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COMMENTS OF ITIF

Before the

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In the Matter of:	)	
The Future of Competition Policy in Canada	)	Public Consultation

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THE FUTURE OF COMPETITION POLICY IN CANADA: THE NEED TO RIGHT THE SHIP

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INTRODUCTION

The Canadian Minister of Innovation, Science, and Industry launched a public consultation in November 2022 for potential amendments to the Competition Act, for which it published a discussion paper titled *The Future of Competition Policy in Canada*.[1]

ITIF appreciates the opportunity to respond to the public consultation and recommends avoiding a regulatory Titanic: Europe's stringent model will not transpose well to Canada, because Canada is a smaller market with fewer innovation capabilities, so global companies could determine that a commercial presence is not worth the regulatory risk The Canadian market is fundamentally different from the U.S. and EU markets in that respect. For example, while Europe's flawed regulatory approach in the Digital Markets Act (DMA) will undoubtedly impose significant economic costs, the European market is unavoidable for most global companies.[2] Similarly, given the size and importance of the U.S. market, companies are unlikely to pull out of it even if they are faced with onerous competition rules—although, given recent Congressional elections, the odds of the United States adopting such rules is low. In contrast, the Canadian market is commercially less essential for global companies, increasing the economic costs of a flawed regulatory approach. Importing into the Canadian Competition Act regulatory experiments from Europe or populist rhetoric from America thus may disproportionately harm the Canadian economy.

[1] MISED, *The Future of Competition Policy in Canada*, https://ised-isde.canada.ca/site/strategic-policy-sector/sites/default/files/attachments/2022/The-Future-of-Competition-Policy-eng_0.pdf

[2] Aurelien Portuese, "The Digital Markets Act: A Triumph of Regulation Over Innovation", (ITIF Report, August 2022), https://itif.org/publications/2022/08/24/digital-markets-act-a-triumph-of-regulation-over-innovation/

In 2002, the OECD reported that Canadian "policymakers have been sympathetic to fears that a strong competition policy could undermine economies of scale."[3] Twenty years later, Canadian policymakers are seemingly reneging on a wise tradition of protecting scale, competitiveness, and innovation, and they are poised to import foreign regulatory experiments.

In the proposed reforms, the Canadian government seeks to ban more mergers, ban certain business practices by online platforms, prevent collaborations among competitor, integrate labor effects into competition analysis, reform deceptive marketing provisions, bolster the Competition Bureau's powers, and encourage private antitrust litigation.[4]

Both the Canadian Chamber of Commerce and the Canadian Bar Association have expressed concerns about the proposed amendments to the Competition Act. The Canadian Chamber of Commerce has lamented "rushed amendments" in 2022, expressed "serious concerns" about the new round of amendments, and recommended postponing them until a broader consultation can study them.[5] Equally, the Canadian Bar Association emphasized that "Canada's competition laws aim to prevent anti-competitive conduct rather than industry consolidation itself."[6] Defending the efficiency defenses of the current Competition Act, the Bar Association warned that "in today's highly competitive global economy, it seems counterintuitive to question legislation aimed at rewarding efficiency, productivity, and innovation."[7] It made clear that "concerns about the digital economy are in many ways related to consumer's privacy rights, not competition law" and emphasized that any proposed changes must "not inadvertently stymie innovation and competitive behaviour."[8]

The suggested reforms of the Canadian Competition Act are wrong on economic and legal grounds at the wrong time:

- **Wrong economics:** Canada doesn't need flawed competition reforms to break up corporations; it needs reforms to promote innovation and grow larger firms. The government must strengthen Canada's competitiveness by encouraging innovative companies to gain more scale. Deconcentrating

[3] OECD, "Canada—The Role of Competition Policy in Regulatory Reform", (2002) https://www.oecd.org/canada/27067414.pdf p.5

[4] MISED, *The Future of Competition Policy in Canada*, https://ised-isde.canada.ca/site/strategic-policy-sector/sites/default/files/attachments/2022/The-Future-of-Competition-Policy-eng_0.pdf p.5

[5] John Pecman, "Competition Act. Reform Interim Report", (Canadian Chamber of Commerce, June 2022), https://chamber.ca/wp-content/uploads/2022/06/Competition-Act-Reform-Interim-Report-Canadian-Chamber-Future-of-Business-Centre.pdf

[6] Navin Joneja, "Summary of CBA Views on Potential Competition Act Amendments," Open Letter of the Canadian Bar Association, April 28, 2021, https://www.ourcommons.ca/Content/Committee/432/INDU/Brief/BR11295778/br-external/TheCanadianBarAssociation-e.pdf

[7] Ibid.

[8] Ibid.

the economy through assertive competition policy, not dissimilar to the flawed view advocated by antitrust populists, would only speed up the ongoing decline of Canada's competitiveness.[9]

- **Wrong law:** Canada's regulatory approach, including the Competition Act of Canada, is regularly praised as a model framework for promoting competition. Canada fosters a "total welfare standard" that appropriately integrates the diversity of pro-efficiency arguments. Rather than amending a well-respected law and adopting the misguided regulatory experiments Europe is testing across the pond, the Canadian government should preserve and reinforce the Competition Act with better enforcement and clearer guidance.
- **Wrong time:** The Canadian government has suggested a new round of amendments to the Competition Act even before the first round of amendments adopted in 2022 enter into force in June 2023. The best practice would be to implement these first amendments and independently assess their effects before adopting new amendments. Additionally, before any new amendments, Parliament should conduct hearings to assess the need for them and produce a report detailing the findings. It would be unwise for the Canadian government to hastily adopt a new round of amendments before the Parliament has done its due diligence.

The Canadian government must right the ship of excessive amendments to the Competition Act. It should pause and reflect on how European-style competition rules would damage an economy with insufficiently scaled firms. The path envisaged for Canadian competition rules will be tantamount to a Brexit—a self-inflicted cost that dissociates a relatively small market from the rest of the world, makes it less attractive for foreign investments, and acts as a costly barrier for Canadian companies that need to expand to achieve greater efficiencies of scale.

