Taxing Anticompetitive Mergers

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I. Introduction

Merger enforcement under competition laws around the world almost always relies on injunctive remedies. If a proposed merger is found to have a harmful effect on competition, however that test is specifically framed, a jurisdiction will make an order prohibiting the merger, an order for some kind of structural remedy, such as a divestiture (see, e.g., *Imperial Oil/Texaco*, a gasoline merger that was approved conditional on the divestiture of a number of gas stations), an order for some kind of behavioural remedy, such as an order to hold data separate between the merging parties post-merger (see, e.g., *Google/Fitbit*), or an order for both divestiture and behavioural remedies (see, e.g., *Rogers/Shaw*, a telecommunications merger that was approved conditional on various pricing commitments as well as divestitures of wireless assets). The remedy might be the result of negotiation between the public authority and the merging parties, or the result of litigation.

While almost all competition law review of mergers concerns proposed, not consummated, mergers, it is conceivable also to review mergers after they have taken place. For example, while US doctrine treats a merger as ongoing from the date of its consummation forward, and thus renders litigation limitation periods irrelevant, courts may review a merger years after its consummation for its competitive effects (*FTC v. Facebook*). In Canada, while there is a shorter limitation period of only one year to review mergers, the authorities may also review mergers after the fact (*Competition Act*, s. 97).

Even for a review of a merger *ex post*, remedial orders are also geared to an injunctive approach. In Canada, for example, s. 92(1)(e) of the *Competition Act* explicitly contemplates that the Competition Tribunal may order the dissolution of a merger that has already been consummated, or may order the divestiture of assets. The court in *FTC v. Facebook*

acknowledged the potential remedial challenges associated with unwinding a long-since consummated merger, but clearly contemplated such an outcome as a possible remedy.

The obvious attraction of relying on injunctive remedies is that, if calibrated appropriately, they avoid ongoing social harms from an anticompetitive merger. Moreover, injunctive orders avoid a requirement of precise estimates of harm from a merger, which *ex post* damage regimes would have to confront (see, e.g., Hovenkamp, 1984, 2011).

Perhaps at least in part as a consequence of these advantages of injunctive relief, policy discussions about optimal merger remedies focus largely on the relative advantages and disadvantages of structural versus behavioural remedies (see, e.g., Motta et al., 2007; Heyer, 2012). For example, structural remedies ideally limit ongoing supervision by the competition authority or a regulator of competitive conditions in a particular market, which might become intractable if conditions consistently and significantly change over time, and instead rely on market forces to discipline firms (Heyer, 2012). On the other hand, structural remedies such as divestitures may be insufficiently tailored to address competition concerns, and are also irreversible; behavioural remedies are at least in theory open to modification as circumstances change (Heyer 2012).

This article takes a different approach. Rather than debating the merits of different injunctive approaches to anticompetitive mergers, it contemplates the underappreciated advantages of ordering financial payments as a response to anticompetitive concerns. I avoid using the term "damages" because monetary payments for anticompetitive mergers in the analysis may or may not reflect losses to any party or parties. Moreover, I focus on financial payments to the state, rather than damages payable to private parties. I also avoid, however, using the terms "fine", or "penalty." This is because, as I will explain, there are circumstances

when ordering the parties to make a financial payment may be appropriate even if the parties have done nothing wrong as a matter of competition law; indeed, they may not have proposed a merger that ought to be prevented. I instead use the terms "financial payment," "monetary payment," or, put simply, a "tax."

Shifting enforcement's focus from injunctive remedies to financial payments would allow merger enforcement to address some critical deficiencies with the present injunctive approach, some of which are likely to become more significant over time. Before enumerating the advantages, let me acknowledge at the outset the significant disadvantage of reliance on taxes. A tax on anticompetitive mergers as I contemplate it may or may not deter such mergers. That is, I propose that the law accept the consummation and continuing existence of some anticompetitive mergers. This obviously has the drawback that social losses associated with anticompetitive mergers will arise and persist. In a perfect world, of course, there would be no need to tolerate such a drawback, and enforcement could perfectly address the anticompetitive risks of mergers. In our imperfect world, however, sub-ideal enforcement is inevitable, and as a consequence there are potential advantages from reliance on taxes that may ultimately allow anticompetitive effects.

Such acceptance of anticompetitive effects in the face of imperfect enforcement is common in competition law. The oligopoly problem, for example, is well-known: a small number of firms in a market may set cooperative levels of pricing despite the absence of explicit collusion that antitrust law would address (Turner 1962, Posner 1968). The law accepts anticompetitive outcomes because no effective enforcement strategy is available. For example, in the Canadian case of *Atlantic Sugar*, three sugar companies had an understanding, though not an explicitly communicated agreement, that they would refrain from aggressively competing with one another; when one party did, price wars broke out and then subsided with the parties

again realizing their historical market shares. The behaviour by the parties in *Atlantic Sugar* was clearly uncompetitive, but ultimately held to be lawful for practical reasons. The Supreme Court of Canada acknowledged that while the trial judge had found an "agreement" despite the absence of communication, the court concluded that the law against collusion required explicit communication of an offer between competitors to ground an unlawful agreement. Such a requirement was not found in the statute itself, but such an embellishment makes sense given the enforcement difficulties, including remedial challenges, if purely unspoken agreements were unlawful.

Similarly, I suggest that the law consider taxes on anticompetitive mergers for enforcement reasons. There are a number of intrinsic shortcomings of merger enforcement that render reliance on injunctive relief misguided in some cases. Shifting away from injunctions to monetary payments has a number of advantages. I outline briefly the advantages of taxes on anticompetitive mergers in the balance of this Introduction, and then elaborate in following sections.

A significant problem with merger review in many contexts concerns their international nature. If many competition agencies review a global merger with a view to either approving or disapproving, there will inevitably be conflict because of mutually incompatible orders across regimes. Such conflict not only has the potential to create political international discord, it also undermines the efficacy of merger enforcement. Reliance on monetary payments for anticompetitive mergers avoids such incompatibility.

Informational problems in reviewing mergers *ex ante* support the case for monetary payments. By allowing for monetary payments, the law is better able to engage in meaningful *ex post* review of mergers that turn out to be anticompetitive. And in some circumstances, monetary

payments may be an appropriate response to the challenging problems of reviewing acquisitions of nascent competitors by dominant firms (Hemphill and Wu, 2020).

There is a debate at present in several jurisdictions about the appropriate goals for competition policy (Shapiro 2018, Iacobucci 2023). Taxing competitive mergers allows for a wider effective scope for competition law while avoiding the dangers of incoherence that a wide scope risks generating. By departing from the usual injunctive approach to merger remedies and shifting instead to taxes on mergers, competition law may reflect polycentric values while remaining focused in enforcement.

Section II assesses the mergers tax in the context of international mergers, Section III considers the tax and the acquisition of nascent competitors, Section IV considers the tax as an appropriate *ex post* remedy, and Section V considers polycentric legal goals and the mergers tax. Section V concludes.

