ICLE International Center for Law & Economics

Comments from the International Center of Law and Economics on The Future of Competition Policy in Canada

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Executive Summary

ICLE Future of Competition Policy in Canada Comments

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In what the Discussion Paper refers to as a "moment of reckoning" for competition law, it is crucial that the Government not overreact with experimental legislative reform that will later be exceedingly difficult to unwind. Five main conclusions can be drawn from this submission, and they warrant a much more restrained approach.

First, the Government should follow several important guiding principles when it decides what competition policy is appropriate for Canada. Any potential reform should be based on careful examination of the facts and evidence, as well as the specifics of Canada's economy, and it should be scrupulous in applying the error-costs framework. In addition, despite frequent rhetoric to the contrary, it is entirely unclear that "digital" markets present the sort of unique challenges that would necessitate an overhaul of the Competition Act. Accordingly, evidence does not recommend that Canada follow the sort of competition regulation or reform contemplated elsewhere, nor should Canada be compelled to act just because other countries are "doing something."

Second, there is no rhyme or reason to presumptions against self-preferencing behavior. Self-preferencing is normal business conduct that can, and often does, yield procompetitive benefits, including efficiencies, enhanced economies of scope, and an improved products for consumers. In addition, a ban on self-preferencing would cause harms for the startup ecosystem by discouraging acquisitions by large firms, which would ultimately diminish the incentives for startups. This is presumably not what the Government wants to achieve.

Third, altering the purpose of the Competition Act would be a grave mistake. Competition law does not serve to protect competitors, but competition; nor can harm to competitors be equated with harm to competition. The quintessential task of competition laws—the Competition Act included—is distinguishing between the two, precisely because the distinction is so subtle, yet at the same time so significant. Similarly, "fairness" is a poor lodestar for competition-law enforcement because of its inherent ambiguity. Instead of these or other standards, the Competition Act should remain rooted in the principle of combating "a substantial lessening or prevention of competition."

Fourth, the Government should exercise extreme caution in its exploration of labour-market monopsony, as altering the merger-control rules to encompass harms to labour risks both harming consumer welfare and the consistency and predictability of competition law.

Fifth, in its impetus to bolster competition-law enforcement by making it "easier" on the Canadian Competition Bureau, the Government should not sacrifice rights of defense and the rule of law for expediency. In this, at least, it can learn from the example of the EU's Digital Market Act.

Introduction

We thank the Government of Canada for the opportunity to comment on its Consultation on the future of competition policy in Canada. The International Center for Law and Economics (ICLE) is a non-profit, nonpartisan research center whose work promotes the use of law & economics methodologies to inform public-policy debates. We believe that intellectually rigorous, data-driven analysis will lead to efficient policy solutions that promote consumer welfare and global economic growth. ICLE's scholars have written extensively on competition and consumer-protection policy. Some of our writings are included as references in the comment below. Additional materials may be found at our website: www.laweconcenter.org.

On 17 November 2022, the Canadian Government ("Government") published a Consultation for the Future of Competition Policy in Canada ("Consultation") with the purpose of informing the Government's next steps for improving competition in emerging and digital markets, including potential legislative changes (Government of Canada, 2022). The Consultation builds on a Discussion Paper issued by the Canadian Competition Bureau ("CCB") entitled "The Future of Competition Policy in Canada" ("Discussion Paper") which broaches several issues that have been hotly debated, both in Canada and abroad, such as so-called "killer acquisitions," self-preferencing practices by dominant online platforms, the effects of monopsony power on labour, private damages claims, the necessity of bolstering antitrust enforcement, and deceptive marketing practices (Discussion Paper: 5). While all these questions undoubtedly deserve extensive commentary, we have decided to focus on five issues where we think our expertise in law and economics, as well as our experience in the regulation of digital markets, bring the most added value.

These comments are organized as follows. In Section I, we outline several general principles that guide any effective competition policy, especially in the realm of digital markets. We argue that sound competition policy needs to account for the economic specificities of the jurisdiction that passes it, the significant heterogeneity of digital platforms, and the important error costs associated with regulating digital markets. In Section II we argue that Canada should not follow the EU in imposing outright bans and *ex ante* obligations for conduct that is ubiquitous in the digital world, such as self-preferencing. We argue, instead, that there are legitimate reasons—ranging from economic efficiency to safety, privacy, and security—to prefer a more restrained, case-by-case approach. We also connect the skepticism toward self-preferencing with a broader, misguided belief that vertical integration is typically anticompetitive, which is not supported by the available evidence.

In Section III, we argue against a range of proposals that would, in one way or another, alter the purpose clause of the Competition Act. We emphasize that competition law serves to protect competition, not competitors; caution against the reliance on amorphous concepts, such as "fairness," to guide competition-law enforcement; and hold that merger control should remain tethered to a standard of "substantial lessening or prevention of competition." In Section IV, we explain that, while it may appear politically expedient and attractive, there are serious limits on the extent to which labour effects can be integrated into competition analysis.

Finally, Section V warns against sacrificing effective procedural safeguards and rights of defense for the sake of facilitating enforcement. More generally, we warn against the increasingly prevalent intuition that making enforcement easier is always good, effective, or costless; or that "more enforcement" is synonymous with the public good. Section VI concludes.

I. Some General Principles for Effective Competition Policy

When done well, competition policy can provide the governing framework for free enterprise—a set of rules that prevent the formation of *inefficient* monopolies, while allowing markets to deliver benefits to consumers unfettered by heavy-handed government intervention. To achieve this goal, it is essential for competition policy to be grounded in several principles that ensure it achieves a balance between over- and under-deterrence of harmful conduct. These principles include having a competition policy that fits the specific needs and market realities of the jurisdiction enforcing it; ensuring that competition policy is mindful of error-cost considerations; and avoiding a one-size-fits-all approach that treats all markets, notably digital ones, as identical.

A. Canada Should Implement the Right Competition Rules *for Canada*

The Consultation appears to assume that Canada's adversarial system of competition-law enforcement is too archaic to deal with competition issues arising in the modern, digital economy (Ibid: 51), and that Canada is falling behind the regulatory trends set by "international partners," such as the United States, Australia, and the European Union.

> "[The Government] is committed to a renewed role for the Competition Bureau in protecting the public in our modern marketplace, in line with steps taken by many of Canada's key international partners" (Ibid: 4).

While these trends exist—despite significant variation in terms of scope and legislative progress across jurisdictions—there is currently a dearth of evidence to suggest that they are a positive development worthy of emulation. It is even less clear whether emulating these developments would be the right move, given Canada's specific market realities.

The EU's Digital Markets Act ("DMA"), the most comprehensive legislative attempt to "rein in" digital companies, entered into force only last October, and it will not start imposing obligations on gatekeepers until February or March 2024 *at the earliest*. (Grafunder *et al.*, 2022). Nevertheless, its sponsors have predictably touted it as a resounding success and a landmark piece of legislation that will upend the ways in which digital platforms do business. The press has also wasted no time in lionizing the EU's regulatory *pièce de résistance* as a "victory" over tech companies, as if the relationship between business and government were a zero-sum game (Abend, 2015; Harris, 2022).

