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ISSUES FOR TWO-SIDED PLATFORMS IN CANADIAN COMPETITION LAW

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This paper proposes a framework for the analysis of anti-competitive conduct in the context of two-sided platforms under Canadian competition law. Applying this framework, the paper analyzes two recent reviewable conduct applications by the Competition Commissioner – against Visa and Mastercard, and against the Toronto Real Estate Board – that implicate the economics of two-sided platforms and are currently under consideration by the Competition Tribunal. In general, two-sided platforms intermediate interactions between two distinct sets of users, such that demand from one side of the platform depends on the extent of demand from the other side (e.g. operating systems, security exchanges, video game consoles). This paper argues that restrictions on a platform's users should be permitted to the extent that these maintain incentives for efficient conduct within the platform and neither constrain nor distort the ability of participants to transact on alternative platforms nor facilitate cartels. Conduct that limits users' ability to transact on alternative platforms, removing a competitive constraint through exclusivity, or that facilitates cartel behaviour should be regarded as anti-competitive.

Cet article propose un cadre d'analyse du comportement anticoncurrentiel dans le contexte des systèmes bifaces en droit canadien de la concurrence. À la lumière de ce cadre, il examine deux requêtes récentes du commissaire de la concurrence visant des comportements susceptibles d'examen : une concernant Visa et MasterCard; l'autre, la chambre immobilière de Toronto. Toutes deux mettent en cause les paramètres économiques des systèmes bifaces, et elles ont été soumises au Tribunal de la concurrence. De façon générale, les systèmes bifaces servent de pont pour les interactions entre deux groupes distincts d'utilisateurs, de telle sorte que la demande d'un groupe dépend de la demande de l'autre groupe (p. ex., systèmes d'exploitation, bourses de valeurs mobilières,

consoles de jeux vidéo). L'auteur soutient que l'imposition de restrictions aux utilisateurs d'un système devrait être permise dans la mesure où les restrictions ni n'entravent ni ne faussent la capacité des participants de recourir à d'autres systèmes, ni ne facilitent la création d'un cartel. Un comportement qui limite la capacité des utilisateurs de recourir à d'autres systèmes, qui supprime une pression concurrentielle en créant une situation d'exclusivité ou qui facilite un comportement de cartel devrait être considéré comme anticoncurrentiel.cartels.

1. Introduction

Two-sided (or multi-sided) platforms have increasingly attracted the attention of competition authorities, and the unique characteristics of two-sided platforms have been asserted by certain respondents to constitute justification for allegedly anti-competitive conduct. Such multi-sided platforms intermediate demand from two or more distinct groups of users and are characterized by indirect network effects, such that an increase in usage by one set of users increases the value of the complementary product or service for another set of users. In two-sided markets, the demand from one side of the platform depends on the extent of demand from the other side.

Examples of multi-sided platforms include operating systems for software, payment systems (particularly credit and debit card networks), security exchanges, online marketplaces and video game consoles. Indeed, any marketplace where usage of the interface by one group of users determines the value to (and participation from) another distinct set of users might be characterized as a two-sided market. All involve interactions between buyers and sellers that would face much higher search and transaction costs in the absence of a centralized platform through which they could interact.

These platforms pose unique issues for competition law because apparently anti-competitive conduct for a traditional “one-sided market” may have a pro-competitive explanation or be accompanied by countervailing efficiencies where a two-sided platform is concerned. On the other hand, the indirect network effects also provide potential opportunities for a two-sided platform to foreclose markets

to competitors in a manner that traditional frameworks for analyzing exclusionary conduct might have difficulty confronting.

Drawing on past jurisprudence and economic theory, this paper examines how Canadian competition authorities should assess whether certain restrictions imposed by two-sided platforms lessen competition.

1.1 Needed scrutiny for two-sided platforms

Technological advances – particularly in information technology – have lowered certain of the barriers to entry for establishing new, competing platforms. However, in the face of such emergent competition, incumbents with an established user base may have incentive to resort to anti-competitive strategies to constrain competition from more efficient platforms.

As such, competition authorities appear to have become increasingly vigilant with respect to markets involving two-sided platforms. The authorities recognize that, since two-sided platforms often intermediate a broad range of economy-wide transactions (particularly as manifested in payment systems or securities exchanges), diminished competition between platforms can negatively impact economic efficiency more broadly. Yet, authorities continue to struggle with how to fit the traditional framework for analyzing anti-competitive conduct and mergers to the context of two-sided platforms.

Focusing on competition law in Canada under the *Competition Act*,² this paper considers the unique challenges facing the Competition Bureau (the “Bureau”) for analyzing reviewable conduct in the context of two-sided platforms. Indeed, two reviewable practice applications (*Visa-MC and TREB*) have recently been brought by the Commissioner of Competition (the “Commissioner”), in which the respective respondents have asserted the two-sided character of their platforms to dispute the alleged anti-competitiveness of the conduct.³

Recognizing the need for pricing structures for two-sided platforms that “get both sides on board,” but also observing the potential for nuanced strategies by a platform with market power to hinder competition from more efficient platforms, this paper proposes a framework

for distinguishing between pro-competitive and anti-competitive conduct where two-sided platforms are concerned.

1.2 Proposed framework

Broadly, drawing from the two forthcoming matters before the Competition Tribunal (the “Tribunal”), this paper argues that the inquiry should be whether the conduct limits users’ ability to transact on alternative platforms, removing a competitive constraint through exclusivity, or whether the conduct facilitates cartel prices by particular users. Specifically, this paper argues that a platform should generally be able to impose restrictions on its users to the extent that these maintain incentives for efficient conduct *within* the platform and neither constrain nor distort the ability of participants to transact on alternative platforms nor facilitate cartels.

This paper then proceeds by: 1) describing the relevant issues in the forthcoming Canadian two-sided platform cases, *Visa-MC* and *TREB*; 2) demonstrating how economic theory around two-sided markets and Canadian jurisprudence supports the proposed approach; and 3) discussing how the proposed approach would apply to *Visa-MC* and *TREB*.

2. Forthcoming two-sided competition cases

The Commissioner recently initiated applications against:

- Visa and Mastercard (together, the “Networks”) for price maintenance under section 76 of the *Act*, alleging that the restraints on merchants result in an indirect upward influence on the interchange fees charged for network access;⁴ and
- The Toronto Real Estate Board (“TREB”) for abuse of dominant position under section 79 of the *Act*, alleging that TREB’s restrictions on brokers’ access to TREB’s Multiple Listing Service (“TREB MLS”) – in particular, the effective exclusion of virtual office websites (“VOWs”) – constitute anti-competitive conduct.⁵

In both matters, the respective respondent operates a two-sided platform and, drawing from the economics of two-sided platforms,

each respondent claims that its particular restraints are necessary to protect and enhance the value of the particular platform for its user base.

In the *Visa-MC* matter, the Networks assert that the prohibition on merchants surcharging customers for card usage reflects a necessary mechanism for balancing demand on both sides of the platform, so as to ensure an optimal value of the platform for both cardholders/customers and merchants.

In the *TREB* matter, TREB asserts that the restriction on republication of TREB MLS data to potential buyers through broker-operated VOWs is necessary to maintain incentives for optimal participation by selling brokers and for non-price competition by all broker participants.

Indeed, the economics of the two-sided platforms implicated in the respective allegations differ substantially, and, in the context of the given platform, the respective restrictions have distinct alleged effects.