II. International Mergers and a Merger Tax

Mergers that have an international scope create problems for enforcement agencies (Iacobucci and Trebilcock 2004). Many mergers today have implications across multiple countries and competition jurisdictions. Examples abound. The *GE/Honeywell* proposed merger was one (Fox 2002), and the recent *Microsoft/Activision* merger is another (Browning 2023). Such multijurisdictional mergers present problems when different jurisdictions reach conflicting results, as in both *GE/Honeywell*, which was approved by the US but not by the EC, and *Microsoft/Activision,* which has been approved by the EC, but challenged by the UK (it was also challenged unsuccessfully in the US). Such disagreements create frictions between jurisdictions, with, for example, allegations of favouritism for local businesses (Bradford et al. 2018). Indeed,

disagreements over merger enforcement, as opposed to other anticompetitive conduct, tend to be the most controversial in the international sphere (Iacobucci and Trebilcock 2004). It is worth reflecting on why this is so.

Consider, for example, laws against horizontal agreements between competitors. An international cartel may have members conspiring in one set of geographic locations while selling into different geographic locations. There is starkly different antitrust treatment of this conduct between exporting and importing countries. The EU, the US and Canada all exempt export cartels from domestic antitrust enforcement (Victor 1991) and thus would not challenge the conduct of domestic conspirators selling abroad. On the other hand, the same jurisdictions would ban foreign cartels from cartelizing when selling into their jurisdictions; indeed, following an "effects-based" approach, the US and Canada would treat such conduct as criminal. The contrast could not be starker: the US and Canada treat as criminal European conspirators selling into North America, while the same conduct would be perfectly permissible in Europe. Yet, while export cartels have their detractors (Victor 1991), there is relatively little conflict about the different treatment across jurisdictions.

The critical reason for the global competition community's acceptance of different international treatment of cartels is that different jurisdictions can decide to impose sanctions on the cartel or not without interfering with antitrust enforcement in other jurisdictions. Europe permits export cartels, but its antitrust laws obviously do not require them. It is therefore possible for a US enforcement action against a foreign cartel to target conduct that harms the US while not interfering with Europe's decision to permit but not require export cartels. In this sense, there is no conflict in enforcement.

There is another reason why there is relatively little tension about differing approaches to export cartels, but I do not think it is a necessary reason: all antitrust regimes condemn price-fixing in one way or another. Given that Europe would forbid foreign cartels exporting into Europe, they would presumably be unable to complain credibly should the US sanction a cartel exporting to the US (though Europe does stop short of criminalizing such behaviour). Given the substantial similarity across national laws, there is reason to expect there to be less friction over the laws' enforcement.

Substantive harmony, however, is not a necessary reason for the relative lack of friction. Different jurisdictions take different approaches to different practices by firms with market power, yet disagreement whether to treat a particular practice as anticompetitive is not usually a source of conflict between jurisdictions. This is because, as with cartels, jurisdictions are able to enforce jurisdiction-specific law, and craft jurisdiction-specific remedies. If, for example, the US permits resale price maintenance following *Leegin* (at least as a matter of federal law), while Europe continues to treat RPM as problematic, this difference does not lead to conflict in practice. Rather, multi-national sellers selling into the US may impose RPM on downstream retailers, while potentially refraining from doing the same in Europe. The US also takes a permissive approach to exclusive territories, while the EU restricts them given the importance of territorial integration and international trade within the EU. As a response to these differing laws, a seller may simply sell to the US with exclusive territories, but not in the EU.

An excellent example of the importance of local remedies, and the consequential avoidance of international conflict, was the EC complaint against *Microsoft* for tying Windows Media Player to Windows (*Microsoft* 2007). Microsoft was found to have abused its dominance by bundling WMP with Windows. The EU required Microsoft to sell a version of Windows that

did not include WMP as a bundled media player. Microsoft complied in respect of sales into Europe, but did not do so elsewhere. US consumers, for example, were unaffected by Europe's departure from the US approach to monopolization.

Recognizing the suitability of local responses to what a country considers to be competitively problematic conduct, even if other countries do not see it as so, Iacobucci and Trebilcock (2004) contend that most sources of friction between different competition regimes in different countries are addressed by countries relying on the National Treatment principle. That is, countries should be free to fashion local substantive law, and local remedies, for what they perceive to be anticompetitive conduct. National enforcement actors may, however, have incentives to treat domestic businesses dealing in multinational markets more permissively: the domestic country benefits from anticompetitive practices in such settings because it realizes the supra-competitive profits from the practices while deadweight losses and markups are suffered abroad. The exemption for export cartels presumably reflects this kind of calculus. To address this problem, National Treatment would require domestic authorities to enforce the law without regard to the national origin of the parties involved. National Treatment allows different countries to adopt law suited to their economic circumstances, or suited to their perceptions of what ideal competition law ought to be, perceptions that can and do vary across polities. At the same time, National Treatment avoids ultimately collectively harmful beggar-thy-neighbour, self-interested and strategic enforcement of law.

Critical to the optimality of the National Treatment regime is the availability of local remedies for anticompetitive conduct. That is, it must be possible for a country to take an idiosyncratic approach to a practice, and in response fashion a local remedy that does not affect other jurisdictions. There are occasional contexts when crafting local remedies may be

challenging in respect of abuse of dominance. For example, the US has on occasion broken up monopolies (see, e.g., Yoo (2008) on *AT&T*), and has on many other occasions mooted doing so (see, e.g., Warren 2020, *FTC v. Facebook*). To the extent that the US would break up a monopoly, while other jurisdictions to which the firm sells would not, there is a conflict: Microsoft, for example, cannot be broken up with respect to the US, but not to Europe. These situations are relatively rare, however.

With respect to mergers, however, there is a significant probability that local injunctive remedies are not available to address a multinational merger. This is in part because geographic markets may be global. If a proposed merger would result in a firm that sells across borders around the world, geographically specific injunctive remedies, such as local divestitures, may be either unavailable (a firm may not have a meaningful presence in a country) or ineffective at addressing competitive concerns from the merger. The problem also arises in significant part because the remedial response to mergers is injunctive: the proposed merger either is approved (perhaps with conditions) or rejected. Microsoft and Activision, for example, cannot merge with respect to the EU, which approved the deal, but not with respect to the UK is challenging the deal as anticompetitive.

