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Digital Platforms: Oversight if Necessary, But Not Necessarily Regulation

Twentieth Report of C.D. Howe Institute Competition Policy Council

In recent years, attention to alleged harms from “Big Data” platforms has intensified. Reiterating the message from a previous communiqué,¹ the continuing consensus of Council members is that Canada’s statutory framework for competition law enforcement continues to provide a robust and flexible toolkit to address anti-competitive behaviour in the digital marketplace, including that which may arise in respect of digital platforms.

For economic policy, appropriate application of competition law enforcement should be the first defence and direct regulation the last resort. While observing the political pressure to regulate certain digital platforms to achieve other policy goals, Council members are concerned that policymakers have failed to identify the harms that they propose to address with sufficient precision – that is, what specific “market failures” do policymakers seek to solve? Proposals to regulate digital platforms at a federal level may also raise major constitutional questions that can be avoided by application of the *Competition Act*, a framework law of general application – specifically, the question is what head of power supports federal jurisdiction to regulate use of data by particular companies or transmitting content over the Internet?

These are the views expressed by the C.D. Howe Institute’s Competition Policy Council, which held its twentieth meeting on October 8, 2020 to discuss whether Canada should join other countries in making changes to its competition laws to address the harms inflicted by digital platforms and/or using direct regulation.

1 Competition Policy Council. 2019. *Canadian Competition Policy in the Digital Age: Is Today’s Toolkit up to the Task?* C.D. Howe Institute. May 16. Available online: <https://www.cdhowe.org/cpc-communique/competition-bureau-already-has-%E2%80%9Ctoolkit%E2%80%9D-handle-big-tech-cd-howe-institute-competition-policy>



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The Competition Policy Council comprises top-ranked academics and practitioners active in the field of competition law and policy. The Council provides analysis of emerging competition policy issues. Elisa Kearney, Partner, Competition and Foreign Investment Review and Litigation at Davies Ward Phillips & Vineberg LLP, acts as chair along with Grant Bishop, Associate Director, Research, at the C.D. Howe Institute. Professor Edward Iacobucci, Dean at the University of Toronto Faculty of Law and Competition Policy Scholar at the Institute, advises the program. Erika Douglas, Assistant Professor of Law at Temple University Beasley School of Law, also contributed valuably to this Council meeting. The Council, whose members participate in their personal capacities, convenes a neutral forum to test competing visions and to share views on competition policy with practitioners, policymakers and the public.

At Issue: Should Canada Consider Changes to Competition Law, or Introduce Direct Regulation with Respect to the Conduct of Digital Platforms?

The Council's discussion led to the following conclusions:

- Particularly as digitally-mediated commerce becomes ubiquitous, policymakers should avoid grouping distinct businesses, operating in different product markets and with different business models, under such an inexact catch-all of “Big Data.”
- Policymakers must resist the “big is bad” fallacy since even in a market with strong network effects, competitors may vigorously compete for the market.
- If the alleged harm or market failure caused by the digital platforms is economic in character, competition law should be the presumptive framework for analyzing the conduct, testing evidence, and fashioning remedies.
- The Competition Bureau should be adequately resourced to investigate conduct that is alleged to harm competition or the competitive process. Efficient allocation of Bureau resources should also be considered.
- Consideration should be given to whether certain amendments to the *Competition Act* might be made to update its application to conduct by digital platforms or involving data. However, if amendments are required, robust and open consultation with the competition bar and business groups should be the precursor to any specific legislative proposals.
- Policymakers should justify proposals for regulating economic aspects of data and digital conduct by precisely identifying the market failure, explaining why competition law is inadequate to address a particular harm, and demonstrating that regulation will remedy the market failure without introducing additional distortions.
- Before designing any regulation, policymakers should evaluate the adverse impacts on competition and innovation, the costs of compliance as a barrier to entry and the risk of perversely entrenching incumbents.

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Background

Council members recognized a growing movement both internationally and domestically for the regulation of digital platforms. Council members observed that while certain concerns relate to privacy norms, personal freedom, and the impacts of social media on democratic processes, many of the current international and domestic proposals for regulation of digital platforms also appear motivated by economic and trade objectives and entail oversight of commercial conduct.