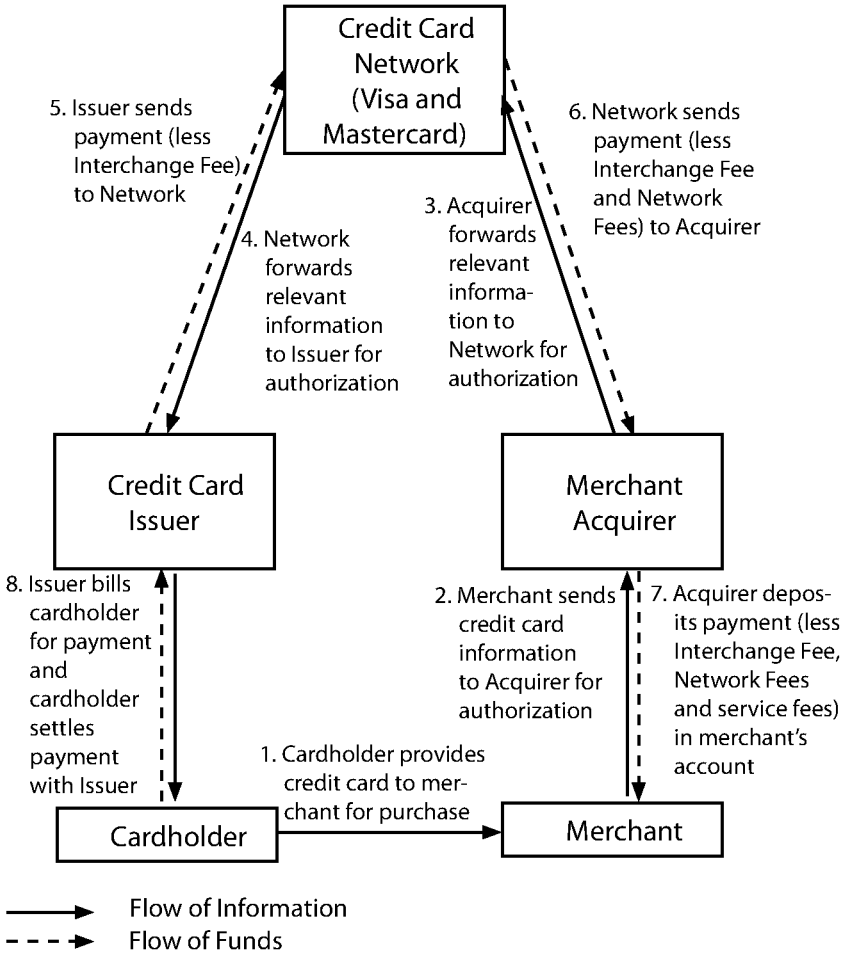
2.1 Issues in the *Visa-MC* Matter

The *Visa-MC* matter concerns the payment system provided by each Network. The payment system allows cardholders to transact with participating merchants.

In the system, the cardholder is issued a credit card by an issuer, which is a bank that has an issuing relationship with the given Network. Merchants purchase the ability to process transactions (that is, obtain authorization, clearance and settlement services) with cardholders on the Network through an agreement with an acquirer, who provides the point-of-sale infrastructure and access to the Network. When a cardholder opts to pay by credit card, the value of the sale is cleared through the given Network, involving a monetary transfer from the issuer bank through the Network to the acquirer. The acquirer credits an amount to the merchant and the issuer bills the cardholder.⁶

For each transaction, a card acceptance fee is charged and deducted from the value of the transaction. The amount ultimately credited to the merchant will be reduced by a percentage of the transaction, determined by the particular credit card used by the cardholder. The card

Figure 1: Flow of payments between participants in credit card network⁹



acceptance fee is composed of services fees received by the acquirer, network fees received by the given Network and interchange fees received by the issuer. Figure 1 illustrates the flows of information and payments involved in clearing a credit card payment.

The interchange fees comprise the largest component of the card acceptance fee – on average around 80% – and premium cards typically carry higher interchange fees than basic credit cards.⁷ Part of the interchange fee is used to fund benefits for cardholders.

Through the agreements between acquirers and Networks, the Networks require acquirers to incorporate specified restrictions in their service agreements with merchants. Among other restrictions, these merchant agreements prohibit merchants from: surcharging for a transaction when a credit card is used (the “no-surcharge rule”); declining any credit card issued on the Network; and encouraging usage of particular card types (i.e. those with lower interchange fees) on the Network (collectively, the “Merchant Restraints”).⁸

2.1.1 Commissioner’s allegation of price maintenance by Networks

To establish price maintenance under section 76 of the *Act*, the applicant must show: a) a direct or indirect upward influence on the downstream price at which a product is sold by agreement, threat, promise or other like means; and b) an adverse effect on competition in a market.¹⁰

The Commissioner alleges that, as a result of the Merchant Restraints imposed by the Networks, merchants are impeded or constrained from encouraging their customers to use lower-cost methods of payment, such as cash, debit cards and credit cards with lower card acceptance fees.¹¹ The Commissioner asserts that these Merchant Restraints impede or constrain merchants from discouraging the use of more expensive credit cards by customers in favour of lower-cost methods of payment.¹²

Specifically, the Commissioner contends that in the absence of the Merchant Restraints, a merchant could respond to a high interchange fee on a particular card by attempting to encourage customers to use credit cards with lower interchange fees or other lower-cost methods of payment.¹³ According to the Commissioner, the Merchant Restraints eliminate a significant source of competitive discipline on interchange fees by prohibiting merchants from distinguishing between credit cards, refusing to accept credit cards with higher interchange fees or otherwise effectively encouraging customers to use lower-cost payment options.¹⁴ Following from these alleged effects, the Commissioner alleges that the Merchant Restraints influence upward or discourage the reduction of the interchange fees paid by merchants on transactions involving credit cards.¹⁵

Notably, the present Merchant Restraints do not forbid merchants from discounting the purchase price if a customer uses an alternative method of payment. However, the Commissioner argues that discounting is not as effective as surcharging in promoting competition since, if only discounting is permitted, card-accepting merchants cannot advertise a lower base purchase price and, behaviourally, customers react more strongly to paying a surcharge than receiving a discount.¹⁶

As required by section 76 of the *Act*, the Commissioner alleges that the Merchant Restraints are adversely impacting competition in the market for credit card network services in which the Networks are alleged to wield market power. Specifically, the Commissioner alleges that the Merchant Restraints distort the competition that would otherwise govern the price-setting mechanism for card acceptance fees, preventing or constraining merchants from undertaking actions to foster competition, such as by refusing to accept credit cards with higher interchange fees or applying surcharges to such credit cards.¹⁷ Absent the Merchant Restraints, the Commissioner contends that different card types (e.g. “premium” and “basic”) from different issuers within each Network would compete on the price of credit card network services, thereby resulting in lower interchange fees.¹⁸

2.1.2 Response of Networks

The Networks counter that the Merchant Restraints are pro-competitive rules that protect cardholders from being subjected to an unexpected surcharge or card decline at the point-of-sale.¹⁹ The Networks contend that, in deciding whether to accept cards of a given Network generally, each merchant must decide whether the benefits outweigh the costs and whether accepting cards will ultimately contribute to the merchant’s overall profitability.²⁰

The Networks also assert that the “two-sided” character of credit card payment systems means that the Merchant Restraints are required to optimally balance demand from both sets of its customers on either side of its platform.²¹ The Networks argue that its pricing structure must be tailored to the two-sided character of demand: merchants will not accept a credit card unless there are enough cardholders who use it, and consumers will not use a credit card unless there are enough merchants who accept it.²²

Moreover, the Networks propose that allowing surcharging would result in harm to both cardholders who face the charge and to merchants generally, contending the reduction in the use of the Network's cards would diminish the value of the platform to merchants. Speaking to the two-sided character of their platforms, the Networks argue that merchants will find it more valuable to accept payment by a credit card brand if more cardholders use that brand, and consumers will find it more valuable to use a credit card if more merchants accept that brand of credit card.²³ The Networks contend that, in the absence of the Merchant Restraints, cardholders will have diminished incentives to use a Network's credit cards, leading to reduced issuance and consequent diminished incentive for merchants to accept those cards.²⁴ Indeed, the Networks assert that their objective in setting interchange fees is to maximize the volume of transactions that flow across their respective platform so as to achieve "the efficiencies associated therewith."²⁵

The Networks further argue that the Commissioner's economic theory that the Merchant Restraints restrict merchants from steering customers to other forms of payment, thereby curtailing competition with respect to card acceptance fees, is at odds with the Commissioner's contention that other payment methods are presently ineffective competition for the market for "credit card network services."²⁶ Indeed, the Networks contend that, since the Commissioner has defined the relevant market as "credit card network services," the Merchant Restraints cannot constitute a constraint on competition from other payment methods, these being in a distinct market from the Commissioner's market definition.²⁷

Finally, the Networks contest the Commissioner's application of the "influencing upwards" requirement of section 76. The Networks argue that the no-surcharge rule "explicitly prohibits merchants from charging cardholders more, not less" when customers pay with a credit card.²⁸ The Networks contend that, if the removal of the Merchant Restraints resulted in lower interchange fees, the product would not be equivalent: the Networks assert that the merchant would then pay less for a card that is worth less to cardholders and thus to merchants.²⁹

2.2 Issues in the TREB matter

The TREB matter concerns the restrictions on the use of data from the TREB MLS – specifically, the restriction on republication of data from the TREB MLS to potential homebuyers through a VOW.

