The importance of quantifying non-price effects in Canada

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I. Introduction

1. When we think about anti-competitive effects, whether they arise from a merger or anti-competitive behaviour by firms, we generally think in terms of price competition. In other words, we ask whether the merger or conduct will lead to higher prices for consumers. However, rivalry among firms is not limited to price. In fact, many factors other than price, such as service, variety and quality, are valued by consumers and can alter demand for a product. Further, and perhaps most importantly in today’s economy, firms compete by innovating, whether it be by developing new technologies or reaching consumers in ways that improve a product’s overall value proposition. Forms of competition that manifest in ways other than price are commonly referred to as non-price competition.

2. Interest in non-price effects is present in many jurisdictions, as evidenced, for example, by the American Antitrust Institute’s recent Invitational Symposium on the Non-Price Effects of Mergers, which took place in June 2016, as well as a 2016 Workshop on Emerging Competition Issues hosted by the Canadian Competition Bureau (“Bureau”), which noted that “there is a growing interest in developing methods to incorporate non-price effects into competition assessment frameworks” and that price alone “may not capture all of the outcomes flowing from competition.”

3. The 2010 US Horizontal Merger Guidelines stress the importance of non-price effects by acknowledging that “[e]nhanced market power can also be manifested in non-price terms and conditions that adversely affect customers, including reduced product quality, reduced product variety, reduced service, or diminished innovation. Such non-price effects may co-exist with price effects, or can arise in their absence.” Several recent US merger cases have highlighted the inclusion of non-price effects when assessing anti-competitive effects, including reductions in product quality in H&R Block and reduced innovation in the proposed AMAT/Tokyo Electron...
merger. Other jurisdictions are also considering how to incorporate non-price effects into their merger analyses, as evidenced by country submissions made during the course of recent OECD roundtables and by the inclusion of a plenary session on this topic at the International Competition Network’s 2017 annual meeting.

4. The consideration of non-price effects in competition assessments is a timely topic not only because of the rapid pace of change in our digital economy, but also, at least from a Canadian perspective, because of two recently litigated competition matters in Canada—Tervita Corp. v. Canada (Commissioner of Competition) and TREB v. The Toronto Real Estate Board—which have in different but related ways shed significant light on issues surrounding the consideration of non-price effects in Canadian competition enforcement.

5. As outlined in more detail below, the SCC’s decision in Tervita reinforced the importance of quantifying all measurable anti-competitive effects, including non-price effects, in merger matters where an efficiencies defence is raised. In its decision, the SCC set out a framework that involves comparing measurable anti-competitive effects to measurable efficiencies, and then assessing non-price effects that are unquantifiable with lesser weight. This framework suggests that when an efficiencies defence is involved, both the merging parties and the Bureau should make every effort to quantify non-price effects. The Tribunal’s redetermination decision in TREB, meanwhile, highlights the importance of preserving non-price competition, noting that “this case focuses on dynamic competition, including innovation, the most important type of competition.”

6. With Canadian courts having recently emphasized both the importance of preserving non-price competition and the need for the Bureau to quantify the effects of such competition in certain merger matters, as well as the general interest in non-price effects globally, it raises two obvious questions: what tools do we have to quantify non-price effects and how can these tools be improved?

7. This paper seeks to address these questions. However, before doing so, it discusses the importance of Tervita and TREB and sets out the relevant legal framework in Canada, particularly the efficiencies defence in merger matters.

II. The importance of Tervita and TREB

8. On January 22, 2015, the SCC released its long-awaited decision in Tervita. In this matter, the Bureau alleged that Tervita’s acquisition of a hazardous waste landfill in northeastern British Columbia was anti-competitive and therefore challenged the merger before the Tribunal under section 92 of the Competition Act (the “Act”). The Tribunal allowed the Commissioner’s application on the basis that the merger was likely to substantially prevent competition, a decision that was upheld by the FCA. However, the SCC overturned the decision on the basis of a successful section 96 “efficiencies defence” despite agreeing with the lower court decisions and the Commissioner that the merger was likely to result in a substantial prevention of competition under section 92 of the Act. The SCC decision has important implications for the need to quantify all price and non-price effects in future cases, particularly in cases where the parties claim merger efficiencies.