For example:

- In the United Kingdom, the 2019 “Furman Report” proposed updates to antitrust enforcement and merger policy, open standards for data mobility, and a “code of competitive conduct” applicable to firms with “strategic market status.”² Following on this review, the Competition and Markets Authority published a Digital Markets Strategy.³ This Strategy included a market study on online platforms and digital advertising, which was published in July 2020 and recommended development of an *ex ante* regulatory regime to oversee the activities of online platforms funded by digital advertising.⁴ In parallel, a Digital Markets Taskforce undertook consultations concerning a new pro-competition approach for digital markets.⁵
- In Australia, following the report of the Australian Competition & Consumer Commission (ACCC) “Digital platforms inquiry” in 2019,⁶ Australia’s government outlined a roadmap for reforms, including a special ACCC unit to monitor and report on digital platform markets and a voluntary code of conduct, among other reforms.⁷

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- 2 Digital Competition Expert Panel. 2019. *Unlocking digital competition*. Her Majesty’s Treasury. March 13. Available online: <https://www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel>
 - 3 Competition and Markets Authority. 2019. *Digital Markets Strategy*. July 3. Available online: <https://www.gov.uk/government/publications/competition-and-markets-authority-digital-markets-strategy>
 - 4 Competition and Markets Authority. 2020. *Online platforms and digital advertising market study*. July 1. Available online: <https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study>
 - 5 Competition and Markets Authority. 2020. *Digital markets taskforce: terms of reference*. March 11. Available online: <https://www.gov.uk/government/publications/digital-markets-taskforce-terms-of-reference/digital-markets-taskforce-terms-of-reference--3>
 - 6 Australian Competition & Consumer Commission. 2019. *Digital platforms inquiry – final report*. July 26. Available online: <https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report>
 - 7 Australian Government Treasury. 2019. *Government Response and Implementation Roadmap for the Digital Platforms Inquiry*. December 12. Available online: <https://treasury.gov.au/publication/p2019-41708>

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- Earlier this year in the European Union, the President of the European Commission committed to institute liability and rules for digital platforms with a “*Digital Services Act Package*.”⁸ The Commission proposed cooperative supervision of platforms and *ex ante* rules covering large online platforms acting as gatekeepers to information, content and marketplaces.
- Most recently, in the US, the House Judiciary Committee (Subcommittee on Antitrust, Commercial, and Administrative Law) held a year-long investigation of online platforms and market power, intended to create a basis for antitrust reform proposals to address digital marketplace competition. The 449-page report by the majority of the committee, released October 6, 2020, included recommendations for: structural separations to prohibit platforms from operating in lines of business that depend on or interoperate with the platform; prohibiting platforms from engaging in self-preferencing; and requiring platforms to make their services compatible with competing networks to allow for interoperability and data portability.⁹ The House Judiciary Committee Report is in line with scholars who have proposed regulatory measures, including utility-like “public interest” oversight,¹⁰ creation of a “Digital Platform Agency,”¹¹ and “break-up” of digital platforms.¹²

Notably, the terms of reference for the UK’s Digital Markets Taskforce explicitly reference the importance of “striking the right balance between promoting competition and innovation on the one hand and avoiding disproportionate burdens on business on the other hand.” While recognizing the need to act to prevent competition outcomes that could hurt consumers, any actions taken by the government must be “coherent and cohesive, build confidence and clarity for businesses and consumers,

8 European Commission. 2020. *The Digital Services Act package*. Available online: <https://ec.europa.eu/digital-single-market/en/digital-services-act-package>

9 U.S. House Committee on the Judiciary. *Investigation of Competition in the Digital Marketplace: Majority Staff Report and Recommendations*. Available online: <https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=3429>

10 Simons, Josh, and Dipayan Ghosh. 2020. *Utilities for democracy: Why and how the algorithmic infrastructure of Facebook and Google must be regulated*. Brookings Institution. August. Available online: <https://www.brookings.edu/research/utilities-for-democracy-why-and-how-the-algorithmic-infrastructure-of-facebook-and-google-must-be-regulated/>

11 Wheeler, Tom, Phil Verweer, and Gene Kimmelman. 2020. *New Digital Realities; New Oversight Solutions: The Case for a Digital Platform Agency and a New Approach to Regulatory Oversight*. Harvard Kennedy School - Shorenstein Center Discussion Paper. August 20. Available online: <https://shorensteincenter.org/new-digital-realities-tom-wheeler-phil-verweer-gene-kimmelman/>

12 Van Loo, Rory. 2020. “In Defense of Breakups: Administering a “Radical” Remedy,” *Cornell Law Review* (Forthcoming). Available online: https://scholarship.law.bu.edu/cgi/viewcontent.cgi?article=1951&context=faculty_scholarship

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boost innovation and investment, and reinforce the UK's position as a global leader in stable, innovation-friendly regulation." This pro-innovation focus stands out from the terms of reference for the other efforts listed above.