The all-or-nothing approach to injunctive remedies inevitably creates conflict in the context of controversial international mergers, with a number of distinct consequences (Iacobucci and Trebilcock, 2004). First, countries will not get the result that their competition law would dictate. The US and EU may take different approaches to conglomerate mergers, for example. In *GE/Honeywell*, the US allowed a merger, with divestitures of certain product lines, between two firms that essentially sold complements, while the EC disallowed the merger out concern that the merged entity would be too effective in serving its customers because of its

product range. As optimal approaches to competition law are clearly subject to thoughtful debate about which reasonable people may disagree, both views are conceivably defensible, and in any event appeared to be held in good faith.[1] (The jurisdictions seem to have reversed themselves with respect to *Microsoft/Activision*, perhaps reflecting political currents in the US.) When Europe blocked the merger, it did so at the expense of what the US saw as good for competition and buyers. That is, the European decision imposed harm on the US. Of course, if the US could have required the merger to go ahead, such a decision would have been perceived to have imposed harm on Europe. Conflict between decisions means that one jurisdiction wins while the other loses.

Second, an international merger regime that depends on injunctions will probably result in sub-optimal enforcement. To isolate one reason for this, consider a world in which all jurisdictions take a similar view of what optimal merger law is in the abstract. While there may be agreement on the principles that ought to apply to mergers, there may be disagreement across jurisdictions in applying those principles to a given case. Facts may be fuzzy, and disagreements are understandable. In a world in which any jurisdiction can issue an injunction preventing a merger, there is a significant danger of error: even if nine of ten jurisdictions approve a merger, suggesting that the merger is probably benign, if the tenth issues an injunction against it, the merger will be prevented unless the parties decide to pull out of the naysaying country altogether, which is itself costly and socially harmful.

Another reason for sub-optimal enforcement is that different jurisdictions may share objectives in merger policy, but may have different views about how best to achieve those objectives. The *GE/Honeywell* case illustrates such division across regimes with broadly similar

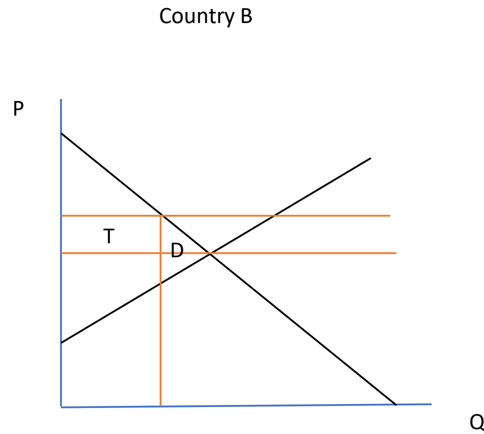
[1] Bradford et al. (2018) study European competition law decisions and conclude that Europe does not display a protectionist stance to European businesses.

consumer welfare objectives. With all-or-nothing injunctive remedies, the result of a review of a potentially anticompetitive a global merger will be that the strictest regime will prevail. Again, if nine out of ten jurisdictions approve the merger, but the tenth does not, the tenth regime's approach dictates the outcome even though it is an outlier with respect to the optimal approach. A race-to-the-strictest approach to global merger enforcement is undesirable (Iacobucci and Trebilcock, 2004).

Shifting from injunctive remedies to monetary payments avoids the problems inherent in the present global regime. Suppose that instead of injunctive relief, each jurisdiction that finds the merger to be anticompetitive requires the merging parties to make a monetary payment that would deter the parties from consummating the merger should that jurisdiction be the only reviewing jurisdiction, as well as a tax reflecting the social losses from the merger. That is, the appropriate payment would reflect the present value of the future overcharges and deadweight losses from the merger. Once the monetary payments are paid to each objecting jurisdiction, the merging parties may proceed with the merger.

Consider the following example. There are two countries in the world, A and B. A approves the merger as compatible with competition in its jurisdictions. B finds the merger to be problematic and predicts that it will lead to supra-competitive profits and deadweight losses in its

jurisdiction.



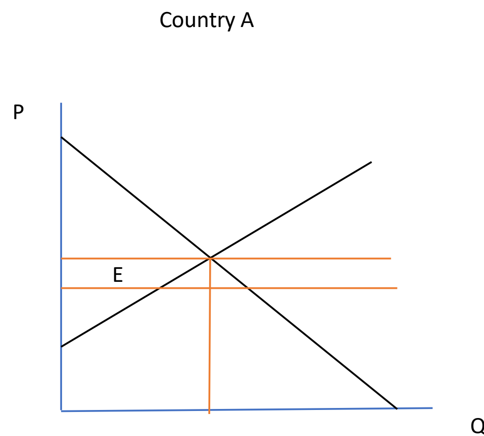
B imposes a tax on the merger equal to the deadweight losses, D, and future profits, T (for transfer from consumers) that it brings about, while A does not impose a tax. The parties will proceed with the merger if the present value of the profits realized in country A exceed the tax. There is deterrence from B's tax, but if procompetitive profits in country A exceed deadweight losses in B, then the merger will proceed.[2]

It is clear that this approach is second-best from B's perspective in that an anticompetitive merger may go ahead and create deadweight losses in that country, but that is acceptable when the first-best outcome – the merger is consummated with respect to A but not with respect to B – is unavailable. If the merger is not anticompetitive in country A, any gains

[2] If, on the other hand, both jurisdictions would allow the merger to proceed, no tax would be payable and the merger would go ahead. Finally, if both countries find the merger objectionable, the taxes payable would deter the parties from consummating the deal. To elaborate on this last point, the tax in jurisdiction i, Ti+Di, exceeds the anticompetitive profit from that jurisdiction, Ti; if both jurisidictions tax, the tax will exceed the profits.

the merging parties realize there are from socially positive effects, such as intensified competition or efficiency savings. It is appropriate that these gains be offset against deadweight losses in B (which the merging parties lose after tax in country B). The merger proceeds if there is a net global benefit from its consummation: the gains from A, which reflect social benefits, are weighed against the deadweight losses from B.

There are special cases in which the tax achieves the global optimum. For example, suppose that the merger does not change competitive conditions in A, but rather allows the merging party to lower its average costs. It will continue to produce at the same price and quantity, but will save an amount, call it E, from the merger. This is reflected in by the following.



In B, however, the merger creates an overcharge and profits, T, and a deadweight loss D from reduced quantity, as above.

If the merger goes ahead, the merging parties would pay $T+D$ to jurisdiction B, would expect to realize T in profits from B, and would realize E in country A. The merger will go ahead if the profits from the transaction are positive; that is, $(T-(T+D))+E>0$, which is equivalent to $E>D$. This condition is only met if the merger on balance increases world welfare.

More generally, whether the outcome achieves the global optimum will depend on the existence of social benefits in A even as the merger generates losses in B, and will depend on the merging parties realizing a large enough share of the social benefits in A to offset the private losses from the tax in B. In the special case, the merging parties realize all the social benefits of the merger, which implies that their tradeoff is optimal from a global social perspective. More generally, the parties are unlikely to realize all the social benefits – some will accrue to consumers – which implies that there is excessive deterrence of the merger from a global perspective. It is important to recognize, however, that while there may or may not be excessive deterrence with a tax, there will almost always be excessive deterrence with reliance on injunctions. In the example, B would issue an injunction prohibiting the merger and that would be the end of it. The tax is an improvement on the status quo.

