Comments by the *Business at OECD* (BIAC) Competition Committee to the OECD Competition Committee

Competition and Consumer Policy in Digital Markets

24 June 2026

I. Introduction

1. Digital industries or markets have fundamentally reshaped both competitive dynamics and consumer interactions, driving unprecedented innovation, economic growth, and consumer welfare gains. At the same time, as in any industry, certain conduct may give rise to concerns about harm to consumers and competition.

2. Digital transformation includes data-driven business models, the use of algorithms to present consumer-facing options, and sophisticated online choice architectures – innovations that have delivered enormous value to consumers and businesses alike. Indeed, firms now compete not only through price and quality, but also by collecting and gaining insights through user data, optimizing engagement through algorithms, and shaping consumer experience through interface design.

3. In this context, questions are increasingly raised about the boundaries and potential overlap between competition policy and consumer protection. In digital industries, if practices distort competition, they may simultaneously undermine consumer choice, privacy, and trust.[1] However, while certain types of conduct may raise questions under both competition and consumer protection frameworks, it is critical not to conflate the two or to assume that overlapping concerns necessarily warrant overlapping enforcement.

4. Consumer protection law and competition law can best be seen as complementary. While both share the goal of protecting consumer welfare, they pursue this objective in different ways. Competition law concentrates on market failures associated with the creation and use of individual or collective market power, while consumer protection law emphasizes instances in which consumer welfare is threatened by information asymmetries and deception, regardless of whether firms have market power.[2] Consumer protection

[1] This scenario can be distinguished from three other scenarios, reflecting the possibility that specific conduct or intervention could be in compliance with one legislative framework and not the other, or both, or neither. Thus, the enforcement of competition law could benefit consumer protection law objectives, and vice versa. Other cases might find the enforcement of one legislative framework detrimental to the goals of the other. *See* OECD, The Interaction Between Competition and Data Privacy – Background Note (2024), https://www.oecd.org/content/dam/oecd/en/publications/reports/2024/06/the-intersection-between-competition-and-data-privacy_b5ac1ae6/0dd065a3-en.pdf. This principle was also recognized by the decision of Italy's Autorita` Garante per la Concorrenza e il Mercato in relation to Facebook Inc. and Facebook Ireland Ltd. that EU competition, consumer or data protection law share family ties but also have different objectives, scopes of application, and enforcement structures. AGCM, Facebook/Condivisione Dati con Terzi, Case PS11112, Provvedimento n. 27432, AGCM Bull. n. 46/2018, ¶¶ 55–56 (Nov. 29, 2018), https://www.agcm.it/dotcmsdoc/allegati-news/PS11112_scorr_sanz.pdf. Therefore, the three policies coexist in the digital economy. Compliance with one legal regime does not ensure compliance with the other legal regimes.

[2] Mark Armstrong, *Interactions Between Competition and Consumer Policy*, 4 COMPETITION POL'Y INT'L 97, 100–12 (2008)

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policy is directly concerned with protecting individual rights, empowering consumers and preventing consumer harm, while competition policy focuses on business practices, ensuring that companies do not engage in anticompetitive behaviours that undermine market efficiency.[3]

5. The complementary nature of competition and consumer protection law has important practical consequences for enforcement agencies. As observed in the legal doctrine, antitrust and consumer protection institutions may therefore be envisaged to allocate resources towards different goals, with consumer protection institutions taking enforcement actions towards improving disclosures, filling information gaps and protecting consumers against fraud and deception, and with antitrust limited to preventing the unlawful creation, acquisition or use of market power and anticompetitive effects.[4]

6. While coordination between enforcement authorities charged with consumer protection and competition law may in some cases be desirable to optimize consumer welfare, enforcement must remain distinct, given their unique objectives, as discussed above. In particular, caution is warranted as the mere existence of potentially overlapping concerns does not justify expanding enforcement or creating new regulatory obligations. Sound enforcement should be grounded in evidence, proportionality, and rigorous observance of the applicable analytical frameworks and legal standards.

7. While competition law remains essential for addressing unlawful acquisition and maintenance of market power and preserving competitive dynamics, it is not designed to remedy and indeed should not aim to address all forms of consumer dissatisfaction. Equally, consumer protection law should not be stretched to address market power issues that fall squarely within the ambit of competition policy. Each framework has distinct tools and standards, and the integrity of both depends on their being applied to the conduct they are designed to address.

