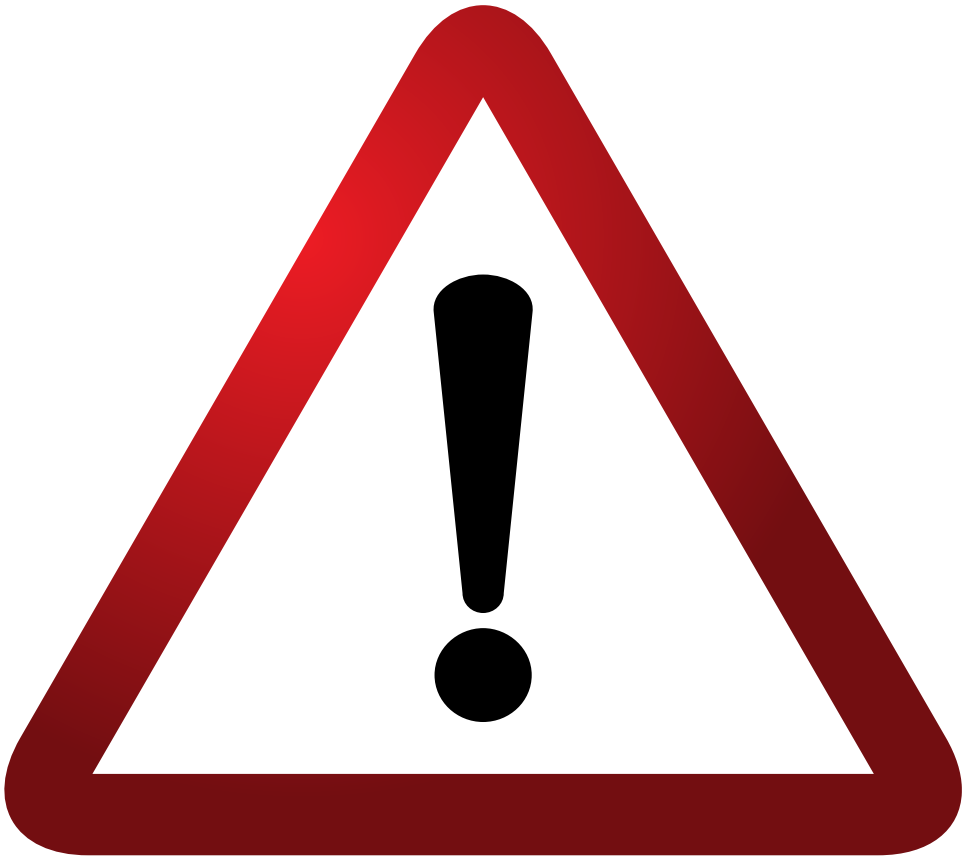

BEWARE *EX ANTE* REGULATION: INTRODUCING "CUT AND PASTE" *EX ANTE* REGULATIONS IN CANADA AGAINST SELECT BIG TECH COMPANIES IS BAD ECONOMIC AND LEGISLATIVE POLICY

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TechREG CHRONICLE
APRIL 2023

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By John Pecman & Huy Do

This paper examines the international and Canadian debate around *ex ante* regulations for Big Tech platform companies. The paper explores the need for and costs associated with *ex ante* regulation and concludes that pursuing such regulations in Canada would be ill-advised. While some argue that ex ante regulation is necessary to prevent market failure and protect incentives for innovation, this paper contends that no empirical evidence has been offered with respect to actual market failure. The paper provides a brief overview of international policy developments aimed at addressing vertical issues stemming from the network effects and scale economies in concentrated digital platform markets. These include the European Union's *Digital Markets Act*, the United Kingdom's *Digital Code of Conduct*, the United States' *American Innovation and Choice Online Act*, and the G7's Digital Policy. In addition, it examines recent Canadian competition policy developments, focusing on calls for *ex ante* regulation of Big Tech platform companies. The paper argues that the expressed goals of *ex ante* regulation are often amorphous and that there are significant costs associated with its implementation, as well as potential legal hurdles in the Canadian context. Moreover, the current ex post enforcement framework of the *Competition Act*, with some tweaking, is capable of protecting the competitive process in Canada. In light of these factors, pursuing *ex ante* regulations in Canada would be ill-advised and potentially unconstitutional.

01
INTRODUCTION

Nearly 25 years ago Google and Amazon were at their infancy, Facebook and the Apple App Store had yet to be developed, and Microsoft was engaged in its epic antitrust battle against the U.S. Department of Justice for bundling its operating system and web browser applications. Since then, these so-called digital "gatekeepers" have introduced a vast number of innovative products and services that benefit consumers and businesses. At the same time, antitrust policy concerns regarding vertical discrimination have again come to forefront following successful enforcement actions in the European Union ("EU") and an increase in speculation that the large digital intermediation platforms might be harming competition by favoring their own content over that of their competitors.

Despite its successes in the courts tackling alleged anticompetitive behavior by large digital platforms and before any market failure has occurred, the EU has introduced experimental *ex ante* regulations with the *Digital Markets Act* (the "DMA"), which targets a few large U.S. digital platform companies by, for example, prohibiting their use of certain vertical restraints, such as self-preferencing practices that are said to favor their own downstream products at the expense of competitors. Regulations can be an useful policy instrument to assist in the functioning of markets and the stability of an open market economy. However, poorly designed and executed *ex ante* regulations have been proven to stifle innovation and consumer welfare. With the introduction of the DMA, the EU has now set a dangerous precedent that may foreshadow increasing government sector regulation worldwide, which risks impeding future technological progress in the digital sector.

This paper will: (1) provide a brief overview of the international policy developments in response to the vertical issues stemming from the network effects and scale economies in concentrated digital platform markets; (2) provide a summary of the Canadian competition policy developments; (3) examine the need for, and costs associated with, *ex ante* regulation and (4) explain why *ex ante* competition regulation of the digital sector is ill-advised in the Canadian context. The focus of the paper will, however, be on the Canadian policy debate and the need, if any, to amend the current abuse of dominance provisions under the *Competition Act*, (the "Act") to align itself in whole, or in part, with the *ex ante* regulations introduced by the DMA.

