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Check and balance

The case for improving Canada's *Competition Act* to protect workers

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The case for improving Canada's *Competition Act* to protect workers

Introduction

Canada's competition law, the *Competition Act*, is supposed to keep corporate power in check and protect consumers and businesses from its abuse. However, this paper outlines how the law is weak and ineffective, by design. This weakness has implications for people across Canada, and workers in particular.

In the mid-1980s, neoliberal ideology had come to dominate thinking on antitrust and competition policy in both the U.S. and Canada. From this perspective, the function of competition law was not to protect Canadians from the abuses of corporate power, but to promote the efficiency of the Canadian economy. This view resulted in the competition law we have today which is highly permissive of corporate dominance and riddled with gaps that permit corporations to form monopolies that can exploit consumers and workers.

In this report we examine competition policy in Canada and other jurisdictions, analyze deficiencies in Canadian law, and contrast them with the successes of legal actions taken in the U.S. and Turkey. These case studies show both the need for legislative reform in Canada, and what is possible when authorities have the laws they need to protect workers.

What is competition policy?

Competition policy is the suite of laws, regulations, law enforcement and processes designed to regulate competitive behaviour between businesses. In Canada, the competition authority is the Competition Bureau and it is headed by the Commissioner of Competition. The bureau enforces Canada's competition law, the Competition Act, which was last revised in 2009. The Commissioner of Competition has the power to investigate business practices in order to assess whether they undermine competition in the market, as defined by the *Competition Act*.

Functionally, competition law (or antitrust law, as it is referred to in the U.S.) is concerned with actions taken by businesses to create and protect their dominant position in the market. There are three key classes of business conduct that competition law is concerned with: mergers and acquisitions, abuses of dominance, and collusive agreements (cartels, conspiracies, bid-rigging, etc.)

Illegal collusive agreements can be further subdivided into those that run afoul of either criminal or civil laws. Criminal collusive agreements—commonly called "hard core" cartels—are blatant agreements between competitors, including agreements to fix prices or to allocate markets between each other (agreeing to only buy or sell products only to certain people or businesses). Civil collusive agreements include business arrangements that may not have the explicit intent to suppress wages or job quality, but still undermine competition to the disadvantage of workers. We provide examples of these types of agreements later in the report.

Competition policy in Canada has multiple goals laid out in the purpose statement of the act: greater economic efficiency and innovation, more product variety and better prices for consumers, and the ability of entrepreneurs to start businesses and bring new products to market. It should be noted, however, that only one of these goals—economic efficiency—has been granted direct protection in the statute, taking precedence over the other goals.

Competition policy in Canada is a dynamic system of laws, jurisprudence and enforcement decisions that are evolving and are shaped by the views and judgments of actors within a broader system. As the leader of an independent law-enforcement agency, the commissioner has the ultimate authority on which business conduct cases to investigate and which cases to take to the Competition Tribunal, Canada's administrative court for competition law matters. Under common law, the decisions made by the tribunal, federal courts, and the Supreme Court define and refine Canadian competition law.

Finally, the law itself, developed by parliamentarians, with public and expert input, is informed by current economic thinking on competition. At each level these disparate actors shape the lens through which Canadian competition law views issues of corporate power, with the potential to dramatically alter outcomes for Canadians.

The U.S., historically understood as the vanguard on issues of competition and antitrust, is beginning to move away from this ideology in order to adopt a more holistic and realistic approach to curtailing corporate power. President Joe Biden has appointed Lina Khan, a deeply progressive antitrust reformer, as chair of the Federal Trade Commission and recently signed a sweeping executive order focused on reining in American monopolies. Legislators at both the state and federal level have put forward ambitious antitrust legislation to curb the ability of corporations to swallow up their rivals, provide consumers with more freedom to take their business and data elsewhere, and create tools for Congress to break up dominant technology companies. This shift is best illustrated by Biden's remarks at the signing of the Executive Order on Promoting Competition in the American Economy, "we're now 40 years into the experiment of letting giant corporations accumulate more and more power... I believe the experiment failed."

Most promising, some of these reforms speak directly to the power of corporations over workers. In June 2021, the New York State Senate introduced the *Twenty-First Century Anti-Trust Act*. The bill contains amendments to the state's antitrust laws to explicitly address competition issues in labour markets, prohibit the abuse of dominance in labour markets, impose restrictive contract requirements on workers and non-compete agreements between employers, or address any conduct that restricts workers from disclosing their wages and benefits. Most strikingly, the bill also requires antitrust authorities to consider antitrust effects on labour markets when reviewing mergers and acquisitions.[2]

While the U.S. is modernizing its tools for curbing corporate power, Canada is not. Our own law, the *Competition Act*, has not changed substantially since the law came into force in 1986. While select parliamentarians have signalled their desire to review the *Competition Act*, there has yet to be substantial legislative activity. Beyond having out-of-date law, Canada has also underfunded its only competition authority, the Competition Bureau, which only recently received a funding increase after more than a decade of fiscal stagnation.

One of the most egregious and longstanding areas of oversight in our competition policy is the protection of workers. There are serious gaps in

the *Competition Act* that not only overlook workers, but actively harm them. Despite these gaps, there is still latitude for the Competition Bureau to enforce the law to protect workers, particularly when it comes to reviewing mergers. Despite this, there is no public evidence that the Competition Bureau has undertaken an investigation into anti-competitive conduct in labour markets.