9. For the purpose of estimating the anti-competitive effects when an efficiencies defence has been raised under section 96 of the Act, the SCC has made it clear that the Bureau must quantify all quantifiable anti-competitive effects, or they will be given a weight of zero. This zero weighting would apply even in circumstances where a substantial lessening or prevention of competition was found on the basis of non-quantified effects. In other words, the SCC has indicated that measurable effects that are not quantified will not be assessed qualitatively.
10. On April 27, 2016, the Tribunal released its redetermination decision in \textit{TREB}.\textsuperscript{16} In this case, the Commissioner argued that TREB, Canada’s largest real estate board serving approximately 42,500 real estate brokers and salesperson members,\textsuperscript{17} restricted its members from accessing and displaying important data (such as the sold prices of homes) and thus prevented the emergence of innovative internet-based business models. The Tribunal found that TREB had abused its dominant position in the market for residential real estate brokerage offerings by implementing rules that prevented innovative business models from operating in competition with TREB in the Greater Toronto Area. The Tribunal also found that TREB’s actions resulted in a substantial lessening or prevention of competition in Canada. Notably, the Tribunal allowed the Commissioner’s application even though the Bureau did not quantify the anti-competitive effects of TREB’s policy.\textsuperscript{18} In its redetermination, the Tribunal emphasized the importance of non-price competition to the Canadian economy, particularly as it relates to promoting and encouraging innovation.

11. These two decisions have brought the issue of assessing and quantifying non-price effects in Canadian competition matters to the forefront. The SCC’s decision in \textit{Tervita} has established that all measurable anti-competitive effects must be quantified in cases where an efficiencies defence is raised, and the Tribunal’s redetermination in \textit{TREB} has indicated that non-price competition, particularly innovation and dynamic competition, is an important type of competition to preserve in the economy. What these cases should highlight, above all, is that it is more important than ever in Canada to understand what economic tools are available to quantify non-price effects, and for economists to continue to build on this area of study.

\section*{III. Legal framework In Canada}

12. Canada’s merger regime generally employs a “total surplus” standard as a starting point, whereby the anti-competitive effects from an expected increase in price following the merger are measured as the total expected deadweight loss (i.e., the sum of consumer and producer deadweight loss) and any wealth transfer from producers to consumers as a result of that price increase is considered neutral.\textsuperscript{19} In some cases, however, as set out in \textit{Propane} and confirmed by the Tribunal in \textit{Tervita},\textsuperscript{20} a portion of the wealth transfer may be considered an anti-competitive effect if, for example, the effects are garnered towards socially adverse consumers.\textsuperscript{21} This use of the total surplus standard as a starting point in merger assessments in Canada contrasts with the approach of many other jurisdictions, which gravitate towards a “consumer surplus” standard for merger reviews.

13. The treatment of the wealth transfer becomes particularly important when an efficiencies defence is raised. If the Bureau alleges that a proposed transaction would result in a substantial lessening or prevention of competition under section 92 of the Act, the merging parties can advance an efficiencies defence under section 96 to demonstrate that the gains in efficiency from the transaction would outweigh and offset any anti-competitive effects.\textsuperscript{22} Under this “trade-off” analysis, the anti-competitive effects estimated by the Bureau must be balanced by the Tribunal against the efficiencies claimed by the merging parties. In particular, section 96 of the Act requires that the Tribunal allow a merger that is found to prevent or lessen competition substantially if the Tribunal determines that the gains in efficiency attributable to the merger are greater than and offset the merger’s anti-competitive effects: “The Tribunal shall not make an order under section 92 if it finds that the merger or proposed merger in respect of which the application is made has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger and that the gains in efficiency would not likely be attained if the order were made.”\textsuperscript{23}
14. The SCC’s decision in Tervita provides a framework for assessing both qualitative and quantitative effects and efficiencies under the section 96 trade-off. In particular, the SCC established a two-part test, whereby the quantitative efficiencies are first compared against the qualitative anti-competitive effects, and then the qualitative considerations are weighed, before a final determination is made on whether the total efficiencies offset the total anti-competitive effects: “(...) the balancing test under s. 96 may be framed as a two-step inquiry. First, the quantitative efficiencies of the merger at issue should be compared against the quantitative anti-competitive effects (the ‘greater than’ prong of the s. 96 inquiry). Where the quantitative anti-competitive effects outweigh the quantitative efficiencies, this step will in most cases be dispositive, and the defence will not apply: (...) Qualitative considerations must next be weighed. Under the second step, the qualitative efficiencies should be balanced against the qualitative anti-competitive effects, and a final determination must be made as to whether the total efficiencies offset the total anti-competitive effects of the merger at issue (the ‘offset’ prong of the inquiry).”