The European sector regulations were developed in large part because it was the EU's view that the lengthy competition law investigations and subsequent judicial reviews of digital platforms were too slow to keep up with the fast-moving digital economy. Many are no doubt familiar with Adam Smith's famous term the "invisible hand," which he used to describe how free markets incentivize individuals, working in their own self-interest, to produce efficiently what is necessary for society. The paper raises the concern that DMA-like *ex ante* prohibitions, which require certain digital platforms to collaborate with their competitors, would appear to place handcuffs on Adam Smith's metaphorical hand for the sake of the competition authority's inability to act more quickly under existing competition law processes. Before other policymakers follow the EU's lead, greater consideration should be given to the cost of *ex ante* regulation and the availability of other legal tools and mechanisms to speed up competition law investigation and adjudication in digital markets. Failing to do so risks significant distortionary effects on market incentives and output that would arise from sector regulation.

02
OVERVIEW OF KEY INTERNATIONAL POLICY DEVELOPMENTS

There have been tremendous policy debate and legislative initiatives internationally when it comes to competition law reform, including in relation to adoption of *ex ante* regulation. A more fulsome summary and discussion of the significant international developments has been canvassed by the OECD in its paper *Ex Ante Regulation and Competition in Digital Markets.*[2] Below are summaries of significant developments in Europe and the U.S., being the jurisdictions that are often looked upon by competition policymakers in other jurisdictions, such as Canada.

A. EU – DMA

The EU's DMA, which entered into force on November 1, 2022, is considered an *ex ante* instrument that seeks to preemptively fix digital markets in anticipation of harm. Its regulations are inspired by the EU's past and current antitrust cases against large online platforms.[3]

2 OECD (2021) Ex Ante Regulation and Competition in Digital Markets, OECD Competition Committee Discussion Paper.

3 EU Digital Markets Act: next steps and long-term outlook, December 7, 2022.

The DMA seeks to foster fairer competition and contestability in digital markets and identifies gatekeepers who must comply with its obligations and prohibitions. Gatekeepers are defined as "large platforms providing core platform services," such as online search engines, app stores, and messenger services.

Gatekeepers must comply with the obligations that are set out in the DMA, specifically, the obligations set out in Articles 5, 6, and 7. Additionally, there are many other obligations that gatekeepers will have to comply with, including:

· Prohibition of self-preferencing: the DMA forbids gatekeepers from treating their own services and products more favorably in ranking, indexing, and web-crawling
· Prohibition of most-favored-nation clauses: Under Article 5(3), gatekeepers are prohibited from imposing most-favored-nation clauses on their business users
· Prohibition of anti-steering practices: gatekeepers must permit businesses using their intermediation services to promote offers to end users free of charge and conduct transactions with these users without relying on the gatekeepers' services
· Restriction on gatekeepers' use of data: the DMA places limitations on how gatekeepers can use the data they collect through their activities
· Access to gatekeepers' data: gatekeepers must provide end users, business users, and competitors with access to different types of data

B. UK – Digital Code of Conduct

On November 17, 2022, the United Kingdom's government confirmed that the Digital Markets, Competition and Consumer Bill would be brought forward in 2023. Among its reforms to competition and consumer law in the UK, this bill would contain several significant wide-ranging reforms to the regulation of digital markets and the existing competition and consumer law regimes.

With part of the focus on a pro-competitive regime,[4] the Digital Markets Unit, within the Competition and Markets Authority, designates companies that have a Strategic Market Status ("SMS").[5] Additional information on the criteria that will determine whether a company has an SMS will be included in legislation and the Digital Markets Unit will also be required to publish further guidance. Once designated, companies will be subject to regulation, including through "an enforceable code of contract; and mandatory reporting requirements for transactions meeting certain thresholds."[6]

Conduct requirements will be outlined in each code of conduct and tailored to the specific SMS company at issue. The code of conduct is still being finalized and, as such, further details on the proposed regime and the extent of regulatory authority that the Competition and Markets Authority will possess remains to be seen; however, such code may include prohibiting SMS companies from applying discriminatory terms and conditions, bundling, or tying services, and leveraging other parts of their business to entrench their power in a designated activity.[7]

"Conduct requirements will be outlined in each code of conduct and tailored to the specific SMS company at issue

C. U.S. – American Innovation and Choice Online Act ("Klobuchar Bill")[8]

While there have been numerous legislative initiatives in the U.S. with respect to antitrust, the Klobuchar Bill, which was sponsored by Democratic Senator Amy Klobuchar, appears to have gained the most traction, being co-sponsored Republican Senator, Chuck Grassley. That said, passage of this bill remains uncertain owing to other legislative priorities.[9]

Among other things, the Klobuchar Bill would prohibit *ex ante* certain large online platforms from engaging in the following conduct:

4 Freshfields Bruckhaus Deringer, "UK competition, consumer and digital regulation reforms," October 12, 2021.

5 Ashurst Competition Law Update, UK, "UK Government Update on Digital Markets, Competition and Consumer Bill," November 22, 2022.

6 *Ibid.*

7 *Ibid.*

8 See American Innovation and Choice Online Act, S. 2992, 117th Cong. (as reported by S. Comm. On the Judiciary, March 2, 2022), available at: www.congress.gov/bill/117th-congress/senate-bill/2992/text.

9 George L. Paul, Daniel Sokol and Gabriela Baca, "Key Developments in the United States," Global Competition Review, November 25, 2022, available at: https://globalcompetitionreview.com/guide/digital-markets-guide/second-edition/article/key-developments-in-the-united-states.

· self-preferencing;
· unfairly limiting the availability of competing products on the platform;
· discriminatory application or enforcement of the platform's terms of service; and
· restricting access to platform data generated by the activity of competing business users.

In addition, the Klobuchar Bill would restrict a platform's use of non-public data obtained or generated on the platform.

