



Competition Bureau
Canada

Bureau de la concurrence
Canada

Highlights from the Competition Bureau's Data Forum

Discussing competition policy in the digital era

Canada

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The following is a summary of the presentations and discussions that took place at the Data Forum. The opinions are those of the panelists and participants and do not necessarily reflect the views of the Competition Bureau or the Commissioner of Competition.

Introduction

On May 31, 2019, the Competition Bureau held a one-day forum to discuss competition policy in the digital era. The forum focused on the evolving realities faced by competition enforcers in the digital economy, including panel discussions on platforms, privacy and data portability.

The forum was attended by over 100 participants from Canada and abroad, including representatives from the business, legal and academic communities, federal regulators, foreign competition authorities, and the Bureau. The forum's agenda is included at Annex 1.

The Context in Canada

“The rapid rise of the borderless digital economy is a truly global phenomenon, which requires competition authorities to collaborate and cooperate on an almost daily basis.”

- **Matthew Boswell**
Commissioner of Competition

The advent of the data-driven economy has resulted in unprecedented levels of innovation, generating benefits for consumers and companies across Canada; however, this has also resulted in concerns about the growing market power of certain platforms who may act as gatekeepers to the broader digital economy.

Data has become a key asset for digital firms looking to innovate. Concerns have been raised over whether competition policy and enforcement tools must adapt to address the competition implications of the collection and use of large quantities of data. These issues have increasingly been the focus of policymakers globally, amidst growing calls for increased regulation and antitrust enforcement.

The forum provided an opportunity to advance an important public policy dialogue. We heard from leading subject-matter experts on how data-related issues **can** and **should** be assessed by competition agencies.

Canada's Digital Charter – Trust in a digital world

In his opening remarks, the Honourable Navdeep Bains, Canada's Minister of Innovation, Science and Economic Development, noted that 90% of the world's data was generated over the last two years – and that statistic was also true in 2016.

Five of the world's six most valuable companies use data-driven business models. These models have led to questions surrounding the quantity of data controlled by a handful of firms and the state of competition in the market as a result.

Minister Bains also spoke about the key principles of Canada's new Digital Charter. Unveiled the week prior to the event, the Charter seeks to build a foundation of trust for Canada's digital and data-driven economy and society. One of the key principles of the Charter is focused on ensuring a level playing field in the online marketplace to facilitate growth of Canadian businesses and affirm Canada's leadership in a digital and innovation-focused economy.

Applying this principle requires exploring whether the Commissioner of Competition has adequate tools to ensure fair competition in the digital economy. Indeed, in a recent [letter to the Commissioner](#), Minister Bains noted the importance of considering how well suited our system is to the present and the future marketplace, with a view to ensuring that our competition infrastructure is fit for this purpose and able to remain responsive to a modern and changing economy.

As we move forward, the Bureau will work with Innovation Science and Economic Development Canada (ISED) to look at:

- the impact of digital transformation on competition;
- emerging issues for competition in data accumulation, transparency, and control; and
- the effectiveness of our competition policy tools and frameworks, and our investigative and judicial processes.

Discussion at the forum touched on many of these subjects and laid a foundation for the critical work ahead.

The Global Context

As the digital economy continues to grow, large digital platforms, or “Big Tech”, have been garnering attention worldwide. The forum was held against a backdrop of jurisdictions around the world grappling with the challenges posed by the data-driven economy. For example:

- In **Australia**, the Australian Competition and Consumer Commission launched its [Digital platforms inquiry](#) in December 2017 to examine the effect that digital search engines, social media platforms and other digital content aggregation platforms have on competition in media and advertising services markets.
- In the **United States**, the Federal Trade Commission (FTC) launched its [Hearings on Competition and Consumer Protection in the 21st Century](#) which featured a series of public hearings during the fall 2018 - spring 2019 examining whether adjustments may be required to competition and consumer protection law, enforcement priorities, and policy. In February 2019, the FTC also announced the creation of a [task force](#) dedicated exclusively towards monitoring competition in the tech industry and taking enforcement actions when warranted.
- In the **United Kingdom**, the Digital Competition Expert Panel produced its report [Unlocking digital competition](#) in March 2019 that considered the potential opportunities and challenges the emerging digital economy may pose for competition and pro-competition policy, and making recommendations in relation thereto.
- In **Europe**, an expert panel produced its final report, [Competition policy for the digital era](#), for the European Commission in April 2019 exploring how competition policy should evolve to continue to promote pro-consumer innovation in the digital age.

