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A Statutory Inversion: Adoption of the s 92(3) Rebuttable Structural Presumption in the Competition Act

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I. Introduction

In this article I will review the amendment and addition, respectively, of Sections 92(2) and 92(3) of the *Competition Act* in June 2024. Sections 92(2) and 92(3) provide a rebuttable structural presumption that a merger is anticompetitive. This article is precipitated by the presumption's first use in Canada in the RONA/All-Fab merger, which I will discuss briefly. I will trace the conceptual origin of structural presumptions to U.S. case law, through to its adoption in Canada's *Competition Act*. I will suggest that the last two years of amendments to the *Competition Act* demonstrate that Parliament is moving away from a holistic and efficiencies-based approach to merger review. Finally, I will argue that there were alternatives to the current Section 92(3) provision that Canada could have implemented, discuss issues of fairness in merger review, and throughout the article I will touch on the likely effect of the presumption on mergers in Canada generally.

(a) A New Focus in Competition Bureau Merger Review

The focus of merger review by the Competition Bureau was transformed in 2024. New provisions, including Section 92(3), provide that mergers exceeding certain concentration or market thresholds are presumed to have anticompetitive effects. Section 92(3) of the *Competition Act* creates the rebuttable structural presumption that a merger will substantially lessen or prevent competition.[1] When a merger raises a market's Herfindahl-Hirschman Index (HHI)[2] by more than 100, and either the post-merger HHI is above 1,800 or the combined market share of the merging parties exceeds 30 percent, the presumption is triggered.[3] Since the presumption is rebuttable,

[1] *Competition Act*, RSC 1985, c C-34, s 92(3).
[2] Albert Hirschman, *National Power and the Structure of Foreign Trade* (Los Angeles: University of California Press, 1980): The Herfindahl-Hirschman Index (HHI) is the sum of the squares of all market participate market shares in a defined market.
[3] See Appendix: Figure 1, Figure 2, for visualizations.

when Section 92(3) is triggered the burden falls on the merging parties to prove, on a balance of probabilities, that their merger will not substantially lessen or prevent competition.[4]

The *Bill C-59* (2024) amendments to the *Competition Act* effected a notable inversion in the use of market structure information by the Competition Bureau.[5] Prior to this amendment, Canadian competition law treated market share and concentration index data as mere analytical aids to determining whether a merger is likely to substantially lessen or prevent competition. The Bureau wrote in its 2011 Merger Enforcement Guidelines that, "Market definition, and the measurement of market share and concentration in the relevant market, is not an end in itself."[6] In the same vein, Section 92(2) of the pre-2024 *Competition Act* precluded the Tribunal from concluding that a merger is anticompetitive on the basis of market share or concentration alone. Prior to the 2024 amendment, the text of Section 92(2) stated: "For the purpose of this section, the Tribunal shall not find that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially solely on the basis of evidence of concentration or market share."[7]

Now, however, concentration and market share are at the fore of Competition Bureau review. Adoption of the rebuttable structural presumption in Section 92(3) was pushed for by the Commissioner of the Competition Bureau[8] who was in turn inspired by U.S. merger guidelines, a desire for guideposts in merger review, and efficient allocation of burdens of proof.[9] To the Bureau, that may mean offloading the burden of proof onto merging parties when mergers meet the threshold conditions described in Section 92(3). Parliament adopted the Commissioner's suggested addition to Bill C-59 by changing the text of Section 92(2) and adding the rebuttable structural presumption in Section 92(3); the current text of Section 92(2) is worth reproducing, for comparison:

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[4] *Competition Act*, *supra* note 1.
[5] Bill C-59, An Act to implement certain provisions of the fall economic statement tabled in Parliament on November 21, 2023 and certain provisions of the budget tabled in Parliament on March 28, 2023, 1st Sess, 44th Parl, 2021, (first reading (22 November 2021).
[6] Competition Bureau, Guidelines, "2011 Competition Bureau Merger Enforcement Guidelines" (6 October 2011) at s 3.2 <competition-bureau.canada.ca> [https://archive.ph/fpe1e].
[7] *Competition Act*, RS 1985, c 19 (2nd Supp), s 92(2).
[8] Letter from Competition Bureau to Members of the House of Commons Standing Committee on Finance (2024), "re: Bill C-59" <ourcommons.ca> [https://archive.ph/U5VZS]
[9] *Ibid* at 6–9.

> "**92** … **(2)** For the purpose of this section, if the Tribunal finds, on a balance of probabilities, that a merger or proposed merger results or is likely to result in a significant increase in concentration or market share, the Tribunal shall also find that the merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially, unless the contrary is proved on a balance of probabilities by the parties to the merger or proposed merger."[10]

Rebuttable structural presumptions have the obvious efficiency advantages of reducing the prosecutorial and evidentiary burden of the Bureau. The Commissioner of the Competition Bureau, in his letter to Parliament regarding additions to Bill C-59, noted that the presumption would incentivize merging parties to "offer significant remedies at an early stage of review, or else not proceed with the transaction."[11] The simplicity of this approach comes with costs. Rigid statutory structural presumptions capture mergers that are likely *not* anti-competitive (false positives), and the negotiating posture of the Competition Bureau will likely be more aggressive whenever the presumption is triggered—halting transactions. This adds costs to merging parties whose merger would not be found as anti-competitive on a full analysis of the evidence.

(b) Parliament's Reasons for Enacting the Presumption

At least three factors contributed to the enactment of Section 92(3) as it appears now: public input, the advocacy of the Competition Bureau, and an apparent policy-trend in Parliament's view of competition law. All three of these sources point in the direction of combating anti-competitive effects in the Canadian economy. It is not surprising, therefore, that a rebuttable structural presumption was an appealing option to Parliament and the Competition Bureau.

The Minister of Industry in 2024 sought input on Bill C-59 (2024) from identified stakeholders and the general-public. The identified stakeholders included businesses and their associations, public interest organizations, academics, law practitioners, and others.[12] A summary of submissions was published in the *Future of Canada's Competition Policy Consultation – What We Heard Report*.[13] Contributors from the general public spoke of the "need to guard against

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[10] *Competition Act*, RSC 1985, c C-34, s 92(2).
[11] *Supra* note 8 at 8.
[12] Government of Canada, Future of Canada's Competition Policy Consultation – What We Heard Report (Ottawa: Canada, 2022), s II.
[13] *Ibid*, s II.

further concentration in certain critical industries, such as grocery or telecommunications, to preserve affordability and consumer choice". Comments from the public-at-large generally raised the ineffectiveness of the *Competition Act* in preventing monopolies; that the *Act* must be revised because of that ineffectiveness and "lacklustre" enforcement, and even supported market-share based review of mergers.[14]

The Commissioner of Competition was also pushing for change. As noted earlier, the Commissioner of the Competition Bureau wrote to Parliament suggesting specific amendments to the *Competition Act* be added to Bill C-59. The Commissioner wrote of a need for flexibility to avoid capturing mergers that are unproblematic.[15] He also suggested that the adoption of a rebuttable structural presumption in Canada would align with the US, while also "facilitating cooperation and convergence" between the Canadian and U.S. enforcement agencies.[16]

At the same time, Parliament's policy appears to have shifted to a more structural, and less evidence-based, view of competition. Adoption of the rebuttable structural presumption aligns with earlier amendments to the *Competition Act* that strengthen enforcement against market structure, with less regard to anti-competitive conduct or effects. Section 96, which was repealed in 2023, used to provide an "efficiency" defence to mergers that were proven to be anti-competitive. At the heart of the efficiencies defence was the notion that, even if a merger appears on its face anti-competitive, the effect on consumer welfare will likely be mitigated by efficiencies available to the merging parties.

(c) A Movement Away from Efficiency, and Anti-Competitive Effects

The efficiency defence featured prominently in *Tervita Corp. v. Canada (Commissioner of Competition),* 2015.[17] In *Tervita*, although the Competition Bureau had proven the impugned merger was likely to be anti-competitive, the Bureau had failed to *quantify* the anti-competitive effects of the merger. As such, the Section 96 efficiencies defence raised by Tervita Corp. prevailed, even if any efficiencies resulting from the merger were marginal. The SCC held that the qualitative evidence brought by the Commissioner could not be used in a quantitative analysis of

[14] *Supra* note 13.
[15] *Supra* note 8 at 9.
[16] *Ibid.*
[17] *Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3 [*Tervita*].

efficiencies. Parliament clearly moved away from placing efficiencies as the primary consideration under the merger provisions of the Act when the Section 96 efficiency defence raised in *Tervita* was repealed in 2023. In retrospect, repealing Section 96 was part of a *series* of amendments to the *Competition Act* taking place over the past two years, including the addition of the rebuttable presumption in 2024.

In theory, a rebuttable structural presumption strikes the balance of weighing market structure and anticompetitive effects. Section 92(3) does not provide, for instance, an irrebuttable presumption based on structure. Nor, on the other hand, does Section 92(3) rely on a full analysis of the evidence. The Commissioner of the Bureau, in his suggested amendment to the *Competition Act*, called it "*prima facie* proof"[18] whenever the rebuttable structural presumption is triggered. That structural, *prima facie* proof shifts the persuasive burden of proof onto merging parties to rebut the structural presumption with the kinds of evidence listed in Section 93 of the *Act*.[19] While the decision is determined by evidence of likely anti-competitive effects, it is possible that, in practice, the primacy of market structure, and the litigation posture of the Bureau towards merging parties, creates a disproportionate burden on merging parties attempting to rebut the structural presumption. Considered alongside all the other changes to the Competition Act over the last two years—including raising the *remedy* standard in Section 92(1)(e)[20] such that competition levels must be restored to pre-merger levels; imposing greater penalties for violations of the *Act*; and removing the Section 96 "efficiency" defence, the rebuttable structural presumption is part of a trend of Parliament strengthening the Competition Bureau's enforcement ability.

The excepting language of Section 92(2), "…unless the contrary is proved…," clearly frames the presumption as rebuttable by proof that a merger is not anti-competitive. Shifting the burden of proof onto the merging parties, however, is still a significant boost to the Competition Bureau's negotiating position and efficiency during merger review. While the determinative issues in respect of finding a merger anticompetitive remain the same as pre-2024—as defined in Sections 92(2) and 93 of the *Act*—the Bureau might be able to screen more cases with its reduced prosecutorial burden. Section 92(3) could function as a statutory hook, allowing the Bureau to dig in where it previously would let things go. Pre-2024, the Bureau applied a "safe harbour" threshold

[18] *Supra* note 8 at 10.
[19] *Competition Act*, RSC 1985, c C-34, s 93.
[20] *Ibid*, s 92(1)(e).

for deals below 35% final market share, whereas now any of those deals may be deemed presumptively anticompetitive.[21] The Commissioner of the Bureau also predicted that the presumption would prompt merging parties to "offer significant remedies at an early stage of review, or else not proceed with the transaction,"[22] further benefiting the Bureau's enforcement efficiency.

II. Application of Section 92(3) in the Rona / All-Fab Merger

(a) The RONA / All-Fab Merger

Section 92(3) was applied for the first and only time to RONA Inc.'s acquisition of All-Fab Building Components, a company in Saskatoon, Saskatchewan. The Competition Bureau reported in a position statement that within certain geographic markets the RONA / All-Fab merger triggered the Section 92(3) threshold.[23] RONA's arguments focused on "effective remaining competition, the availability of substitutable products, and barriers to entry".[24] However, the Bureau did not accept that the evidence adduced by the merging parties rebutted the presumption. In exchange, RONA offered to divest from ZyTech Building Systems, a company in Martensville, Saskatchewan. Since the Bureau was satisfied that divestment would preserve competition in the Saskatoon area, the Commissioner of Competition entered into a Consent Agreement with Rona Inc., allowing RONA's acquisition of All-Fab to proceed conditional on divestiture from ZyTech.[25]

(b) Shift in Negotiation Dynamics

As the Commissioner of Competition hoped might occur, RONA Inc. offered a remedy during negotiations with the Competition Bureau: voluntary divestiture of a competing business in an overlapping market. From the Bureau's statement, it appears that it invoked the presumption of anticompetitiveness, then, following the merging parties' Section 93 arguments, the Bureau did not find that their evidence sufficient to rebut the presumption.[26] The options left to the merging

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[21] *Supra* note 6 at 10.
[22] *Supra* note 8 at 8.
[23] Competition Bureau, News Release, "Competition Bureau statement regarding its review of RONA's acquisition of All-Fab" (6 January 2025), online: <competition-bureau.canada.ca> [https://archive.ph/sx3dv].
[24] *Ibid.*
[25] *Commissioner of Competition v RONA Inc* (20 December 2024), CT-2024-011, [2024] online: Competition Tribunal <decisions.ct-tc.gc.ca> [https://archive.ph/ZCuvl]; see also *Competition Act*, RSC 1985, c C-34, s 105.
[26] Competition Bureau*, supra* note 23.

parties were to offer some other remedies to satisfy the Bureau, litigate the acquisition at the Tribunal, or abandon the transaction. It is doubtful whether the second option is ever appealing before a merger has taken place. When there are a multitude of options, an acquisition is more likely to be aborted if litigation is necessary from the jump. Further, since the efficiencies defence was repealed, merging parties have one less defence at the Tribunal. The new negotiation dynamics, being skewed in favour of the Bureau, are indeed likely to result in more merging parties offering voluntary divestitures, other remedies, and more parties structuring deals to avoid triggering thresholds altogether. In fact, early evidence suggests that deals are already being abandoned or tailored to avoid the Section 92(3) presumption.[27]

III. Three Worries About The Presumption

The changes to merger review under the *Competition Act* over the last two years, although appearing subtle, are transformative. The likely effects include deterrence by encouraging merging parties to self-select out of transactions based on the Section 92(3) criteria, and voluntary offering of alternative remedies in the face of possible litigation when the Bureau raises the rebuttable structural presumption. While these changes empower the Bureau to enforce a new policy of merger regulation, there are three general issues to consider with the direction Parliament has taken: (1) whether the nature of the Section 92(3) presumption is well-suited to the Canadian context, (2) whether the presumption is fair, and (3) whether there were better options available to Parliament.

(a) Whether the Presumption is Well-Suited to the Canadian Context

Section 92(3) was inspired by the U.S. common law, specifically, *United States v Philadelphia National Bank.* Our Parliament has taken U.S. common law and transposed it into our statutory law without the benefit of decades of common-law evolution and legal scholarship. Thus, it may not be clear to Canadian Courts just what the presumption is, how it works, and how it is rebutted.

The rebuttable structural presumption arises from a long history of U.S. case law starting with *Brown Shoe Company v. United States*, in 1962. The U.S. Supreme Court considered market

[27] Competition Bureau, *Report of merger review* (Ottawa: Competition Bureau of Canada, 2023) <competition-bureau.canada.ca> [https://archive.ph/7SubB].

concentration evidence for the first time in *Brown Shoe*, finding that market concentration evidence is informative but not decisive.[28] The next year, the same Court would hold in *United States v. Philadelphia National Bank* that "[a] merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined, as violative of the *Clayton Act*, in absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects." [29] *PNB* stood for the use of market share and concentration data as forming a substantive inference of anti-competitive effects, rather than a legal presumption from basic facts, as it is often interpreted to provide today.[30] The rebuttable structural presumption does not appear until 1990, when the United States District Court for the District of Columbia shifted the burden of rebutting a structural presumption onto the plaintiff in *United States v. Baker Hughes*.[31] Market share and concentration data formed an inference of anti-competitive effects from facts of independent probative value in *PNB*, whereas in *Baker Hughes*, market share and concentration data were not viewed as having independent probative value outside of forming the legal presumption. *Baker Hughes* paradoxically discounted the probative value of market share and concentration data as after the presumption is rebutted, the government must raise *additional* evidence or else their case against the merger fails.

For several reasons, Canada has not truly aligned itself with U.S. competition law. The most obvious distinction is that the U.S. rebuttable structural presumption is a common-law rule informed by U.S. economics, whereas Canada has codified the U.S. presumption in the Canadian *Competition Act*. Less obvious is that under *PNB* and *Baker Hughes* the burden of persuasion lies with the government at all times.[32] Additionally, *PNB* has not been consistently integrated into merger enforcement guidelines and some legal scholars push for its stricter application.[33] By contrast, a plain reading of our Canadian *Competition Act* shifts the burden of persuasion onto the merging parties. That is an important distinction. In *Baker Hughes*, Judge Clarence Thomas cites several cases describing the way in which rebuttable structural presumptions shift burdens of proof

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[28] *United States v. Philadelphia National Bank*, 374 US 321 at 363(1963).
[29] *Brown Shoe Company v United States,* 370 US 294 at 294. (1962).
[30] Sean Sullivan, "What Structural Presumption" (2018) 42 J of Corporate L 403 at 410–412, 416–420.
[31] *United States v Baker Hughes,* 908 F (2d) 981 at 983 (DC Cir 1990).
[32] *Ibid*.
[33] Herbert Hovenkamp & Carl Shapiro, "Horizontal Mergers, Market Structure, and Burdens of Proof" (2018) 127 Yale LJ 1996 at 2012–2013.

in U.S. merger law, concluding that the government bears the ultimate burden of persuasion.[34] The Government in *Baker Hughes* was appealing the decision of a lower court, which held that the merging parties should have been required to rebut the presumption by "a clear showing." On appeal, the Court rejected the government's argument because it would shift the burden of persuasion to the defendant,[35] and because the defendant is free to rebut the presumption with any of a variety of types of evidence including entry-barriers evidence.[36] The U.S. *PNB* presumption does not shift the persuasive burden of proof onto merging parties in the same way as Section 92(3) of the *Competition Act* will.

Additionally, Canada has codified the latest U.S. guidelines, while the U.S. approach is more flexible. For instance, the U.S. DOJ and FTC had a different set of thresholds in place for the structural presumption in 2010 than they do now.[37] Our presumption is fixed in statute, amenable to change only by amendment. Further, any proposed amendment has political-optics challenges, as an easing of the threshold levels could be characterized as being "pro-oligopolies." The Canadian approach is thus inflexible. An amendment process to adjust the presumption will be slow and politically expensive, meaning the presumption is likely here to stay. Because of the statutory, fixed nature of the Canadian presumption, and the flexibility of the US approach, merger review under the Canadian *Competition Act* is only superficially aligned with the U.S. competition law approach.