But it is important to carefully consider the facts and evidence. Indeed, while the DMA likely will transform how the targeted companies do business (albeit possibly not in the way the regulation's supporters assume), the jury is still very much out on the question of whether the DMA is, or will be, a success. The DMA's origins are enlightening in this regard. Prior to its adoption, many leading European politicians touted the text as a protectionist industrial-policy tool that would hinder U.S. firms to the benefit of European rivals—a far cry from the purely consumer-centric tool it is sometimes made out to be. French Minister of the Economy Bruno Le Maire acknowledged as much, saying (Pollet, 2021): "Digital giants are not just nice companies with whom we need to cooperate, they are rivals, rivals of the states that do not respect our economic rules, which must therefore be regulated… There is no political sovereignty without technological sovereignty. You cannot claim sovereignty if your 5G networks are Chinese, if your satellites are American, if your launchers are Russian and if all the products are imported from outside."

Andreas Schwab, one of the DMA's most important backers in the European Parliament, likewise argued that the DMA should focus on non-European firms (Broadbent, 2021): "Let's focus first on the biggest problems, on the biggest bottlenecks. Let's go down the line—one, two, three, four, five—and maybe six with Alibaba. But let's not start with number seven to include a European gatekeeper just to please [U.S. president Joe] Biden."

Even on its own terms, whether the DMA will achieve its dual goals of "fairness" and contestability is uncertain. Less certain still is whether it will produce negative unintended consequences for consumer prices, product quality, security, innovation, or the rule of law—as some commentators have warned (Auer & Radic, 2023; Barczentewicz, 2022; Colangelo, 2023; Radic, 2022; Ibáñez Colomo, 2021; Cennamo & Santaló, 2023; Bentata, 2021). In a similar vein, no evidence suggests that the competition-law cases against tech companies based on such theories of harm as self-preferencing will withstand the courts' scrutiny or that they will result in net benefits to consumers or competition.

The still nascent "trends" in other jurisdictions offer even less in terms of evidence to counsel adoption of far-reaching DMA-style solutions like banning self-preferencing, forcing interoperability, or prohibiting the use of data generated by business users. The U.S. antitrust bills targeting a handful of companies seem unlikely to be adopted soon (Kelly, 2022); the UK's Digital Markets Unit proposal has still not been put to Parliament; and Japan and South Korea have imposed codes of conduct only in narrow areas. The mere prevalence of trends—especially at a tentative stage—is not, on its own, indicative, much less dispositive, of the appropriateness of a regulatory response. It should therefore be treated neutrally by the Government, not with deference.

Second, the Discussion Paper fails to adequately grapple with the possibility that the EU's regulatory response might not be well-suited to the Canadian context. For one, Canada's economy is one-eighth as large as the EU's (Koop, 2022), meaning that it is much less likely to be seen as an essential market by those companies affected by any potential antitrust/regulatory reform. Thus, while the EU can perhaps afford to impose costly and burdensome regulation on digital companies because it has considerable leverage to ensure—with some, though by no means absolute, certainty—that those companies will not desert the European market, Canada's position is comparatively more precarious.

In addition, the EU has an idiosyncratic digital strategy that has produced no notable digital platforms, with the arguable exceptions of Spotify and Booking.com, and has instead shifted its attention almost entirely to redistributing rents across the supply chain from those digital platforms that have emerged (Manne and Radic, 2022; Manne and Auer, 2019). Even staunch supporters of the DMA have admitted that the DMA will do nothing to help the EU produce its own platforms to challenge the dominant U.S. firms (Caffarra, 2022) . The DMA and the European Commission's recent flurry of cases against U.S. tech companies are arguably an integral part of that overarching strategy.

B. Regulation Should Be Scrupulously Mindful of Error Costs

With rare exceptions, the Discussion Paper does not sufficiently acknowledge that regulation is neither free of risk nor costless to implement. Legal decision making and enforcement under uncertainty are, however, always difficult, and always potentially costly. The risk of error is always present, given the limits of knowledge, but it is magnified by the precedential nature of judicial decisions: an erroneous outcome affects not only the parties to a particular case, but also all subsequent economic actors operating in "the shadow of the law" (Manne, 2020a). The uncertainty inherent in judicial decision making is further exacerbated in the competition context, where liability turns on the difficult-to-discern economic effects of challenged conduct. This difficulty is magnified further still when competition decisions are made in innovative, fast-moving, poorly understood, or novel market settings—attributes that aptly describe today's digital economy (Ibid.).

More specifically, Type I errors—*i.e.*, enforcement of the rules against benign or beneficial conduct—might mean reducing firms' incentives to make investments in areas where free-riding is seen by competitors as a viable strategy (Auer, 2021), thereby reshaping the products that consumers enjoy (such as Apple's walled-garden iOS model, Canales 2023; Sohn, 2023; Auer, Manne & Radic, 2022); diminishing quality; or driving up prices (on this last point, see Section II). Where the possibility and likelihood of these costs is not brought into the equation, regulations will exceed the social optimum, to the harm of consumers, taxpayers, and, ultimately, society. To be sure, this is not to say that no regulation or legal reform should ever be undertaken; it is only to say that they should be undertaken within the error-cost framework.

When it comes to considering competition reform, the Government must be careful not to conflate correlation with causation. On several occasions, the Discussion Paper connects certain exogenous phenomena with anemic competition enforcement or a lack of significant competition reform since the 1980s (Discussion Paper: 6-7, 15). While the connection is made rhetorically explicit, however, the Discussion Paper provides no arguments or sources to support it. For instance, it is unclear that heightened competition enforcement would have mitigated the impact of the COVID-19 pandemic or that it attenuates economic inequality, as the Discussion Paper implies. Economic evidence and respect for the rule of law, rather than political expediency, should be the forces driving reform. Lastly, and more generally, if the objectives of the Competition Act are going to be stretched beyond their current understanding to encompass considerations extrinsic to competition—such as protecting the "social landscape and democracy" (Ibid: 7)—a much broader legislative reform is needed. That, in turn, would necessitate substantively more empirical research than the anecdotal evidence currently available on, say, the relationship between economic concentration and un-democratic outcomes (as well as tighter definitions of democracy) (Manne & Stapp, 2019; Stapp, 2019; Manne & Radic, 2022). In this connection, we have often cautioned against a "Swiss Army knife" approach to competition, in favor of tethering it to one quantifiable standard that it is best-placed to deliver (and which is expressly recognised in the Competition Act): providing consumers with competitive prices and product choices (Manne, 2022a; Manne & Hurwitz, 2018). After all, if, as the Discussion Paper suggests, the current iteration of the Competition Act, which focuses specifically on lower prices and product quality for consumers, has not contributed enough to drive down the costs of living for Canadians, why give it more wildly ambitious goals?

The danger here is threefold. The Competition Act may fail in achieving these ulterior goals; it may, by diluting the importance of prices and product quality for consumers, perform even more poorly at lowering the costs of living; and, lastly, the legal uncertainty resulting from the imposition of a quagmire of conflicting goals may chill efficient conduct (see Section III).

