BENEFITS OF COMPETITION AND INDICATORS OF MARKET POWER

Introduction

This issue brief describes the ways in which competition between firms can benefit consumers, workers, entrepreneurs, small businesses and the economy more generally, and also describes how these benefits can be lost when competition is impaired by firms' actions or government policies. Several indicators suggest that competition may be decreasing in many economic sectors, including the decades-long decline in new business formation and increases in industry-specific measures of concentration. Recent data also show that returns may have risen for the most profitable firms. To the extent that profit rates exceed firms' cost of capital—which may be suggested by the rising spread on the return to invested capital relative to Treasury bonds—they may reflect economic rents, which are returns to the factors of production in excess of what would be necessary to keep them in operation. Such rents may divert resources from consumers, distort investment and employment decisions, and encourage firms to engage in wasteful rent-seeking activities.

The causes underlying a possible decrease in competition and corresponding increase in market power are not clear, but candidate explanations include efficiencies associated with scale, increases in merger and acquisition activity, firms' crowding out existing or potential competitors either deliberately or through innovation, and regulatory barriers to entry such as occupational licensing that have reduced the entry of new firms into a variety of markets. Government action can help reverse this trend. Antitrust authorities, namely the Department of Justice (DOJ) and the Federal Trade Commission (FTC), are charged with enforcing antitrust laws, challenging anticompetitive mergers, anticompetitive exclusionary conduct, and collusion by competitors. Their enforcement actions can block consolidation that reduces competition in a market, sanction anticompetitive behavior, and help define the contours of antitrust law through court decisions. These measures not only have immediate effects on the behavior that is challenged but also may help deter anticompetitive abuses in the future.

Promoting competition extends beyond enforcement of antitrust laws, it is also about a range of other pro-competitive policies. Several U.S. departments and agencies are actively using their authority to advance pro-competition and pro-consumer policies and regulations. For example, in several cases the Federal Aviation Administration (FAA) of the Department of Transportation (DOT) has sought to provide competitive airline carriers with greater access to take-off and landing slots at capacity constrained "slot-controlled" airports. The Federal Communications Commission (FCC), in its most recent design of a spectrum auction, established a market-based spectrum reserve designed to ensure against excessive concentration in holdings of low-band spectrum. Other recent examples include government actions on cell phone unlocking, net neutrality, standards-essential patents, and defense acquisition and procurement.

This brief argues that consumers and workers would benefit from additional policy actions by the government to promote competition within a variety of industries. In addition, more work is needed to understand how policies that promote competition should be applied in the digital economy and other technologically dynamic sectors.

Benefits of Competition and Potential Harms from Market Power

A long line of economic literature argues that competition among firms benefits consumers via lower prices (for an overview, see Kovacic and Shapiro (2000)).[1]

[1] While in theory these benefits can accrue even when there are only a few firms or a single firm in the marketplace, provided that the monopolist faces a credible threat of entry by other firms (Spence 1977, Dixit 1980), the benefits are more certain when there is vigorous competition among existing competitors. Tirole (1988) and Cabral (2000) provide useful overviews of the

Competition can benefit consumers in other ways as well: competition may lead to greater product variety, higher product quality, and greater innovation, which drives productivity growth and helps lift living standards (Hotelling 1929; Aghion et al. 2005; Shapiro 2012).[2]

When there is little or no competition, consumers are made worse off if a firm uses its market power to raise prices, lower quality for consumers, or block entry by entrepreneurs. A firm with market power recognizes that if it reduces price to gain more customers, it loses revenue on the existing customers it already has. Thus, it may set a higher price and provide a lower quantity of its product than would maximize societal welfare. Competition pushes firms to reduce price below this level, both to gain share from rivals, and in recognition that higher prices can be profitably undercut by competitors who are similarly trying to increase their sales. Alternatively, monopolists may choose not to upgrade quality or variety, which would also leave customers worse off than if the market had competitors. And monopolists may be less rigorous in pursuing efficient cost reductions, for as Sir John Hicks (1935) famously wrote, "the best of all monopoly profits is a quiet life."

Competition between firms may also help workers. In the same way that two firms might compete against one another and lower prices to entice consumers to purchase a product, firms competing to hire from a specialized labor market may raise wages to attract and retain workers. In addition, small businesses and entrepreneurs can benefit, for example, when upstream firms compete against each other for the opportunity to supply a product to a downstream small business or entrepreneur. If an entrepreneur sells its products to downstream firms rather than to end-users, it would benefit from there being a greater number of downstream firms to which it can sell products—the greater the number of downstream firms, the better the ability to negotiate a good price for the products it sells. Thus, whether the business model of an entrepreneur is business-to-business or business-to-consumer, competition among upstream firms and among downstream firms helps the entrepreneur grow his or her business by creating and capturing value in the marketplace (Brandenburger and Stuart 1996).

A firm that has market power when purchasing inputs or hiring workers may be able to exploit its market power, at least in the short-run. "Monopsony power" in the labor market may lead a firm to restrict employment, reducing wages below what they would be in a competitive market. In the classic example of isolated "company towns" in the late 19th and early 20th centuries, workers only had one option to which to sell their labor and hence could be exploited by this company, at least in the short run. Boal (1995) finds some evidence of monopsony power in the short run on the part of coal mining firms that owned company towns in the early 1900s. But over the longer run, it appears that workers move to find better paying jobs if wages are too low. This dynamic highlights how the mobility of assets—be they human, capital, or even digital—may help to mitigate against market power.

Firms can move from exercising their market power to the point where they are abusing it. Standard Oil at the turn of the previous century helped establish the impact and importance of antitrust laws. Before the implications of the Sherman Antitrust Act were clarified in early court decisions, Standard Oil had engaged in a variety of predatory tactics to weaken competitors (exclusionary conduct), purchased most of its direct rivals (horizontal integration) as well as a substantial portion of firms involved in other aspects of the oil industry (vertical integration), eventually gaining control over nearly 90 percent of U.S. oil production. Standard Oil used its size to obtain better terms on transportation and other ancillary transactions than its smaller competitors could command. These deals in turn made it easier for Standard Oil to undercut smaller rivals, softening them for purchase or forcing them out of business, reducing capacity in the industry. In 1911, the Supreme Court found for the Department of Justice, and ordered that Standard Oil Company be dissolved on the grounds that it violated the Sherman Antitrust Act's prohibition on trusts and other business activities that restrained trade and commerce.

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theoretical conditions, assumptions, and extensions needed for these benefits to accrue.

[2] The link between competition, innovation and productivity growth is covered in greater detail in Chapter 5 of the 2016 *Economic Report of the President*; available: https://www.whitehouse.gov/sites/default/files/docs/ERP_2016_Chapter_5.pdf.

More recently, in *United States v. Microsoft Corporation*, a case originally brought in 1998 by DOJ and twenty State Attorneys General, the United States Court of Appeals for the D.C. Circuit found that Microsoft had abused its monopoly power, upholding the United States District Court for the District of Columbia's original findings of fact (even though it overturned the District Court's ultimate verdict). Microsoft was found to have violated the Sherman Antitrust Act by a variety of exclusionary acts it used to maintain its PC operating system monopoly. Specifically, Microsoft sought to disadvantage the growth of non-Microsoft Internet browsers that developers could have used to compete with the Microsoft operating system monopoly. Through the resulting settlement, Microsoft was required to take steps to end its unlawful practices and restore competition, helping to create the conditions that have led to greater competition, innovation, and diversity in internet browsers. The Microsoft and Standard Oil cases are just two high-level examples of the types of investigations, enforcement, and remedies that DOJ Antitrust and FTC undertake every year.

While high levels of market power can sometimes allow for abuses, it is important to note that consumers are not necessarily worse off when a firm's market share increases. Sometimes, a firm's market share increases because of innovations by the firm, which result in products and services valued by customers. In fact, the U.S. Patent and Trademark Office (USPTO) grants patents—exclusive rights to use or license a technology or product—to inventors of innovations that exhibit both "novelty and non-obviousness." Allowing firms to exercise the market power they have acquired legitimately can maintain incentives for research and development, new product introduction, productivity gains, and entry into new markets, all of which promote long term economic growth.

Market share may increase as a firm realizes economies of scale, or efficiencies created by larger operations, resulting in lower costs that are passed on to consumers in the form of lower prices.[3] Some newer technology markets are also characterized by network effects, with large positive spillovers from having many consumers use the same product. Markets in which network effects are important, such as social media sites, may come to be dominated by one firm, because the "network externalities" in these markets tip to one provider of the network product or service.

Sometimes even when there is a monopolist serving a market, the threat of entry by new competitors can, in theory, keep prices low and quality high, benefiting consumers. In theory, the mere presence of these potential entrants helps to set a cap in terms of the rents that can accrue to the monopolist. It is important to acknowledge, however, that there is little empirical evidence of potential entry having a substantial impact on monopolists' behavior, except in certain specific cases (e.g., Dafny 2005, Goolsbee and Syverson 2008, Seamans 2012, Tenn and Wendling 2014).[4]

The presence of many firms in a market does not ensure competition. Under certain conditions, firms may be able to collude with each other to create and abuse market power, for example by agreeing to raise prices or by restricting output (thereby raising prices) to consumers or by restricting wage growth for workers. In the United States, price-fixing agreements among competitors are illegal and may be subject to criminal prosecution, including possible prison sentences for individuals who engage in this collusion. Detecting and prosecuting collusive cartels is an important priority for the antitrust agencies, both to eliminate the specific conduct in question and for its value as a deterrent in other settings.

[3] Furthermore, some industries, such as power transmission, water, and other utilities, may be "natural" monopolies, which occur when fixed costs are very high, and marginal costs are low and approaching zero; these conditions imply that it is more efficient to have one firm supply the market.

[4] Economists have engaged in an active debate about the conditions under which lower prices, higher quantity, or higher quality might actual deter or delay entry (see Tirole 1988 and Cabral 2000). For example, while the pricing argument is intuitively appealing, it turns out that theoretically, and practically, such a strategy likely only works when the incumbent monopolist has some information about the market that the potential entrant does not also share—a condition termed "asymmetric information" by economists (Milgrom and Roberts 1982).