ANTITRUST POPULISM IN CANADA IS WRONG ECONOMICS

The consultation paper recommends a more aggressive approach to merger review since "excessive corporate consolidation lessens competition, potentially raising prices and harming consumer choice and innovation."[10]

First, this statement is made in the absence of empirical evidence. In the United States, that same assertion was widely made by "neo-Brandeisian" scholars and activists, and believed by many, even though the latest U.S. Census data on concentration showed it to be completely wrong.[11] As such, before acting, the

[9] See Rob Atkinson, "How Canada has fallen behind in the global race for advanced industries", The Hamilton Spectator, August 17, 2022, https://www.thespec.com/ts/business/opinion/2022/08/06/how-canada-has-fallen-behind-in-the-global-race-for-advanced-industries.html ("While Canada's global share of GDP increased from 1.95 per cent in 1995 to 2 per cent in 2018 its share of output in advanced industries collapsed from 1.8 to 1.2 per cent."); Rob Atkinson, "The Hamilton Index: Assessing National Performances in the Competition For Advanced Industries" (ITIF Report, June 2022), https://itif.org/publications/2022/06/08/the-hamilton-index-assessing-national-performance-in-the-competition-for-advanced-industries/

[10] MISED, *The Future of Competition Policy in Canada*, https://ised-isde.canada.ca/site/strategic-policy-sector/sites/default/files/attachments/2022/The-Future-of-Competition-Policy-eng_0.pdf p.19

[11] Rob Atkinson, Filipe Lage de Sousa, "No, Monopoly Has not Grown", (ITIF Report, June 2021), https://itif.org/publications/2021/06/07/no-monopoly-has-not-grown/ ("Despite widespread claims of widespread

Competition Bureau should thoroughly review trends in concentration, rather than simply take the word of anti-corporate activists.

Moreover, the statement is based more on ideology than on empirical evidence. Evidence shows that consolidation can increase innovation, foster productivity and contribute to the dynamic competition process whereby companies maintain or boost their competitiveness. In fact, more competition often means less innovation and productivity, according to a well-accepted U-inverted model.[12]

Indeed, the smaller average firm size in Canada accounts for approximately 20 percent of the gap in Canada-U.S. sales per employee overall and 48 percent in manufacturing.[13] While average firm size in the United States increased, the average size of firms in Canada fell from 17.5 employees in 1984 to 15.3 employees in 1997, with most of the decline coming from large firms getting smaller. This decline caused average sales per employee in Canada to fall by $1,700. If the United States had the same firm size distribution as Canada—which the populist left in America desires—U.S. per capita GDP would be $1,800 lower.[14]

A competition policy agenda rooted in deconcentration would also counter the need to increase the competitiveness of the Canadian economy. As a 2019 report from Deloitte notes, "competitiveness is critical for businesses, governments, and workers. However, Canada has a competitiveness challenge."[15] In the World Bank's Ease of Doing Business index, Canada fell from the 4th place globally in 2006 to the 23rd in 2019.[16]

In addition, Canada's share of global GDP fell from 2.5 percent in 1978 to 1.9 in 2020, with its leading firms now "no longer world-class."[17] "Canada's vanishing corporate titans" is due to slower innovation from long-gone superstar firms.[18] Innovation in Canada has faltered: homegrown innovation (i.e., innovation

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monopolization, just 4 percent of U.S. industries are highly concentrated, and the share of industries with low levels of concentration grew by around 25 percent from 2002 to 2017")

[12] See, for a discussion, Aurelien Portuese, "Precautionary Antitrust: The Changing Nature of Competition", 17(3) *Journal of Law, Economics and Public Policy*, (2022):548-634.

[13] Danny Leung, Césaire Meh, and Yaz Terajima, "Firm Size and Productivity," Bank of Canada Working Paper 2008–45 (Ottawa: Bank of Canada, November 2008), 11, http://www.bankofcanada.ca/wp-content/uploads/2010/02/wp08-45.pdf.

[14] Rob Atkinson, Michael Lind, *Big is Beautiful: Debunking the Myth of Small Business* (Cambridge, MA: MIT Press, 2018):124

[15] Deloitte, "Making regulation a Competitive Advantage", https://www2.deloitte.com/ca/en/pages/finance/articles/regulatory-competitiveness.html (2019)

[16] See https://data.worldbank.org/indicator/IC.BUS.EASE.XQ

[17] Philip Cross, "Canada's Faltering Business Dynamism and Lagging Innovation", Fraser Institute (2021), https://www.fraserinstitute.org/studies/canadas-faltering-business-dynamism-and-lagging-innovation, p.1

[18] Raicho Bojilov, "Indigenous Innovation during the IT Revolution: We Never Had It So Good? In Edmund Phelps, Raicho Bojilov, Hian Teck Hoon, Gylfi Zoega (Eds.) *Dynamism: The Values that Drive Innovation, Job Satisfaction, and Economic Growth,* (Cambridge MA: Harvard University Press, 2020), p.73; Rob Atkinson, "How Canada has fallen behind in the global race for advanced industries", The Hamilton Spectator, August 17, 2022, https://www.thespec.com/ts/business/opinion/2022/08/06/how-canada-has-fallen-behind-in-the-global-race-for-advanced-industries.html; Rob Atkinson, "The Hamilton Index: Assessing National Performances in the Competition

domestically generated as opposed to imported) grew by a cumulative 0.11 percent from 1970 to 2012—the lowest increase of any G7 nation.[19] More specifically, ITIF's Hamilton Index finds that:

> Canada lost global market share in all seven industries of the Hamilton Index, with the largest losses in motor vehicles and computer and electronics. Canada's global share of all advanced industries fell by one-third from 1995 to 2018, from 1.8 percent to 1.2 percent… Relative to GDP, Canada's performance is even weaker. From 1995 to 2018, advanced-industry output as a share of the Canadian economy fell by 33 percent and now stands at just 60 percent of the global average, well below Mexico and barely above the mostly developing countries included as "rest of the world." If Canadian policymakers wanted it to equal the same share of the Canadian economy as the global average, advanced-industry output would have to increase by two-thirds, or US$57 billion…."[20]

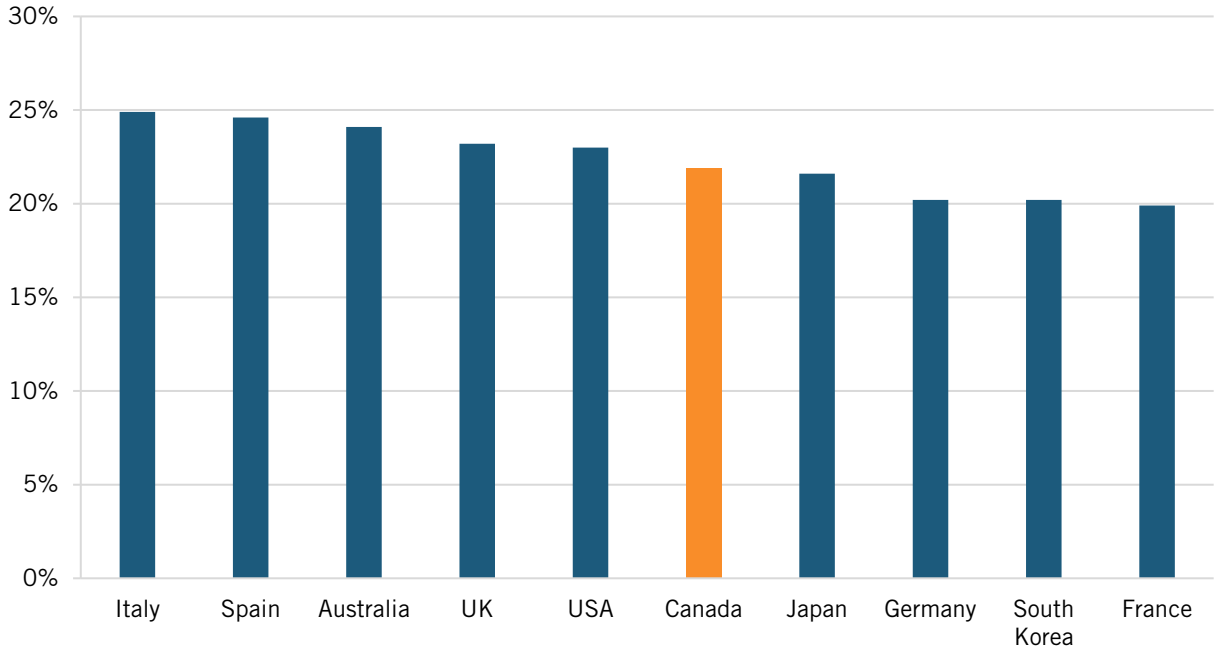
The idea that there is an insufficient level of competition in Canada is baseless: Canada's private sector gross operating margin (gross operating surplus and mixed income as a share of output) is about the same as the advanced economy average. Canada's gross operating margin of 21.9 percent places it sixth among the ten major OECD economies (See Figure 1). Canadian companies' average rates of profitability undermine the idea of a Canadian economy characterized by "monopolies" and insufficient levels of competition.

For Advanced Industries" (ITIF Report, June 2022), https://itif.org/publications/2022/06/08/the-hamilton-index-assessing-national-performance-in-the-competition-for-advanced-industries/

[19] Rob Atkinson, "How Canada has fallen behind in the global race for advanced industries", The Hamilton Spectator, August 17, 2022, https://www.thespec.com/ts/business/opinion/2022/08/06/how-canada-has-fallen-behind-in-the-global-race-for-advanced-industries.html ("While Canada's global share of GDP increased from 1.95 per cent in 1995 to 2 per cent in 2018 its share of output in advanced industries collapsed from 1.8 to 1.2 per cent."); Rob Atkinson, "The Hamilton Index: Assessing National Performances in the Competition For Advanced Industries" (ITIF Report, June 2022), https://itif.org/publications/2022/06/08/the-hamilton-index-assessing-national-performance-in-the-competition-for-advanced-industries/

[20] Rob Atkinson, "The Hamilton Index: Assessing National Performances in the Competition For Advanced Industries" (ITIF Report, June 2022), https://itif.org/publications/2022/06/08/the-hamilton-index-assessing-national-performance-in-the-competition-for-advanced-industries/, p.33

Figure 1: Gross operating margin among large OECD economies, 2019 (Spain and South Korea data from 2018)[21]



The solution to weak Canadian competitiveness is not vertically disintegrating companies (through aggressive merger reviews or bans on self-preferencing). Instead, the solution is most likely to come from increased consolidation. The proposed assertive approach to mergers wrongly encourages the vertical disintegration of companies at a time when the Canadian economy needs just the opposite.

Indeed, as ITIF's Robert Atkinson points out, data on concentration in Canada is missing, therefore policymakers should refrain from drawing hasty conclusions. He notes that:

> "the fact that StatsCan has not measured concentration since 2009 makes it very difficult to know what the state of concentration is in Canada. Interestingly, that does not stop Canada's Competition Bureau from asserting that concentration has grown to problematic levels in Canada."[22]

On the contrary, it is plausible that Canadian industries remain under-consolidated, thereby missing out on scale economies and opportunities to improve the nation's competitiveness. Indeed, in the mid-2000s, the OECD reported that the Canadian industrial concentration ratio was 40 percent lower than in the United States.[23]

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[21] OECD, STAN: Database for Structural Analysis (accessed February 6, 2023), https://stats.oecd.org/Index.aspx?DataSetCode=STANI4_2020.