So, why all the interest for competition in the digital economy?

As we heard from our speakers, there is growing populist and political concern over concentration in the digital marketplace. Particularly with a small number of digital platforms that control vast amounts of

data. Platforms that are increasingly seen as gatekeepers to the digital economy by controlling access for businesses looking to compete online.

This growing concentration has, in itself, led to the criticism of antitrust agencies for failing to stop acquisitions of smaller tech companies dubbed by many as “killer acquisitions”.

We also heard the view that there have been blatant violations of consumer privacy. In the face of scrutiny over these violations, it was suggested that Big Tech has shown that it believes it is bigger than government.

Digital Platforms

The forum’s first panel considered digital platforms. Panelists pointed out that platforms vary significantly and concerns with concentration of the market are more specific to platforms that operate in two-sided or multi-sided markets characterized by network effects. In this market, data collected from customer interactions with the platform is a critical input to both the service and the selling of ads to monetize the service.

We heard that these platforms can offer a compelling user experience and the lowest price; characteristics that are considered consumer benefits under prevailing competition law standards. However, these markets are also undeniably characterized by concentration, low or no entry, and prone to “tipping” to winners. It was said that ex post antitrust enforcement alone could not address all of the concerns associated with these characteristics.

The challenge lies in addressing the disadvantages while preserving the benefits that consumers have grown accustomed to, such as zero-price and enhanced user experiences. In trying to address these issues, it was noted that we should be careful in identifying the harms that are of concern before thinking about remedies.

“We need to think clearly and we need to make sure that we’ve identified the problem before we start throwing solutions at it.”

- **Melanie Aitken**

Co-Chair Competition and Foreign Investment Group at Bennett Jones, LLP,
and former Commissioner of Competition

Killer acquisitions

There was debate about whether or not there is an endemic merger problem in the tech industry or if a few select transactions are examples of cases facing second-guessing with the benefit of hindsight (e.g. Google/Waze, Microsoft/LinkedIn, Facebook/WhatsApp and Facebook/Instagram).

We heard that start-ups in this space are in the market to be acquired. Their innovations are often incremental; a function or feature that fits into a larger stack. Start-ups lack the capital to achieve scale. The only exit strategy for the venture capitalists financing these start-ups is to be acquired by a large firm.

On the other hand, a panelist pointed out that in carrying out its study, the UK’s Digital Competition Expert Panel looked at hundreds of acquisitions that occurred under the radar over the years and that the conclusion of the panel was that a few problematic mergers were likely missed.

Exploring Solutions

To address these concerns, there is a movement calling for a wholesale rethinking of the purpose and design of competition law frameworks. However, there is also an opposite movement that believes that the existing frameworks are well suited to address any competition concerns in the digital economy, as none of these issues are conceptually new.

Where does Canada stand?

Many at the forum appeared to be of the view that Canada's Competition Act provides a flexible and robust framework to address many of the issues surrounding the digital economy. However, there was also agreement that additional tools might improve the Bureau's ability to keep up with a fast evolving economy and to address issues related to data and digital platforms.

Where and how to regulate

There was agreement that some market distortions demand regulation over and above competition law. Still, we were reminded that unnecessary or poorly designed regulation carries its own risk of market distortion by interfering with creativity, innovation and other forces at play. For this reason, there was some hesitation around resorting to regulation to address competition concerns stemming from digital platforms before first determining whether Canadian competition law could address those concerns, with adjustments where needed.

The digital economy raises a number of social policy considerations such as privacy, diversity of voices and violence that call more naturally for some regulation. They are important public policy objectives but they are not competition concerns. This leads back to the importance of clearly identifying the harms that we seek to prevent and using the appropriate tools in doing so.

A look at potential antitrust tools

Panelists discussed various tools to address competition concerns related to digital platforms; both additional tools for competition agencies as well as tools designed to complement the work of enforcers.