It is not clear that aligning with the U.S. is of that much value, though. The Canadian context requires thresholds and approaches calibrated to our own needs. Canada has it's own economic challenges and interests, such as raising productivity and growth. While the structural presumption in the U.S. arose over decades of common-law, and is tailored to its own circumstances, we have leap-frogged that process and codified the product of years of competition law evolution from a disparate legal system, and far busier economy. It is obvious that the U.S. sees a greater number of transactions than Canada, but while we may learn from their merger enforcement experience, it is not necessarily true that their enforcement strategies will be appropriate or necessary when scaled to the Canadian context. For example, if the U.S. develops

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[34] *Supra* note 31 at 982–983.
[35] *Ibid*, at 983.
[36] *Supra* note 31 at 984.
[37] US Department of Justice, "Horizontal Merger Guidelines" (19 August 2010) <justice.gov> [https://archive.ph/cmz8g].

a rough heuristic to screen a disproportionately greater volume of mergers, we may not benefit from adopting the same approach. It may be the case that in Canada, even with fewer resources, our enforcement agency may have greater capacity per merger to do more thorough work. These sorts of considerations depend on the particular facts of the Canadian economy that require a more tailored approach.

There are lessons to be learned from further abroad as well. The European Union views market shares, market concentration, and the change in market concentration as indicators that are useful but not dispositive in their *Guidelines on the assessment of horizontal mergers*, and do not implement a rebuttable presumption.[38] E.U. guidelines are markedly more nuanced than the current Canadian model. Rather than a single threshold, the E.U. considers multiple bands of market concentration levels, and different levels of market share. While more complex, the E.U. guidelines consider more scenarios providing gradated responses that mitigate the risks from false positives in a system with a single threshold like Canada.[39] E.U. merger review does not involve a rebuttable presumption, or any other device, that shifts the persuasive burden of proof off the E.U. Commission and onto the merging parties. As such, the persuasive burden of proof lies with the E.U. Commission, as it does in U.S. merger review.

Comparing the weight given to market structure, and who has the ultimate burden in merger review, the E.U. and U.S. have more in common with each other than with Canada. Further, the approaches taken to define merger review are better suited to the respective circumstances of the U.S. and the EU. While U.S. common-law has evolved over decades to fit its unique circumstances, the EU, being a dynamic and far younger entity, has adopted a flexible statutory system of merger review. Canadian merger review, under the new Section 92(3) scheme, has neither the common law history of the U.S., nor the flexibility of the E.U. merger review guidelines, and Canada is now the only jurisdiction of the three to have statutorily codified a shift of the persuasive burden onto merging parties.

(b) Whether the Presumption is Fair

[38] European Union Law, "Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings" (2004) at paras 14–21 <eur-lex.europa.eu> [https://archive.ph/apJUv]
[39] *Ibid* paras 18–21.

Due to the novelty of the Section 92(3) rebuttable presumption, and because the Competition Bureau understandably does not publish all its interactions with merging parties, it is unclear how the presumption is applied outside of applications before the Tribunal. The Bureau's statement does not make clear how it weighs the presumption, Section 93 evidence raised by the merging parties, and the Bureau's doubts about the rebuttal evidence and arguments of the merging parties. The Bureau published the following regarding the RONA / All-Fab merger: "[t]he Bureau examined the available evidence related to the factors in Section 93 of the Act and found it was not sufficient to rebut the structural presumption in the Saskatoon area."[40] The language of this statement is unclear. Does the Bureau interpret Section 92(2) and 92(3) as meaning that the presumption under Section 92(3) itself must be rebutted (as in *Baker Hughes*), or that the presumed fact of anti-competitiveness must be rebutted (as in *PNB*)? Admittedly, the language of Section 92(2) is also unclear.[41] The clause "unless the contrary is proved on a balance of probabilities" could reasonably be taken to apply to either the underlying "significant increase in concentration or market share" facts, or the inference that the same is "likely to prevent or lessen, competition substantially." This matters because whether market share or concentration data must be rebutted directly or may be rebutted by other evidence substantially changes the degree of primacy given to market structure under Section 92(2). Until a decision by the Competition Tribunal or a higher court answers this question, there is added risk and uncertainty in litigating a merger rather than abandoning transactions or offering alternative remedies to the Bureau. Early Bureau merger review statistics suggest abandonment of deals is already taking place.[42]

There is another question of fairness at play. The Section 92(3) thresholds are a blunt-instrument, inevitably capturing false-positives—transactions that are not in fact anti-competitive.[43] The following are examples of mergers that are always captured by the presumption but are not necessarily anti-competitive: a merger resulting in a market share of 35-40% when, (i) a much larger competitor has more than 50% of the market, (ii) where the buyers in the market are huge and have countervailing buying power, or (iii) where there are low barriers to entry that restrict price increases. In cases like these and borderline cases, merging parties might choose not

[40] Competition Bureau, supra note 23.
[41] *Competition Act*, RSC 1985, c C-34, s 92(2).
[42] Report of merger review, *supra* note 27.
[43] See Figure 1 and Figure 2 for illustration.

to transact simply because of the costs of dealing with the Bureau, risks of litigation, and commercial pressures.[44] Aside from being *unwilling* to rebut a presumption of anti-competitiveness, the merging parties could also be *unable* to produce the evidence to rebut a presumption despite their merger being pro-competitive.[45] Merging parties do not have access to the market data that the Bureau can produce from under Section 11 of the *Competition Act*. Under Section 11, the Bureau can collect data from the merging parties and from merging parties' competitors. It is possible for the Bureau to request market share data that the merging parties simply cannot provide, such that a merger can fall afoul of the Section 92(3) presumption because of market share data the merging parties had no way of knowing before they filed. Underlying questions of market share is the question of market definition. How a market is defined will naturally vary market share data, further complicating the considerations merging parties must make before filing. These additional costs, risks of inability to produce market data, and uncertainty create significant friction for possible mergers.

In sum, the presumption creates a chilling effect on economic activity that is either benign or beneficial to market competition. The above concerns could be addressed with increased transparency on the part of the Bureau and Competition Tribunal. Specifically, insight into the types of evidence, and the weight given to each in respect of rebutting the structural presumption and proving that a transaction is not anti-competitive would greatly clarify the way in which Section 92(3) will be applied. With some transparency, any chilling effect or unfairness could be minimized or averted.

(c) Whether the Section 92(3) Presumption Was the Best Option

Parliament skipped a step of statutory evolution by adding Section 92(3) to the *Competition Act*. Before leapfrogging over decades of U.S. case law—lifting their rebuttable structural presumption and pasting it into our own statute—the *Competition Act* prohibited finding any merger as likely anti-competitive on market structure evidence alone. Rather than open the door to findings based on market structure evidence alone and borrowing a more nuanced framework

[44] John Taladay, "The use of presumptions in antitrust enforcement and jurisprudence" (2024) 4-2024 Concurrences 121319 at para 36.
[45] *Ibid* paras 58–70.

like that of the EU, where market structure is one gradated indicator among many, Canada jumped to presumptions.

The process through which this occurred is noteworthy. The Commissioner of Competition wrote his suggested amendments to Parliament on March 1, 2024, between the first and second reading of Bill C-59 in the House of Commons. By June 20, 2024, Bill C-59 received royal assent and the amendments to the *Competition Act*, including the Commissioners suggested structural presumption, became law. It seems unlikely that Parliament could have appreciated the changes to merger review that they enacted in such a short time. Indeed, the Canadian Bar Association (CBA) published an article asking for more time to study and debate Bill C-59.[46] The CBA noted separately in a letter to the Senate National Finance Committee that the Committee had expressed that it lacked adequate time to scrutinize Bill C-59, so the CBA attempted to provide guidance for its review of Bill C-59.[47] In the same letter, the CBA notes that the House adopted amendments to Bill C-59 in response to the Commissioner of Competition's request and not the recommendation of policy experts at Innovation Science and Economic Development (ISED). Taken together, the above are indications that the 2024 *Competition Act* amendments were rushed and not given adequate consideration.

A more moderate amendment to the statute may have been supportable. To avoid false-positives and false-negatives (anti-competitive mergers that are not caught by the Bureau), Parliament could have strengthened the Bureau's enforcement capability by rewriting the old Section 92(2) provision which prohibited the Tribunal from finding a transaction anti-competitive on the basis of market structure evidence alone.[48] By enacting the presumption, it's possible that all Parliament has accomplished could be described as trading false-negatives for false-positives. The CBA did not think that a structural presumption was a good option, or the only option. The CBA wrote to Innovation, Science and Economic Development Canada in 2022 regarding proposed changes to Canadian competition law that "the idea that mergers should be presumptively illegal is flawed" for two reasons.[49] First, market shares are a "simplistic and often inaccurate

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[46] Canadian Bar Association, "Taking the time to study proposed amendments to the Competition Act" (2024) <cba.org> [https://archive.ph/wPMSu].
[47] Letter from Elisa Kearney to The Honourable Senator Claude Carignan (5 June 2024), "Re: Bill C-59 Fall Economic Statement Implementation Act, 2023" <sencanada.ca> [https://archive.ph/jnT30].
[48] *Competition Act,* RSC, 1985, c C-34, s 92(2).
[49] Letter from Sandra Lee Walker to Samir Chhabra (22 June 2023), "Re: Consultation on the Future of Competition Policy in Canada" <cba.org> [https://archive.ph/CA08t].

measure of market power." Second, US experience tells us that structural presumptions "shift the focus of argument to other aspects of a review, such as market definition." The CBA wrote to an MP regarding Bill C-59 in April of 2024 asking, "why the inclusion of structural presumptions in the *Merger Enforcement Guidelines* would not achieve the same result, while allowing for flexibility to amend the thresholds as appropriate."[50] The CBA's question is apt. Such an approach would be more in line with the way that the U.S. flexibly updates its Merger Enforcement Guidelines in order to achieve its aims, as opposed to having thresholds fixed in statute.

Several options were available to Parliament in 2024. Parliament could have simply opened the door to the use of market share and concentration data by repealing Section 92(2). Parliament could have also defined an approach like the U.S., where Merger Enforcement Guidelines in Canada adapt the merger review thresholds to meet the circumstance rather than fix the thresholds in statute. Instead, Section 92(2) was rewritten and accompanied by Section 92(3), it has moved market share and concentration data to the fore of merger review. The thresholds of merger review are also fixed in statute. In reviewing these amendments and considering new ones, Parliament should consider whether the Bureau really does not have the capacity to carry the persuasive burden of proof and review each merger with a holistic approach weighing all of the circumstances. A more comprehensive and holistic approach like that in the EU is important in order to minimize both false-negatives and false-positives and creating a chill in beneficial merger activity. Further, the loss to consumer welfare could be significant if good, efficiency-enhancing and complex deals are regularly delayed due to Bureau processes. One way to formulate the question Parliament should ask is whether the direct and indirect "chilling" and other costs of the presumption are outweighed by the investment needed to empower the Bureau not to rely on presumptions.

IV. Conclusions

RONA / All-Fab is certainly the first of many mergers to which the Bureau will apply Section 92(3). Although Parliament seems to be moving in the direction of favouring market structure analysis over evidence of anti-competitive conduct, efficiency or effects, the Section 92(3) presumption considers a balance of structure and evidence. But, in some sense, the origin of the presumptions in U.S. case-law is neither here nor there. Parliament is free to take inspiration

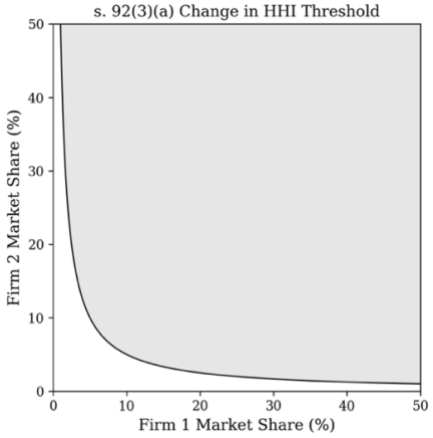
[50] Letter from Elisa Kearney to Peter Foncesca (29 April 2024), "Re: Bill C-59, Fall Economic Statement Implementation Act, 2023" <cba.org> [https://archive.ph/7z8oV].

from wherever it chooses. There is, however, a subtle warning that burden shifting presumptions are not simple devices in the fact that American courts have spent years developing that case-law. Unsurprisingly, our Section 92(2) provision has ambiguities that have manifested already in the RONA / All-Fab case. Much will turn on eventual Tribunal decisions, and in the interim, the presumption skews merger review in favour of the Bureau. A deterring effect may have been intended, as the Commissioner in 2024 anticipated voluntary offering of remedies by merging parties as a practical effect of his proposed amendments. The Commissioner of Competition intended that "ill-conceived deals that are particularly anti-competitive … should never leave the boardroom." Unfortunately, benign, beneficial, and "ill-conceived" mergers alike may fall afoul of market-share based presumptions. Policy concerns such as consumer welfare and investment will become paramount as Parliament reviews the economic effects of these *Competition Act* amendments and related Tribunal decisions, when they arise.

At present, the amendment to Section 92(3) has created at least three worries: whether the Section 92(3) burden shifting aspect of the presumption is ill-suited to the Canadian context, whether the presumption is unfair to some potential merging parties, and whether the amendment process was rushed and missed more moderate alternatives. Counterbalancing these worries are the benefits of efficiency, deterrence, and policy concerns that market concentration and affordability issues need to be reined in. However, absent overriding concerns, shifting the burden of proof and unfairness in the law should outweigh possible efficiency and deterrence effects. Assuming that structural presumptions are here to stay, some of the way forward may be to mitigate those worries above. Transparency on the part of the Bureau can alleviate many of the questions of fairness. If merging parties have some idea as to how the Bureau responds or weighs different types of Section 93 evidence, and its posture generally towards disputes of market share, market definition and other considerations related to the structural presumption, then merging parties can better prepare for review of their transaction. This could have the dual effects of reducing the cost of mergers and encouraging mergers that the Bureau is likely to approve. In the longer term, Parliament could adopt a more flexible scheme of merger review that is gradated or removes the merger review threshold levels from the statute. Instead, merger review thresholds could be determined by periodically updated Merger Review Guidelines published by the Bureau. Such an approach would be more flexible and better adapted to our Canadian context.

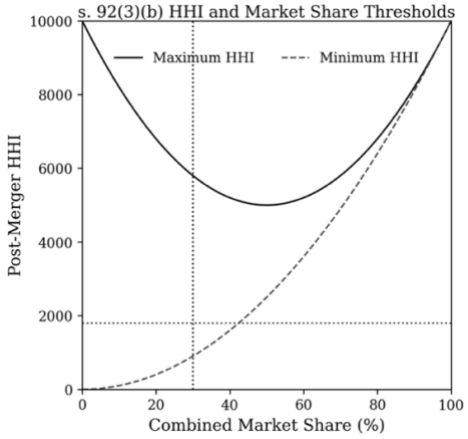
V. Appendix

Figure 1: Illustration of Section 92(3)(a) Threshold



In the grey area above the curve, all two-party mergers with the corresponding market shares of the merging parties meet the Section 92(3)(a) threshold as the change in the concentration index (HHI) is greater than 100 (the curve continues in the x and y directions; it is identical to $y = 50/x$).

Figure 2: Illustration of Section 92(3)(b) Thresholds



Between the solid and dashed curved lines are all possible concentration index values in two-party mergers. The range of values between the dashed and curved line is possible because of variable concentration in the remainder of the market. Except for the bottom left quadrant, defined by the dotted vertical and horizontal lines, all mergers trigger either the Section 92(3)(b)(i) concentration index (HHI) threshold of concentration index greater than 1,800, or the Section 92(3)(b)(ii) threshold of combined market share greater than 30%.

Here is the News: A Comparison of Media Mergers in Canada and the United States in the Age of State-Sanctioned Censorship

Hayden Godfrey

I. Introduction

In September of 2025, less than a week after the assassination of right-wing podcaster, pundit, and college provocateur Charlie Kirk on the campus of Utah Valley University, comedian Jimmy Kimmel took to the stage on the set of *Jimmy Kimmel Live!* for his customary monologue. Kimmel, never one to shy away from criticizing the Republican Party, deplored conservative media figures and elected officials for politicizing the death of a prominent political thought leader in measured, albeit firm terms. "We hit some new lows over the weekend, with the MAGA gang desperately trying to characterize this kid who murdered Charlie Kirk as anything other than one of them and doing everything they can to score political points from it," he said, in part.[1] Angered at the perceived slight towards their political movement and one of its most visible boosters, the administration of U.S. President Donald J. Trump moved swiftly to signal their discontent. In an unprecedented rhetorical gambit, Brendan Carr, the chair of the Federal Communications Commission (FCC), the independent government agency tasked with regulating communications by radio, television, and satellite, not-so-subtly threatened retribution against Kimmel and the American Broadcasting Company (ABC).[2]

Within days of Carr's comments (and the associated wrath of supporters of Trump and Kirk), Kimmel was taken off the air "indefinitely" by ABC, which is owned by the Walt Disney Company.[3] ABC later reinstated Kimmel's show,[4] but the contentious debate surrounding his comments and the broader issue of free speech in the Trump era didn't end there; Sinclair Broadcasting, the owner and operator of over 36 local ABC stations across the country, announced their intention to "pre-empt" Kimmel's show on their air, so too did Nexstar Media Group, who

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[1] John Koblin, Michael Grynbaum & Brooks Barnes, "ABC Pulls Jimmy Kimmel Off Air for Charlie Kirk Comments After F.C.C. Pressure", *The New York Times* (17 September 2025), online: <nytimes.com> [https://archive.ph/TEX7i].
[2] *Ibid.*
[3] *Ibid.*
[4] John Koblin et al., "Jimmy Kimmel's Show to Return to ABC on Tuesday Night," *The New York Times* (22 September 2025), online: <nytimes.com> [https://archive.ph/wip/t4JcQ].

own an additional 32 affiliates.[5] Between those two companies, Kimmel was taken off the air in markets in 30 of the 50 U.S. states and Washington, D.C. Both corporations reversed their decisions days later, bringing Kimmel back to local airwaves.[6]

Though the network suspension and the associated affiliate blackout were, ultimately, short-lived, it prompted a renewed wave of concern related to the fickle nature of a journalistic media apparatus heavily concentrated in a few corporate entities. If so few entities had control of many of the nation's television stations, what was to stop them from exercising their discretion in other realms and pulling material they deemed unseemly off the air?

Indeed, Canadian observers were thrust into a familiar comparative frame of mind, once again asking the question: Could it happen here?[7] Canadian media has, for its part, become increasingly concentrated, in part due to a perceived lack of strength and willingness by regulatory bodies and media moguls' intent on further bolstering their already voluminous portfolios.[8] Why is Canada, like the U.S., beholden to such large, dominant players? What factors do their respective competition law regimes use to evaluate and, ultimately, approve media mergers? How are mergers in the media context even considered in Canada?

This paper explores the state of news media ownership and consolidation in both Canada and the United States. Its analysis begins by explaining the traditional concerns associated with media ownership consolidation, then proceeds to compare the historic competition law treatment of the media industry in both countries.