[22] Rob Atkinson, "Big is Beautiful. Strengthening growth and competitiveness in the Canadian economy", (MacDonald Laurier Report, November 2021), https://macdonaldlaurier.ca/mli-files/pdf/Nov2021_Big_is_beautiful_Atkinson_PAPER_FWeb.pdf p.15

[23] Ibid.

Second, the proposals are likely to shrink foreign investment. Canada already has the fourth highest level of restriction on foreign investments among the 37 OECD nations.[24] The proposed reforms of the Competition Act will make mergers less likely and the proposed ban on self-preferencing will prevent innovative digital platforms from offering bundled services. This will lower already highly regulated foreign investments and discourage the process of creative destruction, which enables productive companies to displace less productive ones for the benefit of Canadian consumers.

The suggested reforms of the Competition Act are therefore wrong economics. It is an agenda mimicking the Neo-Brandeisian agenda at a time when the Canadian economy needs further industry consolidation through mergers and market disruption through innovative platforms.

Third, the Canadian government seeks to reform the Competition Act due to the fear of what can be called "data monopolies".[25] The idea that a few companies have "monopolized" data collection is misguided and risks distorting the stiff competition in advertising markets which fund the products and services enjoyed for free by consumers. Since data is a non-rivalrous good, data collection cannot be monopolized by a few companies who would prevent others from collecting the same or similar data about consumers. The government should refrain from tackling non-existent "data monopolies", otherwisee it may generate costs for consumers who enjoy free products and services in ad-funded markets.

Finally, the Ministry seeks to reform the Canadian Competition Act in order to preserve the "health of Canada's social landscape and democracy…" This objective is another misguided goal borrowed from the Neo-Brandeisian rhetoric. In fact, at least in the United States, concentration does not weaken democracy: firms with more revenue, higher profits, and greater market value spend less on lobbying per dollar of revenue than smaller firms do.[26] Furthermore, mergers reduce lobbying expenditures, while corporate spin-offs increase lobbying, on average.[27]

THE SUGGESTED REFORMS ARE MISGUIDED

Canadian competition expert Michael Trebilcock wrote, "it is often claimed that Canada's competition Act, 1986 is the most economically literate competition statute in force in any jurisdiction in the world."[28] Despite this, the Canadian government risks squandering that laudable heritage in the name of copying recent European-style regulations which do not enjoy the status of economic literacy. The Canadian government

[24] Vincent Geloso, "Barriers to Entry and Productivity Growth", In Steven Globerman (Ed.) *Achieving the Four-Day Work Week: Essays on Improving Productivity Growth in Canada*, (Fraser Institute 2021), pp.17-25.

[25] Joe Kennedy, "The Myth of Data Monopoly: Why Antitrust Concerns About Data are Overblown," (ITIF Report, March 2017), https://www2.itif.org/2017-data-competition.pdf

[26] Hadi Houalla, "Oops! It Turns Out Aggressive Antitrust Would Increase Business Lobbying", (ITIF Report, January 2023), https://www2.itif.org/2023-antitrust-and-lobbying.pdf

[27] Ibid. See also Joe Kennedy, "Monopoly Myths: Is Concentration Eroding Labor's Share of National Income? (ITIF Report, October 2020), https://www2.itif.org/2020-monopoly-myths-share.pdf

[28] Michael J. Trebilcock, Ralph A. Winter, Paul Collins, Edward M. Iacobucci, *The Law and Economics of Canadian Competition Policy* (Toronto: University of Toronto Press, 2002) 31.

should avoid falling into "the new age of populism."[29] The envisaged reforms of the Competition Act are misguided for multiple reasons.

First, the reforms would depart from Canada's "total welfare standard," which comprehensively analyzes efficiency defense arguments to avoid harm to consumers and productivity/competitiveness through zealous competition enforcement. The total welfare standard goes beyond the widely accepted "consumer welfare standard" to integrate, into the antitrust analysis, considerations of productivity and innovation that may counterbalance potentially detrimental effects on competition.

For instance, under current law, business practices may be acceptable, despite increasing consumer prices, if such practices generate innovation capabilities for a company or enable it to increase the quality of its products. In merger analysis, the focus on the total surplus, rather than the consumer surplus, allows companies to scale up if there are expected positive competition or innovation effects.

The saga of *Superior Propane-ICG Propane* is illustrative.[30] The case illustrates Canadian merger laws' balancing of pro-efficiency gains with efficiency losses.[31] In this case, the combined market shares of the merged company would amount to 95 percent in sixteen local markets for propane distribution in Canada. This decreased competition had to be counterbalanced by considerable efficiencies to pass muster under Section 96 of the Canadian Competition Act. Despite some divergences between the Competition Tribunal and the Federal Court of Appeal, the merger was cleared because of the $29 million per year over ten years of cost savings with an estimated deadweight loss of only $3 million per year. The total surplus analysis was original because it balanced producer surplus (i.e., cost efficiencies) against consumer cost (i.e., expected price increase). The merger analysis using the total welfare standard referred to the Canadian tax system to emphasize that redistribution should be achieved from means other than blocking a pro-efficiency merger.[32]

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[29] Michael Caldecott, "Paradigm or Paradox: Canada's Competition Law Regime in the New Age of Populism", 33 *Canadian Competition Law Review*, 51-99 (2020) (noting that "in the context of the encroachment of populism into antitrust observed in the U.S. and the EU, the compromise between the consumer welfare standard and other policy objectives contained in the *Competition Act* is not necessarily a negative.")