C. 'Digital Markets' Are Not Inherently Prone to Market Failure

While any market or industry may be distinctive in certain regards, it is not at all established that digital markets are so distinctive to warrant special treatment under the competition rules—much less to justify new legislation. The Discussion Paper assumes, as has become increasingly popular, that digital markets are marked as special because of their data-driven network effects or extreme returns to scale. (Discussion Paper: 8-9) (Cremer, de Montjoye, & Schweitzer, 2019; Zingales & Lancieri, 2019). The Government, however, should at least contemplate the counterarguments to this assertion.

From the outset, it is worth noting that there is arguably no such thing as a "digital" market. Put differently, *every* market today—from higher education to supermarkets—employs some level of digital technology, which renders the label "digital" largely superfluous. The flipside of this is that some markets typically seen as the epitome of "digital" rely heavily on physical infrastructure. Online sales platforms like Amazon, for instance, sell physical products, stored in warehouses, through a distribution network made up of a fleet of trucks and planes. Both observations undercut the claim that digital markets embody a distinct kind of competition, and one that can be parsed from markets across the Canadian economy.

More fundamentally, digital markets are arguably less prone to "tipping"—*i.e.*, the emergence of runaway leaders whose competitive advantage can no longer be eroded because of their large userbases—than is generally assumed. The value of data in creating network effects is significantly overestimated. It is important to note that network effects, on the one hand, and economies of scope and scale, on the other, are distinct economic phenomena. Whereas economies of scope and scale reflect cost-side savings, network effects "operate through user benefits enhancement as production increases. Network effects are therefore a reflection of consumers' perception of value" (Tucker, 2019). While there is a common assumption that acquiring sufficient data and expertise is essential to compete in data-heavy industries, the "learning by doing" advantage of data rapidly reaches a point of diminishing returns, as do advantages of scale and scope in data assets (Manne & Auer, 2021). Critics who argue that firms such as Amazon, Google, and Facebook are successful because of their superior access to data have the causality in reverse. Arguably, it is because these firms have come up with successful industry-defining paradigms that they have amassed so much data, and not the other way around. Indeed, Facebook managed to build a highly successful platform relative to established rivals like MySpace (Jacobs, 2015).

Third, and relatedly, network effects in digital markets are rarely insurmountable. Several scholars in recent years have called for more muscular antitrust intervention in networked industries on grounds that network externalities, switching costs, and data-related increasing returns to scale lead to inefficient consumer lock-in and raise entry barriers for potential rivals (Discussion Paper: 23). But network effects can also be highly local. "For example, when I consider whether to use Dropbox or another file sharing service, I do not care about the total number of users of Dropbox; instead, I care about how many of my handful of collaborators also use it" (Tucker, 2019). Thus, network effects tend to *destabilize* market power: "[w]hile network effects facilitate the rapid growth of platforms, they also accelerate their demise."(Ibid.)

There are countless examples of firms that easily have overcome potential barriers to entry and network externalities, ultimately disrupting incumbents. Recently, Zoom outcompeted long-established firms with vast client bases and far deeper pockets, such as Microsoft, Cisco, and Google, despite the video-communications market exhibiting several traits typically associated with the existence of network effects (Auer, 2019).[1] Other notable examples include the demise of Yahoo, the disruption of early instant-messaging applications and websites, and MySpace's rapid decline. In each of these cases, outcomes did not match the predictions of theoretical models (Manne & Stapp, 2019).

More recently, TikTok's rapid rise offers perhaps the greatest example of a potentially superior social-networking platform taking significant market share away from incumbents. According to the *Financial Times*, TikTok's video-sharing capabilities and powerful algorithm are the most likely explanations for its success (Nicolaou, 2019). While these developments certainly do not disprove network-effects theory, they eviscerate the belief, common in antitrust circles, that superior rivals cannot overthrow incumbents in digital markets.

Of course, this will not always be the case. The question is ultimately one of comparing institutions—*i.e.*, do markets lead to more or fewer error costs than government intervention? Yet this question is systematically omitted from most policy discussions (Auer, 2022).

Lastly, the widespread assumption that critical, large-scale data are exclusive to a few companies, who then misuse it to distort competition and exclude rivals, is largely unfounded. Data are widely used by a range of industries—not just "digital" services—and they are, or can be, the source of important procompetitive benefits. This is not sufficiently recognized in the Discussion Paper, which instead views data almost exclusively as a "currency" and a barrier to entry that serves to entrench market power. In fact, data can serve to drive innovation, optimize costs, and respond to rapidly changing consumer tastes—among other things (Manne & Auer, 2020: 1355). For instance, data in online search enable customers to find more (and more relevant) products and to compare product quality and price, especially using online reviews. Similarly, e-commerce enables consumers in more remote and thinly populated areas to obtain goods and services that were previously hard to access. Assuming that data are principally a barrier to entry erected to exclude rivals, that access to data should therefore be restricted for certain companies, or that the data at their disposal should be diluted, is not only fundamentally wrong, but also likely to harm consumers.

II. Canada Should Not Introduce DMA-Style Per Se Prohibitions, nor a Presumption of Illegality for Self-Preferencing

In its section on abuse of dominance, the Discussion Paper toys with the idea of imposing *per se* prohibitions or presumptions of anticompetitive harm on certain unilateral conduct, notably self-preferencing (Discussion Paper, 2022:31-32). This wariness of self-preferencing is echoed by several scholars, not least Vass Bednar and her co-authors (2022: 28), who argue that:

> "In a fair, competitive market, products may come to dominate markets by virtue of being superior to those of competitors in quality, price, or some other characteristic. However, through self-preferencing market operators may gain dominance in specific markets due to the fact that they operate and control how information is presented in the marketplace in which they sell their product. In this way, self-preferencing can undermine the competitive dynamic of these markets, leading to poorer market outcomes. Self-preferencing constitutes an advantage that is not based on the merits of competition, but instead the degree of dominance that the self-preferencing firm has in another market."

Admittedly, some jurisdictions, including the EU, have prohibited dominant platforms outright from giving preferential treatment to their own products (see, *e.g.*, Article 6(5) of the DMA). But as argued in the previous section, this says nothing on its own about whether Canada should follow suit. Accordingly, Canadian authorities should consider the actual costs and benefits of self-preferencing before they adopt sweeping prohibitions of this sort of conduct.

A. Self-Preferencing Is Not Presumptively Harmful

Courts and regulators in other countries have recognized that self-preferencing can have important pro-competitive justifications. As the Fifth Interim Report of the Digital Platform Service Inquiry of the Australian Consumer and Competition Commission states:

> The ACCC recognises that there may be legitimate justifications for some types of self-preferencing conduct, such as promoting efficiency, or addressing security or privacy concerns, which would need to be carefully considered in developing new obligations. Any new obligations to prevent self-preferencing should be tailored to address specific conduct likely to harm competition, rather than amounting to a broad prohibition on any and all selfpreferencing by Designated Digital Platforms (2020: 131).