There are several potential objections to the tax regime, none of which is overwhelming. First, it allows the merger to proceed despite its anticompetitive effects in B. While obviously not ideal, there are important mitigating considerations. For one thing, there is no way to avoid a sub-optimal outcome since the merger cannot go ahead in A but not B. The sub-optimality of the tax regime simply reflects a particular kind of imperfect enforcement with which antitrust regimes have long learned to live. Just as there is no ideal solution to the oligopoly problem, there is no ideal solution to the multi-jurisdictional merger problem.

For another thing, it is open to the authorities in B to direct the proceeds from the tax to be spent in a manner that mitigates harm to the individuals who suffer from the diminution of competition. For example, just as proceeds from consumer class actions are allocated to consumers of a product, proceeds from the tax could be paid out to customers of the merged entity. Alternatively, the authorities could use the proceeds in some kind of cy-pres payment that advances the interests of consumers either in this or other markets. I will return to this use of proceeds in later sections.

Another objection to the merger tax on global mergers is that the monetary payments that the authorities may order may not accurately reflect the overcharge and deadweight loss. This critique, while entirely plausible, would apply to many existing practices. Most prominently, abuse of dominance cases may and do attract significant financial penalties leveled by competition authorities, and the risk of treble damages in the US. For example, the European Commission levied a €4.3 billion fine on Google for abusing its dominance in search. It would be surprising if the financial penalties or the damage awards were calibrated precisely to the specific context in question, yet the law carries on successfully despite the imperfections.

To be sure, the tax that I contemplate requires an assessment *ex ante*, which adds to the challenge of accurate estimation. But *ex ante* assessment is also required by the present emphasis on injunctions. Moreover, *ex post* precision in the tax is not as important for deterrence as having an unbiased estimate *ex ante.* All that is required for the kind of optimal deterrence described in the above example, for example, is that the *ex ante* estimate of the overcharge and deadweight loss is unbiased. In any event, estimating damages *ex post* is hardly straightforward, with authorities having to control for all factors other than the conduct in

question to reach an estimate of the impact of the practice. Errors are likely both *ex ante* and *ex post*.

Moreover, the injunctive approach is also prone to error, and error with potentially more significant consequences. Whether a particular jurisdiction miscalculates the merger tax on anticompetitive mergers might have a marginal effect on the overall economics of the proposed merger, and a non-pivotal impact on the decision to proceed with the merger. In addition, if many jurisdictions are reviewing the merger, the errors are more likely to offset one another by the law of large numbers. If, however, a single jurisdiction that relies on an injunction to stop mergers makes a mistake and finds a procompetitive merger to be anticompetitive, the merger will face an order not to go ahead, thus risking significant welfare losses around the world.

There is a conceptually different problem, namely that jurisdictions may strategically tax mergers as though they were anticompetitive even if they are not. That is, countries may seek to extract rents from the merging parties by charging an inflated merger tax. Again, there is nothing new about this objection. Countries level financial penalties for other kinds of conduct in antitrust law, such as abuse of dominance and cartelization, as well as any number of other legal areas other than competition law, and the temptation to extract rents must exist in these contexts as well, yet the concern about strategic penalties does not seem to be of much importance in practice. Countries have legal processes that protect firms from arbitrary or strategically punitive enforcement actions, and must also have concern about their reputations for doing business and excessive taxation. Such constraints would operate with respect to the merger tax.

In summary, a tax on anticompetitive mergers jurisdiction by jurisdiction avoids the all-or-nothing outcome for proposed mergers that presently exists, or at least exists when

jurisdiction-specific injunctions, such as local divestitures, are not possible. The present regime has a number of undesirable implications, including conflict between jurisdictions, a race-to-the-strictest, and the risk that an error by a single jurisdiction could in effect improperly veto the merger and sacrifice global benefits. A tax on mergers would allow jurisdiction-specific remedies for anticompetitive mergers and thus would avoid the conflict inherent in an all-or-nothing injunction regime. While the tax regime would allow mergers to take place that are perceived to be anticompetitive in some jurisdictions, the tax would deter the merger from taking place unless there are gains in jurisdictions where it is not anticompetitive that offset deadweight losses from jurisdictions where there are competitive harms. The merger tax regime would obviously be prone to error, but the errors in a single jurisdiction would tend to be relatively small compared to the value of the merger, and would tend to offset one another across many jurisdictions. There is a risk of rent-extracting strategic invocation of the merger tax, but such a risk arises whenever a jurisdiction has the authority to level financial payments on a foreign actor, something that arises in all kinds of antitrust and other legal contexts. The merger tax is an appropriate response to the challenges of multijurisdictional antitrust review of mergers.

III. Informational Challenges and the Acquisition of Nascent Competitors

Reviewing prospective mergers requires competition agencies to reach conclusions about the likely competitive effects of mergers under conditions of imperfect information. Authorities and the parties themselves lack perfect foresight, yet under present approaches, must assess whether to permit a merger *ex ante*. An especially problematic class of cases involves the acquisition by an established firm of a "nascent competitor," one that is at an embryonic stage but that if successful, could emerge as a competitor to the incumbent. Hemphill and Wu (2018)

rightly identify the conundrum this presents for competition authorities. It may be that the probability of a nascent competitor emerging as a strong competitor to the would-be acquiror/incumbent is low, or in any event below 50%, which makes proving that the merger is anticompetitive on a balance of probabilities improbable, and in any event inappropriate in a regime that requires the authorities challenging a merger to prove on a balance of probabilities that the merger is anticompetitive. Yet the acquisition could over time prove to be anticompetitive as the nascent competitor's product, now controlled by the incumbent, becomes competitively significant.

Various solutions to this problem have been proposed. For example, there is a US proposal, also mooted in Canada, that conduct – perhaps including mergers – that is merely capable of affecting competition be disallowed. Hemphill and Wu (2018) argue that *Sherman Act* s. 2 jurisprudence would allow a claim for monopolization if a merger had a reasonable probability of lessening competition (*Microsoft*). The UK takes a "balance of harms" approach: authorities ought to take not just the probability of a nascent competitor's emergence into account, but also the magnitude of the impact of that emergence.

There are clear drawbacks from lowering the requisite standard to "capable of" lessening competition. Many practices, including most mergers, would in some state of the world be capable of lessening competition. Almost any acquisition of a nascent competitor would meet such a standard, even if the overwhelming majority of such acquisitions were competitively benign. The FTC's recent challenge to Meta's proposed acquisition of a relatively small virtual reality fitness application, Within, illustrates the standard's potential for intervention that would have been unimaginable under standard balance of probability tests (*Meta/Within*). Even though Meta does not produce fitness VR applications, it is of course possible that they would have done

so eventually, and furthermore possible that its app and Within's app would emerge as fierce competitors. The FTC's case also appears to rest on the claim that Meta is using the acquisition as part of a strategy to dominate the broader VR space. It is possible that Within might emerge as a critical application for VR, and that Meta's acquisition of it would provide it with a significant advantage in broader VR activities. At the time of the FTC's challenge, however, such anticompetitive possibilities would have existed, but with presumably very low probabilities. It is difficult to imagine that a fitness VR app would play any significant role in the VR competitive space.