8. The business community has a strong interest in coherent, predictable, and consistent regulatory frameworks. As enforcement in digital industries may span consideration of both competition and consumer domains, firms face growing uncertainty about how their conduct will be assessed and which standards will apply. This makes clarity, coordination, proportionality, and restraint essential components of an effective response.

II. Digital Practices at the Intersection of Competition and Consumer Policy

9. Competition authorities are increasingly considering certain practices that appear digital industries and raising questions about whether they should be evaluated under one or both competition and consumer protection frameworks.

10. For example, online choice architecture, including the use of so-called "dark patterns," has drawn regulatory attention for its potential effects on consumer decision-

[3] UNCTAD, *Maximizing Synergies Between Competition and Consumer Protection Policies*, U.N. Doc. TD/RBP/CONF.10/4, at 4 (Apr. 28, 2025), https://unctad.org/system/files/official-document/tdrbpconf10d4_en.pdf.

[4] Joshua D. Wright & Benjamin B. Johnson, *The Antitrust/Consumer Protection Paradox: Two Policies at War with Each Other*, 121 YALE L.J. 2216, 2218 (2012).

making. Choice architecture exists in physical spaces as well.[5] At the same time, some observers have raised antitrust questions such as whether these practices increase switching costs and may therefore entrench positions of market power. Regardless of the regime, it is essential to distinguish between genuinely harmful conduct and interface design choices that reflect legitimate competitive strategies and innovation. Most "nudging" or design optimization is not manipulative, and much of it creates genuine value for consumers by enabling businesses to make more accurate recommendations for things to watch or buy, resulting in efficiencies for consumers.[6]

11. Data-driven practices further illustrate the complexity of the considerations: the accumulation of datasets can facilitate innovation, improve service quality, and personalize consumer experiences, even as it raises potential questions about barriers to entry and privacy. Any regulatory response must carefully weigh these pro-competitive benefits against any potential harms.

12. Algorithmic pricing provides another example. Algorithmic pricing can deliver significant efficiencies and consumer benefits, including lower prices, faster price adjustments, and more responsive markets.[7] Yet competition authorities have raised concerns that algorithms may facilitate tacit coordination or parallel pricing strategies.

13. Personalized pricing is another area where the two regimes may pull in different directions, as price discrimination, in some circumstances, may be considered pro-competitive from a competition law perspective but in certain circumstances may be considered harmful to vulnerable consumers from a consumer protection standpoint.

14. These examples demonstrate that the same underlying mechanisms (data collection, algorithmic optimization, and behavioural engagement) – can simultaneously generate questions under both competition and consumer protection frameworks. Across all of these areas, consumer protection and competition regimes should remain separate. While authorities should engage in frequent and open dialogue across policy boundaries, remedies in one area should be drafted to limit the potential for conflict with objectives under the other regime. Above all, overregulation and regulatory creep across domains should be avoided, as it can have a chilling effect on the market. Enforcement should be evidence-based, proportionate, and carefully chosen so the pro-competitive effects of innovation and data-driven developments are taken into account in the competitive assessment of a given practice, as distinct from the analysis under consumer protection regimes. Importantly, enforcement action should offer guidance to all businesses as to how to ensure compliance in a way that is practical and allows businesses to continue to innovate and deliver for their consumers.

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5 OECD, *Dark Commercial Patterns*, OECD Digital Economy Papers No. 336, at 11 (Oct. 26, 2022), https://doi.org/10.1787/44f5e846-en; RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008).

6 Carlos A. Gomez-Uribe & Neil Hunt, *The Netflix Recommender System: Algorithms, Business Value, and Innovation*, 6 ACM TRANSACTIONS ON MGMT. INFO. SYS., no. 4, art. 13 (Dec. 2015), https://dl.acm.org/doi/10.1145/2843948.

7 Martin Spann, et al., *Algorithmic Pricing: Implications for Marketing Strategy and Regulation*, INT'L J. RSCH. MKTG. (2025), https://doi.org/10.1016/j.ijresmar.2025.05.001.

