. 6, 2021) (statement of Jonathan Kanter, Nominee, Assistant Att’y Gen.), <https://www.judiciary.senate.gov/meetings/09/29/2021/nominations>.

⁹ Or 15-day waiting period for cash tender or bankruptcy transactions. 16 C.F.R. § 803.10(b)(1).

¹⁰ Press Release, Fed. Trade Comm’n, FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination (Feb. 4, 2021), <https://www.ftc.gov/news-events/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early>.

¹¹ Press Release, Fed. Trade Comm’n, FTC Rescinds 2015 Policy that Limited Its Enforcement Ability Under the FTC Act (July 1, 2021), <https://www.ftc.gov/news-events/press-releases/2021/07/ftc-rescinds-2015-policy-limited-its-enforcement-ability-under>.

¹² Fed. Trade Comm’n, Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act (Aug. 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf.

¹³ Fed. Trade Comm’n, Statement of Chair Lina M. Khan, Joined by Comm’rs Rohit Chopra and Rebecca Kelly Slaughter, on the Withdrawal of the Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act 5 (July 1, 2021),

Also in July 2021, the FTC rescinded its quarter-century-old policy statement that established that the agency would no longer require companies subject to consent agreements to obtain prior approval from the FTC for certain future acquisitions.¹⁴ On October 25, 2021, the FTC issued a new policy statement on prior approvals,¹⁵ which was issued simultaneously with its first consent decree requiring prior approval.¹⁶ Notably, the press release issued in conjunction with publication of the consent decree emphasized that the order “extends the coverage of the prior approval beyond the markets directly impacted by” the transaction.¹⁷

In September 2021, the FTC withdrew its approval of the 2020 Vertical Merger Guidelines, which had been issued jointly by the FTC and the Antitrust Division,¹⁸ and, at least for now, remain in place at the Antitrust Division.¹⁹ The Democratic Commissioners voted to rescind on the basis that the guidelines both were based on a flawed economic theory regarding the procompetitive effects of mergers and included an approach to vertical merger review based on an efficiencies analysis not contained in American antitrust law (in line with

Jonathan Kanter’s recent testimony, discussed above).²⁰

On the legislative side, high-profile politicians have been advocating for stronger antitrust enforcement and policy changes for some time, including expanding antitrust policy to address a wider range of issues like privacy and income inequality, breaking up Big Tech companies, and amending legislation to better address digital platforms and markets.²¹ Perhaps the most significant recent proposal in Congress is the Competition and Antitrust Law Enforcement Reform Act of 2021, introduced by Amy Klobuchar in February 2021.²² Legislative reform proposals have not been limited to the Democrats; Republicans have put forward reform proposals such as the Tougher Enforcement Against Monopolies Act (proposed by Republican Senators Mike Lee and Chuck Grassley).²³ Other proposals have also emerged, such as the legislative agenda offered by various House members, referred to as A Stronger Online Economy: Opportunity, Innovation and Choice.²⁴

https://www.ftc.gov/system/files/documents/public_statements/1591498/final_statement_of_chair_khan_joined_by_rc_and_rks_on_section_5_0.pdf.

¹⁴ Press Release, Fed. Trade Comm’n, FTC Rescinds 1995 Policy Statement that Limited the Agency’s Ability to Deter Problematic Mergers (July 21, 2021), <https://www.ftc.gov/news-events/press-releases/2021/07/ftc-rescinds-1995-policy-statement-limited-agencys-ability-deter>.

¹⁵ Fed. Trade Comm’n, Statement of the Commission on Use of Prior Approval Provisions in Merger Orders (Oct. 25, 2021), https://www.ftc.gov/system/files/documents/public_statements/1597894/p859900priorapprovalstatement.pdf.

¹⁶ Press Release, Fed. Trade Comm’n, FTC Imposes Strict Limits on DaVita, Inc.’s Future Mergers Following Proposed Acquisition of Utah Dialysis Clinics (Oct. 25, 2021), <https://www.ftc.gov/news-events/press-releases/2021/10/ftc-imposes-strict-limits-davita-incs-future-mergers-following>.

