March 31, 2023

Via Electronic Submission

The Honourable Francois-Phillippe Champagne
Minister of Innovation, Science, and Industry
C.D. Howe Building
235 Queen Street
Ottawa, ON K1A 0H5
Canada

RE: Consultation on the Future of Competition Policy in Canada

Dear Minister Champagne:

On behalf of the Software & Information Industry Association (SIIA), we appreciate the opportunity to provide these comments in response to the consultation on the future of competition policy in Canada.

SIIA is the principal trade association for the software and digital information industries worldwide. Our members include over 450 companies, reflecting the broad and diverse landscape of digital content providers and users in academic publishing, education technology, and financial information, along with creators of software as well as platforms used by millions all over the world. SIIA is dedicated to fostering a healthy environment for the creation, dissemination, and productive use of information. We believe in a competition policy that is focused on engendering innovation, protecting the competitive process, and providing consumers with superior products at competitive prices.

General comments

The United States and Canada share the longest international border in the world, a common language, much history, and a unique economic relationship. The U.S. is Canada's largest investor, accounting for 44 percent of all foreign direct investment flowing into your country.[1] As President Biden said on the eve of his recent state visit, "[n]o two nations on earth are bound by such close ties of friendship of family, of commerce, or of culture as the United States and Canada."[2] The recently agreed United States-Mexico-Canada Agreement (USMCA) was a signature achievement. Among other things, USMCA includes a first-of-its-kind digital trade chapter, whose goal is to promote economic prosperity, and to advance our global competitiveness.

Canada is recognized as having a comprehensive and highly astute competition law system. Not only that, Canada has a long history of sophisticated regulation in this area. The *Anti-Combines Act of 1889*,

[1] https://www.state.gov/reports/2022-investment-climate-statements-canada/

[2] https://twitter.com/POTUS/status/1639393854087659520

for example, marked the adoption of the first modern competition law anywhere. The last significant review of the Competition Act (the Act) took place in 2007-08. Conducting periodic reviews of the efficacy of existing laws is an exercise in both prudence and responsible governance. The world has changed over the last 15-plus years, and because of that it is reasonable to suspect that some minor tweaks to the Act could be in order. But less than two years ago, the Canadian Bar Association submitted to Parliament its views on potential changes to the Act, insisting that it "works well and without controversy in an overwhelming majority of cases."[3] Any fundamental changes therefore may seem to be not only unnecessary and unwarranted but unwise.

Curiously, the Innovation Ministry, in its discussion paper[4], refers to competition policy "having a moment of reckoning," among other things, because it features "in the pages of newspaper op-ed sections."[5] Without diminishing the import of expert contributions to the policymaking process, the op-ed pages of even the most widely circulated newspapers hardly connote a groundswell of support for reform among the broader populace. But it does point to a larger issue with the fixation, among some, on competition policy as a panacea that, if only it were applied more aggressively to fight an endless set of challenges, real or imagined, could solve the world's ills.

As an additional source of inspiration for the Government's desire for reform, the paper cites to foreign jurisdictions, such as the United States and the European Union, that have recently introduced, and in some cases passed, legislation specifically targeting large online platforms. Of course, there is nothing wrong with learning from peer countries, but context and timing matter, and there are a few reasons why we urge caution in following recent U.S. and EU examples.

In the U.S., none of the ballyhooed platform-targeting bills that were introduced in the last Congress, chief among them the American Innovation and Choice Online Act (AICOA), ultimately made it across the finish line. There are several reasons why this set of proposals, that specifically targeted large—and hugely popular—online platforms, failed.