III. Enforcement Choices

A. General Observations

15. When conduct raises the prospect of overlapping concerns, authorities must decide whether to proceed under competition law, consumer law, or both.

16. BIAC has previously emphasized that various modes of regulation can be useful but must be proportionate and tailored to the specific problem, and that the consequences of a "false positive" can be increasingly severe depending on the intervention contemplated.[8]

17. Furthermore, the guiding principle for allocating enforcement responsibility should be principles based. Decisions between consumer protection and antitrust should not be swayed by the promise or appeal of potentially faster enforcement or lower evidentiary burdens.

18. Rather, the application of competition law should be triggered only where evidence substantiates that the conduct at issue causes harm to competition, such as by erecting barriers to entry, diminishing non-price competition, or reducing competitive discipline, rather than where the concern is an individual harm to consumers arising from unfair practices. Where the concern is instead one of deception, manipulation, lack of transparency, or exploitation of individual consumers, as is often the case with misleading advertising, fake reviews, or unfair data practices, consumer protection law is the more appropriate and better-suited instrument. Coordination between the two regimes and regulators should nonetheless be encouraged where possible.

19. Agencies must carefully evaluate consumer protection actions to ensure that their implementation does not run counter to competition goals, and vice-versa. The potential for such tension is well-illustrated by the treatment of consumer data. From a competition law perspective, the wider availability of data may stimulate competition by lowering barriers to entry and enabling new market participants to compete effectively. However, privacy and consumer protection laws can rightly restrict the sharing of data that is personal or proprietary, meaning that a competition remedy mandating data-sharing could itself create a harm to consumers' privacy and data security.

20. Examples such as this underscore why coordination between authorities is not merely desirable but essential. Competition authorities must act only on evidence presented in specific circumstances and be careful in their approach to remedies, while consumer protection agencies should likewise ensure that their measures do not inadvertently undermine the competitive dynamics that ultimately benefit consumers. By maintaining this disciplined approach, policymakers can maximize enforcement clarity and

[8] OECD, Consumer Data Rights and Competition – Note by BIAC, DAF/COMP/WD(2020)46, ¶¶ 45-46 (May 28, 2020), https://one.oecd.org/document/DAF/COMP/WD(2020)46/en/pdf (recommending that "the risk of over-enforcement should be weighed particularly carefully" and that regulatory measures be "carefully tailored to avoid chilling innovation and investment"); Bus. at OECD (BIAC), *Protecting Consumers on Online Marketplaces* 3 (Apr. 2021), https://www.businessatoecd.org/hubfs/website/documents/pdf/Consumer%20Policy/Position%20on%20Protecting%20Consumers%20on%20Online%20Marketplaces%20-%20April%202021.pdf (calling for "[r]isk based, balanced, and flexible approaches" grounded in "a sound evidence base").

predictability for businesses and consumers alike, while avoiding the chilling effects of overlapping or contradictory regulatory action.

B. Risks of Overlap, Duplication, and Fragmentation

21. For the business community, the risk of overlap, duplication, and fragmentation has become a central concern in the regulation and enforcement of digital industries, where conduct may fall simultaneously within the scope of competition law, consumer protection law, and data protection law. This reflects the structurally interconnected nature of digital business models, which rely on data, algorithms, and user interfaces.

22. Double enforcement arises where multiple authorities pursue the same or closely related conduct under different legal regimes, whether through parallel proceedings, sequential investigations, or the imposition of cumulative sanctions.

23. The likelihood of such overlap is heightened by the multi-functional character of platform conduct, which often combines elements of market power, data exploitation, and direct interaction with consumers. For example, a single practice such as personalized advertising based on extensive user profiling may be scrutinized as an abuse of dominance, an unfair commercial practice, and a breach of data protection requirements. Each legal regime captures a different dimension of the same underlying behaviour.[9]

24. The institutional landscape further amplifies the risk of duplication, as enforcement competences are distributed across competition authorities, consumer protection bodies, and data protection authorities at both EU and national levels. These authorities operate under distinct legal mandates and pursue partially overlapping objectives, while applying different legal standards, evidentiary thresholds, and remedial frameworks. This institutional pluralism increases the likelihood of overlapping or even conflicting enforcement actions.