IMPROVING MERGER REVIEWS

It was suggested that competition authorities should conduct retrospectives of mergers that were cleared or not reviewed. Retrospectives provide a great opportunity to learn and to identify where it might be required to bring changes to how assessments are conducted.

Additionally, a "balance of harm test" was suggested given the particular challenges of acquisitions in the tech space. Such a test could be more economically accurate as it could consider both the scale and the likelihood of harm in merger cases involving potential prevention of future competition.

ENFORCEMENT FOR ANTI-COMPETITIVE CONDUCT

When it comes to conduct, we heard suggestions such as introducing speedier interim measures powers and lowering the standard of review to a judicial review standard. Such measures seek to accelerate enforcement in a fast evolving space.

"The maximum penalties for anti-competitive behaviour [...] lack the teeth necessary to deter anti-competitive behaviour."

- Matthew Boswell
Commissioner of Competition

The Commissioner called for the strengthening of the incentives to comply with the law. He noted that the maximum penalties for anti-competitive behaviour in Canada are simply not high enough to deter anti-competitive conduct.

Others suggested that expanding the right of private access to abuse of dominance could provide a solution to the lack of case law from which to draw on when it comes to abuse of dominance. Recognizing that competition authorities have limited resources, allowing private action could help considerably to clarify where the bounds of the law ought to fall.

AN EX ANTE CODE OF CONDUCT

One of the major recommendations coming out of the UK's Report of the Digital Competition Expert Panel is the creation of a digital markets unit tasked with working with industry and stakeholders to establish a digital platform code of conduct. This code would apply to conduct by digital platforms designated as having strategic market status (e.g. firms that hold a position of enduring market power and control others' market access).

Increasing Competition with Data Portability

“Data portability is critical to the Canadian digital economy and it's very important, if not also critical, to the regulatory framework for competition in Canada in the digital marketplace.”

- Kirsten Thompson

National Lead of Transformative Technologies and Data Strategy Group, Dentons

In contemplating whether there are possible structural changes that could foster innovation and competition, data portability becomes a natural topic of discussion. Open banking is a predominant example of some of the benefits portability can bring to competition in the financial sector.

We heard that in the UK, while looking into retail banking, experts realized that banks were sitting on a vast amount of data that was being underutilized. Rather than breaking up big banks it was decided to move to open banking and implement data portability and mobility, and open API remedies. Open banking spurred innovation to provide more services to consumers and saw more engagement from consumers.

Spurring innovation with open banking

We heard that the average Canadian only switches banks once every ten years and this is likely because many consider switching difficult. It was also suggested that consumers don't benefit from real transparency from their banks. Data portability would allow the marketplace to innovate to provide that transparency.

Although a committee has been tasked with looking into open banking, we heard that Canada lags behind.

The right to data portability

A panelist defined data portability as a person's right to receive their personal data from an organization in a secure, structured, commonly used and machine readable format. A complex definition that raises a number of challenges.

We heard that Canada's privacy legislation does not contain a data portability right, only a right of access. While anyone can ask a private firm for the personal data they have collected, firms are not required to provide a copy and consumers have no control over what the firm does with the data. By contrast, the

GDPR treats privacy as a human right and affords consumers more control over their data. Australia has also created a “digital consumer right” that gives everyone the right to data portability. This right is being implemented by sector, starting with banking. Utilities and telecommunications are likely to be the next sectors to implement this right to data portability.

If data portability is to become a right in Canada, a number of questions must be answered:

- Where is that right embedded? Is it in privacy legislation or in competition law?
- What does the right to “receive” data mean? Does it mean that the consumer gets the information directly from a firm or should it be transferred to the firm’s competitors? And in what format?
- Once a firm has provided a copy of the data, to the consumer or a competitor, should the data be deleted or are there now multiple sets of the same data?

These are only some of the least technically complex questions that need to be addressed.

THE SCOPE OF THE DATA PORTABILITY RIGHT

Perhaps most importantly, regulators will have to determine what data is included in this right. Under Canada’s Personal Information Protection and Electronic Documents Act, personal data means any information about an identifiable individual. This includes an individual’s name, age or financial information but also observed and inferred information about that individual such as profile created by a firm.