D. G7 Digital Policy

Competition authorities from Canada, France, Germany, Italy, Japan, the United Kingdom, and the U.S. attended the 2021 G7 Summit held in the UK, at which digital markets were a key agenda item. The competition authorities published a compendium describing the "high level of commonality in the approaches that authorities are taking to address competition concerns" as well as setting out proposals for strengthening enforcement.[10]

An issue highlighted in the compendium is concern over the enforcement of digital mergers. Nonetheless, it has also recognized that competition authorities have become more active in challenging and remedying proposed mergers in the digital markets.[11] Algorithms present increasingly complex issues, but the G7 competition authorities are being more involved in the understanding of this space through the creation of technical teams with specialized knowledge. One of the most important outputs of the 2021 G7 Summit is the emphasis on global cooperation for a coordinated response to digital markets. The question that remains is how cross-border cooperation among the G7 countries will play out. As seen, the EC proposed the DMA, the UK proposed tailored rules for select large digital players, and the U.S. proposed more stringent enforcement under the Klobuchar Bill.

03
CANADIAN POLICY DEBATE

The policy debate over competition law reform in on-going and evolving in Canada. While not strictly focused on competition policy, the Canadian government's announcement of its Digital Charter foreshadowed the initiatives that were to follow, namely Senator Wetston's consultation on competition policy; limited amendments to the Act through the *Budget Implementation Act*; and, most recently, Innovation Science and Economic Development Canada's ("ISED") *The Future of Competition Policy in Canada* ("ISED Consultation Paper").

A. Digital Charter

Announced in June 2022, Canada's Digital Charter is a framework outlining Canadians' rights and expectations in the digital world. It includes 10 principles, such as universal access, safety and security, and control and consent.[12] The Charter also includes a proposed Digital Bill of Rights and several measures to protect privacy and data, including Bill C-11, which updates Canada's privacy laws for the digital age.

B. Senator Wetston's Consultation on Competition Policy

In 2019, Senator Howard Wetston, a former head of the Canadian Competition Bureau (the "Bureau") and former Federal Court Justice with deep experience and interest in competition policy, launched a public consultation on the modernization of the Act to address concerns about the effectiveness of the existing competition policy framework in the face of digital markets. The consultation sought input from stakeholders on how to promote competition, address new forms of anti-competitive conduct, and adapt competition law to the rapidly changing technological environment.

As part of the consultation process, Professor Edward M. Iacobucci of the University of Toronto Faculty of Law was commissioned to prepare a discussion paper. This discussion paper, titled *Examining the Canadian Competition Act in the Digital Era*, analyzed the distinctive features of digital markets and highlighted possible amendments to the Act.[13] Among other things, the discussion paper addressed the need for technologically neutral competition law; the pow-

10 Freshfields Bruckhaus Deringer, "Tackling the global challenges of digital markets – key issues from the G7 competition authorities meeting in London", December 13, 2021.

11 *Ibid.*

12 "Canada's Digital Charter: Trust in a digital world" (August 30, 2022), online: Government of Canada https://ised-isde.canada.ca/site/innovation-better-canada/en/canadas-digital-charter-trust-digital-world.

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

ers of the Bureau to address anti-competitive conduct in the digital economy; the "abuse of dominance" provision, including a new "digital platform definition"; data access and privacy issues; and international cooperation on competition law in the digital era. The discussion paper recommended modest changes to the Act, including prohibiting wage-fixing and no-poaching agreements; amending section 96 of the Act so that the "Commissioner need not rely on quantitative evidence to establish a probably substantial lessening or prevention of competition from a merger";[14] and amending the abuse of dominance provisions so that there is better clarification that anti-competitive acts do not require a negative effect on a competitor, demystifying the relationship between subsections 79(1)(b) and 79(1)(c), and increasing Administrative Monetary Penalties.

The discussion paper's findings provided important insights into how Canada can maintain and enhance competition in the digital age. For example, it highlights that digital markets are particularly prone to the emergence of firms with market power, which can set prices, quality, or other conditions while being partially shielded from intense competitive pressure. Despite this, the discussion paper argues that the Act can still be effective in addressing these concerns, though certain changes may be required to account for the unique features of digital markets. It is important to note that the discussion paper does not advocate for utility-like *ex ante* regulations for digital markets. Overall, it stresses the importance of ongoing dialogue and analysis in adapting competition law to the changing economic landscape. The insights gained during Senator Wetston's consultation will be invaluable in promoting economic welfare, innovation, and productivity in Canada.

More than 25 submissions, including a detailed submission from the Bureau, were received in response to Senator Wetston's consultation. Copies of these submissions can be found here.

> ***As part of the consultation process, Professor Edward M. Iacobucci of the University of Toronto Faculty of Law was commissioned to prepare a discussion paper***

C. The Bureau's Submission on Digital Markets

The Bureau's submission to Senator Wetston included 35 wide-ranging recommendations that, if implemented, would fundamentally reshape competition enforcement in Canada.[15] Although Senator Weston's consultation was focused on the digital economy, the Bureau's recommendations were, for the most part, more general in nature – applying equally to the digital economy and traditional markets. According to the Bureau, its recommendations were intended to "[modernize] the Act so that Canadian consumers and businesses can prosper in a competitive and innovative marketplace"[16] and provide the Commissioner with "the right tools to ensure that individuals and companies comply with the Act across a wide range of economic activity."[17] Broadly speaking, the Bureau's recommendations dealt five broad topics, namely (1) merger review, (2) abuse of dominance, (3) competitor collaborations, (4) consumer protection / deceptive marketing and (5) litigation. Significantly, the Bureau did not call for utility-like *ex ante* regulation, whether in the digital platform context or otherwise. In fact, the Bureau stated that being "big" is not a problem under the Act, as businesses can gain market share through the competitive process.[18]

D. Submissions With Respect to Ex Ante Regulation

While the Bureau's legislative wish list did not call for *ex ante* regulation of Big Tech, other submissions provided to Senator Wetston have suggested that *ex ante* regulation be explored or adopted. For example, Vass Bednar (Executive Director of McMaster University's Master of Public Policy in Digital Society Program) submits:

> Further study is required in order to consider revisions specific to digital markets in a Canadian context. … Changes could be made to section 78 of the Act to name anticompetitive conduct that is specific to digital markets.
>
> In June, the U.S. House Democrats introduced five antitrust bills as part of an antitrust agenda under "A Stronger Online Economy: Opportunity, Innovation, Choice." These include: the "American Innovation and Choice Online Act," to … *prohibit discriminatory conduct by dominant platforms, including a ban on self-preferencing and picking winners and losers online*;

14 *Ibid*. at page 33.