Table 1: Change in Market Concentration by Sector, 1997-2012

Industry	Revenue Earned by 50 Largest Firms, 2012 (Billions $)	Revenue Share Earned by 50 Largest Firms, 2012	Percentage Point Change in Revenue Share Earned by 50 Largest Firms, 1997-2012
Transportation and Warehousing	307.9	42.1	11.4
Retail Trade	1,555.8	36.9	11.2
Finance and Insurance	1,762.7	48.5	9.9
Wholesale Trade	2,183.1	27.6	7.3
Real Estate Rental and Leasing	121.6	24.9	5.4
Utilities	367.7	69.1	4.6
Educational Services	12.1	22.7	3.1
Professional, Scientific and Technical Services	278.2	18.8	2.6
Administrative/ Support	159.2	23.7	1.6
Accommodation and Food Services	149.8	21.2	0.1
Other Services, Non-Public Admin	46.7	10.9	-1.9
Arts, Entertainment and Recreation	39.5	19.6	-2.2
Health Care and Assistance	350.2	17.2	-1.6

Note: Concentration ratio data is displayed for all North American Industry Classification System (NAICS) sectors for which data is available from 1997 to 2012.
Source: Economic Census (1997 and 2012), Census Bureau.

Indicators of Declining Competition

While there are many benefits of competition for consumers and workers, competition appears to be declining in at least part of the economy. This section reviews three sets of trends that are broadly suggestive of a decline in competition: increasing industry concentration, increasing rents accruing to a few firms, and lower levels of firm entry and labor market mobility.

The U.S. Census Bureau tracks revenue concentration by industry, and one measurement it provides of such concentration is the share of revenue earned by the 50 largest firms in the industry. Table 1 shows that the majority of industries have seen increases in the revenue share enjoyed by the 50 largest firms between 1997 and 2012. Several industry-specific studies have found consistent results over longer periods of time. In financial services, Corbae and D'Erasmo (2013) find that loan market share (measured on a national level) of the top 10 banks increased from about 30 percent in 1980 to about 50 percent in 2010, and deposit market share of the top 10 banks increased from about 20 percent in 1980 to almost 50 percent in 2010. A study by the Congressional Research Service (Shields 2010) shows that, between 1972 and 2002, industry concentration—as measured by the share of revenues held by the top four firms—increased in eight of the nine agricultural industries that it tracks, while Fuglie et al. (2012) find that global revenue concentration among upstream agricultural supply industries has increased as well.

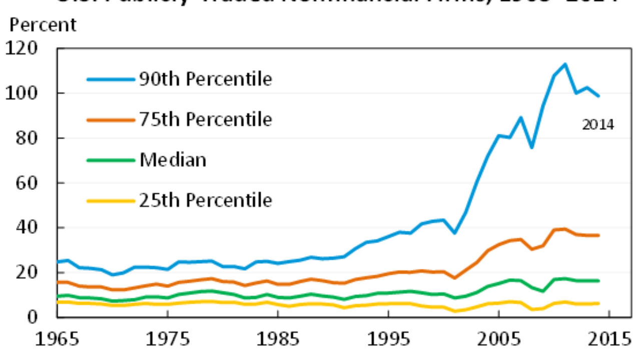
The statistics presented in Table 1 are national statistics across broad aggregates of industries, and an increase in revenue concentration at the national level is neither a necessary nor sufficient condition to indicate an increase in market power. Instead, antitrust authorities direct their attention to concentration at the relevant market level for each product or service. Those data are not readily available across the economy. But in a few industries, more heavily studied due to an availability of disaggregated public data, there is some evidence of increasing market level concentration. For example, Gaynor, Ho, and Town (2015) report that between the early 1990s and 2006, the average Herfindahl-Hirschman Index (HHI)[5] for hospital markets increased by about 50

[5] The Herfindahl-Hirschman Index (HHI) is a commonly used measure of market concentration that is created by summing up the squared shares of firms in a market. Higher values of the HHI indicate higher market concentration; it can be close to zero when a market is comprised of a large number of firms of small size and reaches a maximum of 10,000 when a market is controlled by a single firm. Antitrust agencies generally

percent to almost 3,200. This would be the level associated with just three equal-sized competitors in a market.[6] The FCC (2015) reports that the average HHI for wireless providers in a market increased from under 2,500 in 2004 to over 3,000 in 2014. Prater et al. (2012) document an increase in railroad market concentration between 1985 and 2007.

Returns on invested capital for publicly-traded U.S. nonfinancial firms have also become increasingly concentrated within a smaller segment of the market. Figure 1 indicates that the 90th percentile firm sees returns on investments in capital that are more than five times the median. This ratio was closer to two just a quarter of a century ago.

Figure 1: Return on Invested Capital Excluding Goodwill, U.S. Publicly-Traded Nonfinancial Firms, 1965–2014

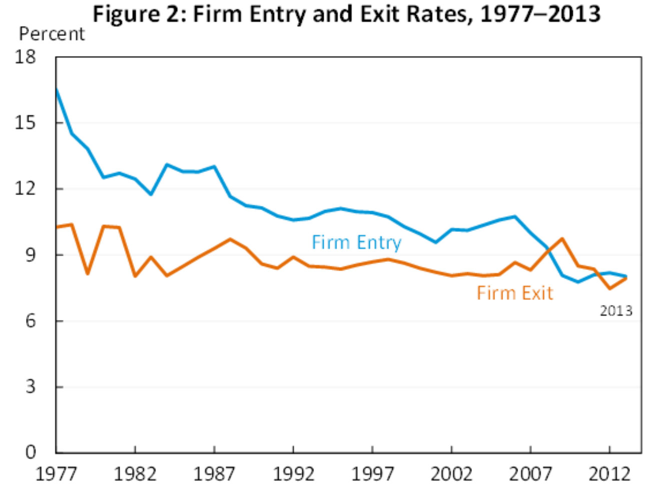


Note: The return on invested capital definition is based on Koller et al (2015), and the data presented here are updated and augmented versions of the figures presented in Chapter 6 of that volume. The McKinsey data includes McKinsey analysis of Standard & Poor's data and exclude financial firms from the analysis because of the practical complexities of computing returns on invested capital for such firms.

Source: Koller et al. (2015); McKinsey & Company; Furman and Orszag (2015).

There is also evidence of a decline in the number of new firms each year. Numerous academic papers have highlighted a long-term downward trend in business dynamism—the so-called churn or birth and death rates of firms—since the 1970s (e.g., Decker et al. 2014a). Figure 2 below, which uses data from the U.S. Census Bureau's Business Dynamics Statistics for 1977-2013, indicates that firm entry rates have declined over time, whereas firm exit rates have been more or less steady. Moreover, recent research finds that whereas in the 1980s and 1990s, declining dynamism was observed in selected sectors, notably retail, the decline was observed across all sectors in the 2000s, including the traditionally high-growth information technology sector (Decker et al. 2014b).

Figure 2: Firm Entry and Exit Rates, 1977–2013



Source: U.S. Census Bureau, Business Dynamics Statistics.

Labor market dynamism—which refers to the frequency of changes in who is working for whom in the labor market—has also declined since the 1970s.[7] Lower rates of labor market dynamism may be due to multiple factors including lower rates of new firm entry, greater restrictions on a worker's ability to move—such as in the case of non-compete agreements or occupational licensing described below—or even collusion between firms not to hire each other's workers, which has occurred in Silicon Valley.[8] The fact that both business and labor market dynamism have been in decline since

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consider markets in which HHI is between 1,500 and 2,500 to be moderately concentrated, and consider markets in which the HHI is in excess of 2,500 to be highly concentrated (see https://www.justice.gov/atr/herfindahl-hirschman-index for more detail).

[6] The authors also report that in 2006 more than 77% of MSAs were classified as highly concentrated (i.e., having HHIs>2,500).

[7] The decline in labor market dynamism was covered in greater detail in Chapter 3 of the 2015 *Economic Report of the President;* available: https://www.whitehouse.gov/sites/default/files/docs/2015_erp_chapter_3.pdf .

[8] Several well-known technology firms in Silicon Valley allegedly engaged in collusive "no-poaching" arrangements. More information available here: https://www.justice.gov/opa/pr/justice-department-requires-ebay-end-anticompetitive-no-poach-hiring-agreements and here: https://www.justice.gov/opa/pr/justice-department-requires-six-high-tech-companies-stop-entering-anticompetitive-employee

the 1970s could suggest that competition may be on the wane as well.

The reasons for declining firm entry rates are not well understood, but a partial explanation is that barriers to entry may have increased in many industries. These barriers could be in the form of Federal, State, or local licenses or permits, including occupational licenses discussed below. While such regulations serve a valuable role in protecting public well-being, they can also add fixed costs to an entrepreneur wanting to open a new business. Barriers to entry may be related to various advantages that have accrued to incumbent firms over time. For example, economies of scale may mean that incumbent costs are far below those of new entrants, making it difficult for entrants to compete. Or demand-side network effects may tip the market to a single provider of the network good. But incumbent advantages could also be political in nature; for example, if existing firms successfully lobby for rules protecting them from new entrants.

In summary, there is evidence of 1) increasing concentration across a number of industries, 2) increasing rents, in the form of higher returns on invested capital, across a number of firms, and 3) decreasing business and labor dynamism. However, the links among these factors are not clear. On the one hand, it could be that a decrease in firm entry is leading to higher levels of concentration, which leads to higher rents. On the other hand, it could be that higher levels of concentration are providing advantages to incumbents which are then used to raise entry barriers, leading to lower entry. Or it might be that some other factor is driving these trends. For example, innovation by a handful of firms in winner-take-all markets could give them a dominant market position in a very profitable market that could be difficult to challenge, discouraging entry. Even though it is not clear whether or how these three factors are linked, these trends are nevertheless troubling because they suggest that competition may be decreasing and could require attention by policymakers and regulators.

