COMPETITION POLICY: SHOULD THE PROVINCE PLAY A LARGER ROLE?

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Issue

There is much focus in advanced economies about reconsidering competition policy in light of new technologies and the effects on economic structure and firm behaviour. Old ways of thinking about market competition and competition policy do not quite seem to fit these new and emerging economic developments.

Canada is caught up in this new focus on competition policy. One of us, for instance, has written extensively about the need for a modernised competition policy framework.

Yet most of the discussion in Canada thus far has been focused on federal action. This is somewhat understandable because the federal government is responsible for the Competition Act and is home to the Competition Bureau, which is the country's main force on competition issues.

As stated in the Competition Act, competition policy aims to "maintain and encourage competition in Canada" for the purpose of promoting certain economic objectives, including:

1. The efficiency and adaptability of the Canadian economy;
2. Expanding opportunities for Canadian participation in world markets, while recognizing the role of foreign competition in Canada;
3. Ensuring that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy, and
4. Providing consumers with competitive prices and product choices.

The purpose of competition policy can be debated – and it is as hotly contested today as it has been historically – but it is important to recognize that competition policy and its enforcement is undertaken in service of higher-order national and sub-national goals.

It takes into account a range of objectives for stakeholder groups which, at times, may be at odds with one another. In this way, competition policy has never been politically neutral, despite efforts to often portray it as a primarily economic or even mathematical exercise.

Competition policy at its best should ensure that markets are fair and competitive (not controlled by a few dominant corporations), that they allow the best ideas, products, and services to flourish, and that they create widespread prosperity and opportunity for Canadians.

In this context, however, the role of the provinces should not be overlooked in any efforts to boost competition and protect the interests of Canadian consumers. An Ontario-led approach to improving competition might also prove more accessible than sometimes opaque proceedings that can emanate from Ottawa.

Canada takes a federalist approach to many policy priorities, whereby both the provinces and the federal government have a role to play in a particular domain, such as health or privacy. But competition regulation is distinctly federal.

A role for the provinces, to complement the Competition Bureau's priority areas, has not been well-articulated, despite provinces having primary oversight of consumer protection and labour issues; issues that are complementary to competition concerns.

Canada has decoupled consumer protection oversight from competition regulations. For example, in Ontario, consumer protection is the responsibility of the Ministry of Government and Consumer Services (MGCS) under the Consumer Protection Act. But consumer protection intersects with competition policy in important ways, and the Competition Bureau and MGCS have created a memorandum of understanding to collaborate more effectively at these intersections.

As Canada looks ahead to a comprehensive review of the Competition Act, there may be a stronger role for the provinces to support and facilitate fair competition in Canada. Other jurisdictions - like Australia, the US, and many European countries - have taken a federalist approach to competition regulation in ways that may be more robust than Canada's emphasis on federal-only policy.

Last year, for instance, President Biden introduced an historic Executive Order on Promoting Competition in the American Economy. The Order takes an all-of-government approach to improving competition across a range of markets, with the ambition to lower prices, increase wages, and promote innovation and economic growth.

Canada has not mirrored this all-of-government approach through a formal policy direction, but various provincial ministries have engaged on competition issues this year. A class-action lawsuit in Quebec (but not led by the province) is considering whether the price of meat was being fixed by concentrated meat-packing companies, and the province of Alberta has intervened in the proceedings on the Rogers-Shaw merger. On the heels of the recent Rogers outage ('Red Friday'), many in Canada are being reminded of the role Sasktel, Saskatchewan's crown-owned telecommunications firm, plays in providing competitive diversity in the province.

There is an opportunity therefore to reimagine and reinforce a more cooperative approach to competition regulation, to realise the economic benefits that may arise from more strategic enforcement of existing laws or the introduction of new approaches. Better monitoring of the changing dynamics in various markets is increasingly critical. Ontario can be a provincial leader in this area.

