

Intelligence MEMOS



From: John Pecman

To: Canadians Concerned About Competition

Date: November 8, 2021

Re: **COMPETITION LAW IS NOT THE PLACE TO FIGHT BIG TECH**

The rocket-like rise of the tech titans has triggered a competition policy response from many of Canada's largest trading partners, largely owing to populist angst over alleged market power and privacy concerns.

In Europe and the United States, myriad proposals driven by a "big is bad" mantra seek new laws and regulations to tame the more successful digital platform companies.

Traditional laissez-faire policies that have enabled unprecedented economic growth face the prospect of a deep chill should these proponents succeed in creating greater marketplace equality for businesses at the expense of consumer welfare. Competition rules that would punish successful enterprises to pursue nebulous notions of fairness put at risk incentives for investment and innovation that underpin our prosperity and employment.

There is no doubt that Canada's competition laws can be better tuned to oversee the digital economy. At the same time, there is a consensus among economists and antitrust practitioners that current competition law goals of protecting consumer welfare and promoting efficiency are the right ones.

Online markets have challenged core antitrust principles because so many digital services are free to users. Instead of money, consumers provide attention and data, both of which are useful to advertisers. Social media and search providers bring together buyers and sellers to interact in a multi-sided market.

Competition in such multi-sided markets may emerge, not from one platform, but across different types of online and offline channels to attract users. For instance, Facebook competes with Google, Twitter and Apple for advertising revenue, but it is also in direct competition with offline advertising such as broadcast and print ads. Similarly, Amazon competes with other on-line retailers, such as eBay and Shopify, but also with traditional bricks-and-mortar retailers such as Walmart, Costco and Canadian Tire, which also sell their goods and services online.

As a result, online competition is not easy to define, which challenges antitrust enforcers' traditional application of the analytical tools traditionally used to address anti-competitive conduct. These complications underpin the current debate on whether the existing analytical framework can be applied to the new digital economy or whether the framework itself needs to be revised.

Regulators need to recognize the different business models the various companies operate and should consider potential interventions or remedies only on a case-by-case basis.

Many left-leaning populist reformers say they want "tougher" antitrust laws and changes to the analytical framework itself. This is a reaction to the rapid growth of large digital networks and online intermediary platforms, their scale, their acquisition strategies and their enhanced ability to collect data. Populists claim these advantages create unfair competition or insurmountable entry barriers for new competitors. They want to broaden antitrust regulations to address rising inequality, employee wages and the concentration of political power.

But as a 2018 [report](#) from the Competition Bureau put it: "There is little evidence that a new approach to competition policy is needed although big data may require the use of tools and methods that are somewhat specialized and, thus, may be less familiar to competition law enforcement."

A case in point was the Bureau's successful challenge of the Toronto Real Estate Board's restrictions on members' access to real estate data. Courts agreed that TREB's data restrictions prevented the emergence of innovative, online business models for residential real estate brokerage services in the Greater Toronto Area, that they had an adverse impact on innovation, quality and the range of service offerings.

More recently, the Bureau initiated a new digital investigation under its existing legislation to determine if Google is leveraging its alleged market power in the supply of data-driven in-stream video advertising space into adjacent advertising technology markets.

Open-market capitalism, unfettered by over-regulation, generated the industrial, technological and green revolutions, significantly increased standards of living, and resulted in innovations that immensely improved people's well-being. Without capitalism's incentives to invest and innovate, history has demonstrated, the economy would stagnate and eventually decline. The social imbalances produced by a free market can best be addressed through other policy tools and laws. For instance, employee rights can be addressed by employment law, while wealth and income inequality are best left to taxation and government spending.

The Hippocratic Oath of "first, do no harm" comes to mind whenever there are discussions about reform to competition laws. Should we consider changes that would provide our competition watchdog with additional tools and resources to tackle alleged digital abuses of the competitive process? Absolutely, yes. Should we make changes that protect competitors from competition or prevent them from becoming innovative or efficient themselves? Absolutely not.

John Pecman is a Senior Business Advisor with Fasken, a Senior Fellow at the C.D. Howe Institute and member of its Competition Policy Council, and the former Commissioner of Competition.

To send a comment or leave feedback, email us at blog@cdhowe.org.

The views expressed here are those of the author. The C.D. Howe Institute does not take corporate positions on policy matters.

A version of this Memo first [appeared](#) in the Financial Post.