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Open Markets. Open Systems. Open Networks.

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CCIA Comments in Response to the Consultation on "The Future of Competition Policy in Canada"

The Computer and Communications Industry Association[1] (CCIA) welcomes the opportunity to comment on the discussion paper titled "The Future of Competition Policy in Canada"[2] proposed by Innovation, Science, and Economic Development Canada (ISED) to reform the Canadian Competition Act, released on November 22, 2022.

Digital services platforms, referred to in the Discussion Paper as "large digital platforms," offer innovative and popular services to consumers and play an important role throughout the economy. As highlighted by the general introduction of the Discussion Paper, "digital innovation is transforming Canada's economy and improving Canadians' quality of life by enhancing productivity, diversifying the consumer experience, connecting people, and opening up new markets."[3] However, the Discussion Paper seems to suggest that there might be market features of digital services that may impede, distort, or restrict competition. CCIA strongly believes that for ISED to determine whether there is a need to address possible competition concerns in this area, it is important to fully and accurately understand the various business models behind digital services platforms and the industries in which they operate and revisit provisional proposals and recommendations with a clear understanding of the complex realities of the varying business models.

CCIA wishes to emphasize the benefits digital services platforms provide for consumers and discuss important considerations ISED and regulators should take into account before designing any proposed regulation. Therefore, our comments (i) provide general observations regarding the Discussion Paper (Part I); (ii) discuss specific recommendations of the Discussion Paper (Part II); and (iii) detail key principles to guide regulatory proposals (Part III).

I. General Comments

The Discussion Paper states that "competition law and policy are having a moment of reckoning. With views about affordability, concentration, market power, and digital platforms regularly

[1] CCIA is an international, not-for-profit association representing a broad cross-section of technology and communications firms. For over fifty years, CCIA has promoted open markets, open systems, and open networks, advocating for sound competition policy and antitrust enforcement. CCIA members employ more than 1.6 million workers, invest more than $100 billion in research and development, and contribute trillions of dollars in productivity to the global economy. For more, visit www.ccianet.org.

[2] Discussion Paper: The Future of Competition Policy in Canada, Innovation, Science, and Economic Development Canada, November 2022, https://ised-isde.canada.ca/site/strategic-policy-sector/en/marketplace-framework-policy/competition-policy/future-competition-policy-canada

[3] *Id.* at 7.

featured in the pages of newspaper op-ed sections, vigorous debate in legislatures around the world, and numerous expert reports helping to shape public understanding of an occasionally complicated concept, marketplace framework policies, and antitrust law are under the spotlight."[4] Specifically, the Discussion Paper references proposed and enacted reforms in the United States, Australia, the European Union, and the United Kingdom. Although policymakers often find themselves under significant pressure as other regulators develop national digital programs, CCIA would like to caution that running faster to adopt regulations in this important area is not necessarily the best strategy for policymakers and legislators.

While it may be useful to study jurisdictions that have adopted novel digital regulatory measures, ISED should not assume that measures from the most active and vocal jurisdictions would be the best choice for Canadian consumers and the economy. In this regard, ISED should avoid relying on international regulatory proposals in this area without analyzing the context, purpose, and objective of the particular regulation and considering their potential impact on the Canadian economy and consumers.

Additionally, it should be considered that some international reforms result from particular political and economic dynamics and national digital agendas. Therefore, rather than following untested international regulatory experiments, Canadian policymakers should take advantage of learning from the experience in those jurisdictions, some of which are already emerging, for example in relation to the costs imposed on regulators or the lack of certainty regarding the obligations being imposed. In parallel, ISED should continue to focus on gaining a comprehensive understanding of the unique dynamics of the Canadian economy to determine if there really is a need for reform in the first place.

The Discussion Paper highlights that "competition law has been thrust into the centre of Canadian policy debate as concerns mount about affordability, market concentration and the enormous influence of new economic giants."[5] While the broad application of the Competition Act is noted as a strength, the Discussion Paper states that there are "clear signals'" that more must be done to ensure that Canada keeps pace with its peer countries who are "already well down the road towards re-examining their frameworks and approaches to competition policy in light of the digital economy."[6] At this point, it is important for ISED to consider that overly complex, intrusive, or broad regulatory regimes are likely to deter entry and investment from innovative companies. Also, it is important to consider that there may be interest in addressing concerns that arise online, but it is fundamental to evaluate what specific problems Canada is currently facing and which ones are the most pressing ones for the government to address.

