The Future of Competition Policy in Canada

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March 31, 2023

I am pleased to submit these comments in response to the Government of Canada's consultation and discussion paper on the Future of Competition Policy in Canada ("Discussion Paper").

My comments are deliberately narrow but address what I believe to be one of the most consequential potential changes considered by the Discussion Paper:

> Creating 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.

My comments on this potential change draw heavily on a recent ISED-commissioned study by Vass Bednar, Ana Qarri, and Robin Shaban ("BQS"). A main theme of that study is that competition policy should move away from identifying anticompetitive conduct through evidence-based assessment of its effects and, instead, use per se or bright line rules to put blanket prohibitions on certain types of conduct by certain firms. (BQS use the terminology "consequentialist" to refer to tests that require a showing of anticompetitive effects and "deontological" to refer to bright line rules.)

The BQS study is important because it provides concrete arguments for creating bright line rules to police anticompetitive unilateral conduct. I find that those arguments fail for three distinct reasons. First, more vigorous enforcement does not require adopting bright line rules; in other words, the government need not rely on bright line rules to invigorate enforcement. Second, bright line rules will cause the loss of tangible benefits that Canadians are enjoying right now; BQS seem to agree that the suspect unilateral conduct is delivering benefits—at least in the short run. Third, while recognizing the costs of over-correction, BQS ultimately make no proposal to minimize or prevent such costs.

I detail those conclusions after an introductory section that provides some background. Given character limits imposed on submissions I have kept my focus narrow.

My comments are made based on my extensive background in competition policy and the application of policy to public and private enforcement, which I briefly summarize. I received a PhD in economics in 1999 from Université de Montréal and since 2000 have been a full-time professional economist focusing on competition. Since 2019, I have been the owner of Rideau Economics, a competition economics consultancy located in Ottawa. From 2016 to 2019, I served a three-year term on interchange as the T.D. MacDonald Chair in Industrial Economics at the Canadian Competition Bureau ("Bureau"). In that capacity, I was the Bureau's Chief Economist. At the Bureau, I worked with case teams, worked on special projects, directly engaged with stakeholders, and advised the Commissioner of Competition on all significant competition matters, including work related to the Bureau's enforcement and advocacy mandates. I was also a principal contributor to the Bureau's outreach efforts on emerging competition issues related to big data.

In 2021, I was appointed a Member of the Competition Policy Council at the C.D. Howe Institute. The C.D. Howe Institute is a prominent Canadian thinktank whose objective is to raise standards of living by promoting public policies that are economically sound. I currently am the chair of the Canadian Bar Association's Reviewable Matters/Unilateral Conduct committee. I regularly publish articles on issues related to competition law enforcement and competition economics. I am also regularly invited to speak on topics pertaining to competition law enforcement and competition economics at various conferences, continuing education events, and other fora.

I am being compensated for the time I have spent in making these comments by the US Chamber of Commerce. The US Chamber has in no way dictated or restricted my comments. As such, my comments are not necessarily theirs; nor are they necessarily those of the other entities with which I am associated.

I. Basics: evidence-based assessments of effects and bright line rules

In Canada, unilateral conduct is currently assessed through, among other things, an evidence-based analysis of its effects. In short, to meet their burden, the Commissioner or a private plaintiff must show that, more likely than not, conduct has had, is having, or is likely to lead to a substantial lessening or prevention of competition ("SLPC"). SLPCs are proven typically by showing an increase in price or a decrease in quality or innovation is likely. This approach is used in many (but not all) foreign jurisdictions and is justified by the fact that unilateral conduct is omnipresent in the economy and raises no competition concerns in the vast majority of cases. In some circumstances, however, unilateral conduct can harm competition. Thus, to detect those instances, we ought to use available evidence to assess its effects.

Competition law is hardly an outlier in using an evidence-based approach to assess the effects of possible interventions. In fact, an evidence-based approach is generally seen as a key feature of good public policy. The COVID-19 pandemic is illustrative: experts assess a proposed public health intervention (like whether to approve a given vaccine) based on available evidence (like the vaccine's efficacy and safety). Different evidence leads to different actions.

In contrast, bright line rules impose a broadly applicable prohibition that is not rebuttable with evidence (beyond, potentially, the firm's identification as a "gatekeeper"). In Canada, bright line rules are currently applied to conduct such as "hard-core" price fixing that is viewed to have limited, if any, benefits.

New perspectives, motivated by a belief that competition law enforcement in Canada is not sufficiently vigorous or effective, have emerged arguing for an expansion of the scope for bright line rules. BQS are leading advocates for that perspective and propose a treatment similar to Europe's Digital Markets Act, which will use bright line rules to police unilateral conduct when it takes effect in May of this year. Notably, that Act combines competition and non-competition objectives as its key aim is to foster Europe's "digital sovereignty."

In these comments, I assume that the federal government desires to strengthen competition enforcement and ask whether bright line rules on unilateral conduct would be the best way to do that.