Causes of Market Power

There may be multiple reasons for the apparent increase in firm concentration, including deliberate behavior by firms, mergers and acquisitions activity, or State or local occupational licensing, among others.

Firm Behavior

Firms have for centuries engaged in behavior to expand their market. Pursuing the acquisition of market power by offering consumers greater value than rivals is a form of competition that benefits consumers, and is not itself problematic. Indeed, U.S. law recognizes the societal benefits of innovation by providing for government awards of temporary monopolies for inventions under the patent system. This potential to earn monopoly profits can provide an incentive to invest in research and development, facilitating innovations that drive technological progress. In some cases, however, the temporary monopoly afforded by a patent may not be socially productive, as may happen if a firm's business model is to earn profits by asserting royalty rights to patents it knows to be invalid under a threat of costly patent litigation.[9]

However, when firms attempt to increase their profits through anticompetitive means—colluding with rivals, purchasing competitors, erecting barriers to entry to insulate their incumbency from competition, or other actions—society suffers. As a consequence, legislators, regulators and courts have directed a substantial amount of effort towards curbing such activities. In the United States, the Sherman Antitrust Act, Clayton Antitrust Act, and Federal Trade Commission Act provide front-line defenses against these abuses.[10]

[9] While there are still patent litigation abuses, recent executive, judicial, and legislative actions have helped the U.S. patent litigation landscape. More details are available in an issue brief titled "The Patent Litigation Landscape: Recent Research and Developments" available here: https://www.whitehouse.gov/sites/default/files/page/files/201603_patent_litigation_issue_brief_cea.pdf

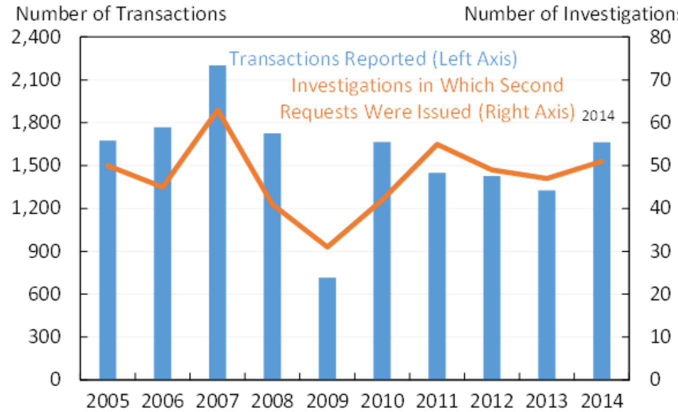
[10] The Sherman Antitrust Act of 1890 focused on curbing restraints on trade, including overtly anticompetitive behaviors such as price fixing. The Clayton Antitrust Act adopted an incipiency standard, designed to prevent acquisition of market power, including through anticompetitive mergers and acquisitions.

Mergers and Acquisitions

Increased industry concentration may in part result from an uptick in merger and acquisition activity. The objective scale of takeover activity in recent years is substantial. Global activity in mergers and acquisitions surpassed $5 trillion in 2015, about $2.5 trillion of which is in the United States, the highest amount in a year on record.[11] Deals surpassing $10 billion account for 37 percent of global takeover value, almost double the average of 21 percent for the last five years. However, it is important to note that the academic literature on takeover activity suggests that "merger waves" occur when stock market valuations are high, and the S&P 500 has risen almost 60 percent over the past five years during the continued recovery from the Great Recession (Maksimovic and Phillips 2001; Rhodes-Kropf and Viswanathan 2004). Thus, while merger activity is at an all-time high, there is some reason to believe that part of this recent trend may be due to cyclical factors rather than changes in business practices or enforcement behavior. Nevertheless, such merger activity could leave the economy with more large firms and potentially less competition. Preventing reductions in competition from mergers falls squarely within the law enforcement mission of the antitrust agencies.

Proposed mergers and acquisitions that meet certain thresholds are reported to the DOJ and FTC under the Hart-Scott-Rodino Antitrust Improvements Act of 1976. While merger and acquisition values have spiked in recent years, the number of transactions reported to antitrust authorities has been more or less flat over the past decade, except for a notable drop in 2009 (Figure 3, left axis). In addition, during the past decade, the number of second requests issued by antitrust authorities—indicating that additional information and investigation is needed to determine whether the merger is likely to harm competition—has been relatively stable each year (Figure 3, right axis). In FY2014, 3.2 percent of mergers (51 out of 1,683 mergers) were issued a second request. The rest of the mergers were cleared within 30 days, as per 15 U.S. Code § 18(b)(1)(B).

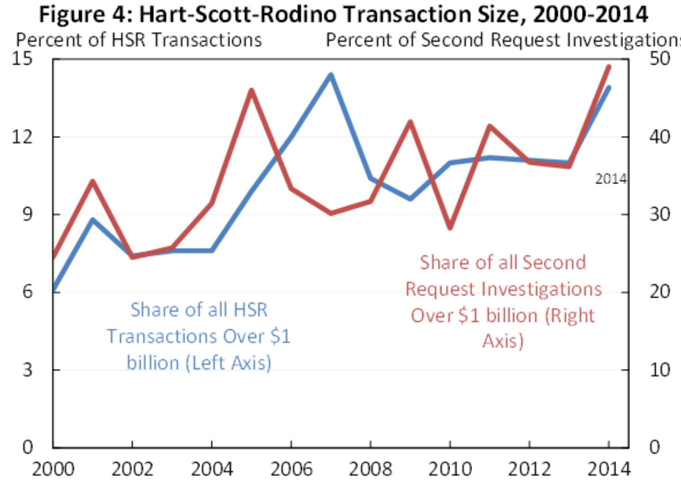
Figure 3: Hart-Scott-Rodino Transactions and Investigations, 2005-2014



Source: DOJ & FTC, Hart-Scott-Rodino Annual Report (FY2014)

From 2000 to 2007, the proportion of reported mergers with a value greater than $1 billion increased from 6 percent to close to 15 percent and then, after falling off during and just after the recession, has again begun to increase (see Figure 4, left axis). In addition, these larger transactions accounted for an increasing share of the investigations that the antitrust authorities subjected to second request (see Figure 4, right axis); in 2014, nearly half of the second requests issued were for these larger transactions.[12]

Figure 4: Hart-Scott-Rodino Transaction Size, 2000-2014



Source: DOJ & FTC, Hart-Scott-Rodino Annual Reports (FY2000 to FY2014)

Occupational Licensing and Other State Laws

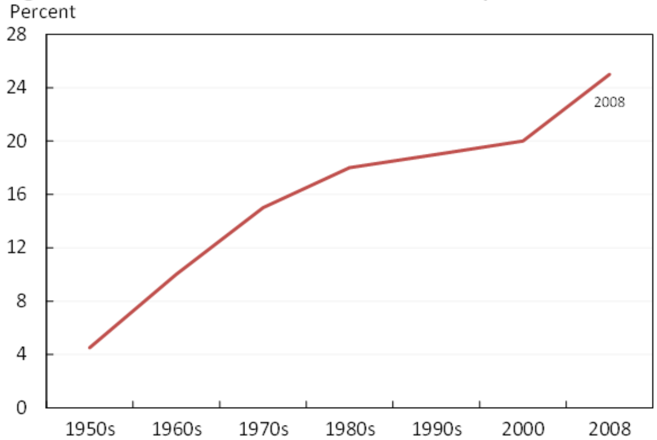
As highlighted in a recent White House report (CEA et al. 2015), the share of workers in occupations requiring

[11] These figures are according to Dealogic's data (http://www.dealogic.com/media/market-insights/ma-statshot).

[12] However, a portion of this increase is due to the fact that transaction size is reported in nominal dollars and so naturally increases over time.

some sort of State license grew fivefold over the last half of the 20th century (Figure 5), which fundamentally creates entry barriers for firms and workers. Though they are in some cases merited, such licensure requirements have the potential to make it more difficult for workers to move across State lines or between jobs, thus imposing a drag on the productivity of local economies. Importantly, some State occupational license requirements can be thought of as anti-competitive policies that protect labor market incumbents to the detriment of other workers and society as a whole.

Figure 5: Share of Workers with a State Occupational License



Source: Council of State Governments (1952); Greene (1969); Kleiner (1990); Kleiner (2006); and Kleiner and Krueger (2013), Westat data; CEA calculations.

Occupational licensing is but one example of a type of State law that may favor incumbents at the expense of new competitors. Other State and local examples include "certificate of need" laws that may make it difficult for new hospitals or health care providers to enter the market or provide new services, restrictions on direct-to-consumer automobile sales that may favor established automobile dealerships, and local taxi medallions that have historically been limited by the local government in many cities. In the latter case, the 2016 *Economic Report of the President* discussed several ways in which competition between incumbent taxi firms and newly entering on-demand ride-for-hire platforms are benefiting consumers in multiple cities.

Recent Federal Government and Agency Actions

DOJ, FTC, and other Federal government agencies have undertaken a range of efforts designed to promote competition and reduce market power abuses. These actions include more than just antitrust enforcement, though such enforcement is critical.

Antitrust Enforcement

The antitrust agencies—the Department of Justice Antitrust Division and the Federal Trade Commission—influence competition through their enforcement of antitrust (DOJ and FTC) and consumer protection laws (FTC), and their competition advocacy work. The primary antitrust enforcement mandates are: 1) to detect, punish, and deter agreements by independent firms that replace competition with collusion; 2) to challenge exclusionary behavior by firms that is intended to acquire, maintain, or extend monopoly power; and 3) to prevent the unlawful acquisition of market power through mergers and acquisitions where the effect "may be substantially to lessen competition, or to tend to create a monopoly." In evaluating mergers and business practices other than collusion, the courts call on the agencies to distinguish between anticompetitive mergers and practices and those that are competitively neutral or even beneficial, such as efficiency-enhancing mergers that are likely to reduce consumer prices as merger efficiencies are passed on to customers, or vertical contracting agreements that may reduce retail prices or increase investments in customer service.

