

CCIA Comments in Response to the Canadian Competition Bureau's Public Consultation on the Draft Anticompetitive Conduct and Agreements Guidelines

The Computer & Communications Industry Association (CCIA)¹ appreciates the opportunity to submit comments in response to the Competition Bureau's (Bureau) public consultation on the draft anticompetitive conduct and agreements guidelines (draft Guidelines),² released for public comment on October 31, 2025.³

Policymakers should remain mindful of certain guiding principles when determining whether any potential competition concerns warrant new regulation. When designing and implementing new regulations, policymakers should ensure that any new regulations, if necessary, are minimally intrusive and fully reflect the realities of dynamic and innovative digital markets. As the draft Guidelines acknowledge, many conducts newly identified as raising competition concerns are common business practices that are often procompetitive or competitively benign.⁴ CCIA recommends the Bureau revisit certain proposals in the draft Guidelines to ensure that full consideration is given to any procompetitive efficiencies generated by such conduct. These comments highlight CCIA's key concerns and specific recommendations on the draft Guidelines.

I. Key Considerations and Principles to Guide Regulatory Proposals

Ongoing global digitalization provides consumers and firms with immense benefits across numerous industries, including advertising, agriculture, manufacturing, and retail.⁵ Many markets, such as retail and telemedicine, feature digital components that compete with physical offerings.⁶ “Digital” firms are simply those that adopted technology early across various sectors.

¹ CCIA is an international, not-for-profit trade 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. The Association advocates 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 Competition Bureau Canada, *Anti-competitive Conduct and Agreements Enforcement Guidelines* (Oct. 31, 2025), <https://competition-bureau.ca/en/how-we-foster-competition/consultations/anti-competitive-conduct-and-agreements>.

³ Competition Bureau Canada, *Public consultation on new anti-competitive conduct and agreements guidelines* (Oct. 31, 2025), <https://competition-bureau.ca/en/how-we-foster-competition/consultations/public-consultation-new-anti-competitive-conduct-and-agreements-guidelines>.

⁴ *Supra* n. 2, at para. 131 (“In some cases, conduct or agreements may have benefits that are pro-competitive and increase competitive rivalry.”).

⁵ See, e.g., Sarah Robson and Tim Cowell, AVEVA, *The four pillars of a trusted industrial information infrastructure* (2023), <https://discover.aveva.com/paid-search-industrial-cloud-hybrid-saas/whitepaper-the-four-pillars-of-a-trusted-industrial-information-infrastructure>; Yifat Perry, *Digital Transformation: Examples from 5 Industries*, NetApp BlueXP (Jun. 24, 2022), <https://bluexp.netapp.com/blog/cvo-blg-digital-transformation-examples-from-5-industries>.

⁶ Rosa Abrantes-Metz and Mame Maloney, *Competitive Dynamics of Online and Brick-and-Mortar Retail Prices*, CCIA Research Center (Aug. 2, 2022), <https://research.ccianet.org/reports/competitive-dynamics-online-brick-mortar-retail-prices/>; Trevor Wagener, et. al., *Consumer Preferences Embrace a Mix of Physical and Digital*, CCIA Research Center (Jan. 31, 2022),

Studies confirm how digital services and multi-sided business models create and stimulate competition throughout the economy.⁷

Digitalization is particularly evident with the increasing adoption of artificial intelligence (AI) across Canadian industries, notably in information, finance, and professional services.⁸ Rapid technological developments constantly alter competitive dynamics; generative AI market conditions evolve as quickly as the underlying technology itself.⁹

As the global economy moves towards increased digitalization, over-enforcement regarding specific business conducts risks creating asymmetric results in markets, leading to increased legal ambiguity and business uncertainty. Given the dynamic and innovative nature of digital markets, any proposed guidance must consider the wider potential implications for businesses, consumers, and innovation in the broader Canadian economy.

When designing new regulations, policymakers should adhere to established principles of competition policy, focusing on demonstrable harms rather than speculative theories.

Over-reliance on theoretical models of harm risks overly aggressive enforcement of antitrust laws that can chill investment and stifle innovation in nascent and rapidly developing markets.¹⁰ Importantly, policymakers must consider the potential impacts of stricter regulatory scrutiny on the broader Canadian economy. Introducing new guidelines is not costless. Therefore, the ultimate objective of any new guidelines should be to promote competition and stimulate innovation to the benefit of consumers.¹¹

<https://ccianet.org/research/reports/consumer-preferences-embrace-mix-physical-digital-shopping/>; John Glaser and Kyle Zebley, *It's Time to Cement Telehealth's Place in U.S. Health Care*, Harvard Business Review (Jan. 20, 2023), <https://hbr.org/2023/01/its-time-to-cement-telehealths-place-in-u-s-health-care>; Prashant Gandhi et. al., *Which Industries Are the Most Digital (and Why)?*, Harvard Business Review (Apr. 1, 2016), <https://hbr.org/2016/04/a-chart-that-shows-which-industries-are-the-most-digital-and-why>.