15 Examining the Canadian Competition Act in the Digital Era" (February 8, 2022), online: Government of Canada https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/promotion-and-advocacy/regulatory-adviceinterventions-competition-bureau/examining-canadian-competition-act-digital-era.

16 *Ibid.*

17 *Ibid.*

18 *Ibid.*

> the "Ending Platform Monopolies Act," to eliminate the ability of dominant platforms to leverage their control over across multiple business lines to self-preference and disadvantage competitors; and the "Platform Competition and Opportunity Act," prohibiting acquisitions of competitive threats by dominant platforms, as well acquisitions that expand or entrench the market power of online platforms.[19]

Similarly, Keldon Bester (independent consultant and researcher), once again referencing the U.S., calls for more prescriptive competition rules, including *ex ante* civil *per se* provisions, instead of relying on case-by-case determinations:

> In the United States, there is a building discussion on reviving the role of competition authorities in addressing unfair methods of competition, a core but underutilized authority held by the Federal Trade Commission ("FTC"). Sandeep Vaheesan points out three potential policy areas for FTC rulemaking to clarify the bounds of fair competition, including a ban on exclusive dealing and exclusionary contracts by dominant firms, below-cost pricing by near-dominant firms, and the violation of other existing laws, suggesting examples of environmental and labour, to gain a competitive edge. The merit of each of these and other potential boundaries on unfair competition is worth debating, but Vaheesan's example provides a model of how an expanded competition law could be more prescriptive in addressing conduct determined to be unfair and detrimental to Canadians. *Instead of relying predominantly on case by case determinations, a set of civil per se provisions, for example, could provide greater certainty as to what Canadians consider to be fair competition*. [Footnotes omitted and emphasis added].[20]

Moreover, Vivic Research (an economic consulting firm) submits that:

> Another solution to the indeterminacy problem is to reform the substantive tests associated with the civil provisions so that they are more rule-based, or what some call *per se* tests. Jedlickova describes this approach to evaluating anticompetitive conduct as the deontological approach common to EU law, in contrast to the consequentialist approach employed in Canada and elsewhere. The deontological approach would not require the Commissioner to assess the effects of the conduct. Rather the conduct may be deemed to be anticompetitive based on its character. Assessing conduct based on its characteristics rather than effects avoids the problem of the Tribunal or Commissioner having to weigh the various relevant effects of the conduct. The deontological approach has the added benefit of perhaps being more predictable in general.[21]

On the other hand, other submissions provided to Senator Wetston argue against *ex ante* regulation. For instance, in their submission on behalf of the MacDonald Laurier Institute, Anthony Niblett (law professor at the University of Toronto) and Daniel Sokol (law professor at the USC Gould School of Law) discuss the challenges of competition policy in digital markets, including issues such as economies of scale, self-preferencing, privacy, network effects, and control over data. The authors argue that while there is a need for greater attention to these issues, some of the push to regulate large digital players around the world seems to be based on the idea that "big is bad," which can harm consumers through higher prices, lower quality, reduced product offerings, and a chilling effect on innovation. The authors suggest that Canada's competition law framework is sufficient to deal with anti-competitive behavior, and that radical changes to the Act are not required. Incremental changes such as increasing penalties for abuse of dominance and perhaps allowing private rights of action for section 79 cases may serve to promote and encourage pro-competitive behavior. The authors warn that regulations that restrict integration of digital platforms and affect the ability of platforms to control their data will likely fail to capture the very diverse ways in which digital platforms compete and innovate; and could harm consumers.

E. Budget Implementation Act Reforms to the Act

Bill C-19, also known as the *Budget Implementation Act*, included significant amendments to the Act, expanding its scope, particularly with regards to digital markets. While the intention of these amendments was to promote competition

19 Vass Bednar, "Senator Wetston Response re: *Examining the Canadian Competition Act in the Digital Era Consultation Paper"* (December 15, 2021) at 12, online (pdf): https://static1.squarespace.com/static/63851cbda1515c69b8a9a2b9/t/63d1eaeb7152687ffc0cb574/1674701548598/bednar.pdf.

20 Keldon Bester, "SUBMISSION: Examining the Canadian Competition Act in the Digital Era" (December 15, 2021) at 5, online (pdf): https://static1.squarespace.com/static/63851cbda1515c69b8a9a2b9/t/63d1ec1390984d17ee0f7c30/1674701844128/bester.pdf.

21 Vass Bednar et al, "Study of Competition Issues in Data-Driven Markets in Canada" (January 2022) at 2, online (pdf): https://static1.squarespace.com/static/63851cbda1515c69b8a9a2b9/t/63d1f4b6217f9e441123144e/1674704058295/vivic-research-competition-data-driven-markets-final-report-2022.pdf.

and protect consumers, there are concerns that certain of the amendments may have unintended consequences. For example, the amendments include expanding the scope of the abuse of dominance provisions to explicitly capture conduct intended to have an adverse effect on competition or a selective or discriminatory response to an actual or potential competitor. The amendments also allow private parties to apply to the Competition Tribunal for a remedy arising from alleged abuse of dominance and increase administrative monetary penalties for a first violation by a corporation to up to three times the value of the benefit derived from the conduct or, if such amount cannot be reasonably determined, up to 3 percent of a party's annual worldwide gross revenues. Bill C-19 also includes an explicit prohibition against drip pricing, an expansion of relevant factors when assessing competitive effects of proposed mergers, and a new anti-avoidance provision. Finally, a new criminal provision for wage-fixing and no-poaching agreements, and increased penalties under the existing criminal cartel provisions of the Act, will come into effect in June 2023. In spite of the tweaks proposed to the competition framework, there was no *ex ante* regulation for Big Tech platform companies or markets in the *Budget Implementation Act* as passed.

