Keldon Bester - Competition policy as a lever for organic growth and innovation in Canada

In her lone dissent of the US Federal Trade Commission's (FTC) 2007 decision to close its investigation of Google's acquisition of DoubleClick, Commissioner Pamela Jones Harbour noted that it was difficult to believe a company with a market capitalization of over $200 billion, top tier engineering teams, and existing connections with publishers and advertisers would not be able to create its own competitive alternative to DoubleClick's ad serving platform.

With this statement, Harbour summarized an important but overlooked function of competition and antitrust law: its ability to encourage organic growth and innovation through competing on the merits and investing corporate resources rather than the acquiring potential competitors. By removing mergers and acquisitions that reduce competition as a cheap shortcut to growth, competition policy encourages firms to invest in their own capacities for innovation, preserving and increasing competitive intensity. This argument was also present in the FTC's unsuccessful bid in 2022 to block Meta's acquisition of the VR fitness game company Within. The agency stated that the time, talent, and effort required for Meta to create its own competitive offering "reflect the very essence of competition, the dynamic that the antitrust laws seek to protect and promote." In this way, competition policy not only protects and promotes competitive intensity, but also encourages the kind of competition we wish to see in our economies. By resurrecting its authority over unfair methods of competition at the outset of 2023 the FTC has signaled that a leading competition enforcement agency is taking the shaping of competition seriously.

Instead of promoting this kind of organic growth and innovation, Canada's competition law, and in particular its merger law, has focused on a narrow interpretation of efficiency to justify removing existing and potential competitors from the market. By disregarding the value of the competitive process rather than fostering competition, Canadian competition law attempts only to make the competitive situation worse at a more acceptable rate.

The outcome of the Rogers-Shaw transaction, a major Canadian telecommunications merger, is just the most recent high-profile example. With a decision from Canada's Competition Tribunal in the last hours of 2022, the adjudicative body blessed a dominant incumbent's acquisition of a disruptive competitor on the grounds that the incumbent would support the expansion of a third competitor to replace any lost competitive pressure. Despite admission that at least hundreds of thousands of Canadians would see competition worsen and prices rise, the transaction was allowed to proceed.

In early 2022 the Competition Bureau shed light on these deficiencies in the law, noting that under our current framework it would be "particularly difficult-or even impossible" to block the acquisition of an emerging competitor in dynamic markets. This is particularly problematic in markets with networked structures, where preservation of competition most often contends with the power associated with control of economic bottlenecks. Whether railways, telecoms, or online platforms, barriers to entry and reinforcing feedback loops make monopoly outcomes in these markets more likely and raise the stakes for limiting the power of gatekeepers to suppress the competitive process.

But the consequences of Canada's focus on a static conception of efficiency is clear in Canada beyond just networked industries. While the profitability of Canadian firms has risen steadily over time, our productivity growth continues to lag international peers. Supported by a competition policy focused on profitability rather than preserving competitive intensity, Canadian firms are insulated from the imperative to invest in innovation that drives productivity growth.

While the current Canadian federal government has spent its tenure attempting to implement a variety of strategies to address this lagging productivity growth, a more robust competition policy has until recently been mostly a curiosity. By investing in competition policy not only as a tool to prevent economic domination but also to promote organic growth and innovation Canada can create a more holistic and effective approach to driving innovation and productivity growth. While Canada can benefit from a greater focus on competition, competition must be understood as part of a broader innovation ecosystem that considers the motivations and incentives of the different drivers of innovation as well as interlocking policy areas such as intellectual property protection.

Innovation-focused competition policy can also complement the guardrails on fair competition that peer jurisdictions such as the EU, UK, and Australia are introducing to rein in the economic power of dominant platforms. By creating obligations on major platforms to reduce their control over economic bottlenecks and promote entry and expansion of competitors, these in-flight regulatory moves have an important role to play in responding to the existing power accumulated by platforms. But a forward-looking competition policy focused on the value of fostering and maintaining dynamic markets is necessary to avoid the current competitive issues in the digital economy simply re-emerging in future iterations of technological and economic change. The time is right for this kind of introspection as the federal government is in the midst of the first formal consultation on the *Competition Act* in over a decade, initiated as the result of public interest advocacy and Canada's laggard status in the global policy conversation on the future of competition policy.

Though Canada is moving in the right direction with a comprehensive review of its competition law, there is a real risk that we repeat the mistake of the last four decades of devaluing competition rather than creating a system that fosters organic growth, innovation, and productivity-enhancing investment. But the Canadian government can avoid this mistake by moving quickly to enact a stronger set of competition laws with three key characteristics: a merger enforcement framework that deters harmful mergers and instead incentivizes organic growth through investment, an approach to abuse of dominance that focuses on addressing the harms of monopoly in their incipiency, and a competition authority with the resources and powers to engage in a process of continuous learning as our economy continues to evolve around us.

Encouraging this kind of forward-looking approach to competition policy will be critical to redrawing the balance of power between citizens and platforms we see today, protecting that balance moving forward and ultimately building a more productive economy in which innovation is widely distributed.