¹⁷ Press Release, Fed. Trade Comm’n, FTC to Restrict Future Acquisitions for Firms that Pursue Anticompetitive Mergers (Oct. 25, 2021), <https://www.ftc.gov/news-events/press-releases/2021/10/ftc-restrict-future-acquisitions-firms-pursue-anticompetitive>.

¹⁸ Press Release, Fed. Trade Comm’n, Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary (Sept. 15, 2021), <https://www.ftc.gov/news-events/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines>.

¹⁹ Dep’t of Justice, Antitrust Div., Justice Department Issues Statement on the Vertical Merger Guidelines (Sept. 15, 2021), <https://www.justice.gov/opa/pr/justice-department-issues-statement-vertical-merger-guidelines>.

²⁰ See Fed. Trade Comm’n, Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines 3 (Sept. 15, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596396/statement_of_chair_lina_m_khan_commissioner_rohit_chopra_and_commissioner_rebecca_kelly_slaughter_on.pdf.

²¹ E.g. Sen. Elizabeth Warren, Reigniting Competition in the American Economy, Keynote Remarks at New America’s Open Markets Program Event (June 29, 2016), https://www.warren.senate.gov/files/documents/2016-6-29_Warren_Antitrust_Speech.pdf; House Democrats, A Better Deal: Cracking Down on Corporate Monopolies and the Abuse of Economic and Political Power (July 2017), <https://forthepeople.speaker.gov/sites/forthepeople.house.gov/files/documents/A-Better-Deal-on-Competition-and-Costs.pdf>.

²² S. 225, 117th Cong. (2021).

²³ S. 2039, 117th Cong. (2021).

²⁴ This agenda includes five separate bills: the American Innovation and Choice Online Act, H.R. 3816, 117th Cong. (2021); the Platform Competition and Opportunity Act, H.R. 3826, 117th Cong. (2021); the Ending Platform Monopolies Act, H.R. 3825, 117th Cong. (2021); the Augmenting Compatibility and Competition by Enabling Service Switching Act, H.R. 3849, 117th Cong. (2021); and the Merger Filing Fee Modernization Act, H.R. 3843, 117th Cong. (2021).

The antitrust legislative and policy environment in the United States is in flux and potentially heading into uncharted territory.²⁵ It remains uncertain which legislative proposals will ultimately be implemented or have the most impact and how drastic the antitrust laws will be changed. Recall that in 1977, in what was previously viewed as the highwater mark of U.S. antitrust policy confusion,²⁶ the head of the FTC announced that U.S. antitrust policy should work “to bring the American economy more into line with the nation’s democratic and social ideals,” in part by addressing social and environmental harms such as resource depletion, energy waste, and environmental contamination, as well as worker alienation, and the “psychological and social consequences” of the marketplace.²⁷ Fast forward to 2021, and arguably a new highwater mark of antitrust policy confusion has emerged. The antitrust laws of today, according to some in the current Administration, may be used to address a wide range of issues not traditionally seen as core to antitrust, including economic liberties, democratic accountability, the welfare of workers, farmers, small businesses, start-ups, and local newspaper content.²⁸ At a more basic level, the recent actions by the U.S. agencies (including those described above) have garnered significant criticism and have even caused some to question whether basic norms such as due process and the rule of law are being respected.²⁹

Canada Should Not Simply Copy the U.S. Approach to Antitrust Policy or Enforcement

Leaving aside the fact that the future of U.S. antitrust policy remains uncertain, Canada would be better served by not following the United States down this proverbial antitrust rabbit hole. The United States remains Canada’s largest trading partner and closest geopolitical ally. Indeed, recent developments in the United States and other jurisdictions are frequently cited as evidence of the need for change in Canada, most recently by Canada’s Commissioner of Competition.³⁰ However, it is imperative that Canadian policy makers think carefully about which aspects of the current antitrust policy discussion are in fact important, relevant, and applicable to the Canadian context. Adopting specific policy changes simply because they are being considered in the United States risks causing significant harm to Canadian businesses, consumers, and taxpayers, as well as upending the delicate balancing of these stakeholders embodied in the Canadian *Competition Act*.

