COMPETITION POLICY COUNCIL

COMMUNIQUÉ

May 16, 2019

Canadian Competition Policy in the Digital Age: Is Today's Toolkit up to the Task?

Seventeenth Report of the C.D. Howe Institute Competition Policy Council

At their April meeting, Council members discussed whether Canada's competition policy toolkit is sufficient to address new forms of market power that may arise in the digital economy.

Governments worldwide are wrestling with public concerns about the perceived power and influence of "Big Tech" companies like Google, Facebook and Amazon that provide digital platforms for searching, shopping and social media and collect extensive datasets about users' online activities. In the face of populist appeals for a revamp of antitrust rules and pressure to directly regulate digital platforms, the consensus of the Council was that Canada's competition law continues to provide a robust framework for confronting new forms of anticompetitive behaviour that may arise in the digital economy. However, Council members cautioned that competition law has limits. While competition law is structured to address conduct that may prevent or lessen competition, it is not designed to directly control market power. Council members agreed that regulation may be appropriate to address non-economic objectives or persistent, identifiable "market failures" – that is, an inefficient equilibrium that market competition will not rectify and competition law cannot address.

This is the majority view of the C.D. Howe Institute's Competition Policy Council, which held its seventeenth meeting on April 23, 2019.

Council members generally agreed that competition law has been capable of adapting to new technology and forms of anticompetitive conduct. With respect to both abuse of dominance and merger review, the Council's consensus was that Canada's conceptual framework remains appropriate – although some members believed that recent court decisions have inappropriately modified the scope of certain provisions. New analytical and evidentiary approaches may be required – particularly to address non-price dimensions of competition. Council members also stressed the need for better information about market concentration and more rigorous competition law enforcement to test the limits of the competition law framework. Nonetheless, policymakers must be cognizant of the sensitivities of business investment to regulatory uncertainty and avoid dampening fast-moving and highly dynamic competition "for the market" in the technology sector. Policymakers should not assume that incumbents are invincible to upstart digital disruptors.

INSTITUT C.D. HOWE INSTITUTE
Essential Policy Intelligence | Conseils indispensables sur les politiques

The Competition Policy Council comprises top-ranked academics and practitioners active in the field of competition policy. The Council provides analysis of emerging competition policy issues and is co-chaired by Adam Fanaki, Partner, Competition and Foreign Investment Review and Litigation at Davies Ward Phillips & Vineberg LLP,[1] and Grant Bishop, Associate Director, Research, at the C.D. Howe Institute. Professor Edward Iacobucci, Dean at the University of Toronto Faculty of Law and Competition Policy Scholar at the Institute, advises the program. The Council, whose members participate in their personal capacities, convenes a neutral forum to test competing visions and to share views on competition policy with practitioners, policymakers and the public.

At Issue: Is today's competition toolkit sufficient to address new forms of market power?

The Council meeting considered three areas of possible challenge for Canadian competition law:

- Can Canadian merger review adequately assess future competitive impact of acquisitions of new but potentially disruptive competitors?
- Are abuse of dominance provisions and remedies in Canadian competition sufficient to address possible dominance in data and market power of platforms?
- Should dominant platforms be regulated?

Background:

In Canada, potential issues arising from market power in data-driven industries are attracting increasing attention from policymakers. The December 2018 report of the House of Commons Standing Committee on Access to Information, Privacy and Ethics recommended examination of the potential economic harms caused by so-called "data-opolies" in Canada and study to determine if modernization of the *Competition Act* is needed.[2] In a recent article, Deputy Bank of England Chairman Philip Marsden flagged concern about the growing "Leave" movement calling for structural remedies to the market power that may exist in the digital economy (e.g., price caps, market share caps or breakups).[3] Similarly, former antitrust prosecutor Carl Shapiro has also recently argued that more vigorous antitrust enforcement – particularly intensified scrutiny of the competitive behaviour

1 During Adam Fanaki's absence for the April 2018 meeting, Elisa Kearney, Partner, Competition and Foreign Investment Review and Litigation at Davies Ward Phillips & Vineberg LLP, acted as interim co-chair.