15. With regards to the consideration of qualitative evidence, the SCC stated that “[t]he Tribunal to give qualitative elements weight in the analysis, they must be supported by the evidence, and the reasoning for the reliance on the qualitative aspects must be clearly articulated.” The SCC also noted that “the ultimate offset analysis does allow for consideration of both quantitative and qualitative effects” and that “[t]he above [two-step] framework merely guides the structure of that inquiry to ensure that the Tribunal’s reasoning is as explicit and transparent as possible.”

16. It is important to note that while emphasizing the importance of quantifying all measurable anti-competitive effects for the purpose of a section 96 trade-off analysis, Tervita also demonstrated that there is no obligation on the Commissioner to quantify the anti-competitive effects for the finding of a substantial lessening or prevention of competition, in and of itself. In other words, if an efficiencies defence is not raised, the Tribunal should give weight to measurable anti-competitive effects even if those effects have not been quantified (although it may be advisable, nonetheless, for the Commissioner to quantify all anti-competitive effects in all cases). In TREC, the Tribunal reinforced this notion by stating that “[t]he Tribunal is of the view that such analysis similarly applies to a finding of substantial prevention of competition in the context of an abuse of dominant position” and that “[i]n contrast to merger cases in which the efficiency exception is invoked by the respondent(s), there is no obligation on the Commissioner to quantify the anti-competitive effects of an impugned practice of anti-competitive acts (Tervita at para 166).”

17. What does this mean for considering non-price effects under the Act?

18. In matters where an efficiencies defence is not available or not utilized, the case law has established that non-price dimensions of competition are not only important, but potentially sufficient or determinative in allowing an application by the Commissioner. Therefore, while it may be beneficial to do so, it is not necessary for the Bureau to have quantified anti-competitive effects (or even to have measurable effects) in order for it to prevail when an efficiencies defence has not been raised or is not available—in those cases, a qualitative assessment of likely price and/or non-price effects can be sufficient.

19. Conversely, in matters where an efficiencies defence is available and utilized, the Commissioner has the burden to quantify the measurable anti-competitive effects for the purpose of the section 96 trade-off analysis. While non-price or qualitative evidence can still be a component of the trade-off analysis under section 96, this occurs within the more subjective “offset” aspect of the trade-off when weighing all quantified and non-quantified effects against all quantified and non-quantified efficiencies. The SCC in Tervita rejected that a threshold can be applied to the magnitude of the efficiencies for a section 96 defence to prevail (i.e., the efficiencies can be minor or even insignificant in a successful defence).

20. Based on the recent case law in Canada, it is especially important for the Bureau to quantify any quantifiable anti-competitive effects when a section 96 efficiencies defence may be invoked. Similarly, merging parties should quantify all possible efficiencies, whether they are productive, allocative or dynamic efficiencies. This may be especially true in innovative industries or those with disruptive technologies, where the most important efficiency gains are dynamic in nature.

24 Tervita SCC decision, ¶ 147.
25 Ibid, ¶ 147.
26 Ibid, ¶ 149.
27 TREC redetermination, ¶ 469.
28 While the SCC’s decision in Tervita focuses on section 96 efficiencies, it is probable that courts would have a similar interpretation of the burden to quantify all quantifiable effects should an efficiencies defence be raised under the civil competitor collaboration provision of the Act (section 90.1).
29 In Tervita, the Tribunal interpreted the meaning of “offset” in the Act to have a non-measurable aspect to it or a more judgmental component to the analysis. See Tervita Tribunal decision, ¶ 144.
30 Tervita SCC decision, ¶ 151.
IV. Economics literature on non-price effects

21. In the economic models most commonly applied in competition analysis, firms choose only price and/or output. However, in reality, non-price attributes may also be chosen by firms and can change as a result of a merger, just as the price/output calculus might change. In fact, for at least some firms, the non-price attributes can be more important than price.