Canada’s Economic Priorities Are Not the Same as the United States

Effective competition policy is informed by a country’s economic priorities. Canada’s economy is significantly smaller than the U.S. economy — approximately one-tenth the size — and smaller than Europe’s largest national

²⁵ The beginning of Obama’s presidency was, similar to Biden’s, marked by public statements both criticizing the previous (Bush) administration for overly lax antitrust enforcement, but continuing to largely stay the course (when considering the aggregate of his enforcement record; in rescinding the Section 5 FTC policy (enabling Biden to act on his Executive Order) and the other actions noted above, Biden’s administration seems to be willing to deviate from what his party’s track record has been, adding to uncertainty that is worrisome for businesses.

²⁶ See George Bittlingmayer, *The Antitrust Emperor’s Clothes*, 25 REGULATION 46 (2002); also see 125 CONG. REC. 466 (1979) (remarks of Rep. William Frenzel; calling the FTC “a rogue agency gone insane”); 125 CONG. REC. H10,757 (daily ed. Nov. 14, 1979) (statement of Rep. William Frenzel).

²⁷ See Michael Pertschuk, Chairman, Fed. Trade Comm’n, Remarks Before the Eleventh New England Antitrust Conference 20 (Nov. 18, 1977).

²⁸ President Biden, *supra* note 5.

²⁹ See Ben Remaly, *Wilson: FTC leadership may pose an existential threat to the agency*, GLOB. COMPETITION REV. (Nov. 10, 2021), <https://globalcompetitionreview.com/gcr-usa/federal-trade-commission/wilson-ftc-leadership-may-pose-existential-threat-the-agency> (Article includes quote from Republican Senator Mike Lee decrying U.S. antitrust policy changes: “if this is what antitrust reform looks like, it’s dead in the water”).

³⁰ Matthew Boswell, Comm’r of Competition, Canada needs more competition: Pre-recorded remarks at the Canadian Bar Association Competition Law Fall Conference <https://www.canada.ca/en/competition-bureau/news/2021/10/canada-needs-more-competition.html>; also see Vass Bednar & Robin Shaban, *Canada’s Competition Act Needs an Overhaul*, GLOBE & MAIL (June 20, 2021), <https://www.theglobeandmail.com/business/commentary/article-canadas-competition-act-needs-an-overhaul/> (opening the article with a discussion of legislative changes and proposals in the United States).

economies. Germany's economy is more than twice the size of Canada's.³¹ It is important to ensure that Canada's economic policies support efficiency and innovation to ensure Canada's global competitiveness. This was made clear in Prime Minister Trudeau's December 2019 mandate letter to Canada's Minister of Innovation, Science and Industry, stating that one of the Minister's priorities was to "[c]ontinue to support Canada's traditionally strong industries...to increase productivity and innovation, especially as we transition to a low-carbon economy."³²

Unlike U.S. antitrust law,³³ Canada's legislators have articulated clear objectives for Canadian competition policy: the overarching "purpose" clause in the Canadian *Competition Act* speaks to Canadian economic priorities including promoting competition in order to achieve efficiency and adaptability, expand opportunities for Canadian participation in world markets, support opportunities for small and medium businesses and provide consumers with competitive prices and product choices.³⁴