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[5] Edward Segarra, "Nexstar, Sinclair to continue Jimmy Kimmel show suspension on some ABC stations despite return," *USA Today* (23 September 2025), online: <usatoday.com> [https://web.archive.org/web/20251021184109/https://www.usatoday.com/story/entertainment/tv/2025/09/23/jimmy-kimmel-live-suspension-nexstar-media-group-sinclair/86309199007/]; Saman Shafiq, "Which ABC stations are not airing Jimmy Kimmel's return? See list.," *USA Today* (23 September 2025), online: <usatoday.com> [https://web.archive.org/web/20251021184411/https://www.usatoday.com/story/entertainment/tv/2025/09/23/sinclair-nexstar-not-airing-jimmy-kimmel-list/86307443007/].

[6] Wyatte Grantham-Philips & Andrew Dalton, "Nexstar and Sinclair bring Jimmy Kimmel's show back to local TV stations," *The Associated Press* (26 September 2025), online: <apnews.com> [https://archive.ph/2TLcA].

[7] Andrea Hernandez, "Canadian industry reaction to Jimmy Kimmel Live! suspension" (18 September 2025), online: *Media in Canada* <mediaincanada.com> [https://web.archive.org/web/20251021185120/https://mediaincanada.com/2025/09/18/citytv-jimmy-kimmel-live-canada/].

[8] HG Watson, "Media Concentration Climbs in Canada as Newsrooms Shrink," *J-Source* (29 February 2016), online: <j-source.ca> [https://web.archive.org/web/20251105034203/https://j-source.ca/media-concentration-climbs-in-canada-as-newsrooms-shrink/]; "Postmedia-Sun merger 'foolishly' accepted by Competition Bureau, prof says," *CBC News* (20 January 2016), online: <cbc.ca> [https://web.archive.org/web/20251105033534/https://www.cbc.ca/news/canada/ottawa/postmedia-cuts-ottawa-sun-follow-1.3411579].

In particular, it examines the relevant turning points of recent media mergers before the Canadian Competition Bureau and the United States Department of Justice's Antitrust Division to attempt to crystallize the main legal and economic considerations governing competition law as it pertains to media and journalism and, ultimately, compare the two approaches.

II. Why Should Consolidation Be a Cause of Concern?

As a purely economic matter, investment from large corporate entities does not, on its face, pose an immediate danger to the health or vitality of journalistic organizations. In the digital age, news outlets are increasingly resource- and staff-strained,[9] and large, powerful owners can provide a much-needed cash infusion that, in theory, allows the journalists in question to best serve their communities by using the boost in investment to report consistently and productively. Indeed, it had long been thought that billionaires sought to "save the news."[10]

However, conflicts often arise when the public service of journalism is turned into a purely profit-driven proposition. In the words of the journalism scholar Margot Susca, increased corporate investment in journalism has created "an elite, wealth-driven oligopoly destabilizing and eroding the constitutionally protected entity" that is journalism.[11] This, she says, is the result of "profit-minded owners and managers treating newspapers like any other disposable product in a capitalist society."[12] "[O]nce we view constitutionally protected news organizations like any other widget in a capitalist economy, then our democracy is doomed," Susca told *POLITICO* in 2024.[13]

The financial incentives are separate but related to the substantive, journalistic concerns that come with corporate and consolidated ownership of media channels. The mass media theorist

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[9] Erik Peterson, "Paper Cuts: How Reporting Resources Affect Political News Coverage" (2021) 65 Am J Pol Sci 443 at 449; Fred Dews & Eric Bull, "The Decline of Newspapers, in Four Charts" (23 October 2014), online: *Brookings Institution* <brookings.edu> [https://web.archive.org/web/20251024152634/https://www.brookings.edu/articles/the-decline-of-newspapers-in-four-charts/].

[10] Benjamin Mullin & Katie Robertson, "Billionaires Wanted to Save the News Industry. They're Losing a Fortune," *The New York Times* (18 January 2024), online <nytimes.com> [https://web.archive.org/web/20251024152025/https://www.nytimes.com/2024/01/18/business/media/billionaires-news-media-owners.html].

[11] Margot Susca, *Hedged: How Private Investment Funds Helped Destroy American Newspapers and Undermine Democracy* (Urbana: University of Illinois Press, 2024) at 164.

[12] *Ibid* at 23.

[13] Jack Shafer, "The Investment Firms Leave Behind a Barren Wasteland," *POLITICO* (18 February 2024), online <politico.com> [https://web.archive.org/web/20251024202038/https://www.politico.com/news/magazine/2024/02/18/is-wall-street-to-blame-for-the-collapse-of-newspapers-00141920].

C. Edwin Baker, for one, explains that conglomerate ownership can place an outlet's goal of critically and independently reporting on certain issues in conflict with the economic ambitions of its conglomerate.[14] This, Baker posits, results in the censorship of journalism by "private power" that is just as objectionable as censorship by the state, a paradigm that has long (and uncontroversially) been prohibited by constitutional free speech frameworks.[15]

This tension has repeatedly manifested in modern-day American journalism; news outlets across the country, including *The Washington Post*,[16] *The Los Angeles Times*,[17] *The Las Vegas Review-Journal*,[18] *The Baltimore Sun*,[19] and *The Denver Post*,[20] among others, have clashed with their owners, corporate conglomerate or otherwise, in recent years. Their owners, often corporate entities or parts thereof with vast and diverse holdings across industries and markets, have been reticent to allow "their" pages to be the vehicle for expository reporting of industries or causes in which they have an interest, resulting in a muzzled or chilled journalistic apparatus.

In short, a consolidated press not only transforms the journalistic proposition into a profit-driven one, but can corrupt the very purpose of an independent, constitutionally protected press, which is to report without fear or favour, no matter the topic.

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[14] C. Edwin Baker, "Media Concentration: Giving Up On Democracy" (2002) 54 Fla L Rev 839 at 908.
[15] *Ibid* at 915.
[16] Benjamin Mullin & Katie Robertson, "Inside The Washington Post's Decision to Stop Presidential Endorsements," *The New York Times* (27 October 2024), online: <nytimes.com> [https://web.archive.org/web/20251024161002/https://www.nytimes.com/2024/10/27/business/media/washington-post-president-endorsement.html].
[17] Ryan Mac, Benjamin Mullin & Katie Robertson, "Los Angeles Times Owner Clashed With Top Editor Over Unpublished Article," *The New York Times* (26 January 2024), online: <nytimes.com> [https://web.archive.org/web/20251025152247/https://www.nytimes.com/2024/01/26/business/media/los-angeles-times-owner-editor-clash.html]; Katie Robertson, "Los Angeles Times Owner Wades Deeper Into Opinion Section," *The New York Times* (12 December 2024), online: <nytimes.com> [https://web.archive.org/web/20251025191742/https://www.nytimes.com/2024/12/12/business/media/la-times-patrick-soon-shiong.html].
[18] Dan Hernandez, "Columnist quits over ban on him writing about billionaire Sheldon Adelson," *The Guardian* (26 April 2016), online: <theguardian.com> [https://web.archive.org/web/20251024155317/https://www.theguardian.com/us-news/2016/apr/26/columnist-resigns-sheldon-adelson-las-vegas-review-journal].
[19] Elahe Izadi & Laura Wagner, "Baltimore Sun staff clash with new owner: 'Don't know how to reason with him,'" *The Washington Post* (17 January 2024), online: <washingtonpost.com> [https://web.archive.org/web/20251024155806/https://www.washingtonpost.com/style/media/2024/01/17/baltimore-sun-staff-meeting-david-smith-sinclair-alden/].
[20] Jack Healy, "Denver Post Editor Who Criticized Paper's Ownership Resigns," *The New York Times* (3 May 2018), online: <nytimes.com> [https://web.archive.org/web/20251024160329/https://www.nytimes.com/2018/05/03/business/media/denver-post-editor-resigns.html]; Pete Vernon, "The battle for The Denver Post," *Columbia Journalism Review* (8 May 2018), online: <cjr.org> [https://web.archive.org/web/20251024160704/https://www.cjr.org/the_media_today/denver-post-battle.php].

The following two brief sections will outline the current state of media ownership and consolidation in the United States and Canada, with a particular focus on print (and, by extension) online news publications and television stations.

III. State of Play: Canada

Canadian print media are, by and large, owned by two media giants: Postmedia (*The National Post*, *The Montréal Gazette*, *The Calgary Herald*) and Torstar Corporation (*The Toronto Star*, *The Hamilton Spectator*, *The Waterloo Region-Record*), both of which exert significant influence on newspaper journalism, owning primary papers in 14 of Canada's 15 largest English-speaking cities.[21]

Bell Media (CTV), Rogers Communications (Citytv), and Corus Entertainment (Global News) are prominent in the television space.[22] The publicly funded but editorially independent Canadian Broadcasting Corporation (CBC) is also an important player, particularly in the country's northern territories.[23] In 2015, for instance, Bell, CBC, Rogers, and Shaw (the latter of whom was acquired by Rogers in 2023) controlled 80 per cent of all television revenues in Canada.[24]

Outside the scope of the Bureau, the Canadian Radio-television and Telecommunication Commission (CRTC) regulates broadcasting policy and regulation,[25] and its ability to stipulate the conditions of broadcast licenses has, to some, contributed to Canada's concentrated media environment.[26]

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[21] For this count, Mississauga and Brampton, which are Canada's sixth and 11th largest English-speaking cities, respectively, are included in the Toronto media market covered by *The Toronto Star*. Surrey, B.C., is, likewise, included within Vancouver's media market, covered by the Postmedia-owned *Vancouver Province* and *Sun*.

[22] Matthew Graham, "Canadian TV viewing trends," (25 September 2025), online: *NLogic* <inspiration.nlogic.ca> [https://web.archive.org/web/20251114170329/https://inspiration.nlogic.ca/en/tv-viewing-trends-in-canada]; Andrea Hernandez, "Election Coverage: CBC and CTV hit record-breaking viewership numbers," (1 May 2025), online: *Media in Canada* <mediaincanada.com> [https://web.archive.org/web/20251114170455/https://mediaincanada.com/2025/05/01/election-coverage-cbc-ctv/]; Nic Newman, *Reuters Institute Digital News Report 2024* (Oxford: Reuters Institute for the Study of Journalism, 2024) at 121.

[23] LE Fox, "The truth about the CBC in Northern Canada," (2 July 2025), online: *Canadian Centre for Policy Alternatives* <policyalternatives.ca> [https://web.archive.org/web/20251105035702/https://www.policyalternatives.ca/news-research/the-truth-about-the-cbc-in-northern-canada/].

[24] Dwayne Winseck, *Media and Internet Concentration in Canada Report 1984-2015* (Ottawa: Carleton University, 2016).

[25] A. John Beke, "Government Regulation of Broadcasting in Canada (Part 1)" (1971) 58 Sask L Rev 39 at 58; Daniel J. Baum, "Broadcasting Regulation in Canada: The Power of Decision" (1975) 13 Osgoode Hall LJ 693 at 697.

[26] Sonja Macdonald, "Local news media is declining in Canada—we have to reverse the trend," (2 July 2025), online: *Canadian Centre for Policy Alternatives* <policyalternatives.ca>

IV. State of Play: United States

In the United States, massive ownership transactions have led to a trio of national conglomerates (Gray Television, Nexstar, and Sinclair) owning some 40 per cent of all local news stations and having a presence in more than 80 per cent of media markets.[27] The consolidation does not discriminate across the political divide; Gray, for instance, owns a quartet of stations in conservative North Dakota and the same number in largely liberal Illinois.[28] Nexstar, for its part, has just as many stations in Colorado as it does in Missouri.[29]

This dynamic is similarly at play in print; Gannett (who owns, among others, *USA Today*, *The Detroit Free Press*, and *The Milwaukee Journal Sentinel*), McClatchy (*The Miami Herald*, *The Sacramento Bee*, *The Kansas City Star*), Alden Global Capital (*The Chicago Tribune*, *The Denver Post*), Hearst (*The San Francisco Chronicle*, *Houston Chronicle*), and Lee Enterprises (*The St. Louis Post-Dispatch*, *Buffalo News*) own over 350 publications between them spread across 47 states.[30] Advance Local Publications (*The Oregonian*, *The [Cleveland] Plain Dealer*) is also a key player, with large, agenda-setting publications across the country.[31] Gannett, alone, owns one out of every six daily newspapers in the country, including the primary newspapers in 12 of the 50 largest American cities.[32]

The proceeding two sections will briefly describe the processes and relevant legal and statutory considerations involved in merger approvals in both countries and explore recent cases that illustrate each country's respective regulatory agency's approach to evaluating news media mergers.

[https://web.archive.org/web/20251126225312/https://www.policyalternatives.ca/news-research/local-news-media-is-declining-in-canada-we-have-to-reverse-the-trend/].

[27] Gregory J. Martin et al, "Media Consolidation" (2024) Stanford University Graduate School of Business Working Paper No. 4227 at 2.

[28] Gray Media, "Channel Census for Owned Stations" (1 April 2025), online (PDF): <graymedia.com> [https://web.archive.org/web/20251003080955/https://graymedia.com/assets/pdf/2025_04_Gray_Station_Census_Market_Name.pdf].

[29] Nextstar Media Group, "Stations" (30 September 2025), online: <https://www.nexstar.tv> [https://web.archive.org/web/20251027000715/https://www.nexstar.tv/stations/].

[30] Harvard University, "Index of Seven Big Owners of Dailies" (2021), online: <futureofmedia.hsites.harvard.edu> [https://web.archive.org/web/20251026235913/https://futureofmedia.hsites.harvard.edu/index-seven-big-owners-dailies].

[31] *Ibid.*

[32] *Supra* note 27.

V. North of the Border: The Canadian Process

Mergers in Canada are reviewed by the Competition Bureau, an independent agency that largely works within the framework of the *Competition Act*, a federal statute enacted in 1985.[33] In the words of former Commissioner John Pecman, the *Act* exerts regulatory influence on both businesses and consumers, ultimately ensuring that "market forces work to create efficient businesses with incentives to innovate and that consumers benefit from lower prices and better products and services."[34] Practically speaking, the Commissioner — an independent enforcement official overseen "to a very limited degree" by the Minister of Industry — applies a "substantive statutory test" to all mergers to assess whether the merger is "likely to result in a substantial prevention or lessening of competition."[35]

As the Canadian competition law scholar John Tyhurst explains, this statutory test entails a projection of the impact of the proposed merger, which takes into account several complex "economic indicators."[36] The onus is on the Commissioner to prove, on "a balance of probabilities standard," that the proposed merger will result in prevention or lessening of competition.[37] In the words of the Supreme Court of Canada in *Tervita*, "mere possibilities are insufficient to meet this standard."[38] Indeed, the "vast majority" of cases reviewed by the Bureau do not result in a challenge, leading Canada's merger review regime to produce but a small corpus of jurisprudence from which to draw and analyze; so few cases end up posing an issue, and most of the potentially problematic cases are resolved in negotiation.[39]

Smaller still is the universe of media and journalism specific merger reviews in recent Canadian history, despite long-standing concern over the country's top-heavy and consolidated ownership of news outlets.[40] The Bureau's 2024 introduction of the "structural presumption,"

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[33] James B. Musgrove, *Fundamentals of Canadian Competition Law*, 4th ed (Toronto: Thomson Reuters, 2022) at 15.
[34] John Pecman, "Unleash Canada's Competition Watchdog: Improving the Effectiveness and Ensuring the Independence of Canada's Competition Bureau" (2018) 31 Can Competition L Rev 1 at 7.
[35] *Ibid*; Calvin S. Goldman & Navin Joneja, "The Institutional Design of Canadian Competition Law: The Evolving Role of the Commissioner" (2010) 41 Loy U Chicago LJ 535 at 540.
[36] John Tyhurst, *Canadian Competition Law and Policy* (Toronto: Irwin Law, 2021) at 196.
[37] *Ibid* at 197.
[38] *Tervita Corp v Canada (Commissioner of Competition)*, [2015] 1 SCR 161 at para 66 [*Tervita*].
[39] *Supra* note 36 at 261.
[40] Walter C. Soderlund & Kai Hildebrandt, *Canadian Newspaper Ownership in the Era of Convergence: Rediscovering Social Responsibility* (Edmonton: University of Alberta Press, 2005) at 12; Marc Edge, "News as Hazardous Waste: Postmedia, the Competition Bureau, and the Supreme Court of Canada" (2017) 42 Can J Commun 852 at 853; Dwayne Winseck, "Netscapes of power: convergence, consolidation, and power in the Canadian mediascape" (2002) 24 Media Cult Soc 795 at 813.

which holds that a merger is "presumed to harm competition…if it results in a significant increase in concentration or market share," could likewise reduce the amount of prospective mergers which prompt Bureau investigation or challenges.[41] In essence, it allows a merger to be found presumptively anti-competitive if certain market concentration thresholds are exceeded, thus shifting the onus of showing that a merger will *not* be anti-competitive to the merging parties, which, in turn, clarifies the regime's process and parameters.[42]

However, the Bureau's decision in the successful merger of Postmedia and Sun Media in 2015 and its investigation into the 41-outlet swap between Postmedia and Torstar in 2017 shine a light on the specific points on which analyses turn, particularly as journalistic outlets rely less on advertiser support and more acutely on digital subscriptions.

The Bureau allowed Postmedia to acquire the tabloid Sun franchise from Quebecor Media due to the lack of a so-called "close rivalry" between the two parties' for the attention of readers and a similar lack of rivalry among their competition for advertisers, among other factors.[43] On the reader side, the Bureau's findings indicated that the parties' newspaper offerings "appeal to different types of readers and those readers do not tend to substitute between the parties."[44] Presumably, the Bureau's analysis—which they self-described as containing "[e]xtensive documentary and empirical evidence"—compared the readership of Postmedia and Sun publications based on the political ideology, age, geographic region, and education of their readers,

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[41] Competition Bureau Canada, Guide, "Changes to the Provisions on Mergers and Restrictive Trade Practices in the *Competition Act*" (7 November 2024), online: <canada.ca> [https://web.archive.org/web/20251128192139/https://competition-bureau.canada.ca/en/mergers-and-acquisitions/changes-provisions-mergers-and-restrictive-trade-practices-competition-act]; Chris Margison, Tony Di Domenico & Musa Mansuar, "The Evolving Competition Law Landscape in Canada: Where Are We Now" (2025) 38 Can Competition L Rev 46 at 55; Matthew Chiasson, "Parliament Got It Right: Why Rebuttable Structural Presumptions Make Sense in Merger Review" (2025) 38 Can Competition L Rev 152; Robert Topel, "On Recent Amendments to the Canadian *Competition Act: Benefit Dervice* and the Determination of Monetary Penalties" (2025) 37 Can Competition L Rev 188 at 189.