Corporate power and workers

From a traditional economic standpoint, one of the core reasons why monopolies and oligopolies are so detrimental is their ability to inflate the price of the goods or services they sell and increase their profitability at the expense of Canadians. If there is only one or a small handful of businesses to buy from, those businesses have "market power"—the ability to set prices above the competitive price of the product and degrade the quality of their offerings—because they know people have nowhere else to go to purchase the product.

A prominent example of market power in practice is mobile phone services in Canada. Because there are so few providers of cellphone services in Canada, the big telecom companies—Bell, TELUS, and Rogers—and their "flanker brands" (Fido, Koodo, Virgin Mobile, Public Mobile, and Lucky Mobile) can control and inflate the prices paid by Canadians. As a result, Canadians pay some of the highest mobile service fees on the planet and these companies maintain high levels of profitability relative to global peers.

The same principle of market power that lets businesses gouge consumers can also be wielded against suppliers of inputs to businesses, including workers. In this case, rather than businesses using their market power to inflate the price of the products they sell, they use their market power to suppress the price of goods or services they purchase and increase their own profit margins. This power, when used against suppliers, is called *monopsony* (in contrast to monopoly).

There is little data on the degree of monopsony power in Canadian labour markets, illustrating a recurring theme of the opacity of corporate power in Canada. However, evidence from the U.S. shows that as market concentration increases, indicating greater monopsony power, wages fall and employers offer fewer benefits, like health or life insurance.[1] One study on temporary foreign workers in the U.S. shows that monopsony power suppresses wages of temporary foreign workers by as much as 13%.[2] However, when workers

can collectively leverage their power against employers through unionization, they are able to counteract the effects of monopsony power, to some extent.[3]

Monopsony power in labour markets also impacts workers differently and can explain, in large part, why men generally earn more than women.[4] Patriarchal family structures, where men are expected to be primary breadwinners and women are expected to both work and be primary caregivers, restrict women's employment options. Employers use their monopsony power to leverage these social expectations and pay women less for their work. In Norway, 70% to 90% of the gender wage gap experienced by high school-educated women can be attributed to monopsony power. For women with a college or university degree, this number ranges from 20% to 70%.[5]

Research from the U.S. shows that monopsony power may also explain the troubling divergence between productivity growth and the growth of real wages.[6] Monopsony power enables employers to capture a greater share of the profits from productivity gains, rather than sharing those gains with workers through higher wages.

The rising prevalence of digital platforms risks exacerbating corporations' existing monopsony power over workers. For example, a 2018 study of Amazon's Mechanical Turk service found a "surprisingly high degree of market power" held within the platform. The platform allows employers to post short-term tasks to a remote, decentralized community of workers. Due to this market power, it was estimated that Mechanical Turk enables employers to pay workers 13% less than what they deserve, based on their productivity.[7]

Despite the relevance of monopsony power for worker welfare, the bureau, to date, has not taken any public action to address it.

We believe there are two key reasons why Canada does not take monopsony power seriously in our competition policy. The first is that Canada's competition laws are weak, in general. As we will highlight in the following section, Canada's laws contain gaps that permit businesses to use their market power to exploit workers. The second issue is that the bureau does not enforce Canada's existing laws to the full extent, particularly when reviewing mergers. The bureau has the power to block mergers that undermine wages or job quality, but there is no evidence the bureau has considered workers when reviewing any merger. As Naidu et al (2018) argue, this massive oversight could be driven by the simplistic assumption commonly made by many economists that specialize in competition policy that labour markets are inherently competitive.[8] Furthermore, the bureau likely lacks the internal knowledge and operational capacity to assess the impact of mergers or other

types of business behaviours on labour markets, exacerbated by its historical underfunding and statutory focus on economic efficiency.

Canada's failings and guidance from vanguard jurisdictions

While authorities in Canada have not acted to address monopsony power in labour markets, authorities elsewhere are taking more decisive action. Around the world, competition authorities have increasingly focused their enforcement efforts on the labour market. In jurisdictions like the U.S., the EU and its member states, Brazil, and Turkey, authorities are pursuing investigations and civil and criminal cases against employers whose anti-competitive practices harm workers, decrease worker mobility, and lower wages.[9] These cases illustrate the possibilities of using competition policy as a tool to protect workers and ensure fair economic outcomes.

In the United States, the Department of Justice's Antitrust Division (DOJ) has pursued several antitrust violations in the labour market over the last 20 years. In these two decades, the DOJ has filed an average of 2–3 civil cases a year related to the labour market.[10] In the last year alone, the DOJ initiated three different criminal proceedings against companies that have entered into wage fixing and no-poach agreements.[11] On top of its enforcement action, in 2016 the DOJ published the Antitrust Guide for Human Resource Professionals.[12] The guide outlines the DOJ's position on competitive harms in the labour market, solidifying its intent to pursue these cases.

In the European Union, investigations into the labour market effects of business practices have often been treated as secondary issues to larger investigations.[13] To date, the European Commission, which acts as the EU's Competition Authority, has not ruled on a purely labour market competition case. However, at the member state level, there is growing enforcement in this area.