2 Canada. 2018. "Democracy under Threat: Risks and Solutions in the Era of Disinformation and Data Monopoly." House of Commons Standing Committee on Access to Information, Privacy and Ethics. December. Available online at: http://www.ourcommons.ca/DocumentViewer/en/42-1/ETHI/report-17/page-141#37.

3 Marsden, Philip. 2019. "Leave, Remain & Common Ground: Pragmatism in Dealing with Tech Giants." *Competition Policy International*. April. Available online at: https://www.competitionpolicyinternational.com/leave-remain-common-ground-pragmatism-in-dealing-with-tech-giants/.

of large tech firms – is necessary to address the widespread and growing concern over the political and economic power of large corporations in the United States.[4] However, Shapiro stresses that competition law is ill suited to directly address concerns associated with the political power or other policy goals like income inequality or job creation.

The consensus of the Council is that Canada's *Competition Act* provides a robust and flexible framework for addressing competition concerns in the digital economy. The focus of competition law is on whether market participants erect barriers to entry or expansion, inhibit contestability (i.e., user switching) or collude to influence prices or production. Council members generally agreed that anticompetitive conduct in the digital economy can be addressed under existing provisions of the *Competition Act*, albeit potentially requiring advances in analytical methods and innovative (though not unprecedented) approaches to remedies.

However, certain Council members stressed the limits of competition law. That is, competition law can confront acquisitions of competitors or specific conduct that may prevent competition. Competition law is not designed to directly control market power that is obtained by competitive conduct. Therefore, regulation may be appropriate to address persistent and identifiable market failures that competition law cannot address.

Council members noted the valuable work of the Competition Bureau in its consultations and 2018 report on "Big Data and Innovation."[5] Council members supported the Bureau position that competition enforcers should not condemn firms merely because they are "big" or possess valuable datasets. Council members agreed that past competition cases involving access to data and multi-sided platforms reflect the same principles that should apply to anticompetitive conduct in the digital space. Former Commissioner and Council member John Pecman reiterated this position in a recent article.[6]

Nonetheless, many Council members emphasized that Canada requires better information about the state of competition and market concentration in the Canadian economy. Council members generally supported the intensification of competition enforcement in Canada and, noting the dearth of case law from which to draw guidance, increasing the number of litigated cases.

---

4 Shapiro, Carl. 2018. "Antitrust in a time of populism." *International Journal of Industrial Organization* (27 February) 61: p. 714–748. Available online: https://faculty.haas.berkeley.edu/shapiro/antitrustpopulism.pdf.

5 Competition Bureau. 2018. *Big data and innovation: key themes for competition policy in Canada*, (19 February) at 5. Available online: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04342.html.

6 Pecman, John. 2019. *Don't Break Up Big Tech Firms: Former Antitrust Regulator* (22 April 2019). Available online: http://www.cfo.com/regulation/2019/04/dont-break-up-big-tech-firms-former-antitrust-regulator/.

Is Canadian Merger Review Missing "Killer Acquisitions"?

Council members agreed that Canada's pre-merger notification rules and framework for merger review are sufficient to safeguard against anticompetitive acquisitions even in the tech space. Acquisitions that involve a target with domestic assets or sale revenues exceeding $96 million are notified to the Bureau, provided the parties collectively have Canadian assets or sales exceeding $400 million. There may be acquisitions of potential disruptive entrants in digital sectors that do not trip these thresholds. However, this is the case in any industry and the Bureau has the ability to challenge non-notifiable transactions.

Members of the Council warned against introducing different merger review thresholds or bespoke approaches to small tech start-ups. Some jurisdictions (e.g., Germany) have moved or are considering moving (e.g., European Union) to a transaction value-based threshold. However, as commentators have observed – and Council members echoed – the German approach has resulted in confusion around the appropriate nexus with the jurisdiction, and it remains unclear whether there is actually an enforcement gap.[7] Complaints from other market participants can flag potentially problematic acquisitions to the Bureau – and players in the tech scene have large incentives to ensure that markets are not foreclosed by anticompetitive behaviour.