⁷ See, e.g., European Commission, *Staff Working Document: Evaluation of the Vertical Block Exemption Regulation* (Sep. 8, 2020), at 32, https://eur-lex.europa.eu/A_New_Digital_Competition_Regime:_Insights_into_Economic_Risks_-_CCIA_Research_Center/legal-content/EN/TXT/?uri=celex:52020SC0172 (“[A]lternative online distribution models such as online marketplaces have made it easier for retailers to access customers. By using these third-party platforms, small retailers may, with limited investments and effort, become visible to potential customers and sell products to a large customer base and in multiple Member States.”); Oxera, *How platforms create value for their users: implications for the Digital Markets Act* (May 12, 2021), at 34, <https://www.oxera.com/wp-content/uploads/2021/05/How-platforms-create-value.pdf> (“The bundling and tying of different features and services by a platform can boost the efficiency of a market by reducing transaction costs, increasing choice for consumers, and helping businesses to achieve scale economies.”).

⁸ OECD, *The Adoption of Artificial Intelligence in Firms* (May 2, 2025), at 46

https://www.oecd.org/en/publications/the-adoption-of-artificial-intelligence-in-firms_f9ef33c3-en/full-report.html (“The three leading industries in Canadian AI adoption were: 1) information and culture (18% of all firms); 2) finance and insurance (21%); and 3) professional, scientific and technical services (21%). The largest Canadian firms have the highest rates of AI uptake, as in other countries.”).

⁹ Paulo Rocha Abecasis et. al., *Generative Artificial Intelligence: The Competitive Landscape*, Copenhagen Economics, (Feb. 2024), <https://copenhageneconomics.com/publication/generative-artificial-intelligence-competition/>.

¹⁰ See Susan Woodward, *Antitrust Enforcement Over-deters Acquisitions, Squeezing Smaller Startups and Venture Capital Investors*, CCIA Research Center (Jan. 25, 2025), <https://ccianet.org/research/reports/antitrust-enforcement-over-deters-acquisitions-squeezing-smaller-startups-and-venture-capital-investors>.

¹¹ OECD, *The Role of Innovation in Competition Enforcement*, OECD Competition Policy

As the Organisation for Economic Cooperation and Development (OECD) and the International Competition Network (ICN) underscore, guidelines and regulations should allow for clearly procompetitive or competitively benign conducts, and recognize justifications for legitimate business behaviors to ensure the costs of new regulations do not outweigh the benefits.¹² Without appropriate safeguards, the draft Guidelines may inadvertently harm Canadian consumers and businesses, particularly the small and medium-sized businesses (SMBs) that rely on digital services. CCIA encourages the Bureau to analyze whether the potential benefits of the draft Guidelines outweigh the potential harms to Canada's consumers, businesses, and economy.¹³

II. Specific Considerations

Given the importance of ensuring that businesses in Canada can operate with clear and predictable guidelines, as part of the Bureau's ongoing consideration of the draft Guidelines, CCIA would like to highlight a few key provisions that would benefit from further reconsideration.

A. Increased Legal Uncertainty Stemming From a Conduct-first Approach to Effects Assessment

CCIA recommends the Bureau reconsider its proposed conduct-led approach to assessing competitive behavior and maintain crucial legal safe harbors that ensure regulatory certainty. By deprioritizing provision-specific thresholds and removing clear safe harbors, the draft Guidelines' proposed analytical framework¹⁴ grants the Bureau greater flexibility in determining which ACCA provisions can apply.¹⁵ While this approach can bolster enforcement discretion, it risks heightened legal and business uncertainty and significantly raises regulatory compliance costs. Such a shift makes it difficult for firms, particularly those in highly dynamic digital markets, to determine whether ordinary competitive behavior is lawful.

Roundtable Background Note (2023), at 5

https://www.oecd.org/en/publications/the-role-of-innovation-in-competition-enforcement_6599e020-en.html.

¹² OECD, *Key Issues in Digital Trade Review: OECD Global Forum on Trade 2023 "Making Digital Trade Work for All"* (Oct. 2023), at 13, https://www.oecd.org/en/publications/key-issues-in-digital-trade-review_b2a9c4b1-en.html; ICN, *Framework of Competition Assessment Regimes*, ICN Advocacy Working Group (Apr. 2015), https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AWG_FrameworkCompetitionAssessmentRegimes.pdf.

¹³ See OECD, *Regulatory Policy Outlook* (2021), https://www.oecd-ilibrary.org/governance/oecd-regulatory-policy-outlook-2021_38b0fdb1-en; OECD, *Regulatory Impact Assessment* (2020), <https://www.oecd.org/gov/regulatory-policy/regulatory-impact-assessment-7a9638cb-en.htm>.

¹⁴ *Supra* n. 2, at para. 321 ("We focus on the nature of the conduct or agreement and whether it gives rise to competition concerns.").

¹⁵ *Id.* at para. 322 ("We may choose either to focus on one provision that we think is the most appropriate, or to apply under multiple ACCA provisions.").