F. ISED Consultation Paper

On November 17, 2022, the Honourable François-Philippe Champagne, Minister of Innovation, Science and Industry, launched the much-anticipated public consultation for the second round of potential amendments to the Act. In his announcement, Minister Champagne notes that "[t]his consultation is meant to be a wide-ranging review of our ground rules and an exploration of all aspects of the Competition Act and if they are fit for purpose" – particularly in "a modern economy that continues to evolve quickly."[22]

The accompanying ISED Consultation Paper explores a wide range of areas of potential amendments, including with respect to merger review (e.g. efficiencies defense, interim relief, standard for merger remedy); unilateral conduct (e.g. joint dominance, test for remedial order, relevance of intent and/or competitive effects, structural presumptions); competitor collaboration (e.g. algorithmic activity, "agreement" and "intent" in the age of artificial intelligence); deceptive marketing; and administration and enforcement (e.g. market study powers, private enforcement and damages). [23]

Notwithstanding the breadth of potential amendments included in the ISED Consultation Paper, *ex ante* regulation is not an area of focus. In fact, the ISED Consultation Paper spends very little time on *ex ante* regulation, noting:

> The Act does not proactively dictate how to conduct business, allocate resources among stakeholders, or designate entrants, participants, winners, or losers in the free market. Direct management of business conduct, through codified rules or *ex ante* structures or regulation – while tremendously influential to the state of competition – fall generally outside the Act's purview, and in many cases are reserved for provincial and territorial jurisdiction in Canada's federal system.[24]

04

NEED FOR AND ECONOMIC COSTS OF *EX ANTE* REGULATION

As noted by Taladay and Lugard,[25] competition authorities have spent decades advocating for de-regulation in order to remove inefficient government constraints. However, some are now calling for *ex ante* regulation in the name protecting competition (i.e. because of perceived market failures and/or the inability of regulators to curtail alleged anti-competitive behavior through *ex post* enforcement). In this context, Taladay and Lugard cite recommendations from the OECD to articulate the following 10 principles of *ex ante* regulation:

> 1. Good regulation should serve clearly identified policy goals;
> 2. Good regulation should have a sound legal and empirical basis;
> 3. Good regulation should produce benefits that justify costs, considering the distribution effects across society;
> 4. Good regulation should minimize costs and market distortions;

22 "Statement from Minister Champagne on the launch of the Competition Act review" (November 17, 2022), online: *Government of Canada* https://www.canada.ca/en/innovation-science-economic-development/news/2022/11/statement-from-minister-champagne-on-the-launch-of-the-competition-act-review.html.

23 "The Future of Competition Policy in Canada" (22 November 2022), online (pdf): *Government of Canada* https://ised-isde.canada.ca/site/strategic-policy-sector/sites/default/files/attachments/2022/The-Future-of-Competition-Policy-eng_0.pdf.

24 *Ibid.* at 13.

25 John Taladay, Paul Lugard, "The Ten Principles of *Ex ante* Competition Regulation" (November 2, 2022), online: *Competition Policy International* https://www.competitionpolicyinternational.com/the-ten-principles-of-ex-ante-competition-regulation/.

5. Good regulation should promote innovation through market incentives and goal-based approaches;
6. Good regulation should be clear, simple and practical for users;
7. Good regulation should be consistent with other regulations and policies;
8. Good regulation should be compatible with competition, trade, and investment-facilitating principles at domestic and international levels;
9. Good regulation should maintain competitive neutrality; and
10. Good regulation should preserve due process protections.[26]

As we debate the desirability and appropriateness of *ex ante* competition regulations, the first three of these principles are of particular relevance, with the remaining principles coming into play if, and when, concrete *ex ante* regulation proposals are put forward. These three principles require us to consider a number of questions, such as the following: why is *ex ante* regulation necessary? What policy goal does it serve? What are the attendant costs associated with *ex ante* regulation?

Because of allocative inefficiencies generated by sector regulations, competition authorities around the world advocate with governments and policymakers to rely on market forces and competition law oversight unless there is clear evidence of market failure. For example, the Bureau advises government stakeholders as follows:

> ***As we debate the desirability and appropriateness of ex ante competition regulations, the first three of these principles are of particular relevance***

In all sectors of the economy, regulation should only be put in place when there is good evidence to show that, without regulation, policy objectives will not be met. Empirical evidence that demonstrates how the benefits of regulation will outweigh the cost to consumers is the best evidence in most cases.[27]

As set out in a paper prepared by the OECD, "[t]he market power of the digital platforms … results partly from the digital markets' distinctive economic features that, when taken together, *may* lead to a degree of failure of the natural competitive process to deliver competitive outcomes" [emphasis added].[28] It is notable that no empirical economic evidence is offered to support the proposition that there has, in fact, been market failure when it comes to digital markets. One should not confuse enforcement failure with market failure. Until there is credible evidence of real market failure, competition policymakers should exercise caution in resorting to *ex ante* regulation, lest it does more harm than good.

Moreover, some of the concerns articulated with respect to digital markets and platform companies to support the call for *ex ante* competition regulation revolves around policy concerns that have nothing to do with competition. For instance, the UK's Digital Markets Taskforce lists harm to society at large, with impacts on issues of "mental health, media plurality, accuracy of news and democracy,"[29] which appear to go well beyond traditional purposes of competition laws. This leads us back to the first principle cited above, namely that good regulation should serve clearly identified policy goals. A competition law that purports to deal with all of society's concerns (from income inequality, to environment, social and governance, to privacy and to democratic norms) ceases to be a competition law that is justiciable. Rather, it becomes a law revolving around "public interest" that will be extremely difficult – if not impossible – to apply and adjudicate.