22. The relationship between competition and non-price factors—particularly innovation effects and quality effects—has been extensively studied in the economics literature. While the more traditional theoretical economics literature typically predicts that innovation should decrease with competition, the empirical evidence often shows increases in quality and innovation from increased competition. Significantly, a 2005 paper by Aghion et al. demonstrates that there is an inverted U-shaped relationship between competition and innovation: over lower levels of competition, the relationship is positive, while over higher levels of competition, the relationship is negative. The usual models of competition cannot easily account for such non-linearities. Shapiro (2012) provides a robust review of the findings from the theoretical and empirical literature on the relationship between competition and innovation, noting that “[t]he lack of robust results in this particular line of empirical work is understandable, given the measurement difficulties and conceptual complexities.” Shapiro does note, however, that the “empirical evidence overall gives powerful support for the proposition that heightened competitive pressure causes firms to invest more to improve their efficiency.”

23. Non-price effects can manifest in many different ways, and very often are industry specific. In a number of studies and past cases, industry metrics of quality have been quantified and used to infer a relationship between concentration and relevant industry metrics of quality or innovation. In some industries, the relationship between competition and innovation or quality is generally positive (i.e., more competition leads to increased innovation or quality), while in other industries, it can be negative (i.e., less competition leads to increased innovation or quality). A few of these studies are summarized below.

24. For example, several empirical studies have examined the effects of mergers in the radio broadcasting and newspaper industries on factors such as the variety of formats available to listeners and readers and the number of topics covered. A study by Berry and Waldofogel (2001) of mergers in the US radio broadcasting industry between 1993 and 1997 showed that, while increased concentration was associated with a decline in entry by new stations, concentration was also correlated with greater variety (i.e., more formats) per station. A similar study by Lisa George (2007) examined newspaper mergers in the 1990s and showed that consolidation in newspaper ownership led to more differentiation among newspapers and a larger number of topics covered per market.

25. In the airline industry, studies have focussed on the impact of consolidation on standard metrics of airline quality, such as wait times and flight delays. For example, Michael Mazzeo (2003) found that routes served by more than one airline with direct non-stop service had a significantly lower frequency of flight delays, as well as shorter delays.

26. In another paper, David Matsa (2010) studied the effect of Walmart’s entry in the US supermarket sector, and found that its entry caused a 33% decrease in inventory shortfalls at large grocery chains. Matsa found that many of Walmart’s competitors could not compete on price, and as a result had to compete on the basis of other factors, such as improving quality (by increasing inventory levels).
27. John Kwoka (2015) has conducted several retrospective merger analyses to assist with predicting future effects and several of those studies have focussed on non-price effects. In a 2016 presentation at the above-referenced Invitational Symposium on the Non-Price Effects of Mergers, Kwoka highlighted that in many cases, retrospective merger studies have found that mergers resulted in a decrease in quality or innovation.

28. One challenge with these industry-specific metrics is that even though they are quantifiable measures, they may not be easily compared to the idiosyncratic cost savings put forth by the parties under an efficiencies defence. As a result, agencies and firms could benefit from additional tools to quantify non-price effects in measures that can be compared to efficiencies and price effects (or deadweight loss calculations in Canada) on an “apples to apples” basis. In order to allow for direct comparisons of price and non-price effects (as well as efficiencies) in terms of impacts on consumer welfare, economists may be required to make structural assumptions to estimate the relative value consumers place on non-price factors.