[30] The two largest distributors of propane in Canada announced their merger in 1998. The Competition Commissioner contested the merger, but on August 30, 2000, the Competition Tribunal approved the merger based because of expected efficiencies. See *Comm'r v. Superior Propane Inc.*, 2000 Comp. Trib. 15. On appeal in 2001, the Federal Court of Appeal asked the Competition Tribunal to revise its analysis of the anticompetitive effects of the merger. See *Canada (Commissioner of Competition) v. Superior Propane Inc. and ICG Propane Inc.,* [2001] 3 F.C. 185. The Competition Tribunal's second order on April 4, 2002, approved again the merger. See *Comm'r v. Superior Propane Inc., 2000 Comp. Trib*. 16. Finally, the Federal Court of Appeal confirmed the merger on January 31, 2003. See *Canada (Comm'r) v. Superior Propane Inc. and ICG Propane* Inc., [2003] F.C. 529.

[31] Thomas W. Ross, Ralph, A. Winter, "The Efficiency Defense in Merger Law: Economic Foundations and Recent Canadian Developments," 72 *Antitrust Law Journal* 471 (2005) ("the result of *Superior Propane* is a merger law that is close to the method of balancing efficiency and anticompetitive effects favored by most economists."). See Oliver E. Williamson, "Economies as an Antitrust Defense: The Welfare Tradeoffs," 58 American *Economic Review*, 18 (1968).

[32] Thomas W. Ross, Ralph, A. Winter, "The Efficiency Defense in Merger Law: Economic Foundations and Recent Canadian Developments," 72 *Antitrust Law Journal* 471 (2005) ("The *Superior Propane* re-determination decision thus

There is "no other leading jurisdiction that has ever come close to adopting a total surplus standard for the review of mergers," and yet, this analysis is the one mostly recommended by economists because it leads to maximization of growth.[33] Economists praise the total surplus standard as encapsulated in Canadian merger law.[34] This valued feature distinguishes Canadian competition from both U.S. antitrust and European competition law:

> "The primary theoretical difference is the explicit balancing of efficiency gains against non-redistributional anti-competitive effects in Canada (a total welfare approach), whereas the United States and EC simply view efficiencies as one among many factors to be considered in the overall analysis (i.e., consumer welfare is the criterion to be maximized)."[35]

The modernization of Canadian competition law in the 1980s largely stemmed from the Council of Canada's *Interim Report on Competition Policy* of 1969 which emphasized that competition law was about pursuing "the most efficient performance" in terms of optimal resource use (i.e., allocative efficiency) as well as "the recognition of the importance of research, invention and innovation" (i.e., dynamic efficiency).[36]

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leaves Canadian merger law with solid welfarist foundations. In reaching this decision, the Tribunal rejected (…) non-welfarist arguments on the part of the Commission.")

[33] Ibid, p.497. See Darwin V. Neher, David M. Russo, J. Douglas Zona, "Lessons from the Superior-ICG Merger", 12(2) *George Mason Law Review*, (2003) pp.289-318, 314 ("The total surplus standard requires a balancing of all the relevant economic effects of a proposed merger. Such a balance implies that different effects must be put into similar metrics so that they can be compared— either formally through quantification in common units like dollars, or informally through qualitative judgment.")

[34] See Darwin V. Neher, David M. Russo, J. Douglas Zona, "Lessons from the Superior-ICG Merger", 12(2) *George Mason Law Review*, (2003) pp.289-318, 291 ("most economists would agree that merger policy (and competition policy more generally) should be focused on increasing economic efficiency. Most antitrust economists would further argue that merger and competition policy should be focused on increasing total surplus, thus distributional effects, or transfers from one member of society to another, should not be considered."); Michael J. Trebilcock, Ralph A. Winter, Paul Collins, Edward M. Iacobucci, *The Law and Economics of Canadian Competition Policy* (Toronto: University of Toronto Press, 2002) 40 ("Competition policy is appropriately viewed as an instrument to maximize efficiency, or the 'total surplus' gained by market participants. The use of competition policy to achieve not merely efficiency but an equitable distribution of wealth would result in an excessively complex and non-transparent set of legal rules that would be both uncertain and arbitrary—being determined by the opinions and values of whoever was sitting on the tribunal in a particular case. Government instruments such as taxes and social insurance are much better suited for the goal of distributing income equitably.").

[35] Neil Campbell, Michael J. Trebilcock, "Comparative Analysis of Merger Law: Canada, the United States, and the European Community, 15 *World Competition* pp.5-37 (1992) p.35

[36] See Economic Council of Canada, *Interim Report on Competition Policy,* (Ottawa: The Queen's Printer, 1969) https://publications.gc.ca/collections/collection_2018/ecc/EC22-12-1969-eng.pdf (noting at p.19 that "the efficiency of resource use must, however, be seen in dynamic as well as static terms, which implies among other things the recognition of the importance of research, invention and innovation…")

See also John S. Tyhurst, "50 Years On: The Influence of the Economic Council of Canada's *Interim Report* on Competition Policy", 32 *Canadian Competition Law Review*, pp.122-146 (2020)

Canadian competition law was modernized mainly through adoption of the total welfare standard. Leading officials worldwide continuously praise the total welfare standard in Canadian competition law. For instance, FTC Commissioner Christine Wilson has recently suggested that the U.S. should adopt a total surplus standard to emulate Canada's efficiencies defence, which would "*better capture dynamic efficiencies*" and promote the spread of "*innovations and cost-saving measures*":

> "We should consider the experience of other jurisdictions that apply the total welfare standard. It has been noted that the welfare standard employed in Canada lies somewhere between a consumer welfare and a total welfare standard. The 1986 Competition Act of Canada expressly provides an efficiencies defense for mergers that may increase prices for consumers. Their experience could be instructive."[37]

Second, the reforms would depart from the Canadian antitrust tradition. Canada was the first major nation to adopt antitrust legislation with the Anti-Combines Act of 1889.[38] Canada modernized its competition law in 1986 and has embraced favored economics and empirical analysis over a populist approach against corporate bigness. The suggested reforms of the Competition Act would significantly depart from the total welfare standard and the long tradition of integrating sound economics into Canadian competition enforcement.[39] The result would be to join a chorus of foreign policymakers who designed regulations targeting large and innovative companies at a considerable cost to national competitiveness and Canadian consumers due to Canada's "small market economy."[40]