In the context of the DMA, the EU's concern about the perceived absence of competition and innovation in digital platform markets was one of the underlying rationales for the introduction of the DMA. The EU's objective was to ensure contestable and fair digital platforms markets with a view to promoting innovation, competitive prices, and high-quality digital products. The EU makes a clear link between competition and innovation to justify its use of *ex ante* regulation in the digital sector.[30] Economist Joseph Schumpeter, famous for his theory of "creative destruction" observed that greater

26 *Ibid.*

27 Competition Bureau Canada, Competition Advocate, Jan. 2020.

28 *Supra* note 2. These distinctive economic features include:
· the presence of strong economies of scale with low or zero marginal costs;
· extreme direct and indirect network effects that make it easier for a platform with a large number of established users to attract more users;
· a data-driven feedback loop which further strengthens the network effects;
· remarkable economies of scope due the role of data as a critical input; and
· conglomerate effects.

29 "A new pro-competition regime for digital markets" (2020) at 19, online (pdf): *Competition and Markets Authority* https://assets.publishing.service.gov.uk/media/5fce7567e90e07562f98286c/Digital_Taskforce_-_Advice.pdf.

30 *Supra* note 2 at 21.

competition reduces post-innovation profits, which reduces the incentive to innovate relative to an industry with fewer competitors. He observed that firms often will receive a greater benefit from innovation when they have a greater share of the market. Several economists have found that there generally appears to be a complex, non-linear relationship between innovation and economic concentration across an industry that resembles an inverted "U."[31] Although the economic literature finds there is an ambiguous impact of concentration on innovation, the EU has taken the mixed economic scholarship on the relationship between product market competition and innovation to decree, unequivocally, that more competition results in more innovation. Overstating the benefits of competition is no way for a government to develop economic policy and to introduce costly sector regulations.

> ***In the context of the DMA, the EU's concern about the perceived absence of competition and innovation in digital platform markets was one of the underlying rationales for the introduction of the DMA***

When appropriate, sector regulations can promote important social goals, including the protection of workers, public health, safety, and the environment. Economists widely recognize that complying with regulations increases both direct and indirect economic costs. The former refers to resources devoted to the administration and compliance of regulations. Indirect costs relate to the costs that result from a regulation that affects market structures or consumption patterns. Such regulations can create barriers to entry, limit competition, and impose opportunity costs.[32] As a result of these entry restrictions, there can be substantial regulatory costs associated with barriers to innovation, decreased choice and quality for consumers, and higher prices that are completely opposite to the stated objectives of the EU's *ex ante* regulations for digital platforms.

The DMA regulatory design, introduced without any empirical evidence demonstrating its net benefit to consumers, favors contestability by smaller firms who may introduce innovation to the market at the risk of limiting innovation and investment by successful, large incumbent firms. A recent study by Narayanan and Lee-Makiyama estimates the economic impacts of the EU shifting from *ex post* to *ex ante* regulation for digital platforms "is … a loss of about 85 billion EUR in GDP and 101 billion EUR in lost consumer welfare based on a baseline value of 2018. Also, it will reduce the labour force by 0.9 [percent]."[33]

In their zeal to prohibit what they perceive as anti-competitive behavior by the large digital platform companies, policymakers are looking at the DMA as a silver bullet to foster competition and curb market power. However, the DMA has come under scrutiny for its heavy use of *per se* rules, which do not require proving actual harmful effects but instead outlaw the conduct itself, leading to false positives and false negatives.[34] Furthermore, firms that have the resources and expertise may be able to adapt their business conduct in a way that achieves a similar result but is not subject to the existing *per se* rules and, as a result, is not explicitly outlawed.

The DMA's strategy of applying the same obligations to all gatekeepers and core platform services may lead to significant error costs due to the heterogeneity of gatekeepers and services.[35] The obligations are derived from past and current competition cases and investigations regarding specific firms and platform services, but the effects of these obligations may differ considerably for different gatekeepers and services, leading to potentially large error costs and a net negative impact on contestability and fairness. Additionally, the inflexibility of regulatory requirements under the DMA can create significant barriers to entry for new market entrants.[36]

The DMA also creates a skewed playing field against digital channels and companies identified as gatekeepers. Its focus on increasing the "contestability" of core platform services rather than digital markets suggests that the EC

31 Philippe Aghion et al., "Competition and Innovation: An Inverted-U Relationship" (2005) The Quarterly Journal of Economics, Vol. 120, No. 2 at 6.

32 New South Wales Government, MEASURING THE COSTS OF REGULATION, June 2008.

33 Economic Costs of Ex ante Regulations, Hosuk Lee-Makiyama Badri Narayanan Gopalakrishnan, Ecipe Occasional Papers, October 2020 https://ecipe.org/publications/ex-ante/.

34 Anne C. Witt, "Can the EUs' Digital Markets Act rein in big tech?" (21 October 2022), online: The Conversation https://theconversation.com/can-the-eus-digital-markets-act-rein-in-big-tech-192373. False positives occur when the regulation outlaws conduct that does not actually harm the market, potentially impeding innovation and competition. False negatives occur when the regulation fails to catch harmful conduct, allowing large firms to circumvent the rules and continue their anti-competitive behavior.

35 Wolfgang Kerber, "Taming tech giants with a per-se rules approach? The Digital Markets Act from the "rules vs. standard" perspective" (2 June 2021), online (pdf) at page 6.

36 *Ibid.* at page 5.

designed the regulation explicitly to uproot the gatekeepers' market positions in favor of other companies.[37] This may encourage rent-seeking and free-riding behaviors at the expense of incentives to innovate, potentially leading to inferior services being offered to consumers.[38]

The DMA may hinder the widespread adoption of digital technologies as it creates extra regulatory costs that could harm businesses in the digital space. The obligation to share data with and grant access to rivals may make it cheaper for firms to copy market leaders' moves, thereby discouraging innovation.[39] Furthermore, the DMA pushes antitrust activity into the regulatory realm, assuming that digital gatekeepers do not act according to competitive market forces and must be directed before entering those markets.[40] As Carl Shapiro cautions in a recent paper regarding the U.S. bills containing *ex ante* regulations akin to the DMA, "misguided regulatory interventions" may do more harm than good, "harming end users and stifling innovation." Shapiro reminds us of the U.S. experience regulating industries, in which effective regulation to promote competition in dynamic industries can be subverted by regulatory capture and can be overtaken by technological progress.[41]

Similarly, Professor Daniel Sokol cautions against destroying entrepreneurship with poorly designed *ex ante* antitrust legislation in his op ed on the Klobuchar Bill.