We heard that caution is needed in determining where to draw the line. Companies, particularly large incumbents, are using the data they collect to drive insight, generate inferences and improve or customize products and services for the benefit of consumers. If companies are forced to share innovation intelligence with their competitors, there may be less incentive for them to generate it in the first place and consumers could lose out. There was a sense that a careful balancing exercise is required to address this concern.

Regulating data portability

WHO WILL REGULATE?

A particular challenge of answering all of the questions surrounding data portability lies in the multitude of regulators acting in the space. In the financial sector alone, the Financial Transactions and Reports Analysis Centre of Canada, the Office of the Superintendent of Financial Institutions, the Bank of Canada, Finance Canada, and the Financial Consumer Agency of Canada are all regulatory bodies touching data that work in silos.

Regulatory fragmentation was identified as having the potential to impede progress in the pursuit of open banking.

SECTORIAL CHALLENGES

The panel also explored the idea that not all sectors of activity experience the same data-related challenges. Some industries may need a top-down regulatory approach while others can succeed with an industry-led approach. The consensus was that there is no “one size fits all” approach. Developing regulations and policies requires input from industry experts.

Beyond open banking - use cases for data portability

We heard about an industry collaboration, [The Data Transfer Project](#), created out of the desire to allow for a direct transfer of user data between services. Google, Microsoft, Facebook, Twitter and many more are working on this open source project that is premised on providing choice to users.

A panelist told participants that when it comes to use cases, it appears that the majority of users want to

back-up their information or they want to try a competing service. He also pointed out that not all users are looking for the same use cases. Users themselves are innovative when it comes to creating use cases once given control of their data.

The need for digital literacy

In order for data portability to fulfill its promise of increased competition in the digital economy, panelists acknowledged that consumers must understand what they can do with their data and their rights and obligations. There is a great need for digital literacy, particularly when it comes to consent.

In fact, digital literacy was a recurring theme throughout the day, with acknowledgment that a lot of the issues surrounding data may not be solved without greater consumer literacy. This was perhaps no more evident than when discussing privacy.

Where Privacy Fits In

In today's digital economy, privacy is an undeniable issue with large tech firms being the focus of much scrutiny. In the days leading up to the Forum, the Standing Committee on Access to Information, Privacy and Ethics (ETHI) hosted the [International Grand Committee on Big Data, Privacy and Democracy](#) in an effort to hold tech companies accountable to users when it comes to the use of personal information they collect on their users.

But why should competition authorities be interested?

Participants at the forum seemed to agree that privacy can and should be considered as a dimension of competition to varying extents. However, panelists pointed out that many argue that while privacy is an important public policy consideration, it falls outside the scope of competition law. Proponents of this position will often say that privacy is not something businesses compete on simply because people do not care.

Understanding consumer behaviour towards privacy

One panelist suggested that the perception that consumers do not care fails to consider that they are being human in an inherently complex environment. We are currently operating in an environment where the existing tools and policies designed to help people make decisions online were not designed for humans but rather for "econs" – perfectly rational agents. "Econs" are capable of processing a lot of information without effort, making complex trade-offs and are forward-looking. Humans, on the other hand, are impulsive and often operate on autopilot.

Privacy is an abstract concept and people struggle with abstract concepts. For example, consumers are not equipped to understand or quantify how much privacy is lost when making a purchase on Amazon.

We must also recognize that the online environment is designed to motivate people to share their data. Default settings are often set to the lowest level of privacy. We cannot assume that people do not care about privacy based on their behaviour online given the context in which they operate.

Competing on privacy

“There are entrepreneurs who are waiting in the wings with privacy-by-design technologies and they just need to be able to break through.”

- Sally Hubbard

Director of Enforcement Strategy, Open Markets Institute

We heard the idea that there is a whole market for privacy on its own. A market where privacy-by-design start-ups focus on providing the same services while preserving privacy. Tech companies are investing in and promoting changes in privacy approaches, changing the nature of competition on privacy.