Proposals for Regulation of “Big Data” in Canada

Canada's Digital Charter, launched in May 2019, introduced 10 principles intended to build a foundation of trust for Canadians in the digital sphere. The Government promised changes to Canadian privacy legislation. It also promised updates to the *Telecommunications Act*, *Broadcasting Act*, and *Radiocommunication Act* to promote competition and affordability for Internet and wireless mobile services. The government will also be examining new approaches to privacy and competition policies across government in order to address issues around the digital and data-driven economy, with recommendations related to an ongoing copyright review being prioritized.

The Prime Minister's December 2019 mandate letters to the Minister of Innovation, Science and Industry and Minister of Canadian Heritage referenced work to advance Canada's Digital Charter and establish a new set of online rights related to digital privacy and “new regulations for large digital companies to better protect people's personal data and encourage greater competition in the digital marketplace” and the establishment of a “Data Commissioner” to oversee those regulations.¹³

Since the Council's October meeting, the federal government tabled legislation intended to implement some of the objectives of the “Digital Charter” as well as recommendations of the January 2020 final report of the Broadcasting and Telecommunications Legislative Review Panel (the “Yale Report”), which was struck in June 2018 to review Canada's communication legislative framework to ensure that Canadians continue to benefit from an open and innovative Internet.

Specifically, in Bill C-11, the government proposed an overhaul of federal privacy laws, including the enactment of the *Consumer Privacy Protection Act* (CPPA) and the establishment of a new Personal Information and Data Protection Tribunal.¹⁴ The CPPA envisions regulations for “data

13 Office of the Prime Minister. 2019. *Minister of Innovation, Science and Industry Mandate Letter*. December 13. Available online: <https://pm.gc.ca/en/mandate-letters/2019/12/13/minister-innovation-science-and-industry-mandate-letter>

14 Bill C-11, *An Act to enact the Consumer Privacy Protection Act and the Personal Information and Data Protection Tribunal Act and to make consequential and related amendments to other Acts*, 2nd session, 43rd Parliament, 2020 (First Reading, 17 November 2020). Available online: <https://parl.ca/DocumentViewer/en/43-2/bill/C-11/first-reading>

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mobility frameworks” under which an individual could request the transfer of personal data from one organization to another organization.¹⁵ For such data mobility frameworks, the CPPA would confer authority to Cabinet to define “parameters for the technical means for ensuring interoperability” and “specifying organizations that are subject to a data mobility framework.”¹⁶ The CPPA would also require an organization to provide “a general account of the organization’s use of any automated decision system to make predictions, recommendations or decisions about individuals that could have significant impacts on them” as well as explain to any requesting individual “the prediction, recommendation or decision and of how the personal information that was used to make the prediction, recommendation or decision was obtained.”¹⁷ In Bill C-10, the federal government proposed various amendments to the *Broadcasting Act*, including to bring “online undertakings” (defined as “an undertaking for the transmission or retransmission of programs over the Internet for reception by the public by means of broadcasting receiving apparatus”) under the broadcasting authority of the CRTC.¹⁸

Additional action to regulate large digital companies is likely. Canadian Heritage Minister Steven Guilbeault indicated during a parliamentary speech on Bill C-10 that forthcoming legislation would address issues including the relationship between the news media and digital platforms. In this regard, the Yale Report emphasized a “collective interest in monitoring and regulating big data.” The report asserted that a “small number of increasingly essential, and increasingly dominant, online platform providers base their business model on the capacity to collect and analyze Big Data to serve their corporate interests.” The report recommended bringing online platform providers under the jurisdiction of the CRTC and legislation to address “use of Big Data by dominant online platform providers and potential threats to privacy, competition, consumer protection, cultural sovereignty, democratic institutions, and taxation.”