[4] *Id.* at 6.
[5] *Id.* at 1.
[6] *Id*. at 5.

One element of the Discussion Paper is how to reform competition policy to introduce specific reforms for digital services. In this regard, CCIA encourages ISED to avoid arbitrary scoping of new rules to specific digital services platforms. Proposed reform recommendations should be rules of general applicability and not be designed and enforced only against particular companies. Importantly, CCIA strongly believes that ISED should carefully consider whether categorizing a few companies as digital platforms and implementing additional and costly rules only to such platforms is, in fact, the best path forward for the Canadian economy.

Additionally, as mentioned in the Discussion Paper, "Canada was the world's first country with antitrust legislation, and its approach has undergone many changes over the years to keep the Act effective and adapted to its environment."[7] Therefore, and building on this rich antitrust history and tradition, a key consideration is whether the existing antitrust enforcement framework already provides more proportionate ways to achieve the desired outcomes. CCIA supports this approach.

Specifically, CCIA strongly believes that, before proposing any new regulation or amendment, the Canadian Government should take two important steps. First, it should carefully evaluate if existing antitrust and consumer protection provisions and tools are in fact appropriate to combat potentially anticompetitive conduct that may affect consumers. New regulation may only be necessary to address particular and demonstrated harms. Second, ISED should consider whether the existing competition framework provides alternatives that could achieve the same objectives without the cost and complexity of a new regulatory regime. CCIA underscores that, even if it is demonstrated that the existing framework is not sufficient, there are alternatives to *ex-ante* regulations that should be taken into consideration. For example, Japan has recently adopted a co-regulatory approach focused on transparency over outright prohibitions.[8] Before implementing any new regulation, CCIA strongly recommends that ISED carefully evaluate the range of alternatives that already exist to determine which may be better suited to the Canadian legal framework and economy.

The Discussion Paper also asks the fundamental question "what is competition law for?"[9] The current Competition Act states that "the purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices." In accordance with this provision that has been applied in Canada since 1986, the objective of

[7] *Id.* at 6.
[8] *See* Japan's Act on Improving Transparency and Fairness of Digital Platforms (2020), https://www.meti.go.jp/english/policy/mono_info_service/information_economy/digital_platforms/tfdpa.html.
[9] Discussion Paper at 12-13.

competition should continue to promote efficiency and competitive prices and product choices for consumers. As part of this comprehensive review of the Competition Act, CCIA would like to stress the importance of focusing on these objectives and remaining consistent with decades of competition policy in Canada.

Finally, the Discussion Paper underscores that "while competition policy, in today's economy especially, intersects with other areas of focus – privacy, security, and disinformation, among others – the required government response to the challenges of the information age is multi-faceted, and happening across numerous areas."[10] In fact, CCIA would like to stress that digital regulation must be a coordinated effort through multiple policy areas given the interconnectedness of competition, data privacy, consumer protection, intellectual property, and other policy areas. In addition to the impact from a competition enforcement and policy perspective, regulatory proposals in the digital economy may have significant consequences in areas such as data privacy, national security, cybersecurity, and intellectual property that could lead to negative implications for consumers and businesses. It is vitally important for ISED to analyze the impact any proposed regulation may have on these related policy areas.

II. Specific Comments

1. Merger Review

The Discussion Paper establishes that the Government is considering the following possible reforms in relation to merger control: (i) the revision of pre-merger notification rules to better capture mergers of interest; (ii) the extension of the limitation period for non-notifiable mergers or tying it to voluntary notification; (iii) easing of the conditions for interim relief when the Competition Bureau is challenging a merger and seeking an injunction; (iv) changes to the efficiencies' defense, *e.g.,* restricting its application to circumstances where consumers or suppliers would not be harmed by the merger; and (v) revisiting the standard for a merger remedy, including to better protect against prospective competitive harm or to better account for effects on labor markets.[11]