Indeed, many companies' business models, from supermarkets to consultancy firms (Moss, 2022), are based on various forms of vertical integration, which includes self-preferencing (Sokol, 2023). In the specific context of online platforms, self-preferencing allows companies to improve the value of their core products and to earn returns so that they have reason to continue investing in their development (Andrei Hagiu, Tat-How Teh, & Julian Wright , 2022; Manne & Bowman, 2020). The EU's ban on self-preferencing does not contradict this: it merely indicates that, under the DMA, procompetitive justifications and efficiencies are deemed irrelevant—a blunt approach that the Government might reasonably want to avoid.

One important reason why self-preferencing is often procompetitive is that platforms have an incentive to maximize the value of their entire product ecosystem, which includes both the core platform and the services attached to it. Platforms that preference their own products frequently end up increasing the total market's value by growing the share of users of a particular product. Those that preference inferior products end up hurting their attractiveness to users of their "core" product, exposing themselves to competition from rivals. (Manne, 2020b).

Along similar lines, the notion that it is harmful (notably to innovation) when platforms enter competition with edge providers is unfounded. Indeed, a range of studies show that the opposite is likely true. Platform competition is more complicated than simple theories of vertical discrimination would have it, and there is certainly no basis for a presumption of harm (Manne, 2020c).

To cite just a few supportive examples from the empirical literature: Li and Agarwal found that Facebook's integration of Instagram led to a significant increase in user demand, both for Instagram itself and for the entire category of photography apps. Instagram's integration with Facebook increased consumer awareness of photography apps, which benefited independent developers, as well as Facebook (Li & Agarwal, 2016). Foerderer *et al.* found that Google's 2015 entry into the market for photography apps on Android created additional user attention and demand for such apps generally. (Foerderer *et al.*, 2018). Cennamo *et al.* found that video games offered by console firms often become blockbusters and expand the consoles' installed base. As a result, these games expand the opportunities for independent game developers, even in the face of competition from first-party games (Cennamo, Ozalp, Kretschmer, 2018). That is, self-preferencing can confer benefits—even net benefits—on competing services, including third-party merchants. Finally, while some have suggested that Zhu and Liu (2018) demonstrate harm from Amazon's competition with third-party sellers on its platform, the study's findings are far from clear-cut. As co-author Feng Zhu noted in the *Journal of Economics & Management Strategy*: "[I]f Amazon's entries attract more consumers, the expanded customer base could incentivize more third-party sellers to join the platform. As a result, the long-term effects for consumers of Amazon's entry are not clear" (Zhu, 2018).

The ambivalent effects of self-preferencing are no less true when platforms use data from their services to compete against edge providers. Indeed, critics have argued that it is unfair to third parties using digital platforms to allow the platform's owner to use the data gathered from its service to design new products, when third parties do not have equal access to that data. That seemingly intuitive complaint was, *e.g.*, the basis for the European Commission's landmark case against Google (see T-604/18, *Google v. Comm'n*, 2022 ECLI:EU:T:2022:541). But we cannot assume that conduct harms competition simply because it harms certain competitors (see also Section IIIB). Unambiguously procompetitive conduct, such as price-cutting and product improvements, similarly put competitors at a disadvantage. Improvements to a digital platform's service may be superior (or preferred) to alternatives provided by the platform's third-party sellers, and therefore procompetitive and beneficial to consumers. The alleged harm in such cases is the burden of having to compete with goods and service offerings that offer lower prices, higher quality, or both.

Finally, prohibiting companies from self-preferencing or significantly constraining their ability to do so could damage the entire venture-capital-backed ecosystem. In discouraging vertical integration, large companies will have diminished incentives to acquire startups; and those startups in turn will have less incentives to exist (Manne, 2022b). As pointed out recently by Daniel Sokol: "Without the ability to 'self preference,' companies will be less willing to acquire new businesses and technologies. The combination of weaker incentives for acquisition along with the inability to use contractual self preferencing will reduce scope economies and integration efficiencies" (Sokol, 2023).

The point applies equally to a firm's internal investments: that is, a firm might invest in developing a successful platform and ecosystem *because* it expects to recoup some of that investment through, among other means, preferred treatment for some of its own products. And exercising a measure of control over downstream or adjacent products might drive the platform's development in the first place. In sum, a hardline approach to self-preferencing would harm consumers, stifle innovation, and disrupt the startup ecosystem. There is also insufficient evidence to justify a presumption of harm or shifting the burden of proof to defendants.

B. Vertical Integration and the Self-Fulfilling Prophecy of Self-Preferencing

At the most basic level, the misplaced condemnation of self-preferencing stems from another, earlier myth that recently has had a resurgence: the notion that vertical integration is commonly anticompetitive. Indeed, vertical conduct by digital firms—whether through mergers or through contract and unilateral action—frequently arouses the ire of critics of the current antitrust regime. Many critics point to a few recent studies that cast doubt on the ubiquity of benefits from vertical integration. But the findings of those studies are easily—and often—overstated. There is considerably more empirical evidence that vertical integration tends to be competitively benign. This includes widely acclaimed work by economists Margaret Slade and Francine Lafontaine (former director of the Federal Trade Commission's Bureau of Economics under President Barack Obama), whose meta-analysis of vertical transactions led them to conclude:

> [U]nder most circumstances, profit-maximizing vertical integration decisions are efficient, not just from the firms' but also from the consumers' points of view. Although there are isolated studies that contradict this claim, the vast majority support it. Moreover, even in industries that are highly concentrated so that horizontal considerations assume substantial importance, the net effect of vertical integration appears to be positive in many instances. We therefore conclude that, faced with a vertical arrangement, the burden of evidence should be placed on competition authorities to demonstrate that that arrangement is harmful before the practice is attacked (Lafontaine & Slade, 2007: 629).

Similarly, a study of vertical restraints by Cooper *et al.* (2005)—former FTC economists, including a former director of the FTC's Bureau of Economics and three FTC deputy directors (two former and one current)—finds that "[e]mpirically, vertical restraints appear to reduce price and/or increase output. Thus, absent a good natural experiment to evaluate a particular restraint's effect, an optimal policy places a heavy burden on plaintiffs to show that a restraint is anticompetitive." As O'Brien (2008) observed, the literature suggests that diverse vertical practices "have been used to mitigate double marginalization and induce demand increasing activities by retailers. With few exceptions, the literature does not support the view that these practices are used for anticompetitive reasons."

Subsequent research has tended to reinforce these findings. Reviewing the literature from 2009-18, Lipsky *et al.* (2018), conclude that more recent studies "continue to support the conclusions from Lafontaine & Slade (2007) and Cooper *et al.* (2005) that consumers mostly benefit from vertical integration. While vertical integration can certainly foreclose rivals in theory, there is only limited empirical evidence supporting that finding in real markets (Lipsky *et al.*, 2018: 8)."