Member states have been increasingly proactive in investigating these cases.[14] For example, an Italian taxi company was investigated in 2019 for its driver employment terms. The company excluded drivers that would not agree to strict non-compete terms, which prevented them from driving for other taxi companies. A Hungarian recruitment association was fined €2.8 million for its role in enforcing anti-competitive employment terms. The organization had in place agreements preventing members from recruiting the other's employees. An agreement between hospitals in the Netherlands

to not hire anesthesiologists was found by a civil appeals court to be anti-competitive.[15] And throughout the European Union, in Portugal, Poland, and Lithuania, sports leagues are faced with competition investigations for alleged collusion on player compensation and no-poach agreements.[16]

Beyond the U.S. and EU, other jurisdictions around the world are paying attention to anti-competitive harms in the labour market. In March 2021, Brazil's competition authority launched the country's first investigation into anti-competitive collusion in the labour market. The authority is investigating thirty-six health care companies regarding the exchange of commercially sensitive information on employee renumeration and benefits, and wage-fixing agreements.[17] The Turkish Competition Authority (TCA) has also spearheaded an investigation of the employment and labour practices of 32 companies.[18]

Part of the reason why Canada's Competition Bureau has not taken the same action as authorities elsewhere is weak law, particularly when it comes to competitor collaborations. In the two sections that follow, we highlight these deficiencies in Canadian law and contrast them with the successes of legal actions taken in the U.S. and Turkey. These case studies show both the need for legislative reform in Canada, and what is possible when authorities have the laws they need to protect workers.

Criminal cartels

Competitor agreements (cartels) to fix prices or to allocate markets (i.e., only selling to/purchasing from certain buyers/sellers) are criminally illegal under the *Competition Act*. However, in a statement published in November 2020, the bureau stated that it does not have the power to take on criminal cases against wage fixing or no-poach agreements between companies. This has only been true as of 2009, when the *Competition Act* was amended to exclude the word "purchase" from section 45 of the *Competition Act*, the act's primary cartel provision.[19] This change has made it impossible for authorities to prosecute collaborations between competitors that involve purchasing a product or service (in this case, labour).[20]

This major shortcoming of Canadian law gives businesses free license to form cartels to suppress wages and undermine workers, and businesses today are benefiting from this. Until recently, Tim Hortons included no-poach clauses in employee contracts, which prohibited a Tim Hortons restaurant from offering work to employees of another Tim Hortons location. A former

Tim Hortons baker hopes to represent a class of Tim Hortons workers whose wages allegedly stagnated as a result of these clauses.[21] The no-poach clauses were removed from contracts of Canadian franchisees only after investigations and potential lawsuits were launched against Tim Horton's parent company in the United States.[22] Had Canada's law not been amended, no-poach agreements like this could be criminally prohibited by the *Competition Act*.[23]

In contrast, in the U.S., more companies are being criminally charged for anti-competitive agreements related to workers. As of July 2021, the DOJ has initiated three criminal proceedings on collusion in the labour markets related to no-poach and wage-fixing agreements. Federal grand juries have, as of July 2021, given out indictments (criminal charges but not convictions) in all three cases, but no criminal case has been tried yet.

In the wage-fixing cases, the DOJ charged the accused companies with conspiracy in restraint of trade in violation of section 1 of the *Sherman Act*, the cornerstone of American antitrust law. Criminal penalties for violations of the *Sherman Act* include fines of up to US$1 million for individuals, $100 million for corporations, and up to 10 years in prison for each offence. In situations where the employer gains more than $1 million from their offence, the maximum fine may be increased to twice the gain derived from the crime or twice the loss suffered by victims if either amount is greater than $1 million.

In one case, the DOJ indicted the former owner of a physical therapist staffing company in December 2020 for wage fixing. The former owner was charged for participating in a conspiracy to fix prices by lowering the rates paid to physical therapists and physical therapist assistants. The DOJ's Antitrust Division announced that the charges were important to deterring employer collusion that "cheats American workers of free market opportunities and compensation."

Civil anti-competitive agreements

Although Canada's criminal provisions have been defanged, the bureau could pursue civil cases against anti-competitive agreements in labour markets. However, the legal tools available to the bureau are weak, making it difficult, if not impossible, to hold companies accountable for these types of violations. To date, the bureau has not taken a case against competitors collaborating to undermine workers under the act's civil provisions.

Under section 90.1 of the *Competition Act*, which prohibits anti-competitive agreements between competitors, the Commissioner of Competition has

the power to pursue a civil investigation against firms that are alleged to be entering into these agreements. However, the commissioner has himself stated that the bar to prove a violation of section 90.1 is incredibly high.[24] This is because the Competition Bureau must show that these agreements "substantially lessen or prevent competition", which is not the case for investigations taken under the act's criminal provisions.