In general, many jurisdictions around the world already recognize that new market realities require new policy approaches. There has been a marked shift in the global zeitgeist around competition policy enforcement and renewed attention to its relevance. A recent G7 Compendium Report in Competition in Digital Markets benchmarked Canada's policy progress on competition alongside France, Germany, Italy, Japan, the United Kingdom and the United States, as well as the European Union, and revealed that Canada is falling behind international peers.

Other areas which intersect with competition regulation – like labour, intellectual property (IP), privacy and data policy – are not clearly covered by any one regulatory agency and raise complex jurisdictional questions. These areas have significant consequences for stakeholders like workers, consumers, and citizens generally.

It might be worth differentiating now between 'competition policy' and 'procompetitive regulatory reform,' as the two are often conflated.

Competition policy is about applying rules to make sure businesses and companies compete fairly with each other. Competition policy enforces against restrictive trade practices such as cartels and defined abuses of dominance – including exclusionary, predatory, or disciplinary trade practices. This encourages enterprise and efficiency, creates more choice for consumers, and helps reduce prices and improve quality.

Related to improving competitive outcomes, **procompetitive regulatory reform** may improve the policy environment that governs a market in a way that improves competition or at least avoids restricting it. Studies estimate that Canada could realise a 4-5% boost in productivity through pro-competitive regulatory reform and reduced barriers to entry. In this way, improved competition is not simply about the reduction or elimination of 'red tape,' but rather, ensuring that coherent and fair guardrails are in place to guide the market and firms.

We will use both these lenses to briefly consider where and how the Province of Ontario could engage in policy leadership to improve competition outcomes without 'stepping on the toes' of the federal government.

Indeed, Ontario is well-positioned to pursue a stronger pro-competition approach, given its central economic role in the federation. It could assume a leadership role among the provinces - to advance a more cooperative or federalist approach.

Consider that Ontario generates 37% of national GDP and is home to almost 50% of all employees in high tech, financial services and other knowledge-intensive industries. This alone warrants more direct engagement in market behaviour and outcomes.

Further, Ontario is a leading continental jurisdiction for manufacturing, including autos and auto parts. It also has more than half of the highest quality (Class 1) farmland in Canada.

Meanwhile, the Province of Ontario has an existing MOU with the Competition Bureau, dating from 2015, that aims to advance the mutual goals shared by the Ontario Ministry of Government and Consumer Services and the Competition Bureau. This collaboration could be enhanced to benefit the provincial economy while promoting effective competition nationwide.

Overview

Canadians are experiencing an inflationary period during which corporate profits are capturing more of the economic recovery. A recent Toronto Star investigation suggested that supermarkets are increasing profits faster than necessary, and profiting from inflation. As argued by the Competition Commissioner, "Canada needs more competition." The provinces can help achieve this aspiration.

But, as we discuss in a later section, Canada's underlying competition challenges are not a new phenomenon. They reflect longer-term, structural developments in the economy that increasingly require a coherent and well-developed policy response.

The good news is that Canada is set to initiate a comprehensive review of the federal Competition Act, which was last revised in 2009. Following a public consultation process, initiated by now-retired Senator Howard Wetston, a much-needed public debate about the role of competition policy is underway. This mirrors other jurisdictions which have been updating their legislative, regulatory, and enforcement regimes to keep pace with current market realities.

In the United States, for instance, as mentioned previously, President Biden issued an Executive Order on Promoting Competition in the American Economy in mid-2021. The order established an historic whole-of-government approach to competition policy, recognizing the sweeping challenge of industry consolidation.

The Order also established a White House Competition Council, led by the Assistant to the President for Economic Policy and the Director of the National Economic Council, who chairs the Council. The heads of many government agencies are included. The Order also brought together dozens of initiatives among a dozen federal agencies, including a requirement for some to report on how competition issues affect their respective industries.

Like the United States and other countries, Canada is struggling with changing economic circumstances that seem to require closer examination of competition policy, especially in the context of consumer protection. Two trends seem particularly relevant here: industry consolidation and the rise of digital markets.