Mergers that exceed certain thresholds (roughly $78 million in 2016) must be notified in advance to the FTC and DOJ. These agencies' initial screens reveal no competitive issues in the vast majority of cases, and those mergers are permitted to proceed without delay. Those that raise potential competitive concerns are investigated to determine whether the transaction poses a real risk to competition, with problematic ones selected for in-depth review through what is called a "second request" for more extensive data and documentation. These investigations can result in clearance, if the detailed review suggests that initial competitive concerns are unfounded. Mergers that are determined to substantially lessen competition may be challenged by the agency. In some cases, when firms are informed that the agency has determined a challenge is likely they choose to abandon the transaction. If a

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problematic merger is not abandoned, a challenge will then be filed in court.[13]

For example, in 2011 DOJ filed an antitrust lawsuit to block AT&T's proposed acquisition of T-Mobile, arguing that the merger would reduce competition between mobile carriers, leading to higher prices, worse service and less innovation, all of which would hurt consumers.[14] AT&T eventually dropped the proposed acquisition. Recent robust competition between carriers as well as innovative contract types and improvements in services may in part stem from competition that was preserved by DOJ's action. As another example, in 2015, the FTC filed an administrative complaint outlining how the proposed $8.2 billion merger of Sysco and US Foods would violate antitrust laws by reducing competition for foodservice distribution, both countrywide and in specific markets. The Commission successfully obtained a preliminary injunction from the U.S. District Court for the District of Columbia, at which point the parties abandoned the merger.

In 2009, Thoratec, a monopoly provider of FDA-approved left ventricular assist devices, proposed to acquire HeartWare, a potential entrant into the market whose competing product was rapidly moving through the FDA approval process. Among other efficiency arguments, one potential benefit was that Thoratec's experience and existing distribution channels may have helped provide HeartWare's product to more customers (Farrell, Pappalardo and Shelanski 2010). However, the FTC determined that following the merger, Thoratec would face less competitive pressure to innovate. The FTC filed a complaint to block the merger; and the parties subsequently abandoned their proposed merger.[15] The case is one example of the FTC taking action to block a merger that posed a potential risk to innovation. HeartWare subsequently gained FDA approval for its device in 2012, and over 9,000 patients have used the device.

Merger Remedies

In some cases, the antitrust authorities determine that concerns about competitive harm can be addressed without blocking the entire merger. Sometimes antitrust authorities will allow a merger to proceed conditioned on specified structural remedies, such as the divestiture of a part of the merged business to a third party. DOJ's 2013 settlement of its challenge to the American Airlines/US Airways merger included divestiture of slots (take-off and landing rights) to low-cost carriers at Reagan National and LaGuardia airports, as well as gates at Dallas Love Field and several other capacity-constrained airports. The Division reasoned that post-merger competition would be best preserved by facilitating low-cost carrier entry at capacity-constrained airports dominated by these legacy carriers.

There is ongoing debate over the effectiveness of merger remedies in preserving the competitive pre-merger conditions. Some observers have praised the increased use of remedies in recent years as aggressive and creative, while others question the government's ability to craft such remedies, monitor compliance with them, and whether they actually promote competition (Kwoka and Moss 2012, Kwoka 2013, Shughart and Thomas 2013). The FTC is presently updating its 1999 study of merger remedies with a study of merger orders that took place between 2006 and 2012, using its compulsory process authority to collect information as necessary. This analysis may provide the agencies with additional guidance on what characteristics make potential remedies more or less effective.

Anticompetitive Conduct

Anticompetitive conduct may be challenged under Section 2 of the Sherman Antitrust Act (monopolization) or Section 5 of the Clayton Act (enforced by the FTC against "unfair methods of competition" and "unfair or deceptive acts or practices"). For example, a number of conduct challenges have sought to preserve competition in health care markets. These include FTC challenges to

[13] The FTC process is somewhat different at this stage, though the standards for challenging a merger are similar across the two enforcement entities.

[14] DOJ's actions are described here: https://www.justice.gov/opa/pr/justice-department-files-antitrust-lawsuit-block-att-s-acquisition-t-mobile

[15] More information available here: https://www.ftc.gov/news-events/press-releases/2009/07/ftc-challenges-thoratecs-proposed-acquisition-heartware

"pay for delay" schemes in which a brand drug manufacturer compensates another producer to delay introducing their generic version of the drug when the brand patent expires, enabling the branded product to continue to earn monopoly rents past patent expiration. DOJ challenged most-favored-nation contract clauses used by the dominant insurers in Ohio and Michigan, arguing that they raise hospital reimbursement rates to their rivals, discourage entry and innovation, and increase the price of healthcare to consumers.

In 2015, the U.S. Supreme Court affirmed the FTC's ability to challenge the North Carolina Board of Dental Examiners's ability to block entry of unlicensed teeth whitening firms.[16] The FTC argued that the Board members, primarily dentists, viewed entry by the teeth whitening firms as detrimental to their business and used their power on the State Board to block competition. (Balan et al. 2015). This case is notable given the rapid increase of licensing over the past several decades (see Figure 5 above). This decision could have pro-competitive effects going forward, as licensing boards across States adjust their behavior.

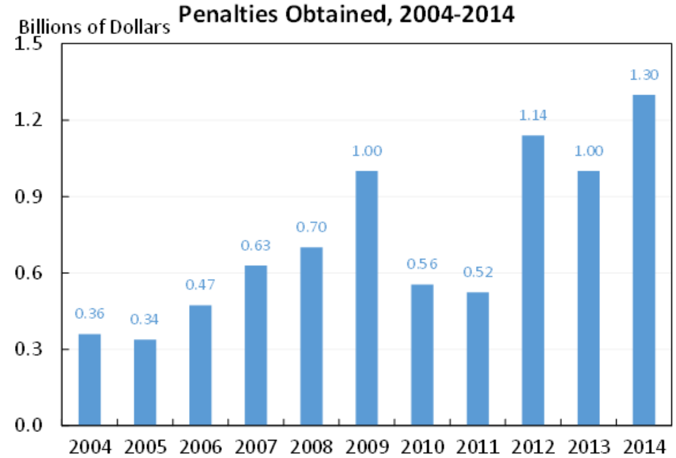
Collusion

Price-fixing, bid-rigging, and market-allocation agreements among firms harm competition and increase prices for consumers. The Sherman Antitrust Act prohibits "every contract, combination…., or conspiracy, in restraint of trade or commerce," and provides DOJ with the authority to prosecute entities and individuals who conspire to fix prices, rig bids, or allocate markets, so as to combat cartels, which the Supreme Court has deemed "the supreme evil of antitrust" (Baer 2014b). For those found guilty of these offenses, DOJ can recommend the imposition of various sanctions, including prison time and fines, as a way to hold wrongdoers accountable and punish and deter their harmful acts.

For example, DOJ uncovered a conspiracy among the world's top manufacturers of liquid crystal display (LCD) panels to fix the prices for panels used in computer monitors, notebook computers, and televisions. Their price fixing of these inputs directly affected the prices of these consumer products. DOJ's economic expert estimated that the conspirators' average per-panel margin was $53 higher during the four years that they regularly met to coordinate their price fixing. The expert also testified that the conspirators' overcharges on the panels that came into the United States were in excess of $2 billion. DOJ's LCD panel investigation led to 13 executives being convicted and $1.3 billion in criminal fines, in addition to more than $1 billion in damages recovered by States and private plaintiffs.

DOJ's criminal prosecution of corporations and individuals and the sanctions resulting from those prosecutions have increased over time. Between 2009 and 2014, DOJ filed about 340 cases—a more than 60 percent increase over the prior five years—and charged more than 310 individuals and 110 corporations (Baer 2014a). This increased number of prosecutions has resulted in increased criminal fines. Between 2009 and 2014, DOJ obtained more than $5.4 billion in criminal fines and penalties, including a record $1.3 billion in 2014 (see Figure 6 below).[17]

Figure 6: Criminal Antitrust Fines and Penalties Obtained, 2004-2014



Source: U.S. Department of Justice, Antitrust Division

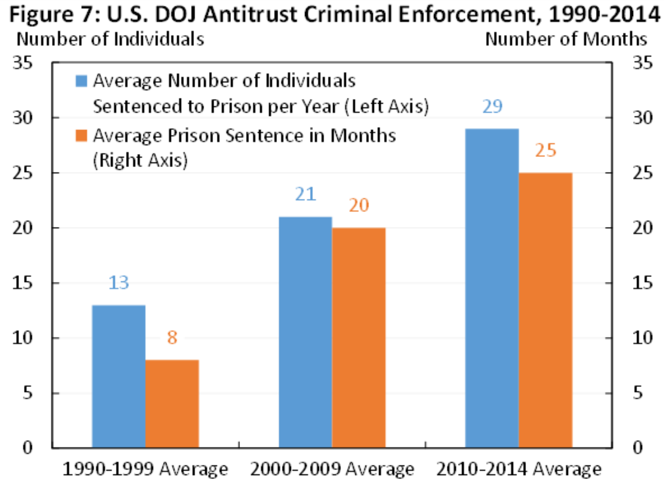
In addition to increased fines, DOJ has sought prison sentences for more individuals, and also longer prison sentences. Since 2010, the average number of individuals sentenced to prison each year for criminal antitrust violations has increased 38 percent and the average sentence has increased from 20 months in 2000-

[16] The decision can be read here: http://www.supremecourt.gov/opinions/14pdf/13-534_19m2.pdf

[17] DOJ's criminal enforcement program update is available at: http://www.justice.gov/atr/division-update/2015/criminal-program-update

2009 to 25 months in 2010-2014.[18] The average number of defendants sentenced to jail has also increased, from 21 in the 2000s to 29 in 2010-2014 (see Figure 7 below).[19] Over time, these enhanced criminal enforcement activities could have a deterrent effect.

Figure 7: U.S. DOJ Antitrust Criminal Enforcement, 1990-2014



Source: U.S. Department of Justice, Antitrust Division

Antitrust law also prohibits agreements to fix wages or limit competition for workers. For example, DOJ has successfully challenged—through civil enforcement—agreements that limited competition for nurses in both Arizona and Utah. Registered nurses (RN) in a number of areas of the country have filed private antitrust suits alleging that hospitals colluded with their local competitors to avoid recruiting each other's workers, thus depressing wages (Blair and DePasquale 2010).