25. In addition, the expansion of competition law to encompass non-price parameters, such as data protection, privacy, and fairness, has brought it closer to the traditional domain of consumer protection law, thereby blurring the conceptual boundaries between the regimes.[10] At the same time, consumer protection law has evolved to address issues such as behavioural manipulation, dark patterns, and digital choice architecture, which may also have exclusionary or exploitative effects relevant to competition law. As a result, both regimes increasingly target similar forms of conduct, raising the risk that the same practice will be investigated or challenged multiple times under different legal frameworks.

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[9] This convergence is also reflective of the fact that digital market conduct is inherently multi-dimensional, simultaneously affecting competition, consumer autonomy, informational self-determination, and, in some cases, broader societal interests.

[10] For example, recent amendments to Canada's Competition Act (specifically in 2022) have formally integrated consumer privacy as a dimension of non-price competition. Budget Implementation Act, 2022, No. 1, S.C. 2022, c. 10, § 256 (Can.) (amending Competition Act, R.S.C. 1985, c. C-34, § 79); *see also* Competition Bureau Canada, *Guide to the 2022 Amendments to the Competition Act* (2022), https://competition-bureau.canada.ca/en/guide-2022-amendments-competition-act.

26. One manifestation of over-enforcement is duplicative liability, where the same underlying behaviour is sanctioned more than once under different legal characterizations. This may lead to cumulative financial penalties or overlapping compliance obligations.

27. Such duplication may arise, for instance, where contractual terms governing data use are deemed unfair under consumer law and simultaneously characterized as exploitative conduct under competition law.

28. A further concern lies in the potential for inconsistent outcomes, as different authorities may reach divergent conclusions regarding the legality of the same conduct, particularly where legal standards are different. These inconsistencies undermine legal certainty and predictability, making it more difficult for undertakings to assess ex ante the legality of their conduct and to design compliant business models.

29. Over-enforcement may also manifest through the accumulation of remedies, including behavioural obligations, transparency requirements, data access mandates, and interoperability duties imposed under different regimes. Such remedies may overlap, interact in unforeseen ways, or even conflict in their practical implementation, thereby increasing the regulatory burden on firms and complicating compliance strategies.

30. In addition, as discussed further below, authorities may engage in strategic or opportunistic enforcement by selecting the legal basis that offers more favourable procedural tools, lower evidentiary thresholds, or stronger sanctioning powers. This dynamic may further exacerbate duplication and contribute to a perception of regulatory overreach, particularly where similar conduct is repeatedly scrutinised from different legal angles.[11]

31. From an economic perspective, cumulative enforcement may lead to over-deterrence, discouraging not only harmful practices but also legitimate and welfare-enhancing innovation in digital tools. This risk is especially significant in data-driven industries, where innovation often depends on the ability to experiment with new uses of data, algorithmic systems, and platform design.

32. BIAC acknowledges however that, at the same time, a certain degree of shared jurisdiction may be justified on the basis that different legal regimes address distinct dimensions of harm and may therefore operate in a complementary manner.

33. The central challenge, therefore, lies in distinguishing between complementarity, which may enhance regulatory effectiveness, and inefficient duplication, which imposes unnecessary costs, for the business community and society at large.

[11] The Italian AGCM and the German Bundeskartellamt both investigated Facebook's automated transfer of personal data to third parties, addressing similar but not identical conduct. However, the two authorities relied on different legal bases: the AGCM, which holds competence in both competition and consumer law, opted for the "easier route" to sanction Facebook under consumer law, thereby avoiding the need to define the relevant market or establish dominance. The Bundeskartellamt, lacking consumer law competence, was compelled to pursue the case under national competition law. *See* Marco Botta & Klaus Wiedemann, *The Interaction of EU Competition, Consumer, and Data Protection Law in the Digital Economy: The Regulatory Dilemma in the Facebook Odyssey*, 64 ANTITRUST BULL. 428 (2019).

34. The literature generally emphasizes the need for enhanced coordination between authorities, including information sharing, procedural alignment, and, where appropriate, the designation of lead authorities or the sequencing of proceedings.[12] It also highlights the importance of developing coherent analytical frameworks and ensuring that the cumulative effects of enforcement actions – both in terms of sanctions and remedies – remain proportionate.