Third, the reforms would generate litigation risks for the Competition Bureau through increased judicial review of administrative decisions. In Canada, only a handful of mergers are contested before the Competition Tribunal. For instance, between 1986 and 2003, only three mergers were concluded "through contested proceedings." However, to speed up enforcement, the proposal limits due process and adopts a less robust economic analysis in favor of per se rules of illegality. With the push to speed up competition enforcement, due process may be limited, and economic analysis may become cursory, if not inexistent. Expedited justice often contradicts due process and the defendant's rights. Canadian courts have long recognized that "the more the process provided for, the function of the tribunal, the nature of the decision-making body, and the determinations that must be made to reach a decision resemble judicial making, the

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[37] Christine S. Wilson, "Welfare Standards Underlying Antitrust Enforcement: What You Measure is What You Get" (Luncheon Keynote Address delivered at the George Mason Law Review 22nd Annual Antitrust Symposium, Arlington, VA, February 15, 2019): https://www.ftc.gov/system/files/documents/public_statements/1455663/welfare_standard_speech_-_cmr-wilson.pdf

[38] See, more generally, Michael Trebilcock, Francesco Ducci, "The Evolution of Canadian Competition Policy: A Retrospective," 60(2) *The Canadian Business Law Journal*, (2018); Thomas W. Ross, "Introduction: The Evolution of Competition Law in Canada," 13 *Review of Industrial Organization*, pp.1-23 (1998)

[39] Marcel Boyer, Thomas W. Ross, "The Rise of Economics in Competition Policy: The Canadian Perspective", 50(5) *Canadian Journal of Economics*, pp.1489-1524 (2017) ("the result is a Canadian law that generally reflects best practices and relatively sophisticated economic thinking…Canada has now the strongest efficiency defense of mergers among OECD countries.")

[40] Ibid, p.60.

more likely it is that procedural protections closer to the trial model will be required by the duty of fairness."[41] These two factors—i.e., a weakened right for defendants for the sake of hasty enforcement and a cursory economic analysis for the sake of per se rules of illegality and questionable presumptions—may generate considerable litigation risks.

The consultation paper notes that "competition law enforcement, in most cases, conducted ex post facto and dependent on a plethora of economic evidence, does not generally provide a rapid response to urgent marketplace issues." The government must bear in mind that changes that would lead to disregard for the "plethora of economic evidence" may unduly violate the defendants' rights, and represent an excessively hasty intervention in "dynamic digital markets."[42]But procedural fairness will nonetheless require the Competition Bureau and the Competition Tribunal to maintain the need for full consideration of the defendant's arguments regarding efficiency and innovation. Otherwise, Canadian courts may overturn their decisions.

Indeed, by pursuing reforms that may excessively speed up the process of imposing administrative decisions by the Competition Bureau, the Canadian government may very well increase litigation risks with "quick-look rules" that square poorly with due process and complex economic analysis.[43] The consultation paper seeks "ways to expedite litigation before the Tribunal and courts" but unfortunately suggests that "the addition of more civil forms of enforcement (such as through per se civil prohibitions…), as an alternative or complement to cumbersome or potentially undesired criminal enforcement, may also be worth exploration."[44] Such a misguided approach epitomizes the litigation risks described since per se prohibitions frustrate the due process and ignore complex economic analysis.

Consequently, companies allegedly violating the Competition Act may have a greater chance of reversing the administrative decisions of the Competition Bureau both before the Competition Tribunal and the appellate courts. These litigation risks have already materialized in Europe with the recent *Intel* and *Qualcomm* judgments reversing fining decisions from the European Commission because of the weakness of the economic analysis.[45] This trend is also illustrated in America with the FTC decision about Illumina and the court order related to Meta's acquisition of Within.[46]

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[41] *Baker v. Canada (Minister of Citizenship & Immigration),* [1999] 2 S.C.R. 817, 23 (Can.), citing Old St. Boniface *Residents Ass'n Inc. v. Winnipeg (City),* [1990] 3 S.C.R. 1170; *Syndicat des employes de production du Quebec & de l'Acadie v. Canada (Human Rights Comm'n),* [1989] 2 S.C.R. 879 (Can.).

[42] MISED, *The Future of Competition Policy in Canada*, https://ised-isde.canada.ca/site/strategic-policy-secto/sites/default/files/attachments/2022/The-Future-of-Competition-Policy-eng_0.pdf p.51

[43] More generally, see OECD, Recommendation of the Council on Transparency and Procedural Fairness in Competition Law Enforcement", https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0465 (2022) (recommending, among others, that competition authorities "Inform parties and offer them opportunities to engage meaningfully in the competition law enforcement process, with due regard to the effectiveness of the investigation…")

[44] Ibid.

[45] See Judgement of the General Court of 26 January 2022, *Intel Corporation Inc. v European Commission*, ECLI:EU: T:2022:19; Judgment of the General Court of 15 June 2022, Qualcomm v. Commission, ECLI:EU: T:2022:358.