As the OECD notes, presumptions and legal safe harbors protect commercial practices that usually generate net social benefits.¹⁶ Safe harbors ensure that competition authorities can prioritize limited resources by avoiding assessing procompetitive or competitively neutral behavior. By removing safe harbors and potentially applying multiple ACCA and merger provisions to the same conducts and agreements, this dual-track enforcement approach creates a risk of sequential proceedings, further increasing legal uncertainty. This can hinder procompetitive conduct and chill investment by firms seeking to avoid regulatory risk. Clear and predictable standards are essential to avoid deterring procompetitive conducts that benefit consumers and the broader Canadian economy.

Competition policy should prioritize competition, not competitors. Properly applied, competition policy can enhance market competitiveness and ensure better results for consumers. While the draft Guidelines allow consideration of efficiency and innovation justifications, these are considered only on a secondary, exceptional basis. CCIA recommends the Bureau explicitly clarify that conduct and agreements do not give rise to competition issues where demonstrable proconsumer benefits—such as lower pricing, improved quality, or increased product availability—outweigh potential anticompetitive effects. Adopting a clear balancing test would increase legal and business certainty, allowing firms to pursue price-lowering strategies without risking increased regulatory scrutiny.

B. Market Definition Considerations

CCIA recommends the Bureau revise the draft Guidelines to emphasize a fact-specific, individual approach to assessing relevant markets. Establishing a defined market by relying on objective economic evidence from market participants is crucial to analyzing the competitive effects of business realities.¹⁷ As international authorities such as the OECD and the ICN underscore, market definition is not a purely legal construct but a fact-intensive exercise intended to identify the “area of effective competition.”¹⁸

¹⁶ OECD, *Safe Harbours and Legal Presumptions in Competition Law*, OECD Roundtables on Competition Policy Papers, No. 210, (Nov. 9, 2017), at 21 <https://doi.org/10.1787/e5ace536-en>.

¹⁷ OECD, *Market Definition*, OECD Roundtables on Competition Policy Papers, (Oct. 11, 2012), at 28 https://www.oecd.org/content/dam/oecd/en/publications/reports/2012/10/market-definition_e54deedd/62f0f46c-en.pdf (“[A] properly defined relevant market delineates the area of competition, i.e. separates the active competitive forces from those more passively operating in the background.”).

¹⁸ See e.g. OECD Roundtables on Competition Policy Papers, *Market Definition* (Oct. 11, 2012), at 28 https://www.oecd.org/content/dam/oecd/en/publications/reports/2012/10/market-definition_e54deedd/62f0f46c-en.pdf; ICN, *ICN Recommended Practices for Merger Analysis* (Apr. 2010) Comment 4, at 4 https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_RPsforMergerAnalysis.pdf (“Agencies should assess market definition within the context of the particular facts and circumstances of the merger at issue.”).

The draft Guidelines diverge from international best practices by allowing authorities to ignore market research and define markets differently from how market participants perceive them.¹⁹ Objective, fact-based analysis of competitive dynamics is essential to assessing whether intervention is warranted. Defining the relevant market for both product/service and geography is an important step in effects analysis. An artificially narrow or broad market definition risks distorting market realities, creating flawed analyses, and chilling a dynamic market with misplaced enforcement.²⁰

The draft Guidelines also expand the Bureau’s consideration of factors establishing the product dimension of a relevant market,²¹ including product technological compatibility with those offered by other suppliers and consumers’ willingness to multi-home.

Importantly, firms often rely on consumer data to enhance products and provide better value to consumers. In dynamic digital markets, app marketplaces can gather data to develop products that better meet user preferences, and facilitating user choice by providing data portability tools and interoperability mechanisms.²² Users frequently multi-home across platforms, which significantly limits switching costs following technological innovations or the introduction of new entrants. Treating switching costs resulting from product integration as a form of anticompetitive lock-in risks confusing successful competition on the merits with exclusionary conduct.

C. Market Power Analysis and Barriers to Entry

The draft Guidelines note the Bureau may apply its provisions when firms interfere with the competitive process to establish or sustain market power.²³ In dynamic digital markets, the Guidelines adopt an expansive view of market power by classifying network effects, “learning-by-doing” efficiencies, and data access as potentially significant barriers to entry.²⁴ This broad approach risks mischaracterizing standard competitive advantages as indicators of durable market power.

¹⁹ *Supra* n. 2, at para. 53.

²⁰ ICN, *ICN Recommended Practices for Merger Analysis* (Apr. 2010) Comment 5, at 5

https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_RPsforMergerAnalysis.pdf (“Market shares and concentration levels are meaningful in merger analysis only when they are based on properly defined markets. Therefore, agencies should exercise particular care in defining markets where the choice among possible market definitions may have a significant impact on market shares.”).

²¹ *Supra* n. 2, at para. 72 (“Other factors we may consider include the degree of interoperability among products, technological links and complementarity, network effects across products, or other customer switching costs.”).