TREB is a trade organization for real estate brokers in the Greater Toronto Area (the “GTA”). The organization owns and operates the TREB MLS, which is an electronic database containing historical information about the purchase and sale of residential real estate in the GTA and a full inventory of active and historical MLS listings. The TREB MLS is accessible only to TREB’s membership of real estate brokers, and the Commissioner argues that the TREB MLS is a key input into the supply of residential real estate brokerage services in the GTA.³⁰ By listing properties for sale on the TREB MLS, TREB brokers agree to share their listings with all other participating TREB brokers, and TREB brokers thereby use the platform to match buyers and sellers of residential real estate.³¹

Notably, selling brokers who are members of TREB are not required to list on the TREB MLS, nor are they restricted from listing on alternative platforms, even if a listing has already been entered on the TREB MLS.³²

The Commissioner defines a VOW as “a secure, password-protected website that enables residential real estate customers to search a database containing MLS information themselves, thus obtaining MLS information over the Internet.”³³ The TREB MLS rules limit use of the system to “the exclusive and internal use” of a broker and restrict “using, copying, reproducing, or exploiting” the TREB MLS database for the purposes of “creating, maintaining or marketing” of any competitor to the MLS database.³⁴

Consequently, the TREB MLS rules prohibit a broker, who operates a VOW, from downloading historical and current listing data from the TREB MLS and offering that system’s inventory of listings and other data to buyers via a VOW.³⁵ Notably, brokers using the TREB MLS are able to generate reports from the system and provide these to clients.³⁶ As well, proposed rules for the TREB MLS would allow brokers to publish aspects of listings on a broker-operated website but would

restrict the information that could be extracted from the TREB MLS for search and display by website users.³⁷

2.2.1 Commissioner's allegations of abuse of dominance by TREB

To establish abuse of dominance under section 79 of the *Act*, the applicant must establish: 1) the person has market power; 2) the person engaged in an anti-competitive act under section 78 of the *Act* (being generally conduct that has an intended predatory, exclusionary or disciplinary effect on a competitor);³⁸ and 3) the practice has lessened competition in a market.³⁹

The Commissioner argues that the relevant product markets are the supply of residential real estate brokerage services to homebuyers and the supply of residential real estate brokerage services to home sellers within the geographic coverage of the TREB MLS system.⁴⁰ Contending that the TREB MLS system is a key input for supplying brokerage services, the Commissioner asserts that TREB substantially or completely controls the supply of these brokerage services in the GTA through its ability to establish and enforce rules for use of the TREB MLS system, including the TREB MLS restrictions.⁴¹

The Commissioner also explicitly recognizes the indirect network externalities involved in the TREB MLS, observing that the “value of the TREB MLS system is greater as its number of users increases,” but asserts that these indirect network externalities constitute a significant barrier to entry for any potential substitute listing system.⁴²

The Commissioner alleges that the TREB MLS restrictions are anti-competitive, allegedly intended “to discipline and exclude innovative brokers who would otherwise compete with TREB’s member brokers who use traditional methods.”⁴³ The Commissioner argues that VOWs make brokerages more efficient, reducing the time and expense incurred by brokers in matching buyers to listings.⁴⁴ The Commissioner observes that TREB’s rules and proposed rules require customers to contact a member broker personally in order to obtain information from the TREB MLS, and contends that this thereby “entrenches the traditional ‘bricks and mortar’ model,” discriminating against member brokers who would use VOWs.⁴⁵

The Commissioner asserts that the restrictions are anti-competitive in that they prevent broker-operated VOWs from extracting data from the TREB MLS in order to compete with allegedly less efficient, traditional “bricks and mortar” brokers and to thereby exert downward pressure on commission rates.⁴⁶

2.2.2 Response by TREB

TREB disputes that TREB has market power within the alleged market (“real estate brokerage services”) and contests that the TREB MLS rules have intended anti-competitive effects. Specifically, TREB counters that it does not operate in the relevant market (as defined by the Commissioner)⁴⁷ and argues that TREB members actively compete with non-traditional providers of listing and home-buying services (e.g. recently-launched, independent listing websites), with multiple options for homebuyers and sellers beyond the use of a traditional broker.⁴⁸ TREB further notes that TREB imposes no restrictions on member brokers from listing properties for sale on other websites, unless so directed by the seller.⁴⁹

Importantly, TREB argues that balancing demand on both sides of its two-sided platform requires the rules. TREB contends the rules 1) provide incentives for brokers to provide complementary services that enhance the value of the platform and 2) prevent free-riding by brokers on the existing stock of listings.⁵⁰ TREB argues that the rules shape critical non-price competition by brokers such that, in absence of the rules, buy-side brokers would not have incentives to widen the pool of buyers (by attracting *marginal* buyers) but rather would compete to represent buyers already in the market (i.e. *inframarginal* buyers).⁵¹ That is, rather than compete over those potential buyers who are already looking, TREB argues that sellers want buy-side brokers to attract potential buyers who would not otherwise participate. TREB argues that a reduction in the incentives for buy-side brokers to attract buyers would reduce liquidity on the platform and, correspondingly, diminish sell-side brokers’ incentives to invest in attracting additional listings.⁵² The dynamic reflects the two-sided character of the TREB MLS platform and, according to TREB’s argument, the rules protect incentives for brokers to engage in non-price competition for the ultimate benefit of all participants.⁵³

TREB also contends that the relevant markets should not be those for “real estate brokerage services,” since TREB does not participate in those downstream markets and only derives demand from sell-side and buy-side brokers.⁵⁴ Moreover, TREB argues that other competing platforms on which brokers are free to list and search are a significant competitive constraint on TREB’s pricing of services on its own TREB MLS platform.⁵⁵

Indeed, TREB argues that, if allowing VOW access could reduce costs without compromising the value of the TREB MLS, TREB would have incentives to remove the restrictions.⁵⁶ However, TREB posits various reasons why allowing VOW access could impair the incentive structure for brokers to attract new buyers and the corresponding incentives for sellers to attract new listings.⁵⁷ In particular, TREB notes the potential for VOWs to free-ride on existing listings generated by full service brokers by whom new listings are generated.⁵⁸

2.3 Distinctions between Visa-MC and TREB

Superficially, the evocation of the economics of two-sided platforms by the Networks and TREB may appear similar. Each respondent asserts that the particular restrictions are necessary to enhance volumes through their respective platform and thereby enhance the value of the particular platform through indirect network effects. However, the manner in which the respective two-sided platform is implicated differs between the two matters in several respects.

First, in *Visa-MC*, the Commissioner argues that the restrictions limit the ability of users on one side of the platform (merchants) to channel transactions to alternative, potentially lower-cost payment methods that would otherwise more vigorously compete with the Networks. In contrast, in *TREB*, the Commissioner argues that the restrictions prevent downstream users from conducting transactions over the platform in a different manner. Thus, at issue in *Visa-MC* is whether the merchant restraints limit effective competition with the platform, while in *TREB* the issue is whether the TREB MLS rules are intended to limit downstream competition between brokers.

Second, if the economic theory of each respondent is accepted, the restrictions by each platform have different intended effects. In

Visa-MC, the restrictions explicitly aim to constrain merchants from influencing cardholders to choose an alternative platform or establishing a different price between payment methods. In *TREB*, there is no restraint on either set of participants in listing or searching on an alternative platform. The restrictions are aimed at counteracting free-riding and incenting non-price competition by brokers so as to encourage complementary services that enhance the value of the platform to each set of users.