In particular, the Discussion Paper establishes that "concerns have been raised with respect to the reach of the Act's remedial framework, given the potentially harmful effects of concentration. The more prominent role of innovative start-up firms in the digital economy has also accelerated calls for reform. Non-notifiable, yet ultimately important acquisitions may evade detection, while even known mergers may cause competitive harm that is too difficult to forecast with precision at the time of acquisition, yet too late to remedy once it becomes apparent."[12] In this regard, it is important to consider that mergers and acquisitions play an important and positive

[10] *Id.* at 13.
[11] *Id.* at 19-29.
[12] *Id.* at 19.

role in the economy, including as a key driver of innovation and investment. While it is critical to scrutinize transactions that are likely to have a negative impact on competition, it is imperative that Canada's merger regime not prevent transactions that are pro-competitive (thereby depriving users of their benefits) or competitively benign (thereby depriving sellers of the opportunity to maximize the recovery of their investment and the return on their innovation). There appears to be no evidence that Canada would be unable to address anticompetitive acquisitions in the digital sector under current merger control regulations. In fact, it has been recognized that digital platform mergers are often pro-competitive.[13] While CCIA believes that the existing Canadian merger regime is working well and able to effectively review and prevent potentially anticompetitive acquisitions, tailored amendments to the pre-merger notification regime may be appropriate.

Additionally, the Discussion Paper is exploring the possibility of including changes to the efficiencies defense, including by restricting its application to circumstances where consumers or suppliers would not be harmed by the merger. A primary benefit of mergers to the economy is their potential to generate significant efficiencies and thus enhance the merged firm's ability and incentive to compete, which may and often does result in lower prices and better quality. In addition, mergers can improve dynamic efficiency by serving as an alternative exit strategy, facilitating the elimination of inefficient firms and the fast expansion of successful innovators. Vertical mergers, in particular, often provide procompetitive efficiencies. Therefore, it is particularly important not to modify the rules regarding merger efficiencies in a way that could potentially dissuade companies from pursuing transactions that may result in significant merger-specific benefits for consumers.[14]

In the Discussion Paper, ISED also suggests creating an "easier" injunction standard.[15] In this regard, it is important to consider that the well-defined injunction standard (with the lower bar for the balance of convenience in government action) has long been available to the Competition Bureau Canada (CCB) for merger cases when it is able to demonstrate the likelihood of a substantial anticompetitive effect. Any lowering of the current standards would carry great risks by allowing the CCB to become an (effectively unreviewable) independent investigator, judge, and jury. As such, the CCB could become an unchecked arbiter of the economy, with its leadership having the ability to block potentially procompetitive and pro-consumer mergers without any challenge. CCIA believes that ISED should consider a change to the current standards only if mergers have led to consumer harm in the period between a failed application for an injunction and an ultimately successful challenge. On the contrary, there appears no

[13] *See, e.g.,* Koren W. Wong-Ervin, Antitrust Analysis of Vertical Mergers: Recent Developments and Economic Teachings, Antitrust Source (2019), https://www.americanbar.org/content/dam/aba/publishing/antitrust-magazine-online/2018-2019/atsourcefebruary2019/feb19_full_source.pdf; Samuel Bowman & Sam Dumitriu, Better Together: The Pro-competitive Effects of Mergers in Tech (2021), https://laweconcenter.org/wp-content/uploads/2021/10/BetterTogether.pdf.

[14] Discussion Paper at 25.

[15] *Id.* at 24.

evidence that the inability to block a transaction on an interim basis pending a full challenge has foreclosed markets or harmed consumers.

In general, CCIA believes that proposals to reform the merger review system and lower the standard of proof for digital mergers are disproportionate and could have the same negative effect as an outright ban on acquisitions. If ISED and the Government wish to pursue broader merger reform, this should be done on an economy-wide basis first, then look for evidence about any gaps in enforcement that would need to be specifically addressed by sector-specific rules.