Like Canada's criminal laws against competitor collaborations, the country's weak civil laws leave room for businesses to engage in collusive behaviour that undermines workers.[25] A recent example of competitor agreements that may fall under this category is the pandemic-related "Hero Pay" debacle. During the first wave of COVID-19 in March 2020, Canada's biggest grocers, including Metro, Loblaws and the Empire-owned Sobeys, raised wages for grocery workers by $2 an hour, purportedly to reflect the additional risk workers were taking on the frontlines of COVID-19. All three companies maintained this higher wage only until June 2020, at which point the three companies communicated about their plans to end the wage increase. In a government committee hearing, one representative explained that the purpose of the communications was to gather information that would help him decide whether to terminate [their] own program.[26]

Competition authorities in the U.S. and Turkey have investigated these types of information exchanges and agreements and found them to be anti-competitive and detrimental to workers. Starting in 2010, the DOJ initiated several investigations into high tech companies for their no-poaching agreements against highly skilled tech workers and the related exchanges of information through in-person meetings and email.

One agreement, the "Do Not Cold Call" agreement, involved one company placing the names of the other company's employees on a "Do Not Cold Call" list and instructing its recruiters not to offer those employees competitive job offers. In addition to the "Do Not Cold Call" agreements, it was alleged that the animation studios Pixar and Lucasfilm entered into written agreements not to cold call each other's employees, to notify the other company whenever making an offer to an employee of the other company, and not to engage in bidding wars over employees. In response to the lawsuits filed by the DOJ against Adobe, Apple, Google, Intel, Intuit, Pixar and others, the companies decided to settle on the condition they would discontinue these practices.

The harmed workers took this opportunity to launch two class actions in 2011 and 2015. Workers argued that the employers had conspired "to fix and suppress employee compensation and to restrict employee mobility." According to the workers, the agreements had decreased their wages and

their benefits, as well as restricted their employment opportunities and their ability to better their own careers. As a result, they asked the court for monetary damages to remedy the harms of this violation and an order from the court that forces companies to cease this type of action in the future. These lawsuits resulted in several settlements in the range of USD 20–415 million.[27]

In recent years, the Turkish Competition Authority (TCA) has also taken a strong stance against anti-competitive agreements in labour cases. Several TCA decision explicitly acknowledge labour market agreements as falling within the scope of competition law.

In a 2020 decision, the TCA considered an agreement entered into by 47 businesses that fixed the wages of truck drivers, recognizing this agreement as a buying cartel under Turkish antitrust law. A buying cartel is an agreement that creates monopsony power in a market and falls under the same type of violation as an agreement to fix prices or divvy up customers in Turkey. In an earlier decision in 2019, the TCA ruled that non-compete agreements and no-poaching obligations imposed on franchisees by their franchisor were, per se, violations of Turkish antitrust law. In both cases, the TCA recognized the harm these types of agreements cause to employees and to the labour market. While consumers may also be harmed by these agreements, the relevant harm for the purposes of the TCA's analysis in these cases was the losses that the employees suffered in wages and other benefits, and their decreased job mobility as a result of employers' monopsony power.

Mergers and the opportunity for a labour perspective

In our search of legal actions taken by international competition authorities that protect workers, we did not find any examples of merger investigations. Competition authorities regularly review mergers and acquisitions to ensure that they do not remove a valuable competitor and undermine competition. But, to date, we have not found evidence that competition authorities outside of Canada examine the competitive impacts of a merger on labour markets.

Competition authorities, including the Competition Bureau, are not prevented from incorporating an analysis of labour impacts in these cases. While the bureau has never investigated the impact of a merger on wages or employment quality, it could, according to current law and the Merger Enforcement Guidelines published by the bureau.

In fact, merger investigations are the single best opportunity for labour unions in Canada to engage with and influence competition policy today.

There is nothing in the *Competition Act* that prevents the bureau from investigating the impact of mergers on labour markets and workers. It is presumably the bureau's lack of capacity or will that prevent it from taking on these investigations.

Labour researchers and advocates can engage in a real way in Canada's competition policy system by providing information to the bureau when it is undertaking merger investigations. When investigating mergers (or any other conduct), the bureau relies heavily on information provided by "market participants" through interviews and written submissions. Unions and other labour activists can provide useful information to the bureau as market participants that can help bureau officers establish a case against a merger on the grounds that it undermines competition in a labour market.

To block a merger in Canada the Competition Bureau needs to build a case to show that the merger will lead to a "substantial lessening or prevention of competition." This means the bureau needs to show that through the merger the company will gain market power that it can then use to influence prices or other "dimensions of competition" in the market, including "quality, product choice, service, innovation and advertising."[28]

In the majority of cases, the "substantial lessening or prevention of competition" that the bureau investigates has to do with the goods being sold by the merged companies. In these cases, the bureau investigates whether the two companies sell the same or similar products and if these products are substitutes for each other. If two companies sell similar products and the merger would remove an important competitor that cannot be replaced, then the acquirer company may have significant market power after the merger. On these grounds, the bureau could challenge the merger to prevent it or modify the deal so that it does not create market power for the acquirer.

When it comes to workers and wages, the bureau can do a similar analysis, but from a monopsony, rather than monopoly, perspective. If two companies want to merge, and they hire from the same pool of people, the acquirer could use its market power to supress wages or undermine the quality of employment. To make this case, the bureau would need to collect specific information about the labour market affected by the merger and the estimated impact of the merger on wages or other aspects of employment that could be affected by the merger (like benefits, vacation).