These priorities are delicately balanced in the existing *Competition Act* and reflect a defined set of policy goals. The legislative framework of the *Competition Act* carries out this balancing of objectives and interests throughout its various parts. For example, Canada's highest judicial body (the Supreme Court) has noted that, with respect to mergers, the need for efficiencies is a paramount objective,³⁵ and the efficiencies exceptions in the *Competition Act* (section 96

and 90.1) permit mergers and other forms of collaboration that may have anti-competitive effects but create significant efficiencies that outweigh those anti-competitive effects.³⁶ Similarly, Canada's codified regulated conduct defense also permits certain behavior that would otherwise carry legal sanctions if such conduct is specifically authorized or mandated by a law or regulation.³⁷ Mergers in designated sectors of national importance (e.g. finance, transportation) cannot be blocked if they have been approved by designated Ministers in the Canadian government.³⁸ More generally, Canada's economy is also generally subject to greater regulation than the U.S. economy. This has served Canadians well in the past (for example with respect to prudential regulation of financial services during the 2008/2009 financial crisis)³⁹ and generally means that Canada has historically used a variety of methods to address competition-related concerns or other forms of market failure. These features of Canada's competition law regime reflect a balanced approach to competition policy and recognize Canadian-specific economic priorities.

Canada Is Taking a Different Approach to Big Tech

Many jurisdictions are wrestling with the complex and interrelated aspects of antitrust, privacy and data, particularly in relation to social media. In the United States, under the current Biden administration, this has in part led to confusion about the appropriate scope of antitrust policy.⁴⁰

³¹ INT'L MONETARY FUND, WORLD ECONOMIC OUTLOOK DATABASE (Oct. 2020), https://www.imf.org/en/Publications/WEO/weo-database/2020/October/weo-report?c=156,132,134,136,158,112,111,&s=NGDP_RPCH,NGDPD,NGDPDPC.&sy=2020&ey=2021&ssm=0&scsm=1&sc=0&ssid=1&sc=0&sic=0&sort=country&ds=.&br=1.

³² Letter from Justin Trudeau, Prime Minister of Canada, to Navdeep Bains, Minister of Innovation, Sci., & Indus. of Canada (Dec. 13, 2019), <https://pm.gc.ca/en/mandate-letters/2019/12/13/minister-innovation-science-and-industry-mandate-letter>.

³³ Christine S. Wilson, Comm'r, Fed. Trade Comm'n, Welfare Standards Underlying Antitrust Enforcement: What You Measure is What You Get, Luncheon Keynote Address at George Mason Law Review 22nd Annual Antitrust Symposium: Antitrust at the Crossroads? 4 (Feb. 15, 2019), https://www.ftc.gov/system/files/documents/public_statements/1455663/welfare_standard_speech_-_cmr-wilson.pdf.

³⁴ *Competition Act*, R.S.C. 1985, c. C-34 § 1.1.

³⁵ *Tervita Corp. v. Canada (Commissioner of Competition)*, 2016 SCC 3 at paras 110-113.

³⁶ *Competition Act*, R.S.C. 1985, c. C-34 § 96.

³⁷ *Id.* § 45(7).

³⁸ *Id.* § 94.

³⁹ See Kevin G. Lynch, *Avoiding the financial crisis: Lessons from Canada*, POLICY OPTIONS (May 1, 2020), <https://policyoptions.irpp.org/magazines/the-fault-lines-of-federalism/avoiding-the-financial-crisis-lessons-from-canada/>.

⁴⁰ E.g. President Biden, *supra* note 5 (calling for all agencies to consider "unfair data collection and surveillance practices that may damage competition, consumer autonomy, and consumer privacy").

Canada has taken a more compartmentalized approach by separately proposing legislation (outside of the competition law area) specifically dealing with privacy law and the regulation of internet-based media companies. In November 2020, the Honorable Navdeep Bains, Minister of Innovation, Science and Industry, introduced Bill C-11, the [Digital Charter Implementation Act, 2020](#), which would have overhauled the federal government's approach to regulating privacy in the private sector.⁴¹ The bill would also have enacted the Personal Information and Data Protection Tribunal Act ("PIDPTA") and established an administrative tribunal, which would hear appeals of certain decisions made by the Privacy Commissioner of Canada under the Consumer Privacy Protection Act and impose penalties for contravention of certain of its provisions. Also in November 2020, the Government of Canada introduced Bill C-10, [An Act to amend the Broadcasting Act and to make related and consequential amendments to other Acts](#).⁴² This legislation, which would have updated broadcasting legislation and broadened its scope to require digital media broadcasters to contribute to Canada's broadcasting system, was introduced with a view to supporting Canadian content producers and creators. The legislation was specially designed to bring social media and other online platforms into the fold broadcasting regulation.