2. Unilateral Conduct

The Discussion Paper discusses "the rise of Big Tech" and establishes that, given the size and breadth of activities of digital companies, the Government is considering possible competition reforms. In particular, the Discussion Paper questions the elements of the current abuse of dominance approach in Section 79,[16] which requires the fulfillment of a three-part test before a remedial order can be issued: (i) substantial or complete control of a market; (ii) a practice of anticompetitive acts; and (iii) an actual or likely substantial lessening or prevention of competition. Although new structural and proactive approaches remain under consideration, the Discussion Paper states that "the Act's abuse of dominance legal tests are ripe for re-examination."[17]

While analyzing the existing abuse of dominance provisions and possible reforms, the Discussion Paper refers to the fact that "increasingly, legislators are turning to the possibility of preventive rules or presumptions applied to dominant firms or platforms, with respect to both acquisitions and business practices such as self-preferencing and data use, rather than conducting extensive economic analyses in each case."[18] If the above means that Canada is considering as an alternative the implementation of *ex-ante* obligations and prohibitions, it is crucial to analyze what these specific reforms to the digital economy would mean for the everyday consumer and what changes a user might see in many of the products that they enjoy and find beneficial.

Canadian policymakers should think more broadly and consider what an *ex-ante* regulation's impact would be on consumers and small businesses that have, for long, benefited from these products and services. As such, it is important to distinguish between conduct that is often procompetitive or at least competitively benign versus anticompetitive. Before implementing any new regulation, it is crucially important to analyze its impact considering all the possible consequences that digital-specific regulation could bring for consumers, innovation, and the economy. It is also important to highlight that new or industry-specific regulations should only be introduced after a comprehensive analysis of their costs and benefits. An effort to protect

[16] Canada's Competition Act, Section 79, https://laws-lois.justice.gc.ca/eng/acts/C-34/section-79.html.
[17] Discussion Paper at 39.
[18] *Id*. at 35.

competitors, and not competition, may protect less efficient or innovative competitors at the expense of providing consumers and the economy with pro-competitive benefits.

CCIA would like to note that some international regulations, such as the Digital Markets Act (DMA) in Europe, include various measures that may have a significant impact on companies in their efforts to provide low prices for their products. The European Commission's "gatekeeper" provisions may reduce, directly and indirectly, the ability and incentives of global companies to provide innovative products to consumers.[19]

For example, as mentioned above, a type of conduct that the Discussion Paper identifies as potentially problematic from a competition perspective is self-preferencing. However, a review of the relevant economic literature reflects that self-preferencing is a common business practice that can produce significant procompetitive effects and benefit consumers in numerous ways.[20] Under a self-preferencing prohibition, it seems that the only clear-cut way for a platform to avoid legal scrutiny may be to stop selling its own products. However, this would significantly harm consumers and innovation.[21]

As another example, some jurisdictions including the European Union, identify increasing interoperability as an obligation to be considered for digital services platforms. CCIA encourages interoperability as a way to increase "market contestability" and reduce barriers to entry and believes that practices such as multi-homing and switching can help keep markets open to entry and expansion. However, forced data sharing poses important risks to user privacy. Furthermore, this obligation can affect integrity and security, since tools and technologies to fight spam, scams, and other harmful activities would be compromised if third-party apps are not obligated to meet those same standards and allow such tools to work on their networks. In addition, there are risks of disclosing businesses' confidential information.

Given the complexity of online digital services and the potential unintended consequences derived from any new and complex regulation, CCIA recommends designing regulations, if any would be needed, at a principle level rather than targeting and scoping particular companies and imposing specific prohibitions on them. The Discussion Paper notes that one alternative could be "condensing the various unilateral conduct provisions into a single, principles-based abuse of dominance or market power provision."[22] If that is the case, CCIA recommends that ISED be clear enough when defining the relevant terms and precise enough that those principles apply only to activities connected to the law's objective.

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[19] *See*, e.g., Carmelo Cennamo and D. Daniel Sokol. Can the EU Regulate Platforms Without Stifling Innovation? (2021), https://hbr.org/2021/03/can-the-eu-regulate-platforms-without-stifling-innovation.

[20] *See*, *e.g.,* B. Hoffman & G. Shinn, SELF-PREFERENCING AND ANTITRUST: HARMFUL SOLUTIONS FOR AN IMPROBABLE PROBLEM, https://www.clearygottlieb.com/-/media/files/cpi--hoffman--final-pdf.pdf; H. Hovenkamp, GATEKEEPER COMPETITION POLICY, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4347768.