²² See e.g. William Morland, *What’s New With Data Portability and our Transfer Your Information Tool*, Meta Platforms (Oct. 18, 2022), <https://developers.facebook.com/blog/post/2022/10/18/data-portability-and-our-transfer-your-information-tool/>; Chance Miller, *Apple and Google team up to make iPhone and Android switching easier*, 9to5Mac (Dec. 8, 2025), <https://9to5mac.com/2025/12/08/apple-and-google-team-up-to-make-iphone-and-android-switching-easier/>.

²³ *Supra* n. 2, at para. 106.

²⁴ *Supra* n. 2, at para. 90.

Market power must be demonstrated through objective, fact-based analyses rather than inferred from market structure.²⁵ By including largely procompetitive or competitively neutral factors as anticompetitive barriers to entry, the Bureau risks excessively deterring investment and innovation by inferring market power where none exists. CCIA recommends the Bureau adopt a nuanced and pragmatic approach that considers the procompetitive benefits of these factors. This promotes business and legal certainty, which fosters innovation and investment in the Canadian economy.²⁶

While network effects are a factor in merger analysis, their presence is not inherently anticompetitive.²⁷ When assessing network effects, competition authorities should consider digital firms frequently compete on innovation, functionality, and product integration rather than price alone.²⁸ Recognizing these market features is crucial to accurately reflect dynamic competition.²⁹

Furthermore, CCIA recommends the Bureau refrain from characterizing “learning-by-doing” efficiencies as potential barriers to entry. In digital markets characterized by high levels of innovation and dynamism, market incumbency does not automatically present an advantage simply because the incumbent was a first “learner.” First-mover advantages are rare and often fleeting.³⁰ Incumbents often shoulder the costs of new market development and investment, while later entrants can rely on these sunk costs to “free ride” and reduce entry costs. Market incumbents can struggle to anticipate and adapt to changing consumer preferences.³¹ By

²⁵ ICN, *ICN Recommended Practices for Merger Analysis* (Apr. 2010), Comment 1, at 3 https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_RPsforMergerAnalysis.pdf (“An agency’s merger analysis should not be a mechanical application of a legal standard based on rigid presumptions, structural criteria, or formulaic concentration numbers. An agency should apply its merger analysis reasonably and flexibly on a case-by-case basis, recognizing the broad range of possible factual contexts and the specific competitive effects that may arise in different transactions.”).

²⁶ Hailey Phelps, *What Makes Companies Invest?*, Federal Reserve Bank of Richmond (Q4 2020), https://www.richmondfed.org/publications/research/econ_focus/2020/q4/feature2 (“[P]olicy uncertainty may lower business confidence, which in turn has a dampening effect on investment.”).

²⁷ Catherine Tucker, *Network Effects and Market Power: What Have We Learned in the Last Decade?*, Boston University (Jul. 2018), at 3 <https://sites.bu.edu/tpri/files/2018/07/tucker-network-effects-antitrust2018.pdf>.

²⁸ Tone Knapstad, *Digital dominance: assessing market definition and market power for online platforms under Article 102 TFEU* (Nov. 8, 2023) <https://doi.org/10.1080/17441056.2023.2280334> (“Competition in digital markets is dynamic and focused more on innovation than price.”).

²⁹ OECD, *OECD Handbook on Competition Policy in the Digital Age*, (2022), https://www.oecd.org/content/dam/oecd/en/publications/reports/2022/02/oecd-handbook-on-competition-policy-in-the-digital-age_50b6e951/c8c1841b-en.pdf; ICN, *ICN Recommended Practices For Merger Analysis* (Apr. 23, 2025), <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2025/05/ICN-Recommended-Practices-for-Merger-Analyses-Coordinated-Effects-23-April-2025.pdf>.

³⁰ Selçukhan Ünekbas, *Do First-Mover Advantages Last?*, Network Law Review, (2023) <https://www.networklawreview.org/phd-advantage/>.

³¹ Marvin Lieberman and David Montgomery, *First Mover Advantages*, Strategic Management Journal, Vol. 9 (1988), at 9 https://uol.de/f/2/dept/wire/fachgebiete/entrepreneur/download/Artikel_Internetoekonomie/Lieberman_First_Mover.pdf.

observing an incumbent's weaknesses, new entrants can quickly contest markets defined by rapidly evolving technology, such as AI.³²

Digital and AI-driven markets possess advantages stemming from widely accessible data, which may depreciate rapidly once past threshold due to fast-moving consumer preferences and technological advancements.³³ Additional data is either not informative or yields marginal improvements that are offset by the expenses or work associated with capturing that additional data. In these markets, an incumbent's data advantages provide limited protection from new entrants bringing innovative data sources or superior algorithms.³⁴ Consequently, treating data access as an anticompetitive barrier without carefully considering market nuances risks stifling innovation. This is particularly notable in retail, where AI adoption has led to greater availability and generation of data, bolstering SMB competitiveness.³⁵

Competition policy should distinguish between conduct that improves offerings for consumers and conduct that forecloses rivals through exclusionary means. Objective analysis is essential to determine whether a firm controls an input and whether that input is "essential." This is crucial in digital markets characterized by open source solutions and interoperable technologies.