Agency and Sector Specific Actions

Many other government agencies also have the ability to engage in sector-specific regulation and rule-making to affect pro-competitive outcomes. There have been multiple examples of such actions over the past several years, often in collaboration with competition advocacy efforts by the antitrust agencies.

- *Airport Access*. The DOT has in some proceedings successfully sought divestitures of airlines' "slots"—the right to fly in and out of a capacity-constrained airport at a given time—to allow new competitors access to this critical resource. These actions can facilitate entry by new competitors. For example, the FAA recently changed the designation of Newark Liberty International Airport from a "slot-controlled" to a "schedule-facilitated" airport. With this change in designation, any airline currently holding slots at the airport will need to use them or relinquish them to other airlines. The FAA's action therefore potentially gives more airlines access to the airport, potentially increasing competition between airlines, which could ultimately lead to lower prices and/or higher quality services for travelers.

- *Net Neutrality.* The FCC's 2010 Open Internet order, and its subsequent 2015 action, were aimed at ensuring that broadband providers do not exploit their "terminating access monopoly" over consumers to privilege their own vertically integrated content or discriminate against others' content or force content providers to pay fees for access or preferential access to customers. In other words, broadband providers who have a monopoly over service to their individual customers may not provide faster or better access to their own content versus content provided by others. This action represents regulatory intervention targeting not just potential for anticompetitive behavior in the consumer market for Internet service providers, but potential competitive harms for other markets (video content, social media platforms, etc.) that depended on potential access to all online consumers regardless of their Internet service providers.

- *Wireless Spectrum.* The FCC has taken a number of steps to promote competition through ensuring competitive access to radiofrequency spectrum, a limited resource that allows telecommunications equipment like cellular phones and televisions to function. In its most recent design of a spectrum auction, the FCC established a market-based spectrum reserve designed to ensure against excessive concentration in holdings of low-band spectrum, and updated its bidding credit rules to

[18]Assistant Attorney General Bill Baer's Testimony before the Oversight of the Antitrust Enforcement Agencies – House Judiciary Committee, Subcommittee on Regulatory Reform, Commercial and Antitrust Law, May 15, 2015, http://www.justice.gov/atr/congressional-testimony.

[19] Also available from the criminal program update: http://www.justice.gov/atr/division-update/2015/criminal-program-update

provide meaningful opportunities to *bona fide* small businesses and rural service providers to participate in auctions. In 2015, the FCC also updated its spectrum screen used for competitive reviews of proposed secondary market transactions.

- *Cell Phone Unlocking.* Historically, when a consumer purchased a cellphone and signed a contract with a telecommunications service provider, he or she was often unable to switch networks (and thus service providers) while still using the same device. Because of certain software that resided on the device, this constraint was present even when the new network and the device were technologically compatible. The device could thus be said to be "locked" to this original network. In light of the fact that cell phone locking impedes consumer choice in the marketplace, the FCC worked to secure voluntary commitments from the wireless industry so that new policies could be adopted to reduce the scope, incidence, and impact of this practice. As of February 2015, all nationwide mobile service providers adopted six standards that had been laid out in 2014 by CTIA-The Wireless Association, an industry group.[20]

- *Defense Acquisition and Procurement.* As part of its Better Buying Power initiative, begun in 2010 and now in its third iteration, the Department of Defense (DoD) has focused more intensively on promoting competition among contractors that provide the military with goods and services. This initiative was undertaken in recognition of the fact that competition not only reduces prices and increases the quality and variety of goods and services but also spurs innovation and affords small businesses the opportunity to enter new markets, potentially boosting overall productivity of the defense industrial base. Importantly, because innovations in defense technologies often also have civilian applications, this form of innovation has the potential to impact the overall economy positively as well.

- *Standard-Essential Patents (SEPs).* Voluntary consensus standards set by standards-developing organizations (SDOs) have paved the way for innovation that allows consumers to use the many innovative features of today's smart phones and computers, from e-mailing and texting to making video calls and watching videos. Often participants in a standard-setting process will voluntarily commit to license their patents that are essential to such standards, called SEPs, on fair, reasonable, and non-discriminatory (F/RAND) terms, in exchange for the benefit of being included in the standard. The International Trade Commission (ITC) was asked to issue an exclusion order in Samsung's case against Apple for infringing its SEPs. During the ITC's investigation, DOJ and the U.S. Patent and Trademark Office (USPTO) released a Joint Statement that outlined circumstances where the issuance of an exclusion order might fail to satisfy the ITC's public interest standard. It said that a credible threat of an exclusion order, which would ban an alleged infringer's competitive products from the market, could allow SEP owners to renege on their F/RAND commitment and extract supra-competitive royalty payments. This, in turn, could harm consumers through higher prices and stifle innovation by increasing the risks for companies seeking to implement standardized technology. In reviewing the ITC's exclusion order, the U.S. Trade Representative (USTR) shared the concerns of the Joint Statement and disapproved the order issued by the ITC against Apple and in favor of Samsung. At the same time, the executive agencies all strongly supported the protection of intellectual property rights and the ability of SEP holders who make F/RAND commitments to receive appropriate compensation. The Joint Statement and USTR's disapproval demonstrate how agencies of the executive branch can work together to promote and protect competition and consumers while protecting intellectual property rights.

Potential Areas for Future Consideration

Looking forward, as more and more sectors of the economy are digitized, departments and agencies may need to consider how digitization is impacting competition and whether additional regulation is

[20] FCC provides a list of frequently asked questions about cell phone unlocking on its website as well as the list of the exact standards laid out by CTIA and subsequently adopted by all nationwide wireless service providers: https://www.fcc.gov/consumers/guides/cell-phone-unlocking-faqs

needed. Thus potential areas for further exploration to enhance competition include the use of big data and the role of price transparency. Other areas for consideration include the role of common ownership of stock and the role of an evolving supply chain. All these areas present opportunities and challenges, and more research is needed.

Big Data

As indicated in the FTC's 2016 "Big Data" report, firms now routinely collect and trade customer information, including history of websites visited, prices observed, and products purchased. There are benefits to both firms and customers to having this information collected. Online merchants are able to carefully tailor their prices and products to each customer. As highlighted in CEA's 2015 report, "Big Data and Differential Pricing," knowledge about individuals' preferences, characteristics, and purchasing histories can allow firms to extend discounts, package deals, or other special offers to consumers in ways that make both firms and consumers better off. There may, however, also be costs, especially to consumers, including but not limited to loss of privacy or identity theft.

Regulators may want to consider whether this "big data" is a critical resource, without which new entrants might have a difficult time marketing to or otherwise attracting customers.[21] Even if big data is considered a critical resource to which entrants need access, it is not clear whether or how it should be provided. One option might be to make some of the data portable, such that customers could take this data, and their business, to whichever seller they want. On the one hand, one might imagine that businesses would then compete with one another to offer better prices and higher quality services so as to win or retain a customer's business. On the other hand, one might also imagine that businesses might adjust their businesses models, and become more selective in their initial customer acquisition strategy, which might leave some sets of customers worse off than before. Thus, more research is needed to better understand the costs and benefits of data portability. However, as noted above, mobility of assets—be they human, capital, or digital—may help to mitigate against market power abuses.

Price Transparency

Another area for further research by regulators and policymakers is price transparency. Greater transparency with regard to prices, in both offline and online markets, as well as ease of searching for these prices, could also be beneficial to consumers. If a customer can easily compare prices across multiple storefronts or websites, then the customer can make a well-informed decision, and businesses could be incentivized to compete for the customer's business via lower prices (Brown and Goolsbee 2002; Brynjolfsson and Smith 2000; Zettelmeyer, Scott Morton and Silva-Russo 2001). However, other research has shown that price transparency can in some settings facilitate tacit collusion by enabling firms to see what other firms are charging, and hence easily detect any deviation from agreed-upon high prices (Stigler 1964; Kyle and Ridley 2007, Schultz 2005).

Governments and non-profit organizations have worked in the past to increase price transparency in some cases. For example, Education Superhighway allows school districts to compare broadband pricing and other contract terms across hundreds of other school districts (Education Superhighway 2015). Policymakers may want to consider additional ways to encourage greater transparency of prices, while recognizing and working to address the potential ways this service may aid firms' attempts to collude.

Common Ownership

Common ownership of stocks by large institutional investors may also lead to anti-competitive effects (O'Brien and Salop 2000). A recent paper by Azar, Schmalz and Tecu (2015) argues that institutional investors, who are large owners of the biggest firms in an

[21] In fact, in a December 2015 speech, FTC Commissioner Terrell McSweeney concluded "Can one company controlling vast amounts of data possess a kind of market power that creates a barrier to entry? It may be that an incumbent has significant advantages over new entrants when a firm has a database that would be difficult, costly, or time consuming for a new firm to match or replicate." https://www.ftc.gov/system/files/documents/public_statements/903953/mcsweeny_-_cra_conference_remarks_9-12-15.pdf;

industry, implicitly encourage the firms they own not to compete with each other, thereby raising profits. Further study of the anti-competitive effects of common ownership is warranted given that many U.S. industries are oligopolies and that the role of institutional investors has grown over the last 30 years—according to the Boston Consulting Group, 61 percent of assets under management worldwide in 2014 came from institutions (Shub et al. 2015).

Supply Chain

A final area for further examination and research is how to address market structure changes throughout the supply chain. A natural question is whether increased concentration in one area of the supply chain leads to increased concentration in other parts of the supply chain. One might imagine that consolidation could improve a firm's bargaining position with upstream suppliers and downstream customers. More generally, economists are beginning to model and better understand empirically how consolidation in one part of the supply chain affects market outcomes and consumer welfare in other parts of the supply chain (e.g., Crawford and Yurukoglu 2012; Gowrisankaran, Nevo and Town 2015). The results of this effort and future research in this area will continue to be of use to antitrust authorities and regulators, ultimately helping to benefit consumers.