While neither piece of proposed legislation has been enacted, dealing with privacy law and social media companies in separate, standalone legislation may very well address many of the policy concerns being raised by antitrust reform advocates in the United States and elsewhere such that drastic and untested changes to Canada's competition laws are not necessary.

It is also not clear that competition law reforms targeted at the digital economy in Canada will be significantly impactful. Large multinational tech companies tend to view the United States

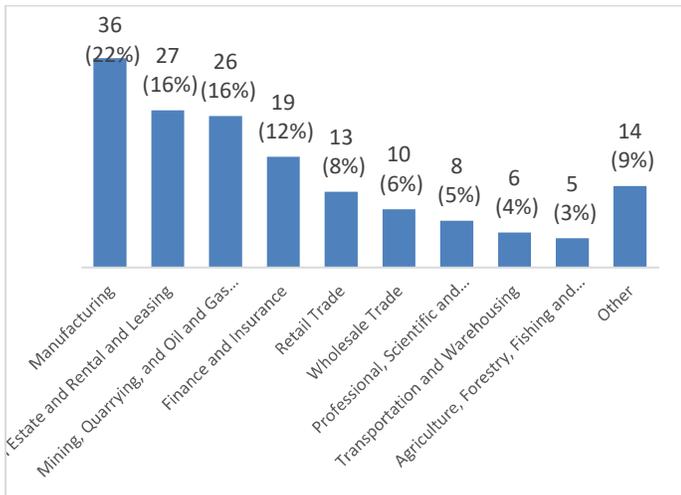
and Europe as the key competition regulators when making business decisions. Accordingly, significant competition law enforcement initiatives in those jurisdictions are likely to have a much more significant impact on Big Tech behavior than any changes to Canada's laws. Rather than introducing sweeping legislative changes that may not be appropriate for the Canadian economy, there are a variety of other more practical mechanisms that Canada can use to ensure it meaningfully contributes to the international competition policy conversation (e.g. sharing of information, coordination on merger remedies). It is also worth noting that the Bureau's two active merger challenges currently before the courts relate to grain elevators and oil and gas waste disposal services, not firms participating in the digital economy.

Finally, changes to Canadian competition laws (premised on a supposed need to address concerns related to global internet platforms and social media companies) would have significant unintended consequences for a wide range of other industries, including those that are the primary drivers of the Canadian economy. Other industries with a large Canadian presence — manufacturing, oil and gas, financial services, aerospace, agriculture and transportation, to name a few — each have their own unique characteristics that would need to be taken into account.⁴³ Indeed, a review of the industry sectors that make up the bulk of merger transactions reviewed by the Bureau shows that the merger laws in Canada are more relevant to manufacturing, real estate, mining, and financial services companies, rather than technology companies.

⁴¹ See Colin Hyslop, *Bill C-11: Canada Proposes New Data Privacy Legislation*, DATA PROT. REPORT (Nov. 20, 2020), <https://www.dataprotectionreport.com/2020/11/bill-c-11-canada-proposes-new-data-privacy-legislation/>.

⁴² See Menaka Raman-Wilms & Bill Curry, *What Is Bill C-10 and Why Are the Liberals Planning to Regulate the Internet?*, GLOBE & MAIL (May 20, 2021), <https://www.theglobeandmail.com/politics/article-what-is-bill-c-10-and-why-are-the-liberals-planning-to-regulate-the/>.

⁴³ See Letter from Justin Trudeau, *supra* note 32 (requesting that the Minister "[c]ontinue to support Canada's traditionally strong industries – including, but not limited to, automotive, aerospace and agri-food").



