Response to Consultation Invitation - Examining the Canadian Competition Act in the Digital Era

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Via e-mail only

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I would like to congratulate the Honourable Howard Wetston and the Senate of Canada for opening this consultation and providing a platform for stakeholders to contribute to the debate surrounding the potential need for Canada to reform its competition policy framework.

In this response to the consultation call, I would like to build upon a few issues raised by Professor Iacobucci, bring awareness to the complexities in establishing a competition regime focused on the digital segments and sales channels, and further shed light on some potentially undesirable outcomes.

While there is a pressing need to assess whether Canada's Competition Act remains effective and appropriate in addressing the challenges of today's economy, I would like to in particular agree with and stress the fundamental importance of Professor Edward M. Iacobucci's recommendation that Competition policy should focus on competition issues solely.

Adequacy of the Current Canadian Competition Law Regime

Public reporting suggests that, influenced by recent approaches of the United States and the European Commission in regulating digital markets, the Canadian Commissioner of Competition is calling for an interventionist approach to competition.[1] However, it is essential foremost to consider whether such an approach is indeed necessary and appropriate in the Canadian context. Any amendment to the Canadian Competition regime should be made with due consideration to the specificity and sufficiency of the current Canadian regime. The Canadian Competition Bureau itself warned in previous occasions that "an uninformed or overly interventionist enforcement approach risks chilling investment in the accumulation and use of big data through legitimate means and losing out on significant benefits to competition and innovation"[6]. Canadian competition policy must continue to be designed and implemented taking into account the unique facets of the Canadian economy. It is therefore crucial that Canadian policy makers resist temptations to follow current antitrust policy proposals being

[1] Jaren Kerr, Competition commissioner says Canadian laws need U.S.-style makeover, Globe & Mail (2021) in Navin Joneja and Matthew Prior, Skating on Thin Ice: Why Canadian Competition Policy Should Not Be Determined by U.S. Antitrust Enforcement, 2021

considered in other jurisdictions that are not necessarily relevant nor applicable for the Canadian Competition regime.

As highlighted by Professor Iacobucci, "Digital markets present not only idiosyncratic competitive characteristics […] but new product markets altogether. But this does not imply that the Act needs an overhaul. […] Given the flexibility, there is no reason why the Act would not apply to new practices in new markets." Indeed, past cases show that the Competition Act has been successfully applied to cases involving large tech companies and digital markets. To illustrate this, Iacobucci mentions two recent cases where Canada's Competition Bureau has opened investigations against large tech players, one of which was centered around online platforms allegedly treating their own downstream services differently from those of competitors in an uncompetitive way. Many scholars agree that where self-preferencing constitutes a harm to competition, the existing framework in Canada is broad and flexible enough to deal with such exclusionary conduct.[2]

Iacobucci also demonstrates the resilient and flexible nature of Canada's competition law framework in light of technological development with regards to "anti-competitive conduct that restricts access to data".[3] While regulatory intervention that facilitates data sharing mechanisms as a way to confer value to competitors remains highly controversial, situations where the refusal to provide access to such data heightens barriers to entry can be addressed by the Competition Act under Section 79 (abuse of dominance).[4]

While the aforementioned proposed regulatory approaches from the United States and the European Commission intend to improve consumer welfare and market conditions for SMEs within these Big Tech ecosystems, the actual impact of these regulations on these countries' digital economies is yet to be tested and proven, and would in fact likely have negative consequences for SMEs.[5] As such, these proposals stem from a flawed and untested assumption that established consumer welfare-based antitrust enforcement is not enough to address the different challenges that follow the rise of new business models.[6]

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[2] Daniel Sokol and Anthony Niblett, Up to the Task: Why Canadians Don't Need Sweeping Changes to Competition Policy to Handle Big Tech, 2021

[3] To date, there is no conclusive data showing that sharing data would improve contestability. (United Kingdom, HM Government, BEIS Research Paper: Competition and Innovation in Digital Markets, 2021)

[4] Daniel Sokol and Anthony Niblett, Up to the Task: Why Canadians Don't Need Sweeping Changes to Competition Policy to Handle Big Tech, 2021

[5] Michael G Jacobides, Martin Bruncko and Rene Langen, Regulating Big Tech in Europe: Why, so what, and how understanding their business models and ecosystems can make a difference, 2020

[6] Michael G Jacobides, Martin Bruncko and Rene Langen, Regulating Big Tech in Europe: Why, so what, and how understanding their business models and ecosystems can make a difference, 2020

Canada has an opportunity to prove that the effective enforcement of its current competition framework is flexible enough to accommodate and address the challenges of the digital era.