Industry Consolidation

Canada experienced a historic merger boom in 2021, with more than 1,985 deals involving Canadian companies (the highest number in more than twenty years).[1] Megadeals also increased significantly, with fifteen deals valued at over CA$1 billion occurring as of June 2021.[2] Ontario regularly leads the country by M&A deal volume and deal value.

This merger wave likely exacerbated a longstanding industry concentration problem in Canada, which is viewed widely as playing a role in the nation's economic challenges such as low entrepreneurship rates, low business dynamism, stifled innovation, and harm to consumers and workers.

Canadians pay some of the highest rates globally for internet services, international travel, and banking services. But concentration afflicts numerous other industries, too, including funeral services, grocery stores, newspapers, garbage collection, agriculture production, and more. And industry concentration is growing, according to a 2019 report.

To support economic recovery and growth, governments need to review and revise their legislative and regulatory regimes to remove barriers to evolving marketplace models and promote competition, while ensuring the rights of consumers are protected, particularly in digital markets.

To that end, Ontario's Ministry of Government and Consumer Services recently undertook an extensive review of Ontario's Consumer Protection Act (2002) and is considering a new, streamlined statute that would better reflect the modern marketplace while making it easier for businesses to comply and for consumers to understand their rights and remedies. By exploring the intersection of competition policy and consumer protection, the Province can position itself as a leader in the post-Covid economy.

These actions are timely, given that Covid-19 has supercharged concentration as main-street businesses have struggled to compete with dominant players both within and outside digital markets.

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[1] Financial Post, Numbers as of June 16, 2021.

[2] Ibid.

The Rise of Digital Markets

Digital markets are distinct in their scale, speed, and network effects, which raise new challenges for regulators about such things as privacy and consumer protection, data ownership, and the gatekeeping behaviour of dominant firms.

Ontario has the highest percentage of digital economy jobs nationally, as well as the highest share of GDP from the digital economy sector (6.8% in 2019).[3] Early in the pandemic, retail e-commerce sales doubled nationally. The imperative to compete in an online context has, appropriately, increased attention on the dynamics and challenges faced by independent third-party sellers.

Smaller businesses both rely on and, arguably, are powerless against dominant platforms like Amazon, Google, Square, Etsy, and others. A deeper appreciation of the challenges that entrepreneurs and small businesses may face when competing in a digital context is warranted given government investments to support firms which transition online (e.g. Digital Main Street). The Province should be well-aware of the potential anti-competitive behaviours that are prevalent in digital marketplaces.

Here are just a few of the problems independent businesses are encountering: Small firms are spending more money on advertising, which is inefficient; are subject to more marketplace "tolls," which is exploitative; are vulnerable to being ripped off via "copycatting" or "informed replication," which means they can be cloned out of existence; and merchants that compete as a third-party in an online marketplace(s) may face potential pressure to become acquired as a private label product through killer acquisitions or serial acquisitions that "roll up" third-party sellers.

Were the Province to take a strengthened role in competition policy by supporting SMEs which sell and compete in digital markets, it would align itself with global conversations which increasingly recognize that concentrated industries and the rise of digital markets are unique economic challenges for many stakeholders.

Federalist approaches globally

Various jurisdictions have employed a federalist or subnational approach to competition policy. The United States, the European Union, and Australia are notable examples for Ontario policymakers.

[3] Digital supply and use tables, 2017 to 2019

The United States

In the United States, in addition to the designated federal agencies responsible for antitrust enforcement – the Department of Justice, Antitrust Division and the Federal Trade Commission – fifty-six "state" attorneys general (including the District of Columbia and five territories) can bring antitrust cases against dominant firms on behalf of the subnational government and its citizens.

The states can enforce federal antitrust laws, such as the Sherman Act of 1890, the Clayton Act of 1914, the Robinson-Patman Act of 1936, the Celler-Kefauver Merger Act of 1950, and the Hart-Scott-Rodino Antitrust Improvements Act of 1976. Additionally, approximately 28 states (54%) have their own laws, commonly referred to as the "Little FTC Acts." These laws give state attorneys general broad authority to police anticompetitive conduct (even if commerce is increasingly interstate, and, as such, federal antitrust laws are often better suited for legal action). All 50 states as well as the District of Columbia have passed laws designed to prevent unfair competition.