35. In sum, overlap in the regulation of digital industries is to some extent inevitable given the multi-dimensional nature of platform conduct, uncoordinated duplication risks generating legal uncertainty, excessive regulatory burdens, and potential over-deterrence. Therefore, more integrated and carefully calibrated enforcement approaches may be necessary.

C. The Ne Bis in Idem Doctrine Does Not Provide an Effective Protection Against Double and Overenforcement

36. In the EU, the principle of ne bis in idem, as developed in the case law of the Court of Justice, notably in *bpost*[13] and *Nordzucker*,[14] is frequently invoked in discussions on overlapping enforcement.[15] However, it does not provide a comprehensive solution to the risks of double or over-enforcement arising from the regulation of digital platforms.

37. At its core, the doctrine is designed to prevent the duplication of proceedings and penalties for the same offence. Its function is therefore fundamentally aimed at ensuring that undertakings are not sanctioned twice for identical wrongdoing.

38. In the EU, the European Court of Justice requires the fulfilment of three cumulative conditions: identity of the offender, identity of the material facts, and identity of the legal interest protected. This "triple identity" test significantly narrows the scope of the ne bis in idem principle, particularly in complex business models.

39. Indeed, in digital industries, the requirement of identity of the legal interest is rarely satisfied. Practices such as large-scale data collection, personalized advertising, or platform self-preferencing simultaneously implicate the competition rules (market power), consumer protection (fairness and transparency) legislation and data protection law (privacy and

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12 Belle Beems, *The Principle of Sincere Cooperation as Institutional Bridge Between Competition and Data Protection Law?*, 9 MKT. & COMPETITION L. REV. 149 (2025); OECD, The Interface Between Competition and Consumer Policies – Note by BIAC, DAF/COMP/GF(2008)10, at 235-244 (June 5, 2008), https://www.oecd.org/content/dam/oecd/en/publications/reports/2008/06/the-interface-between-competition-and-consumer-policies_97fe930f/94cefc3f-en.pdf.

13 Case C-117/20, bpost SA v. Autorité belge de la concurrence, ECLI:EU:C:2022:202 (Mar. 22, 2022).

14 Case C-151/20, Nordzucker AG v. Bundeswettbewerbsbehörde, ECLI:EU:C:2022:203 (Mar. 22, 2022).

15 As a result, duplicative proceedings that would trigger the ne bis in idem analysis under EU law remain largely permissible in the United States, subject only to limited constitutional and institutional constraints. The Double Jeopardy Clause in the Fifth Amendment of the U.S. Constitution prohibits prosecuting a defendant twice for the same criminal offense after an acquittal or conviction and protects against multiple criminal punishments for the same crime. Critically, however, U.S. double jeopardy protection does not extend to civil or administrative enforcement proceedings, which is the form of enforcement most common in digital markets regulation. As a result, a company may face concurrent or successive criminal prosecution and civil enforcement action for the same underlying conduct without constitutional impediment. It is further narrowed where both federal and state authorities are permitted to prosecute the same conduct independently. Accordingly, the constitutional constraints on duplicative enforcement in the United States are considerably more limited than the EU ne bis in idem framework, even as that framework has itself been substantially narrowed by *bpost* and *Nordzucker*.

autonomy). Thus, even where the same conduct, such as the design of consent flows or the terms of service, is at issue, authorities may often legitimately characterize it differently depending on the regulatory lens. This differentiation suffices to exclude the application of ne bis in idem.

40. The judgment in *bpost* explicitly confirms that parallel enforcement under different legal regimes is permissible.[16] This is particularly significant where the same platform practice may trigger scrutiny from multiple authorities. The ECJ accepted that multiple proceedings may be brought, provided they pursue complementary objectives and are appropriately coordinated.[17] In the context of digital industries, this effectively legitimizes concurrent investigations into, for example, data-driven business models. In doing so, the Court reframes ne bis in idem not as a strict prohibition of duplication, but as a principle allowing cumulative enforcement subject to conditions. This substantially limits its capacity to constrain overlapping enforcement in the digital economy.