AICOA was widely understood to be a poorly drafted solution in search of a problem. And it never enjoyed the level of support, either in Congress or among voters, that its proponents claimed to have. In the words of one of America's preeminent antitrust experts, "[] AICOA misidentifie[d] the sources of harmful market power by being both under- and overinclusive. It [was] underinclusive to the extent that it applie[d] only to online commerce; it [was] overinclusive in that it applie[d] to products and services over which the seller [had] no market power. As a result, its substantive requirements [were] egregiously mistargeted."[6]

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[3] https://www.ourcommons.ca/Content/Committee/432/INDU/Brief/BR11295778/br-external/TheCanadianBarAssociation-e.pdf

[4] https://ised-isde.canada.ca/site/strategic-policy-sector/en/marketplace-framework-policy/competition-policy/future-competition-policy-canada

[5] Id. at 6.

[6] Hovenkamp, Herbert, *Gatekeeper Competition Policy* (March 18, 2023). U of Penn, Inst for Law & Econ Research Paper No. 23-08, Michigan Technology Law Review (2023) at 5.

Moreover, the bill drafters refused repeated invitations to grapple with additional serious concerns with the bill related to, for example, cybersecurity, user privacy, and content moderation, all of which carried the risk of substantial unintended consequences. While the specific issues around content moderation may be peculiar to the U.S. and its constitutional structure, cybersecurity and user privacy are universal concerns that any serious-minded government or legislature contemplating the same types of reforms will need to confront.

The European Union has for years been pursuing a very ambitious digital agenda, and, as a result, they are much farther along. But how well any of the resulting legislation actually works in practice is unclear. The *General Data Protection Regulation*, for example, was held up as a model privacy legislation for the world, but four years after it entered into force its enforcement record has been, at best, uneven and weak.

Of more recent vintage is the Digital Markets Act (DMA), which is one of the drivers behind the current antitrust push in both the U.S. and Canada. Due to the unique European circumstances that precipitated the DMA's introduction, the notion that it should, or could, serve as a model for similar-type legislation in North America seems misplaced. As a general matter, the EU is interested in creating what it deems to be the best possible conditions for its domestic entrepreneurs. As a result, the DMA is drafted in a way that European governments and lawmakers hope will provide more fertile ground for EU-based tech companies to compete globally. Whether that approach will work as intended in Europe is highly uncertain. But, in any event, it is difficult to see how or why it would hold much appeal in Canada.

When the DMA was introduced in 2020, the European Commission was at pains to point out that it reflected "European values," and that its main purpose was to "prohibit unfair conditions imposed by online platforms that have become or are expected to become gatekeepers…"[7] The argument that existing EU competition law has failed to adequately police the digital economy is probably wrong. But even assuming it is correct, it is not clear how an EU-specific issue would be relevant to the question of whether alleged competition problems posed by newly dominant online platforms can be handled within Canada's existing rules. Four years ago, in report called "Big data and innovation: key themes for competition policy in Canada," the Bureau itself concluded that the Act was more than up to the task. To wit: "there is little evidence that a new approach to competition policy is needed."[8]

The discussion paper stresses the concern of many Canadian consumers with affordability. Specifically, as it relates to the DMA, it bears emphasizing that it contains a range of measures, including, but not limited to, prohibitions on "self-preferencing," bundling, and an obligation for "gatekeepers" to share data with their competitors that more than likely will reduce the incentive for these companies to innovate, and could impact their ability to provide lower prices for their customers. A final point worth

[7] https://ec.europa.eu/commission/presscorner/detail/en/IP_20_2347
[8] https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/publications/big-data-and-innovation-key-themes-competition-policy-canada

flagging is that, although the DMA experiment will impose significant extra economic costs, the European market is of a size that makes it hard for large tech companies to ignore. Canada is a major world economy, but its market might not be quite as indispensable. This is not to suggest that imposing substantial additional burdens on companies would cause them to pull out of Canada, but it could affect the types of products and services available to Canadian consumers, and the prices at which they can be offered.