My reading of BQS reveals three distinct bases for their belief that competition law enforcement is not sufficiently vigorous: 1) Conduct is frequently beneficial in the short-run but possible long-run harm is not recognized; 2) Conduct may leverage data, network effects, or economies of scale or scope to create superior products that other competitors cannot match; 3) Conduct creates some kind of social, moral, or political harm.

I address the first two bases in depth below but here briefly note that the last is a non-traditional concern that implicates the purpose of Canada's *Competition Act*. I, like many others, have argued that good competition policy should remain focused on traditional objectives: maximization of economic efficiency. I only revisit that topic briefly by putting it in the context of recent events. TikTok has had enormous and rapid success challenging established "platform" incumbents; that success runs counter a central premise held by many, including BQS, that "many digital markets" have features that "tend to increase market concentration, raise barriers to entry, and strengthen the durability of market power." In any case, because TikTok is a Chinese-owned company, its success raises national security concerns and other policy issues. I believe that it would be a mistake for competition enforcers to consider such concerns in their assessment of conduct by or directed toward TikTok. More generally, competition enforcement should not reflexively seek to support other objectives the governments may pursue: an able TikTok is good for competition, something the Bureau presumably supports; but the Federal government, focused on other policy considerations, has banned TikTok from all federal government devices.

II. Bright line rules are not needed for more vigorous enforcement

If the government concludes that competition law enforcement in Canada should be enhanced, must it employ bright line rules to do so? The answer is simple: No.

The logic of that answer is easy to grasp. Currently, a plaintiff must satisfy three elements to prevail before the Competition Tribunal in a unilateral conduct case: dominance, intent, and effects. A reform that enhances enforcement could lower the burden faced by plaintiffs by modifying, or even nullifying, any of those elements without invoking a bright line rule. Even a *rebuttable* presumption still involves an evidence-based analysis and, as such, differs fundamentally from a bright line rule (i.e., a non-rebuttable presumption).

Without my endorsing their specific recommendations, the Bureau's comments underscore this point. While arguing for increased powers and lower burdens, those comments do not recommend adoption of bright line rules—in fact, they conspicuously do not address the topic. For example, the Bureau's first recommendation is that the Commissioner, once having shown dominance, would meet their burden by showing intent *or* effects. The Bureau's comments also contain other recommendations that would, at least in the Commissioner's view, incentivize more vigorous enforcement of all parts of the Competition Act (e.g., immunizing the Commissioner against cost awards).

The importance of this initial observation grows in light of the next part of my comments: bright line rules are likely to be harmful to competition and Canadians.

III. Bright line rules are not the answer for Canada

Unilateral conduct is incredibly common in Canada just as it is in all market economies.

One form of unilateral conduct involves *vertical* agreements, which are agreements between two firms that do not compete because they are upstream or downstream in the production chain from one another. For example, a restaurant may enter into an exclusive deal with an upstream supplier to serve only Pepsi and not Coke; a retailer may commit to purchasing particular quantities of goods from a manufacturer at particular prices. In the *vast* majority of cases, vertical agreements are used in contexts where there is no plausible concern that anticompetitive effects will result. If a vertical agreement is used where anticompetitive effects are implausible, one must acknowledge that the agreement has procompetitive benefits. In fact, economists widely recognize the value—even necessity—of this type of unilateral conduct.

Other forms of unilateral conduct do not involve vertical agreements: a firm may cut a list price, introduce a new product, or enhance its marketing efforts. Again, the *vast* majority of price cuts, new product introductions, and marketing practices raise no plausible anticompetitive concern.

Nevertheless, BQS argue that certain forms of unilateral conduct are sufficiently harmful that they should be proscribed with bright line rules, specifically calling out certain types of marketing ("self-preferencing") and new product introductions ("copycatting") by certain firms ("gatekeepers.")

But again, if self-preferencing and copycatting are used by firms where anticompetitive effects are implausible, one must acknowledge the potential for procompetitive effects that enhance efficiency and benefit consumers even if used by "gatekeepers." To my knowledge, with the likely exception of competitors like HBO, Amazon, and traditional film studios, nobody is worried that Netflix heavily promotes its own content. Similarly, the consensus view is that "copycat" private-label products bring substantial benefits to consumers. BQS agree: "The classic example of procompetitive copycatting is with private-label products in the grocery sector. In certain contexts, these products can enhance competitive rivalry in a market, leading to more variety, lower prices, and potentially greater product innovation." But, as the Bureau's 2017 position statement on its investigation into unilateral conduct by Loblaws noted "when grocers develop strong Private Labels they increase their bargaining position with suppliers." While private-label products benefit consumers, they may not benefit competitors.

To be clear, unilateral conduct *can* harm competitors and consumers. For instance, in 2010, Intel settled a case with the US FTC that involved the use of vertical agreements shortly after settling a private action concerning the same issues with AMD for $1.25 billion USD (the EC decision against Intel was annulled in 2022—an astounding 13 years after the EC's initial 2009 €1.06 billion fine). Three decades ago, Microsoft famously took "four steps to exclude Java from developing as a viable cross-platform threat"—essentially an aggressive form of self-preferencing.