Ultimately, the notions that self-preferencing and vertical integration are anticompetitive reinforce each other. Self-preferencing purportedly exemplifies why vertical integration is (or can be) harmful, as only companies that are vertically integrated engage in self-preferencing. At the same time, calls to ban or limit self-preferencing are built on the unsubstantiated intuition that vertical integration itself is generally harmful, which is likely why the negative effects of self-preferencing are summarily presumed, despite a lack of clear and convincing evidence to that effect. The circular logic is evident and fallacious.

None of this is to suggest that proposed vertical mergers should not be subject to scrutiny, or that vertical restraints ought to be *per se* lawful. It is, in fact, *possible* for vertical mergers or other vertical conduct to harm competition, and vertical conduct—both unilateral and concerted—should remain subject to fact-specific, rule-of-reason inquiry into its effects on competition and consumers. Evidence does not, however, suggest a general skepticism of vertical integration is merited, and nor does it support a fundamental change in the competition standards or presumptions that apply to vertical integration (Fruits, Manne, & Stout, 2020: 950). As discussed in the previous sub-section, it also does not substantiate a presumption of illegality or a *per se* prohibition on self-preferencing.

III. Repurposing the Purpose Clause: Antitrust Should Remain Grounded in Robust Effects Analysis and Efficiencies Should Remain a Viable Defense

There is a clear impetus in the Discussion Paper to degrade, if not shun entirely, evidence of procompetitive effects and efficiency considerations in the context of antitrust enforcement. For example, it is suggested that the Competition Act's Purpose Clause should be reframed as protecting "fair competition," with "less focus on competitive effects," and that this reframing would be in the interest of achieving a "level playing field" (Discussion Paper: 38). The Discussion Paper also proposes broadening the definition of "anti-competitive act" for the purpose of abuse of dominance to ensure that it includes harm toward a competitor, not just to competition (Ibid: 17). In a similar vein, efficiencies are consistently framed as an *obstacle* to the Government's ability to block "potentially harmful" deals, rather than as instances where government intervention should rightly be avoided (Ibid: 5).

The Discussion Paper also appears to suggest, albeit less explicitly, the possibility of lowering the evidentiary standard of proof for merger review from "substantial lessening or prevention of competition" to a more enforcer-friendly "appreciable risk" of lessening competition (Ibid: 23). While the combined effect of these proposals would surely be to make enforcement easier for the Bureau, a point we discuss in Section IV, there are also concrete, substantive harms associated with abandoning longstanding competition standards.

A. Competition Law Serves to Protect Competition, not Competitors

Antitrust law does not serve to protect competitors—only to protect competition. As courts have long recognized, the natural process of competition is such that it results in some companies inevitably abandoning the market. But this is not a flaw to be corrected through antitrust enforcement; it is the central *feature* of competition. Indeed, as the European Court of Justice has repeatedly held in a well-established line of case-law:

> Not every exclusionary effect is necessarily detrimental to competition (see, by analogy, *TeliaSonera Sverige*, paragraph 43). Competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation (Case C 209/10 *Post Danmark,* EU:C:2012:172, para 22).

Repurposing competition law to protect *all* competitors, rather than competition itself, vitiates the essence of antitrust law, rendering it, and competition, pointless. Indeed, at the most essential level, the purpose of the competition rules is to distinguish between conduct that anticompetitively serves to exclude competitors, on the one hand, and competition on the merits that may lead firms to exit the market, on the other. While even first-year law students intuitively understand this critical distinction, it can prove challenging to distinguish between the two in real-world cases. The reason is simple: anticompetitive foreclosure and competition on the merits both ultimately result in the same observable outcome—that rivals exit the market. To draw the line, antitrust enforcers and policymakers have developed a wealth of tools to infer both the root causes and the effects of firms' market exit, such as, *e.g.*, the "as efficient competitor test" in the EU (Auer & Radic, 2023).

Blurring this subtle but crucial conceptual boundary by reorienting the Competition Act toward the protection of competitors would also have serious economic ramifications. By artificially retarding or foreclosing firm exit, the Competition Act would have the perverse effect of encouraging free-riding, discouraging efficient firm behavior and, ultimately, harming consumers and the economy as a whole.

B. "Fairness" Is Not a Useful Goal for Antitrust Law—or Regulation, for that Matter

Fairness is not a foreign concept to antitrust law, and fairness considerations are not new to it (Colangelo, 2023). Its perennial allure lies in the evocation of principles of equality and justice with which few would disagree. (Who, after all, is in favor of "unfairness?")

The problem lies in the inherent ambiguity of the concept, which makes it much more valuable as a rhetorical device—albeit a politically attractive one—than a working, quantifiable threshold of anticompetitive conduct. Under traditional liberal notions of fairness, understood as equality before the law, the case for redistributing rents away from dominant digital companies—especially where such dominance has resulted from a superior business model, management, and/or product-design decisions—is comparatively weak. On the other hand, if fairness is understood as equality of outcome, then ensuring that rents generated by digital platforms are distributed equally across the supply chain and horizontally to competitors suddenly becomes more defensible.

This conceptual fuzziness is exacerbated by the existence of multiple sets of stakeholders, which diminishes the possibility of identifying "fair" outcomes for any given group. Thus, what may seem like "fair" compensation for access to a platform and customer base from the perspective of, *e.g.*, app developers, may not seem "fair" to the platforms that have invested time, research, and money into developing such a platform, or to low-usage consumers who may be asked to pay more for their devices to compensate developers whose apps they don't use.

The use of fairness as either a goal of competition policy or a standard to adjudicate antitrust disputes inevitably raises complicated value judgements: Which group should competition authorities favor; what definition of "fairness" should enforcers mobilize; and, more fundamentally, should competition authorities be empowered to make such value-laden judgments in the first place? Contemporary competition policy has traditionally steered clear of these largely intractable questions (Ibid: 12). As the Discussion Paper rightly indicates, the Competition Act "does not proactively dictate how to conduct business, allocate resources among stakeholders, or designate participants, winners or losers in the free market (Discussion Paper: 13)."

And yet, under the inherent uncertainty of a DMA-style fairness standard, the Bureau would inevitably be forced to do just that—whether it wanted to or not. This would subvert the entire edifice of Canadian competition law, ensconcing a new standard as the system's lodestar with entirely unpredictable material consequences. It would also, and perhaps even more importantly, signal a shift away from the rule of law and toward government discretion, transforming the Bureau from an executive enforcer of the law to a social engineer. Ironically, for all the talk about market concentration and democracy, the inverse relationship between unfettered government discretion and democracy is much better understood, and historically accounted for, than the supposed link between market concentration and undemocratic outcomes (Hayek, 2007, 2011; Mises, 2014; Friedman, 2002).

C. Merger Control Should Remain Tethered to a "Substantial Lessening or Prevention of Competition" Principle

The Discussion Paper notes that "[o]ne of the antitrust reform bills before the U.S. Senate would modify the legal test for merger intervention from substantial lessening of competition to 'an appreciable risk of materially lessening competition'" (Discussion Paper: 23). Specifically, the Discussion Paper identifies the U.S. bill's proposal that the burden of proof for certain mergers be reversed, based on, e.g., increases in concentration, the size of the merger (valuations exceeding US$5 billion), or the identity (and presumed dominance) of the acquiring firm (Ibid). In the alternative, it is suggested that there be a more stringent competition test or reporting threshold for certain sensitive sectors. While the question of the best competition policy for Canada remains paramount, it is worth noting that the U.S. bill was not enacted by the U.S. Congress, and for good reasons.