Many Council members expressed concern that improperly applied regulation could deter investment and have negative unintended consequences on innovation, competition, and efficiency across the Canadian economy. If not carefully designed, regulation may stymie innovation, hinder competition

15 CPPA, s.72.

16 CPPA, s.120.

17 CPPA, s.62(2) and 63(3).

18 Bill C-10, *An Act to amend the Broadcasting Act and to make related and consequential amendments to other Acts*, 2nd session, 43rd Parliament, 2020 (First Reading, 3 November 2020). Available online: <https://parl.ca/DocumentViewer/en/43-2/bill/C-10/first-reading>

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for the market or perversely entrench incumbents. Moreover, terms like “Big Data” or “Big Tech,” often used to bucket companies with widely different products and business models, are nebulous and risk imparting arbitrariness and imprecision for identifying which businesses would be in or out of a particular regulatory regime.

Competition Law Should be the Presumptive Regime to Address Anti-competitive Harm

Council members reiterated the view from this Council’s earlier communique in May 2019 that Canada’s competition law continues to provide a robust and flexible framework for confronting new forms of conduct that may arise in the digital economy that could have anti-competitive effects and they do not support major overhaul of the framework.¹⁹ As a framework of general application with the aim of promoting economic efficiency through vigorous competition across all sectors of the economy, competition law remains capable of adapting to new technology and forms of conduct that harms competition or the competitive process.

In respect of digital platforms, the Competition Bureau had earlier outlined potential antitrust issues and its enforcement approach in its February 2019 report on “Big Data and Innovation.”²⁰ Council members recognized that the evolution of digital technologies and the scale of network effects from multi-sided platforms may create opportunities for conduct that harms competition or the competitive process.

While a former Competition Commissioner has argued that the network effects and non-transparent exercise of market power by certain digital platforms has outstripped traditional competition oversight and warrants a regulatory approach,²¹ the majority of Council members are concerned about policymakers leaping to direct regulation as a solution, rather than looking to competition law as the

19 Competition Policy Council. 2019. *Canadian Competition Policy in the Digital Age: Is Today’s Toolkit up to the Task?* C.D. Howe Institute. May 16. Available online: <https://www.cdhowe.org/cpc-communique/competition-bureau-already-has-%E2%80%9Ctoolkit%E2%80%9D-handle-big-tech-cd-howe-institute-competition-policy>

20 Competition Bureau. 2018. *Big data and innovation: key themes for competition policy in Canada*. February 19. Available online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04342.html>

21 Aitken, Melanie. 2019. “Tech has Outstripped Competition Oversight,” C.D. Howe Institute Intelligence Memo. August 14. Available online: <https://www.cdhowe.org/intelligence-memos/melanie-aitken-regent-debate-tech-has-outstripped-competition-oversight>

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presumptive tool to address economic concerns around digital platforms – particularly those involving an alleged market failure. Council members contend that competition law should be the presumptive framework for assessing the evidence of market failure, and fashioning appropriate remedies. Some Council members were also concerned about abandoning framework legislation and rushing to regulation in response to unfounded assertions of market failure.

This is consistent with the consensus observed by Wright and Yun at the U.S. Federal Trade Commission (FTC) hearings on Competition and Consumer Protection in the 21st Century, which took place between September 13, 2018 and June 12, 2019. Given the heterogeneity of platforms, special rules for assessing platforms are likely to suppress important economic distinctions. Competitive effects analysis requires more than making simple inferences from the price on one side of a given platform, and platforms should not be subject to different rules or special scrutiny.²² They also expressed a consensus view that, while big data plays an important role in platform quality and may provide an incumbent with a competitive advantage, it is not clear this is different from other hurdles that entrants in many markets must overcome, including economies of scale, patents, trade secrets, and brand loyalty.

Council members recognized that the evolution of digital technologies and the scale of network effects from multi-sided platforms may create opportunities for conduct with anti-competitive effects and that the susceptibility of digitally-intermediated product markets to market power amplifies the need for rigorous, well-resourced competition enforcement. Certain Council members also contended that, if meaningful competition is for the market rather than in the market (e.g., because of network effects), it may be particularly important to protect the ability of firms not in the market to potentially displace the incumbent. While taking no position on the merits of individual cases, Council members generally supported the Bureau's pursuit of increasingly assertive enforcement with respect to digital

22 Wright, Joshua D., and John M. Yun. 2018. *Platforms in the Spotlight at the FTC Hearings*. George Mason Law & Economics Research Paper No. 18-44. Available online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3280532

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platforms.^{23 24 25} Certain scholars have argued for an expansion of antitrust analysis to accommodate new issues being raised in respect of digital platforms – for example, the question of how to balance an antitrust remedy involving access to consumer data with data privacy concerns.²⁶