According to US antitrust law expert Stephen D. Houck: "The states have come to be regarded as a significant feature of the institutional antitrust enforcement landscape in this country."[4]

State attorneys general can bring cases individually, or as a multi-state group, and can bring both civil and criminal cases. The top three areas of antitrust enforcement for state AGs are, in order: merger review, price-fixing and bid-rigging, and monopolisation cases. States also have strong procurement power, so they can be the subjects of bid-rigging or price-fixing themselves. The circumstances here are a little different than in Canada, including regarding Ontario.

States also cooperate in bringing complex cases, as is currently the case regarding big tech firms. The list of antitrust cases against big tech now includes: Washington D.C. against Amazon; a coalition of 36 state AGs led by Colorado (including Puerto Rico and Guam) against Google Search; a coalition of 9 states, led by Texas, against Google Ad Tech; the state of Ohio against Google (in attempts to convert the company into a public utility); and a 48 state co-sponsored case against Facebook.

The European Union (EU)

In the EU, competition policy is developed and enforced through two central rules of the Treaty on the Functioning of the European Union (TFEU) — Articles 101 and 102. The European Commission is the primary agency responsible under these laws for bringing investigations, cases, requests for information, and the issuing of fines, under these laws.

[4] Stephen D. Houck, Transition Report: The State of State Antitrust Enforcement.

However, in addition, there are 28 National Competition Authorities (NCAs)[5] which, as of 2004, are empowered to enforce all aspects of EU competition law in addition to EC actions. These nations cooperate through the European Competition Network (ECN) and bring cases within their own national courts.[6]

This federalist approach has greatly expanded the enforcement of EU competition law[7] and NCAs brought over 90% of all competition cases in 2020 and over 85% of cases since 2004 (2804 total since 2004, of which 410 were brought by the EU Commission and 2394 brought by NCAs).[8]

In general, the EU investigates and brings bigger, more complex cases while national competition authorities address smaller, more regional competition concerns. The diversity of languages in the EU also makes more local enforcement desirable.

Conjoined Consumer Protection and Competition Authorities

While competition policy in Canada has historically been decoupled from consumer protection, antitrust and consumer protection law enforcement are treated as complementary tools for achieving improved market competition in the United States and Australia. The Federal Trade Commission (FTC) and the Australian Competition and Consumer Commission (ACCC) are responsible for both bodies of law in the US and Australia.

Furthermore, many EU member states also co-house their consumer protection and competition regulatory mandates. The OECD believes that these functions should be conjoined.

This too provides important context as the Province of Ontario reviews its Consumer Protection Act.

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[5] National Competition Authorities and Members of the European Competition Network (ECN) include: Austria, Belgium, Bulgaria, Croatia, Czechia, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, and Sweden.

[6] Application of antitrust law by National Courts

[7] "There are now multiple enforcers of the EU competition rules, which has led to their much wider application. In the period covered from 1 May 2004 to 31 December 2013, the application of the EU competition rules has grown at a remarkable rate, with approximately 780 cases being investigated by the Commission (122) and the NCAs (665). Enforcement by the NCAs has developed in a broadly coherent manner." https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2014:453:FIN

[8] https://ec.europa.eu/competition-policy/european-competition-network/statistics_en

Pros and Cons of the Federalist Approach

In summation, federalist approaches to competition policy, viewed on their merits, can:

- Provide more resources to police increasingly complex markets, particularly when federal enforcers are overburdened by the sheer number of investigations and cases (the Competition Bureau is only ~400 people trying to police a $2T economy);
- Offer a scaled approach to competition policy enforcement, whereby subnational jurisdictions, such as provinces, which understand local markets and are closer to constituents for consumer protection concerns, can play an important role in bringing cases;
- Bring a diversity of perspectives on enforcement, which is an important counterbalance to what can be entrenched perspectives at the federal level;
- Create a richer and more detailed case law that is relevant, or even enforceable, federally;[9]