1. *Industry concentration, firm size and mergers*

As a background matter, the Government should consider that some of the concerns motivating the failed U.S. legislation stemmed from potentially misleading characterizations of concentration across U.S. industries. Of signal influence was a 2016 brief issued by then-President Barack Obama's

Council of Economic Advisors ("CEA") (White House, 2016). As observed by Carl Shapiro—a former Obama CEA member and a former chief economist at the U.S. Justice Department's Antitrust Division—certain statements in the exhibits and the text were potentially (and, for many, actually) misleading:

> [S]imply as a matter of measurement, the Economic Census data that are being used to measure trends in concentration do not allow one to measure concentration in relevant antitrust markets, i.e., for the products and locations over which competition actually occurs. As a result, it is far from clear that the reported changes in concentration over time are informative regarding changes in competition over time (Shapiro, 2018: 727-28).

Shapiro did not deny that changes in concentration in specific markets could be concerning. Rather, he pointed out that key indicators in the CEA issue brief were not relevant to competition analysis. For example, cited concentration ratios were far higher than any that should flag competition concerns, and identified industry groupings were far too broad to assess market power in any specific markets (Ibid: 721-722). At bottom: "Industrial organization economists have understood for at least 50 years that it is extremely difficult to measure market concentration across the entire economy in a systematic manner that is both consistent and meaningful (Ibid: 722)."

One approach to assessing the relationship between concentration, profits, and competition is embodied in the Structure-Conduct-Performance ("SCP") paradigm, which tended to measure concentration by the Herfindahl-Hirschman Index (HHI), and which used specific HHI thresholds for competitive screening or evaluation. But while HHIs may still be used for rough and preliminary screening purposes, merger analysis has—by and large, and for decades—left the SCP framework behind, as both theoretical and empirical work has undermined the approach (Schmalensee, 1989; Evans, Froebd, & Werden, 1993; Berry, 2017; Salinger, 1990; Miller *et al.*, 2022). Industry-specific research has only reinforced the wisdom of rejecting the SCP framework, demonstrating that, *e.g.*, various new screening tools are more accurate than concentration measures in flagging health-care-provider mergers that are potentially anticompetitive (Garmon, 2017).

The "substantial lessening of competition" standard focuses on the question of whether harm to competition has occurred, or is likely to occur, with a focus on actual or likely consequences: harm to consumers, often in terms of increased prices, but also in terms of reduced output and nonprice dimensions of competition, such as lower product quality and diminished convenience or availability. Alternatives tend to be less clear, harmful to consumer welfare, or both.

The suggestion that merger policy should alter its methods or standards according to the size of the firm (or firms) involved recalls the "big is bad" approach to antitrust enforcement prevalent in the first half of the twentieth century. That approach, and the assumption of market power (and harm to competition) had no real economic basis:

> In short, there is no well-defined "causal effect of concentration on price," but rather a set of hypotheses that can explain observed correlations of the joint outcomes of price, measured markups, market share, and concentration. . . .
>
> Our own view, based on the well-established mainstream wisdom in the field of industrial organization for several decades, is that *regressions of market outcomes on measures of industry structure like the Herfindahl-Hirschman Index should be given little weight in policy debates* (Berry *et al.*, 2019: 48).

Scale is not an accurate proxy for either market power or anticompetitive conduct. To reimplement the big-is-bad approach risks arbitrary impediments to broad categories of procompetitive mergers, and reduced innovation in business models that would benefit consumers. It would protect inefficient (high-cost) producers from precisely the kinds of competitive pressures that competition law is supposed to foster (Manne & Hurwitz, 2018: 1,6).

To be sure, large tech firms' impressive scale might *appear* to imply market power; and such firms, among others, may possess a degree of market power in one or another market. Large firms, like small ones, also may engage in anticompetitive conduct. Nonetheless, and especially in the contemporary tech industry, it is "not unusual for efficient, competitive markets to comprise only a few big, innovative firms. Unlike the textbook models of monopoly markets, these markets tend to exhibit extremely high levels of research and development, continual product evolution, frequent entry, almost as frequent exit—and economies of scope and scale (i.e., 'bigness'). Size simply does not correlate with anything recognizable as 'consumer harm'" (Ibid).

A presumption against large firms (and large transactions) would necessarily benefit smaller firms, independent of the question of whether they provide consumers with superior or less-costly goods and services. Indeed, some courts have expressly recognized that deciding competition matters for the purpose of favoring small firms entailed that "occasional higher costs and prices might result from the maintenance of fragmented industries and markets" (*Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1967)). Such maintenance has always raised the question of which decision standard should be employed, and what its economic basis should be, as well as the rationale for trading consumer welfare for benefits to certain smaller firms. Not incidentally, thresholds recently proposed for presumptively suspect firms or transactions are such that many very large firms escape heightened scrutiny. That includes firms that may have significant market power in one or more markets. And, of course, small firms might well enjoy significant market power in niche markets.

There remain legitimate debates about the optimal methods and standards for competition policy, but the drive toward a consumer welfare standard, begun in the 1960s and 1970s, ultimately identified a coherent and predictable outcome against which to evaluate both specific competition matters and competition policy: greater consumer welfare is achieved through the condemnation of conduct that suppresses innovation, increases prices, or diminishes desirable nonprice dimensions of goods and service, such as quality and convenience. Application of the consumer welfare standard is not always trivial, but it is generally tractable, and increasingly so, as developments in data sources and industrial-organization economics continue.

A recent policy statement by the U.S. Federal Trade Commission (FTC) set a template for the disadvantages of popular reform proposals, with something akin to an "appreciable risk" standard. The FTC had withdrawn its prior Unfair Methods of Competition policy statement and, in doing so, disavowed the consumer welfare standard as "open ended" and capable of delivering "inconsistent and unpredictable results" (Federal Trade Commission, 2021). In its place, the FTC announced a new standard: a prohibition of "unfair" conduct that "tend[s] to negatively affect competitive conditions."

What that means is not clear. We are told that unfair conduct is "coercive, exploitative, collusive, abusive, deceptive, predatory"—terms that may be evocative in ordinary usage and some of which occur, in *dicta*, in certain historical U.S. antitrust cases. But those terms have no clear established meaning in Canadian, U.S., or European competition jurisprudence. The statement also declares as unfair any conduct that "involve[s] the use of economic power of a similar nature," or that "may" be "otherwise restrictive or exclusionary." That all seems relatively open-ended.

Further, as Gilman and Hurwitz (2022) explain, the phrase "tends to negatively affect competitive conditions" is noteworthy mostly for what it is not. It does not specify either harm to competition or harm to consumers, but rather a tendency (not necessarily a likelihood) to "negatively affect" (perhaps to harm) "competitive conditions." Thus, we have a sort of any-party-in-the-marketplace standard, concerned with effects on "consumers, workers, or other market participants" and whether conduct "tends to" affect (negatively) any party, and which does not turn to whether the conduct directly caused actual harm in the specific instance at issue. Effects need not be "current" or "measurable" or even "actual." And they need not be likely.