These industries are facing their own challenges, including remaining relevant in a global economy and adapting to transformative climate change policies. A thoughtful discussion about competition policy in Canada would more appropriately focus on these industries and their challenges. In contrast, global internet platforms and social media companies are by and large not based in Canada; their presence in Canada is a by-product of their global reach rather than any uniquely Canadian features. Amendments to the *Competition Act* that might be designed to address concerns regarding the digital economy are bound to have unintended and unforeseen knock-on consequences given that the *Competition Act* is a framework statute of general application.⁴⁴

Need Objective Evidence to Warrant Changes

Canada has experience in emulating U.S. antitrust rules, with mixed results. Most prominently, in 2009, Canada's merger review laws and laws relating to competitor

collaborations were both significantly amended in order to “modernize” the regime by replicating the existing antitrust laws and policies in place south of the border. Canada's merger review process is now essentially the same as the HSR merger review process in most respects (30 day waiting period which can be extended by the agency information request until 30 days after such information request is complied with). Likewise, Canada's law regarding competitor collaborations now includes a *per se* offense for hard-core cartels while maintaining a rule-of-reason approach for other types of joint ventures. The driving rationale behind these amendments to Canadian competition law in 2009 and 2010 was in fact the integration of the Canadian and U.S. economies.⁴⁵

Commentators have long suggested that these reforms do not actually suit Canada's interests.⁴⁶ For example, the merger review process is often criticized by both the Bureau and private parties, albeit for different reasons.⁴⁷ The Bureau, which advocated for the U.S.-style merger review process, now suggests that the already extended timeframes do not provide it with enough time to assess any efficiencies created by a merger, in the event that merging firms intend to rely on the efficiencies exception contained in the *Competition Act*.⁴⁸ Many private parties take the opposite position, arguing that the current merger review process already leads to undue merger delays.⁴⁹ In actuality, of the thousands of transactions reviewed by the Canadian Competition Bureau since 2009 (when the merger review laws in Canada were last reformed), only a handful

⁴⁴ Recent rounds of legislative amendments have tried to eliminate industry-specific provisions contained in the statute, e.g. Competition Bureau Canada, A GUIDE TO AMENDMENTS TO THE *COMPETITION ACT*, <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03045.html> (last visited Oct. 23, 2021) (“The airline-specific provisions have been repealed so that all industries are treated equally”).

⁴⁵ Competition Pol’y Rev. Panel, *COMPETE TO WIN* (June 2008) at 56, [https://www.ic.gc.ca/eic/site/cprp-gepmc.nsf/vwapi/compete_to_win.pdf/\\$file/compete_to_win.pdf](https://www.ic.gc.ca/eic/site/cprp-gepmc.nsf/vwapi/compete_to_win.pdf/$file/compete_to_win.pdf).

⁴⁶ Brian Facey, *Canada should learn from U.S experience before adopting new antitrust laws*, *GLOBE & MAIL* (February 10, 2009); Paul Crampton, *A critical step forward*, *GLOBE & MAIL* (July 2, 2008).

