Commissariat à la protection de la vie privée du Canada
Office of the Privacy Commissioner of Canada

BY EMAIL December 21, 2021

The Honourable Howard Wetston, C.M., Q.C., LL.D
Senator for Ontario
Room 316, East Block
Senate of Canada
Ottawa, Ontario K1A 0A4
Howard.Wetston@sen.parl.gc.ca

Subject: SUBMISSION – *Examining the Canadian Competition Act in the Digital Era*

Dear Senator Wetston:

Thank you for the invitation to participate in your consultation to promote additional dialogue on paths forward for Canadian competition law. As you know, my Office oversees compliance with the *Privacy Act*, which covers the personal information-handling practices of federal government departments and agencies, and the *Personal Information Protection and Electronic Documents Act*, Canada's federal private-sector privacy law. As my Office's mission is to protect and promote the privacy rights of Canadians, I am only able to offer privacy and cross-regulatory related insights as opposed to a more direct assessment and comments on Professor Iacobucci's discussion paper.

The digital transformation of our economy has brought with it a number of opportunities and challenges for all regulators. Among other things, this transformation has led to an increased cross-regulatory intersection between **privacy**, **competition** and **consumer protection**. It has become apparent that these intersections will only continue to grow both in frequency and magnitude, as their interplay shapes today's digital economy and society.

Our Office has been a leader in the area of cross-regulatory intersections, acting as co-chair of the Global Privacy Assembly's Digital Citizen and Consumer Working Group ("**DCCWG**"). With a focus on developing a better understanding of the intersection between privacy, consumer protection and competition regulation, the DCCWG has been actively promoting cross-regulatory collaboration, and has recently focused its attention on the intersection of privacy and competition. On the latter, this summer the DCCWG completed work that brings together both the theory and practical application underpinning our current understanding of this intersection. It resulted two complementary reports appended to the DCCWG's 2021 Annual Report. The first is a DCCWG-commissioned independent academic

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report by Professor Erika Douglas of Temple University Beasley School of Law, titled '*Digital Crossroads: The Intersection of Competition Law and Data Privacy*'.

The second, which I have attached for your reference, is the DCCWG-authored '*Privacy and Data Protection as Factors in Competition Regulation: Surveying Competition Regulators to Improve Cross-Regulatory Collaboration*'. It is within the context of the intersection between privacy and competition regulation, and through sourcing of the DCCWG's recent reports, that I offer the following comments that may inform your consideration of future amendments to the *Competition Act*.

Privacy will play a larger role in competition policy

As noted in Professor Iacobucci's discussion paper, privacy will play a larger role in competition policy within digital markets in the future. With this in mind, when one views privacy as a non-price factor of competition today, it is not hard to imagine how an organization can engage in anti-competitive conduct. If a reduction in the number of competitors in a market is likely to lead to increased prices, the inverse can be true with respect to privacy protections as an element of product quality. With fewer competitors in the market, there is less incentive to continue to enhance or maintain existing levels of privacy protections, as a qualitative component of a product or service. Once a digital enterprise gains a dominant market position, if not an outright monopoly, consumers will be left with little to no choice but to accept a lower quality product should that enterprise choose to reverse course with respect to previous privacy-serving practices. If, for example, that enterprise were to begin tracking their customer's online habits in an effort to monetize that information, the lack of substitutable products leaves consumers no meaningful alternative but to accept a lower quality product/service or stop using the product/service altogether – which in today's digital economy may not always be practicable, given consumer dependence on dominant digital platforms as well as other network effects and externalities. At the same time, a monopoly digital giant with market power could suppress privacy-friendly product/service innovations and potentially eliminate competition with respect to the level of privacy protections offered by competitors.

Professor Iacobucci's discussion paper appears to adopt what the DCCWG's 'Privacy and Data Protection as Factors in Competition Regulation' report has termed the "traditionalist" approach to regulation. While not unique to competition regulators, as presented on page 12 of that report, "[t]his approach is rooted in the view that competition authorities can more effectively achieve their mandates by focusing on competitive issues and elements when assessing the conduct at issue, and setting aside any factors that do not have a competitive bearing on the conduct. Under this theory, competitive assessments utilize traditional competitive indicators such as price or market share, and would generally exclude factors such as privacy." This approach relies on other regulators to address other issues (such as privacy) within their regulatory sphere.