CCIA recommends against relying on high profit margins or price variations as indicators of anticompetitive conduct. As the OECD notes, using high profits as a measure of potentially anticompetitive conduct would send distorted signals to the market and could have a chilling effect on competition.³⁶ Given the challenges in evaluating supracompetitive outcomes,³⁷ CCIA recommends adopting the Hypothetical Monopolist Test (HMT) and the Small but Significant

³² See e.g. Kenrick Cai et. al., *Exclusive: OpenAI to release web browser in challenge to Google Chrome*, Reuters (Jul. 9, 2025) <https://www.reuters.com/business/media-telecom/openai-release-web-browser-challenge-google-chrome-2025-07-09/>.

³³ See, e.g., BIAC, *Comments by the Business at OECD (BIAC) Competition Committee to the OECD Competition Committee, Artificial Intelligence, Data, and Competition*, (Jun. 12, 2024), <https://www.businessatoecd.org/hubfs/Artificial%20Intelligence%2C%20Data%2C%20and%20Competition.pdf?hsLang=en>; Hal R. Varian, *Artificial Intelligence, Economics, and Industrial Organization*, 109 AEA Papers & Proc. 399 (2019); https://www.nber.org/system/files/working_papers/w24839/w24839.pdf; OECD, *Artificial Intelligence, Data, and Competition*, (May 2024), https://www.oecd.org/content/dam/oecd/en/publications/reports/2024/05/artificial-intelligence-data-and-competition_9d0ac766/e7e88884-en.pdf.

³⁴ Ariel Ezrachi and Maurice Stucke, *Virtual competition: The promise and perils of the algorithm-driven economy*, Harvard University Press (Aug. 22, 2016), <https://www.conpolicy.de/en/news-detail/virtual-competition-the-promise-and-perils-of-the-algorithm-driven-economy>.

³⁵ Mark Hamstra, *AI tools drive widespread efficiencies for small retailers*, Supermarket News (Nov. 5, 2025), <https://www.supermarketnews.com/independents-regional-grocers/ai-tools-drive-widespread-efficiencies-for-small-retailers>.

³⁶ OECD, *Latin American And Caribbean Competition Forum Session III: Promoting effective competition in public procurement*, Background note by the OECD Secretariat (Apr. 7, 2016), at 31 [https://one.oecd.org/document/DAF/COMP/LACF\(2016\)31/en/pdf](https://one.oecd.org/document/DAF/COMP/LACF(2016)31/en/pdf).

³⁷ *Supra* n. 2, at para. 97 ("We [the Bureau] often have significant challenges when we evaluate evidence of supra-competitive prices or profits. For example, it may be hard to know what a "competitive" price is, how to measure a firm's economic costs, or how to adjust for quality. As a result, we may consider evidence of supra-competitive prices or profits alongside other evidence of market power.").

and Non-transitory Increase in Price (SSNIP) method as an analytical framework for assessing pricing. As U.S. competition authorities recognize,³⁸ the HMT provides a rigorous, internationally recognized econometric framework that ensures findings are grounded in empirical evidence.

Importantly, the Bureau should give greater consideration to the competitive constraints found in innovation-driven markets. In fast-growing and disruptive markets, current market shares are not necessarily indicative of a firm's market power. In digital markets, even firms holding over thirty percent market share can face significant constraints from the threats of innovation or entry from adjacent markets.³⁹

D. Anticompetitive Conduct and Agreements Considerations

Given its broadened scope and significantly increased focus on digital markets,⁴⁰ the draft Guidelines identify common business practices and contractual terms—such as self-preferencing, most-favored-nation (MFN) clauses, and exclusive dealing agreements—as potentially anticompetitive.⁴¹ These practices often serve legitimate efficiency purposes, such as quality control, protection of sensitive intellectual property (IP), and incentivizing increased investment in complementary technologies. Restricting a firm's ability to control access to diagnostic and repair tools could reduce incentives to invest in advanced technologies that ultimately harm consumer welfare. These practices spur innovation, enhancing consumer welfare by lowering costs and increasing choice.⁴²

Because the competitive effects of these practices are highly context-specific, the Bureau should clarify the need for a fact-specific inquiry rather than presuming anticompetitive harm. For example, MFN agreements can promote pricing fairness and prevent harmful practices disadvantaging smaller sellers, thereby reducing transaction costs and ultimately benefiting

³⁸ U.S. Dep't of Just. and Fed. Trade Com'n., *2023 Merger Guidelines* (Dec. 18, 2023), at 4.3.A. <https://www.justice.gov/atr/merger-guidelines>.

³⁹ OECD, *The Evolving Concept of Market Power in the Digital Economy*, Background Note by the Secretariat, DAF/COMP(2022)2 (May 2022), at 21 https://www.oecd.org/content/dam/oecd/en/publications/reports/2022/05/the-evolving-concept-of-market-power-in-the-digital-economy_c384e80f/2cfcb4a8-en.pdf (“Market shares are a particularly limited indicator of market power in digital markets.”); see also Tone Knapstad, *Digital dominance: assessing market definition and market power for online platforms under Article 102 TFEU* (Nov. 8, 2023) <https://doi.org/10.1080/17441056.2023.2280334> (“[M]arket shares, which are a static measurement of power, are not necessarily indicative of competitive strength in fast-growing digital markets.”).