Given that the acquisition of smaller firms by larger firms often leads to social welfare gains (Furman Report 2019), a rule that strongly discourages acquisitions of smaller companies that may turn out to be rivals is overkill: welfare gains are routinely sacrificed because of a small number of acquisitions that turn out to be competitively significant in fact.

The balance of harm test has a stronger basis in that it takes into account not just low-probability harms, but also higher-probability gains.[3] Suppose a merger has a probability p of creating anticompetitive harm, H, while the converse probability, 1-p, of creating social gains, B, either through higher quality products or through an increase in competition. The balance of harm test does not simply ask whether p is high enough, which lowering the burden of proof would ask, but also asks how harmful that outcome would be when compared to the expected benefits of allowing the merger (Furman Report, 2018; Johnson, 2020; Johnson, Pecman, Reisler, 2020). That is, stop a proposed merger if $pH>(1-p)B$.

[3] This was proposed in what is commonly referred to as the *Furman Report* in the UK: United Kingdom, Unlocking Digital Competition: Report of the Digital Competition Expert Panel, also known as the 'Furman Report' (March 2019), available at https://assets.
publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf.

There is a case to be made for the balance of harm test. But it suffers from some important disadvantages. For one, enforcement agencies and adjudicators generally rely on a legal system that turns on probabilities, not cost-benefit analysis. The law in most jurisdictions that addresses abuse of dominance or mergers does not depend on cost-benefit analysis, but whether the practice is likely to lessen competition substantially (e.g., s.79 and s. 92, *Competition Act* Canada) or even if it has a significant probability of lessening competition substantially (*Microsoft* in the U.S.). To isolate the acquisition of nascent competitors by a dominant firm with a different approach would be jarring for most legal systems. For example, suppose that there is a 99% chance that a merger would be benign, but essentially neutral for society, while there is a 1% chance that the merger would be mildly harmful. The balance of harm test would call for the prevention of such a merger even though the probability of mild harm is trivial. Or suppose that a merger is 99% likely to cause mild harm, but has a 1% probability of significant social benefits; the balance of harm test would allow the merger, even though the merger is almost certain to be harmful. There is a coherent argument for such outcomes, but allowing almost certainly harmful behaviour while condemning almost certainly benign behaviour would sit uneasily with the usual structure of legal decision-making. At the very least, it risks misunderstandings on the part of adjudicators when applying a very different approach to a legal dispute from the norm.

More instrumentally, the balance of harm approach is potentially highly sensitive to small differences in the probability of harm or benefit from a merger, yet such estimates of such probabilities are likely to be highly imperfect. For example, moving from a very, very small 1% chance that a nascent competitor could be a vigorous competitor should the merger not take place, and that as a consequence the acquisition would be anticompetitive and socially harmful,

to a merely very small 3% chance triples the expected harm from the merger, while making very little difference to the expected benefits, which would now be expected to be realized 97% of the time, not 99% of the time. The precision required to avoid such small ranges in estimates is beyond the reach of enforcement, yet such sharp differences in expected values may translate into a sharp difference in outcomes: because the law relies on injunctive relief, the merger's approval could turn on such small variations in estimates. The UK rejected this approach because of this sensitivity to imperfect estimates (Johnson et al., 2020).

A merger tax avoids such drawbacks. The law, rather than relying on injunctions preventing a possibly anticompetitive merger, could impose a tax on a merger that involves the acquisition of a nascent competitor. Suppose, for example, that an acquisition has a 10% probability of being anticompetitive, which would give rise to supracompetitive profits T, and deadweight losses, D. Rather than attempting to weigh the expected harms of the merger, 0.1(T+D) (if consumer welfare is the standard[4]) with the benefits and making a decision on the merger, the authorities could allow the merger while imposing a tax of 0.1(T+D) on the merging parties. The parties would weigh their gains from the merger against the tax and decide whether to proceed. The benefits could derive from efficiencies, defined broadly to include a cost saving or, more likely a product innovation[5], from the merger. Given that the acquiring firm is dominant, it is likely able to internalize some or all of these gains through higher prices, or perhaps greater quantities sold. Formally, assuming social benefits of B from the acquisition, and assuming that the dominant firm realizes fraction x of the social benefits of the merger, the dominant firm deciding whether to pursue the merger will consider whether its expected profits

[4] The approach would work regardless of the conception of social harm from anticompetitive outcomes. The tax would adjust to the conception of harm.
[5] As the *Furman Report* observed, most acquisitions of smaller firms by dominant firms are efficient. This often results from the integration of new features in the dominant firm's product.

from merging are greater than zero. That is, whether $0.9(x)B+0.1(T-(T+D))>0$; that is, if $0.9(x)(B)>0.1(D)$, the acquisition will go ahead.

The decision rule of the dominant firm is not perfectly aligned with the social interest given that the dominant firm will not necessarily internalize the social benefits from a benign acquisition. It is therefore possible that the tax would deter a merger that is socially beneficial in expectation. It is also possible that the tax would allow a socially harmful merger in expectation. If the merging parties are better informed about the probability that the merger is anticompetitive, and believe it to be higher than the 10% estimated by the authorities, then the tax may be insufficient to deter. For example, if the probability that the merger is anticompetitive is known to the parties to be 20%, then their profit from the merger will be positive; that is, that $0.8(x)(B)+0.2T-0.1(T+D)>0$, or $0.8x(B)+0.1(T-D)>0$. Since the transfer, T, will generally be greater than deadweight losses, expected profit is positive.

As reviewed in the context of the global mergers tax, there is also a risk of error. Estimating the probabilities, social benefits, transfers and deadweight losses will be very challenging, especially in conditions of highly imperfect information associated with the acquisition of a nascent competitor.

Despite these imperfections with a tax on the acquisition of nascent competitors, moving to a tax has clear advantages over injunctive relief. Most importantly, it avoids an all-or-nothing decision on whether to approve a merger involving a nascent competitor. While calculating the tax is prone to error, the probability of those errors affecting the decision to merge is relatively small compared to the effect of an error about imposing an injunction prohibiting the merger or not. In any event, the tax need not be the exclusive remedy. If there is a high probability that the acquisition would be anticompetitive, one that suggests anticompetitive effects even if the

acquiree is nascent, it would not be incompatible with the possibility of a tax instead to impose an injunction. But where there is a low probability, a tax has advantages of potentially deterring a merger whose expected social benefits are negative, and it also has the advantage of raising revenue to be spent at the discretion of the state.