However, there is a significant gap in our merger laws allowing businesses to merge, even if the merger is likely to cause a substantial lessening or prevention of competition in a market, including a labour market. The specific provision is commonly called the efficiencies defence and it allows

anti-competitive mergers if the businesses can show that the merger will create cost savings that are "greater than and offset" the "competitive harm" of the merger. What this means is that if the merger creates sufficient cost savings for business owners, which often include layoffs, then the merger is legal under the *Competition Act*.

The most illustrative example of the efficiencies defence in action is Superior Propane Inc.'s acquisition of ICG Propane Inc. in 1998. Both companies operated propane distribution networks and sold propane to retail consumers. The merger was expected to increase the price of propane by about 8% (a substantial lessening or prevention of competition), leading to a $40.5 million increase of annual revenues for Superior. The deal was also anticipated to create $20.2 million per year in cost savings for Superior, which included about 200 layoffs.

The Competition Tribunal ruled that the deal was legal under the *Competition Act* because the cost savings from the merger were greater than the $3 million per year in "deadweight loss"[29] created by the merger, or the competitive harm. The merger created a monopoly in the sale of propane in 16 communities across Canada.

The efficiencies defence can undermine the ability of the bureau to prevent mergers that harm both workers and consumers. Furthermore, the defence is harmful to workers, since it counts job losses from a merger as a benefit of the merger, rather than a drawback.

Labour unions that are affected by and directly involved with a merger are uniquely positioned to collect information into how the businesses their members work for operate. This information can assist the bureau's officers in rebutting the efficiencies claims of the merging parties. However, to do this, unions must begin engaging in merger reviews undertaken by the bureau and provide useful information that can be used by officers to craft a case.

Reforms

While the bureau can take some meaningful action to protect workers, particularly when it comes to merger reviews, it is also severely limited due to our weak competition law. For Canada's competition law to truly promote and protect worker welfare from corporate power, reforms are needed. We outline four critical changes below.

1. **Remove the efficiencies defense for mergers.**[30] Removing the defense would prevent businesses form claiming job losses as a benefit, rather than a drawback, of a merger.

2. **Revise section 45 to include the word "purchase".** The act's main cartel provision allows businesses to conspire to fix wages and undermine work quality because it does not cover conspiracies related to the *purchase* of goods and services, only their *supply*. Including the word "purchase" in the provision would make these blatant conspiracies a criminal offense and hold business leaders accountable.

3. **Give the bureau the power to compel information from businesses for market studies.** Currently, we have essentially no information on the state of anti-competitive conduct in Canada's labour markets. The bureau must undertake a comprehensive study of the state of competition in Canada's labour markets so it can identify and address behaviours that harm workers. However, it currently does not have the power to do so effectively because it lacks the ability to compel sensitive information from businesses for research purposes (it can only do so for law enforcement investigations). Many of the major competition authorities around the world can force businesses to provide this information, which they then use to study industry trends and identify anti-competitive behaviours.

4. **Revise the purpose statement of the Competition Act to consider the welfare of people of traditionally marginalized communities.** Prioritizing the welfare of people from communities that have historically been marginalized in the purpose statement could enhance Canada's competition policy in two ways. This change would signal that people, including workers, and their social and economic welfare matter, refocusing Canada's competition policy away from the blind pursuit of economic efficiency. Second, it would give the bureau more latitude to take cases against businesses that are hurting these individuals through anti-competitive conduct, enhancing its ability to keep corporate power in check.

Conclusion

There is growing consensus among international competition authorities that competition policy should address worker welfare. Canada and its provinces are lagging behind, while competition authorities elsewhere, most notably in the U.S. and Turkey, and increasingly throughout the EU, are taking decisive action.

Canada needs reform of its competition law that integrates an anti-monopoly focus. Such reform would be an opportunity to take labour markets seriously from a competition perspective. Workers and unions are an integral part of the Canadian economy. As a result, we have shown that they can and should play a constructive role in keeping monopolies and oligopolies in check. This can be done through advocacy for legislative reform and through different engagement with the regulatory process.

Beyond legislative reform, unions can also engage with the bureau more effectively in the process of investigations into anti-competitive conduct. For example, by providing labour market information and insight to the bureau over the course of a merger investigation, unions can assist the bureau in understanding the consequences of a merger for workers, with the possibility open for Canada's first ever labour-focused merger case. Without a doubt, the initial learning curve will be steep on both sides, with the bureau and unions requiring time to understand each other's language and modes of operating. Doing the work to bridge these deeply intertwined topics could shape the outcome of future cases and help protect workers across Canada against the detrimental impacts of corporate dominance.