Conclusion

Competitive markets promote economic efficiency and growth. Their benefits can include lower prices and better products for consumers, greater opportunities for workers, and a level playing field for entrepreneurs and small businesses that seek to enter new markets or expand their share. When firms take action to impede competition, through anticompetitive mergers, exclusionary conduct, collusive agreements with rivals, or rent-seeking regulation to restrict entry, their profitability may increase, but at the cost of even greater reductions in consumer welfare and societal benefits.

Recent indicators suggest that many industries may be becoming more concentrated, that new firm entry is declining, and that some firms are generating returns that are greatly in excess of historical standards. In addition, the dollar volume of merger and acquisition activity is at record levels. There are also numerous barriers to entry at the State and local levels in the form of occupational licensing and other restrictions that can effect workers as well as entry by small businesses and entrepreneurs.

Over the past several years, antitrust authorities have focused on mergers and acquisitions and have pursued criminal sanctions, in the form of historically high fines and long prison sentences, aimed at achieving more robust levels of deterrence. Antitrust authorities have also considered the important goal of promoting innovation.

Departments and agencies, including the FCC, USPTO, DOT, and others, have been using their regulatory authority to foster beneficial competition between firms. There may however be scope for additional actions to be taken by departments and agencies to promote competition through rulemaking and regulations and by eliminating regulations that create barriers to or limit competition.

Free markets have the potential to provide great improvements in living standards, channeling resources to productive uses and providing consumers with quality and choices. Sometimes, though, abuses of market power by firms can undermine many of these potential benefits. As this issue brief demonstrates, competition between firms can generate many benefits to consumers, workers, and small businesses. Yet, as this brief also discusses, some indicators suggest there is more market concentration, higher profits for a few firms, and declining entry, all of which could result from less competition. Competition policies and robust reaction to market power abuses can be an important way in which the government makes sure the market provides the best outcomes for society with respect to choice, innovation, and price as well as fair labor and business markets.

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FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

For Release

Premerger Notification Office Implements Temporary e-Filing System

March 13, 2020

Tags: Competition | Bureau of Competition | Merger | Hart-Scott-Rodino Act (HSR) | Coronavirus (COVID-19)

Due to the developing COVID-19 coronavirus pandemic, and consistent with guidance from the Office of Personnel Management, the Premerger Notification Office (PNO) will implement a temporary e-filing system. During this emergency, all filings must be submitted via this system, and all hard copy and DVD submissions will be suspended. Key facts are as follows:

- The PNO will be open to accept hard copy and DVD Hart-Scott-Rodino filings until Friday March 13, 2020 at 5:00 p.m.
- The PNO will not accept any filings on Monday, March 16, 2020.
- Beginning at 8:30 am on Tuesday, March 17, 2020, the PNO will accept HSR filings only via the temporary e-filing system.
- The system will involve uploading documents to a secure Accellion file-transfer platform using the same file formats as specified for DVD filings on the Style Sheet for Hart-Scott-Rodino Filings.
- While this temporary system is in place, early termination will not be granted for any filing.
- The Department of Justice will implement the same procedures.

The PNO is working to get this system in place on a very tight schedule. The PNO has issued specific guidance on the temporary e-filing system and PNO operating procedures. If you have questions after reviewing our guidance, please contact premerger@ftc.gov. We appreciate your support and patience during this difficult time.

The Federal Trade Commission works to promote competition, and protect and educate consumers. You can learn more about how competition benefits consumers or file an antitrust complaint. Like the FTC on Facebook, follow us on Twitter, read our blogs, and subscribe to press releases for the latest FTC news and resources.

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JULY 09, 2021

FACT SHEET: Executive Order on Promoting Competition in the American Economy

The economy is booming under President Biden's leadership. The economy has gained more than three million jobs since the President took office—the most jobs created in the first five months of any presidency in modern history. Today, the President is building on this economic momentum by signing an Executive Order to promote competition in the American economy, which will lower prices for families, increase wages for workers, and promote innovation and even faster economic growth.

For decades, corporate consolidation has been accelerating. In over 75% of U.S. industries, a smaller number of large companies now control more of the business than they did twenty years ago. This is true across healthcare, financial services, agriculture and more.

That lack of competition drives up prices for consumers. As fewer large players have controlled more of the market, mark-ups (charges over cost) have tripled. Families are paying higher prices for necessities—things like prescription drugs, hearing aids, and internet service.

Barriers to competition are also driving down wages for workers. When there are only a few employers in town, workers have less opportunity to bargain for a higher wage and to demand dignity and respect in the workplace. In fact, research shows that industry consolidation is decreasing advertised wages by as much as 17%. Tens of millions of Americans—including those working in construction and retail—are required to sign non-compete agreements as a condition of getting a job, which makes it harder for them to switch to better-paying options.

In total, higher prices and lower wages caused by lack of competition are now estimated to cost the median American household $5,000 per year.

Inadequate competition holds back economic growth and innovation. The rate of new business formation has fallen by almost 50% since the 1970s as large businesses make it harder for Americans with good ideas to break into markets. There are fewer opportunities for existing small and independent businesses to access markets and earn a fair return. Economists find that as competition declines, productivity growth slows, business investment and innovation decline, and income, wealth, and racial inequality widen.

When past presidents faced similar threats from growing corporate power, they took bold action. In the early 1900s, Teddy Roosevelt's Administration broke up the trusts controlling the economy—Standard Oil, J.P. Morgan's railroads, and others—giving the little guy a fighting chance. In the late 1930s, FDR's Administration supercharged antitrust enforcement, increasing more than eightfold the number of cases brought in just two years—enforcement actions that saved consumers billions in today's dollars and helped unleash decades of sustained, inclusive economic growth.

Today President Biden is taking decisive action to reduce the trend of corporate consolidation, increase competition, and deliver concrete benefits to America's consumers, workers, farmers, and small businesses. **Today's historic Executive Order established a whole-of-government effort to promote competition in the American economy.** The Order **includes 72 initiatives by more than a dozen federal agencies to promptly tackle some of the most pressing competition problems across our economy.** Once implemented, these initiatives will result in concrete improvements to people's lives.

Among other things, they will:

- Make it easier to change jobs and help raise wages by banning or limiting non-compete agreements and unnecessary, cumbersome occupational licensing requirements that impede economic mobility.
- Lower prescription drug prices by supporting state and tribal programs that will import safe and cheaper drugs from Canada.
- Save Americans with hearing loss thousands of dollars by allowing hearing aids to be sold over the counter at drug stores.

- Save Americans money on their internet bills by banning excessive early termination fees, requiring clear disclosure of plan costs to facilitate comparison shopping, and ending landlord exclusivity arrangements that stick tenants with only a single internet option.
- Make it easier for people to get refunds from airlines and to comparison shop for flights by requiring clear upfront disclosure of add-on fees.
- Make it easier and cheaper to repair items you own by limiting manufacturers from barring self-repairs or third-party repairs of their products.
- Make it easier and cheaper to switch banks by requiring banks to allow customers to take their financial transaction data with them to a competitor.
- Empower family farmers and increase their incomes by strengthening the Department of Agriculture's tools to stop the abusive practices of some meat processors.
- Increase opportunities for small businesses by directing all federal agencies to promote greater competition through their procurement and spending decisions.

The Order also encourages the leading antitrust agencies to focus enforcement efforts on problems in key markets and coordinates other agencies' ongoing response to corporate consolidation. The Order:

- Calls on the leading antitrust agencies, the Department of Justice (DOJ) and Federal Trade Commission (FTC), to **enforce the antitrust laws vigorously** and recognizes that the law allows them to **challenge prior bad mergers** that past Administrations did not previously challenge.
- Announces a policy that enforcement should focus in particular on **labor markets, agricultural markets, healthcare markets (which includes prescription drugs, hospital consolidation, and insurance)**, **and the tech sector.**
- Establishes a **White House Competition Council, led by the Director of the National Economic Council,** to monitor progress on finalizing the

initiatives in the Order and to coordinate the federal government's response to the rising power of large corporations in the economy.

A more detailed summary of the key actions in the Order is provided below:

Labor Markets

Competition in labor markets can empower workers to demand higher wages and greater dignity and respect in the workplace. One way companies stifle competition is with non-compete clauses. Roughly half of private-sector businesses require at least some employees to enter non-compete agreements, affecting some 36 to 60 million workers.

Overly burdensome occupational licensing requirements also restrict competition. In certain occupations, such as skilled construction trades, licensing is critical to protecting public health and safety and increasing wages for workers who acquire in-demand skills and knowledge. In other occupations, however, it can impede worker mobility without countervailing benefits. Today, almost 30% of jobs in the United States require a license, up from less than 5% in the 1950s. Fewer than 5% of occupations that require licensing in at least one state are treated consistently across all 50 states. That locks some people out of jobs, and it makes it harder for people to move between states—particularly burdening military spouses, 34% of whom work in a field requiring a license and are subject to military-directed moves every few years.

Workers may also be harmed by existing guidance provided by the Department of Justice and Federal Trade Commission to Human Resource personnel that allows third parties to make wage data available to employers —and not to workers—in certain circumstances without triggering antitrust scrutiny. This may be used to collaborate to suppress wages and benefits.

In the Order, the President:

- Encourages the FTC to **ban or limit non-compete agreements**.
- Encourages the FTC to **ban unnecessary occupational licensing restrictions that impede economic mobility**.

- Encourages the FTC and DOJ to strengthen antitrust guidance to **prevent employers from collaborating to suppress wages or reduce benefits** by sharing wage and benefit information with one another.

These actions complement the President's call for Congress to pass the Protecting the Right to Organize (PRO) Act to ensure workers have a free and fair choice to join a union and to collectively bargain. Unions are critical to empowering workers to bargain with their employers for better jobs and to creating an economy that works for everyone.

Healthcare

The proposed Order tackles four areas where lack of competition in healthcare increases prices and reduces access to quality care.