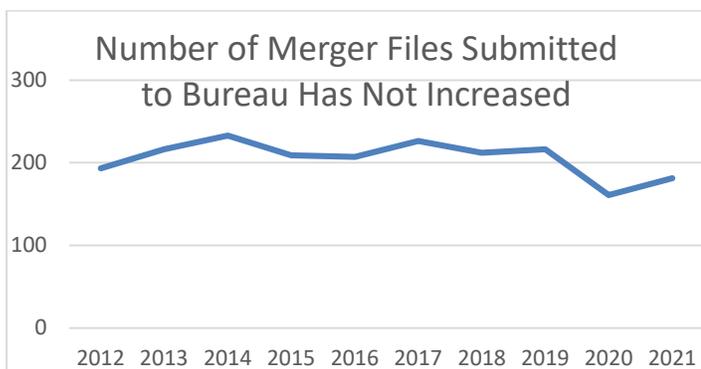
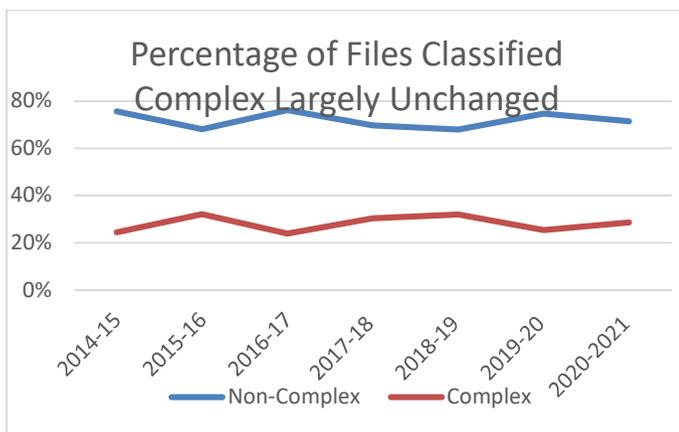
⁴⁷ E.g. Canadian Bar Association, *CBA Competition Law Fall Online Symposium* (Oct. 2021) (the Day 1 sessions focused mainly on private practice concerns with the merger review process); Competition Bureau Canada, *Competition and Growth Summit* (June 2021) (discussions regarding the merger review process focused mostly on the Bureau's concerns).

⁴⁸ See Competition Bureau Canada, *MODEL TIMING AGREEMENT FOR MERGER REVIEWS INVOLVING EFFICIENCIES* (May 21, 2020), <https://www.ic.gc.ca/eic/site/cb-bc.nsf/eng/04531.html>.

⁴⁹ E.g. Communiqué, C.D. Howe Institute Competition Policy Council, *Mergers and Inquisitions? Competition Bureau's Merger Review Needs Improvement* (Oct. 26, 2017); Communiqué, C.D. Howe Institute Competition Policy Council, *Help Wanted: Priorities for a New Competition Commissioner* (May 17, 2018).

have been cleared on the basis of the efficiency exception.⁵⁰

In any event, it is not clear that the merger landscape has changed significantly since the Bureau's last review of the *Competition Act* such that significant reforms are warranted. As recently as 2018, the Bureau studied the suitability of the *Competition Act* for the new digital economy and found that "there is little evidence that a new approach to competition policy is needed."⁵¹ Since this review, the percentage of files classified by the Competition Bureau as "complex" has remained largely unchanged and the total number of files has remained fairly constant as compared to pre-pandemic levels.⁵²



A shift towards the aggressive U.S.-style of antitrust enforcement now taking place would unnecessarily bring about even more uncertainty, delay and confusion for companies doing business in Canada, as the U.S. policies have already had this effect on companies doing business in the United States. As a smaller economy, the effects of this business uncertainty may be more glaring. Canada has a greater need to attract foreign investment and capital. Canada can attract such foreign investment and capital by showing that its regulatory environment supports efficient, productive companies able to compete on global terms. Creating uncertainty, delay, and confusion for companies doing business in Canada will have the exact opposite effect.

Canadian Competition Law Has Not Been Static

As the United States and other countries consider changes to their antitrust laws, Canadian competition law enforcement also has been evolving in line with recent trends and developments (in typical Canadian fashion, with little fanfare).

The digital economy is a centerpiece of the Bureau's *Strategic Vision* and the Commissioner of Competition has described the Bureau as being "at the forefront of the digital economy."⁵³ In addition, the Competition Bureau has been incrementally increasing its competition law enforcement efforts. For instance:

- The Competition Bureau has enhanced its intelligence gathering efforts to review non-notifiable transactions that fall below the

⁵⁰ See Competition Bureau Canada, MONTHLY REPORT OF CONCLUDED MERGER REVIEWS, <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04292.html>; The Canadian Bar Association, Letter to the Stating Committee on Industry, Science and Technology RE: Summary of CBA Views on Potential Competition Act Amendments (Apr. 28, 2021) at p. 3 fn. 8 (since this letter's publication, the Bureau has only cleared one additional transaction — [Canada National Railway Company / H&R Transport Limited](https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04513.html) — on the basis of the efficiencies exception).