If large tech companies cannot vertically integrate, this will have a significant impact on their incentive to acquire startups and thus damage the entire venture capital backed ecosystem. Most successful exits happen not via IPO but by acquisition. In prior work, I identified that deal value has gone up significantly since 2006, whereas IPOs are down significantly relative to the late 1990s. Without a well-functioning M&A system, there will not be successful exit for many ventures.[42]

In a recent presentation, Professor Sokol examined the impact of DMA-like regulations in China (in the form of anti-monopoly guidelines) on entrepreneurship. The data showed that "[a]fter release of the anti-monopoly guidelines, the average number of investments by platform CVC [corporate venture capital] experienced a volatile decline."[43] He further concluded that "China's platform regulation has a chilling effect on entrepreneurship."[44]

05

EX ANTE COMPETITION REGULATION INAPPROPRIATE FOR CANADA

The concerns noted above with respect to the perceived need for and costs associated with *ex ante* regulation should give Canadian policymakers cause for concern when it comes to adopting such regulations in Canada. There is no clear evidence substantiating the need for such regulation, the implementation of which would give rise to significant costs and unintended consequences. Moreover, to the extent that the need for *ex ante* regulation stems from a desire for timely resolutions of enforcement over alleged anticompetitive conduct in the fast-moving digital sector, the existing framework of the Act could, to the extent necessary, be modified and tweaked to address this specific issue. Lastly, it is unclear whether amending the Act to specifically regulate the digital platforms would pass constitutional muster.

A. Current Competition Law Framework in Canada Can Tackle any Anti-Competitive Conduct by Digital Platforms

Many Canadian practitioners and experts submit that the Act currently includes a sufficient legal framework to address anti-competitive conduct in the digital economy. That said, international studies demonstrating durable market

37 Henrique Schneider, "A critical look at the Digital Markets Act" (29 October 2021), online: *GIS Reports Online* https://www.gisreportsonline.com/r/digital-markets-act/.

38 *Ibid.*

39 *Ibid.*

40 *Ibid.*

41 Carl Shapiro, "Regulating Big Tech: Factual Foundations and Policy Goals" *Network Law Review*, Feb 2023.

42 Daniel Sokol, "Don't destroy entrepreneurship with poorly designed antitrust legislation," oped for The Hill, March 12, 2023, available online at: https://thehill.com/opinion/congress-blog/3896647-dont-destroy-entrepreneurship-with-poorly-designed-antitrust-legislation/.

43 Daniel Sokol, "Big Tech Regulation and Tech Entrepreneurship: Evidence from China" (2023) University of Southern California Working Paper at 11.

44 *Ibid.* at 25.

power held by large digital platform firms resulting from network effects suggest that the Act could benefit from some minor retooling to improve its effectiveness to better deal with any anti-competitive acts in the digital sector. In contrast, progressive reformers in Canada are looking for more dramatic changes to Canada's competition law in line with competition policy developments in the EU, which have introduced *ex ante* sector regulations against so-called gatekeeper Big Tech firms. The EU's approach is a significant departure from the traditional organizing framework of consumer surplus economic analysis combined with evidence of competitive harm that has been the cornerstone of international competition law enforcement over the past 40 years. In June 2022, in an effort to address concerns about market concentration, the Government of Canada amended the Act to include an expanded list of factors to be considered when assessing the impact of business practices on competition in the digital sector. While the government is considering further ways to strengthen the Act, it is important to note that this so-called first round of amendments maintained the traditional antitrust principles that underline the Act.

Also of significance is that Canada's competition authority, the Bureau, did not call for utility-like *ex ante* regulations as the appropriate solution to temper digital platform conduct in the policy debate leading up to the initial round of amendments. Nor did the Bureau seek *ex ante* regulation of Big Tech platforms in its submissions to Senator Wetston's consultation[45] and its submissions in response to the ISED Consultation Paper.[46] Moreover, in its 2022 market call-out for the digital economy,[47] the Bureau reiterated its enforcement approach towards digital platforms, as described in its "Big Data and Innovation" report published in February 2019,[48] validating the notion that traditional competition law enforcement principles apply for big data investigations. Specifically, the Bureau sought to strike the right balance between taking steps to prevent behavior that truly harms competition and over-enforcement that chills innovation and dynamic competition. The Bureau's approach does not condemn firms merely because they are "big" or possess valuable big data. Companies that achieve a leading market position – even a dominant one – by virtue of their own investment, ingenuity, and competitive performance are not penalized for doing so.

> ***Many Canadian practitioners and experts submit that the Act currently includes a sufficient legal framework to address anti-competitive conduct in the digital economy***

It is evident that the rise of digital markets raises some interesting questions for competition policy. Issues such as two-sided markets, economies of scale, ecosystems, self-preferencing, privacy, network effects, and control over data are receiving significant attention today. However, so-called "big data" is not an entirely new phenomenon. In fact, not only have firms been developing and using data for a very long time (such as loyalty cards), but competition law enforcement in Canada has also dealt with "big data" issues in a number of instances. For example, two-sided markets were at issue in the alleged anti-competitive conduct of credit card companies, which serve both merchants and customers (*The Commissioner of Competition v. Visa Canada Corporation and MasterCard International Incorporated,* 2013 Comp. Trib.). There are also cases in Canada that have dealt with refusing access to data as an anti-competitive act (*Canada (Director of Investigation and Research) v D & B Companies of Canada Ltd (1995), 64 CPR (3d) 216 (Comp. Trib.)*) and harm to innovation (*The Commissioner of Competition v The Toronto Real Estate Board, 2016 Comp. Trib.*). Moreover, the abuse of dominance provisions under the Act are sufficiently flexible to enable enforcement action against anti-competitive self-preferencing practices or conduct by dominant firms that result in the lowering of customer privacy protection.

Similarly, in Europe, for example, existing competition laws have been successfully deployed in digital markets including multiple cases against Google concerning its comparison shopping service,[49] Android devices[50] and online

45 *Supra* note 15.