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As raised in the DCCWG work, such an approach to competition regulation could result in an increased number of "either-or" enforcement resolutions and policy positions that promote competition at the expense of privacy – or vice versa. Such a binary outcome may not only compromise privacy rights, but also could result in a sub-optimal outcome as it relates to promoting competition in a robust digital economy. DCCWG research suggests that we have arrived at a point where privacy and data considerations have been largely accepted in the anti-trust community as having the potential, in certain circumstances and markets, to be material factors in the competitive calculus.

The Need for Cross-Regulatory Collaboration will continue to Grow

The overlapping regulatory nature of digital markets calls for a cooperative process from regulators. This will help to ensure a holistic and consistent approach to digital regulation to the benefit of competitive markets, consumer welfare, and the protection of privacy rights.

The benefits of cross-regulatory cooperation can be seen in examples such as the Colombian Superintendencia Industria y Comercio's ("**SIC**") "Bank's" resolution. Among other things, the SIC is Colombia's consumer protection, privacy and competition authority. As discussed in greater detail in paragraphs 78 and 79 of DCCWG's '*Privacy and Data Protection as Factors in Competition Regulation'* report, when Colombia's financial regulator asked the SIC to conduct a competitive assessment of the creation of a digital joint venture between Colombia's three largest banks, the competition team conducting the assessment recognized both the privacy implications and the need for the joint venture to garner consumer trust in its services through transparency and respect for Colombia's privacy regulations. As a result, they consulted with their privacy counterparts and, despite the competitive nature of the assessment, incorporated several privacy-related recommendations into their final report.

Another example can be found in the UK's Digital Regulation Cooperation Forum, which is comprised of the UK's Competition and Markets Authority ("**CMA**"), the Information Commissioner's Office ("**ICO**"), the Office of Communications and the Financial Conduct Authority. The Forum was established to ensure greater cooperation on online regulatory matters. In May of 2021, the CMA and the ICO published a joint statement setting out their shared views on the relationship between competition and data protection in digital markets.

I would also draw your attention to the Competition and Consumer Commission of Singapore ("**CCCS**") as an example of how both regulatory spheres' interests have been advanced through cross-sector consideration and collaboration. As part of a public consultation on proposed amendments to various enforcement guidelines (linked), the CCCS has explicitly stated that, where appropriate, their merger assessments will treat data protection as an aspect of quality. Another proposed amendment identified the control/ownership of data as a possible determinant of market power with respect to abuse of dominance assessments. These and other

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examples are explored in greater detail in the DCCWG's '*Privacy and Data Protection as Factors in Competition Regulation*' report appended to the DCCWG's 2021 Annual Report.

In addition, the growing importance of fostering cross-regulatory cooperation between privacy and competition authorities is also reflected by the G7 data protection and privacy authorities' recent agreement to strengthen collaboration with their domestic competition counterparts on the regulation of digital markets.

With these multiple examples of cross-collaboration in mind, I would encourage you to consider, where appropriate, amendments to the *Competition Act* that would enable, or strengthen, cooperation with all regulators who share responsibility for overseeing digital markets. Just as I have recommended that Bill C-11, the *Digital Charter Implementation Act*, 2020, be amended to enhance my Office's ability to work and/or share information with other government authorities, I similarly believe that the Competition Bureau should retain that ability pursuant to section 29 of the *Competition Act*, or see it strengthened.

Thank you for the opportunity to participate in your consultation. Should you wish to discuss these issues further, I can refer you to Brent Homan, Deputy Commissioner Compliance, who has been heading up DCCWG efforts to consider cross-regulatory intersection, and advance collaboration (Brent.Homan@priv.gc.ca).

Sincerely,

Daniel Therrien
Privacy Commissioner

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