V. Quantifying non-price effects: Some possible solutions

29. Stemming from the decision in Tervita, there is clearly a burden on the Commissioner of Competition in Canada to quantify all measurable anti-competitive effects in merger analysis. It is also clear that the tools economists use for quantifying non-price effects need further development. Some economists have urged the agencies to incorporate dynamic models into competition analysis, instead of relying on the standard static models economists use for quantifying non-price effects need in Canada to quantify all measurable anti-competitive effects. In a 2016 presentation at the Invitational Symposium on the Non-Price Effects of Mergers (June 15, 2016), Washington, DC, available at: http://www.antitrustinstitute.org/sites/default/files/kwokapresentation.pdf.

30. Nevertheless, barring the development of new economic models that appropriately account for non-price effects and innovation, the agencies and the merging parties have some options for quantifying the non-price effects of a proposed transaction, like the introduction of new products or services or the discontinuation of existing products.

31. One opportunity that exists is to look to studies in fields of economics outside of antitrust that may assist with assessing non-price effects applicable to a particular matter or industry. For example, economic impact studies are often commissioned by businesses, policymakers and government agencies to assess the benefits to consumers or the economy from the deployment of new technologies, changes in environmental regulations or the introduction of or change in a government policy. While these types of studies are not typically used when assessing the effects of mergers, they can be helpful when trying to quantify some non-price effects that could be incorporated into the necessary trade-off analysis in Canada, assuming the studies are robust and use sound assumptions.

32. To illustrate, if a merger were expected to result in the introduction of technology that benefits consumers by increasing their leisure time by a small amount per day, that benefit could be quantified by estimating the time value of money for consumers affected by this change in technology.

33. For a more concrete example, we can once again look to the Tervita case. In that matter, the Bureau argued that the merger would increase hazardous waste landfill tipping fees, which would result in more waste remaining in the ground (rather than being put in a secure landfill) or more customers switching to bioremediation, which was deemed to be more harmful to the environment. While the Tribunal initially assessed these effects qualitatively, the SCC found that the effects were quantifiable and therefore should have been quantified by the Commissioner if they were to be considered in the trade-off analysis. One manner in which the Bureau might have attempted to quantify these environment externalities would have been through the use of relevant environmental impact studies.


34. Another possible means for quantifying non-price effects in a merger context would be to use properly defined consumer surveys or conjoint studies. Conjoint studies use statistical techniques to determine the values consumers place on different product features or attributes and are typically conducted in an online survey setting. Conjoint studies are a standard tool that firms use to predict demand for new products before they are introduced. Conjoint analyses could be used to quantify a consumer’s willingness to pay for the introduction of a new product feature or to prevent the elimination of a product as a result of a merger. This quantification of willingness to pay could be incorporated into the quantified trade-off analysis required in Canada.

35. From a policy perspective, Katz and Shelanski (2006) offer several suggestions for how competition agencies can incorporate non-price effects into their analysis, specifically the effects of innovation in the case of merger reviews. A few of their policy recommendations include the agencies “develop[ing] and articulat[ing] guidelines for drawing inferences of potential product-market competition from evidence of ongoing innovation” and “develop[ing] the expertise that would allow case-by-case, fact-intensive inquiries to assess the welfare effects posed by mergers where innovation is at stake.”

VI. Conclusion

36. Given the SCC’s guidance in Tervita, there is an increased burden on the Commissioner to quantify all measurable aspects of the anti-competitive effects from a merger, including any non-price effects that can be measured, when an efficiencies defence has been raised. If non-price effects are left unquantified, the Commissioner risks that these effects will be given no weight (if the effects were deemed to be quantifiable) or relatively lower weight in the more subjective “offset” portion of the section 96 trade-off analysis. Similarly, the merging parties should quantify all efficiencies that result from a merger, including those that are difficult to quantify, as the SCC has demonstrated that even a de minimis amount of efficiencies can be enough to overcome an anti-competitive merger.

37. While some economic tools exist for quantifying non-price effects, it will be important to continue to develop new methods. To add to the challenge, these tools will likely be unfamiliar to the courts and legal practitioners, and will be underpinned by structural assumptions that will need to be defended. While there are a number of accepted economic models for estimating price effects, it has yet to be seen whether the courts in Canada (or, indeed, in other jurisdictions) will place significant weight on models used to quantify non-price effects and how these estimates will interplay with quantified price effects and efficiencies in the context of a section 96 trade-off analysis.
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