Equipping the Competition Bureau for effective digital enforcement

The Bureau’s strategic vision for 2020-24, entitled “Competition in the digital age”, emphasizes “timely enforcement action” and proposes to “invest in new tools and training to increase our capacity and ability to handle and analyze the vast amounts of data common to today’s digitally-focused investigations.”²⁷ Certain Council members pointed to the relative resourcing of foreign antitrust agencies, which have ramped up headcount and technical capacities for forensic investigations of digital conduct and the formation of digital task forces.²⁸ Many Council members called on the government to

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- 23 Earlier in 2019, the Bureau published a call-out for information from Canada’s business community about conduct in the digital economy that may be harmful to competition – specifically, “certain strategies that firms may use to hinder competition in certain core digital markets, such as online search, social media, display advertising, and online marketplaces.” Competition Bureau. 2019. “News release: Competition Bureau calls for businesses to report potentially anti-competitive conduct in the digital economy.” September 4. Available online: <https://www.canada.ca/en/competition-bureau/news/2019/09/competition-bureau-calls-for-businesses-to-report-potentially-anticompetitive-conduct-in-the-digital-economy.html>
- 24 In May 2020, the Bureau registered a consent agreement with Facebook, including a \$9 million penalty, for false or misleading claims about the privacy of Canadians’ personal information on Facebook and Messenger between August 2012 and June 2018. Competition Bureau. 2020. “News Release: Facebook to pay \$9 million penalty to settle Competition Bureau concerns about misleading privacy claims.” Available online: <https://www.canada.ca/en/competition-bureau/news/2020/05/facebook-to-pay-9-million-penalty-to-settle-competition-bureau-concerns-about-misleading-privacy-claims.html>
- 25 Competition Bureau. 2017. “Position Statement: Competition Bureau statement regarding its inquiry into Amazon’s price advertising in Canada.” January 11. Available online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04187.html>
- 26 Douglas, Erika. 2020. “Monopolization Remedies and Data Privacy,” 24 Virginia Journal of Law & Technology 2. Available online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3694607
- 27 Competition Bureau. 2020. *Competition in the digital age: The Competition Bureau’s Strategic Vision for 2020-2024*. February 11. Available online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04513.html>
- 28 For example, the U.S. FTC subsequently established a Task Force to Monitor Technology Markets in February 2019. Federal Trade Commission. 2019. “FTC’s Bureau of Competition Launches Task Force to Monitor Technology Markets,” February 26. Available online: <https://www.ftc.gov/news-events/press-releases/2019/02/ftcs-bureau-competition-launches-task-force-monitor-technology>

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ensure the Bureau is properly resourced to conduct inquiries into conduct that involves data or digital platforms that could have an anticompetitive effect.

Other Council members regarded resource constraints as a perennial challenge for the Bureau, requiring adaptation and cross-agency collaboration to target resources most efficiently. In this regard, Council members encouraged collaboration within government to leverage digital expertise across federal enforcement agencies and departments. The Council observes that such an approach has been contemplated in Bill C-11. It was noted that any such initiatives should not increase regulatory uncertainty in the market so as to avoid chilling innovation.

Council members also broadly supported the Bureau's continued focus on international co-operation recognizing the benefits including, more consistent outcomes that minimize the risk and uncertainty for businesses. For a smaller agency like the Bureau, international co-operation should be leveraged particularly when it comes to conduct of the digital platforms that crosses borders. Many Council members were of the view that international co-operation frees up limited Bureau resources to focus on harm to Canadians and the Canadian economy that cannot and will not be addressed by co-operation with foreign enforcement agencies. It was also noted by some Council members that international cooperation does not mean that Canada should automatically accept international practices or norms. In many instances, the Canadian market will require a unique and tailored approach.

Updating the *Competition Act* for Digital Conduct

Despite the majority of Council members forming the view that the *Competition Act* continues to provide a robust and flexible framework and does not require a major overhaul, some Council members support giving the Bureau new tools for effective enforcement. There was no consensus on whether and what amendments to the *Competition Act* would be appropriate, and Council members emphasized that robust and open consultation with the competition bar and business groups should be the precursor to any specific legislative proposals.

First, certain members contended that the burden imposed by the Supreme Court's 2015 decision in *Tervita* may pose particular challenges for effective enforcement in digitally-mediated product markets. *Tervita* requires the Commissioner to quantify the effects of a substantial lessening of competition from a proposed merger in order to inform the merging parties seeking to invoke the efficiencies defence what efficiencies they would be required to show for approval of the merger.²⁹ In digital-mediated

²⁹ *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3.