Annex

A quick guide for merger reviews

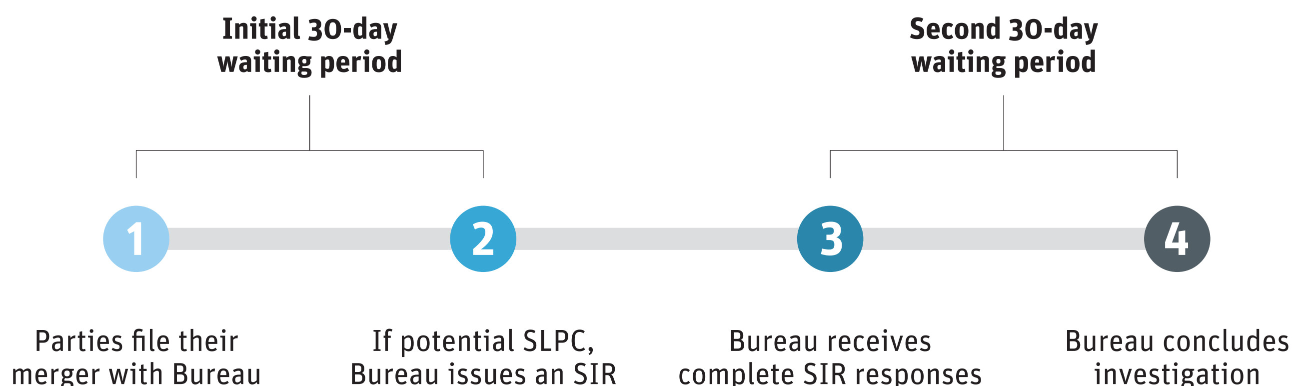
THE AIM OF this guideline is to give union researchers, advocates, or others that wish to engage with the bureau some baseline knowledge of the merger review process and some general guidance on how to engage with the bureau most effectively during the course of a merger investigation. This information can be helpful for those that want to provide information to the bureau to support an investigation.

Timelines

There are specific timelines outlined in the *Competition Act* that the bureau must meet when reviewing a merger. The merger review timeline is represented in Figure 1 below.

When the merging parties notify the bureau of their proposed transaction, the bureau has 30 days to do a preliminary review of the merger, called the "initial 30-day waiting period." During this time, generally, officers will use information provided by the merging parties and market contacts, as well as publicly available information to determine whether it is possible that the transaction will lead to a "substantial lessening or prevention of competition." During this period, officers may contact other businesses or stakeholders (such as unions and labour organizations) to collect information

FIGURE 1 Merger review timeline



that can be used to guide the investigation. These interviews are important, as they can help inform later parts of the merger review process and set the direction of the investigation.

At the end of the initial 30-day waiting period, the bureau chooses to either permit the merger or to continue its investigation. If it chooses to continue the investigation, officers issue a "supplementary information request" or SIR. The SIR is a formal information request issued to the merging companies requiring them to provide documents or data. Officers then use this information to test whether the merger will cause a substantial lessening or prevention of competition and/or as evidence in a case that it will file with the Competition Tribunal. Once the SIR is issued, the bureau waits for the merging parties to respond to the request. During this time, officers may continue to interview market participants and other stakeholders to collect information. The duration of this period may vary, but there are incentives in place to encourage companies to respond to the SIR as quickly as possible. One can assume that companies will take one to three months to respond to an SIR.

Once the companies have responded to the SIR, there is a second 30-day waiting period, where the bureau reviews the information provided in the SIR responses. At the end of this period, the commissioner decides to either permit the merger or to challenge it. If they challenge the merger, they may establish a consent agreement with the parties or file a suit with the Competition Tribunal. A consent agreement is a settlement with the

companies that permits the merger if the companies meet certain conditions that aim to address the competition issues that the merger creates. These conditions may include selling off certain assets or restrictions on what the acquiring company can and cannot do with the assets they have acquired through the transaction.

To engage in the merger review process most effectively, it is important that labour advocates provide the bureau with relevant information during the initial 30-day waiting period. The information collected during this period will help determine what information is requested in the SIR, which is critical for developing a compelling case against the merger. If labour representatives do not engage thebBureau before they issue the SIR, they may miss the opportunity to meaningfully contribute to the case by flagging potential labour market impacts.

The process of a merger investigation is rarely, if ever, made public. Therefore, there is no way of knowing whether an investigation has commenced or the phase of the investigation. To avoid missing the opportunity to contribute to the investigation in the initial 30-day waiting period, it is best to provide submissions as soon after the merger is announced as possible.

The Merger Analysis

The *Competition Act* provides very little, if any, scope for the bureau to challenge a merger on the basis of economic fairness or social justice considerations. Rather, there are specific criteria that the Competition Bureau needs to meet to develop a successful case, which are based on neoclassical economic theory. These criteria are outlined in detail in the Merger Enforcement Guidelines.

The bureau's first step in assessing a merger is to define the relevant market. The relevant market can be broken down into two dimensions: a product market and a geographic market.

The product market defines the characteristics of the good or service that is affected by the merger. In the case of labour markets, it would define which specific workers would be affected by the merger and their characteristics, such as training or specialized education needed for the work. Based on examples of competition cases in the U.S. and Turkey presented in this paper, the product market for a merger could be, for example, truck drivers (perhaps with specific training or qualifications), physical therapists, physical therapists assistants, or nurses with specific training. The product market

is a precise definition that is context specific. There may also be multiple product markets for a given merger.

Ultimately, when defining the product market, officers at the bureau are aiming to answer the questions: Hypothetically, are there other people the business could hire that could do the same job? If not, what experience or qualifications are they missing? These missing qualifications would constitute the product market.

The geographic market refers to the geographic scope of the relevant market. In essence, officers of the bureau need to determine how far afield a company would go to hire someone with the skills and qualifications identified in the product market definition, or how far such a worker would travel to find a job. A geographic market encompassing all of Canada means that companies are willing to hire a worker from anywhere in Canada. There could be justification for a smaller geographic market. For example, if the product market is characterized by certifications that are only valid in a specific province, then the geographic market may be just that province.