[42] Chiasson, *supra* note 41 at 164, 170; Debbie Salzberger et al., "2024 Year in Review" (2025) 38 Can Competition L Rev 1 at 5.

[43] Competition Bureau Canada, Position Statement, "Proposed acquisition of the English-language newspapers of Quebecor Media Inc. by Postmedia Network Inc." (25 March 2015), online: <https://competition-bureau.canada.ca> [https://web.archive.org/web/20251104225034/https://competition-bureau.canada.ca/en/how-we-foster-competition/education-and-outreach/position-statements/proposed-acquisition-english-language-newspapers-quebecor-media-inc-postmedia-network-inc]; Competition Bureau Canada, News Release, "Competition Bureau will not challenge Postmedia's acquisition of Sun Media" (25 March 2015), online: <https://competition-bureau.canada.ca> [https://web.archive.org/web/20251106174934/https://competition-bureau.canada.ca/en/competition-bureau-will-not-challenge-postmedias-acquisition-sun-media].

[44] *Ibid*.

which are some factors that studies have suggested are common indicia of news outlet and platform preference.[45]

In that light, it is reasonable to see the Bureau comparing and distinguishing, say, the readership of The Toronto Sun—whose readers are likely more hospitable to its conservative brand of tabloid journalism—or The National Post to that of the existing Star, which has long been known to occupy a more liberal journalistic space.[46] Similarly, one could imagine their analysis diversifying geographically, comparing existing major Postmedia papers in one province with the equivalent Sun paper in that market. Implicit in their statement is the inference that readers likely would not oscillate between (or even move between universes covered by) sources of news regardless of their ownership, suggesting that their merger would not impede competition. Readers do not, in their words, "substitute between the parties" when they're distinct, separately owned entities, so there is little worry that having them under one roof would complicate or disrupt that dichotomy.[47]

On the advertising side, the Bureau concluded that there was "little evidence of direct rivalry between the parties' newspapers with respect to advertising," and intimated that this distinction flowed downstream from the distinct readership.[48] In other words, because the parties' journalistic offerings were tailored to (and read by) distinct and separate audiences, their respective advertising markets are, similarly, varied.[49]

The Bureau's investigation into the proposed multi-outlet swap between Postmedia and Torstar in 2017 was of a different sort; it was concerned with whether the firms had "reached an agreement contrary to the conspiracy provisions" of the *Act*.[50] Though the Bureau did not specify

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[45] *Supra* note 43; Shanto Iyengar & Kyu S. Hahn, "Red Media, Blue Media: Evidence of Ideological Selectivity in Media Use" (2009) 59 J Commun 19; Shelley Boulianne & Adam Shehata, "Age Differences in Online News Consumption and Online Political Expression in the United States, United Kingdom, and France" (2022) 27 Int J Press/Politics 763; Lia Bozarth et al., "The role of the big geographic sort in online news circulation among U.S. Reddit users" (2023) 13 Sci Rep 6711.

[46] Craig Silverman, "Controversy at 'Fox News North,'" *Columbia Journalism Review* (29 April 2011) online: <cjr.org> [https://web.archive.org/web/20251106230641/https://www.cjr.org/behind_the_news/controversy_at_fox_news_north.php]; John Honderich, *Above the Fold: A Personal History of the Toronto Star* (Toronto: Signal, 2022) at 47, 62, 153; Carlton McNaught, *Canada Gets the News* (Toronto: The Ryerson Press, 1940) at 131.

[47] *Supra* note 43.

[48] *Ibid.*

[49] *Ibid.*

[50] Competition Bureau Canada, News Release, "Competition Bureau closes investigation of Postmedia and Torstar" (7 January 2021), online: <canada.ca>

which portions of the *Act* concerned its investigation, the main criminal conspiracy provisions of the *Act* are contained in Section 45.[51] Indeed, Section 45 is designed to deal with "hardcore cartels" by preventing competitors from fixing prices, allocating markets or restricting output.[52] However, arrangements that may be contrary to the conspiracy provisions are difficult to assess because of "the absence of fully litigated subsection 45(1) cases in Canada."[53] Accordingly, the case law reservoir upon which the Bureau can draw is limited, leading the anti-trust lawyer Albert Gourley to proclaim that the "Canadian record in the enforcement of conspiracies is not impressive."[54]

In the matter of Postmedia and Torstar, the Bureau disclosed little information publicly about its investigation; the Commissioner issued a statement shortly after the Bureau conducted searches at Postmedia and Torstar offices, wherein he simply said they were in the process of "gathering evidence to determine the facts relating to the alleged conspiracy."[55] In a later release, the Bureau confirmed that it had obtained a court order requiring several Torstar employees to be interviewed under oath by Bureau investigators.[56]

In any event, the Bureau closed its investigation, claiming that it did not "find clear evidence demonstrating that competitors reached an agreement to fix prices, allocate markets, or lessen or eliminate the supply of a product or service," conduct which would violate Section 45, resulting from the decision to immediately shutter several papers in the swap shortly after it was consummated.[57] Despite reports of a whistleblower claiming that the two corporations *had* coordinated the closings that occurred shortly after the announcement, the merger proceeded, drawing criticism from some competition law practitioners who believed that the Bureau was too

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[https://web.archive.org/web/20251109235632/https://www.canada.ca/en/competition-bureau/news/2021/01/competition-bureau-closes-investigation-of-postmedia-and-torstar.html].

[51] *Competition Act*, RSC 1985, c C-34, s 45.

[52] Omar Wakil, *The 2024 Annotated Competition Act* (Toronto: Thomson Reuters, 2024) at 3.

[53] *Ibid* at 181.

[54] Albert C. Gourley, "A Report on Canada's Conspiracy Law" (2002) 14 Loy Con Rev 577 at 591.

[55] Competition Bureau Canada, Statement, "Statement from the Commissioner of Competition regarding searches in the greater Toronto area" (12 March 2018), online: <canada.ca> [https://web.archive.org/web/20251110012852/https://www.canada.ca/en/competition-bureau/news/2018/03/statement-from-the-commissioner-of-competition-regarding-searches-in-the-greater-toronto-area.html].

[56] Competition Bureau Canada, News Release, "Competition Bureau obtains court order to advance ongoing investigation of Postmedia and Torstar" (4 December 2018), online: <canada.ca> [https://web.archive.org/web/20251110014325/https://www.canada.ca/en/competition-bureau/news/2018/11/competition-bureau-obtains-court-order-to-advance-ongoing-investigation-of-postmedia-and-torstar.html].

[57] *Supra* note 50.

timid in declining to bring a case under either the conspiracy provisions or civil prosecution provisions.[58]

Of those criticisms, Commissioner Matthew Boswell told *The Tyee*, a British Columbia-based nonprofit news site, that the process of Bureau investigations can be "very challenging" given the high standard of evidence that they must reach.[59] "I totally get it," he said. "The standard of evidence is very high, and the role of the bureau is to investigate and present to the Crown attorney, which must prove things beyond a reasonable doubt."[60]

The following section will examine, describe, and explore the American approach to merger review and two media-related examples that illuminate the relevant turning points on which U.S. merger analyses turn.

VI. South of the Border: The American Process

In the United States, mergers are overseen principally by the Federal Trade Commission (FTC) and the Antitrust Division of the U.S. Department of Justice, which derive their statutory authority primarily from Section 7 of the *Clayton Act*.[61] The *Act*, which was enacted in 1914 and remains "the antitrust provision with the most direct bearing on corporate mergers," was intended to combat the concentration of private economic power.[62] It sought, as prospective purposive analyses demonstrate, to strike a balance between overbearance and complicity, constructing a statutory provision to "deeply curtail mergers and acquisitions" of large firms without "impinging on the freedom of small and failing businesses."[63]

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[58] Bryan Carney, "More Fuel for Investigation into Torstar, Postmedia Newspaper Swap", *The Tyee* (4 December 2018), online: <thetyee.ca> [https://web.archive.org/web/20251110013728/https://thetyee.ca/News/2018/12/04/Investigation-Torstar-Postmedia-Newspaper-Swap/]; Bryan Carney, "Emails Confirm Torstar and Postmedia Knew Both Planned Cuts after Big Swap", *The Tyee* (1 March 2021), online: <thetyee.ca> [https://web.archive.org/web/20251110015047/https://thetyee.ca/News/2021/03/01/Emails-Confirm-Torstar-Postmedia-Knew-Both-Planned-Cuts/].

[59] *Ibid.*

[60] *Ibid*.

[61] Lionel M. Frankel, "The Flawed Institutional Design of U.S. Merger Review: Stacking the Deck Against Enforcement" (2008) 2008 Utah L Rev 159 at 160; Heiko Richter, "Propsects of Merger Review in the Digital Age: A Critical Look at the EU, the United States, and Germany" (2023) 54 Intl Rev Prop Compet Law 223 at 243.

[62] Basel J. Musharbash & Daniel A. Hanley, "Toward a Merger Enforcement Policy That Enforces the Law: The Original Meaning and Purpose of Section 7 of the Clayton Act" (2025) 63 Duq L Rev 1 at 5, 103.

[63] *Ibid* at 102.

Since the so-called "dense" standard of monopolistic prohibition of the *Act* leaves "many concepts open to interpretation through judicial or agency decision,"[64] the agencies' merger guidelines have, increasingly, become useful to businesses to ensure their understanding of the standard used by the agencies to review mergers and acquisitions.[65]

The merger guidelines instruct the agencies to consider, among other factors, the market concentration resulting from the merger, whether the proposed merger will eliminate "substantial competition between firms," "increase the risk of coordination," and "entrench or extend dominant positions."[66] The guidelines, however, are not law "made" by the agencies; they are merely indications of how they "intend to exercise their enforcement discretion."[67] In reflecting on the scope and use of the guidelines in their modern form, the economist Dennis Carlton, who once served as Deputy Assistant Attorney General for Economic Analysis in the Department of Justice's Antitrust Division, wrote that they "have served as a useful statement of economic thinking that merging parties have looked to and courts have relied upon in how they can use economic reasoning to evaluate evidence that bears on the likely effects of a merger."[68]

Much like Canada, most mergers are not deemed anticompetitive and are "permitted to proceed with little controversy," which renders the system "far from ideal" in the eyes of some critics who view it as tending to underenforce due to its institutional design.[69]

However, in contrast to Canada, there exists a larger corpus of jurisprudence in the U.S. relating to media mergers, particularly emanating from civil lawsuits launched by the U.S. Department of Justice's Antitrust Division. This analysis will focus on the cases against Knight Ridder Inc. and the McClatchy Company in 2006, and Nexstar and Tribune Media in 2019, which sought to order divestitures in certain key markets to comply with federal antitrust laws.

McClatchy's acquisition of the 32-newspaper Knight Ridder chain drew the attention of the Department of Justice in the Minneapolis media market, wherein the McClatchy-owned Star Tribune and the Knight-Ridder-owned St. Paul Pioneer Press competed "head-to-head" for

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[64] Peter B. Rutledge, "A Brief Review of Merger Control in the United States" (2000) 13 NYSBA Intl L Practicum 8 at 8.
[65] Meredith Mommers & Angela Landry, "The FTC & DOJ's New Merge Guidelines: A New Path or More of the Same?" (2024) 11 Emory Corp Gov Rev 205.
[66] *Ibid*; US, Department of Justice and Federal Trade Commission, *Merger Guidelines* (Washington, DC: U.S. Department of Justice and the Federal Trade Commission, 2023).
[67] Herbert Hovenkamp, "The 2023 Merger Guidelines: Law, Fact, and Method" (2024) 65 Rev Indus Org 39 at 39.
[68] Dennis W. Carlton, "The 2023 Merger Guidelines: A Critical Assessment" (2024) 65 Rev Indus Org 129 at 129.
[69] Frankel, *supra* note 61 at 159.

readers.[70] The merger of the corporations owning these publications, the government alleged, would give the newly merged entity "almost 100 percent of local daily newspaper circulation in the Minneapolis/St. Paul metropolitan area."[71]

Specifically, the government alleged that the merger, without divestiture in Minneapolis, would violate Section 7 of the *Clayton Act*, which prohibits mergers and acquisitions that would "substantially…lessen competition, or…create a monopoly.[72] The crux of the government's case rested on the potential lessening of competition that would occur in advertising and readership markets should the two entities be successfully merged.

In the advertising sphere, the government's claim was explicit and directly communicated: most advertisers who advertised in either the Star Tribune or the Pioneer Press "[did] not consider other types of advertising," whether it be on the then-nascent internet or in other, non-daily newspaper publications.[73] Their only viable and attractive options for advertising, the complaint intimated, were the two publications, the merger of which would allow the merged entity to impose a "small but significant and nontransitory increase in the price of daily newspapers" without the risk of becoming unprofitable due to an associated loss in sales.[74]

Accordingly, McClatchy and the government agreed to enter into a final judgment that ordered them to divest from the *Pioneer Press* to comply with the *Clayton Act*.[75] In 2007, McClatchy sold the *Pioneer Press* to the Denver-based MediaNews Group Inc.[76]

In its case against Nexstar and Tribune, the Department of Justice, similarly, focused on specific markets in which media monopolies could develop after the merger.[77] Namely, the government's case centered around several small-to-medium markets—Norfolk, VA., Grand Rapids, MI., Memphis, TN., and Des Moines, IA, among them—wherein Nexstar and Tribune

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[70] *U.S. v. The McClatchy Company and Knight-Ridder, Inc.*, Complaint (filed 27 June 2006) No. 1:06-CV-01175 (US Dist DC Cir) at 6.
[71] *Ibid.*
[72] 15 U.S.C. § 18.
[73] *Supra* note 70 at 4.
[74] *Ibid* at 5.
[75] *U.S. v. The McClatchy Company and Knight-Ridder, Inc.,* Final Judgment (filed 27 June 2006) No. 1:06-CV-01175 (US Dist DC Cir).
[76] John Welbes, "MediaNews closes deal to buy Pioneer Press", *Pioneer Press* (23 October 2007) online: <twincities.com> [https://web.archive.org/web/20251108202815/https://www.twincities.com/2007/10/23/medianews-closes-deal-to-buy-pioneer-press/].
[77] *U.S. and Plaintiff States v. Nexstar Media Group, Inc., and Tribune Media Company*, Complaint (filed 31 July 2019) No. 1:19-CV-02295 (US Dist DC Cir).

operated local television stations that, when combined, would constitute more than 47.5% of retransmission market shares, based on revenue.[78]

Accordingly, the government's case focused on the potentially deleterious effect of the merger on advertisers; should the merger go through as originally proposed, the complaint alleged, advertisers would be deprived of the lower advertising prices they enjoy as a result of the head-to-head competition from both parties' stations in their respective markets.[79] Put another way, by eliminating Tribune as a competitor in the market, the merger would "give Nexstar the power to charge MVPDs"—multichannel video programming distributors such as Comcast or DirecTV, for instance—"higher fees for its programming."[80] Those fees, the government posited, would likely get passed on, "in large measure, to their subscribers."[81]

For the merger to proceed, both Nexstar and Tribune were required to divest from certain markets in which a lessening of competition was thought to occur, much like the aforementioned condition in the McClatchy and Knight-Ridder merger.[82] For example, Tribune sold WTVR-TV, a CBS affiliate in Richmond, Va., to the E.W. Scripps Company in 2019.[83] Had it *not* done so, the government's complaint alleged, the new, merged entity—theoretically composed of Nexstar's WRIC-TV, an ABC affiliate, and Tribune's WTVR-TV in the Richmond market—would have an outsized share of the market.[84] As a journalistic matter, the government's complaint pointed out that so-called "Big 4 broadcast content"— that which is aired on affiliates of FOX, NBC, CBS, and ABC—has a "special appeal to television viewers in comparison to the content that is available through other broadcast stations and cable channels" due to their "popular national content and valued local coverage."[85]

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[78] *Ibid* at 8.
[79] *Ibid* at 17.
[80] *Ibid* at 3.
[81] *Ibid*.
[82] *U.S. and Plaintiff States v. Nexstar Media Group, Inc., and Tribune Media Company,* Final Judgment (filed 10 February 2020) No. 1:19-CV-02295 (US Dist DC Cir).
[83] Gregory J. Gilligan, "E.W. Scripps Co. now owns WTVR in Richmond; Nexstar Media completes $7.2 billion purchase of Tribune Media", *Richmond Times-Dispatch* (19 September 2019) online: <richmond.com> [https://web.archive.org/web/20251109200215/https://richmond.com/business/article_b1371e9e-7042-5019-ad1b-9bf409e4c094.html].
[84] *Supra* note 77 at 8; US, Federal Communications Commission, *In the Matter of the Applications of Tribune Media Company (Transferor) and Nexstar Media Group, Inc. (Transferee) et al., Memorandum Opinion and Order* (FCC 19-89) at 5.
[85] *Supra* note 77 at 5.

Despite the regulatory reservations and prompted divestitures, the merger was allowed to proceed and, as of 2024, Nexstar claims that its "programming and content" reaches 70% of U.S. households with televisions.[86]

VII. Across the 49th Parallel: Comparing the Example Merger Analyses

The above examples demonstrate, in part, that the main regulatory agencies overseeing mergers in Canada and the United States use similar analytical frames to evaluate the potentially anticompetitive impacts of large media mergers. Both regulatory agencies focus acutely on how the proposed mergers would undercut price incentives for advertisers and, accordingly, generate higher prices for consumers seeking to benefit from a competitive marketplace. These turning points were not unique to media and journalism but provided workable and logical frames from which to evaluate competition in the marketplace.

However, to the extent that the respective regulatory agencies' reasoning was made public, the U.S. Department of Justice put at least some measure of focus on framing the direct and tangible harm the merger would do to readers. In its antitrust lawsuit against McClatchy and Knight-Ridder, it argued that direct, aggressive competition between the *Star Tribune* and the *Pioneer Press* had, up until that point, contributed to "higher quality news coverage, better service, and lower prices" for its readers in the region.[87] If the two publications were to come under common ownership, it claimed, the incentives to continue to improve in those three departments would functionally disappear.[88] In other words, the merger would allow them to lower the quality of their news coverage, reduce the service package as a whole, and raise prices due to the lack of direct and aggressive competition.

In its evaluation of the Postmedia-Sun merger, the Competition Bureau took the *positive* frame of the editorial quality issue, asserting instead that there is an incentive for "the merged entity to retain readership and maintain editorial quality."[89] In other words, instead of claiming that

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[86] George Winslow, "Nexstar Pitches Investors on Reach, M&A, Deregulation and NextGen TV Opportunities (11 June 2025), online: *TV Tech* <https://www.tvtechnology.com/news/nexstar-pitches-reach-m-and-a-deregulation-and-nextgen-tv-opportunities-to-investors> [https://web.archive.org/web/20251109202958/https://www.tvtechnology.com/news/nexstar-pitches-reach-m-and-a-deregulation-and-nextgen-tv-opportunities-to-investors].