[46] Federal Trade Commission, *In the Matter of Illumina, Inc. Grail, Inc.*, Docket No.9401, September 9, 2022; U.S. District Court, *FTC v Meta Platforms Inc.,* N. D. Cal. (2023)

Fourth, the consultation seems to deploy the popular, yet misguided, rhetoric of integrating so-called "labor effects" into competition analysis. This means that mergers that could reduce the number of jobs thanks to productivity gains and scale economies could become considered as anti-competitive as they would violate an amended Competition Act.[47] The consultation nevertheless notes that the integration of such effects runs counter to the Schumpeterian process of creative destruction which underpins innovation. Indeed, the consultation notes:

> "In a paper commissioned by Innovation, Science and Economic Development Canada, economist Marcel Boyer notes various challenges and pitfalls of applying competition law to labour markets. These include how to integrate the role of technological change and "creative destruction", which will inevitably have an adverse effect on certain jobs, into the analysis."[48]

Despite this cautionary note, the Ministry seems nevertheless determined to reform the Competition Act by integrating the so-called "labor effects" irrespective of the unintended consequences of such integration on innovation:

> "It is worth considering whether amendments to the Act could give labour a more central role in competition analyses. This could include, for example, modifying the Act's purpose clause; the addition of a consideration in the competitive effects test in s. 93 of the Act that would expressly consider monopsony power and labour effects; or modification of the efficiencies defence to address employment-based efficiencies more directly."[49]

Taking "labor effects" into consideration in antitrust analysis would also mean that the monopsony narrative, exaggerated and overblown, would be integrated into Canadian antitrust analysis even though it is more myth than reality.[50] Moreover, as is widely acknowledged, Canada suffers from weak labor productivity. Treating mergers that boost labor productivity as problematic would lead to lower productivity growth, higher prices for consumers and reduced international competitiveness.

The consultation similarly reiterates the baseless argument that labor market concentration leads to lower wages. This claim contradicts the empirical evidence which demonstrates that, on average, "workers earn more in large establishments than they do in small ones." [51] Consequently, one could legitimately argue that policymakers should encourage labor market concentration as larger companies tend to offer higher workers' compensation.

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[47] Joe Kennedy, "Monopoly Myths: Is Concentration Eroding Labor's Share of National Income? (ITIF Report, October 2020), https://www2.itif.org/2020-monopoly-myths-share.pdf

[48] MISED, *The Future of Competition Policy in Canada*, https://ised-isde.canada.ca/site/strategic-policy-sector/sites/default/files/attachments/2022/The-Future-of-Competition-Policy-eng_0.pdf p.28

[49] Ibid, p.29.

[50] Rob Atkinson, "The Myth of Local Labor Market Monopsony", *Innovation Files*, May 7, 2021, https://itif.org/publications/2021/05/07/myth-local-labor-market-monopsony/; Julie Carlson, "Monopolies Are Not Taking a Fifth of Our Wages", (ITIF Report, May 2022), https://www2.itif.org/2022-monopoly-myths-wages.pdf

[51] Ibid.

Fifth and finally, the reforms would embrace a precautionary approach to antitrust in highly dynamic markets, thereby creating a rift between a risk-taking entrepreneurial culture and a risk-averse regulatory onslaught.[52] Precautionary antitrust opposes dynamic antitrust.[53] For instance, prohibiting self-preferencing with ex ante rules would lead to the prohibition of a common business practice that is pro-competitive and pro-innovative without harm other than to less efficient competitors.[54] For instance, the consultation states:

> "It is still fiercely debated whether digital markets and their 'Big Tech' industry leaders present new or unique challenges under the unilateral conduct provisions of the Act. What seems apparent, however, is that some issues previously identified with these provisions may be of even greater concern in the digital era. For instance, a company that controls a platform may also compete on it, and may push users towards purchasing its own products and services, rather than those offered by rivals."[55]

Furthermore, it is evident that the Ministry intends to bar ex ante self-preferencing, so that platforms cannot push their own goods and services above those of third-party sellers. The notion that platforms should be impartial and that the competition they impose on their platforms vis-à-vis third parties should be eradicated is economically harmful and incorrect. A limitation on self-preferencing is detrimental because it prevents platforms from inventing and competing to provide customers with products and services they appreciate. For example, if digital platforms are unable to market their payment systems, incumbents in the banking sector

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[52] See also, Anthony Niblett, Daniel Sokol, "Up to the Task. Why Canadians don't need sweeping changes to competition policy to handle Big Tech", (Mc Laurier-Institute Report, November 2021) https://macdonaldlaurier.ca/big-isnt-bad-tougher-competition-policy-big-tech-solution-search-problem/ (noting at p.11 that "Case law in Canada has largely reflected this economically oriented view, typically focusing on lower prices, increased quality, and other non-price factors, and innovation….But much of the push to regulate large digital players around the world seems to be based on the idea that competition authorities should focus on different—often non-economic—objectives and priorities.")

[53] See, more generally, Aurelien Portuese, "Precautionary Antitrust: The Changing Nature of Competition Law", 17 *Journal of Law, Economics & Policy* 548 (2022); Aurelien Portuese, "Principles of Dynamic Antitrust: Competing Through Innovation", (ITIF Report, June 2021), https://www2.itif.org/2021-principles-dynamic-antitrust.pdf ; Aurelien Portuese, "European Competition Enforcement and the Digital Economy: The Birthplace of Precautionary Antitrust", *The Global Antitrust Institute Report on the Digital Economy*, (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3733715 ; Aurelien Portuese, "The Digital Markets Act: European Precautionary Antitrust", (ITIF Report, May 2021), https://www2.itif.org/2021-digital-markets-a4.pdf ; Aurelien Portuese, "The Digital Markets Act: The Path to Overregulation", Competition Policy International, June 13, 2022, https://www.competitionpolicyinternational.com/the-digital-markets-act-the-path-to-overregulation/; Aurelien Portuese, "The Digital Markets Act: Precaution Over Innovation", Epicenter, June 2021, http://www.epicenternetwork.eu/wp-content/uploads/2021/06/Digital-Markets-Act-precaution-over-innovation-final.pdf ; Aurelien Portuese, "Precautionary Antitrust: A Precautionary Tale in European Competition Policy", in Klaus Mathis (Ed.) Law and Economics of Regulation, (Springer Book, 2021) https://www.springerprofessional.de/precautionary-antitrust-a-precautionary-tale-in-european-competi/19102432

[54] Aurelien Portuese, "'Please, Help Yourself': Toward a Taxonomy of Self-Preferencing", (ITIF Report, October 2021), https://www2.itif.org/2021-self-preferencing-taxonomy.pdf

[55] MISED, *The Future of Competition Policy in Canada*, https://ised-isde.canada.ca/site/strategic-policy-sector/sites/default/files/attachments/2022/The-Future-of-Competition-Policy-eng_0.pdf

will gain from the suppression of the intense competition that platforms impose through their innovative offerings. Customers would lose, while entrenched and lagging competitors would win.