41. Similarly, in *Nordzucker*, the Court adopts a restrictive interpretation of the doctrine even within competition law.[18] This suggests that, a fortiori, the principle will have even less reach across the multiple legal regimes applicable to digital markets.

42. Another limitation lies in the doctrine's focus on punitive sanctions. It is primarily concerned with preventing double fines, rather than addressing the broader regulatory burden faced by digital firms operating under overlapping legal frameworks.

43. With regard to digital industries, over-enforcement may arise through the accumulation of obligations, such as transparency requirements, data access mandates, and interoperability duties. These forms of cumulative intervention fall largely outside the scope of ne bis in idem.

44. Moreover, authorities regulating digital industries may avoid triggering the doctrine by relying on different legal characterizations of the same conduct. For instance, a single interface design may be framed as a "dark pattern" under consumer law and as exploitative conduct under competition law.

45. Although the Court in *bpost* introduces a proportionality requirement concerning the overall severity of penalties,[19] this safeguard remains underdeveloped. It offers limited guidance for assessing cumulative sanctions, including in complex digital regulatory settings.

46. Crucially, the doctrine does not address the risks of inconsistent assessments or fragmented enforcement. Divergent conclusions by competition, consumer, and data protection authorities may still arise in relation to the same conduct.

47. While ne bis in idem retains an important role in preventing extreme cases of duplicate punishment, it is ill-suited to manage the potential for overlap in digital practice

[16] bpost, ¶ 49.

[17] *Id*. ¶¶ 51–56.

[18] Nordzucker, ¶¶ 56-63.

[19] bpost, ¶ 53.

regulation. It therefore does not provide an effective solution to the problem of double or over-enforcement.

48. In Canada, the potential for overlapping enforcement is inherent in aspects of the consumer protection and competition law legislative structure. For example, the *Competition Act* covers conduct such as misleading representations, conduct which is also addressed by various provincial consumer protection statutes. However, the Courts have repeatedly acknowledged that the *Competition Act* is not a consumer protection statute and that the interpretation of these provisions should be in keeping with the purpose clause of the *Competition Act* including incenting competition and ensuring consumer choice.[20] This judicial interpretation and emphasis provides some comfort that conduct that falls under the ambit of the *Competition Act* should be limited to that which gives rise to some level of market impact.

49. That said, recent amendments to expand the scope of the *Competition Act*'s misleading representation provisions to include conduct such as "drip pricing" (where mandatory fees are disclosed later on in the purchase process)[21] appear to be driven by consumer protection considerations more so than market impact considerations, making it more challenging to square the application of these provisions with the broader markets-driven purpose of the *Competition Act*.

50. Similarly, the Competition Bureau's position that it may seek to pursue false or misleading statements in privacy policies has raised potential concerns about the potential for overlap as well as a different approach from that of Canada's federal privacy regulator.[22] Helpfully, Canada's privacy regulator also called for collaboration in this area.[23]

51. In June 2023, the Canadian Digital Regulators Forum was established. The Forum is a venue for regulators to "exchange best practices, conduct research and collaborate on matters of common interest that relate to digital markets or platforms like artificial intelligence ("AI") and data portability."[24] This type of collaboration may serve as a helpful reference point to the extent that it encourages collaboration where appropriate as well as consistency and restraint.

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20 Cineplex Inc. v. Comm'r of Competition, 2026 FCA 10, ¶¶ 12–17; Canada (Comm'r of Competition) v. Cineplex Inc., 2024 Comp. Trib. 5, ¶¶ 222–233.

21 *See* Budget Implementation Act, 2022, No. 1, S.C. 2022, c. 10, §§ 247, 264 (Can.) (amending Competition Act, R.S.C. 1985, c. C-34, §§ 52, 74.01); *see also* Competition Bureau Canada, *Guide to the 2022 Amendments to the Competition Act* (2022), https://competition-bureau.canada.ca/en/guide-2022-amendments-competition-act.

22 Anita Banicevic, *Should the Competition Bureau Be Involved in the Data Economy?*, GLOBE & MAIL, Feb. 6, 2018, https://www.theglobeandmail.com/report-on-business/rob-commentary/should-the-competition-bureau-be-involved-in-the-data-economy/article37877461/.