To elaborate on this last point, the revenue from the merger tax would obviously not directly compensate any consumer harmed by the merger, but would present different options for government. It could, as noted above, establish a fund potentially to compensate buyers who were harmed if the merger turned out to be anticompetitive. It could also be used to promote competition in a sector, perhaps by subsidizing start-ups, or supporting existing government programs designed to promote the start-ups. It could also, of course, be directed to general revenues to be allocated according to other social welfare objectives. To be sure, one's support for the merger tax might turn in part on one's confidence in the government's capacity to make socially beneficial expenditure decisions. While undoubtedly such decisions are potentially flawed and subject to corrosive political influence, if government expenditure decisions are generally socially harmful, then the polity has more important matters to be concerned about than a merger tax. Put differently, the case for the merger tax rests in part on an assumption that, all things equal, government expenditures are positive for social welfare.

IV. Information Problems and an *Ex Post* Tax

Acquisitions of nascent competitors present one class of mergers that present significant challenges for an *ex ante* determination of whether the merger is likely to lessen competition substantially, but it is a more general challenge. Circumstances change, and a merger that appears benign at one point may over time reveal itself to be anticompetitive. There are,

however, legal and practical problems associated with competition challenges to mergers after the fact. From a legal perspective, there may be limitations periods that prevent the authorities from challenging a merger for some fixed period after a merger has closed. At one end of the spectrum, the US considers mergers to be ongoing post-consummation as a matter of antitrust law, which implies that the authorities do not face effective limitations periods (*FTC v Meta*). At the other end, Canada requires its competition authorities to challenge a merger within one year of its consummation (*Competition Act*, s. 97); one year may not be enough to gain perspective on the merger's impact.

Assuming that the authorities do challenge a merger *ex post*, there is a significant remedial problem: how ought the authorities to address a merger that they consider to be anticompetitive after the fact? The canonical metaphor is that *ex post* remediation requires the authorities to unscramble the eggs: separating two merged firms is a difficult, and inevitably arbitrary, exercise. A related problem is that if merging parties fear that the authorities might interfere in the future, they may be reluctant to integrate closely even if doing so is privately and socially beneficial. The short limitation period in the Canadian *Act* is intended to limit such concerns by requiring the authorities to act quickly in response to a potentially anticompetitive merger.

There is an alternative to imposing injunctions that break up the merged firm: levy an *ex post* tax on anticompetitive mergers. Conditional on an *ex post* showing that a merger substantially lessened competition, rather than attempting to undo practically irreversible combinations, the authorities could levy a tax that reflects the anticompetitive effects of the merger. While the tax may reflect social losses from the merger, it is better described as a tax than damages since it would be payable to the state, not disadvantaged buyers. It is also better

described as a tax than a fine or penalty because it would not follow from a finding that the merger was or is unlawful. Rather, the merger may stand because it is not considered unlawful, but because it is anticompetitive, a tax is owing.

The amount of the tax ought to reflect the anticompetitive profits and social losses from the merger. Following the terms used above, should a merger be found to be anticompetitive, the tax could reflect the transfers from any overcharges, as well as any deadweight losses from the merger – T+D in the figures above. This number would be calculated according to the gains and deadweight losses already realized, as well as the present value of those to come.

The merger tax has attractive deterrence properties. At the time of merger, the merging parties will anticipate paying the tax should the merger prove to be anticompetitive. They would compare their gains from the merger, T, against the anticipated tax, T+D, which would result in a loss of D in the absence of any other efficiencies. Anticipating future taxes, those proposing anticompetitive mergers will reconsider.

There are the now-familiar drawbacks of the tax, including error costs in estimating T+D. The case for the tax despite these errors is especially strong in the case of an *ex post* tax on anticompetitive mergers. As long as the authorities are not systematically biased in estimating the overcharge and deadweight loss, the merging parties will expect an accurate tax on average and will be deterred appropriately.

It will be true that the tax will not avoid the deadweight losses associated with any consummated anticompetitive merger. That is, the tax tolerates anticompetitive activity. But that said, its deterrence properties discourage anticompetitive mergers at the outset, and the proceeds of the tax could be used to compensate harmed buyers, or to pursue other socially desirable objectives such as subsidizing competition. It does not prevent consumers from harm,

which would be ideal, but rather is second best. Given enforcement imperfections regardless of the approach, something common in antitrust, there is a case for the merger tax.

Note that the *ex post* merger tax is suited to responding to the acquisition of nascent competitors. While the previous section outlined the possibility of taxing these acquisitions *ex ante* on the basis of probabilistic harm, an alternative would be to allow the acquisition, but then tax it in the event it proves to be anticompetitive. This would create deterrence against anticompetitive acquisitions of nascent competitors, while ensuring that if an anticompetitive merger does take place that the state may pursue socially desirable goals with the proceeds of the tax.

That said, determining whether the acquisition of a nascent competitor was itself anticompetitive will not be a straightforward task: a dominant firm may acquire another firm whose product becomes very popular, but it may be the dominant firm's excellent management, rather than anything anticompetitive, that might result in this outcome. That is, while there are some informational advantages from waiting to see how the acquisition of a nascent competitor plays out, there will remain important informational shortcomings. It is not necessarily the case that the *ex post* tax would be superior to the *ex ante* tax.

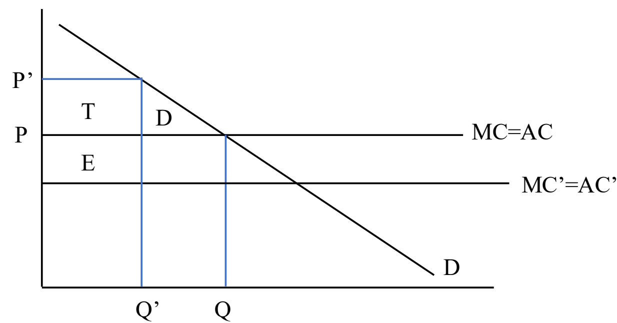
V. Values and a Merger Tax

There is a wide-ranging debate at present about the appropriate objectives of competition law (see, e.g., Shapiro 2018). While few commentators would dismiss economic concerns, such as deadweight losses, as central to antitrust enforcement, there has been a greater push to incorporate consideration and indeed promotion of other objectives as well. The efficiencies defence in Canada provides a clear example of this debate. Relying on the efficiencies defence

as an example, this section discusses briefly the challenges associated with pursuit of multiple goals at once, while demonstrating that reliance on a mergers tax could mitigate some of these challenges.

Oliver Williamson (1968) first considered the welfare trade-offs involved in a merger that increases market power and prices at the same time that it realizes efficiencies that lower average costs. The efficiency gains may offset the deadweight losses from market power. The situation can be depicted graphically:

Williamson model: Welfare effects



The merger lowers average costs (which in this example are equal to marginal costs) while increasing price, which results in a transfer from consumers to producers, T, deadweight loss of D, and efficiency savings, E. From a pure efficiency standpoint, the merger is socially beneficial if E>D, while the transfer from consumers to producers, T, is socially neutral: a dollar has the same social value in the hands of a producer as it does a consumer.