In this context, we heard that a goal of antitrust enforcement and other regulatory measures should be to help create an environment that makes it possible for privacy-by-design start-ups to compete and bring their innovations to users. In creating an environment that fosters privacy-based innovation and competition, consumers might benefit from the competitive alternatives necessary to constrain platforms from engaging in the abusive behaviour that policymakers are looking to curb. In short, competition policy could support privacy policy.

Privacy as a dimension of competition

Many of the privacy concerns discussed at the Forum were seen as broader public policy issues. However, we heard that competition enforcers would not hesitate to consider privacy as a parameter of competition under the right circumstances.

For example, we heard that in mergers involving zero-price products where an increase in price is unlikely, enforcers will be more vigilant when looking at potential loss of quality or innovation, which could include a firm relaxing its privacy settings post merger.

We expect the relationship between competition and privacy to generate further discussion. Especially, as regulation grants consumers more control over their data and their behaviour towards privacy evolves.

Enforcer Perspective

Enforcers agreed that the core principles of competition law are generally up to the task of dealing with the digital economy. Existing frameworks being flexible enough to adapt to a rapidly evolving economy and providing adaptable tools.

Enforcers provided examples of cases involving multi-sided markets, free-product, network effects or data as a barrier to entry. They concluded that they were able to assess these so-called new concepts within traditional frameworks.

However, they agreed that the digital economy does pose challenges when it comes to the rapid pace of change and the borderless nature of the economy. There is a need to reconsider some of the tools, approaches and technology that is used.

Sharpening competition enforcement tools

While the consensus was that tools could be changed or adapted, enforcers offered different perspectives on what those changes could be.

INCREASING INTERNATIONAL COLLABORATION

Because the digital economy is a truly global phenomenon, competition authorities are called upon to collaborate and cooperate on a more frequent basis. According to the Commissioner, the best way to look

at global conduct that may cause concern is to take a globally coordinated approach to enforcement. The Commissioner also pointed to the need for effective ways of sharing information quickly across borders. Most notably in a context where information is not situated in Canada but relevant to conduct in Canada.

UNDERSTANDING THE MARKET

Rapid pace of change being a challenge, we heard of initiatives aiming to ensure that enforcers keep up with the evolution of the economy.

The Bureau recently created the position of Chief Digital Enforcement Officer whose role includes leading efforts to monitor the threat landscape and the underlying emerging technologies as well as strengthening investigative capacity.

The FTC established a digital task force dedicated to monitoring competition in technology markets.

We also heard that some tools might be reconsidered as we gain greater understanding of markets and competitive forces at play in the digital economy. For example, market definition tools might apply differently in markets that have zero-price products. Current remedies may not be effective in the digital context.

As the market evolves and new issues arise, enforcers will continue to refine their thinking and reconsider their tools.

Looking Ahead

The Data Forum provided an opportunity for the Bureau to gather valuable insight from key stakeholders on the competition issues related to the digital economy and possible solutions.

The discussions will contribute to shaping the Bureau's thinking when it comes to competition issues in the digital economy.

Agenda

Registration

8:15-9:00am

Opening remarks and Q&A with **the Honourable Navdeep Singh Bains**,
Minister of Innovation, Science and Economic Development

9:00-9:45am

Panel 1 – Keeping Pace with Digital Platforms: The Role of Antitrust

9:45-11:00am

Digital platforms, through their ever growing collection of valuable data, have ignited debates among policy-makers regarding whether antitrust enforcement needs to be modernized. Some have argued that the tech giants operating these platforms serve as gatekeepers to the digital economy; concerns over their ability to exclude access to essential inputs and discriminate in favour of their own products and services have led to calls for “platform neutrality” regulation or enforcement. Concerns have also been raised about the potential harm arising from tech giants buying smaller start-ups who may not be competitors today, but could become competitive threats in the future. Despite these concerns, the need to preserve the ability and incentive of firms to innovate in the digital age remains central when considering potential solutions to these complex issues. This panel will discuss whether the emergence of digital platforms has created novel antitrust problems and, if so, whether new approaches to conduct and merger enforcement offer the right solutions.

