Subject: Consultation on the future of competition policy in Canada

March 31, 2023

To Whom It May Concern:

The Open Markets Institute (OMI)[1] welcomes the opportunity to provide its perspective to the Government of Canada regarding the future of competition policy in Canada. OMI has written extensively on several of the topics upon which the Government is seeking feedback. These documents include Comments and Requests for Rulemaking for U.S. competition authorities, law review articles, comment pieces, and popular articles. We selected seven documents that we believe would be most beneficial to the Government as it considers amending the Competition Act.[2] These documents are divided into three categories: merger review, exclusive dealing and other forms of unfair competition, and vertical restraints.

Please note that while the documents that OMI is submitting were originally tailored to address U.S. competition laws, much of the analysis and the recommendations could apply equally to Canadian competition law. This is especially true when considering that in both nations many markets are dominated by one or a few firms (indeed often the same firms in Canada and the United States) and the injuries to consumers, workers, independent firms, and the general public do not stop at the border. As essential international partners, it is important that the competition laws in Canada and the U.S. are aligned to be more effective in order to protect our respective citizens.

Merger Review. The Government should use the U.S. Department of Justice's 1968 Merger Guidelines as a template, or as an inspiration, when amending the Competition Act. The Act should announce bright-line rules of illegality tied to market shares. For instance, the U.S. Supreme Court announced in a landmark 1963 decision that a merger between rivals would be presumptively illegal if they had a joint market share greater than 30% in a relevant market. Further, the efficiency defence should not be allowed to redeem an otherwise illegal merger. OMI submits two documents that its staff previously wrote on this topic for the Government to review.

[1] OMI is a nonprofit organization dedicated to promoting fair and competitive markets. It does not accept any funding or donations from for-profit corporations. Its mission is to safeguard our political economy from concentrations of private power that undermine fair competition and threaten liberty, democracy, and prosperity. OMI regularly provides expertise on antitrust law and competition policy to Congress, federal agencies, courts, journalists, and members of the public.

2 All of the documents referenced in this letter are available online and the links are provided in the footnotes.

- Comment to Federal Trade Commission: The Urgent Need for Strong Vertical Merger Guidelines.[3] OMI submitted this Comment to the Federal Trade Commission (FTC) "to underscore the need for new agency guidelines on vertical mergers and explain that the Department of Justice's 1968 Merger Guidelines are a template" that competition authorities should use when revising their merger guidelines. When developing new vertical merger guidelines, the Government should keep two things in mind: (1) "a merger that threatens to reduce competition should not be allowed on efficiency grounds," and (2) "the market shares of firms involved in a vertical merger are critical to analyzing the competitive significance of the merger." Additionally, the new guidelines should allow enforcers to block acquisitions when a dominant platform seeks to acquire a seemingly small or marginal firm if it is apparent that the acquisition may be part of a monopoly protection strategy.

- Curbing Merger Mania.[4] In this article, we explain that the competition authorities should adopt "a robust anti-merger policy [that] could foster inclusive, broadly shared, growth and prosperity" and they would be wise to use the 1968 Merger Guidelines as inspiration. The recent wave of mergers and acquisitions threatens to further concentrate markets and industries and inflict myriad harms on the public. Multiple studies have shown that the consolidations after the 1980s have failed to result in the synergies and efficiencies which were promised by corporate executives. Instead, they led to higher markups. In the 1980s, the U.S. amended its merger policy and enforcers took a much more permissive position toward consolidations. Before this sea change, strong anti-merger policy encouraged firms to grow by expanding their productive capacity and instituting new methods of production, in lieu of acquiring existing business assets and firms.

Unilateral Conduct: Exclusive Dealing. The Competition Act should be amended to adopt a bright-line rule that prohibits dominant firms from using exclusive dealing to foreclose rivals. OMI submits three documents that its staff previously wrote on this topic for the Government to review.

- Petition to the Federal Trade Commission for Rulemaking to Prohibit Exclusionary Contracts:[5] OMI was joined by thirty organizations and five scholars in submitting this petition to the FTC asking it to initiate a rulemaking process to prohibit dominant firms from using exclusionary contracts (including exclusive dealing, exclusionary payments,

[3] *The Urgent Need for Strong Vertical Merger Guidelines* (last visited March 28, 2023) https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5ebf627052b19833a8b37854/1589600886031/OMI-Comment-to-FTC-re-Vertical-Merger-Guidelines.pdf.

[4] Brian Callaci, *Curbing Merger Mania*, Project Syndicate (March 1, 2023) https://www.project-syndicate.org/commentary/recent-court-ruling-on-meta-within-merger-new-era-of-strict-antitrust-enforcement-by-brian-callaci-2023-03.