46 The Future of Competition Policy in Canada – Submissions by the Competition Bureau, available online at: https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/promotion-and-advocacy/regulatory-adviceinterventions-competition-bureau/future-competition-policy-canada.

47 Government of Canada, "Competition Bureau call-out to market participants for information on potentially anti-competitive conduct in the digital economy".

48 Government of Canada, "Big data and innovation: key themes for competition policy in Canada," February 19, 2018.

49 European Commission, "Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service," (June 27, 2017).

50 European Commission, "Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine," (July 18, 2018).

advertising services,[51] and, more recently, in obtaining commitments from Amazon with respect to self-preferencing practices.[52]

To the extent that the driver for *ex ante* regulation is enforcement failure, as opposed to market failure, (i.e. enforcement takes too long), then this can be addressed through reform of the investigation and adjudication process. In this context, employing *ex ante* regulations (with its attendant costs) to remedy slow investigative and adjudication processes is analogous to using a sledgehammer to swat flies.

B. Constitutionality of Using the Act to Regulate Big Tech Platform Companies

The constitutionality of the Act from a division of powers perspective has been settled by the Supreme Court of Canada in a series of decisions. The enactment of the criminal provisions of the Act clearly falls within the federal government's jurisdiction over criminal law, while the other parts of the Act have been found to be a valid federal exercise of its legislative authority over "general trade and commerce."[53]

With respect to the invocation of the "general trade and commerce" jurisdiction of the federal government in relation to the civil damages provision of Act, in *General Motors* v. *National Leasing*, the Supreme Court of Canada laid out the following five indicia in determining the constitutional validity of a legislative provision pursuant to the "general trade and commerce" power:

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

"The constitutionality of the Act from a division of powers perspective has been settled by the Supreme Court of Canada in a series of decisions

The above list of indicia was subsequently cited and applied by the Supreme Court of Canada in *Reference re Pan-Canadian Securities Regulation.* In doing so, the Court stated:

> The scope of Parliament's jurisdiction over trade and commerce has been greatly influenced by "the need to reconcile the general trade and commerce power of the federal government with the provincial power over property and civil rights" (*General Motors*, at p. 659). The concern here is that an overly broad interpretation of the general branch under s. 91(2) could entirely supplant the provinces' jurisdiction over property and civil rights (s. 92(13)) and over matters of a purely local nature (s. 92(16)), while an unduly narrow interpretation could leave this branch "vapid and meaningless" (*General Motors*, at p. 660).[54]

The third criterion establishes a requirement that the federal legislation be general in nature. The criterion indicates that in exercising its jurisdiction over "general trade and commerce," Parliament should not target specific companies, industries, or trade activities, but, rather, should target issues that affect trade as a whole. While the Supreme Court held that the above list is not exhaustive and that failure to meet one or more of these criteria is not necessarily determinative, given this jurisprudence, it is questionable whether *ex ante* regulation of just Big Tech platform companies would be found to be a valid exercise of federal legislative jurisdiction under the general trade and commerce power. Such regulations would not be concerned with trade as a whole, but rather with a particular industry, thereby failing the third indicia and risking supplanting the provinces' jurisdiction over property and civil rights. As noted by Mahmud Jamal, "if the trend towards industry-specific regulation

51 European Commission, "Antitrust: Commission fines Google €1.49 billion for abusive practices in online advertising," (March 20, 2019).

52 European Commission, "Antitrust: Commission accepts commitments from Amazon barring it from using marketplace seller data, and ensuring equal access to Buy Box and Prime," (December 20, 2022).

53 Mahmud Jamal, "Constitutional Issues in Canadian Competition Litigation" *Canadian Business Law Journal*, 41, 2004-2005, pp.66-102.

54 [2018] 3 SCR 189 at para. 100.

continues, those portions of the Act may be on a less secure constitutional footing."[55]

It is worth noting that that the Act currently has industry-specific provisions in relation to federal financial institutions (s.49) and professional sports (s.48).[56] However, these are criminal prohibitions and there is no question that Parliament has the constitutional jurisdiction over criminal matters. Also, until its repeal in 2004, there was an industry-specific abuse of dominance provision in relation to airlines. Presumably, such provision would not have given rise to a constitutional division of powers issue as it had been held by the Privy Council that the federal government has jurisdiction over aeronautics under the "peace, order and good government" head of power under the Constitution.[57]

As competition policy reform is debated and implemented internationally, there have been calls from various quarters for ex ante regulation when it comes to Big Tech platform companies.

06
CONCLUSION

As competition policy reform is debated and implemented internationally, there have been calls from various quarters for *ex ante* regulation when it comes to Big Tech platform companies. As discussed above, many of these calls point to possible market failure and the need to protect and enhance incentives for innovation. However, the case for *ex ante* regulation of Big Tech is weak. In summary, (a) no empirical evidence has been provided to support the notion that there has indeed been a market failure which would necessitate *ex ante* regulation; (b) the goals of *ex ante* regulation are in some cases amorphous (with policy objectives that stretch beyond competition); (c) there are significant costs associated with *ex ante* regulation; (d) the current *ex post* enforcement framework of the Act, with some tweaking, can be up to the task of protecting the competitive process in Canada; and (e) it is questionable whether it would be constitutional in Canada for Parliament to enact *ex ante* regulation targeting Big Tech platform companies. In these circumstances, pursuing such regulations in Canada would be ill-advised.

55 *Supra* note 49 at 69-70.

56 There are other provisions that are superficially industry-specific, such as in relation to amateur sports (s.6(1)), securities underwriting (s.5) and lotteries (s.74.06). However, the provisions relating to amateur sports and securities underwriting are exemptions or carve-outs from the Acts or certain provisions thereof, as opposed to regulate those industries. Similarly, s.74.06 does not purport to regulate lotteries, but rather deal with deceptive marketing in relation to "contest, lottery, game of chance or skill, or mixed chance and skill," which are also regulated under the *Criminal Code*.

57 *Re Aerial Navigation, Canada (AG) v. Ontario (AG) et al,* [1932] 1 DLR 58 (PC).

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