Third, the focus on competition for inframarginal versus marginal volume differs. In *Visa-MC*, the Networks explicitly seek to maximize volume on their respective platform and the Networks do not distinguish between the channeling of inframarginal volume away from competing platforms and the attraction (or deterrence) of marginal transactions. That is, the Networks do not explain whether or how channeling volume through their platform encourages transactions that would not have otherwise occurred. The Networks do not discuss whether their platform minimizes transaction costs relative to competitor platforms. In contrast, *TREB* focuses on the incentives for sell-side brokers to attract marginal volume, presenting a theory of how the value of the platform to both buy-side and sell-side is enhanced by incenting each to attract additional buyers and listings through non-price competition.

Indeed, the Commissioner's economic theory evidences these potentially different effects between inframarginal and marginal volume. In *Visa-MC*, the Commissioner seeks to enable competition between platforms, concerned that, under the no-surcharge rule, merchants must charge a higher base price for all transactions, irrespective of payment method. The Commissioner argues that the no-surcharge rule thereby diverts transactions to credit cards, upwardly influencing merchant prices and thereby crowding out transactions that would have otherwise occurred. In *TREB*, the Commissioner's concern is that homebuyers that transact through the *TREB* MLS could purportedly achieve a lower price if *VOWs* were permitted to republish *TREB* MLS data. While lower-cost matching of buyers and sellers would reduce transaction costs and increase transactions, the Commissioner's concerns are about the efficiency of transactions that occur over the *TREB* MLS and not the diversion of inframarginal volume from competing platforms.

These differences require a consideration of the economics of two-sided platforms and the implications for anti-competitive strategies that a platform might pursue.

3. Competition issues for two-sided Platforms

3.1 Economics of two-sided platforms

Unlike traditional product markets, multi-sided platforms uniquely involve a choice over price structure and price level that “gets both sides on board.”⁵⁹ That is, since the different participants may respond differently to prices (i.e. different price elasticities) and the value of the platform to one side depends on the participation of the other side (i.e. indirect network externalities),⁶⁰ multi-sided platforms often involve “price skewness,” typically setting differentiated prices between the two (or more) sets of participants so as to maximize the value of the platform to all sets of participants.

Indeed, to increase the number of users on side A and correspondingly increase the platform’s value to side B, the price charged to A may be less than the marginal cost of A’s usage, and therefore the platform would involve an effective subsidy from B to A. When set optimally, a skewed price structure can attract users on one side of the platform who would otherwise not be available to the other side.

The indirect network externalities involved in two-sided platforms – such that an increase in the users on one side enhance the value of the platform for the other side – present prospect for increasing welfare by channeling additional volume through a particular platform. However, the increased volume of a particular platform may result in reduced overall efficiency if that volume is somehow diverted from a platform with lower total costs and equal or greater benefits.

The existence of differential network externalities between the two sets of users creates market power on the side where demand is relatively more price inelastic given the existing user base. That is, since one side’s price elasticity incorporates the value of usage on the other side, if usage by side A is less sensitive to increases in price than side B, the platform can set a higher price for side A and a lower price for B.⁶¹ The elasticity of demand will particularly be influenced by alternatives

where “multi-homing” is present. That is, where a set of users has the ability to transact through multiple platforms, their sensitivity to the platform’s price will be greater.⁶²

However, while skewed pricing may reflect the attraction of an optimal set of users on either side, the existence of indirect network externalities can enable one platform to divert volume from a competing platform because of a price structure that is favourable to one side rather than because of a lower cost of processing the transaction. If a platform can subsidize one side to attract a large user base (particularly if the users are exclusive), the other side’s elasticity is reduced and the platform can exert market power to impose a higher mark-up.⁶³

3.2 Anti-competitive strategies in two-sided markets

The economics of two-sided platforms therefore implicate particular concerns for competition authorities: by intermediating connections between participants, such platforms may increase welfare on all sides. However, the network externalities of such platforms also present prospect for the exercise of market power and unique anti-competitive strategies to exclude rival platforms.

3.2.1 Exclusivity arrangements

A platform with market power, derived from the indirect network externalities from a large user base on one side, can potentially impose exclusivity arrangements on the other side⁶⁴ or extend its market power into related markets through bundling.⁶⁵ Indeed, in the context of two-sided platforms, the benefit to a platform of exclusivity arrangements are heightened since exclusivity on one side enhances market power on the other side. Although platforms might contend that such strategies are beneficial to users since channeling additional volume through a network increases the overall indirect network effects, the diversion of volume forecloses competition from other platforms. Despite purportedly off-setting efficiencies, the platform can nonetheless increase its mark-up on the inelastic set of users.

3.2.2 Price Coherence as a form of exclusivity

Similarly, platform requirements for “price coherence,” such that a platform participant cannot incent a counterparty to channel a particular transaction through a lower cost platform, provide a potential strategy for a dominant multi-sided platform to leverage its market power so as to limit competition from potential rival platforms.⁶⁶

If the higher cost product did not have market power (i.e. the ability to increase its price without diverting volume), it could not impose restrictions on a purchaser of a higher-cost product that they resell that product at a price equivalent to a competing, lower-cost product. Yet, in the case of multiple competing two-sided platforms, an individual user on the inelastic side of a platform (side A) may accept the requirement for price coherence from a higher-cost but greater-usage platform, given an ultimatum of forfeiting access to that platform otherwise.

For side-A users, granting such exclusivity (in the form of price coherence) to the higher-use platform is incentive compatible, despite the loss of volume through a second platform, because of the losses if not able to access the higher-use platform would exceed those from foregoing access to the lower-use platform. For the higher-use platform, competition between side A users would make the ultimatum to withdraw access credible.

Such price coherence effectively diverts additional usage through the less efficient system: facing equivalent prices for either platform, side B will choose the platform from which they derive the maximum private benefit. Consequently, by enhancing its volume through price coherence, the platform can further exploit network externalities to increase the price to A, returning part of this to subsidize B’s usage.⁶⁷ In the context of two-sided platforms, the consequences of price coherence echo exclusivity arrangements – albeit more subtly.

3.2.3 Efficiency arguments for price coherence by two-sided platforms

An efficiency argument in support of price coherence might be that, if the two sets of users were able to negotiate different transaction prices depending on what platform intermediated the particular transaction,

a user might price discriminate so as to capture part of the indirect network externalities. By capturing part of the surplus generated by the particular network (i.e. from its investment in attracting users), these users might thereby diminish the value of the network to other participants. That is, if there is to be optimal use of the network on side A, side B should not be able to free-ride by diminishing its implicit subsidy to A through the skewed prices charged by the platform. This is the “non-neutrality” argument, postulated in opposition to permitting surcharging in *Visa-MC*, that two-sided platforms necessarily maintain differentiated pricing in order to sustain the balance of demand on each side of the platform that assures the participation of the other side.⁶⁸

However, where prices are set competitively between all users on one side, this competition should restrain any attempt to capture the indirect network externalities. Where there is competition between users on side A for transactions with side B, an individual user on side A could not sustain its capture of the indirect network externalities that would otherwise accrue to B. Assuming multiple platforms on which users on side A could transact with B, any differentiated price charged by A to B for transacting over a particular platform would be bid down to the level that reflected the relative benefit to A of an alternative platform over that platform.

That is, assuming full competition on side A, a differentiated price could only signal the differential benefit to A of transacting over a competing platform. Where markets on both sides of the platform are competitive and there are multiple platforms on which to transact (each of which would presumably involve indirect network externalities), it is not theoretically clear how price discrimination could be used to extract part of the relative social surplus from using one platform compared to another.

3.2.4 Facilitating collusion through two-sided platforms

Another anti-competitive concern is that a platform might be used to facilitate collusion between users on one side of the platform, both resulting in inefficient diversion of volume to that platform and leveraging the value of access to the platform (and the detriment to

an individual member if access is revoked) to enforce the terms of an effective cartel. This is arguably an implication of the Commissioner's argument in *TREB*.