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markets, quantification can require particularly onerous data collection and analysis and could obscure a valid theory of harm. Certain Council members believe that the burden of quantification puts too much focus on price effects to the neglect of non-price effects. These same members contended that the competitive analysis should place greater emphasis on the “prevent” prong of the standards for abuse of dominance, competitor collaborations, and mergers.³⁰

While there was no consensus on specific amendments, certain Council members proposed amendments to section 78/79 and section 93 of the *Competition Act* to address conduct by digital platforms that may prevent or lessen, or is likely to prevent or lessen, competition substantially – specifically:

- Including the following as factors to be considered regarding prevention or lessening of competition in section 93 or examples of an anti-competitive act in section 78
 - o adverse effects on the competitive process in addition to price and quantity effects,
 - o network effects – for example, which stem frequently from access to user data, and
 - o entrenchment of the market power of an incumbent competitor (i.e., not only removal of a vigorous competitor); and
- Limiting consideration of “superior competitive performance” for determining abuse of dominance in section 79(4) to circumstances where “the likely effect of the practice is not harmful to the competitive process.”

The specific amendments proposed by these Council members are provided in the Appendix to this communique. Emphasizing that these proposed amendments were not debated or endorsed by the Council, these are presented as illustrative. The diversity of views from Council members concerning possible amendments highlights the importance of robust consultation prior to any specific legislative proposals.

Second, certain Council members suggested that to ease the evidentiary burden on the Bureau, a reverse onus be introduced for an acquisition by a dominant incumbent in a given product market; that is, acquisitions by the given incumbent would be presumptively prohibited without demonstration that a proposed merger is in the public interest.

30 That is, for abuse of dominance position, the sub-section 79(2) of the *Competition Act* requires a finding of “effect of preventing or lessening competition substantially in a market.” Similarly, sub-sections 90.1(1) and 92(1) restrict agreements or mergers that are “likely to prevent or lessen, competition substantially in a market.”

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Again, there was no consensus as other Council members strongly disagreed, noting that it would be extremely difficult for companies to prove the negative case that the proposed merger would not harm competition, especially when the relevant timeframes and scope of application are not defined. The reverse onus would instead increase the risks and uncertainty of a competition law challenge, raising transaction costs and expanding delays. While a reverse onus has been proposed in other jurisdictions, it has not yet been implemented, meaning Canada would be applying a fundamentally different test than would our allies. This could reduce investment and acquisition interest in Canadian start-ups, harming Canada's innovation sector.

Third, certain Council members contended that the authority to conduct market studies could provide the Bureau with the ability to better understand, and adapt enforcement for, product markets in which data or network effects could entrench incumbents or adversely impact competition.³¹ These members observed that Canada is the only major developed economy in which the competition authority lacks authority for market studies and emphasized that international experience has demonstrated that market studies are an effective complement to competition enforcement.³² These members believe that concerns about overly broad formal information requests can be mitigated through a requirement that orders be sought from the Competition Tribunal. Additionally, these members suggested that providing the Bureau with powers for market studies could help avoid excessive and harmful direct regulation of digital markets. That is, market studies could allow the Bureau to make evidence-based recommendations concerning any proposed regulation of digital platforms and data. However, there was again no consensus on market study powers. Certain members were concerned about the lack of transparency and accountability in what could be extensive and burdensome information requests.

Finally, certain Council members objected to a perceived push by the Competition Commissioner that amendments are required to address conduct by digital platforms. Specifically, these members disagree that amendments such as increasing the scope and maximum level of administrative monetary penalties (AMPs) are required to address platform conduct. These members argue that such tools are not critical

31 In a prior communiqué, a majority of this Council cautioned against providing the Bureau with powers to compel information in market studies and recommended that any market studies should be limited in scope and length. See: C.D. Howe Institute Competition Policy Council. 2017 *Competition Bureau Should Not Have Power to Compel Information for Market Studies*. May 4. Available online at: <https://www.cdhowe.org/cpc-communique/competition-bureau-shouldnot-have-power-compel-information-market-studies>