Once the product and geographic markets are established, the bureau can then calculate market shares to determine how the merger will impact concentration in the market. The Merger Enforcement Guidelines provide the general market share and concentration thresholds the bureau uses to decide whether to challenge a merger (although these thresholds are merely guidelines, and the bureau can investigate mergers that do not meet these guidelines). Generally, the bureau will not challenge a merger is the market share of the merged firm is less than 35% if the concern is that the merged firm will unilaterally exercise its market power. If the concern is that the merged firm will coordinate with other businesses to exercise its market power, then the thresholds for challenging the merger are a market share of the four largest firms (a four-firm concentration ratio) of 65% and a market share of 10%.

If the market share and concentration thresholds are met, the bureau must then assess whether the merger will result in the merged firm gaining market power that it could then wield to suppress wages and job quality (i.e. substantial lessening or prevention of competition). The merger enforcement guidelines describe two ways that a merged company can undermine competition post-merger. If it is powerful and dominant enough, it can act unilaterally to supress workers. However, it can also act in coordination with competing businesses that also hire from the same labour market. It may do this by indirectly influencing or coercing these businesses in a variety of ways. For more details on this point, see the Merger Enforcement Guidelines.

There are many factors that the bureau would consider when it investigates whether the merger could result in a substantial lessening or prevention of competition, but some of the key questions the bureau would be seeking to answer could be:

- Are one or both of the merging companies strong competitors in the relevant labour market? Do the companies compete for workers and does this competition lead to higher wages and/or job quality?
- By removing a strong competitor from the market through the merger, would the merged firm be able to suppress wages and/or job quality? Will it be able to do this by itself or in coordination with other businesses that also hire people from the relevant labour market?
- Will remaining competitors provide enough competitive rivalry in the market to prevent the merged firm from suppressing wages/job quality?
- Could a new competitor enter the market and provide enough competitive rivalry to disrupt the merged firm's efforts to supper wages/job quality? How likely is this to happen?

Market Contacts

Union researchers and labour advocates can engage in the merger review process as market contacts. Through submissions to the Competition Bureau and interviews with bureau officers, union researchers and labour advocates can provide invaluable information to help officers develop a case against a merger based on its impact on workers. However, to do this it is critical that union researchers and labour advocates provide useful information that Bureau officers can use to craft a case that meets the requirements laid out in the act.

Below we provide a quick list of questions that can help prepare a submission to the bureau or for an interview.

1. Product market

- What are the specific jobs affected? Are there multiple jobs affected?

- What are the skills of the job? Does the job require specialized training, and how long does it take to procure?
- What is the National Occupational Classification (NOC) code of each job affected?

2. Geographic market

- How far afield can the merged company and its competitors go to hire someone with the specific qualifications defined for the product market? Can they hire across Canada, or are they limited to a specific geographic region (province)?
- How far can someone with the qualifications needed for the job work away from home or move to find a new job? Are there barriers that prevent these individuals from moving for work?

3. Market shares

- What companies hire workers that are affected by the merger (i.e. workers in the relevant product and geographic markets)? How many workers do they employ? How many workers do they hire a year?
- How many workers affected by the merger do the merging companies employ?

4. Competitive impacts

- Are one or both of the merging companies strong competitors in the relevant labour market? Do the companies compete for workers and does this competition lead to higher wages and/or job quality?
- By removing a strong competitor from the market through the merger, would the merged firm be able to suppress wages and/or job quality? Will it be able to do this by itself or in coordination with other businesses that also hire people from the relevant labour market (see the Merger Enforcement Guidelines for more information)?

- Will remaining competitors provide enough competitive rivalry in the market to prevent the merged firm from suppressing wages/job quality?

5. Barriers to entry

- Could a new competitor enter the market and provide enough competitive rivalry to disrupt the merged firm's efforts to supper wages/job quality? How likely is this to happen?
- How much time/money does it take to start a new business like the employer's? Are there regulations that would prevent entry?

Notes

1 Fabio Mendez & Facundo Sepulveda, "Monopsony Power in Occupational Labor Markets" (2019) 40 Journal of Labor Research 453, https://www.researchgate.net/publication/333581138_Monopsony_Power_in_Occupational_Labor_Markets.

2 Eric M. Gibbons et al, "Monopsony Power and Guest Worker Programs" (2019) 64:4 The Antitrust Bulletin, https://journals.sagepub.com/doi/abs/10.1177/0003603X19875040.