3.2.5 Potential efficiency of terms for accessing two-sided platforms

However, even where users own the platform (as do *TREB* brokers own the *TREB* MLS), the imposition of any terms of access cannot be interpreted as an anti-competitive act. Encouraging and subsidizing certain behaviours on one side of the platform that benefit the other side will often legitimately enhance the value of the network. While it is certainly possible for platforms to facilitate collusion, the lure of platform access to each side might also be used to provide incentives for each set of users to improve the quality of their participation.

For instance, for a platform that facilitates matching between pairs (e.g. pairs of buyers and sellers, potential employers and employees, or potential mates), side A will value the quantity and quality of the pool of potential matches on side B, and vice versa. Indeed, each side might prefer that the other side provide an appropriate quality and quantity of information or be restricted to a certain type of user so as to best facilitate a match. Rather than to exclude competitors or to facilitate collusion, a platform might impose terms on each side that reciprocally and pro-competitively enhance the value of participating to the other side.

3.3 Anti-competitiveness of two-sided strategies in Canadian law

3.3.1 Price coherence as effective exclusion

Requirements for "price coherence" in the context of two-sided platforms (such as the no-surcharge rule for credit card payments) represent vertical restraints that may limit inter-platform competition. Practices that have conceptually similar exclusionary results are defined as anti-competitive under the *Act* and economic theory supports labeling certain exclusive arrangements as anti-competitive. This section describes current Canadian competition law with respect to exclusionary conduct, examines the undergirding theory, and applies that reasoning to price coherence.

3.3.1.1 Exclusive contracts as anti-competitive under the Act

Section 78 of the *Act* enumerates certain anti-competitive conduct. The Tribunal has also broadly interpreted anti-competitive acts as conduct that constitutes exclusionary, disciplinary or predatory behaviour.⁶⁹ Similarly, section 77 of the *Act* prohibits exclusive dealing and tied selling where these are likely to impede entry or have any other exclusionary effect in a market that would substantially lessen competition.⁷⁰

Analogously, the Tribunal has viewed meet-or-release clauses and most-favoured nation clauses as exclusionary where these impose *de facto* exclusivity.⁷¹ As well, the imposition of output royalties is a recognized form of exclusive dealing, wherein payment is on the basis of units produced from an input rather than the amount of the input itself.⁷² As observed by Trebilcock et al, once a producer accepts a per output unit output royalty from the supplier of a particular input, the royalty discourages the use of competing inputs since the purchase of other inputs involves an implicit tax.⁷³

Tribunal decisions regarding such anti-competitive practices demonstrate how two-sided platforms might be analyzed. Of particular note, *Nielsen*⁷⁴ concerned long-term contracts for the upstream purchase of scanner data from retailers, which Nielsen resold downstream for market research. In its upstream retailer contracts, Nielsen offered an exclusivity arrangement whereby the retailer received an inducement to provide the data exclusively to Nielsen. For downstream buyers, Nielsen offered long-term contracts with penalty clauses for switching to another data-provider. The Tribunal held that the upstream contracts were intended to exclude potential competitors by denying access to an essential input. Furthermore, the Tribunal held that, while only relevant where an entrant could gain access to market data, the downstream contracts were also exclusionary and prevented competition, significantly reducing the volume of business available to a potential entrant.

As well, in *Tele-Direct*,⁷⁵ the Tribunal considered various practices by a supplier of advertising space and services, who dominated the market for directory advertising. While the Director (the Commissioner's

precursor) alleged multiple practices to be anti-competitive, the Tribunal ultimately found only the discriminatory treatment of advertising consultants that acted on behalf of advertisers (and who advised potential advertisers on the allocation of advertising, profiting by reducing advertisers' expenditures on advertising with the respondent) to constitute abuse of dominance.⁷⁶

3.3.1.2 Determining whether exclusivity is economically inefficient

While an exclusive contract may be entered into willingly by a market participant, it may nonetheless have exclusionary and anticompetitive consequences. On the other hand, exclusive contracting may be efficient – despite apparent monopolization of the market. Distinguishing between the efficiency and inefficiency of arrangements that result in exclusivity should be the essence of determining whether competition is lessened.⁷⁷ In general, exclusivity should be considered to be anti-competitive where the restriction removes the competitive constraint of pricing that would otherwise operate.⁷⁸

An exclusivity clause cannot be imposed on a counterparty without compensation, and therefore, for both parties to be willing to enter into the arrangement, the clause must maximize the payoffs for each party relative to the counterfactual. The party granted exclusivity must be willing and able to compensate the counterparty for the loss of its choice.

However, the voluntariness of the agreement does not necessarily mean that exclusivity is efficient. Winter proposes that *Nielsen* exhibits the incentive compatibility of contracts that are nonetheless inefficient where upstream inputs are highly complementary and downstream outputs are highly substitutable.⁷⁹ Since the inputs are complementary (i.e. combining the inputs is of greater value than reselling a single input), a firm that combines all potential inputs achieves a product with greater value than a firm with access to only some of the inputs. In *Nielsen*, Winter observes that access to all scanner data was required for a nationally representative information base.⁸⁰ It follows that, by achieving exclusivity over upstream inputs, the firm can secure a downstream monopoly. With a downstream monopoly, the incumbent can bid a greater price than a potential entrant since the monopoly

profits are higher than in competition. The exclusive contract is incentive compatible to the upstream suppliers (here, of the scanner data from retailers) since it channels some of the downstream monopoly profits upstream.⁸¹

However, the downstream long-term contracts further foreclosed the market and extended Nielsen's market power: by diminishing the customers available to a potential entrant, an incumbent further diminishes what a rival entrant can profitably bid for upstream inputs.⁸² The result is that the incumbent, monopolizing intermediation between the upstream suppliers and downstream customers, can widen its profit margin relative to the competitive counterfactual without the exclusive upstream contracts and exclusive downstream contracts with penalty clauses.

Additionally, while not involving exclusive contracting, in *Tele-Direct*, the Tribunal held that discriminatory treatment of advertising consultants lessened competition by reducing a significant competitive constraint on the respondent. Although the consultants were not directly involved in the market for advertising space, the Tribunal held that consultants represented an important competitive pressure such that the respondent (who held a near monopoly on directory advertising) "was forced to respond positively to the presence of consultants by improving its servicing of its customers."⁸³

3.3.1.3 Does price coherence inefficiently limit competition?

Returning to two-sided platforms, requiring price coherence or otherwise prohibiting "steering" to alternative platforms may have analogous effects to an exclusivity contract. Indeed, the relationships in *Nielsen* and *Tele-Direct* have similar features to those of a two-sided platform: an intermediary is required to link two disparate sets of users (i.e. retailers who supply sales data and purchasers of aggregate market data in *Nielsen*; advertisers and consumers of advertising in *Tele-Direct*). In *Nielsen*, the exclusive contracts on both sides of the platform were required to channel rents to the more elastic upstream party and were self-reinforcing. In *Tele-Direct*, discrimination lessened the ability of consultants to steer advertisers away from usage of a particular platform and to thereby constrain that platform's pricing.

Analogously, price coherence arguably channels a “bribe” to one set of users in order to induce their exclusive use of a particular platform and the exclusive use reinforces the incentive-compatibility of accepting price coherence by the other set of users. Such conduct diminishes the competitive constraint from an alternative platform.

Despite that exclusivity forecloses competition, counterparties in a two-sided platform may agree to price coherence. Any individual user will not internalize the reduction in efficiency from foreclosing on competition for the market in its private decision to accept the terms. As exhibited in *Nielsen*, by channeling a share of its profits to one set of users for exclusive use of the platform, the intermediating platform can thereby limit the competitive constraint on its price-setting upstream and downstream.

In the context of *Visa-MC*, once the no-surcharge rule is imposed, any individual cardholder should rationally use a credit card over other payment methods since, for the same apparent transaction price, other payment methods do not indirectly recycle a portion of the purchase price (analogous to the monopoly profits in *Nielsen*) to the cardholders.