[21] *Id.*

[22] Discussion Paper at 35.

The Discussion Paper also states that another alternative is to create "bright line rules or presumptions for dominant firms or platforms, with respect to behaviour or acquisitions, as potentially a more effective or necessary approach, particularly if aligned with international counterparts and tailored to avoid over-correction."[23] In this regard, rules-based or form-based approaches based on international examples where the long-term effects are yet to be seen may result in significant unintended consequences. This is particularly true in light of the unique market circumstances in which competition complaints have arisen, and understanding that some commonly-referred assumptions may be misleading: multi-sided markets do not always "tip," network effects are not necessarily an entry-barrier, and leveraging into adjacent markets is not inherently problematic.[24]

Finally, the Discussion Paper suggests re-defining "dominance" or joint dominance to address situations of *"de facto"* dominant behavior, such as through the actions of firms that may not be unmistakably dominant on their own, but which together exert substantial anticompetitive influence on the market. In this regard, it is important to consider that the impact of the *"de facto"* dominant behavior would differ across markets. The same behavior that may be considered indicative of market power in one market may merely be vigorous and consumer welfare-enhancing competition in another. Adopting this new definition of dominance could create rules that have no linkage to actual effects or harm. Additionally, linking "dominance" or "joint dominance" to specific behavior could lead to over-capture. The standard of inquiry should remain whether the companies in a particular market are able to engage in behavior that results in anticompetitive harm owing to their market influence.

In any case, given the significant consequences of the introduction of any *ex-ante* regulation and the additional provisions for the digital economy in Canada, CCIA encourages the Government to extensively consult with relevant stakeholders before proposing any regulation.

3. Competitor Collaboration and Deceptive Marketing

The Discussion Paper also considers possible reforms such as (i) recognizing or inferring "agreements" to address the age of Artificial Intelligence (AI), (ii) expanding the scope to include past conduct and monetary penalties, (iii) expanding potentially problematic agreements beyond those between direct competitors, (iv) introducing a mandatory notification or voluntary clearance process for certain types of agreements, and (v) reintroducing buy-side collusion as a criminal offense or a civil *per se* offense. Similarly, it suggests adopting additional enforcement tools suited for modern forms of commerce, given the nature and ubiquity of digital advertising.

[23] *Id.* at 39.
[24] *Id.*

Specifically, in cases of horizontal coordination without an agreement, CCIA recommends considering if such "coordination" could increase efficiencies and benefit consumers. Including this conduct as a violation of competition law without evaluating its consequences on a case-by-case basis can harm innovation, consumers, and the economy. Also, since in these cases there is no illegal agreement, it is difficult to draw a line between competitive and anticompetitive conduct in scenarios of high levels of transparency in the market.[25]

Additionally, CCIA believes that rules for AI should be developed in alignment with proposed federal AI legislation (AIDA, currently included in Bill C-27), where broad impacts of AI can be studied carefully and addressed by the most appropriate regulator (*i.e.*, proposed Artificial Intelligence and Data Commissioner).

Finally, regarding the suggestion of "reintroducing buy-side collusion– beyond only labor coordination – as a criminal offense or a civil per se offense," CCIA would like to encourage the ISED to interpret the ancillary restraints defense for broader agreements between parties liberally. CCIA agrees that it is important to prevent unfair and anticompetitive practices including employment unfair and anticompetitive practices. However, CCIA believes that absent clear evidence, a blanket ban on conduct with criminal implications would not be justified as there are many circumstances in which such a provision is necessary to effectuate a pro-consumer and choice-expanding partnership between companies.

4. Administration and Enforcement of the Law

The Discussion Paper suggests making the administration of the law and enforcement before the Competition Tribunal or courts more efficient and responsive, whether public or private, without unreasonably compromising procedural fairness and by giving the Competition Commissioner more power as an independent decision-maker. Other suggestions include introducing civil provisions to ease the burden associated with current exclusively criminal provisions, introducing the possibility of damage awards to private parties, and easing the collection of information outside the enforcement context (*e.g.,* for market studies).