Moderator:

Jeanne Pratt

Senior Deputy Commissioner, Mergers and Monopolistic Practices Branch, Competition Bureau

Speakers:

Philip Marsden

*Deputy Chair, Bank of England Enforcement Decision Making Committee
Professor of Law and Economics, College of Europe, Bruges*

Melanie Aitken

*Co-Chair Competition and Foreign Investment Group, Bennett Jones, LLP
Former Commissioner of Competition*

Grant Bishop

Associate Director, Research, C.D. Howe Institute

Greg Sivinski

Assistant General Counsel, Microsoft

Morning Refreshments

11:00-11:15am

Panel 2 – Privacy and Competition: The Boundaries

11:15am-12:30pm

Privacy has been a topic of intense debate around the world. The GDPR in the EU and forthcoming privacy regulations elsewhere are changing the regulatory and commercial landscape and, as a result, new business models are setting themselves apart on the basis of privacy protection. Antitrust agencies are not immune from this debate and are being asked to consider how privacy is relevant to competition enforcement. There is ongoing debate over whether, and how, privacy serves as a dimension of competition. Although the use of data allows firms to provide a more tailored product or service, does the consumer have the necessary information to appreciate the trade-offs between privacy and the enhanced user experience and do they have the information necessary to make informed choices? Should antitrust agencies be concerned if consumer data allows firms to engage in price discrimination? This panel will examine the boundaries between privacy and competition with a focus on consumer behaviour.

Moderator:

Mark Schaan

Director General, Marketplace Framework Policy Branch, ISED

Speakers:

Sally Hubbard

*Director of Enforcement Strategy, Open Markets Institute
Former Assistant Attorney General, New York AG Antitrust Bureau*

Melanie Kim

Research Coordinator & Associate, Behavioural Economics in Action at Rotman, Rotman School of Management, University of Toronto

Anindya Ghose

*Heinz Riehl Chair Professor of Technology and Marketing, Stern School of Business,
New York University*

Carole Piovesan

Partner and Co-Founder, INQ Data Law

Lunch and Networking

12:30-1:45pm

Panel 3 – Data Portability and Interoperability: The Future

1:45-3:00pm

Digital platforms have been capitalizing on the large quantities of data they gather from their users and benefitting from network effects. These trends have fueled a debate surrounding whether the leading platforms' control over massive amounts of data has entrenched their power, rendering them virtually unassailable. Many consider data portability and interoperability to be central in empowering consumers with their data and enhancing competition by making it easier for new platforms to enter, providing more choice for users and lowering their switching costs. Some, however, argue that mandating data portability and interoperability would do more harm than good, notably by impeding innovation. This panel seeks to address these issues through the lens of industries that have already created an ecosystem for data portability.

Moderator:

Leila Wright

Associate Deputy Commissioner, Policy, Planning and Advocacy Directorate, Competition Bureau

Speakers:

Joshua Gans

Jeffrey S. Skoll Chair of Technical Innovation and Entrepreneurship, Rotman School of Management, University of Toronto

Kirsten Thompson

National Lead of Transformative Technologies and Data Strategy Group, Dentons

Adam Felesky

Chief Executive Officer, Portag3 Ventures

Jessie Chavez

Senior Software Engineer, Google

Afternoon Refreshments

3:00-3:15pm

Panel 4 – The Regulatory and Enforcement Landscape

3:15-4:30pm

Regulators and enforcers face a daunting set of challenges in today's digital economy: keeping pace with unprecedented change while taking the time to get things right; collaborating across borders and policy areas while respecting confidentiality rules and resource constraints; responding to public outcry while remaining objective and evidence-based; addressing new problems with established, albeit imperfect, regulatory and enforcement frameworks. This panel will provide an opportunity to hear how senior agency officials, both domestic and international, are dealing with these and other challenges and what changes we should expect to see in the regulatory and enforcement landscape over the coming years.

Moderator:

Elisa Kearney

Partner, Davies Ward Phillips & Vineberg LLP

Speakers:

Matthew Boswell

Commissioner of Competition, Competition Bureau

Alden Abbott

General Counsel, US Federal Trade Commission

Nicholas Banasevic

Head of Unit, Antitrust: Information Industries, Consumer Electronics and Internet, DG Competition, European Commission

Daniel Haar

Acting Chief, Competition Policy & Advocacy Section of the Antitrust Division, US Department of Justice

Closing Remarks

4:30-4:35pm

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