[5] *Petition for Rulemaking to Prohibit Exclusionary Contracts* (last visited March 28, 2023) https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5f1729603e615a270b537c3d/1595353441408/Petition+for+Rulemaking+to+Prohibit+Exclusionary+Contracts.pdf.

and other similar practices) "that substantially foreclose rivals from customers, distributors, or suppliers of critical inputs." Exclusionary contracts create unfairly marginalize competitors to dominant firms, perpetuate the dominant firms' market power at the expense of their trading partners, and have dubious justifications.

- American History Provides a Valuable Lesson on How Monopolists Use Exclusive Deals to Fortify Their Market Power:[6] This article explains how dominant firms have historically used exclusive deals as a tool to obtain and maintain control over a market. While these deals have been used by monopolists since the dawn of America's industrial age, they continue to be used by dominant firms today (including Google, Apple, and Mylan—the maker of EpiPens). These dominant firms "use exclusive deals to entrench their market position, supplant competition, and coerce smaller firms into working exclusively with them." In addition to unfairly excluding rivals, these contracts harm customers, distributors, and suppliers. As such, competition laws should prohibit dominant firms from using exclusive deals because it is a business practice that fortifies a monopoly's dominance and prevents smaller firms from competing fairly.

- The Morality of Monopolization Law.[7] In this law review article, we argue that the competition authority should "specifically restrict firms' abilities to use exclusive dealing and below-cost pricing and ban the use of generally prohibited practices as unfair methods of competition." Conduct that the courts have condemned as "anticompetitive" under the Sherman Act typically involved the abuse of market power, use of financial advantages, or the violation of public policy as competitive methods to acquire or maintain monopoly power.

Unilateral Conduct: Vertical Restraints. The Competition Act should be amended to adopt a bright-line rule that prohibits dominant firms from using vertical restraints to control and dominate their independent trading partners. OMI submits two articles that its staff previously wrote on this topic for the Government to review.

- Antitrust Remedies for Fissured Work.[8] This law review article examines whether a firms should be allowed to control their independent trading partners through contracts—otherwise known as vertical restraints. Vertical restraints are commonly used in (1) franchise agreements to control franchisees and turn independent business owners into glorified employees, (2) the poultry industry where processors control everything about the farmers' operations, (3) the e-commerce industry where dominant firms such

[6] Daniel A. Hanley, *American History Provides a Valuable Lesson on How Monopolists Use Exclusive Deals to Fortify Their Market Power*, PROMARKET.ORG (July 4, 2021) https://www.promarket.org/2021/07/04/history-exclusive-deals-monopolists-market-power/.
[7] Sandeep Vaheesan, *The Morality of Monopolization Law*, 63 William & Mary Law Review Online, Article 8 (2002) https://scholarship.law.wm.edu/wmlronline/vol63/iss1/8/.
[8] Brian Callaci & Sandeep Vaheesan, *Antitrust Remedies for Fissured Work*, 108 Cornell Law Review Online 27 (March 14, 2023) https://www.cornelllawreview.org/2023/03/14/antitrust-remedies-for-fissured-work/.

as Amazon use contracts to control independent trucking companies and third-party sellers, and (4) the gig economy where companies like Uber and Lyft control drivers (who are falsely classified as independent contractors) by prescribing fares and driver pay. It argues that competition authorities should prohibit or limit vertical restraints as an unfair method of competition. Through such use of vertical restraints, powerful firms acquire employment-like control over trading partners without assuming the legal duties and responsibilities of employers, such as paying workers a minimum wage and overtime. Restricting the use of vertical restraints would give these trading partners more independence because it would restrict corporate domination and coercion.

- The Shadow Empire That Fuels Amazon's Dominance.[9] This article does a deep dive into Amazon's empire and explains how it uses vertical restraints—contracts and surveillance methods—to control businesses and workers that are outside of its corporate boundaries. It argues that breaking up Amazon is insufficient to counter the harms that Amazon has inflicted on independent trucking companies, independent drivers (flex drivers), and third-party sellers. Rather, competition authorities must target the methods of dominance that Amazon uses to control independent contractors and third-party sellers by limiting or prohibiting its ability to dominate "independent" actors through vertical restraints.

We thank you for taking these points into consideration as you study whether to make broader changes to the Competition Act and policy framework.

Yours Sincerely,

Open Markets Institute

[9] Sandeep Vaheesan, *The Shadow Empire That Fuels Amazon's Dominance*, THE SOAPBOX (Feb. 28, 2023) https://newrepublic.com/article/170708/contracts-surveillance-amazon-anti-trust.