32 Mancini, James. 2019. "Market studies: Time for Canada's Competition Policy Framework to Catch Up," C.D. Howe Institute Intelligence Memo. Available online at: <https://www.cdhowe.org/intelligence-memos/james-mancini-market-studies-time-canada%E2%80%99s-competition-policy-framework-catch>

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to dealing with market issues in this area and perceive the Bureau's interest in these amendments as a way to increase its negotiating leverage with market participants. These members contend that such amendments are “cart before the horse” and the appropriate way of establishing the margins of acceptable conduct is for the Bureau to bring cases concerning platforms that would provide case law for market participants. To this end, introducing a right of private action for certain conduct (e.g., abuse of dominance) could be considered to amplify the extent of enforcement. In an earlier communiqué, a majority of this Council's members had supported a cautious expansion of private rights of action for abuse of dominance under the *Competition Act*.³³

Carefully Calibrate any Digital Regulation to a Well-specified Market Failure

Council members observed that policymakers appear to have jumped from a political concern about the size of certain digital platforms to an assertion of regulation as the appropriate solution without either (a) specifying the precise harm that regulation would address, or (b) explaining how regulation could apply practically to companies that operate in distinct, dynamic and complex product markets.

Council members noted that non-economic harms, like the dissemination of false information and interference with democratic processes, may provide a separate rationale for regulation, but Council members agreed that these should not be conflated with rationales for economic regulation.

“Natural monopolies” – where steep economies of scale result in a single producer for a product – have been the historic explanation for economic regulation. However, Council members were skeptical that digital platforms such as Amazon, Facebook, Apple, or Google constitute natural monopolies in any of the various product markets in which they operate. Council members cautioned against casual allegations of a natural monopoly by a given platform and, as a prerequisite to regulation, stressed the importance of rigorous processes to test evidence of such alleged market failure.

Council members highlighted high risks of policy error and perverse consequences for regulators attempting to prescribe utility-like rules for digital platform conduct. Heightened compliance costs or a freeze of the status quo could easily discourage innovation and new entry. Mandatory disclosure

33 C.D. Howe Institute Competition Policy Council. 2016. *Damage Control: Abuse of Dominance and the State of Private Remedies in the Competition Act*. October 20. Available online at: <https://www.cdhowe.org/cpc-communique/damage-control-abuse-dominance-and-state-private-remedies-competition-act>

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of proprietary knowledge (e.g., algorithms for processing user data) could discourage investments in innovation. It would also pose a significant break from the principles underpinning intellectual property regimes.

Where platforms benefit from network effects, structural remedies – such as mandatory break-up – can deprive consumers of significant value and stymie innovation. For example, following the release of a draft “News Media Bargaining Code law” by the ACCC in draft in July 2020,³⁴ Facebook indicated that publishers and users in Australia will no longer be able to share news on Facebook and Instagram if the draft becomes law.³⁵

Indeed, Council members observed that the ability of platforms to integrate and scale capabilities across different product markets can provide considerable value to consumers in competitive pricing and product quality. Such companies vigorously compete with one another in various product markets (e.g., advertising, video and music, payments) and capabilities developed in one market often equip such a competitor to enter separate markets and disrupt established incumbents.

The consensus of the Council was that before imposing regulation on a particular company or sector of the economy, policymakers should (1) demonstrate why remedies through competition law would be insufficient to address the given market failure; and (2) explain how regulation would practically improve economic efficiency.

Certain Council members believe that so-called “open banking” represents an obvious and reasonably discrete set of product markets that fall under the federal banking power in which federal policymakers can “learn by doing” with regard to how effective regulation could improve economic efficiency. For example, regulators’ experience with establishing standards and protocols for platform interoperability and data portability in relation to financial services can provide lessons to better understand challenges for other contexts.

Council members further agree that, with various efforts underway internationally to facilitate digital entry and competition in financial services, open banking provides an opportunity for Canada to

34 Australian Competition & Consumer Commission. *News media bargaining code – Draft Legislation* (July 31, 2020). Available online: <https://www.accc.gov.au/focus-areas/digital-platforms/news-media-bargaining-code>

35 Facebook. 2020. “Facebook’s response to Australia’s proposed News Media and Digital Platforms Mandatory Bargaining Code,” September. Available online: <https://about.fb.com/wp-content/uploads/2020/08/Facebooks-response-to-Australias-proposed-News-Media-and-Digital-Platforms-Mandatory-Bargaining-Code.pdf>

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learn from foreign experience and be a “fast follower.” The June 2019 report by the Senate’s Standing Committee on Banking, Trade and Commerce on open banking recommended heightened consumer control over their data and a consumer right to direct that their personal financial information be shared with another organization.³⁶

Constitutional Questions for Regulation of Data and Digital Platforms

Relying on the competition law framework to remedy any alleged market failure caused by conduct of the digital platforms could mitigate constitutional challenges to the federal government’s efforts to regulate conduct over the Internet.