The new FTC standard is certainly no model of clarity. Establishing "harm to consumers, workers, or other market participants" may be more tractable than establishing harm to consumers. But that's only because nearly any potential harm to anyone would seem to suffice, no matter the cost to consumers. Indeed, in disclaiming the need to show either actual or likely harm, the relevance of efficiencies, and of relative costs and benefits, the FTC sets the enforcement bar lower still. Whatever degree of unpredictability might attach to the consumer welfare standard, it is impossible to see the FTC's 2022 proposal as an improvement.

The FTC's new policy also appears to buy lower administrative costs at the expense of both predictability and, necessarily, consumer welfare. Fundamentally, the FTC ignores completely the problem of error costs. To the extent that competition policy is concerned with consumer welfare, loose (and seemingly arbitrary) standards will lower administrative costs but increase Type 1 errors (false positives) by sometimes condemning procompetitive and benign conduct as anticompetitive. But amorphous standards may also increase Type 2 errors, as enforcement untethered from consumer welfare and economic foundations may well increase the total number of cases and determinations of liability, while missing difficult cases where real harms might have been found through traditional methods.

Thomas Lambert (2021) employs a decision-theoretic framework to compare competing institutional approaches to competition law and, specifically, to address the market power of large digital platforms, both actual and presumed:

> (1) the traditional U.S. antitrust approach; (2) imposition of ex ante conduct rules such as those in the EU's Digital Markets Act and several bills recently advanced by the Judiciary Committee of the U.S. House of Representatives; and (3) ongoing agency oversight, exemplified by the UK's newly established "Digital Markets Unit." After identifying the advantages and disadvantages of each approach, this paper examines how they might play out in the context of digital platforms. . . . [and] shows how three features of the agency oversight model—its broad focus, political susceptibility, and perpetual control—render it particularly vulnerable to rent-seeking efforts and agency capture. The paper concludes that antitrust's downsides (relative indeterminacy and slowness) are likely to be less significant than those of ex ante conduct rules (large error costs resulting from high informational requirements) and ongoing agency oversight (rent-seeking and agency capture) (Lambert, 2021).

2. *Nascent Competition*

Finally, some argue that an "appreciable risk" to competitive harm standard would be more appropriate in the context of acquisitions of nascent or potential competitors. The argument is that, by their nature, the risks associated with acquisitions of nascent competitors is more speculative. Since we cannot know for sure, given their current size and scope, we need to account for these risks and have a standard that can incorporate them. The argument is laid out most completely by Steven Salop in his paper *Potential Competition and Antitrust Analysis: Monopoly Profits Exceed Duopoly Profits*. In it, he argues that:

> Acquisitions of potential or nascent competitors by a dominant firm raise inherent anticompetitive concerns. By eliminating the procompetitive impact of the entry, an acquisition can allow the dominant firm to continue to exercise monopoly power and earn monopoly profits. The dominant firm also can neutralize the potential innovation competition that the entrant would provide (Salop, 2021:6).

Taken to its logical conclusion, this approach would support a presumption against *any* acquisition, because there is always a risk, no matter how remote, that *any* company could compete with the incumbent in the future. It is unclear how far the qualifier "appreciable" goes toward countering this overly stringent presumption. On this note, it is important to realize that eliminating a potential competitor is not the same thing as eliminating potential *competition*. The market power of firms, even monopolists, is disciplined by how closely the closest potential competitor is to the incumbent. In the jargon of economics: the marginal competitor matters. How quickly could the marginal competitor enter? How closely could the marginal competitor compete on price?

When there are just two firms in a market, we are confident that the second-largest firm is the marginal competitor for the largest. Once we open consideration to all possible or potential competitors, our ability to know in advance which may provide a disciplinary force greatly decreases. As such, any competition standard needs to recognize such limitations and keep potential-competition challenges to clearly articulated cases.

The FTC's recent challenge of Meta's acquisition of Within serves as a natural experiment in showcasing the limits of opening potential-competition challenges to more speculative cases. The FTC's case rested on arguing that Facebook was a potential competitor to Within's virtual-reality fitness app Supernatural. While the judge ultimately did not reject the possibility of potential-competition harms, in theory, he rejected the evidence of such harms in this case (Paul Weiss, 2023).

IV. There Are Serious Limits to Considering the Effects of Mergers on Labour

The Discussion Paper notes "at least two points in the Canadian System where a closer examination of labour effects could occur" (Discussion Paper: 28) Those are, first "in the evaluation of competitive effects, namely as to whether mergers may result in distortions to the labour market, even if there are no harmful competitive effects downstream"; and second, "in the evaluation of efficiencies, in which reduction of labour may be viewed as efficient or pro-competitive" (Ibid.). We recommend the Commission exercise extreme caution in these areas, as both risk harms to consumer welfare, and to the consistency and predictability of competition law.

The Discussion Paper notes "various challenges and pitfalls of applying competition law to labour markets, including, *inter alia*, the difficulty of integrating the role (and benefits) of technological change and 'creative destruction,'" complexities in assessing compensation wholistically, and the question of market definition (Discussion Paper: 28). These measurement difficulties exceed those typically observed in product markets and raise questions regarding whether—and if so, how—to account for trade-offs among, *e.g.*, labour interests and pro-consumer efficiencies and innovation in products, production, or distribution, or between labour interests and consumer welfare.

The concerns cited by the Boyer report are important. For one thing, one cannot distinguish between efficiency gains and the exercise of monopsony power if one looks only to price and quantity in an input market, such as labour. Consider a merger that generates either efficiency gains or market (now monopsony) power. A merger that creates monopsony power will necessarily reduce the prices (wages) and quantity purchased (hired) of inputs, such as labour. But this same effect (reduced prices/wages and quantities for inputs) could be observed if the merger is efficiency-enhancing. If we assess downstream output, efficiency-enhancing mergers will necessarily be associated with greater output. Efficiencies achieved through innovation in product offerings, production, management, or distribution will lead to increased output. If, on the other hand, the merger increases monopsony power, the post-merger firm will perceive its marginal cost as higher than it was pre-merger, and it will reduce downstream output accordingly (Hemphill & Rose, 2018).

To parse labour markets from downstream product and service markets, and to consider the impact on the latter of "out-of-market" effects, would confound the distinction of efficiency-enhancing mergers from monopsony-creating ones, while simultaneously isolating competition analysis of labour markets from observations of pro-consumer efficiencies. It is unclear whether (and, if so, how) using competition law to discipline alleged harm to labour markets is consistent with the consumer welfare standard, the lodestar of antitrust enforcement, at least as it is currently understood.

Marinescu & Hovenkamp assert that, "[p]roperly defined, the consumer welfare standard applies in exactly the same way to monopsony. Its goal is high output, which comes from the elimination of monopoly power in the purchasing market.... [W]hen consumer welfare is properly defined as targeting monopolistic restrictions on output, it is well suited to address anticompetitive consequences on both the selling and the buying side of markets, and those that affect labor as well as the ones that affect products (Marinescu & Hovenkamp, 2014)."