This assertion is also inaccurate from an economic standpoint, as platforms earn most of their revenue from third-party merchants. Due to the anticipated restriction on self-preferencing, Amazon can abandon its Amazon Basics items, as already envisaged due to misguided bans on self-preferencing, but it cannot abandon third-party sellers.[56] Thus, platforms have little incentive to discriminate against third-party sellers, as they are the source of revenue and contribute to the platform's customer attractiveness. The Ministry would err if it followed the chorus of politicians across the world who aim to restrict self-preferencing without properly comprehending the pro-growth and pro-consumer consequences of this prevalent corporate practice.

Ex ante rules of precautionary antitrust such as the prohibition of self-preferencing should remain outside the envisaged reforms if Canada wants to implement a pro-growth and pro-consumer competition policy. What larger markets could afford as self-inflicted regulatory costs, Canada cannot afford because of its marginal role in the world economy. Reforming the administration and enforcement of competition policy in Canada is possible, but reforming the Competition Act as suggested by the consultation paper is undesirable. It would generate unintended consequences on Canadian productivity and the welfare of Canadian consumers and depart from well-regarded standards of Canadian competition law.

RUSHED AMENDMENTS ARE FLAWED GOVERNANCE

The 2022 amendments to the Competition Act received Royal Assent on June 23, 2022. These amendments will come into force on June 23, 2023. Therefore, before the first round of amendments is ever implemented, let alone assessed, the Canadian government wants to embark on a new round of amendments. This hasty regulatory approach can only generate unintended consequences since the second round of amendments is supposed to complement the first round of amendments whose effects remain unknown.

For instance, the 2022 amendments expanded the scope of anti-competitive conduct to include predatory, exclusionary, or disciplinary conduct that negatively impacts a competitor and any conduct that has an "adverse effect on competition." How this expanded scope of anti-competitive conduct will be interpreted and whether additional amendments are necessary remains to be seen. It is too soon to conclude that new amendments are needed before these changes enter into force.

It is urgent to wait: New amendments cannot and should not be introduced, let alone take effect, unless the Government and the Competition Bureau have completed a review of the first round of amendments.

It is even more necessary to wait since the proposed reforms directly transplant provisions from the EU's Digital Markets Act (DMA). But Canadian experts have cautioned against such inspiration. For instance, Prof. Edward Iacobucci from the University of Toronto, commissioned by Sen. Howard Wetston, argued

[56] Jason Del Rey, "Amazon executives have discussed ditching Amazon Basics to appease regulators", Vox, July 15, 2022, https://www.vox.com/recode/2022/7/15/23219277/amazon-basics-private-label-antitrust-concessions

that the DMA "offers a broad condemnation" of practices that can be "benign" and considered that such "a categorical approach to conduct is misguided."[57]

The so-called "pro-competitive" tools envisaged by the Canadian government are ex-ante rules to regulate competition while embracing a precautionary logic that chokes the process of creative destruction so essential to dynamic competition and the competitiveness of the Canadian economy. The Canadian government should refrain from adopting precautionary antitrust, as illustrated by the DMA and the DMU, and instead stick to dynamic antitrust, as defined by the 1976 Council's Interim Report. We conclude with a few recommendations.

RECOMMENDATIONS

We formulate the following recommendations:

- **Wait:** The Canadian government should not adopt a new round of unnecessary amendments without a due appraisal of the effects (positive and negative) of the first round of amendments adopted in 2022. Reforming for the sake of reforming without considering the unintended consequences of previous regulatory changes is not good governance. Canadian businesses do not need frantic regulatory reforms, they instead need an innovation boost that competition policy cannot offer alone;

- **Change gear:** Competition should not be pursued from a static perspective, but rather from a dynamic perspective. The goal, as aptly described in the 1976 Interim Report, is not to maximize competition through corporate deconcentration and smallness but rather innovation competition where scale and competitiveness are the only effective means for companies to outcompete rivals in a highly competitive global economy;

- **Reject precautionary antitrust:** Ex-ante rules of competition, the reversed burden of proof, and hasty intervention on nascent markets deter innovation and distort competition. Competition policy should remain an enforcement-based policy (i.e., case-by-case analysis) rather than a regulatory policy (i.e., across-the-board prohibition without empirical analysis);

- **Engage in transatlantic competition dialogue:** Canada should be part of the U.S.-EU Joint Competition Dialogue to coordinate its enforcement priorities and analysis without attempting to copycat foreign regulations that are highly problematic from an efficiency standpoint.

CONCLUSION

There is no evidence of a need to amend the Competition Act in 2023. The 2022 amendments first need to be implemented and assessed, and any further changes envisaged should not rest upon flawed assumptions borrowed from foreign experiments such as the EU's DMA and the UK's DMU.

[57] Edward M. Iacobucci, "Examining the Canadian Competition Act in the Digital Era", September 27, 2021, https://sencanada.ca/media/368377/examining-the-canadian-competition-act-in-the-digital-era-en-pdf.pdf

Transplanting those regulatory experiments into Canada would harm the economy disproportionately because it is less indispensable to global companies than the European or American economies. Instead of creating the conditions for a regulatory "Titanic," the Canadian government should right the ship with an alternative strategy that prioritizes dynamic innovation over static competition.

Canadian competitiveness is impeded by insufficient consolidation, not excessive consolidation, so proposals to deconcentrate further are inconsistent with its current economic needs. The Canadian government must pause and develop an innovation strategy rather than competition amendments so Canadian companies can build and develop the dynamic capabilities necessary to scale up and compete effectively in rapidly changing global markets.

Thank you for your consideration.

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