The Canadian *Competition Act* establishes an efficiency defence in s. 96, providing that even a merger that substantially lessens or prevents competition ought to go ahead if the efficiency gains from the merger are greater than and offset the anticompetitive effects of the merger. The *Act* does not, however, define what the relevant anticompetitive effects are. This has given rise to controversy. One approach is the total surplus standard, or efficiency standard, which would focus only on a comparison between E and D. Another approach is to treat the transfer from consumers to producers, T, as in whole or in part a negative cost of the merger that ought also to count in the assessment. In the *Superior Propane* case, the Federal Court of Appeal, relying on a purpose clause in the *Act*, s.1.1, that identifies both efficiency and competitive prices as reasons to promote competition, held that the Tribunal should exercise its discretion, perhaps on a case-by-case basis, to decide in the circumstances whether to treat the transfer T as negative, and how much weight to assign to it. While the approach is not inconsistent with the statute, in that it ensures respect for two objectives outlined in s. 1.1, it leaves fundamentally normative questions about how to weigh competing values against one another up to the personal preferences of individual adjudicators to decide on a case-by-case basis. My view is that this is inappropriate and sits uneasily with the rule of law (Iacobucci, 2013, 2021).

The controversy over the efficiencies defence continues, with the Department of Innovation, Science and Economic Development recently raising the possibility of abolishing the defence altogether (ISED, 2023), and the government recently proposing to abolish the defence altogether.

In its report, ISED (2023) also raised a consideration that does not relate to the usual question of how much weight to put on T, and instead asks whether E should be considered to be

an unambiguous social benefit. Efficiency savings may well result from worker layoffs. ISED asks whether it is appropriate to consider a reduction in headcount as a clear gain from a normative perspective given that workers are likely to suffer harm from layoffs. Iacobucci (2013) asks this question as well, but notes that s. 1.1 does not allude to worker welfare as an explicit goal of competition law in Canada. ISED's approach would require statutory amendment, something that it appears willing to consider.

Aside from the specific legal questions, standard responses to the push to expand the goals of competition law to account for worker welfare, or consumer welfare *per se*, in Canada and elsewhere turn largely on the efficacy of other legal instruments to promote goals other than efficiency (see, e.g., Iacobucci, 2021). Employment and labour law can protect worker welfare, for example, while tax and expenditures can address concerns about inequitable transfers from consumers to shareholders. As I explain, a merger tax is another alternative to the efficiency defence that would allow the coherent pursuit of disparate goals.

If a merger tax were available, the law may be able to account both for efficiency and other values, such as consumer welfare and/or labour welfare. The competition authorities considering whether to accept the efficiencies defence would impose a tax of T+D on a proposed merger. The parties considering whether to merge will compare the profit from the transaction, T+E, with the tax, T+D. They will proceed if E>D. That is, they will proceed if the merger is efficient.

The government will have proceeds of T+D from a consummated merger. It may choose to address the distributive concerns of consumers by allocating the proceeds in a manner that benefits consumers, perhaps through direct payments to buyers, or perhaps through other social programs that benefit a class similar to buyers of the product. In addition, or alternatively, if

worker welfare were the concern, the government could allocate proceeds to workers either directly through financial compensation, or indirectly, through funding retraining programs or other programs designed to help workers as a class. With a merger tax in place, the law can address multiple goals at once without requiring adjudicators to make normative decisions. Rather, the tax generates revenue that political actors, whose job it is to make choices across normative values, can decide how to spend.

The advantages of the merger tax are not confined to the efficiencies defence example. It is, however, a kind of special case in that it concerns an anticompetitive merger that is also efficient. The more usual concern, one that political and academic commentary has pressed frequently in recent years, is that a merger may be competitively benign, but contrary to some other goal that competition law ought to pursue. Several non-efficiency goals have been identified in commentary, and in law around the world (see, e.g., Fox and Trebilcock, 20xx)). There are two ways of considering how the merger tax might mediate the relationship between the efficiency focus of antitrust law and these other goals.

First, as in the example of the efficiency defence, the law might tax an efficient merger and use the proceeds to promote other goals. In the efficiencies defence example, the merger is both efficient and anticompetitive. But in other cases, the merger may be efficient *and* pro-competitive, but sits in tension with other social objectives. For example, some have concerns about the political influence of large corporate entities. While this does not engage competition *per se,* a merger may be competitively benign, but may create or intensify misgivings about the political power of the entity. Suppose a merger is competitively benign but raises political power questions that ought to be addressed. Clearly, one approach is to leave political questions to legal instruments other than competition law, such as campaign finance law (Shapiro 2018). An

alternative is to ask competition authorities in deciding whether to approve the merger to weigh political influence against potential economic benefits, or at least the absence of harm, from the merger, just as *Superior Propane* asked the authorities to weigh efficiency and equity. This is unsatisfactory, as noted: it leaves fundamentally normative and political questions to adjudicators rather than politicians.

Rather than leaving the decision to competition authorities to weigh political power and economic considerations, imposing a merger tax would allow the merger to go ahead, while relying on the proceeds of a merger tax to offset any negative political influence derived from the merger. For example, the proceeds could fund political parties and/or candidates, or fund political counterweights to the merged entity such as unions or consumer organizations.

As another example, some have suggested an environmental objective for antitrust, which could be pursued by the use of merger tax revenues, perhaps to subsidize green energy production or distribution. As a final example, some at least implicitly appear to be concerned about small businesses for their own sake, and would have competition law protect small competitors. In the merger context, this might mean preventing a merger that could lead to harm to competitors even if the merger is benign. Rather than distorting antitrust decision-making to disallow a competitively benign merger, the authorities could levy a merger tax and use the proceeds to support small business, perhaps those directly affected by the merger, perhaps small business as a class. The competitive analysis of a merger would be left to competition authorities, while the pursuit of other objectives would be left to politicians to exercise their discretion in allocating the proceeds of the merger tax.

A benefit of the merger tax is that it does not require the law or the authorities to pre-specify which goals ought to be taken into consideration in a given merger. Competition

enforcement may remain focused on conventional competition issues, while government expenditures can focus on other goals. It could be, for example, that there exist both concerns about political power and small competitors from a given merger. The competition authorities could focus on the competitiveness of the merger, and assuming that it is benign, focus only on levying a tax that political authorities will allocate according to political preferences.

If the tax is meant to allow competitively benign mergers while relying on the proceeds of the tax to promote other goals, the optimal size of the tax is not obvious even in principle. In the special case of the efficiencies defence, the tax could focus on the anticompetitive gains from the merger to the margining parties, while leaving the efficiency proceeds with the merging parties. This tax gets the balance right in principle; indeed, if the merger tax is set accurately, the merger will only proceed if the efficiency gains are greater than and offset the anticompetitive effects of the merger; that is, it will proceed only if the gains from the merger, E+T, exceed the tax, T+D, which is true only if E>D. The tax serves as a useful screening device that does not require the authorities to assess the credibility of parties' claims of future efficiency gains, something that some commentary asserts the authorities are ill-equipped to do (Kwoka).