The countervailing argument in *Visa-MC* is that such exclusive use of the platform by a group of users (cardholders) creates indirect network externalities that are of value to merchants⁸⁴ and price coherence through the no-surcharge rule is required to prevent merchants from diminishing cardholders’ incentive to use the network.

However, transposed onto the facts of *Nielsen*, this contention is analogous to postulating that the downstream customers of retail data value Nielsen’s service because of its exclusive access to upstream market data and that to forbid exclusive contracts with upstream suppliers and downstream buyers would diminish the incentives of upstream suppliers to provide the retail data.

Indeed, the two cases share a similarity in the collective action problem faced by downstream buyers in *Nielsen* and merchants in *Visa-MC*: to the degree that merchants/downstream customers are in competition with one another, refusing the terms dictated by the intermediary for access to the platform would result in the loss of

infra-marginal business (i.e. customers who would transact on the particular platform anyway). That is, if a particular merchant does not accept cards, many cardholders would depart to competing merchants who do.

Similarly, if merchants benefit from access to cardholders, theory does not convincingly address why an individual merchant, in competition with other merchants, would impose a surcharge in excess of the relative cost of the network to the merchant compared to an alternative payment method. That is, another competing merchant should bid-down any surcharge to a competitive level that internalized the cost of using a credit card relative to the cost of transacting via another platform.

Indeed, any cardholder would only accept the competitively-set surcharge as long as the cardholder's private benefits of using a credit card relative to using another payment method exceeded the surcharge. If merchants truly benefit from cardholders using a certain payment method and cardholders benefit from having merchants accept a certain payment method, it is unclear why internalizing the relative cost between payment methods would be inefficient.

For instance, if a merchant is to differentiate the price for transacting with a credit card versus transacting with a debit card through a surcharge, the difference between the two payment methods should reflect the difference in the merchant's net benefits from each payment method. Only if the indirect network externalities from additional usage of the credit card in the particular transaction (increasing the value of the credit card network to merchants and cardholders) exceed the indirect network externalities from the usage of a debit card (increasing the value of the debit network) would the surcharging be socially undesirable. To this end, what reason is there to suppose that the indirect network externalities from use of debit cards are less than those from credit cards?

Justifying the efficiency of price coherence would require evidence 1) of monopolistic conditions in the merchant sector and 2) that indirect network externalities for the particular platform exceed potential externalities from a competing platform.

3.3.2 Platform restrictions as downstream collusion or minimum service?

Vertical restraints that limit competition between platforms by effecting exclusivity on one side of the platform are distinct from access requirements that enhance the value of the platform for both sets of users. Vertically-imposed intrabrand restraints, which mandate certain supplementary activities or purchases with respect to the given product, may be anti-competitive, but there may also be efficient explanations for such conduct. This section discusses relevant Canadian competition law and undergirding theory, and applies this framework to access restrictions in two-sided platforms.

3.3.2.1 Supplier-imposed restrictions as anti-competitive under the Act

The *Act* inhibits suppliers from imposing various types of vertical restraints, but limits any prohibition to where the restriction adversely affects or substantially lessens competition (the former being a weaker standard).

The *Act* prohibits market restrictions and tied selling under section 77. “Market restriction” involves the limitation of a purchaser to a defined market and “tied selling” is defined as any practice that requires the customer to purchase another specified product or refrain from using any other products than those specified.⁸⁵

In *Tele-Direct*,⁸⁶ in addition to the section 79 holding, the Tribunal also held that the bundling of advertising space with advertising services constituted tied selling contrary to section 77 of the *Act*, finding that the respondent had leveraged its monopoly in advertising space to enhance its market power in advertising services resulting in a substantial lessening of competition.

Vertical price restrictions are also prohibited as price maintenance under section 76 of the *Act*. Nonetheless, the provision requires “an adverse effect on competition” and provides defences where a price floor is imposed to ensure minimum levels of serving or prohibiting product resale as a loss leader.⁸⁷

More broadly, a restrictive trade practice may constitute abuse of dominance under section 79 of the *Act* where the conduct has an intended predatory, exclusionary or disciplinary effect on a competitor.⁸⁸ Conduct that disciplines a competitor in order to compel compliance with the terms of a cartel could thereby fall within the ambit of abuse of dominance.⁸⁹

Denial of access to an “essential facility” may also contravene section 79. For instance, in *Interac*,⁹⁰ in granting a consent order under sections 79 and 105 of the *Act*, the Tribunal considered whether differential restrictions and rights for non-founding members (versus those for financial institutions that developed the network) on access to an electronic payment network constituted abuse of dominance. The Tribunal accepted the consent order as proposed by the parties. Here, the restrictions were alleged to effectively prohibit participation in the network by non-founding members. Despite the Director’s allegation that the network was an essential input to supply retail financial services, the Director contended that the substantial lessening of competition occurred in the market for shared electronic financial services (an argument accepted, albeit with arguable skepticism, by the Tribunal).

3.3.2.2 Economic efficiency of supplier-imposed restrictions

The economic literature has emphasized the importance of efficient explanations for certain vertical restrictions.

With reference to price maintenance, traditional explanations show how such vertical intrabrand restraints can be used to facilitate supplier cartels upstream and retailer cartels downstream. If imposed jointly, price maintenance by a cartel of suppliers can facilitate identification of deviations from agreed wholesale prices in retail good prices. For a retailer cartel, the price floor can guard against entry by low-cost, low-volume outlets and is enforced by jointly boycotting suppliers who refuse to impose price maintenance.⁹¹

However, price floors may also be used to counter free-riding and coordinate incentives where demand for a product depends both on prices and services provided by a retailer.⁹² Such vertical restrictions can enhance efficiency in at least two circumstances: Firstly, services

by an individual retailer might be complementary to those provided by other retailers or advertising expenses might spill over into adjacent retailers' equilibrium sales territories, generating positive externalities. Secondly, relative to the supplier's optimum, the retailer may compete too strongly for inframarginal customers (those attracted from other retailers) on the basis of price and relatively neglect marginal customers (those attracted into the market), who are attracted only with higher levels of service.

There is also a strong theoretical argument for the efficiency of the tied selling witnessed (and prohibited by the Tribunal) in *Tele-Direct*. Winter argues tying in *Tele-Direct* can potentially be explained by a quality externality – particularly given that the advertising services were bundled and so provided at zero marginal price to the advertiser.⁹³ In providing advertising space, Tele-Direct effectively intermediated readers of the directory and advertisers who wanted to reach readers. As the intermediary, providing advertising services in a bundle “internalized” these quality externalities by enhancing the quality of advertising and thereby the desirability of the directory to readers.

3.3.3 Are platform access restrictions inefficient?

Restrictions imposed for access to a platform could be used to facilitate a downstream cartel, but may also be explicable as requirements for minimum services or to internalize a quality externality.

Restrictions that prohibit usage of a platform by certain types of users might appear to facilitate a cartel. However, if the particular platform does not restrict its users from using other competing platforms, it is difficult to see how collusion could be maintained.

That is, if a cartel of users on side A of platform 1 sought to exclude some low-cost entrant through access restrictions for platform 1, the entrant could instead attempt to match using platform 2. Unless access costs were prohibitive for platform 2 or platform 1 restricted any user from using platform 2, users on side B would then have great incentive to also attempt to match over platform 2. If matching with a low-cost entrant on platform 2, a B-side user could share in the profits from under-cutting the A-side cartel. Only if the A-side cartel imposed

some restriction on B-side users or somehow otherwise “bribed” B-side users to exclusively use platform 1 (for instance, through enforcing price coherence regardless on which platform or with whom a match occurred) could the low-cost user be effectively excluded.

Generally, where other platforms provide a competitive constraint on pricing, non-price restrictions for access to a given two-sided platform – particularly those that might reasonably counteract free-riding – have a high likelihood of being efficient.

In the absence of price or exclusivity restrictions, it then seems likely that non-price restrictions on a platform address externalities analogous to those postulated by Winter to explain price maintenance and tied selling. That is, a platform may require its users to provide minimum levels of service or make expenditures on quality.