23 As the Privacy Commissioner has argued in submissions, effective digital regulation requires "cross-regulatory collaboration" and a "holistic and consistent approach," rather than regulators operating in silos. *See* Off. of the Privacy Comm'r of Can., Submission of the Office of the Privacy Commissioner of Canada on the Competition Act Reform (Mar. 20, 2023), https://www.priv.gc.ca/en/opc-actions-and-decisions/submissions-to-consultations/sub_competion_230320/.

24 OECD, The Intersection Between Competition and Data Privacy Policy – Note by Canada, DAF/COMP/WD(2024)40, ¶ 16 (May 14, 2024), https://one.oecd.org/document/DAF/COMP/WD(2024)40/en/pdf.

IV. Coordination and Procedural Safeguards

52. The potential for overlapping considerations raises the prospect of increased interaction between authorities. This, in turn, raises important concerns regarding legal certainty, procedural fairness, and institutional design, particularly in innovation industries, such as e-commerce, social media and FinTech. Addressing these issues requires both practical coordination tools and a broader reflection on how responsibilities are allocated across enforcement bodies.

53. From a business perspective, one of the primary concerns associated with the potential for overlapping enforcement is legal uncertainty and associated costs. If the same conduct may be assessed under both competition and consumer protection frameworks, firms face ambiguity regarding applicable standards, potential liability, and expected compliance strategies. As illustrated in paragraphs 21-35 above, this uncertainty is compounded where multiple authorities pursue parallel or sequential investigations, creating significant administrative burdens and increasing the cost of compliance.

54. In particular, a key concern for the business community is the risk that agencies may opportunistically resort to competition law enforcement in cases where the underlying conduct is, in substance, a consumer protection offense, because the enforcement tools or penalties may be stronger. The opposite is also a risk. Because many consumer protection laws are characterized by lower evidentiary standards and procedural thresholds, this creates a risk that companies' substantive and procedural rights – designed to apply in competition proceedings – are effectively circumvented. Agencies should be discouraged from leveraging consumer protection frameworks as a path of least resistance where the real harm alleged is anticompetitive conduct. Doing so would undermine legal certainty and erode the protections that competition law affords to firms, including higher standards of proof and more rigorous economic analysis.[25]

55. There is also a risk of inconsistent or conflicting outcomes where different agencies apply distinct analytical frameworks to the same conduct. Divergent remedies, particularly where one authority imposes structural or market-wide obligations and another focuses on transactional or design-based interventions would be difficult to reconcile in practice.

56. Ensuring that each framework is applied to the conduct it is designed to address is essential to preserving the integrity of both enforcement regimes.

57. Similarly, concerns about forum shopping further complicate the landscape, as complainants may strategically select the enforcement venue most likely to advance their claims. These challenges underscore the need for clear jurisdictional boundaries, harmonized standards, and consistent interpretation of overlapping legal concepts.

58. To address these risks, authorities should develop robust procedural safeguards and collaboration protocols.

[25] Selectively leveraging consumer protection frameworks also brings risks for consumers by potentially reducing welfare effects.

59. Formal tools such as memoranda of understanding, structured information-sharing protocols, and joint investigative teams can help ensure coherent enforcement and reduce duplication in the event dual inquiries are appropriate.

60. BIAC supports the proposition that competition and consumer protection unambiguously would benefit from more coordination among policymakers, from the identification of enforcement initiatives to the imposition of specific remedies, whether through full integration in one agency, formal cooperation between agencies, or other methods of consultation. This consultation is especially important when a particular intervention is reaching the remedy phase. Remedies in one area should be drafted in such a way as to limit the potential for conflict with objectives under another area. As mentioned in paragraph 19, a competition remedy requiring data-sharing could itself harm consumers' privacy, underscoring the need for authorities to coordinate on remedy design. In cases involving overlapping jurisdiction, the designation of a lead authority may improve efficiency and provide a clearer point of accountability. In some contexts, a "one-stop-shop" approach, where a single authority coordinates or manages a multi-faceted investigation, may enhance consistency and reduce burdens on affected parties.

61. In addition, the development of joint guidance documents can provide clarity on how agencies intend to approach digital issues and coordinate their respective mandates. Clear timelines and procedural frameworks are equally important, as they provide predictability and help ensure that investigations are conducted in a timely and proportionate manner. Incorporating business consultation into the development of these frameworks can further improve their effectiveness by identifying practical challenges and fostering greater compliance.