Another argument that is often advanced in support of competition law reforms aimed at large online platforms is that digital markets supposedly are highly concentrated. But that is not borne out by the data. In fact, a recent economic study in the United States found that industrial concentration has been declining, leaving the economy no more concentrated in 2017 than in 2002. The report thus finds that the available data do not support the argument that the U.S. has a "monopoly problem," or that U.S. competition policy more broadly has failed. [9]

Specifically, as it relates to the digital economy, the discussion paper goes on at some length about the many substantial benefits that large online companies have brought, and it recognizes that their success has been earned through innovation and the ability to bring to market attractive goods and services. In light of this sentiment, with which we whole-heartedly agree, it would be odd and counterproductive to simultaneously pursue a policy agenda aimed at punishing these very same companies for their success. Before proceeding any further with its reform agenda, we would, therefore, encourage the Government to pause and reflect on what the actual and specific competition law problems that Canada faces are, whether they necessitate any changes to existing law, and, if the answer is yes, what such reforms would need to accomplish.

No one denies, for example, that the digital economy has created novel challenges. But the issue most frequently raised centers around data privacy (i.e., that living our lives online leaves a digital footprint and involves turning over large amounts of personal information amid concerns about how that data is collected and subsequently used). But it would be wide of the mark to argue that competition law is the best vehicle through which to ameliorate these types of concerns.

Recommendations

General principles

As an initial matter, we agree with both the Bureau and the Canadian Bar Association that no evidence supports a clamor for amendments focused specifically on the digital economy. Moreover, fashioning rules that would discriminate, directly or indirectly, against a handful of U.S. companies, would plainly violate both the letter and the spirit of USMCA, and we would therefore advise the Government against going down that road.

[9] https://www.uschamber.com/assets/documents/Final-Industrial-Concentration-Paper.pdf

We appreciate the Government's interest in soliciting the views of a broad cross-section of stakeholders before beginning the reform process. To that end, in the following we provide our views about what principles should underpin future amendments to the Act.

First, Canada finds itself in a highly advantageous position when considering the shape and content of future competition law reforms. Less than a year ago, as part of the 2022 Budget legislation, the Government passed a series of amendments to the Act that "were intended as a "down payment" prior to embarking on broader reforms."[10] These amendments are not taking effect until June 2023, however, and it would be prudent to study how these initial reforms work, and whether they achieve their intended goal, before deciding which more fundamental changes to pursue.

The EU has, in effect, volunteered as a competition law laboratory for some of the reforms that the Government is considering. By singling out and regulating the conduct of a very small group of companies, the DMA is totally at odds with not only the structure and content of the Act but how competition law traditionally has been practiced in Canada. The DMA, moreover, just took effect and the European Commission is in the process of implementing it. But even at this late stage, there are substantial concerns about whether the Commission possesses the requisite know-how and has sufficient resources to adequately implement and enforce this new law. Since the Government seems to agree that there is no immediate need for change in Canada, it can bide its time and wait to see how the DMA experiment plays out.

Second, one of the fundamental questions for which the consultation seeks answers is what the goal of competition policy should be. As noted in the discussion paper, the Act[11] is a law of general applicability that touches virtually all businesses in Canada. Its objectives, which have not changed since 1986, are listed in Section 1.1. They are to promote the efficiency and adaptability of the Canadian economy; to expand opportunities for Canadians in world markets, while recognizing the role of foreign competition in Canada; to ensure that small- and medium- sized companies have an equitable opportunity to participate in the Canadian economy; and to provide consumers with competitive prices and product choices.

While all of these interests are important, the listed goals are not only very broad, they are also, at least somewhat, incongruent. The flexibility inherent in this approach can be a strength because it makes the Act more adaptable to changing circumstances, such as the advent of the digital economy that few would have predicted in the mid-1980s. But it also risks making enforcement actions inconsistent and less predictable, leading businesses to be more risk-averse and innovate less, giving consumers fewer choices at higher prices.

Because of this, amending and streamlining the Act's Purpose Clause could yield tangible benefits. In thinking about what objective, the Act should pursue, we recommend that the Government pay close

[10] Footnote 4 at 11.
[11] https://laws-lois.justice.gc.ca/eng/acts/c-34/page-1.html#h-87830

heed to the answer given by the U.S. antitrust laws. The U.S. Federal Trade Commission has put it this way: "[F]or over 100 years, the antitrust laws have had the same basic objective: to protect the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down, and keep quality up."[12]

Third, it is essential that any new set of rules be designed to prevent foreseeable competitive harm, and that they permit the introduction of evidence-based justifications for any condemned actions. Any new rules, in other words, should allow affected companies to justify their business practices and product designs based on factors like security, system integrity, consumer safety, quality, performance, and functionality.