⁴⁰ See Antonio Di Domenico et. al., *Competition Bureau Releases Proposed Enforcement Guidelines: A New Framework for Addressing Anti-Competitive Conduct and Agreements*, Fasken (Nov. 19, 2025), <https://www.fasken.com/en/knowledge/2025/11/competition-bureau-releases-proposed-enforcement>.

⁴¹ *Supra* n. 2, Section 6, at para. 163.

⁴² Will Taylor and Emilie Feyler, *A New Digital Competition Regime: Insights into Economic Risks*, CCIA Research Center (Feb. 27, 2025), at 16 <https://ccianet.org/research/reports/a-new-digital-competition-regime-insights-into-economic-risks/>.

consumers.⁴³ Exclusive dealing agreements also help secure supply chains and provide sales predictability for SMBs, lowering costs and ensuring product consistency.⁴⁴

Self-preferencing, which can include merely advertising a firm's own products or informing consumers of lower-cost options, is a common business practice that has existed long before digital platforms. Economic literature shows that self-preferencing can have procompetitive benefits, such as reducing prices and eliminating double marginalization.⁴⁵ Supermarkets promoting private-label products illustrates how self-preferencing benefits consumers, as these products often offer comparable quality to branded products at lower prices. In dynamic digital markets, self-preferencing practices can improve service quality, lower costs, and enhance interoperability.⁴⁶ Importantly, studies show that restricting self-preferencing conducts does not always improve consumer welfare and can lead to higher prices or reduced platform attractiveness.⁴⁷

Furthermore, CCIA recommends the Bureau adopt a balanced approach regarding refusals to deal. An overly broad interpretation of Section 75 of the Competition Act to include constructive refusals to deal⁴⁸ excessively deters firms from developing advanced safety tools and proprietary solutions. As the draft Guidelines observe, firms are generally free to choose their business partners.⁴⁹ Firms regularly have legitimate reasons for exclusive dealing or refusing to deal with certain competitors. In the digital economy, where online marketplaces are regularly challenged by bad actors seeking to exploit vulnerabilities,⁵⁰ platform integrity and consumer trust depend on high quality control standards. Competition enforcement should recognize legitimate objectives—such as data security and IP protection—rather than presuming anticompetitive intent. Overly broad remedies, such as mandating input sharing, can undermine innovation incentives, ultimately leaving consumers worse off.⁵¹

⁴³ Martin Geagan and Conor Reidy, *Antitrust 101: “Most Favored Nation” Clauses*, Winston & Strawn LLP (Aug. 5, 2022), <https://www.winston.com/en/blogs-and-podcasts/competition-corner/antitrust-101-most-favored-nation-clauses>.

⁴⁴ Linda Gratz and Markus Reisinger, *On the competition enhancing effects of exclusive dealing contracts*, International Journal of Industrial Organization (Sep. 2013), <https://doi.org/10.1016/j.ijindorg.2013.07.008> (“[E]xclusive dealing contracts can have procompetitive effects even if no efficiency gains are generated.”).

⁴⁵ *Supra* n. 41.

⁴⁶ *Id.*, at 6.

⁴⁷ *Id.*

⁴⁸ *Supra* n. 2, at para. 186.

⁴⁹ *Id.*, at para. 187.

⁵⁰ Rochelle Blease, *E-Commerce Marketplaces: Four Risks Impacting Consumer Trust*, Forbes (Sep. 30, 2024), <https://www.forbes.com/councils/forbestechcouncil/2024/09/30/e-commerce-marketplaces-four-risks-impacting-consumer-trust/>; see also Chris Hooper, *How to ensure trust in a marketplace: Winning the battle for consumer confidence*, Veriff (Mar. 26, 2025), <https://www.veriff.com/fraud/news/marketplace-trust-consumer-confidence>.

⁵¹ OECD, *Abuse of dominance in digital markets* (Oct. 2020), at 26 www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf.

E. Backdoor Merger Control for Serial Acquisitions and Nascent Competitors

CCIA recommends the Bureau reconsider its proposal to assess “serial acquisitions,” which includes mergers involving nascent or potential competitors, and acquisitions in markets featuring network effects under the abuse of dominance standard.⁵² This approach reduces regulatory predictability and transparency of the merger review process by creating an alternative merger control regime when one already exists. This would circumvent review deadlines and notification thresholds, allowing for retroactive analysis. Consequently, this approach can significantly increase business uncertainty and chill investment, particularly impacting startups depending on acquisition to facilitate market exits.⁵³ To promote increased legal certainty, CCIA recommends the Bureau evaluate any merger effects through its existing merger control regime and analytical framework.