⁵¹ Competition Bureau Canada, BIG DATA AND INNOVATION: KEY THEMES FOR COMPETITION POLICY IN CANADA (Feb. 19, 2018), <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04342.html>.

⁵² See Competition Bureau Canada, COMPETITION BUREAU PERFORMANCE MEASUREMENT & STATISTICS REPORT 2020-21, (June 30, 2021) <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04567.html>.

⁵³ Competition Bureau Canada, COMPETITION IN THE DIGITAL AGE: THE COMPETITION BUREAU'S STRATEGIC VISION FOR 2020-2024 (Feb. 11, 2020), <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04513.html>.

current financial thresholds that would trigger mandatory pre-merger notification.⁵⁴

- The Bureau is making more public information available regarding ongoing merger reviews and conduct cases, with a view to obtaining more public input.⁵⁵
- A new Digital Enforcement and Intelligence Branch has been created to centralize expertise on tech and data issues and provide an early warning system for potentially anti-competitive behaviour.⁵⁶

Most importantly, the Competition Bureau recently secured a significant increase in its budget with over C\$200 million in additional resources available over the next 10 years. This is likely to bring about significantly enhanced competition law enforcement in Canada for the foreseeable future and further calls into question the need for significant reform.

The Road Ahead for Canada

From a public policy perspective, the Canadian *Competition Act* is a balanced and complex framework law. It is considered one of the most economically sophisticated antitrust regimes in the world.⁵⁷ It would be a marked step backwards for Canadian competition policy if significant changes were made simply for the sake of change. Canada's *Competition Act* was extensively modernized in 2009 after a comprehensive assessment of Canada's competitiveness in the *Compete to Win* report.⁵⁸ The report considered 155 submissions by a wide range of stakeholders and contained 65 recommendations.

Canada's competition policy should focus on Canadian economic priorities. Identifying those priorities should be subject to debate and change, but what should be avoided is reflexive emulation of policy developments in the United States and elsewhere that do not translate well to the Canadian context. Over-reliance on the larger jurisdictions as a guiding light for Canada could easily result in the adoption of policies that do not reflect Canadian economic realities.

⁵⁴ Press Release, Competition Bureau Canada, Competition Bureau enhances information-gathering efforts on non-notifiable mergers (September 17, 2019), <https://www.canada.ca/en/competition-bureau/news/2019/09/competition-bureau-enhances-information-gathering-efforts-on-non-notifiable-mergers.html>.

⁵⁵ E.g. Press Release, Competition Bureau Canada, Competition Bureau seeks information from market participants to advance investigation of Rogers' proposed acquisition of Shaw (Sept. 28, 2021), <https://www.canada.ca/en/competition-bureau/news/2021/09/competition-bureau-seeks-information-from-market-participants-to-advance-investigation-of-rogers-proposed-acquisition-of-shaw.html>; Press Release, Competition Bureau Canada, Competition Bureau seeks input from market participants to inform an ongoing investigation of Amazon (August 14, 2020), <https://www.canada.ca/en/competition-bureau/news/2020/08/competition-bureau-seeks-input-from-market-participants-to-inform-an-ongoing-investigation-of-amazon.html>.

⁵⁶ Comm'r Boswell, *supra* note 30.

⁵⁷ Brian Facey and David Dueck, *Canada's Efficiency Defence: Why Ignoring Section 96 Does more Harm Than Good for Economic Efficiency and Innovation*, 32 CANADIAN COMPETITION LAW REVIEW 33 (2019), <https://www.blakes.com/insights/articles/2019/canadas-efficiency-defence-why-ignoring-section-96>.

⁵⁸ Competition Pol'y Rev. Panel, *supra* note 45.