[87] *Supra* note 70 at 6.

[88] *Ibid.*

[89] *Supra* note 43.

the merger would reduce or dampen the incentive to produce honest, high-quality journalism, the Bureau seemed to indicate that the merger would steady or even *increase* the incentive to produce quality journalism that advertisers would seek to pay to associate with. This conceptual flip, though mostly rhetorical, provides at least some measure of insight into the approaches of each respective agency.

There is also the fact that the Department of Justice even sought to *challenge* the mergers in question in the first place, even if they did not outright seek to block or ban their implementation. Though the merger review regimes are, by virtue of being in different countries in different jurisprudential landscapes, different, the fact that the American regulators seem more proactive than their Canadian counterparts in taking proactive legal action to challenge or reduce the impact of media mergers is potentially indicative of the attitude towards media mergers in general. Case in point, Tyhurst described the competition law enforcement regime in Canada as "somewhat like a referee in a hockey game: it is largely invisible until a problem which impedes the smooth functioning of the 'game' (the market) arises."[90] Evidently, the Canadian referees did not see conduct that, to extend the Tyhurst metaphor, warranted them taking out and blowing their whistles to halt play.

Conversely, practitioners and scholars have characterized the American antitrust enforcement regime as, among other things, "aggressive,"[91] "vigorous,"[92] and containing a "high degree of continuity" between administrations,[93] while some have pointed out that the regime's two-agency enforcement mechanism has resulted in bureaucratic complexities and a proverbial "butting heads" of resources and goals.[94] In a sense, the Canadian regime comes out ahead in the chain-of-command department, relatively speaking; while it may not exert as pressing an energy on enforcement, it benefits from a unified, single-agency structure instead of being beholden to

[90] *Supra* note 36 at 3.
[91] Justin Zeizel, "U.S. Department of Justice and Its Global Counterparts Continue Aggressive Enforcement Against Cartels" (2014) 34 Rev Banking & Fin L 45 at 47.
[92] Kenneth G. Starling, "Criminal Antitrust Enforcement" (1988) 57 Antitrust LJ 157 at 161.
[93] Daniel A. Crane, "Has the Obama Justice Department Reinvigorated Antitrust Enforcement?" (2012) 65 Stan L Rev 13 At 20.
[94] John McGinnins & Linda Sun, "Unifying Antitrust Enforcement for the Digital Age" (2021) 78 Wash & Lee L. Rev 305 at 307; Ernest Gellhorn et al., "Has Antitrust Outgrown Dual Enforcement? A Proposal for Rationalization" (1990) 35 Antitrust Bull 695 at 714.

what former FTC chair William Kovacic bluntly describes as "two bureaus [performing] the same or similar law enforcement functions" in the American context.[95]

In terms of their communication to the public, the Bureau in Canada shed more—albeit, limited—light on assurance and submissions made to them by the parties seeking to effectuate the merger behind closed doors. Indeed, in the Sun matter, the Bureau claims that Postmedia made "persuasive submissions… suggesting that the proposed transaction is likely to bring about meaningful gains in efficiency."[96] (Notably, the efficiency defence, where parties could "demonstrate that efficiency gains outweighed the merger's anti-competitive effects," is no longer available to parties seeking to merge pursuant to 2023 amendments to the *Act*.[97])

Still, that analysis did not appear—at least to an extent communicated to the public—to meaningfully consider the potential for selective or anti-competitive post-merger conduct that, ultimately, would harm the supposedly competitively neutral impact on the news market. In reality, those "gains in efficiency" manifested, in part, in the literal combination of the Postmedia and Sun newsrooms in four major markets, with reporters enveloped into "one newsroom with two brands."[98]

This, it appears, was despite assurances to the contrary. In a piece published in the longform magazine The Walrus in 2016, former Edmonton Journal editor-in-chief Margo Goodhand reported that Postmedia CEO Paul Godfrey claimed that the newsrooms of the Albertan (Calgary Herald and Calgary Sun) and British Columbian (Vancouver Province and Vancouver Sun) papers would be "competitive, distinct, and entirely independent."[99] Since this did *not* end up being the case, the

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[95] William E. Kovacic, "Downsizing Antitrust: Is It Time to End Dual Federal Enforcement" (1996) 41 Antitrust Bull 505 at 538.

[96] *Supra* note 43.

[97] Competition Bureau Canada, Guide, "Guide to the December 2023 amendments to the *Competition Act*" (18 December 2023) online: <canada.ca> [https://web.archive.org/web/20251125033830/https://competition-bureau.canada.ca/favicon.ico#sec02].

[98] James Bradshaw, "Postmedia merges newsrooms, cuts 90 jobs in response to financial woes", *The Globe and Mail* (19 January 2016) online: <theglobeandmail.com> [https://web.archive.org/web/20251108041703/https://www.theglobeandmail.com/report-on-business/postmedia-cuts-90-jobs-merges-newsrooms-in-four-cities/article28257456/]; Stephen Kimber, "Paper Cuts", *The Walrus* (1 February 2016) online: <thewalrus.ca> [https://web.archive.org/web/20251108044454/https://thewalrus.ca/paper-cuts/]; Jane Lytvynenko, "Postmedia Axes 90 Journalists, Merges Newsrooms Across the Country: Memo" (19 January 2016), online: *Canadaland* <canadaland.com> [https://web.archive.org/web/20251108044228/https://www.canadaland.com/postmedia-axes-90-journalists-merges-newsrooms-across-country-memo/].

[99] Margo Goodhand, "Above the Fold", *The Walrus* (4 February 2016) online: <thewalrus.ca> [https://web.archive.org/web/20251108042631/https://thewalrus.ca/above-the-fold/].

merger resulted in consumers having less choice in news consumption across the journalistic spectrum, not more.

Though it is fruitless to speculate on the exact nature of the submissions made by Postmedia during the Bureau's review, the fact that the Bureau was explicit and transparent about the fact that it was, to some extent, influenced by submissions, arguments, and prospectives by one of the parties indicates at least some level of willingness to engage on their prospective, post-merger vision for the company in question.

There are, of course, limitations to the extent to which the two regulatory regimes can be compared based on the chosen examples, particularly given the scope and size of the American mergers compared to their Canadian counterparts.

For example, while the Postmedia empire is—and was, even before the Sun merger and the Torstar swap—vast, it did not cover nearly the geographic or demographic range of Nexstar's television empire or McClatchy's cathedral of newspaper brands. The American media market is, similarly, far more dispersed and diverse than its Canadian counterpart, with larger cities and a broader, less dense distribution of population. Case in point, as of 2025, the United States has 52 cities of over 400,000 residents, while Canada has but 17.

Since consumer needs are known to vary based on geographic location, the deltas of which are further exacerbated by forces of geographic inequality,[100] it follows that the American agencies have a conceptually more difficult analysis to conduct: more markets, more diverse considerations, and more consumers to consider in their evaluation of potentially anti-competitive conduct.

In short, while there are subtle differences in the administration and posturing of regulatory agencies in Canada and the United States with respect to media mergers, the relatively small recent Canadian corpus of jurisprudence on the subject, combined with the differing complexities in both countries and their respective journalistic landscapes, makes an authoritative and comprehensive comparison difficult.

[100] Ingrid Ulrika Jernudd, "Federal Versus State Antitrust Enforcement: Furthering Competition Through Cooperation" (2023) 21 Geo J L & Pub Pol'y 577 at 583; Ganesh Staraman, Morgan Ricks & Christopher Serkin, "Regulation and the Geography of Inequality" (2021) 70 Duke LJ 1763.

VIII. Conclusion

No matter the jurisdiction, the merger review process is a complex, intricate, and multifaceted one, taking into account a myriad of economic, financial, social, political, and bureaucratic concerns. The policing of competition as a legal, political, and economic matter involves a "complex set of doctrines which marry multiple institutions," rendering it a particularly intricate and byzantine area of legal practice, legislation, and regulation.[101]

Still, the American and Canadian merger review regimes share similarities across the border, and, while the ability to extract overarching comparative differences from recent media merger case studies is limited, the respective approaches to the Postmedia-Sun and Nexstar-Tribune mergers show different rhetorical and administrative approaches to merger enforcement.

As governments continue to pressure corporate conglomerates into altering the editorial and journalistic direction of their media holdings, it would be prudent for the legal and scholarly communities to continue examining the relevant turning points inherent in such merger analyses, such that news consumers and journalists themselves can develop a fulsome understanding of the processes that led to—and will, potentially, continue to lead—to a concentrated media apparatus that gave rise to the Kimmel paradigm.

[101] D Daniel Sokol, Sara Bensley & Maia Crook, "Measuring the Antitrust Revolution" (2020) 65 Antitrust Bull 499 at 500.

Can Pricing Algorithms Collude?

Katerina McMullen

I. Introduction

Competition law and pricing algorithms have fallen out of step. Jurisdictions around the world are playing catch-up with many of the recent advancements in artificial intelligence ("AI"), and the impacts they have on competitive markets. Recently, Canada hosted a G7 summit dedicated to competition law and the challenges stemming from algorithmic pricing.[1] The OECD's report that was commissioned by Canada for this meeting did not provide a definitive path forward for the G7 member states. While all member states agreed that algorithmic pricing raises problems for market competition,[2] and many have commissioned market studies for this issue,[3] the Canadian government is still in the process of assessing how to address and regulate these problems. The prospect of criminal liability under existing legislation has raised significant concerns among corporate counsel and industry observers. Some of these stakeholders argue that, while there are specific cases where antitrust enforcement is required, pricing algorithms foster competition and enhance productivity.[4]

One approach available to enforcers has been applied in California. The state now prohibits the use of "common pricing algorithms" as a tool to facilitate conspiracies, restrain trade, or coerce competitors into adopting the same prices. Bill AB 325 in California defines a "common pricing algorithm" as "any methodology, including a computer, software, or other technology, used by two or more persons, that uses competitor data to recommend, align, stabilize, set, or otherwise influence a price or commercial term."[5] This bill is designed to specifically target separate firms that "use shared algorithms," and not "businesses that develop their own proprietary pricing tools."[6] Effectively, AB 325 targets companies that collude through software as a means of

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[1] Competition Bureau, News Release, "Canada hosts G7 Summit discussing competition issues related to algorithmic pricing" (3 October 2025), online: <canada.ca> [https://archive.ph/z8hvG].
[2] Organisation for Economic Cooperation and Development, *Algorithmic Pricing and Competition in G7 Jurisdictions Emerging Trends and Responses* (Paris: Organisation for Economic Cooperation and Development, 2025), at 19.
[3] G7, *Compendium of Approaches to Improving Competition in Digital Market* (Kananankis: G7, 2025), at 8–54.
[4] Canadian Chamber of Commerce, Publication, "Letter to Competition Bureau Canada Regarding Discussion Paper on Algorithmic Pricing and Competition" (25 July 2025), online: <chamber.ca> [https://archive.ph/j76kJ].
[5] US, AB 325, *An act to add Sections 16729 and 16756.1 to the Business and Professions Code, relating to business regulations*, 2025-2026, Reg Sess, Cal, 2025, s 1 (enacted).
[6] Paul, Weiss, Rifkind, Wharton & Garrison LLP, "California Restricts Use of Common Pricing Algorithms" (13 October 2025), online: <paulweiss.com> [https://archive.ph/ZZlwH].

increasing market prices, a cases where a dominant software provider sets the prices which the companies use.[7] The bill also does not distinguish between competitively sensitive data, and public data such as prices.

The European Union ("EU") has adopted a similar strategy, targeting algorithms that "become a device to facilitate collusion (collusion by code)."[8] EU enforcers are aiming to close the regulatory gap that would have allowed unlawful conduct to avoid scrutiny by operating in the digital world. While the EU's definition could include a company developing their own proprietary algorithm, the focus is to ensure that market participants cannot lawfully collude by using online or algorithmic tools. This new strategy is a "shift in enforcement logic" which lowers the bar for collusion, capturing coordinated behaviour and systems design.[9]

Existing literature on algorithmic pricing treats "collusion" differently from established caselaw. Researchers define tacit collusion using the patterns displayed by the pricing algorithms and the outcomes that they achieve. They focus on pricing patterns which resemble the behaviour of real life cartels, such as punishing deviations, as well as setting supracompetitive prices (prices above what can be sustained in a competitive market).[10] Essentially, "tacit collusion" describes algorithmic pricing that achieves a supracompetitive equilibrium (meaning that the market price stays at the supracompetitive level), and may or may not display patterns resembling human cartel strategies. This excludes human involvement or intent; it is purely algorithmic. A recent policy paper by Renato Nazzini and James Henderson concluded that this sort of behaviour is very difficult to detect, and the authors left open the legal issue of "whether this kind of algorithmic conduct is unlawful."[11]

In this paper, I argue that the characterization of pricing algorithms as "collusive" is technically incorrect. I do so by providing a simplified explanation of how algorithms reach a supracompetitive equilibrium. Building on fundamental mathematical proofs, I reason that pricing

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[7] US, California State Assembly, *Cartwright Act: Violations* (AB 325) (2025) at 2.
[8] Freshfields, "EU Steps Up on Algorithmic Pricing Cartels, Joining the US and Other Jurisdictions" (16 July 2025), online: < riskandcompliance.freshfields.com> [https://archive.ph/0aHL4].
[9] *Ibid*.
[10] Emilio Calvano et al, "Artificial Intelligence, Algorithmic Pricing, and Collusion" (2018) 110 American Economic Rev 10 at 3; See also Emilio Calvano et al, "Algorithmic Collusion, Genuine and Spurious" (2021) 90 Intl J of Industrial Organizations which specifically argues that "genuine" collusion occurs when algorithms punish each other for deviating from the cartel price.
[11] Renato Nazzini & James Henderson, "Overcoming the Current Knowledge Gap of Algorithmic 'Collusion' and the Role of Computational Antitrust" (2024) 4 Stanford Computational Antitrust 1, at 2–5.

algorithms are designed to maintain the highest long-term prices possible, and a supracompetitive equilibrium is simply the result. I demonstrate this through a literature review of computer science and intersectional computational antitrust literature. I equally demonstrate that detecting algorithmic pricing is difficult, and even more so, determining if the algorithm is acting anti-competitively. I also include methods for developing competitive pricing algorithms.

II. Algorithms Learn to Optimize, not Collude

Initially, AI was slow, inefficient, and made decisions based on clearly defined rules. As a result, algorithms lacked the sophistication needed to reach a supracompetitive price without outside human collusion.[12] This is not the case for newer algorithms. Machine learning has made immense progress in the past three decades, and various techniques have been developed to train algorithms to solve a given problem. For algorithmic pricing, all the computer science research has focused on reinforcement learning. A reinforcement learning algorithm learns from its environment: it will punish itself when profits are low and reward itself when they are high.[13] Experimental settings have shown that reinforcement learning algorithms can learn supracompetitive prices without any human collusion.[14]

In non-technical terms, independent algorithms settle on a supracompetitive price because they treat pricing as a math problem. The problem is what price to set, and the desired solution is the one that maximizes long term profits. In simple scenarios, traditional algorithms can learn a supracompetitive price and stay there. In more complex ones, deep-learning algorithms are needed. Ultimately, the supracompetitive price is the optimal solution for an algorithm trying to maximize long term profits.

The general rule for reinforcement learning algorithms is that superior algorithmic design and higher quality data can both lead to an improved ability to identify and maintain a supracompetitive equilibrium. Experimental settings often use two Q-learning algorithms to demonstrate this phenomenon. Q-learning is a form of reinforcement learning where an algorithm learns to maximize an outcome through trial and error, weighing new choices against old ones. Q-learning is mathematically guaranteed to learn the optimal strategy by exploring all possible

[12] Emilio Calvano et al, "Protecting consumers from collusive prices due to AI" (2020) 370 Science 6520 at 1040.
[13] Calvano, *supra* note 11 at 7.
[14] Calvano, *supra* note 10 at 3296.

options and slowly reducing the number of choices it can take.[15] For pricing, this means that, through sufficient iterations and exploration, algorithmic agents eventually converge on the most profitable price. Because an equilibrium yields higher long-term rewards than a competitive price war, a properly optimized Q-learner is mathematically bound to "discover" it as the optimal strategy.

Research in experimental settings proves this. In a multi-agent environment (two or more mock market-participants setting prices), supracompetitive pricing is achieved with very little human input and no algorithmic communication.[16] However, researchers have frequently characterized the manner that the algorithms reach the supracompetitive price as collusive. This is because Q-learning algorithms may exhibit patterns that resemble price wars or cyclical pricing.[17] These sub-optimal pricing patterns have been interpreted as evidence of "collusion."[18] Equally, these studies infer that where one set of Q-learning algorithms do not display these pricing patterns but converge on a competitive equilibrium, they are "colluding."[19]

Bertrand et. al. provide a clear example of researchers defining "algorithmic collusion" as an optimal equilibrium with an observable pattern. They use two identical Q-learning algorithms in a "Prisoner's Dilemma" game, where the algorithms can choose to "Cooperate" (C) or "Defect" (D). In their experiments, the authors vary the value of an incentive to cooperate g, and their results are fixed at $g = 1.8$. If both choose C, they get a reward of $2*g$ (3.6). If both choose differently, D gets the lowest reward possible (g or 1.8), and C gets the highest reward possible ($2 + g$ or 3.8). If both choose D, they get a fixed reward of 2.[20] When the algorithm runs with memory for the current game, both programs pick D, guaranteeing a reward of 2.[21] When memory is expanded, and the algorithm is initialized to aim for a high reward, the two copies eventually test all strategies, and learn that picking C together is better than picking D, or shifting between C, D and D, C. In the process, they demonstrate patterns that the researchers deem evidence of "collusion".[22]

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[15] Francisco Melo, "Convergence of Q-Learning: A Simple Proof".
[16] Calvano et al, "Algorithmic collusion with imperfect monitoring" (2021) 79 Intl J of Industrial Organizations at 11; Timo Klein, "Autonomous Algorithmic Collusion: Q-Learning Under Sequential Pricing Klein" (2021) 52 RAND J of Economics 3 at 539, 553–554; Calvano, *supra* note 11 at 13.
[17] Klein, *supra* note 16.
[18] *Ibid*.
[19] Nazzini & Henderson, *supra* note 11.
[20] Bertrand et al, "Self-Play Learners Can Provably Collude in the Iterated Prisoner's Dilemma" (2023) arXiv at 23.
[21] *Ibid* at 2.
[22] *Ibid* at 2–9.