But there are at least two problems with this reasoning.

First, the assertion that harm to input providers alone should be actionable is based on a tenuous assertion that a mere pecuniary transfer is sufficient to establish anticompetitive harm. As Marinescu and Hovenkamp note "there is merely a transfer away from workers and towards the merging firms. Yet. . . such a transfer is a harm for antitrust law." (Ibid: 1062) But such harms to labour (and other input suppliers) may *benefit* consumers. In the typical case, at least some of the benefits of employer leverage (relative advantage in negotiation) are passed along to consumers; in the limit, *all* such benefits are passed on to consumers (Salop, 2010: 342). The main justification for ignoring such cross-market effects is primarily a pragmatic one, but one considerably diminished by modern analytical methods (Rybnicek & Wright, 2014: 10). Particularly in the context of inputs to a specific output market, these cross-market effects are inextricably linked and hardly beyond calculation.

The assertion that pure pecuniary transfers are actionable is also inconsistent with the fundamental basis for competition law, which seeks to mitigate *deadweight loss*, not mere pecuniary transfers that do not result in *anticompetitive* effects (Bork, 2021: 110).

Finally, market definition, too, is a confounding problem for the prospect of labour competition analysis. In monopoly cases, enforcers and courts can face enormous challenges in identifying a relevant market. These challenges are multiplied in input markets—especially labour markets—in which monopsony is alleged. Many inputs are highly substitutable across a wide range of industries, firms, and geographies. For example, changes in technology, such as the development of PEX tubing and quick-connect fittings, allows for labourers and carpenters to perform work previously done exclusively by plumbers. Technological changes have also expanded the relevant market in skilled labour: Remote work during the COVID-19 pandemic, for example, demonstrates that many skilled workers are not bound by geography and compete in national—if not international—labour markets.

At the same time, many labour markets—especially (but not only) lower-wage labour markets—remain local. They have the potential to crosscut both product markets and their associated geographic markets. And both mergers and unilateral conduct can raise questions concerning how to trade harm to labour—*e.g.*, reduced wages, benefits, or jobs—in one locale against benefits in another.

In short, there is a serious knowledge gap to plug before competition authorities can satisfactorily analyze the impact of mergers on labour markets. Until that is the case, competition law would gain by limiting its focus to output markets.

V. Bolstering the Bureau's Powers and the 'Effectiveness' of Enforcement Should not Come at the Expense of Parties' Rights of Defense, the Rule of Law, and Procompetitive Outcomes

One of the key themes of the Discussion Paper is "the often-narrow circumstances where the Competition Bureau can intervene (Discussion Paper: 4)." For example, the Discussion Paper laments that bringing abuse-of-dominance cases is currently too burdensome for the CCB and suggests implementing EU-style presumptions (Ibid: 34-35) or substituting the need to show intent and (likely) effects for a mere *capability* of anticompetitive effects (Ibid: 37). But the fact that some cases are not easy to bring is not, on its own, a justification for reform (see Section I). Procedural safeguards and burdens of proof exist for a reason: to cabin enforcers' discretion, ensure that rights of defense and the rule of law are respected, and to minimize errors. Furthermore, "more enforcement" is neither good nor bad. What makes it one or other is contingent on the likelihood and extent of the error costs of intervention vs. non-intervention (see Section IB).

In this way, the EU's experience warns of the risk of granting to public authorities extensive powers to enforce novel regulations, while treating the rights of defense as an afterthought (Lamadrid, 2022; Auer and Radic, 2023). Like the ethos that undergirds the Discussion Paper, the DMA is propelled by the (dubious) logic that the competition laws in their current form cannot be deployed easily or quickly enough to address the supposedly unique, endemic challenges of "digital" markets (for the opposite view, see Colangelo, 2022).

But this eagerness to intervene at any cost itself comes at a cost. In the EU, for instance, the draft implementing regulation of the DMA (DIR) indulges in serious procedural over-reach, which is likely to have significant ramifications for targeted companies, third parties, and the Commission itself. Thus, from the outset, the DIR makes clear that the Commission prioritizes procedural effectiveness over procedural fairness (Lamadrid, 2022). It establishes a "succinct" (short) right to respond to the Commission's preliminary findings, thereby abridging parties' rights to defense in ways that the Commission is not similarly constrained in issuing its preliminary findings.

Procedural rules exist to protect parties from abuses by the administration, as well as to protect the administration from costly and unnecessary litigation. This has been recognized, in one way or another, by the European courts. Just this past year, two marquee decisions were quashed by the

European Court of Justice, at least partially because of procedural irregularities: *Qualcomm* and *Intel*. The lesson to be learned for the CCB is that, even if the Competition Act is reformed, Canadian law still recognizes robust rights of defense and procedural safeguards that, if breached because of an administrative over-eagerness to "do more," will be promptly checked by the courts.

VI. Conclusion

In this "moment of reckoning," (Discussion Paper: 6) it is crucial that the Government not overreact with experimental legislative reform that will be exceedingly difficult to unwind. Five main conclusions can be drawn from this submission, and they warrant a much more restrained approach. First, the Government should critically reassess the assumptions that underpin the Discussion Paper. Evidence does not recommend that Canada follow the sort of competition regulation or reform contemplated elsewhere, nor should Canada be compelled to act just because other countries are "doing something." Any potential reform should be based on careful examination of the facts and evidence and should be scrupulous in applying the error-costs framework. In addition, despite frequent rhetoric to the contrary, it is entirely unclear that "digital" markets present the sort of unique challenges that would necessitate an overhaul of the Competition Act.

Second, there is no rhyme or reason to presumptions against self-preferencing behavior. Self-preferencing is normal business conduct that can—and often does—yield procompetitive benefits, including improved economies of scope, greater efficiencies, and improved products for consumers. In addition, a ban on self-preferring could harm the startup ecosystem by discouraging acquisitions by large firms, which would ultimately diminish the incentives for startups. This is presumably not what the Government wants to achieve.

Third, altering the purpose of the Competition Act would be a grave mistake. Competition law does not serve to protect competitors, but competition; nor can harm to competitors be equated with harm to competition. To do so would harm competition and, necessarily, Canadian consumers. The quintessential task of competition laws—the Competition Act included—is to distinguish between the two, precisely because the distinction is so subtle, yet at the same time so significant. Similarly, "fairness" is a poor lodestar for competition-law enforcement because of its inherent ambiguity. Instead of these, or other standards, the Competition Act should remain rooted in the standard of "substantial lessening or prevention of competition."

Fourth, the Government should exercise extreme caution in addressing labour-market monopsony, as altering the merger-control rules to encompass harms to labour risks both harming consumer welfare and the consistency and predictability of competition law.

Fifth, in its impetus to bolster competition-law enforcement by making it "easier" on the CCB, the Government should not sacrifice rights of defense and the rule of law for expediency. In this, at least, it can learn from the DMA's example.

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