3 Benmelech, Efraim, Nittai Bergman & Hyunseob Kim, *Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?*, Working paper series no. 24307 (Cambridge, Mass: National Bureau of Economic Research, 2018), https://www.nber.org/papers/w24307

4 Webber, Douglas A, "Firm-Level Monopsony and the Gender Pay Gap" (2016) 55:2 Industrial Relations: A Journal of Economy and Society 323, https://onlinelibrary.wiley.com/doi/epdf/10.1111/irel.12142

5 Barth, Erling & Harald Dale-Olsen, "Monopsonistic Discrimination, Worker Turnover, and the Gender Wage Gap" (2009) 16 Labour Economics 589, https://www.researchgate.net/publication/222537353_Monopsonistic_Discrimination_Worker_Turnover_and_the_Gender_Wage_Gap

6 Benmelech, Efraim, Nittai Bergman & Hyunseob Kim, *Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?*, Working paper series no. 24307 (Cambridge, Mass: National Bureau of Economic Research, 2018), https://www.nber.org/papers/w24307

7 Arindrajit Dube, Jeff Jacobs, Suresh Naidu, and Siddharth Suri, "Monopsony in Online Labor Markets" (2020) 2:1 American Economic Review: Insights 33, https://pubs.aeaweb.org/doi/pdfplus/10.1257/aeri.20180150

8 Suresh Naidu, Eric A. Posner & E. Glen Weyl, "Antitrust Remedies for Labor Market Power" (2018) 132 Harvard Law Review 536, https://www.ssrn.com/abstract=3129221.

9 OECD (2020), "Competition in Labour Markets", http://www.oecd.org/daf/competition/competition-concerns-in-labour-markets.htm

10 Ioana Marinescu & Eric A. Posner, "Why has antitrust law failed workers?" [March 2019, draft paper], https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3335174

11 No poach agreements are agreements between employers to not poach or solicit each other's employees.

12 Department of Justice (2016), "Antitrust Guidance for Human Resources Professionals", https://www.ftc.gov/public-statements/2016/10/antitrust-guidance-human-resource-professionals-department-justice

13 Laura Damstra & Ambroise Descamps, "How do non-poaching agreements distort competition?" (June 2019) *Oxera*, https://www.oxera.com/insights/agenda/articles/how-do-non-poaching-agreements-distort-competition/

14 Dr. Petra Linsmeier & Dr. Cathrin Mächtle, Non-poaching and Antitrust Law, 37 EUR.COMPETITION L.REV.145, 146 (2016)

15 OECD (2020), "Competition in Labour Markets", http://www.oecd.org/daf/competition/competition-concerns-in-labour-markets.htm

16 Baker McKenzie, "International: Global Competition Law and Labor—The Battle Continues in the Market for Talent" (April 2021) Lexology, https://www.lexology.com/library/detail.aspx?g=9218302e-8513-4dc6-80f1-6a8d66c88312

17 See above.

18 ELIG Gurkaynak Attorneys-at-Law, "New Investigation on the Competition Law Compliance of Hiring and Human Resources Practices of 32 Companies in Turkey" (April 2021) Lexology, https://www.lexology.com/library/detail.aspx?g=a82b7fc2-ee9f-4638-8db2-ea56448e7bd3

19 Section 45 of the *Competition Act* attaches criminal sanctions to anti-competitive conspiracies or agreements between competitors only if these agreements fix the prices of goods sold, restrict output of goods or services, or divvy-up markets between these competitors.

20 Competition Bureau Canada, "Competition Bureau statement on the application of the Competition Act to no-poaching, wage-fixing and other buy-side agreements" (November 2020), https://www.canada.ca/en/competition-bureau/news/2020/11/competition-bureau-statement-on-the-application-of-the-competition-act-to-no-poaching-wage-fixing-and-other-buy-side-agreements.html

21 Christine Dobby, "Why are no poach agreements legal in Canada?" (2021) Toronto Star.

22 BNN Bloomberg, "Restaurants Brands International to review no-poach franchise agreements" (2018), https://ampvideo.bnnbloomberg.ca/restaurant-brands-international-to-review-no-poach-franchise-agreements-1.1109659

23 In its Competitor Collaboration Guidelines, the Bureau confirms that section 45 applies to anti-competitive agreements to fix prices between franchisees.

24 Competition Bureau Canada, "Competition Bureau statement on the application of the Competition Act to no-poaching, wage-fixing and other buy-side agreements" (November 2020), https://www.canada.ca/en/competition-bureau/news/2020/11/competition-bureau-statement-on-the-application-of-the-competition-act-to-no-poaching-wage-fixing-and-other-buy-side-agreements.html

25 Canadian workers are further disadvantaged because they are not able to initiate class actions when they are harmed by civil violations of competition laws. Unlike when companies violate criminal laws for anti-competitive conduct, workers harmed by agreements between competitors that may impact competition do not have a right—explicitly included in the *Competition Act*—to launch private suits or class actions against their employer(s).

26 "Wage Fixing in Canada and Fairness in the Grocery Sector" (June 2021), Report of the Standing Committee of Industry, Science and Technology presented to the House of Commons, https://www.ourcommons.ca/DocumentViewer/en/43-2/INDU/report-6

27 Leiff, Cabraser, Heimann & Bernstein Attorneys-at-Law, "High Tech Employees Class Action Lawsuit" (2015), https://www.lieffcabraser.com/antitrust/high-tech-employees/. See also **In re High-Tech Employee Antitrust Litigation**, No. 11 CV 2509 (N.D. Cal.).

28 Competition Bureau Canada, "Merger Enforcement Guidelines" (last updated 2011), https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03420.html

29 "Deadweight loss" is a neoclassical economic concept that represents the inefficiency associated with market power. When firms use their market power to increase prices, the also decrease their output. The deadweight loss represents the economic value lost from this decrease in output.

30 There is a parallel defences defense for section 90.1 that could also be revoked on the same grounds.

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