Grondin, Charpentier, and Ratz argue in their experimental study that the fluctuating and cyclical patterns shown by competing Q-learning algorithms, and their inability to reach a supracompetitive price, were a result of poor algorithmic design.[23] The authors did so by replicating prior research on pricing algorithms and supracompetitive equilibriums, such as in Calvano et. al.'s study.[24] In contrast, Grondin et. al. found that all the algorithms eventually did reach a supracompetitive equilibrium, when given enough time and the right set-up. They resisted labelling the algorithms as truly collusive and instead argued that the algorithms learn to "converge back to the equilibrium price […] rather than having a truly collusive strategy." They remarked that prior failures to maintain a supracompetitive equilibrium, or to maintain price wars, were a result of the algorithms understanding correctly how and when to lower prices but had not optimized raising them.[25]

In order to address the difficulty with price raising and create algorithms robust to different scenarios, Grondin et. al. used deep Q-learning and trained it to maximize shared profits as opposed to just its own.[26] This algorithm models the logic used by its competitors by tracking their prices along with other public data. Rocher et. al. experimented with this in simulated duopolies and triopolies, and the algorithms converged to a supracompetitive equilibrium.[27] To expand upon this, Grondin et. al. used deep Q-learning that was pre-trained to ensure that it converged at the highest price possible as quickly as possible.[28] In theory, this strategy could work in much more complex scenarios; a deep Q-learning algorithm was trained to beat a superhuman Go AI, and achieved a 97%-win rate over its opponent.[29]

More general research on deep Q-learning has demonstrated that these models excel at achieving supracompetitive prices in complex, simulated real-world scenarios. This is because, instead of learning each and every best choice (the costly Q-learning approach), deep learning infers the best options.[30] In set ups that mimicked air travel and EV pricing, with different

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[23] Suzie Grondin, Arthur Charpentier & Philipp Ratz, "Beyond Human Intervention: Algorithmic Collusion through Multi-Agent Learning Strategies" (2025) arXiv at 1–2.
[24] Melo, *supra* note 15.
[25] Grondin, Charpentier & Ratz, *supra* note 23 at 8.
[26] *Ibid* at 10.
[27] Luc Rocher, Arnaud Tournier & Yves-Alexandre de Montjoye, "Adversarial Competition and Collusion in Algorithmic Markets", (2023) 5 Nature Machine Intelligence at 7–10.
[28] Grondin, Charpentier & Ratz, *supra* note 23 at 10–12.
[29] Wang et al, "Adversarial Policies Beat Superhuman Go Ais" (2023) arXiv at 1.
[30] Shidi Deng, Maximillian Schiffer & Martin Bichler, "Exploring Competitive and Collusive Behaviors in Algorithmic Pricing with Deep Reinforcement Learning" (2025) arXiv at 11–12.

competitor algorithms, different amounts of competitors, and various other variables, deep reinforcement learning algorithms met or exceeded the monopoly level of profits.[31] They can achieve this even when using no other pricing data other than their own.[32]

In summary, existing research demonstrates that "algorithmic collusion" is not in fact collusion at all, but a result of machines optimally solving a math problem.[33] Q-learning is mathematically proven to optimize a decision process with a specific reward in mind. Researchers have misinterpreted the patterns exhibited by competing algorithms that succeed in maintaining an optimal, supracompetitive pricing equilibrium, along with their ability to do so, as evidence of collusion. However, the patterns are at their simplest an intermediary learning stage, as was shown by Bertrand et. al.[34] In contrast to what Calvano et. al.[35] argued, their absence and subsequent failure to reach a supracompetitive state are not an absence of "algorithmic collusion." They are, upon further training, an intermediary stage, or evidence of an algorithm that is not complex enough for the task.[36]

III. Algorithmic Pricing Detection and Supracompetitive Price Prevention

In this final section, I explain how researchers have documented numerous approaches to detect algorithmic pricing and prevent convergence to supracompetitive prices. I then explain the limits of these methodologies and argue that post-deployment detection and prevention are either impossible, or prohibitively difficult to be realistic in the real world. I use these findings to illustrate the argument that numerous experts have made on the subject: specific legislation is needed in the pre-deployment stage if algorithmic collusion is to be addressed.

(a) Detection Methods

By using observational data, i.e., tracking the prices of products in a market, enforcers could identify algorithmic pricing and patterns potentially indicative of algorithmic collusion.

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[31] Diwas Paudel & Tapas Das, "Tacit Algorithmic Collusion in Deep Reinforcement Learning Guided Price Competition: A Study Using EV Charge Pricing Game" (2024) arXiv at 2; Chengyan Gu, "Can Dynamic Pricing Algorithm Facilitate Tacit Collusion? An Experimental Study Using Deep Reinforcement Learning in Airline Revenue Management" (2025) J of Revenue and Pricing Management at 17.
[32] Michael Schlechtinger, *Investing, Predicting, and Mitigating Collusive Behavior in Deep Reinforcement Learning-Based Pricing AIs* (PhD Dissertation, University of Mannheim, 2024) [published] at 72–69.
[33] Grondin, Charpentier & Ratz, *supra* note 23 at 12–13.
[34] Bertrand et al, *supra* note 20.
[35] Melo, *supra* note 15.
[36] Grondin, Charpentier & Ratz, *supra* note 23 at 8.

Nazzini and Henderson hypothesized that algorithmic pricing could be identified through various factors, such as a low rate and degree of price change, price uniformity and lack of discounts, a negative correlation between price and demand, sharp increases in high price-cost margins absent any exogenous explanation, periods of rapid price climbs followed by static high prices which culminate in a steep drop, and sharp and steady price increases following steep declines more generally.[37]

Similarly, Wieting and Sapi found that algorithmic pricing itself may follow specific patterns such as rapid transitory increases or decreases in price (jitters), pricing shooting up rapidly and then gradually decreasing (rockets and feathers), an increase in pricing slowly followed by a rapid decline to the price's starting point (balloons and rocks), pricing increases or decreases for longer but transitory periods between two values (alternating prices), and frequent pricing changes in a seemingly random manner (random jumps).[38] These findings were confirmed in several studies on online marketplaces.[39] Notably, said patterns are not conclusive evidence of algorithmic pricing, and would require a large amount of data.

Antitrust enforcers are beginning to deploy automated tools to bridge this information gap. The UK's Competition and Markets Authority (CMA) has developed a tool to identify resale price maintenance through scraped data, while agencies in Colombia, Greece, and Armenia have implemented systems to monitor daily price updates. However, these methods face significant hurdles; daily snapshots may miss high-frequency algorithmic changes, and the lack of centralized data repositories has already led the CMA to withdraw a previous cartel screening tool.[40] Research also indicates that detection models are difficult to transfer between jurisdictions. Huber, Imhof, and Ishii found that while models trained on local data achieved algorithmic pricing detection rates as high as 97%, accuracy dropped significantly when applied to foreign markets due to differing institutional dynamics.[41] As a result, AI detection tools face considerable hurdles in their development, and may prove inadequate depending on how they gather pricing data.[42]

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[37] Calvano, *supra* note 12 at 15–16.
[38] Phillip Hanspach, Geza Sapi & Marcel Wieting, "Algorithms in the Marketplace: An Empirical Analysis of Automated Pricing in E-Commerce" (2022) 69 Information Economics and Policy at 17.
[39] Calvano, *supra* note 12 at 18–19.
[40] *Ibid*, at 20–26.
[41] Martin Huber, David Imhof & Rieko Ishii, "Transnational Machine Learning with Screens for Flagging Bid-Rigging Cartels" (2022) 185 J of the Royal Statistical Society Series A: Statistics in Society 3 at 1075; Calvano, *supra* note 12 at 23–24.
[42] Calvano, *supra* note 12 at 20–16.

(b) Audits and Ex Ante Tests

To address anticompetitive uses of pricing algorithms, governments have two tools at their disposal, namely empirical audits, which measure the effects of an algorithm by inputting data and observing the outputs, and technical audits, which examine the structure or code of the algorithm. Empirical audits have been effective at detecting anticompetitive behaviour, as was illustrated in the European Commission's investigation of Google's search engine. There, the Commission gathered terabytes of data to prove that Google's algorithm favoured its own services.[43]

In addition, following an investigation—either an observational study, or a sandbox analysis where access to the algorithm is granted—a government could propose changes to address anticompetitive concerns.[44] Calzolari has argued that the EU could leverage commitment decisions to address algorithmic collusion.[45] A government could propose changes such as removing certain inputs, specifically competitor pricing data, or changing the algorithm itself to ensure that it fosters competitive pricing. Other researchers have proposed requiring algorithmic testing prior to deployment.[46] These approaches offer clarity and may serve as proactive guides for both enforcers and companies.

One proposed test within this framework is algorithmic re-training. The fix is that, if two Q-learning algorithms are operating at supracompetitive prices, re-training one of them will result in a dramatic increase in profits for the modified algorithm. This does not happen if both algorithms are operating competitively.[47] However, this test is limited to its experimental setting and would require access to the proprietary algorithms themselves.

Given the findings of Grondin et. al., it is also doubtful that re-training would have any effect on deep learning algorithms, as they can easily adapt to new situations.[48] Deep learning algorithms are black boxes, meaning that they learn without human input and operate with unintelligible internal logic.[49] Auditing the internal operations of a complex deep learning

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[43] Calvano, *supra* note 12 at 26.
[44] *Ibid*.
[45] Luca Calzolari, "The Misleading Consequences of Comparing Algorithmic and Tacit Collusion: Tackling Algorithmic Concerted Practices Under Art. 101 TFEU" (2021) 6 European Papers 2 at 1195.
[46] Calvano, *supra* note 12 at 29.
[47] Mattheo Courthoud, "Algorithmic Collusion Detection" (2021) at 15.
[48] Grondin, Charpentier & Ratz, *supra* note 23.
[49] Jeremy Petch, Shuang Di & Walter Nelson, "Opening the Black Box: The Promise and Limitations of Explainable Machine Learning in Cardiology" (2022) 38 Canadian J of Cardiology 2 at 204.

algorithm is so prohibitively difficult that finding explanations for one algorithm requires a team of dedicated researchers.[50]

With that said, one study has proposed changing deep reinforcement learning algorithms to comply with antitrust law. Schletchinger found that, by including a rules-based or interpretable layer designed to foster competition, AI agents acted competitively and did not trend towards a supracompetitive price.[51] This could serve as a path forward for specific AI legislation.

IV. Conclusion

The problem of "algorithmic collusion" is that it is not, in fact, "collusive." Algorithms are designed to find the optimal solution to a specific problem. In this case, the optimal solution to the problem of maximizing long term profits is learning the highest price possible and how to stay there. That some algorithms do so better than others, with patterns or not, is not evidence of "collusive" and "non-collusive" states. Instead, it demonstrates the difficulty of creating algorithms sufficiently complex and adaptable so that they can consistently learn the optimal solution to the pricing problem.

Further research could examine how different courts have tackled algorithmic pricing and collusion through algorithms, and in doing so identify how anti-competitive outcomes driven by independent algorithms would be addressed. If it turns out that the law, along with new legislation, are incapable of addressing this problem that various countries are trying to address, new approaches should be considered. The best approach would likely be specific AI legislation that aims to maximize competition without sacrificing efficiency and ideally ensuring some sort of algorithmic transparency.

[50] Vikas Hassija et al, "Interpreting Black-Box Models: A Review on Explainable Artificial Intelligence" (2024) 16 Cognitive Computation, at 48.
[51] *Supra* note 32 at 110-111.

Interpreting the Concept of "abuse" in EU Competition Law: A Critical Examination of the Uncertainties and Inconsistencies in Article 102 of the Treaty on the Functioning of the European Union

By Liliana Lipman

I. Introduction

The *Treaty on the Functioning of the European Union* ("TFEU") is the primary source of Competition Law in the EU. Articles 101-109 of the *TFEU* aim to define the fundamental concepts of Competition Law, such as "abuse," and govern anti-competitive behaviour. These articles *should* provide a clear and consistent framework for undertakings, so as to not disturb the competitive environment. However, in practice, this framework remains vague, leading to inconsistent application and legal uncertainty for undertakings. Article 102 is particularly problematic for the operation of EU Competition Law, as its unclear concept of "abuse" and minimal examples provide little legal certainty for undertakings, resulting in a myriad of arbitrary rulings. For the purposes of this article, "legal certainty" will consist of two vital tenets—clarity and predictability[1]—while "inconsistency" will cover judicial action beyond the prescribed scope of Article 102.

Article 102 of the *TFEU* prohibits the 'abuse' of a 'substantial' or 'dominant position within the internal market', where such undertakings could impact 'trade between [EU] Member States'.[2] The Article names well-recognised abuses such as 'unfair purchase or selling prices' or 'limiting production' but provides 'little clarity' on the scope of the term "abuse." This 'elusive notion of abuse'[3] has led to little legal certainty for undertakings, meaning they can *de facto* be penalised for actions not-alluded-to in the Article, such as margin squeezing in the case of *Deutsche Telekom.*[4]

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[1] Hans Gribnau, "Legal Certainty: A Matter of Principle" (2013), online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2447386 at 84.
[2] Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C 115/13, art 102.
[3] Pablo Ibanez Colomo, "The (Second) Modernisation of Article 102 TFEY: Reconciling Effective Enforcement, Legal Certainty and Meaningful Judicial Review" (2023) 14 *Journal of European Competition Law & Practice 8* at 2.
[4] Case C-280/08 P *Deutsche Telekom AG v Commission of the European Communities* [2010] ECLI:EU:C:2010:603.

In contrast, s. 78(1) of Canada's *Competition Act* clearly defines abuse as "any act intended to have a predatory, exclusionary or disciplinary negative effect on a competitor."[5] This definition is supplemented by a list of abusive practices and provides a test for the assessment of emerging anti-competitive conduct (in s. 79). While the Act has also been criticised for its vague provisions,[6] the combination of a statutory definition, a list of enumerated examples, and a mechanism to assess tenuous conduct offers a much more comprehensive framework for undertakings. This provides businesses with greater legal certainty, and reduces the risk of arbitrary application, in comparison to the *TFEU*.

Resultantly, this article will criticize the unclear notion of "abuse" in Article 102, arguing that it fosters a climate of uncertainty for undertakings in EU Competition Law. Firstly, the lack of legal certainty surrounding abuse will be discussed, concluding that Article 102 lacks the essential tenets of predictability and clarity.[7] The EU's response to this uncertainty will then be examined, arguing that guidelines and case law surrounding Article 102 remain insufficient. This insufficiency will be supplemented by an investigation into the arbitrary application of various tests, and the inconsistent administration of Article 102 in practice. The final section will consider the issue of reform and potential recommendations for Article 102.

II. The Legal Certainty Deficit

Legal certainty is a fundamental principle of the law, a principle that Dworkin suggests presupposes predictability and clarity.[8] The *TFEU* constructs the foundation of the EU's legal system and so *should* follow these tenets of legal certainty. However, Dunne contends that the unclear notion of abuse in Article 102 has denied undertakings' "certainty regarding the parameters of competition law and its requirements."[9]

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[5] *Competition Act*, RSC 1985, ss 78–79.
[6] Blake, Cassels & Graydon, "Blakes Comments on the Future of Competition Policy in Canada" (Blake, Cassels & Graydon, 2023), online: https://www.blakes.com/getmedia/86f55091-7aee-4c60-bbbe-0c8dfadb1cd8/Blakes-Comments-on-the-Future-of-Competition-Policy-in-Canada.pdf.aspX.
[7] Gribnau, *supra* note 1.
[8] Ronald Dworkin, "Law's Empire" (1986) *Harvard University Press,1st ed*, at 351.
[9] Niamh Dunne, "Commitment Decisions in EU Competition Law" (2014) 10 *Journal of Competition Law and Economics* at 2.

This lack of legal certainty is clarified when considering that "the majority of cases [recently] investigated by the EC (European Commission)" are not covered in Article 102.[10] For example, the EC established instances of self-preferencing as abusive conduct through *Google Shopping,*[11] despite Vesterdorf arguing there is no legal basis for abusive self-preferencing under Article 102.[12] The subsequent proliferation of digital platform cases, such as *Apple – App Store Practices (music streaming)*[13] and *Amazon Buy Box,*[14] further highlight the unclear scope of permissible conduct under Article 102, as each case concerns different forms of abusive self-preferencing, causing a lack of clear precedent and legal certainty for undertakings.

Without the essential tenets of legal certainty – clarity and "predictability – the concept of abuse remains vague, leaving businesses unclear on whether their conduct is abusive or "may qualify as abusive"[15] in certain settings. Such ambiguity causes a substantial problem for the operation of competition in the EU, as it has fostered an "arbitrary and unstable"[16] environment where effective competition can *de facto* be rendered abusive, reducing certainty and consistency in the enforcement of Article 102.

III. Responses to Uncertainty: *Hoffmann-La Roche* and EC Guidelines

Lorenzo Pace argues that the Court of Justice of the European Union (CJEU) and the EC have responded to critiques of inconsistency in Article 102 by taking steps to clarify the concept of abuse, particularly in exclusionary cases.[17] These developments, Simon de Ridder suggests, offers a comprehensive evidentiary framework for undertakings.[18] Exclusionary practices are defined by the exclusion or marginalization of "less efficient competitors,"[19] while exploitative

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[10] Lisa Kaltenbrunner et al, "European Union: Abuse of Dominance and Article 102 of the TFEU" (2022) *Global Competition Review*.
[11] Case T-612/17 *Google and Alphabet v Commission* [2021] ECLI:EU:T:2021:763.
[12] Nicolas Petit, "Theories of Self-Preferencing Under Article 102 TFEU: A Reply to Bo Vesterdorf" (2015), online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2592253 at 1.
[13] Commission, *Apple – App Store Practices* (Case AT.40437) [2024] ECLI:EU:EC:2024:3554.
[14] Commission, *Amazon Buy Box* (Case AT.40703) [2022] ECLI:EU:EC:2022:40703.
[15] Heike Shweitzer and Simon De Ridder, "How to Fix a Failing Art. 102 TFEU: Substantive Interpretation, Evidentiary Requirements, and the Commission's Future Guidelines on Exclusionary Abuses" (2024) 15 *Journal of European Competition Law & Practice 4* at 18.
[16] I. Lianos, "Competition Law as a Form of Social Regulation" (2020) 65 *Antitrust Bulletin 1*.
[17] Lorenzo Federico Pace, "European Competition Law: The Impact of the Commission's Guidance on Article 102" (2011) *Edward Elgar Publishing 1st ed,* at 140.
[18] Heike Shweitzer, *supra* note 15.
[19] Jorge Padilla, "What is an Exclusionary Abuse?" (2025), online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5006000 at 6.

abuses refer to conduct that exploits customers rather than causes harm to competition.[20] These scholars contend that legal clarity has been achieved through consistent reference to case law—namely, the case of *Hoffmann-La Roche*—and the introduction of Guidance Papers in 2009 and 2024. These developments suggest a degree of clarity in Article 102's application.