Meanwhile, arguments against federalist approaches include that:

- Subnational jurisdictions should stick to 'local' cases only (and not meddle in cases handled by federal enforcers);
- Smaller jurisdictions don't have the resources to take on big cases alone, or to substantially contribute to federal cases;
- They may be "re-inventing the wheel" on cases, especially when requesting information from companies, causing unnecessary paperwork; and, similarly;
- They risk causing a duplication of cases and increased complexity for compliance.

[9] As an example, Washington State brought a case against Amazon for price-fixing, finding that it was in breach of federal antitrust laws. The ruling forced the company to suspend its "Sold By Amazon" program across the country. See: AG Ferguson investigation shuts down Amazon price-fixing program nationwide

It is our belief that federalist or subnational approaches to competition policy and consumer protection are a promising option for Canada, given their effective use in other G7 nations.

This approach can:

- Lead to policy innovation and experimentation, not duplication;
- Be complementary, not competitive, with existing federal law and enforcement;
- Maintain a conversation, whereby salient issues, complaints, and cases flow easily between the provinces and the federal government;
- Provide an integrated lens on issues of mutual concern/interest and provide more resources for understanding complex and ever-changing market dynamics; and,
- Allow for improved enforcement, with increased visibility and attention paid to the concerns of stakeholders.

Opportunities For Reform

As has been noted, Canada lags behind other jurisdictions with regard to efforts to modernise competition regulation. The country also has narrower regulatory coverage on competition policy, which may be due, at least partially, to Canada's non-federated approach.

There are a range of contemporary competition issues that may be well suited to provincial leadership.

One promising area is **labour law** as it relates to wage fixing and/or the gig economy. A recent amendment to the Competition Act contained in the federal Budget Implementation Act (BIA) criminalised wage fixing. Whether the enforcement of wage-fixing concerns might be better suited to provincial labour law was not debated in Parliamentary Committee. Researchers have proposed that new provincial labour law could take on the monopsonistic power of gig platforms.

During the COVID-19 pandemic, the Premier introduced a temporary cap on the commission rate of gig platforms, limiting the standard 30% commission to 20%, with no more than 15% for food delivery services. The temporary cap applied to the largest food delivery companies in the province that serve 500 or more restaurants. This suggests that there may be greater room for provincial policy reform and improved enforcement as it relates to the functioning of wage-setting in the labour market.

Another complementary policy area, more broadly, is **consumer protection**. In the early stage of the COVID-19 pandemic, the Province introduced new penalties against businesses that were charging unfair prices on necessary goods. Authorities could better educate citizens about the deceptive tactics of digital dark patterns and require that processes to unsubscribe mirror the ease of subscription. They could also ensure that e-commerce customers are better endowed with rights through clearly articulated distance selling rights.

The Province could also make a policy change that would improve competition in the telecommunications marketplace. A provision in the provincial Condominium Act permits developers to sole-source the telecommunications infrastructure (facilities) and services in a new build. This provision should be examined and possibly eliminated in order to maintain user choice for consumers in the marketplace. Given the recent Rogers outage, it may be time to revisit how the current legislation permits bulk marketing agreements that make entry by a competitor telecom non-viable. It would be a relatively simple legislative change to spur competition.

How To Move Forward

Given the multiplicity of challenges facing stakeholders, a conceptual shift towards an **all-of-government approach** to competition policy that integrates consumer protection considerations is required by the Province, as well as legislative, regulatory, and enforcement amendments. Better information-sharing practices among provincial ministries, and with federal regulators, is also to be encouraged.