The fact that conduct may have either anticompetitive or procompetitive effects is at the heart of my concerns about bright line rules, which lump together different activity by different firms in different markets. US Assistant Attorney General Kanter, a strong proponent of more vigorous competition law enforcement, has articulated the same concerns, stating that self-preferencing "is often misappropriated, to lump anticompetitive behavior with otherwise competitively benign conduct … Given its amorphous nature, labelling conduct as 'self-preferencing' can end up obscuring rather than shedding light on the ultimate competitive analysis. At the Division, our analysis does not turn on whether a particular flawed label could describe the conduct at issue. Rather our focus is on whether the conduct by a firm with monopoly power has had or will likely have an exclusionary effect and cause competitive harm."

BQS correctly and repeatedly note that distinguishing harmful from beneficial unilateral conduct is hard because "it may be incredibly difficult, if not impossible, to predict the outcomes of markets." That recognition, by itself, should caution against bright line rules. If we cannot easily predict market outcomes, how can we be sure that prohibiting broad categories of conduct would be helpful in avoiding adverse outcomes—especially when that prohibition involves practices that are extremely common and frequently beneficial?

BQS anticipate this critique and respond that anticompetitive and procompetitive self-preferencing may be distinguished by the use of "big data" that "may exacerbate the harms of self-preferencing by enabling more sophisticated forms of self-preferencing more often." Similarly they identify that "the core issue behind copycatting is the use of exclusive data held by a competitor to dominant [sic] markets."

But use of data has been ubiquitous for some time now. For example, supermarkets have been using scanner and loyalty card data in sophisticated and varied ways for years. American Express has long used its "closed loop" network to provide specialized marketing capabilities to merchants. Wal-Mart even deployed proprietary algorithms that detected that purchases of strawberry Pop-Tarts increased seven-fold just before a hurricane; strawberry Pop-Tarts quickly began appearing prominently near checkout before hurricanes.

But setting aside whether, in light of its ubiquity, use of data is a good way to distinguish good from bad conduct, BQS' main concern is that data may be used by certain firms to improve their products thereby making it harder for rivals to compete. They call out Amazon specifically, suggesting that it should not use data to enhance the competitive offerings of its own retail business: "As in the Amazon case, it should be considered whether using the data that a platform may collect from third-party sellers to enhance the competitive offering of its own retail business is appropriate and the implications of a platform's dual role as a platform for third party sellers while *also* being a retailer."

This concern is one with which I strongly disagree as it calls for competition enforcement to protect and promote certain firms and harm and restrain others—almost certainly at the expense of consumers. The eminent competition economics scholar and practitioner Carl Shapiro, in his well-known article "Antitrust in a time of Populism," summarized as follows: "Simply saying that Amazon has grown like a weed, charges very low prices, and has driven many smaller retailers out of business is not sufficient. Where is the consumer harm?" While it is easy to formulate a bright line rule that inhibits the ability of a specific firm to improve their products and grow their sales, that prospect should be anathema to competition policy in Canada.

Setting such non-traditional and non-desirable objectives aside, I read the BQS study to offer three arguments that bright line rules would be useful in achieving traditional competition objectives.

The first recognizes the benefits of the conduct in the short run but appeals to the possibility of harm in the future. But it is *possible* that nearly anything can happen in the long run given BQS' correct (in my view) recognition that "markets and economies are dynamic." In fact, it is easy to point to examples of seemingly unassailable firms that were successfully assailed (Blackberry, Nokia, Myspace, Yahoo!, AOL). When firms successfully use scale, innovate, and meet consumer needs at very low prices, that is not typically viewed as a market failure—although it can limit the success of competitors. In my view, sacrificing today's tangible and real benefits in favour of avoiding the possibility of harm at some ill-defined point in the future is bad policy.

The second is less substantive as it simply assumes away fundamental shortcomings of bright line rules. For example, BQS claim that "A more deontological approach may enhance the law's effectiveness at identifying clearly harmful conduct by assessing the conduct directly, rather than assessing it indirectly through its effects." But that claim ignores the difficulties in identifying "clearly harmful conduct," which are central to concerns about bright line rules. Instead, "clearly harmful conduct" is defined circularly as conduct proscribed by the bright line rule.

The third is that bright line rules lead to more predictable enforcement. But any rule that limits nuance (e.g., making all unilateral conduct legal, making all mergers illegal) will be more predictable. Predictability, by itself, does not redeem a flawed rule.

Despite their arguments in favour of bright line rules, BQS ultimately admit that their recommendations require "knowing more details" about specific "software and algorithms"—the very opposite of a bright line. They acknowledge that "The main challenge for regulators to address self-preferencing is related to the identification of limiting principles that can provide guidance as to when self-preferencing is anticompetitive…" Similarly, they ask "is copycatting always anti-competitive"?

I agree with BQS on these points. But my ultimate conclusions differ from theirs: the *nature* of bright line rules makes them bad for competition and bad for Canada.