Serial acquisitions can promote competition by challenging incumbents and increasing market contestability, creating more diversified and resilient market participants.⁵⁴ These transactions can help foster synergies, lower risk, and accelerate growth relative to organic expansion.⁵⁵ By pooling capital and assets, firms increase access to new opportunities, enabling them to scale and realize greater efficiencies in ways that fragmented markets cannot.⁵⁶

New technology firms often rely on acquisition as an exit strategy and a primary source of growth.⁵⁷ The prospect of acquisition incentivizes firms in highly dynamic and competitive markets to assume risk⁵⁸ and drive innovation through inventing, patenting, and commercializing

⁵² *Supra* n. 2, at para. 315.

⁵³ See, e.g., Jeffrey Bartel, *Exploring Trends In Venture Capital Acquisitions For 2023*, Forbes Magazine (Dec. 1, 2022) <https://www.forbes.com/councils/forbesfinancecouncil/2022/12/01/exploring-trends-in-venture-capital-acquisitions-for-2023/>.

⁵⁴ OECD, Directorate for Financial and Enterprise Affairs, Competition Committee, *Serial Acquisitions and Industry Roll-ups - Note by BIAC* (Dec. 6, 2023), at 10, [https://one.oecd.org/document/DAF/COMP/WD\(2023\)78/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2023)78/en/pdf).

⁵⁵ OECD, *Serial Acquisitions and Industry Roll-ups*, OECD Competition Policy Roundtable Background Note (Nov. 3, 2023), at 6, [https://one.oecd.org/document/DAF/COMP\(2023\)13/en/pdf](https://one.oecd.org/document/DAF/COMP(2023)13/en/pdf).

⁵⁶ See, e.g., Jay Ezrielev, *Shifting the Burden in Acquisitions of Nascent and Potential Competitors: Not so Simple*, Competition Policy International, (Nov. 4, 2020), at 10, <https://www.competitionpolicyinternational.com/wp-content/uploads/2020/11/North-America-Column-November-2020.pdf>; Carl Shapiro, National Bureau of Economic Research, *Competition and Innovation: Did Arrow Hit the Bull's Eye?*, University of Chicago Press (Mar. 2012), at 365, <https://www.nber.org/books-and-chapters/rate-and-direction-inventive-activity-revisited/competition-and-innovation-did-arrow-hit-bulls-eye>.

⁵⁷ Susan Woodward, *Irreplaceable Acquisitions: Proposed Platform Legislation and Venture Capital* (Nov. 2021), at 6, http://www.sandhillecon.com/pdf/Woodward_Irreplaceable_Acquisitions.pdf.

⁵⁸ See, e.g., Luke M. Froeb et. al., *Cost-Benefit Analysis Without the Benefits or the Analysis: How Not to Draft Merger Guidelines* (Aug. 10, 2023), Southern California Law Review, SSRN https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4537425; Dan Wang et. al., *The Past Is Prologue? Venture-Capital Syndicates' Collaborative Experience and Start-Up Exits*, Academy of Management (Apr. 14, 2022) at 65, <https://foster.uw.edu/wp-content/uploads/2021/04/Wang-Pahnke-McDonald-2021.pdf>.

new technologies.⁵⁹ As the OECD notes, the prospect of acquisition by an incumbent can incentivize investments benefiting consumers.⁶⁰

Empirical research shows no systemic issue with serial acquisitions or an enforcement gap regarding acquisitions by large technology firms. An FTC study of non-HSR reported acquisitions of five technology firms between 2010 and 2019 found no evidence the studied acquisitions resulted in higher concentration than those in other sectors, nor indicate that these acquisitions generate unique competitive concerns.⁶¹ Similarly, a study of 175 acquisitions by large technology firms between 2015 and 2017 found no systemic evidence of anticompetitive effects.⁶²

Importantly, the draft Guidelines lack a clear timeframe for analyzing serial acquisitions,⁶³ allowing any two mergers to be construed as part of a “series.” To better reflect competitive dynamics, the Bureau should clarify, using empirical evidence, the circumstances under which acquisitions fall within the same “series.” CCIA recommends the Bureau explicitly limit its consideration under the abuse of dominance standard to the three-year window described in Subsection 79(6) of the Competition Act.⁶⁴ This enhances legal clarity and reduces the risk of flawed analyses and excessive deterrence of procompetitive or competitively benign transactions.

⁵⁹ See, e.g., Jan Bena and Kai Li, *Corporate Innovations and Mergers and Acquisitions*, *Journal of Finance* (Nov. 6, 2014), at 22, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1917215; Marianna Makri et. al., *Complementary Technologies, Knowledge Relatedness, and Invention Outcomes in High Technology Mergers and Acquisitions*, *Strategic Management Journal* (Feb. 1, 2010), at 610, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1995792.

⁶⁰ OECD, *Start-ups, Killer Acquisitions and Merger Control – Background Note*, Directorate for Financial and Enterprise Affairs, Competition Committee (May. 12, 2020), at 29, [https://one.oecd.org/document/DAF/COMP\(2020\)5/en/pdf](https://one.oecd.org/document/DAF/COMP(2020)5/en/pdf); OECD, *Serial Acquisitions and Industry Roll-ups*, OECD Competition Policy Roundtable Background Note (2023), at 8, <https://www.oecd-ilibrary.org/docserver/0b4362f8-en.pdf?expires=1720024128&id=id&accname=guest&checksum=86C02BACB9C28B97F80C3BE5F4C1885E>.