This clarity is first reflected in *Hoffmann-La-Roche [1979],* where loyalty rebates and exclusive purchase agreements by a dominant vitamin producer foreclosed competitors from accessing the market.[21] In this landmark case, the CJEU defined abuse as conduct which leads to "weakened competition," a definition that has since aided a myriad of landmark competition cases, including contesting rebates' ability to foreclose[22] in *Intel*[23] and *Michelin.*[24] Following de Ridder's view, this defining precedent on abuse contributes to the growing "coherent evidentiary law framework" that supplements Article 102.[25] Pace corroborates this view, arguing that the CJEU's repeated reference to *Hoffmann* indicates increasing consistency in the application of Article 102.

More recently, the EC's 2009 and 2024 draft guidelines purport to clarify the term "abuse". The 2009 guidelines achieve this by identifying key factors indicating abusive conduct, including "direct evidence of ... exclusionary strategy" and possible evidence of actual foreclosure.[26] Similarly, the 2024 guidelines seek to clarify the application of the rules of the Treaty by offering a set of assessments to determine whether conduct has had an abusive effect.[27] These assessments include establishing the market position of the dominant undertaking—with greater dominance raising the probability of exclusionary effects—and evaluating the extent of the allegedly abusive conduct, with a higher share of sales increasing exclusionary potential (s70(D)).[28] De Ridder suggests that these guidelines offer a coherent legal framework by providing numerous areas of

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[20] Gregory J Werden, "Exploitative Abuse of a Dominant Position: A Bad Idea That Now Should Be Abandoned" (2021) *17 European Competition Journal 3* at 2.
[21] Case 85/76 *Hoffmann-La Roche & Co. AG v Commission of the European Communities* [1979] ECLI:EU:C:1979:36.
[22] J.S. Venit, "The Judgement of the European Court of Justice in Intel v Commission: A Procedural Answer to a Substantive Question?" (2017) *13 European Competition Journal 2* at 1.
[23] Case C-413/14 P *Intel Corporation Inc. v European Commission* [2017] ECLI:EU:C:2017:632.
[24] Case 322/81 *Michelin v Commission of the European Communities* [1983] ECLI:EU:C:1983:313.
[25] Shweitzer, supra note 15.
[26] Eur-Lex, "Communication from the Commission – Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings (Text with EEA Relevance)" (2009), online: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52009XC0224(01).
[27] European Commission, Guidelines on Exclusionary Abuses of Dominance (Europa, 2023), online: https://competition-policy.ec.europa.eu/public-consultations/2024-article-102-guidelines_en.
[28] *Ibid*.

assessment for abusive conduct. This helps undertakings determine whether their conduct may be deemed abusive, even if it is not explicitly named in Article 102.

Resultantly, Pace and de Ridder argue that the guidelines' clarification, in accordance with *Hoffmann*,[29] set up a "coherent evidentiary law framework"[30] much like ss. 78 and 79 of the *Competition Act*, reducing "uncertainties in the substantive interpretation of Article 102"[31] for undertakings.

IV. Unresolved Ambiguity: Critiques of *Hoffmann-La Roche* and EC Guidelines

Despite these *prima facie* developments in Article 102 guidance, the concept of 'abuse' remains vague, failing to resolve concerns over legal certainty for undertakings. Firstly, although *Hoffmann* is frequently cited, its concepts—particularly what qualitative or quantitative threshold constitutes weakened competition[32]—remain vague, fostering uncertainty over when "competition on merits"[33] becomes abusive behaviour.[34] Resultantly, conduct that undertakings may reasonably believe to be permissible can *de facto* be considered abusive. For example, in *Michelin,*[35] where rebates did not fall into either the "loyalty" or "volume" rebates category identified in Hoffman,[36] they were still considered abusive, thus displaying the need for an articulated boundary. This demonstrates the persistent ambiguity surrounding the concept of abuse.

The need for specificity is mirrored in the 2009 guidelines, where the extent of "factors [indicating] abusive conduct"[37] remains unspecified, leading to uncertainty over the scope of these criteria. While the guidelines identify factors likely to lead to anti-competitive foreclosure,[38] they fail to supplement this guidance with clear evidentiary thresholds—for example, whether actual foreclosure must be proven, or whether potential foreclosure is sufficient. This uncertainty is

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[29] *Hoffmann-La Roche, supra* note 21.
[30] Shweitzer, supra note 15.
[31] *Ibid*.
[32] *Hoffmann-La Roche, supra* note 21.
[33] A. Jones et al, "Article 102 TFEU: Conduct Which Can Be an Abuse" (2023) *Oxford University Press, 15th ed*. at 349.
[34] A. Lamadrid, "The Concept of Abuse in EU Competition Law" (2024) *Chillin'Competition,* online: https://chillingcompetition.com/2013/12/16/the-concept-of-abuse-in-eu-competition-law/.
[35] *Michelin*, *supra* note 24.
[36] Ian Giles and Yasmine Gaspard, "The Intel case" (2017) *Competition Law Insight*, online: https://www.competitionlawinsight.com/competition-issues/abuse-of-dominance/article122461.ece?origin=internalSearch.
[37] *Ibid*.
[38] Eur-Lex, *supra* note 27.

materialised when considering that the EC engaged a hypothetical As-Efficient-Competitor (AEC) test to prove evidence of actual foreclosure[39] in *Intel,*[40] despite there being no basis for hypothetical foreclosure in the guidelines. Without a clear scope, the application of the 2009 guidelines appears arbitrary, allowing for conduct to be deemed abusive even without actual harm to competition. This contributes to legal uncertainty surrounding 'abuse' for undertakings.

More broadly, the 2024 draft guidelines completely omit discussion of exploitative abuse, leaving undertakings uncertain about whether their conduct constitutes anti-competitive behaviour. Where the 2024 guidelines *do* offer guidance (on exclusionary abuse), the provided assessments display inconsistencies, with section 70(D) stating that a higher sales share indicates abuse, before paradoxically stating that "conduct affecting a small share of total sales […] can be capable of having exclusionary effects."[41] This contradiction prolongs legal uncertainty for undertakings surrounding the concept and scope of 'abuse' in both the exclusionary and exploitative form.

Ultimately, the lack of clarity over what constitutes abuse in both *Hoffmann* and the EC guidelines creates significant legal uncertainty for businesses, blurring the boundary between abuse and legitimate competition on merits.[42] Thus, the CJEU and EC's attempts to provide legal clarity for undertakings over the term 'abuse' remain insufficient, contributing to significant uncertainty and inconsistency in Article 102's application.

V. Unpredictable Application: The AEC and SSNIP Tests

Unlike the *Competition Act*, Article 102 does not outline an assessment for abusive conduct. When assessing exclusionary practices, the CJEU has routinely cited the AEC test and the Small but Significant and Non-transitory Increase in Price (SSNIP) Test. However, the EC's failure to clarify when these tests apply has resulted in inconsistencies in their practical implementation.

[39] *Ibid*.
[40] Commission, *Intel Corporation Inc* (Case AT.37990) [2009] ECLI:EU:EC:2009:37990.
[41] European Commission, *supra* note 27.
[42] Ibanez Colomo, *supra* note 3, at 8.

The AEC test assesses whether conduct is "capable of harming as-efficient competitors,"[43] and has become a vital test in landmark cases, namely *Intel, Post Danmark II,*[44] *TeliaSonera,*[45] *and Deutsche Telekom.*[46] Despite the test's frequent use, AEC is not explicitly mentioned in the EC's 2009 or 2024 guidelines, meaning its application can appear arbitrary, fostering further uncertainty over the application of Article 102. This is clarified when considering that AEC was historically developed to assess predatory pricing and loyalty rebates,[47] but has since been applied to margin squeezing (*Deutsche Telekom*)[48] and refusal to supply (*Microsoft Corp*),[49] displaying inconsistency in the application of the AEC test. Had the test been mentioned and defined in EC guidance, undertakings could use it to conduct an *ex-ante* assessment evaluating whether their behaviour could be abusive, but its undefined scope means undertakings cannot confidently rely on it.

Similarly, the SSNIP test remains entirely absent from EC Guidance, despite being vital for market definition in landmark cases such as *IMS Health,*[50] *AstraZeneca,*[51] *and UPC Hungary.*[52] Despite its frequent use, the SSNIP test's absence from EC guidelines leaves undertakings unclear on whether the test should be consistently used to define the relevant market, or whether modern models like the Small but Significant Non-Transitory Decrease in Quality (SSNDQ) test should be adopted.

Ultimately, the absence of clear EC guidance surrounding the application of the AEC and SSNIP tests generates significant legal uncertainty for undertakings. While both tests play a critical role in determining abusive conduct and relevant markets, their undefined scope fosters inconsistency in both their application, and uncertainty over their relevance to Article 102 cases.

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[43] Damien J Nevin, "The As-Efficient Competitor Test and Principle: What Role in the Proposed Guidelines?" (2023) *14 Journal of European Competition Law & Practice* 8 at 2.
[44] Case C-23/14 *Post Danmark A/S v Konkurrenceradet* [2015] ECLI:EU:C:2015:651.
[45] Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECLI:EU:C:2011:83.
[46] *Deutsche Telekom AG*, *supra* note 4.
[47] Miroslava Marinova, "The As-Efficient Competitor Test: A Cornerstone or a Controversy in EU Competition Law?" (2025) *Competition Law Insight,* at 3.
[48] *Deutsche Telekom AG*, *supra* note 4.
[49] Case T-201/04 *Microsoft Corp. v Commission of the European Communities* [2007] EU:T:2007:289.
[50] Case T-184/01 R *IMS Health Inc. v Commission of the European Communities* [2001] ECLI:EU:T:2001:259.
[51] Case C-457/10 P *AstraZeneca AB and AstraZeneca plc v European Commission* [2012] ECLI:EU:C:2012:770.
[52] Case T-20/17 *Hungary v Commission* [2019] ECLI:EU:T:2019:448.

VI. Arbitrary Enforcement in Practice: Exclusionary and Exploitative Abuses

The unclear concept of 'abuse' in Article 102 has undoubtedly been problematic for the operation of competition law. The article's broad and vague provisions[53] have fostered arbitrariness in administrative action[54] surrounding both exclusionary and exploitative abuses.

This arbitrariness of application is evident in a multitude of exclusionary abuse cases; most notably, in *Tetra Pak II,*[55] *Continental Can*,[56] and *TeliaSonera*,[57] where the Commission expanded the scope of Article 102 to apply to non-dominant undertakings, include mergers, and cover margin squeezing. These developments reveal how the unclear definition of 'abuse' has allowed penalization for conduct that is not specified in Article 102, which is sometimes even contrary to the 2009 guidance. For example, the EC's recognition that a "stronger […] dominant position"[58] is a relevant factor in determining abuse.

Although Siniša Rodin permits this arbitrary administrative action,[59] arguing that it falls within the Article's general concept,[60] it is problematic to assume consistent interpretation among undertakings, especially given the inconsistent application of the Article. For example, abuse of refusal to supply was found in *Lithuanian Railways*,[61] but not *Bronner*,[62] causing uncertainty over what conduct falls within the "general concept"[63] of abuse. Similarly, in *TeliaSonera*,[64] the EC applied a stricter legal standard[65] than suggested in the 2009 guidelines, further displaying arbitrariness in Article 102's enforcement. Therefore, a lack of clarity regarding the scope and elements of abuse has led to the arbitrary application of Article 102 in practice, resulting in legal uncertainty for undertakings over what constitutes abuse.

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[53] Ibanez Colomo, supra note 3, at 3.
[54] *Ibid*.
[55] Case C-333/94 P *Tetra Pak International SA v Commission of the European Communities* [1996] ECR I-5951.
[56] Case 6-72 *Continental Can v Commission of the European Communities* [1973] EU:C:1973:22.
[57] *Konkurrensverket v TeliaSonera*, supra note 45.
[58] Eur-Lex, supra note 27.
[59] Ibanez Colomo, supra note 3, at 3.
[60] S. Rodin, "Interpretation in the Court of Justice of the European Union: Originalism, Purposivism, and L'Economie Generale" (2019) 34 Academy on Human Rights and Humanitarian Law: Articles and Essays on Gender Violence and International Human Rights 602 at 3.
[61] Case T-814/17 *Lietuvos geležinkeliai AB v European Commission* [2020] ECLI:EU:T:2020:545.
[62] Case C-7/97 *Bronner v Mediaprint* [1998] ECR I-7791.
[63] Rodin, *supra* note 60, at 602.
[64] *Konkurrensverket v TeliaSonera*, supra note 45.
[65] Fernando Diez, "Jurisprudence of the ECJ on Margin Squeeze: From Deutsche Telekom to TeliaSonera and Beyond… to Telefonica!" (2011), online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1851315 at 16.

For exploitative abuse, Marco Botta argues that the EC's persistent prioritization of exclusionary abuse has left exploitative misconduct as a legal ambiguity. Despite Article 102 including "unfair purchase or selling prices or […] unfair trading conditions,"[66] the scope of exploitative practices remains narrow, with no clarification in the 2024 draft guidance. This has created legal uncertainty regarding the range of exploitative conduct, leaving undertakings without guidance on whether practices constitute abuse.[67] This is encapsulated by the "non-enforcement paradigm,"[68] the idea that exploitative abuses are rarely enforced in practice, with *United Brands*[69] being the only routinely cited precedent despite its "elusive test."[70]

While practices such as oppressive contract terms in *SABAM*[71] and excessive documentation requirements in *General Motors*[72] have been clearly classified as unfair trading conditions,[73] the development of the digital market has introduced new forms of exploitative abuse,[74] such as privacy abuses in *Facebook*[75] which lie beyond Article 102's tangible[76] understanding of exploitative conduct. As Botta argues, exploitative abuses have expanded in recent years without corresponding legal clarity.[77] With an outdated legal framework, absent case law, and lacking EC Guidance, undertakings are left unable to assess when behaviour becomes exploitative. Such unpredictability limits legal certainty, thus posing a significant problem for the operation of competition.

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[66] TFEU, *supra* note 2.
[67] P. Akman, "Exploitative Abuse in Article 82EC: Back to Basics?" (2008) *ResearchGate,* at 5.
[68] Marco Botta, "Exploitative Abuses: Recent Trends and Comparative Perspectives" (2021), online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3909894 at 2.
[69] Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission of the European Communities* [1978] EU:C:1978:22.
[70] Grant Stirling, "The Elusive Test for Unfair Excessive Pricing under EU Law: Revisiting United Brands in the Light of Competition and Markets Authority v Flynn Pharma Ltd" (2020) *16 European Competition Journal* 2 at 1.
[71] Case C-360/10 *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV* [2012] EU:C:2012:85.
[72] Case-375/97 *General Motors Corporation v Yplon SA* [1999] EU:C:1999:408.
[73] TFEU, *supra* note 2.
[74] Y.S. Choy, "Modern Competition Law of Exploitative Abuse in the Digital Economy from a Comparative Perspective" (2021) *Kyungpook National University Law Journal*.
[75] Case T-451/20 R *Facebook Ireland Ltd v European Commission* [2020] EU:T:2020:515.
[76] Stanford Encyclopedia of Philosophy, "Exploitation" (2022) *Stanford Encyclopedia of Philosophy*, online: https://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=exploitation.
[77] Botta, *supra* note 68, at 2.

VII. Recommendations for Reform

While reform is necessary to offer legal certainty to undertakings, the evolutionary nature of competition presents practical obstacles to the development of a codified framework. From intervention over monopolies after the *Treaty of Rome*,[78] to the development of digital platforms, markets have expanded into spaces unimaginable from the European Economic Community's inception. Resultantly, composing a list of specific forms of abuse is impossible, as ever-evolving markets and competitive practices lead to unforeseen abuses. Therefore, a flexible policy must be adopted. Two key areas for reform have emerged: clarity over the concept of abuse, and procedural clarity on how to enforce it.

The *TFEU* could benefit from a broad definition of abuse and three-part test for abuse of dominance, as seen in ss. 78 and 79 of the *Competition Act*. The s. 78 definition of anti-competitive conduct, as mentioned in the introduction, creates a flexible but clearer "general concept"[79] of abuse which, when supplemented by the s. 79 test, reduces the scope for undertakings to claim legal uncertainty. The difficulty with a strict definition of abuse is that it is inherently broad. By ascribing the term definitions like predatory, exclusionary, or disciplinary, a range of abusive behaviour can be captured, allowing for the accommodation of new abusive behaviours. Although such breadth could be criticized for enabling arbitrary enforcement, procedural clarity can mitigate potential inconsistencies.

Three of Damien Geradin's suggestions for procedural clarity merit attention. Firstly, the continuation of the "commitments procedure,"[80] where businesses offer binding promises to amend abusive behaviour. This allows for new forms of abuse to be penalized without hefty fines, offering support to undertakings where the permissibility of conduct was previously unclear. Secondly, to set time limits on investigations,[81] providing undertakings with certainty over the length of their investigation. Consistent time limits would enhance procedural clarity and encourage enforcers to adopt standardized analytical frameworks, mirroring the EC's mechanism

[78] Anca D. Chirita, "A Legal-Historical Review of the EU Competition Rules" (2014) *63 International and Comparative Law Quarterly* 2 at 311.
[79] Rodin, *supra* note 60, at 602.
[80] Damien Geradin and Stijn Huijts, "Abuse of Dominance: Has the Effects-Based Analysis Gone Too Far?" (2021), online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4900869 at 14.
[81] *Ibid*, at 14.

for merger control.[82] Thirdly, leveraging large national authorities, such as the *Bundeskarttelamt,*[83] to address potentially abusive conduct before it reaches supranational attention. This would reduce seemingly arbitrary EC fines while building precedent on unexplored abuse categories, offering greater guidance for undertakings on what constitutes abuse.

Reform in these areas will slowly enhance clarity and predictability over the Article's enforcement, allowing businesses to operate within the parameters of legal certainty.

VIII. Conclusion

This paper demonstrates that Article 102 of the TFEU has a fundamental deficiency of legal certainty, leading to inconsistent application and arbitrary outcomes for undertakings. The conceptual vagueness of the term abuse, compounded by inadequate guidelines and precedent, creates an enforcement framework that fails to satisfy the essential demands of clarity and predictability. This legal uncertainty is exacerbated by the inconsistent application of legal tests, creating perceptions of arbitrariness in the law, where competition on merit may *de facto* be deemed abusive. Whilst the EC and CJEU have attempted to address these concerns through guidelines and case law, meaningful reform requires a foundational re-evaluation of how Article 102 defines and identifies abusive behaviour. Only through this approach can legal certainty for undertakings and consistent application be achieved.

[82] *Ibid*, at 14.
[83] *Ibid*, at 15.