Fourth, any new conduct-based rules must be both necessary and proportionate to the seriousness of the actual or anticipated harm that they seek to prevent; and in the case of the latter, the likelihood of the harm occurring. In addition, it is essential that the Government be upfront about the fact that introducing new legislation that potentially changes some of the fundamental pillars of existing competition law will come at a cost to businesses, Canadian consumers, and the broader Canadian economy. Because of this, any new rule(s) should be preceded by a thorough cost/benefit analysis to provide the best possible basis for informed decision-making, and to make sure that any consequences, whether intended or otherwise, are well understood and worth it.

Comments related to specific proposals under consideration

Lowering the threshold for mandatory pre-merger notifications. Filing thresholds are generally designed to give enforcement agencies visibility into transactions that might raise competitive concerns. We urge the Government to reject lowering the current thresholds for the following reasons. First, it would lead to over-capture. This is especially true for smaller routine acquisitions that raise no competition law concerns, and where an additional filing obligation could lead to a delay and the potential abandonment of clearly pro-competitive mergers. Second, it would put an additional, and unnecessary, strain on already limited public resources. Finally, the absence of a filing does not, under current law, prevent the Government from challenging a merger if it raises legitimate concerns, something that competitors and industry groups likely would be more than willing to bring up with the Bureau should the situation arise.

Extending the limitation period for challenging mergers. The limitation period for challenging "substantially completed" mergers has previously been reduced from three years to one in order to "provide more certainty for the Canadian business community and international investors."[13] Barring exceptional circumstances, a merger should be evaluated at the time of its consummation, and the parties should not be held accountable for changing market dynamics, particularly ones that are beyond their control. Increasing the deadline back to three years would add uncertainty and be likely to deter

[12] https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws
[13] Footnote 3 at 5.

pro-business mergers. For these reasons we urge the Government to reject extending the limitation period for challenging mergers.

Making the administration and enforcement of the Act more efficient and responsive by incorporating, for example, ex ante rules for large digital platforms. As mentioned, the DMA, which has introduced *ex ante rules* specifically targeting a small group of, mostly U.S., online platforms, is a novel and untested regulatory framework. According to the European Commission, it is not part of traditional EU competition law but is working in tandem with it. And although the DMA has recently entered into force, no so-called "gatekeeper" companies have been designated, and its rules have yet to be enforced.

The DMA, moreover, relies on a number of new and undefined terms like "self-preferencing," "fairness," and "contestability," which have given rise to substantial uncertainty that likely will require litigation to properly sort out. There are also concerns about the DMA's rigid and inflexible approach, leading even the German Cartel Office to question how suitable it is as an antidote to potential challenges associated with digital markets.[14] Finally, as the Chair and Ranking Member of the U.S. Senate Finance Committee have argued, the DMA is based on "discriminatory policies [that] will distort trade by disadvantaging U.S. companies and their workers."[15] For Canada to pursue a similar set of policies would be incompatible with commitments undertaken by the Government in the USMCA. For all of these reasons, we urge the Government not to start down a similar path. And, at a minimum, it should wait until the EU has finished its own mandatory review of the DMA to see if it works as intended.

SIIA appreciates your consideration of our views, and we would welcome the opportunity to answer any additional questions on this important matter.

Respectfully submitted,

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[14] https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/2021/OECD_2021_Ex-Ante_Regulation_Competition_Digital_Markets.pdf?__blob=publicationFile&v=2

[15] https://www.finance.senate.gov/imo/media/doc/2022.02.01%20Wyden-Crapo%20Letter%20to%20POTUS%20on%20DMA%20DSA.pdf