Intelligence MEMOS

From: John Pecman, Huy Do and Peter Mangaly

To: Canadians Concerned about Competition

Date: June 15, 2023

Re: **Unnecessary and Costly EU Style Regulations Would Not Serve Canada Well**

---

In response to the federal government's consultation and discussion paper on the Future of Competition Policy in Canada, we raised concerns about moving away from identifying anti-competitive conduct through evidence-based assessments and instead placing blanket prohibitions on certain types of conduct by certain firms before they occur, on the assumption this conduct by such firms will hurt competition. In a recent paper, we explain why pursuing such regulations at this time in Canada would be ill-advised.

Neither the discussion paper nor the consultation submissions by the Competition Bureau called for sector-specific *ex ante* regulation. The discussion paper also notes that such *ex ante* regulation generally falls outside the purview of the *Competition Act* and, in many cases, is reserved for provincial jurisdiction in Canada's federal system.

However, the international policy debate regarding the deterrent value that competition enforcement may have under current rules is often tied to calls for *ex ante* regulatory rules or calls to break up digital giants, while others argue that sector-specific *ex ante* regulation should be explored or adopted.

However, no empirical economic evidence is offered to support the proposition that digital markets are inherently failing or causing harm to consumers or to competition. There are concerns relating to enforcement failure in digital markets (such as investigations taking too long), but these should not be confused with market failure.

Until there is credible evidence of such market failure, competition policymakers should not resort to *ex ante* regulation, lest it does more harm than good.

When appropriate, sector regulation can promote important social and economic goals, including the protection of workers, consumers, public health, safety and the environment. That said, complying with regulation increases both direct costs (e.g. resources devoted to the administration of and compliance with regulation) and indirect costs (e.g. costs that result from regulation that affects market structures or consumption patterns). These substantial regulatory costs create barriers to entry, limit competition and impose opportunity costs, which, in turn, result in barriers to innovation, decreased choice, reduced quality and higher prices.

By way of example, the European Union's *Digital Markets Act*, which just came into force on May 2, is considered an *ex ante* instrument that seeks to pre-emptively fix digital markets in anticipation of harm. One recent study estimates the economic impact of that shift from *ex post* to *ex ante* regulation "is … a loss of about €85 billion in GDP and €101 billion in lost consumer welfare based on a baseline value of 2018." The study also estimates that the DMA "will reduce the labour force by 0.9 percent." Similarly, Daniel Sokol has shown that the impact of DMA-like regulations in China (in the form of so-called anti-monopoly guidelines) resulted in a volatile decline in the average number of investments by platform corporate venture capital. Based on these results, Professor Sokol concluded that "China's platform regulation has a chilling effect on entrepreneurship," which, in turn, has a chilling effect on innovation. There are no reasons to believe similar policies in Canada would not impose similar costs.

Sector-specific regulation can also address the inefficiencies stemming from natural monopolies in some sectors, but it is inappropriate in the case at hand for three reasons.

First, there is no clear evidence substantiating the need for such regulation (i.e. there is no clear evidence of market failure), that would outweigh the significant costs and unintended consequences of such regulation in digital markets.

Second, to the extent that the need for *ex ante* regulation stems from a desire for timely resolutions of enforcement over alleged anti-competitive conduct in the fast-moving digital world, the Act's existing framework could be tweaked to address this specific issue, instead of employing costly *ex ante* regulation, which should be reserved to remedy instances of market failure.

Third, it is unclear whether amending the Act to specifically regulate digital platforms would pass constitutional muster. The Supreme Court explicitly identified measures affecting a particular industry as opposed to trade as whole as one of the five criteria it outlined in its 1989 *General Motors v National Leasing* decision to determine the constitutional validity of a civil legislative provision pursuant to the "general trade and commerce" power. Given this criterion, it is questionable whether *ex ante* regulation of just Big Tech platform companies would be found to be a valid exercise of federal legislative jurisdiction under the general trade and commerce power.

Given competition enforcement concerns in the fast-moving digital space, it is perhaps natural to seek to issue separate rules targeting so-called web giants. But given no evidence of market failure, this would at best be akin to using a sledgehammer to swat flies. There are available options to strengthen enforcement in digital markets using rules of general application.

*John Pecman is a Senior Business Advisor with Fasken, a Senior Fellow at the C.D. Howe Institute and member of its Competition Policy Council, and the former Commissioner of Competition of the Canadian Competition Bureau, Huy Do is a partner at Fasken and is the co-leader of the firm's competition, marketing and foreign investment group and Peter Mangaly is an articling student at Fasken.*

*To send a comment or leave feedback, email us at blog@cdhowe.org.*