*Prescription Drugs***:** Americans pay more than 2.5 times as much for the same prescription drugs as peer countries, and sometimes much more. Price increases continue to far surpass inflation. As a result, nearly one in four Americans report difficulties paying for medication, and nearly one in three Americans report not taking their medications as prescribed.

These high prices are in part the result of lack of competition among drug manufacturers. The largest pharmaceutical companies are able to wield their market power to reap average annual profits of 15-20%, as compared to average annual profits of 4-9% for the largest non-drug companies.

One strategy that drug manufacturers have used to avoid competing is "pay for delay" agreements, in which brand-name drug manufacturers pay generic manufacturers to stay out of the market. That has raised drug prices by $3.5 billion per year, and research also shows that "pay for delay" and similar deals between generic and brand name manufacturers reduce innovation—reducing new drug trials and R&D expenditures.

In the Order, the President:

- Directs the Food and Drug Administration to **work with states and tribes to safely import prescription drugs from Canada**, pursuant to the Medicare Modernization Act of 2003.

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- Directs the Health and Human Services Administration (HHS) to increase **support for generic and biosimilar drugs**, which provide low-cost options for patients.

- Directs HHS to issue **a comprehensive plan within 45 days to combat high prescription drug prices and price gouging**.

- Encourages the FTC to **ban "pay for delay" and similar agreements by rule.**

*Hearing Aids***:** Hearing aids are so expensive that only 14% of the approximately 48 million Americans with hearing loss use them. On average, they cost more than $5,000 per pair, and those costs are often not covered by health insurance. A major driver of the expense is that consumers must get them from a doctor or a specialist, even though experts agree that medical evaluation is not necessary. Rather, this requirement serves only as red tape and a barrier to more companies selling hearing aids. The four largest hearing aid manufacturers now control 84% of the market.
In 2017, Congress passed a bipartisan proposal to allow hearing aids to be sold over the counter. However, the Trump Administration Food and Drug Administration failed to issue the necessary rules that would actually allow hearing aids to be sold over the counter, leaving millions of Americans without low-cost options.

In the Order, the President:

- Directs HHS to consider issuing **proposed rules within 120 days for allowing hearing aids to be sold over the counter.**

*Hospitals***:** Hospital consolidation has left many areas, especially rural communities, without good options for convenient and affordable healthcare service. Thanks to unchecked mergers, the ten largest healthcare systems now control a quarter of the market. Since 2010, 138 rural hospitals have shuttered, including a high of 19 last year, in the middle of a healthcare crisis. Research shows that hospitals in consolidated markets charge far higher prices than hospitals in markets with several competitors.

In the Order, the President:

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- **Underscores that hospital mergers can be harmful** to patients and encourages the Justice Department and FTC to review and revise their merger guidelines to ensure patients are not harmed by such mergers.
- Directs HHS to **support existing hospital price transparency rules and to finish implementing bipartisan federal legislation to address surprise hospital billing**.

*Health Insurance***:** Consolidation in the health insurance industry has meant that many consumers have little choice when it comes to selecting insurers. And even when there is some choice, comparison shopping is hard because plans offered on the exchanges are complicated—with different services covered or different deductibles.

In the Order, the President:

- Directs HHS to **standardize plan options in the National Health Insurance Marketplace so people can comparison shop** more easily.

Transportation

In the transportation sector, multiple industries are now dominated by large corporations—air travel, rail, and shipping.

Airlines: The top four commercial airlines control nearly two-thirds of the domestic market. Reduced competition contributes to increasing fees like baggage and cancellation fees. These fees are often raised in lockstep, demonstrating a lack of meaningful competitive pressure, and are often hidden from consumers at the point of purchase. The top ten airlines collected $35.2 billion in ancillary fees in 2018, up from just $1.2 billion in 2007. Inadequate competition also reduces incentives to provide good service. For example, the Department of Transportation (DOT) estimates that airlines were late delivering at least 2.3 million checked bags in 2019.

In the Order, the President:

- Directs the DOT to consider issuing **clear rules requiring the refund of fees when baggage is delayed or when service isn't actually provided**—like when the plane's WiFi or in-flight entertainment system is broken.

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- Directs the DOT to consider issuing **rules that require baggage, change, and cancellation fees to be clearly disclosed** to the customer.

***Rail*:** In 1980, there were 33 "Class I" freight railroads, compared to just seven today, and four major rail companies now dominate their respective geographic regions. Freight railroads that own the tracks can privilege their own freight traffic—making it harder for passenger trains to have on-time service—and can overcharge other companies' freight cars.

In the Order, the President:

- Encourages the Surface Transportation Board to **require railroad track owners to provide rights of way to passenger rail** and to strengthen their obligations to **treat other freight companies fairly**.

***Shipping*:** In maritime shipping, the global marketplace has rapidly consolidated. In 2000, the largest 10 shipping companies controlled 51% of the market. Today, it is more than 80%, leaving domestic manufacturers who need to export goods at these large foreign companies' mercy. This has let powerful container shippers charge exporters exorbitant fees for time their freight was sitting waiting to be loaded or unloaded. These fees, called "detention and demurrage charges," can add up to hundreds of thousands of dollars.

In the Order, the President:

- Encourages the Federal Maritime Commission to **ensure vigorous enforcement against shippers charging American exporters exorbitant charges**.

Agriculture

Over the past few decades, key agricultural markets have become more concentrated and less competitive. The markets for seeds, equipment, feed, and fertilizer are now dominated by just a few large companies, meaning family farmers and ranchers now have to pay more for these inputs. For example, just four companies control most of the world's seeds, and corn seed prices have gone up as much as 30% annually.

Consolidation also limits farmers' and ranchers' options for selling their products. That means they get less when they sell their produce and meat—even as prices rise at the grocery store. For example, four large meat-packing companies dominate over 80% of the beef market and, over the last five years, farmers' share of the price of beef has dropped by more than a quarter—from 51.5% to 37.3%—while the price of beef has risen.

Overall, farmers' and ranchers' share of each dollar spent on food has been declining for decades. In short, family farmers and ranchers are getting less, consumers are paying more, and the big conglomerates in the middle are taking the difference.

Meanwhile, the law designed to combat these abuses—the Packers and Stockyards Act—was systematically weakened by the Trump Administration Department of Agriculture (USDA).

American farmers and ranchers are also getting squeezed by foreign corporations importing meat from overseas with labels that mislead customers about its origin. Under current labeling rules, meat can be labeled "Product of USA" if it is only processed here—including when meat is raised overseas and then merely processed into cuts of meat here. For example, most grass-fed beef labeled "Product of USA" is actually imported. That makes it hard or impossible for consumers to know where their food comes from and to choose to support American farmers and ranchers.

Corporate consolidation even affects farmers' ability to repair their own equipment or to use independent repair shops. Powerful equipment manufacturers—such as tractor manufacturers—use proprietary repair tools, software, and diagnostics to prevent third-parties from performing repairs. For example, when certain tractors detect a failure, they cease to operate until a dealer unlocks them. That forcers farmers to pay dealer rates for repairs that they could have made themselves, or that an independent repair shop could have done more cheaply.

In the Order, the President:

- Directs USDA to consider issuing **new rules under the Packers and Stockyards Act making it easier for farmers to bring and win claims, stopping chicken processors from exploiting and underpaying**

chicken farmers, and adopting anti-retaliation protections for farmers who speak out about bad practices.

- Directs USDA to consider issuing **new rules defining when meat can bear "Product of USA" labels, so that consumers have accurate, transparent labels that enable them to choose products made here.**
- Directs USDA to develop a plan to **increase opportunities for farmers to access markets and receive a fair return, including supporting alternative food distribution systems like farmers markets and developing standards and labels** so that consumers can choose to buy products that treat farmers fairly.
- Encourages the FTC to **limit powerful equipment manufacturers from restricting people's ability to use independent repair shops or do DIY repairs—such as when tractor companies block farmers from repairing their own tractors**.

Internet Service

The Order tackles four issues that limit competition, raise prices, and reduce choices for internet service.

Lack of competition among broadband providers: More than200 million U.S. residents live in an area with only one or two reliable high-speed internet providers, leading to prices as much as *five times higher* in these markets than in markets with more options. A related problem is landlords and internet service providers entering exclusivity deals or collusive arrangements that leave tenants with only one option. This impacts low-income and marginalized neighborhoods, because landlord-ISP arrangements can effectively block out broadband infrastructure expansion by new providers.

In the Order, the President encourages the FCC to:

- **Prevent ISPs from making deals with landlords that limit tenants' choices.**

Lack of price transparency: Even where consumers have options, comparison shopping is hard. According to the Federal Communications Commission (FCC), actual prices paid for broadband services can be 40%

higher than advertised. During the Obama-Biden Administration, the FCC began developing a "Broadband Nutrition Label"—a simple label that provides basic information about the internet service offered so people can compare options. The Trump Administration FCC abandoned those plans.

In the Order, the President encourages the FCC to:

- **Revive the "Broadband Nutrition Label"** and **require providers to report prices and subscription rates** to the FCC.

High termination fees: If a consumer does find a better internet service deal, they may be unable to actually switch because of high early termination fees —on average nearly $200—charged by internet providers.

In the Order, the President encourages the FCC to:

- **Limit excessive early termination fees.**

Companies discriminatorily slowing down internet access: Big providers can use their power to discriminatorily block or slow down online services. The Obama-Biden Administration's FCC adopted "Net Neutrality" rules that required these companies to treat all internet services equally, but this was undone in 2017.

In the Order, the President encourages the FCC to:

- **Restore Net Neutrality rules** undone by the prior administration.

Technology

The Order tackles three areas in which dominant tech firms are undermining competition and reducing innovation:

Big Tech platforms purchasing would-be competitors: Over the past ten years, the largest tech platforms have acquired hundreds of companies—including alleged "killer acquisitions" meant to shut down a potential competitive threat. Too often, federal agencies have not blocked, conditioned, or, in some cases, meaningfully examined these acquisitions.