In other cases where other values are promoted through the tax, there is no optimal amount of the tax. Rather, the tax ought to be set balancing various concerns. On the one hand, meaningful promotion or protection of other values through the use of proceeds would call for a higher tax. On the other, if a merger is procompetitive and efficient, it would be better to charge a lower tax so as to avoid deterring the merger, perhaps by rendering it unprofitable, perhaps by discouraging would-be merging parties from undertaking costly search efforts to seek out merger possibilities. There is no trade-off-free way to balance these competing considerations.

One approach would be to tax gains that arise from a lessening, but not a substantial lessening of competition. That is, some subset of mergers do harm competition, but insufficiently to prohibit them. Taxing any supercompetitive profits from the marginally uncompetitive merger would be one source of revenue that would not in itself deter an efficient merger: an efficient merger will generate gains from cost savings or something analogous that exceed the gains from anticompetitive profits.

In cases that do not give rise to supercompetitive profits, the merger tax would presumably be realized from cost savings or some other efficiency of the merger. Taxing these gains risks deterring economically beneficial mergers. If, however, non-economic objectives are deemed important, such a risk may be worth bearing. While occasionally deterring a procompetitive merger would not be welcome, there is a trade-off: the *status quo* approach ignores or marginalizes non-economic goals, and thus approves mergers that may do harm from these other perspectives; the merger tax coherently pursues polycentric goals, and if it occasionally deters an efficient merger, that is the price of coherent polycentricity. Of course, it may also be appropriate to limit the merger tax only to anticompetitive profits; that is a different resolution of a political trade-off.

There are different kinds of objection to the merger tax to address alternative goals. One is that there are other legal instruments to pursue other goals; a tax need not be adopted. I am sympathetic to this position, but it is not a dispositive argument against the merger tax. First, the argument does not seem to have convinced many in the competition law discussion, who seem intent on requiring competition law itself to take into account a broad range of values. The merger tax offers a method of accounting for multiple goals within competition law while allowing enforcement to remain focused and coherent.

Second, in some settings the merger tax may have advantages that other legal instruments do not. An appropriate merger tax associated with the efficiencies defence, for example, may screen out cases where claimed efficiencies are negligible or non-credible. This cannot be achieved with other instruments.

Third, taxing supracompetitive profits in a lump sum way raises revenue efficiently: it does not in itself deter efficient mergers; and does not distort marginal decisions. Other instruments, including income tax and expenditures, create distortions.

Another kind of objection is that it would be costly to estimate an appropriate merger tax. For example, suppose that the merger tax were defined by the supracompetitive profits plus deadweight losses that a merger would generate. If this amount were levied in connection with merged parties claiming the efficiencies defence, the merger would already have been subject to close scrutiny by the authorities; determining E, T and D would be an aspect of the review of the merger, and specifying the tax may not generate much in additional costs. On the other hand, if the merger had been found not to lessen competition substantially, the authorities may not have incurred the costs of precisely estimating future price increases. Determining the merger tax in this case would require a significant expenditure.

This too is a fair objection. It would be costly initially to calculate the tax, and if there were an appeal mechanism of some sort about its amount, that too would be costly. There are, however, reasons to accept these costs. First, regulation and taxation are often costly but are undertaken to pursue valuable social goals. Second, the costs of calculating the tax could be mitigated by simpler rules of thumb. It could be, for example, that rather than attempting to specific precisely the overcharge and deadweight losses from a merger that lessens competition but not substantially, the authorities could levy some a tax on some small fraction of expected

revenues post-transaction. A failure to calibrate the tax to the particular merger increases the risk of overdeterrence of socially desirable mergers, and the risk of undeterrence of socially undesirable mergers, but may be a practical response to the costs of precise assessment. Competition law already accepts concessions to the potential impracticality of calculating the economic effects of certain acts. For example, Canadian law recently increased the maximum financial penalty from abusing dominance to three times the benefit to the dominant firm of the anticompetitive practices, or, if impracticable to calculate this figure, 3% of worldwide revenues. The law relies on a rough and ready approach, not precision. The same could be true of the merger tax.

While there are good arguments that competition law ought to focus on the economics of competition and leave promotion of other values to other legal instruments, if competition law were to account for other values, the merger tax is an appropriate avenue. It maintains a coherent focus for competition authorities, while allowing political actors to pursue other goals through reliance on the proceeds of the merger tax. There are drawbacks, to be sure, including the costs of enforcing the tax, but a simple tax may advance social goals without distorting enforcement.

VI. Conclusion

Competition law has almost always sought to address the risk of anticompetitive mergers through *ex ante* injunctive remedies, either prohibiting or restructuring proposed mergers. This article contends that there are advantages to a shift, at least in some circumstances, to monetary payments rather than injunctions. The article identifies four contexts in which a merger tax would be a potentially appropriate response to a propose, or consummated, merger. First, a tax

on anticompetitive global mergers, that is, mergers that have a multinational impact, and for which local injunctive remedies are unsuitable, helps resolve the potentially conflicting determinations of different domestic antitrust authorities. A tax may be levied by jurisdictions that find the merger to be anticompetitive, while other mergers would not levy such a tax. In special cases, the tax produces a globally optimal result, but more generally, it mitigates the harm, including the risk of error and the race-to-the-strictest, from local review of global mergers.

Second, a merger tax might be an appropriate response to acquisitions of nascent competitors by firms with market power. Such mergers may have a low but non-zero probability of proving anticompetitive. While processes relying on injunctive remedies would tend to approve such mergers despite the risks, a merger tax generates some deterrence of potentially anticompetitive mergers without the stark result implied by an injunction prohibiting it. It also allows the proceeds of the tax to be directed to mitigate the impact of the merger.

Third, a merger tax imposed after the fact should a merger prove to be anticompetitive has several advantages. It allows the authorities to make a decision when there is more information about the competitive impact of the merger, while nevertheless generating *ex ante* deterrence by parties anticipating the tax. It also avoids the intractable problems associated with attempt to undo a consummated merger. For these reasons, the *ex post* merger tax would be another useful enforcement approach to acquisitions of nascent competitors.

Fourth, the merger tax would allow competition law to account for multiple social goals while avoiding indeterminacy and incoherence. The tax would allow enforcement agencies to focus on the economic effects of the merger, and proceeds from the tax could be relied upon to advance other goals.

To be sure, there are drawbacks to the tax, including the risk of error costs, the risk of strategic behaviour by rent-extracting countries, and the costs of calculating the tax in any given case. But these drawbacks presently also apply to the current injunction-based merger regimes, as well as other aspects of competition law enforcement. The mergers tax provides a promising avenue to address enforcement challenges that presently exist in most antitrust enforcement regimes today.

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