For many platforms that facilitate matching (for instance, a dating website), the value of the platform to either side may critically depend on the quality of potential matches on the other side. Drawing on the analogy of a dating website, one can understand how frivolous attempted matches initiated by undesirable A-side users might deter many B-side users from using the particular platform. Many B-side users would prefer a platform that restricted A-side users, enhancing the potential of a match.

In the context of *TREB*, it is conceivable that seller agents might be deterred from listing where buyer agents did not provide minimum service levels that assured the quality of the matches in the system – for instance, increasing the number of frivolous visits before a transaction occurred. Clearly, the value of using the *TREB* MLS to either side depends on the quality of participants on the other side and the quantity attracted to the platform.

3.4 Counteracting anti-competitive conduct in two-sided markets

In general, competition policy seeks to prohibit conduct that would exclude more efficient competitors. In the context of two-sided platforms, pro-competitive strategies that enhance the value of the platform to users and improve overall indirect network effects must be distinguished from those that limit competition from other platforms.

Efficiency requires active competition between platforms and the law must ensure that users are reasonably free to migrate towards the platform that achieves the lowest transaction costs. Previous users of one platform may instead choose to use an alternative platform because of its greater liquidity. Enhancing such indirect network externalities promotes efficiency overall. However, as discussed above, naturally skewed pricing structures in two-sided platforms may provide opportunity for a platform to leverage its market power on one side of the market so as to inefficiently divert volume away from a more efficient competing platform. Specifically, the platform may restrict the ability of the less elastic side of the market to transact on an alternative platform either directly or indirectly.

Restrictions that maintain a particular pricing structure for the platform itself and shape incentives *within* the platform, so as to balance demand on each side of the market (i.e. optimize the value of a platform for each set of users), are generally pro-competitive. However, restrictions that constrain potential participants' ability to transact on alternative platforms will adversely impact competition.

By constraining one side from directing volume to another platform, a platform channels volume away from a potentially more efficient platform and is able to influence upwards the total transaction costs faced by customers. Since overall transaction costs are elevated by the diversion to a less efficient platform, the restriction diminishes the total sales volume and, consequently, reduces the social surplus relative to the competitive counterfactual.

However, restrictions that incent user behaviour that, in turn, enhances the value of transacting through a particular platform – such as non-price enhancements like providing complementary services or screening the quality of transactions over the platform – will not generally be anti-competitive, unless the resultant effect is to restrict competitor access to potential platform users or support a cartel on one side of the platform. Indeed, restrictions that prevent free-riding by users on one side of the platform – and thereby preserve the incentives for the other side of the platform to participate – are generally efficient and pro-competitive, since these guard against collective action problems that would otherwise deprive users of lower transaction costs.

Therefore, competition authorities should provide appropriate leeway for platforms to impose restrictions that enhance the value from the platform itself and encourage additional indirect network externalities through increased marginal volume. In contrast, competition authorities should regard restrictions that constrain users' ability to choose between competing platforms, attempting to channel infra-marginal volume away from alternative platforms, as anti-competitive.

4. Applying the framework

In each matter, the role played by the respective restraints in the context of the two-sided platform in question is distinct. In resolving each matter, the respective restriction's impact on competition must be the focus.

4.1 Application in *Visa-MC*

In *Visa-MC*, the crucial determination is whether the Merchant Restraints limit the ability of alternative platforms to compete with the Networks and the ability of merchants to properly internalize customers' choice of payment method.

With regard to the upward influence on price and adverse impact on competition, the Commissioner must show that, absent the Merchant Restraints, the Networks' upward influence on price would have been constrained by competition from alternative payment methods. Even if "credit card network services" are the relevant market, this does not negate the possibility of competition from other markets that might have constrained upward influence on interchange fees absent the merchant restraints. Specifically, it is possible for the Commissioner to argue that the Networks' enforcement of "price coherence" through the no-surcharge rule attenuated the competitive constraint of alternative payment systems – such as debit and cash – on the level of card acceptance fees that could be charged to merchants.

The argument that discounting is an equally effective substitute for surcharging is contradicted by the Networks' position that the no-surcharge rule is necessary to prevent merchants from capturing the indirect network externalities and thereby deterring cardholders from allegedly efficient usage of credit cards. If discounting was equally

effective at internalizing the relative costs to merchants between competing payment methods, the Networks should similarly object that discounting inhibits the purportedly optimal balancing of demand from both sides of the platform.

Moreover, the Networks argue that allowing merchants to surcharge would permit merchants to “capture” part of the surplus generated by the acceptance of cards by other merchants and usage by cardholders of a particular Network. However, for the Networks to demonstrate that the no-surcharge rule is required to prevent merchants from inefficiently diminishing indirect network externalities, the Networks must adduce evidence to show: 1) that insufficient competition exists between merchants to counteract attempts at capture; 2) why limiting the permissible surcharge to the given merchant’s card acceptance fee for the particular transaction would not adequately prevent even monopolistically competitive merchants from achieving capture; and 3) that the asserted indirect network effects are greater in the Networks’ platforms than in a competing payment platform, such as debit.

4.2 Application in *TREB*

In *TREB*, the challenge for the Commissioner will be to show that the *TREB* MLS rules intend to hinder competition from other platforms or facilitate a downstream cartel amongst brokers, rather than seek to align incentives by participants in its platform to minimize transaction costs.

The presence of intended anti-competitive conduct will be the focus. *TREB* contends that its *TREB* MLS rules are required to preserve the value of the platform to its users and it strongly appears that the rules do not discourage any potential user from listing on an alternative platform. The Commissioner alleges that the intended effect is to prevent *VOWs* from competing with traditional brokerages and, as such, the Commissioner will have to disprove *TREB*’s assertion that the rules incent non-price competition and encourage brokers’ attraction of new buyers and sellers. Again, *TREB* argues that, by preventing free-riding on the stock of existing listings, the rules encourage brokers to provide services (presumably including the screening of buyers and careful selection of houses to view) that increase the number and quality of potential buyers, rather than to compete over infra-marginal

buyers on price alone. Moreover, given the absence of rules restricting listing on alternative platforms, the Commissioner must show that alternative home-listing platforms do not already provide a competitive constraint on the TREB MLS.

5. Conclusions

Drawing from past Canadian decisions and economic theory, this paper has explored the considerations for determining whether certain restrictions by two-sided platforms lessen competition and are anti-competitive under Canadian competition law.

To summarize, this paper has postulated the following:

With respect to price coherence:

- Requirements by one platform for price coherence with all other platforms can achieve exclusive use of the platform by one set of users;
- Despite the incentive-compatibility of such effectively exclusive agreements, these are unlikely to be efficient, since the resultant exclusivity diminishes the competitive constraints on the prices charged by the platform; and
- Counterarguments are advanced that allowing users to set prices that depend on which platform was used would inefficiently diminish the indirect network externalities, resulting in suboptimal participation in a given platform; however, these efficiency theories for requiring price coherence appear untenable where neither set of users has market power (i.e. there is competition within each set of users) and there is no reason to suppose that indirect network externalities will be any less for use of a competing platform.

With respect to access restrictions:

- Access restrictions to a dominant platform could be used to facilitate a cartel, disciplining defectors and deterring entrants; however, absent exclusivity covenants or price incentives for

users to refrain from transacting over a competing platform, it is unclear how a cartel's exclusion of a more efficient user could be maintained; and

- In general, non-price restrictions on accessing a platform would seem likely to enhance the efficiency of transacting across that platform, requiring each side to behave in a manner that reciprocally heightens incentives for the other side to participate optimally – for instance, by increasing the quality of matches or discouraging free-riding.

Typically, the paper has also shown how this approach would apply to the facts of *Visa-MC* and *TREB*. Given the increasingly pivotal role played by multi-sided platforms in intermediating demand between various sets of users throughout technologically advanced economies, such platforms will likely continue to attract heightened scrutiny from competition authorities in Canada and abroad.

Endnotes

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²RSC, 1985, c C-34 [the *Act*].

³*The Commissioner of Competition v Visa Canada Corp & MasterCard International Inc* (15 December 2010), CT-2010-010, online: Competition Tribunal < <http://www.ct-tc.gc.ca> > (Notice of Application) [*Visa-MC Application*]; and *The Commissioner of Competition v The Toronto Real Estate Board* (27 May 2011), CT-2011-003, online: Competition Tribunal < <http://www.ct-tc.gc.ca> > (Notice of Application) [*TREB Application*].