62. These coordination challenges also raise broader questions about the appropriate institutional structure for competition and consumer protection enforcement. The current bifurcated model, where responsibilities are divided between separate legal frameworks and, in some jurisdictions, separate authorities, offers important advantages. It allows for the development of specialized expertise, with competition authorities focusing on market structure and dynamics, and consumer protection agencies concentrating on behavioural insights, consumer decision-making, and transactional fairness. It also benefits from established precedent and analytical clarity, contributing to legal stability.

63. At the same time, more unified institutional approaches may offer certain benefits. Integrating functions within a single authority could reduce coordination costs, streamline investigations, and limit the risk of inconsistent outcomes. A unified model may also facilitate a more holistic assessment of digital harms that cut across traditional policy boundaries.

64. In this context, the priority should be to ensure predictability, transparency, and clear allocation of responsibilities, regardless of the institutional model. Businesses require a stable and coherent regulatory environment, and unclear or overlapping mandates can undermine both compliance and innovation. Even within integrated systems, it remains essential to define clear internal boundaries and decision-making processes. BIAC has supported the proposal that both competition and consumer policy emanate from authorities of multi-sector jurisdiction, rather than sectoral regulators. To the extent that

regulation of a particular sector implicates issues of either competition or consumer policy, BIAC recommends a framework for consultation between the sector-specific agency and the agencies with responsibility for competition and consumer policy.

65. Given these considerations, enhanced coordination mechanisms may represent a more pragmatic and proportionate response where full institutional unification does not already exist. Strengthening cooperation between authorities, while preserving the benefits of specialization, can improve enforcement outcomes without the risks associated with structural overhaul.

66. Finally, there is value in incorporating business consultation into the development of coordination frameworks. Engaging with stakeholders can help identify practical challenges, improve the design of enforcement mechanisms, and promote greater compliance.

V. Conclusion

67. Digital industries have raised novel considerations under both competition law and consumer protection.

68. The prospect of increasing overlap between these domains creates challenges related to legal uncertainty, enforcement consistency, and institutional coordination. Addressing these challenges requires clearer frameworks, effective cooperation, and procedural safeguards.

69. Ultimately, an effective response to harms in digital industries must recognize the complementarity of competition and consumer protection, while ensuring that each framework is used within its comparative advantage.

70. BIAC offers the following recommendations to policymakers as they navigate the intersection of consumer protection and competition policy in digital regulation and enforcement.

71. First, policymakers should promote pro-competitive innovation by avoiding regulatory approaches that discourage investment in digital infrastructure and artificial intelligence. Overregulation can have a chilling effect on markets, particularly in innovation industries such as e-commerce, social media, and financial technology. Adaptive and forward-looking regulatory approaches that evolve alongside technological progress are essential to mitigate risks without stifling the innovation that drives economic growth and consumer prosperity.

72. Second, policy interventions should appropriately choose between the distinct competition and consumer protection regimes, minimizing uncertainty for businesses. Competition and consumer protection policies should enhance consumer choice, foster trust in digital industries, and encourage innovation and quality. Competition law aims to preserve the forces of competition and ensure firms face pressure to keep prices low, quality high, and to engage in innovation, while consumer protection empowers individuals against unfair or exploitative practices.

73. Third, policymakers should encourage international cooperation to promote regulatory consistency and avoid fragmentation in domestic policies that may undermine both consumer protection and competitive markets. Compatible regulatory frameworks across jurisdictions not only reduce compliance costs for businesses but also facilitate international trade by providing a consistent environment within which businesses can operate, and consumers can transact with confidence.

74. Fourth, OECD forums are uniquely positioned to serve as platforms for policy convergence and the sharing of best practices. The OECD's cross-sector and cross-disciplinary perspective enables it to convene relevant stakeholders, develop an evidence base, and foster the multistakeholder dialogue that is essential to crafting effective, balanced policy responses.

75. *Business at OECD* remains committed to working with policymakers, consumer advocates, and other stakeholders through these forums to develop policies that empower consumers, sustain innovation, and support competitive and resilient markets.