⁶¹ See generally, Fed. Trade Comm'n, *Non-HSR Reported Acquisitions by Select Technology Platforms, 2010-2019: an FTC Study* (Sep. 2021), <https://www.ftc.gov/system/files/documents/reports/non-hsr-reported-acquisitions-select-technology-platforms-2010-2019-ftc-study/p201201technologyplatformstudy2021.pdf>; see also, D. Bruce Hoffman, *Antitrust in the Digital Economy: A Snapshot of FTC Issues* (May 2019), https://www.ftc.gov/system/files/documents/public_statements/1522327/hoffman_gcr_live_san_francisco_2019_speech_5-22-19.pdf, (“[T]here’s no robust evidence that below-threshold acquisitions are particularly pervasive or problematic in the digital arena.”).

⁶² Axel Gautier & Joe Lamesch, *Mergers in the Digital Economy* (Sep. 2, 2020), <https://doi.org/10.1016/j.infoecopol.2020.100890>.

⁶³ *Supra n. 2*, at para. 315. The draft Guidelines state the Bureau “may take action on conduct or agreements that occurred more than three years ago if part of a broader practice of anti-competitive acts or conduct was ongoing within the past three years.”

⁶⁴ Competition Act, RSC 1985, c C-34, s 79(6).

While efficiencies do not necessarily redeem an anticompetitive merger,⁶⁵ over-enforcement in merger control can detrimentally impact the broader merger ecosystem.⁶⁶ This can excessively deter investment and hinder innovation and competition, particularly in the highly dynamic digital economy.⁶⁷ CCIA recommends the Bureau evaluate serial acquisitions through an objective, proportional inquiry that considers procompetitive effects.⁶⁸ This approach provides the Bureau with robust data to better assess the overall impact of transactions on markets.

F. Remedies

When designing remedies under the abuse of dominance provisions,⁶⁹ authorities should observe key principles ensuring remedies remain fit for purpose. As the OECD notes, remedies must be narrowly tailored, evidence-based, and proportional to identified competitive harms.⁷⁰ This is crucial in highly dynamic digital markets, where overly broad remedies risk hindering innovation and chilling competition.

The Bureau should prioritize evidence-based remedies tied to demonstrable harms rather than speculative theories. An overly aggressive approach to remedy design can inadvertently discourage legitimate, efficiency-enhancing strategies. Importantly, pre-liability interventions risk disrupting commercial operations and harming consumer welfare before a case is fully adjudicated. An enforcement regime that favors aggressive penalties over demonstrable harm analysis ultimately hinders technological innovations and reduces market choice. Consequently, the draft Guidelines should explicitly commit to remedies that are proportionate to the scale of the anticompetitive harm, focused on restoring competition rather than imposing punitive financial burdens.

⁶⁵ Comm'r. Christine S. Wilson, *Breaking the Vicious Cycle: Establishing a Gold Standard for Efficiencies*, Bates White Antitrust Webinar (Jun. 4, 2020), at 3, https://www.ftc.gov/system/files/documents/public_statements/1577315/wilson_-bates_white_presentation_06-24-20_-final.pdf (“The result is that evidence of likely efficiencies rarely, if ever, suffices to overcome a determination that anticompetitive effects may result from a merger.”).

⁶⁶ Damien Geradin, *The Perils of Antitrust Proliferation: The Globalization of Antitrust and the Risks of Overregulation of Competitive Behavior*, Chicago Journal of Int'l Law, (Jun. 1, 2009), at 206, <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1305&context=cjl>.

⁶⁷ See Susan Woodward, *Antitrust Enforcement Over-deters Acquisitions, Squeezing Smaller Startups and Venture Capital Investors*, CCIA Research Center (Jan. 25, 2025), <https://ccianet.org/research/reports/antitrust-enforcement-over-deters-acquisitions-squeezing-smaller-startups-and-venture-capital-investors/>; see also Luis Cabral, *Merger Policy in Digital Industries*, CEPR Discussion Paper no. DP14785 (May 2020), at 4, <http://luiscabral.net/economics/publications/IEP%202021.pdf>.

⁶⁸ See, e.g., Asheesh Agarwal et. al., *Former Enforcers Comment on Request for Information on Corporate Consolidation Through Serial Acquisitions and Roll-Up Strategies* (Jun. 26, 2024), at 2, <https://laweconcenter.org/wp-content/uploads/2024/06/FTC-alum-comments-serial-acquisitions.pdf>.

⁶⁹ *Supra n. 2*, at para. 386.

⁷⁰ OECD, *Remedies and commitments in abuse cases*, OECD Competition Policy Roundtable Background Note (2022), at 14 www.oecd.org/daf/competition/remedies-and-commitments-in-abuse-cases-2022.pdf.

III. Conclusion

CCIA appreciates the Bureau's invitation for input on the draft Guidelines and efforts to consult stakeholders on best practices. CCIA looks forward to engaging in further dialogue on these crucial issues.