Applying a Gender Lens to Competition Policy in the Context of Pink Taxes

By Jeanine Varney

Since the 1980s, toys that used to have one neutrally coloured version have started to be made into two versions: one keeping the original colouring, and another being coloured pink.[1] [2] Before the 1980s, having one version of an originally non-gendered toy produced continued growth in sales with a constant new supply of children due to the high birth rates of the baby boom. As birth rates dropped in the 80s, 90s, and 2000s, toy companies desired continued growth but had a lower child population by which to do so. The solution emerged to create different, gendered versions of the previously gender-neutral products.[3] [4] For example, there might be baby dolls for girls or toy trucks for boys, but many 'gender neutral' or latently 'boy' toys, like building sets, did not have two gendered versions in earlier decades. The recent differentiation in colour meant that a toy company could sell a family with children of different genders two different products, one for girls and one for boys, instead of the family handing down a product irrespective of gender.

This trend, in the face of competition law, is ultimately neutral. Having two versions of an identical product does not inherently influence people's behaviour, because some rational consumers, all else being equal, would choose the original version, and some would choose the new version. However, similar to other products on the market with gendered versions, like insoles or deodorant, companies decided to often price the two products differently based on gender.[5] When this happens in adult markets, women's products—even if they are functionally identical to the men's versions—tend to be priced higher.[6] This difference in price is called a "pink tax" and leads to women paying more for the products over the course of their lives. With the new versions

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[1] Megan Maas, "How Toys Became Gendered" (9 December 2019), online: <msutoday.msu.edu> [https://archive.ph/leYcO].

[2] Carys Betteley, "Children's toys 'marketed at gender' over the years", online: <bbc.com> [https://archive.ph/wip/FDd5B].

[3] Elizabeth Sweet, "Toys Are More Divided by Gender Now Than They Were 50 Years Ago", online: <theatlantic.com> [https://archive.ph/wip/sEjCc].

[4] Kira Cochrane, "The Fightback Against Gendered Toys", online: <theguardian.com> [https://archive.ph/wip/mPyp1].

[5] Neha Georgie, "At first blush—taking a competition lens to healthcare pink taxes", (2025) 16:2 J of European Competition Law & Practice 115 at 115—116.

[6] Martin Perez, "Does The Pink Tax Still Exist? From our Research, Yes." (3 February 2021), online: <parsehub.com> [https://archive.ph/wip/x6ONP].

of previously neutral children's toys, the pink tax had potentially come to the children's toy market. This paper will trace the different methods used to measure the pink tax, and analyze two areas of competition law, troubling the concept of the rational consumer and understanding the idea of markets in this case of gendered products. The essay will also examine perspectives on pink taxes and offer solutions for the problem of pink taxes in children's toys.

I. Measuring Pink Taxes

There have been relatively few studies of the magnitude of pink taxes in children's toys. Part of this dearth of research is because pink taxes can encompass different levels of depth and analysis. For example, there is a general examination of the prices of gendered toys (sometimes also including non-gendered or explicitly gender neutral toys), such as one done on pricing of toys in New York City by the New York City Department of Consumer Affairs.[7] These studies tend to be broad, encompassing multiple categories of toys, such as all "preschool toys" marketed to girls versus boys, as opposed to a more granular level of comparing "preschool building sets" for girls versus boys.[8] These wider categories do provide a broad measure of a pink tax if buying more specifically gendered toys, but sometimes the comparisons between toys in this category are not fully comparable, with girls' and boys' toys being qualitatively different.

A second level on which to analyze a pink tax is an 'apples-to-apples' view of products, comparing a 'boy' version of a product with a 'girl' version of the same product. This method of analysis is much less common and has not been systematized as much as the broader category model, but it is the method of analysis I will use in this article.[9] The products under this model tend to be products that are not inherently gendered—the type of play they facilitate does not gravitate towards a stereotypical gender role. In a lot of these products, there is a model that is more for boys, or gender neutral, and an alternative product that has the same features, but is pink and has longer eyelashes. This changes the targeted gender of the product without changing its other attributes. Since these products are harder to research, especially online, because each version often must be found independently, studies about the pink tax in children's products often

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[7] Bill de Blasio & Julie Menin, "From Cradle to Cane: The Cost of Being a Female Consumer" (2015) at 7, online: <nyc.gov> [https://archive.ph/wip/faFkC].
[8] *Ibid* at 18, 21—24.
[9] Daniel Farhat & Andrea Stanaland, "Beyond the pink tax: Are Amazon toy shoppers disadvantaged when searching by gender?" 16 Research in Business and Economics Journal at 2.

rely on the large category model for research on pink tax differences. However, when looking up these products, it is clear that there are significant differences in price for these basically identical products based on gender among some brands, with the 'girl' product usually being more expensive.[10] However, when examining other brands of gender differentiated products, the products are priced the same.[11] This suggests that pink taxes on some children's otherwise undifferentiable products exist, but they are not present in all cases. To fully delve into the potential differences in price, more data would be needed.

II. The Rational Consumer, Parents, and Children

Competition law theory is, in part, grounded in the idea of the rational consumer and rational choice theory. The rational consumer is one who is informed, maximizes utility and is a rational actor.[12] The introduction of both children and gender complicates these assumptions that underlie competition law. The pink tax is a significant issue in adult men and women's products, but the theory of the rational consumer can sometimes minimize it. After all, a woman could always purchase a cheaper men's deodorant or shaver compared to the more expensive women's equivalent. While the gendered price discrimination of the pink tax is still there, fully rational consumers, who are willing to overlook those aspects of the product that are gendered, could circumvent the pink tax through their actions. However, even in this situation, there are critiques of the rational consumer model, such as that the model is really a conception of the rational *man*, who has historically been catered to, and discounts any differences in the choices of the rational consumer made on gendered or intersectional lines.[13] Children also complicate this idea of rational consumers because children are not rational, not informed, and do not tend to maximize utility. While an adult may be able to overlook the fact that the product they choose, often because of price, does not correspond to their gender, children tend to be more inflexible in their preferences between gendered products, especially with toys and costumes.[14] While the parent is the ultimate consumer, if a child is present (physically or in their minds), then the preference for the pink toy

[10] Mattel, "Fisher-Price Shop by Age", online: <shop.mattel.com> [https://archive.ph/wip/1p3rM].
[11]ToysRUs, "Leapfrog", online: <toyrsus.com> [https://archive.ph/wip/g3YCb].
[12] Chris Noonan, "Consumers in Competition Law", (2025) New Zealand LR 253 at 254.
[13] Kati Cseres, "Feminist Competition Law", (2024) 2023-04 Amsterdam Centre for European Law and Governance 1 at 17.
[14] Claire Conry-Murray & Elliot Turiel, "Jimmy's Baby Doll and Jenny's Truck: Young Children's Reasoning About Gender Norm", (2012) 83:1 Child Development 146 at 151, 155—156.

may win out despite a higher price for the same utility. This is one of the reasons why there is discriminatory pricing on the basis of gender: because, many times, contrary to rationality, people will buy the pink product with the higher price. Children are also inherently less rational than adult consumers. Essentially, when children are in the role of consumers, and products are marketed towards interests and stereotypes to which they are sensitive and inflexible, they may purchase (or influence their parents to purchase) products that have heavy pink taxes.

One of the animating factors behind children's inherent irrationality in this sphere is young children's tendency towards inflexibility, including in gender roles and stereotypes.[15] This often occurs most prominently in young children, who are the peak of the "stick some pink plastic on it" consumer demographic. In addition to young children's stubbornness, this may strongly influence their parents to make strictly gender-consistent choices, even when there is a large price differential between toys. Another scenario occurs if children are not there, or the children are infants, who are not really actors. Parents' adherence to gender stereotyping when buying products for their children may also influence them to act differently than the rational consumer. Parents often influence even very young children's toy preferences towards gendered types of toys.[16] Even when children are still in the womb, parents may develop gender stereotypes about them, their traits and interests, which are often strengthened once the children are born.[17] Children in the womb and newborns usually do not portray strongly gendered traits, but gender roles are projected onto them by their parents, such as describing their baby boys as strong and coordinated, and their baby girls as delicate and fine.[18] These gender stereotypes that are projected onto their babies may make parents behave contrary to the habits of rational consumers when encountering a pink tax, potentially contrary to the behaviour they show in their personal purchasing habits. If a parent has a strong conception of their child's gender, they may be more likely to purchase toys that align with that gender conception or encourage their children to play with gender-consistent toys.[19] This

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[15] Michelle Wang, Vivian Ng, Tracy Gleason, "Toy stories: Children's use of gender stereotypes in making social judgments", (2023) 235: 103879 Acta Psychologica 1 at 2.
[16] Josh Boe & Rebecca Woods, "Parents' Influence on Infants' Gender-Typed Toy Preferences" (2017) 79 Sex Roles 358 at 3, 11.
[17] Roland Imhoff & Lisa Hoffman, "Prenatal Sex Role Stereotypes: Gendered Expectations and Perceptions of (Expectant) Parents" (2023) 52 Archives of Sexual Behavior 1095 at 1096, 1102.
[18] Katherine Hildebrandt Karraker, Dena Ann Vogel & Margaret, "Parents' gender-stereotyped perceptions of Newborns: The Eye of the Beholder revisited" (1995) 33 Sex Roles 687 at 695.
[19] Josh Boe & Rebecca Woods, *supra* note 16 at 11.

shows that parents would not exhibit behaviour in line with the rational consumer or rational choice theory in the face of a pink tax on some of those products.

III. Market Analysis

Another issue in the world of competition law and gendered children's toys is how markets for these toys are defined. Infant toys and toys that are simply a different colour bring complications to the idea of markets. In past competition law cases involving gender and gendered markets where there is not much differentiation on the supply side (at least in making the actual product), such as in the Unilever/Sara Lee merger European Commission decision, superficially different products (deodorants) were found to be in different markets due to their different branding and marketing based on gender.[20] This would indicate that, if children's otherwise identical toys appeal to more specific subsets of markets, or are marketed to children and parents on strictly gendered lines, that they too should be thought of as existing in different markets. This analysis of markets would be beneficial for situations where the critical method of analysis is market share, and for ensuring a merged company would not have a monopoly in a gendered market. However, when comparing prices of substantially the same product, as we are in this case, this understanding of markets may hinder our analysis by separating the products and thus making it harder to legally compare them and correct potential pink taxes. Additionally, an understanding that there are two gendered markets may un-equalize the products, essentially locking our understanding of parents as having to choose the product conforming to their child's gender, when a rational consumer should decide between the products with less emphasis on gender.

Another potential pitfall in market analysis is considering who is buying these children's toys. There is not a gender difference in the purchaser of the toys, but rather, the child for which the toy is bought, whose interests are being prioritized. This is different from a normally gendered market analysis where, for example, a deodorant is marketed to men or women, and the primary buyers are men or women, respectively. In this case, the toy may be marketed to or be designed for boys, but it may be a woman buying it. The problem here is that the same group of consumers are switching their mindsets and considerations based on a variable that, rationally, should not be influencing them to the extent that it is.

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[20] *Unilever/Sara Lee Body Care*, COMP/M5658, [2010] OJEU C/2012/023 1 at 11—16.

IV. Perspectives on Pink Taxes

There have been multiple perspectives discussed regarding pink taxes, especially through a variety of feminist lenses. One more radical perspective interrogates pink taxes themselves. Many reports on pink taxes take it to be self-evident that they exist because of meaningful product differentiation, mainly that women and men need different products. This is grounded in the idea that there is some fundamental difference in attributes between men and women that, for example, would require totally different deodorants. Many times, this is not the case, especially due to the former prevalence of unisex versions of products that companies then separated into single sex versions of the products (i.e. a fully separate women's versus men's deodorant section). This framing has significant relevance in examining gendered products in the children's toy market, where many versions of products started as gender neutral, and then separated into 'girls' and 'boys' versions to incentivize the sale of more products. The Fisher Price Soothe 'n Snuggle Otter plush toy has versions in grey and pink with a price difference of over $13.00 CAD, yet, aside from the colour, there is no differentiation in the product itself.[21] The original, unisex grey version (which is closer to an otter's natural colour) has thus been differentially marketed as one for boys or gender-neutral children, using babies in white or blue clothes and a relative minimum of hair, whereas the pink version is shown with babies in pink or purple clothes or that seem to be identifiably female.[22] Following through on this perspective, needlessly gendered products can also create a gendered construction of images of men and women. If a 'girls' version of a product has the anthropomorphic dog having eyelashes and a bow in her hair, and the 'boys' product does not have those attributes, what kind of message does it send about image standards for girls and boys? This also troubles the bases of gender inclusive competition law analysis because, if the same product is considered to be designed for different groups, this may perpetuate gendered stereotypes in the marketplace.

A second perspective on gender and competition law is to examine cartels and cartel formation. Studies and recommendations examining corporate cartels show that cartels are often

[21] Amazon, "Fisher-Price Baby Toy Soothe 'n Snuggle Otter, Pink Plush Portable Sound Machine with Breathing Motion & Lights for Newborns Ages 0+ Months", online: <amazon.com> [https://archive.ph/wip/iAGll].
[22] *Ibid*; Giorgio Monti, "Gender and competition law: an exploration of feminist perspectives", (2025) 16:2 J of European Competition Law & Practice 67 at 69—70.

formed from corporate 'boys clubs,' with less cartel formation between women or when there is more boardroom gender diversity. There do not seem to be cartels currently in children's toys market. However, it is relevant to note that many of the boardrooms of companies making, pricing, and gender differentiating children's toys resemble the scene in the movie *Barbie.* Mattel Inc.—maker of the very differentiated brand of Fisher Price toys—has a corporate governance structure with significant male majorities on the Board of Directors and Executive Leadership.[23] [24]

A third perspective regarding pink taxes in the context of the law is the types of laws under which authorities should target pink. Two of the main laws in this field from the EU are TFEU Article 102(a), which prohibits "directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions" by firms with a dominant position in the market, and TFEU Article 102(c), prohibiting dominant firms from "applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage."[25] Prosecution under the first section has been more successful, and has been used in a wider series of prosecutions than just pink taxes, also applying to issues such as pharmaceutical prices.[26] With pink taxes, laws similar to article 102(a) could be used to target the higher priced version of the product to hopefully bring equity in the pricing of children's toys. The second section also has wide application to gendered issues in the market, like pink taxes, but the second clause of "placing them at a competitive disadvantage" may be harder to definitively prove, especially because the buyers of children's toys could be either gender and may have children of either gender, thus making it harder to prove disadvantaging effects on the ground. However, both sections are interesting and viable approaches to targeting pink taxes.

V. Solutions

A 2023 OECD report and toolkit on gender inclusive competition law illustrated ten strategies for applying a gender lens to competition policy.[27] Some of these strategies do not seem to be relevant to the current situation of children's toys, but others are much more important. The first two strategies suggested in the toolkit are gathering data to understand how anti-competitive

[23] Mattel, "Executive Leadership", online: <corporate.mattel.com> [https://archive.ph/wip/5ayZX].
[24] Mattel, "Governance", online: <investors.mattel.com> [https://archive.ph/wip/RKrEz].
[25] Neha Georgie, *supra* note 5 at 118.
[26] *Ibid*.
[27] OECD, *Gender Inclusive Competition Toolkit*, (Paris: OECD Publishing, 2023) at 7—8.

behaviour hurts diverse groups and utilizing consumer surveys to understand behaviour.[28] These two strategies are the ideal starting points for analysis of pink taxes in children's toys. While there have been large studies on children's toys as a whole, there have not been the apples-to-apples studies that would give a view of how pink taxes may manifest amongst roughly identical products. Additionally, surveys of parents could help assess what elements drive their behaviour in gravitating towards gendered children's toys. This needs to be determined to truly understand the mechanics of pink taxes. For example, if parents are looking at and comparing both versions of a toy, are they seeing a 'boy' toy in the 'boy' aisle and buying it versus a "girl" toy in the "girl" aisle? Depending on what their thought process is, seeing a toy in a gender-segregated aisle may influence a different set of policy suggestions, such as de-gendering the toy aisle, as opposed to if they are consciously comparing both versions of a toy and going with the one upon which they wish to construct gender.

De-gendering the toy aisle may also be a solution from a market perspective. This solution is to ensure that gendered versions of the same toy are considered in the same market. It would be easy, especially if they are separated spatially in a store or website, to consider the same toy in pink or blue/neutral versions to have two different markets, which would hinder competition analysis and enforcement, the way we see in men's and women's deodorants today.[29] Placing toys next to each other may allow parents to more rationally compare the toys and their prices by considering them in the same market. Placing them next to each other may also induce stores to equalize the prices due to the inconsistency of having two toys with wildly different prices adjacent to each other.

After de-gendering toy aisles, if there are still clear gender differentiations in price and in consumer buying habits, an analysis of whether markets should be separated should be considered. This falls into strategy three of the OECD report, which encourages an analysis of whether the firm can differentiate by gender through supply side (marketing, sales, attributes) or demand side (consumer identity, consumer behaviour) factors.[30] If yes, the firm can differentiate in markets and thus gender should be a variable in assessing competition, but if not, a smaller group may be

[28] *Ibid* at 28.
[29] Neha Georgie, *supra* note 5 at 119.
[30] OECD, *supra* note 27 at 29.

protected from prices being raised on the products.[31] Under this analysis, children's toys could be differentiated in markets because, even though they are the same in attributes other than colour, they are marketed differently and undergo different consumer behaviour. Thus, regulatory authorities and competition law should consider that there may be different markets for these products on lines of gender and should seek to eliminate pink taxes through accounting for a separation in markets.

VI. Conclusion

In sum, to assess the problem of pink taxes in children's toys, more data is needed. Specifically, there needs to be data about apples-to-apples comparisons of children's toys. This will ground a more thorough analysis of where pink taxes occur in these products and the potential solutions available to equalize prices. Competition law needs to be applied with a view towards gender, especially in cases where gender is a very sensitive variable, such as in baby's toys. The idea of the rational consumer, especially in this context, also needs to be interrogated with respect to whether its manifestation is helping to foreclose action on pink taxes, specifically in children's toys. Some frameworks of market differentiation could also be troubled due to how they could both help separate nearly identical toys into different markets based on gender. However, not differentiating markets could pose roadblocks to analysis of anticompetitive behaviour in gendered markets and hinder efforts to eliminate pink taxes through competition law. Existing non-gendered legislation could be helpful in competition law in prosecuting pink taxes, but the approach to dismantling pink taxes may vary based on the individual laws and their requirements. Currently, the most viable solutions to the problem of pink taxes in children's toys rest on gathering more data to understand how pink taxes manifest in the current market, ensuring 'girl' and 'boy' toys are not segregated spatially to try to get them in the same market, and conducting a more thorough market analysis on these gendered toys.

[31] *Ibid*.