In the near-term, we recommend adopting an all-of-government approach to competition policy at the provincial level, by making **competition assessments** a mandatory aspect of regulation. There is a toolkit for competition assessments available on the Competition Bureau website: Strengthening Canada's economy through pro-competitive policies: A step-by-step guide to competition assessment. This could be complementary to the Red Tape Challenge, "Fewer Fees, Better Services Act, 2022." Competition assessments can help to eliminate barriers to entry for small-medium sized enterprises, and also help protect taxpayer dollars through healthy scrutiny and the lens of increasing competition.

We also encourage the responsible provincial ministry (Government and Consumer Services) to **clarify areas of coordination with the Competition Bureau** under the existing MOU, without needing to alter the MOU itself. Promising areas of coordination include: health technology, consumer privacy (including children and youth digital privacy), data privacy for consumers, workers, and smaller businesses, and data mobility.

Given the complex and overlapping nature of many of the issues we have identified, we also recommend that **other provincial ministries develop an MOU** with the Competition Bureau, or perhaps amend and enhance the existing MOU. The ministries of Labour, Training and Skills Development, Health, Agriculture, Food and Rural Affairs, Intergovernmental Affairs, and the Attorney General are particularly relevant in this respect.

Similarly, the creation of a **Provincial Competition Council**, similar to the new White House body, to investigate and monitor progress on initiatives that promote competition in Ontario could aid in the adoption of the all-of-government approach to competition. We recommend that the Ministers from the following ministries participate: Government and Consumer Services; Labour, Training and Skills Development; Health; Agriculture, Food and Rural Affairs; Intergovernmental Affairs; Children, Community and Social Services; Economic Development, Job Creation and Trade; Finance; Energy; Northern Development, Mines, Natural Resources and Forestry; and the Treasury Board Secretariat.

Finally, our last near-term recommendation is that provincial ministries should require **certificates of independent bid determination** during procurement, which is recommended by both the OECD and the Competition Bureau as best practice to deter and counter bid-rigging. It also aids the Competition Bureau if prosecution is warranted in the future. We recommend adding this requirement to the procurement process across all provincial departments, as a relatively easy way to begin the all-of-government competition policy process.

Medium-term recommended actions include having the province **engage with Ottawa's forthcoming Competition Act review process** as a stakeholder, while also engaging and amplifying other stakeholder voices including consumers, workers, and small businesses. Thus far, Canada's policy elite, including economists and think tanks, have predominated in the conversation, but it is important that stakeholders most affected by these policy changes have avenues to make their voices heard. We suggest that the Government of Ontario **hold public forums** with entrepreneurs and small businesses in order to better understand what anti-competitive practices they may be facing.

Other medium-term actions include **undertaking more research** or exploration, including: : 1) commissioning an OECD Competition Assessment, as well as 2) initiating and conducting a 12-month Productivity Review, as Australia does every five years. And lastly, exploring continued collaboration with other provinces, specifically on labour mobility and lowering barriers to entry for out-of-province workers (beyond the 55 Red Seal trades).

Longer-term actions involve clarifying new structures to strengthen competition, including legislative reviews and the **potential for a stand-alone Provincial Competition Authority.**

Conclusion

In Canada's division of powers, competition regulation has been decoupled from consumer protection, workers' rights, and other dimensions related to markets and economic activity. The federal government is responsible for the former and the provinces cover the latter. However, in an increasingly digital economy, this decoupling is contributing to an administrative murkiness that is perpetuating challenges for small businesses, entrepreneurs, workers, and consumers in Ontario.

This policy brief has argued that competition policy ought to become an area of greater federal-provincial collaboration, with the Ontario government taking a leadership role on behalf of the provinces to assert itself in these issues. It has also set out short, medium and long-term recommendations on how a new, more federalist approach to competition regulation can be achieved that better reflects economic and technological developments.

Having a province more closely involved in competition issues would encourage an important new look at competition problems. A province-led lens on competition can be achieved without immediate legislative change. An all-of-government approach would be meaningful in promoting competition in Ontario to benefit consumers, businesses, and workers and establish Ontario as a leader in the federation on competition issues of provincial significance.

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