Notably, in its 1989 decision in *General Motors of Canada Ltd. v. City National Leasing*,³⁷ the Supreme Court upheld Parliament’s establishment of competition law as a valid exercise of the general branch of the federal trade and commerce power. In that case, the Supreme Court enumerated indicia for determining whether a law is validly adopted under the general trade and commerce power – specifically, the relevant questions are:

- (1) whether the law is part of a general regulatory scheme;
- (2) whether the scheme is under the oversight of a regulatory agency;
- (3) whether the legislation is concerned with trade as a whole rather than with a particular industry;
- (4) whether it is of such a nature that provinces, acting alone or in concert, would be constitutionally incapable of enacting it; and
- (5) whether the legislative scheme is such that the failure to include one or more provinces or localities in the scheme would jeopardize its successful operation in other parts of the country.

It is expected that some aspects of the federal government’s efforts in Bill C-10 and Bill C-11 will trigger constitutional challenges. For example, the CPPA could face challenge on the basis that data portability and mandatory disclosure of details for a company’s automated decision systems concern property and civil rights under provincial jurisdiction.

36 Standing Senate Committee on Banking, Trade and Commerce. 2019. *Open Banking: What It Means For You*. June. Available online: <https://sencanada.ca/en/info-page/parl-42-1/banc-open-banking/>

37 [1989] 1 SCR 641.

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Similarly, certain commentators argue that federal jurisdiction may not provide the authority sought under Bill C-10 for the CRTC to regulate providers that transmits content over the internet under the *Broadcasting Act*. Some of the proposed changes to the *Broadcasting Act* could also infringe on the freedom of expression protected by section 2(a) of the *Charter*.

Conclusion

The Council's consensus is that competition law should provide the presumptive framework for addressing concerns about the market conduct of digital platforms. Council members emphasize that competition law provides an established, durable and flexible framework of general application. Policymakers should not jump to regulation as a solution without showing that competition law cannot provide an adequate remedy for the alleged market failure caused by the digital platforms and without providing the Competition Bureau with the resources necessary to enforce the *Act*. Wide consultation with the competition bar and business groups should precede any legislative proposals for amending the *Competition Act*. Unless carefully considered, amendments to the *Competition Act* could have a chilling effect on pro-competitive conduct.

Appendix:

Certain members proposed the following amendments to the *Competition Act*. The Council did not reach a consensus on whether specific amendments were desirable. However, the amendments recommended by these certain members are reproduced below.

- (1) Revise the "Purpose Clause" under Section 1.1 to narrow focus to economic policy objectives but with greater emphasis on non-price effects and impacts. This could be revised as follows:

The purpose of this *Act* is to implement a general economic policy framework, by maintaining and encouraging reliance on competition and the competitive process in order to ensure the efficiency, flexibility and adaptability of the Canadian economy and in order to provide consumers with competitive prices and product choices.

- (2) Replace current 92(2) to include language such as:

In determining whether a merger would result in a substantial prevention or lessening of competition (SLPC), the Tribunal shall consider whether the merger would have adverse price or quantity implications for consumers OR would adversely affect the competitive process or developments in any affected market.

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(3) Add a new factor to Section 93 as follows:

Whether the merger with a competitor or potential competitor would entrench or enhance the market position of a leading incumbent business, including leading technology businesses and platforms.

(4) Add a new section as 79(1.1) to the dominance section similar to the new 92(2) above to ensure balance between price and competitive process impacts in deciding if a practice meets the SLPC test.

(5) Add a new anticompetitive act to Section 78(1) as follows:

Selective or discriminatory response to an actual or potential competitor for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from a market, particularly in markets demonstrating network effects.

(6) Amend Section 79(4) to state:

...whether the practice is predominantly the result of superior competitive performance and the likely effect of the practice is not harmful to the competitive process.

Members of the C.D. Howe Institute Competition Policy Council

Members of the Council participate in their personal capacities, and the views collectively expressed do not represent those of any individual, institution or client.

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* Not in attendance, October 8, 2020.