Introducing these new proposals would not be costless. It is important to consider that an independent prevention power would be a significant shift and dangerous precedent insofar as it would confer upon the Competition Commissioner the powers of investigator, judge, and jury. The CCB (and Commissioner) already have at their disposal a broad range of investigative tools in the context of an investigation or formal inquiry, from the target, its competitors, suppliers, and customers in the industry. By way of example, the CCB routinely obtains Section 11 court orders against targets during non-criminal inquiries under the Competition Act. This process is

[25] *See*, e.g., Ariel Ezrachi, Maurice E. Stucke, ARTIFICIAL INTELLIGENCE & COLLUSION: WHEN COMPUTERS INHIBIT COMPETITION. (2017), https://www.illinoislawreview.org/wp-content/uploads/2017/10/Ezrachi-Stucke.pdf.

already straightforward for the CCB as the application itself is ex parte: the affected company receives no formal service of the filed materials and no formal notice of the hearing. Counsel for the Commissioner files the evidence and supporting written representations with the court and appears at a brief oral hearing. The company is almost never provided with notice or represented at the hearing.

CCIA encourages ISED to consider that any new regime should give stakeholders the opportunity to provide comments regarding the specific regulation in all stages of the regulatory process and be secured by suitable procedural protections and review mechanisms. Any mandatory new regulations should include these procedural safeguards and clear procedures to protect due process and defense rights as well as access to merits and judicial review.

III. Key Principles

Without adopting and complying with some basic principles, a competition reform that includes any *ex-ante* regulation would run the risk of harming consumers, competition, and innovation. Therefore, CCIA offers the following harmonizing principles that ISED should consider to ensure that any proposed amendments to the existing competition law and policy framework or new regulation in Canada are effective, proportionate, and do not lead to unintended consequences.

1. Clearly Identify Competition Policy Goals and Evaluate the Need for New Regulation

Identifying the desired outcomes of any new regulation in a clear and unambiguous manner is a key element in determining policy goals. First, from a competition policy perspective, it is important to analyze to what extent any new regulation is directed towards the general purpose of competition – that is, promoting efficiency and consumer welfare. Second, it is crucial to determine whether the existing enforcement frameworks provide more proportionate ways to achieve the desired outcomes. Third, it is important for regulators to identify if the objectives of the intended competition regulation also include non-competition goals, which potentially could be addressed through other industrial policy tools in a more efficient manner. Economy-wide harms are better addressed by economy-wide reforms, rather than platform-specific regulation.

2. Protect Consumers and the Economy

Digital services platforms provide Canadian consumers and businesses with tremendous benefits. Numerous studies have confirmed the many ways in which digital services and multi-sided

business models reinforce and stimulate competition in the market.[26] Given the dynamic and innovative nature of digital markets, any new regulation for digital service platforms needs to take into account wider potential implications for businesses and consumers. Therefore, we encourage ISED to thoroughly assess whether the benefits of any proposed digital platform regulation would outweigh its potential negative impact on Canadian consumers and the economy.

For Canada to attain its overarching goal of facilitating fair competition, investment, and innovation, any proposed regulation should not contradict the competition enforcement and policy framework and should continue to focus on enhancing consumer welfare, also taking into account the business models and ecosystems that create value for consumers and the economy. Any measures should ensure the continued promotion of customer choice and competition, which are two key components of economic growth and prosperity.

3. Protect Innovation

The digital economy is characterized by product, process, and service innovation. Innovation enhances consumer welfare not only in the form of price reduction but also brings about improvement in the services that customers enjoy. An overly burdensome and heavy-handed regulation could significantly hinder innovation and harm economic growth in an economy. In practice, implementing an overly rigid *ex-ante* regulation would have enormous repercussions in terms of how the impacted companies would develop their products, as any regulation would bring about significant uncertainty and challenges regarding its implementation. Specifically, any regulation based on designation as a "platform" or "gatekeeper" will deter new entrants from business models that could come under such a designation.

4. Preserve Business Freedom

Digital economy regulation should preserve business freedom and choice of procompetitive business models. Consumers and users exercise this right when they choose to accept the terms of dealing with platform operators. These private entities should continue to have the freedom to provide their own terms and services under the premise of fairness and clarity for consumers.