Ensuring the Clearly defined Scope of Competition Law

True to the dynamic nature of competition law, the policy considerations that it serves has evolved throughout time. While there have been tendencies to align the goals of competition with the current economic backdrop or even the prevailing political climate, a key goal that has gained widespread acceptance is the promotion of economic efficiency and achieving consumer welfare. As currently codified, the purpose of Canadian Competition law is to encourage competition in Canada in order to: (i) promote the efficiency and adaptability of the Canadian economy; (ii) expand opportunities for Canadian participation in world markets; (iii) provide consumers with competitive prices and product choices.[7]

Indeed, the reshaping of the global economy into one that is digitally oriented has posed an enticing allure for legislators and policymakers to also restructure the goals of competition policy in line with this shift. However, an effort to address these issues through legislation is not realistic and does not account for the variety of industries and business models that have been digitized. Attempting to regulate a multitude of policy concerns under one inflexible instrument, as evinced by the developments in the drafting of the Digital Services Act (DSA) and Digital Markets Act (DMA) in the European Union (EU), would likely give rise to intrinsic complications that are not relevant for antitrust policy. The expansive regulatory nature of the DSA and DMA has resulted in a situation which risks duplication and misalignment of regulation on specific matters. Issues such as privacy, data security, labour protection, and political power, demand their own policies. In this regard, it should be highlighted that **Competition law is not the solution for all problems.** Any amendment to the Canadian competition regime should ensure it scope remains within traditional applications of antitrust law and provides legal certainty for operators and enforcement agencies.

Lessons from other Jurisdictions – The European Union Digital Markets Act

The European Union is currently negotiating its proposed regulation for the digital single market. The proposed Digital Markets Act (DMA) intends to apply alongside EU competition law in light of digitalisation, to ensure a fair and competitive online economy. In attempting to address the increasing power which certain firms have on the digital market, EU policymakers have adopted a protectionist approach, advocating for technological sovereignty and strategic autonomy in a political climate growing increasingly hostile to non-European businesses, particularly U.S. companies. The

[7] Competition Act (R.S.C., 1985, c. C-34)

proposed DMA has taken an extensive approach to regulate "dominant firms" despite the detriment to consumers' welfare and market accessibility.

1. Impact on Consumers and Businesses – Quality of Products on the Market

In attempting to curb potentially unfair practices by dominant players on the EU digital market, policymakers have proposed to introduce a series of obligations and prohibitions on a certain number of firms. One such example is the proposal to prohibit or severely restrict targeted advertising and recommender systems. Such tools play a crucial role in ensuring customers receive appropriate, relevant and the best quality material suited to them. Furthermore, many SMEs rely on tools such as targeted advertising to reach their consumer base. Recommender systems are also built to ensure businesses reach their target audience. The DMA in proposing to severely restrict such tools, risks hampering the businesses of SMEs or freelancers who use online services to reach customers. In attempting to restrict such tools, the DMA risks diminishing the quality of services offered online and thus the experience of consumers on the market. When regulating competition, the quality of services offered on the market to consumers and business users must remain a priority.

Providing consumers with competitive prices and product choices is one of the goals of the Competition Act and it should continue to be the focus of competition regulation in the digital era as well. Competitive prices are provided by various business models and aggregation methods in new creative ways by technology companies that operate in a variety of sectors. In addition to this, Consumer protection and welfare has always been intrinsically linked with competition policy, and it should continue to be so.

The aforementioned proposed obligations and prohibitions of DMA on certain market players not only risks deterring the quality of products on the market but will also have serious safety and security implications for consumers. Proposed mandatory obligations on technical interoperability risk increasing consumers exposure to unsecured third-party software applications. Similarly, proposed prohibitions on the combination of personal data sourced from core platforms services of gatekeepers with data sourced from ancillary platform services and prohibitions of bundling or cross-tying ancillary services, are likely to reduce the protection and security provided to users. While the prevention of abuses by dominant market players is a core concern of Competition policy, the effects on consumers of any regulation introduced to this aim must be thoroughly examined.

2. Impact on Market Players – Innovation

The DMA introduces a system following the precautionary principle, by taking an ex-ante approach to prohibiting certain actions by certain players on the market for fear of potential negative effects on

the market. Unfortunately, no consideration is paid to potentially positive effects which such practices may have on the market, consumers, or other market players. Such an approach could deter innovation by new and existing market players. Not only does such an approach risk downgrading the quality of services offered by leading market players, as mentioned above but prohibitions on practices such as price discrimination can harm SMEs and entrepreneurs entering the market who benefit from financial exemptions from online service providers.

The imposition of obligations or prohibitions on market players based on their respective size or consumer/user reach – standards that are not typically relevant when evaluating anticompetitive conduct or market power – will harm innovation as growing players may be deterred or even prevented from scaling up as a result of increased regulatory burdens. Furthermore, the DMA attempts to facilitate market entry by proposing data-sharing and interoperability obligations on dominant market players to their competitors. Such obligations may encourage free-riding behaviours and reduce the incentives for large digital companies to innovate, and thus risks hindering innovation and growth in the EU market. Such a system of regulating competition which takes an approach of introducing asymmetric obligations risks disincentivising growth for smaller players, keeping them artificially small to avoid regulation, thus deterring innovation and growth on the market. Competition law must facilitate an environment supportive of all market players.

Additionally, although the DMA claims that technology giants' buyouts reduce market entry rates and decrease the supply of venture capital funding and investment available to start-ups, robust studies analysing venture capital deals in different segments of the technology industry prove otherwise: there is a whole innovation ecosystem thriving with these acquisitions.[8] In cases where a dominant firm may acquire a smaller company with the sole purpose of eliminating the competition, Professor Iacobucci clarifies that Canada's competition act is already "equipped to address the harms that result from the loss of potential competitors. Indeed, the Act explicitly contemplates orders in the face of conduct that prevents competition."