In the Order, the President:

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- Announces an Administration policy of **greater scrutiny of mergers**, especially by dominant internet platforms, with particular attention to the acquisition of nascent competitors, serial mergers, the accumulation of data, competition by "free" products, and the effect on user privacy.

*Big Tech platforms gathering too much personal information***:** Many of the large platforms' business models have depended on the accumulation of extraordinary amounts of sensitive personal information and related data.
In the Order, the President:

- Encourages the FTC to establish **rules on surveillance and the accumulation of data.**

*Big Tech platforms unfairly competing with small businesses***:** The large platforms' power gives them unfair opportunities to get a leg up on the small businesses that rely on them to reach customers. For example, companies that run dominant online retail marketplaces can see how small businesses' products sell and then use the data to launch their own competing products. Because they run the platform, they can also display their own copycat products more prominently than the small businesses' products.
In the Order, the President:

- Encourages the FTC to establish **rules barring unfair methods of competition on internet marketplaces.**

*Cell phone manufacturers and others blocking out independent repair shops***:** Tech and other companies impose restrictions on self and third-party repairs, making repairs more costly and time-consuming, such as by restricting the distribution of parts, diagnostics, and repair tools.

In the Order, the President:

- Encourages the FTC to issue **rules against anticompetitive restrictions on using independent repair shops or doing DIY repairs** of your own devices and equipment.

Banking and Consumer Finance

Over the past four decades, the United States has lost 70% of the banks it once had, with around 10,000 bank closures. Communities of color are

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disproportionately affected, with 25% of all rural closures in majority-minority census tracts. Many of these closures are the product of mergers and acquisitions. Though subject to federal review, federal agencies have not formally denied a bank merger application in more than 15 years.

Excessive consolidation raises costs for consumers, restricts credit for small businesses, and harms low-income communities. Branch closures can reduce the amount of small business lending by about 10% and leads to higher interest rates. Even where a customer has multiple options, it is hard to switch banks partly because customers cannot easily take their financial transaction history data to a new bank. That increases the cost of the new bank extending you credit.

In the Order, the President:

- Encourages DOJ and the agencies responsible for banking (the Federal Reserve, the Federal Deposit Insurance Corporation, and the Office of the Comptroller of the Currency) to **update guidelines on banking mergers to provide more robust scrutiny of mergers**.
- Encourages the Consumer Financial Protection Bureau (CFPB) to issue **rules allowing customers to download their banking data** and take it with them.

###

Guide to the June 2024 amendments to the *Competition Act*

June 25, 2024

Important amendments to the *Competition Act* became law on June 20, 2024, following Royal Assent of Bill C- 59, the *Fall Economic Statement Implementation Act, 2023*. The Government of Canada has made these changes as a part of its modernization of Canada's competition regime.

This guide provides an overview of the most important changes.

> The guide is not a legal document and does not replace legal advice. The Competition Bureau will be reviewing and updating its enforcement guidance to ensure transparency and predictability for the business and legal communities.

On this page:

More effective merger control

Effective merger control is essential for Canadians to receive the benefits of a competitive marketplace. Anti-competitive mergers can lead to real harm in the economy, including higher prices, fewer choices, and lower levels of innovation.

The *Competition Act* includes provisions to address anti-competitive mergers. While the Competition Bureau can review any merger in Canada, the Bureau must be notified in advance of mergers that exceed certain financial thresholds. This allows the Bureau to conduct a review and, if necessary, challenge a merger before the Competition Tribunal or obtain remedies prior to the transaction closing.

The amendments to the *Competition Act* make important changes that allow the Competition Bureau to address anti-competitive mergers more effectively. This includes:

- Creating a presumption that a merger is anti-competitive if it significantly increases concentration or market share.
  - Merging parties may seek to rebut this presumption if there is sufficient evidence that the merger will not substantially prevent or lessen competition.

When does the new presumption apply for mergers?

Under the changes to the *Competition Act*, a merger is presumed to be anti-competitive if it significantly increases concentration or market share.

- Concentration is measured with a *concentration index*, which is defined as the sum of the squares of the market shares in the relevant market. This is also known as the Herfindahl-Hirschman Index.

This presumption applies if, in any relevant market:

- the concentration index after the merger increases or is likely to increase by more than 100; and
- either:
  - the concentration index after the merger is or is likely to be more than 1,800, or
  - the combined market share of the parties to the merger or proposed merger is or is likely to be more than 30%.

The specific thresholds for this presumption can be updated through regulations.

- Strengthening remedies for anti-competitive mergers by establishing that their goal is to preserve or restore the level of competition that would have existed without the merger.
  - Previously, merger remedies only had to lessen the competitive harm caused by the merger so that it was not substantial.
- Clarifying that the Competition Tribunal can consider competitive harm in labour markets, as well as the risk of coordination between competitors, when deciding whether a merger or a part of a merger should be allowed.
- Expanding the range of mergers requiring advance notification to the Competition Bureau by addressing gaps in the requirements.
  - As an example, a company's sales into Canada now count towards the transaction-size threshold for notification purposes.
- Extending from one year to three years the period the Competition Bureau has to challenge a merger for which it was not notified.

- Preventing parties from closing potentially harmful mergers where the Competition Bureau has applied for an injunction.
  - The changes temporarily pause mergers when there is a pending application for an injunction before the Competition Tribunal.
  - Previously, parties could close a merger before the Competition Tribunal was able to issue a decision on an injunction application.

Other recent amendments to the *Competition Act* have removed the efficiencies defence for anti-competitive mergers, and expanded the list of factors that the Competition Tribunal could consider to decide whether a merger will harm competition.

Stronger powers to address anti-competitive agreements

The *Competition Act* contains both criminal and civil provisions dealing with anti-competitive agreements between businesses. The amendments significantly strengthen the civil provision which prevents companies from entering into agreements that substantially prevent or lessen competition.

Specifically, the changes:

- Expand the civil provision to cover past anti-competitive agreements going back up to 3 years.
  - Previously, the Competition Bureau could only challenge existing or proposed agreements that harmed competition in the present or were likely to in the future.
- Allow the Competition Tribunal to impose monetary penalties and order parties to an anti-competitive agreement to take actions necessary to restore competition.

- Allow private parties to bring challenges to anti-competitive agreements under the civil provision directly to the Competition Tribunal.
  - Previously, only the Competition Bureau had the authority to challenge anti-competitive agreements under the civil provision.

Enhanced refusal to deal provision

In most cases, businesses have the right to decide who they do business with. However, the *Competition Act* prohibits a business from refusing to deal with another business if that refusal harms competition and meets other conditions.

The changes:

- Expand the refusal to deal provision to cover situations where a refusal is substantially affecting part of a business.
  - Previously, the provision only applied to extreme cases where a refusal was substantially affecting the entirety of the business that was refused.
- Ensure that the provision can apply to refusals to provide diagnostic or repair information or related products.
  - This change will help independent firms that provide repair services get access to the information and parts they need to repair products.

Improvements to the deceptive marketing practices provisions

Under the *Competition Act*, it is illegal to advertise or market something in a way that is false or misleading.

The changes strengthen the Competition Bureau's ability to act against bogus discount claims and drip pricing by:

- Requiring that businesses be able to establish that their discount claims are genuine.
- Clarifying that it is misleading to omit mandatory fees from advertised prices, unless those fees are imposed by government **on purchasers**, such as sales tax.
    - Previously, some firms had interpreted the *Competition Act* as allowing them to pass their own business taxes and regulatory compliance costs onto consumers as mandatory hidden fees.

The changes also tackle unsupported environmental claims, commonly known as greenwashing, by:

- Requiring that claims about the environmental benefits of a **product** be supported by adequate and proper testing.
- Requiring that claims about the environmental benefits of a **business** or **business activity** be based on adequate and proper substantiation in accordance with an internationally recognized methodology.
- The Bureau is assessing the impact of these requirements and expects to provide guidance, in due course, that will offer transparency and predictability for the business and the legal communities in the enforcement of the law.

Expanded private access to the Competition Tribunal

Under the *Competition Act*, private parties can apply directly to the Competition Tribunal to challenge certain types of anti-competitive conduct.

The changes:

- Extend private access rights to cases involving deceptive marketing practices and a civil provision dealing with anti-competitive agreements.
    - Previously, private access was limited to provisions involving refusal to deal, price maintenance, exclusive dealing, tied selling and market restriction, and abuse of dominance.
- Broaden who can apply directly to the Competition Tribunal, and ease the legal test used to determine whether cases can proceed.
    - Previously, in most cases, only businesses whose entire operations were directly and significantly impacted by the alleged anti-competitive conduct were permitted to apply directly to the Competition Tribunal.
- Allow the Competition Tribunal to order those who contravene the *Competition Act* to make monetary payments to persons affected by the anti-competitive conduct.

These changes will come into force on June 20, 2025.

Other changes

- **Civil mechanism for enforcing consent agreements:** Most civil cases under the *Competition Act* are resolved through a negotiated consent agreements that set out what companies agree to do to resolve concerns. The amendments provide the Competition Bureau with a new tool to enforce compliance with these agreements, including the option for the Competition Tribunal to impose administrative monetary penalties if parties don’t meet their commitments. This will help ensure that businesses follow through on the terms of their consent agreements.

- **Reprisal actions:** The amendments prohibit anyone from penalizing, harassing or disadvantaging another person based on that person's communication or cooperation under the *Competition Act*. This provides an additional layer of protection for whistleblowers, complainants, industry participants and others that come forward and provide assistance under the *Competition Act*.
- **Cost awards:** The amendments limit the circumstances where the Competition Bureau would be required to pay costs following a case at the Competition Tribunal. This change reduces the chilling effect that potential cost awards can have on public interest enforcement.
- **Environmental collaboration certificates:** Businesses considering collaborating with one another to protect the environment can seek a certificate from the Competition Bureau confirming that the *Competition Act*'s conspiracy, bid-rigging and civil agreement provisions will not apply to the collaboration. The Bureau can grant a certificate if it is satisfied that the agreement is for the purpose of protecting the environment and that it will not harm competition.

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