5. Maintain Competitive Neutrality

Additionally, any proposed remedy should endeavor to maintain competitive neutrality. *Ex-ante* regulations that blatantly favor or inhibit particular market participants risk delegitimizing both the regulation and its underlying policy goal and may lead to reduced investment and entry into

[26] *See*, e.g., Oxera, How Platforms Create Value for Their Users: Implications for the Digital Markets Act (2021), https://www.oxera.com/wp-content/uploads/2021/05/How-platforms-create-value.pdf; Organisation for Economic Co-operation and Development, Network Effects and Efficiencies in Multisided Markets - Note by H. Shelanski, S. Knox and A. Dhilla (2017), https://one.oecd.org/document/DAF/COMP/WD(2017)40/FINAL/en/pdf.

Canadian markets as well as harm to consumers and to the competitive process.[27]

6. Prevent Distortive Dependencies

Experience shows that government-mandated access conditions lead to long-running government-led renegotiations of terms of service.[28] In dynamic and diverse digitally-enabled markets, imposing new and untested *ex-ante* access conditions risks tying future innovation to ongoing regulatory oversight.

7. Provide Legal Certainty and Predictability

Ex-ante regulation needs a workable and future-proof mechanism for balancing the interests of consumers, suppliers, and other ecosystem participants in an open market economy with free competition. To provide legal certainty, this centralized oversight of the digital economy should be based on a coherent, objective, and administrable governance and enforcement framework instead of implementing safe harbors, presumptions, burden shifting, and/or different standards that would apply only to certain market participants in certain sectors of the economy.

8. Use an Evidence-based Approach

CCIA encourages ISED to review the evidence and past experience and focus any proposed regulatory reform on the types of conduct that are recognized to be demonstrably harmful for competition, rather than seeking to address theoretical or speculative harm, which would risk overregulation to the detriment of innovation. CCIA's recommendation is for ISED to embrace a balanced, evidence-based approach to regulation.

CCIA also recommends that prior to proposing a new platform regulation, Canadian policymakers gather evidence through extensive consultation to confirm and justify that there is in fact a need for the rules to be changed or for additional rules to be imposed on digital platforms. If the need for new rules is identified and confirmed, those new rules should be proportional to the impact of potential harm. New rules should aim to promote competition and enable continuous innovation in the marketplace while preventing competitive harm and unfettered regulatory discretion.

9. Implement Procedural Protections to Involve Affected Companies and Relevant Policymakers

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[27] OECD, Competitive Neutrality in Competition Policy, https://www.oecd.org/competition/competitive-neutrality.htm.
[28] For example, the European directive in the telecom sector was originally created with the aim to "reduce ex-ante sector-specific rules progressively as competition in the market develops." European Parliament and Council Directive on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) (March 7, 2002), https://eur-lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:32002L0019&from=EN. Nearly 20 years later, subsequent EU directives governing the telecommunications sector are still working on that aim

CCIA stresses the importance of the Canadian Government ensuring that there is a sufficient consultation process and stakeholder engagement on any reform proposal, especially in areas in which the regulation can have significant economic impacts.

Additionally, if a new *ex-ante* regulation gets implemented, the integrity of the regime should also be secured by suitable procedural protections and review mechanisms. In particular, full merits review by a court should be available for decisions that have legal consequences for affected companies.

10. Analyze the Costs and Benefits of Implementing New Regulation

Finally, due to the significant economic impact of regulating digital services platforms in Canada, it is crucial for ISED to play an active role in engaging with relevant stakeholders and market players in the development of any *ex-ante* regulatory proposal. Introducing new regulations for platforms is not costless, especially given the dynamic and innovative nature of digital markets. As a result, the ultimate objective of any new regime should be to promote competition and innovation.

To ensure that the cost of any new regime does not outweigh its benefits, the rules should allow conduct that is clearly procompetitive or completely benign and recognize justifications for legitimate protections. Without appropriate cost and benefit analysis, an *ex-ante* regulatory regime may outlaw legitimate and procompetitive forms of conduct, to the detriment of consumers and businesses that use these platforms.

CCIA is pleased to provide this input on the Discussion Paper and welcomes any questions from ISED.