In the same vein, specific cases where a dominant company may "acquire a nascent rival in order to preserve its incumbency and attendant network externalities" does not justify significant reforms such as banning future acquisitions or breaking up existing companies. As recognized by the European Commission, this could lead to unintended risks to innovation considering that the chance for start-

[8] Quantitative research carried out by scholars from Quello Center at Michigan State University with more than 32,000 venture capital deals in 173 different segments of the technology industry and nearly 400 tech start-up acquisitions made worldwide between 2010 and 2020 by Google, Facebook, Amazon, Apple, and Microsoft reveal a positive, causal impact of big tech start-up acquisitions on venture capital activity. (Tiago S. Prado and Johannes M. Bauer, Effects of Big Tech Acquisitions on Start-up Funding and Innovation, 2021).

ups to be acquired by larger companies is an important element of venture capital markets.[9] Instead, what Canada needs is greater vigilance and effective enforcement tools.

3. Recognising the Unique Business Models and Markets of the so-called "Big Tech"

The horizontal approach to regulating "big-tech" fails to capture the different business models and monetisation strategies that these companies operate under or the market in which they offer their services or products. For example, many of the DMA's obligations apply to all businesses identified as "gatekeepers", which does not account for the different nature of companies' services and the different business models they employ in their respective markets. Any reform of the Canadian competition framework should make sure to avoid grouping distinct businesses under inexact terms such as "gatekeepers" or "Big Tech". It should instead focus on specific business models, the extent of online/offline competition, and the implications for competition and welfare.

"Big tech" companies operate not only under entirely different business models but also across distinct markets with different concentration *ratios*, where they enjoy significantly different market share. An effective competition legislation should consider the multi-reality aspect of the various markets in which they offer their services and products. For instance, the mobile phone operating system market contrasts sharply with other sectors, such as retail, where digital and nondigital channels are intertwined. In practice, this means that while the phone operating system market is highly concentrated with very few – and no small – players, e-commerce is ultimately one sale channel within retail, where online-offline solutions complement and compete with each other.[10][11]

In this sense, albeit through distinct means and with their respective costs and benefits, both e-commerce players and conventional brick-and-mortar firms sell products to end-users. In fact, the practice of multi-homing is common across the retail industry, such that consumers easily switch between online and physical stores depending on their needs. The close links between these two models have all the more been amplified during the pandemic.[12]

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[9] Jacques Crémer, Yves-Alexandre de Montjoye, and Heike Schweitzer, Competition Policy for the Digital Era: A Final Report, 2019.

[10] Selling through a variety of different channels has become an important strategy to create a seamless shopping experience for customers and attract potential shoppers. While e-commerce has increased during the pandemic, shopping malls and brick-and-mortar stores will still continue to play an important role as they provide proximity to the customer, which can increase engagement.

[11] According to a study by Harvard Business Review done with 46,000 shoppers, only 7 per cent of people preferred shopping exclusively online (Harvard Business News, How 'Buy Online, Pick Up In-Store' Gives Retailers an Edge, 2021).

[12] A recent McKinsey & Co. survey found that 59% of U.S. consumers who used BOPIS in 2020 said they intend to continue using it in the long term *in* Forbes, Retail Is Back - It's Time To Modernize Stores With An OmniChannel Experience, 2021

Thanks to digital services, consumers and sellers, including SMEs, have a wider range of options for products and marketplaces. For instance, as a result of the pandemic-induced growth of digital channels, big supermarket chains that would generally operate through conventional channels are now increasingly integrating online tools and supply chains, which leads to strong competition within retail through the coexistence of different business models. Innovation is encouraged by this competition while consumers enjoy different levels of pricing and quality of service.

Moreover, it could even be argued that imposing additional obligations on e-commerce players—just by the mere fact that they operate online—may put them at a competitive disadvantage over brick-and-mortar firms that sell exactly the same product or service. In such a case, additional costs brought about by increased regulation to online retailers might possibly be shouldered by consumers themselves, leaving them worse off. As such, restraint must be exercised in imposing one-size-fits-all obligations on online service providers.

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I would like to thank once again the Honourable Howard Wetston and the Senate of Canada for the opportunity to provide input on this consultation call. I hope the concerns raised in this response will be duly considered in the review of the Canadian Competition regime.

Respectfully,

Kaisu Karvala

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[i] Kaisu Karvala is a tech industry expert with over 20 years of industry experience as VP at Rovio and Telia, and having served as a board member of the European Telecommunications Network Operators' Association (ETNO) and for eight years as Chair of mobile operators' alliance GSMA Europe. Kaisu's expertise lies in guiding companies globally in reaching their policy and business objectives, having led communications and advocacy campaigns worldwide, and developed and headed programmes to build and scale-up ecosystems. Kaisu Karvala is currently Head of Region UK and Europe for Access Partnership, an international public policy firm specialized in the tech sector.