⁴*Visa-MC Application*, *supra* note 3.

⁵*TREB Application*, *supra* note 3.

⁶*Visa-MC Application*, *supra* note 3 at paras 32-40.

⁷*Ibid* at paras 9-10.

⁸*Ibid* at paras 12-13.

⁹*Ibid* at para 39.

¹⁰*Act*, *supra* note 2, s 76(1).

¹¹*Visa-MC Application*, *supra* note 3 at para 61.

¹²*Ibid* at para 17.

¹³*Ibid* at para 71.

- ¹⁴ *Ibid* at para 70.
- ¹⁵ *Ibid* at para 16.
- ¹⁶ *Ibid* at para 66.
- ¹⁷ *Ibid* at para 93.
- ¹⁸ *Ibid* at para 93.
- ¹⁹ *The Commissioner of Competition v Visa Canada Corp & MasterCard International Inc* (31 January 2011), CT-2010-010, online: Competition Tribunal < <http://www.ct-tc.gc.ca> > (Response of Visa Canada Corporation) at para 3 [*Visa Response*] (The Mastercard response largely echoes the arguments put forward by Visa and citations reference the *Visa Response*).
- ²⁰ *Ibid* at para 22.
- ²¹ *Ibid* at para 29.
- ²² *Ibid* at para 26.
- ²³ *Ibid* (Economic Theory) at para 4.
- ²⁴ *Ibid* (Economic Theory) at para 8.
- ²⁵ *Ibid* (Economic Theory) at para 2.
- ²⁶ *Ibid* at para 57.
- ²⁷ *Ibid* at para 62.
- ²⁸ *Ibid* at para 46.
- ²⁹ *Ibid* at para 47.
- ³⁰ *TREB Application, supra* note 3 at para 13.
- ³¹ *Ibid* at para 14.
- ³² *The Commissioner of Competition v The Toronto Real Estate Board* (19 August 2011), CT-2011-003, online: Competition Tribunal < <http://www.ct-tc.gc.ca> > (Response of the Toronto Real Estate Board) at para 26 [*TREB Response*].
- ³³ *TREB Application, supra* note 3 at para 19.
- ³⁴ *Ibid* at para 27.
- ³⁵ *Ibid* at para 36.
- ³⁶ *Ibid* at para 31.
- ³⁷ *Ibid* at para 35.
- ³⁸ *Canada (Director of Investigation & Research) v Nutrasweet Co* (1990), 32 CPR (3d) 1 (Comp Trib).
- ³⁹ *Act, supra* note 2, s 79.
- ⁴⁰ *TREB Application, supra* note 3 at paras 41-43, and 46.
- ⁴¹ *Ibid* at paras 44-45.
- ⁴² *Ibid* at para 47.
- ⁴³ *Ibid* at para 49.
- ⁴⁴ *Ibid* at para 23.
- ⁴⁵ *Ibid* at para 36.
- ⁴⁶ *Ibid* at paras 58-59.
- ⁴⁷ *TREB Response, supra* note 32 at para 30.
- ⁴⁸ *Ibid* at paras 15 and 56.
- ⁴⁹ *Ibid* at para 26.
- ⁵⁰ *Ibid* (Economic Theory) at para 7.

⁵¹ *Ibid* (Economic Theory) at para 11.

⁵² *Ibid* (Economic Theory) at para 11.

⁵³ *Ibid* (Economic Theory) at para 11.

⁵⁴ *Ibid* (Economic Theory) at para 13.

⁵⁵ *Ibid* (Economic Theory) at para 15.

⁵⁶ *Ibid* (Economic Theory) at para 22.

⁵⁷ *Ibid* (Economic Theory) at para 24.

⁵⁸ *Ibid* (Economic Theory) at para 24.

⁵⁹ D Evans “The Antitrust Economics of Multi-sided Platform Markets” (2003) 20 Yale J of Regulation 325 at 354.

⁶⁰ J-C Rochet & J Tirole “Two-sided markets: a progress report” (2006) 37 RAND J of Econ 645 at 646.

⁶¹ Evans, *supra* note 59 at 343-345.

⁶² Rochet & Tirole, *supra* note 60 at 659; M Armstrong “Competition in Two-Sided Markets” (2006) 37 RAND J of Econ 668.

⁶³ M Rysman “The Economics of Two-Sided Markets” (2009) 23 J of Econ Perspectives 125 at 129-30.

⁶⁴ *Ibid* at 134.

⁶⁵ *Ibid* at 140.

⁶⁶ A Frankel & A Shampine, “The Economic Effects of Interchange Fees” (2006) 74 Antitrust Law Journal 627 at 633.

⁶⁷ *Ibid* at 633-35.

⁶⁸ Rochet & Tirole, *supra* note 60 at 650.

⁶⁹ *Nutrasweet*, *supra* note 69.

⁷⁰ *Act*, *supra* note 2, s 77(2).

⁷¹ Michael Trebilcock, Ed M Iacobucci, Ralph A Winter & Paul Collins, *The Law and Economics of Canadian Competition Policy* (Toronto: University of Toronto Press, 2003) at 456.

⁷² *Ibid*.

⁷³ *Ibid*.

⁷⁴ *Canada (Director of Investigation & Research) v D&B Co of Canada Ltd* (1995), 64 CPR (3d) 216 (Competition Trib) [*Nielsen*].

⁷⁵ *Canada (Director of Investigation and Research) v Tele-Direct (Publications) Inc* (1997), CT-93/3, online: Competition Tribunal <<http://www.ct-tc.gc.ca>> [*Tele-Direct*].

⁷⁶ The Tribunal also found that the respondent’s bundling of advertising space with services constituted tied selling under section 77 that substantially lessened competition in the market for advertising services, as discussed below.

⁷⁷ Ralph A Winter, “Presidential Address: Antitrust restrictions on single-firm strategies” (2009) 42 Can J of Econ 1207 at 1223-36.

⁷⁸ Admittedly, the decision of the Federal Court of Appeal in *Canada (Commissioner of Competition) v Canada Pipe Co*, 2006 FCA 233, with respect to whether conduct constitutes an anti-competitive act and

results in a substantial lessening of competition focuses on the negative effects on competitors rather than the competitive constraint on pricing absent the impugned practice. However, as argued by Michael Trebilcock, “Abuse of Dominance: A Critique of Canada Pipe” [2007] Can Comp Rec L, an economically meaningful “but for” analysis must consider whether the competition would better restrain inefficient behaviour in the counterfactual.

⁷⁹ *Winter, supra note 77* at 1227.

⁸⁰ *Ibid* at 1228.

⁸¹ *Ibid* at 1228.

⁸² *Ibid* at 1228.

⁸³ *Tele-Direct, supra note 75* at 361.

⁸⁴ i.e. more cardholders enhance the value of the network to merchants and merchants’ participation in turn increases the value to cardholders.

⁸⁵ *Act, supra note 2*, s 77.

⁸⁶ *Tele-Direct, supra note 75* at 250-52.

⁸⁷ *Act, supra note 2*, s 76.

⁸⁸ *Nutrasweet, supra note 38*.

⁸⁹ Admittedly, as observed by Ed Iacobucci & Ralph Winter, “Abuse of Joint Dominance in Canadian Competition Policy” (2010) 60 UTLJ 219, abuse of dominance does not clearly include facilitating practices. If an agreement is present, cartel arrangements are caught by the *per se* criminality of price-fixing under section 45 of the *Act*. As well, section 90.1 targets agreements between competitors that substantially lessen competition in a market. However, practices that facilitate cartels are arguably not caught by the *Act*.

⁹⁰ *Canada (Director of Investigation and Research) v Bank of Montreal et al* (1996), 68 CPR (3d) 527 (Competition Trib) [*Interac*].

⁹¹ Trebilcock et al, *supra note 71* at 378.

⁹² Winter, *supra note 77* at 1215-16.

⁹³ *Ibid* at 1217.