Council members unanimously agreed on the need for regulatory certainty for business. Major revisions to Canada's merger review rules could cause confusion and dampen Canada's attractiveness as a place to do business. Certain members observed that review of mergers without significant revenues would inevitably involve "crystal ball gazing" around the future prospects of the upstart target and others expressed skepticism that competition authorities could accurately predict a start-up's competitive potential in order to prove a "likely" prevention of competition.

Mergers in the tech space often feature non-price effects (e.g., considerations of privacy and quality), implicate important inputs for innovation and involve new products with a lack of historical data to model market impacts. The Supreme Court of Canada's decision in *Tervita* held that the Bureau must quantify all measurable anticompetitive effects in cases where the efficiency defence is raised.[8] Some Council members pointed out that this may lead to difficulty for the Bureau winning on non-price effects because of evidentiary challenges in quantifying and proving such effects. Other members

7 See, e.g., Hatton, Catriona, David Gabathuler and Alexandre Lichy. 2018. *Digital Markets and Merger Control in the EU: Evolution, not Revolution?* (19 February) Available online: https://www.competitionpolicyinternational.com/digital-markets-and-merger-control-in-the-eu-evolution-not-revolution/.

8 See: *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3.

contended that methodologies to quantify non-price effects are being adapted and adopted to meet this challenge.[9] Council members also observed that the *Tervita* decision allows for the Competition Tribunal to find that non-price effects are not quantifiable.

Adequate Tools to Enforce against Anticompetitive Practices by Digital Platforms?

Council members generally agreed that the current legislative framework under the *Competition Act* can be used to counter abuse of dominance by digital, data-driven players. As evidence for the flexibility of provisions, Council members pointed to recent cases concerning platform competition (e.g., the nuanced competitive analysis of credit card networks in *Visa/Mastercard*)[10] and data as a critical input for competition (e.g., Multiple Listing Service data on past transactions in the *TREB* decisions).[11] Indeed, certain commentators have argued that the outcome in *TREB* has given rise to an "essential facilities" doctrine that goes too far in compelling access to a scarce input for participants in downstream markets in which the owner of the input is not actually a competitor.[12]

Similar to their views on merger review, the Council members' consensus for abuse of dominance was that Canada's conceptual framework remains appropriate, but that new analytical approaches may be required – particularly to address non-price dimensions of competition. In the context of multi-sided platforms, the OECD has also examined whether new approaches are needed to define markets, to assess market power and efficiencies, and to assess the effects of exclusionary conduct and vertical restraints.[13] However, confronting the questions around digital platforms involves the evolution of economic theory and empirical methodology, rather than the re-writing of the framework for analyzing anticompetitive conduct. Additionally, Council members were sensitive to applying precedent from historical cases involving data-derived market power to the current context: past cases typically involve transactional data that belong to the company while the current context often involves user data that engage issues of data ownership and privacy.

9 See, e.g., Duplantis, Renée M. and Ian Cass. 2017. "The importance of quantifying non-price effects in Canada." *Concurrences* 2: 51-57. Available online at: http://files.brattle.com/files/7069_the_importance_of_quantifying_non-price_effects_in_canada.pdf.

10 *The Commissioner of Competition v. Visa Canada Corporation and MasterCard International Incorporated*, 2013 CACT 10.

11 *Toronto Real Estate Board v. Commissioner of Competition*, 2017 FCA 236.

12 Church, Jeffrey. 2018. "The Lamentable Rise of an Expanded Essential Facilities Doctrine in Canada: The Troubling Economic Foundations of the Toronto Real Estate Board Decision." *Canadian Competition Law Review* 31(1): 122-187, Available online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3293028.

13 OECD. 2018. *Rethinking Antitrust Tools for Multi-Sided Platforms 2018*. Available online: http://www.oecd.org/competition/rethinking-antitrust-tools-for-multi-sided-platforms.htm.

As the Council's November 2018 communiqué urged,[14] Council members emphasized the importance of intensified competition enforcement. In particular, Council members highlighted the need for more litigated cases and case law to develop a robust interpretation of the provision. Some Council members reiterated the past recommendations from the Council for expanding private rights of access for abuse of dominance as a way of growing a body of jurisprudence.[15]

Council also observed that the Bureau may be poorly placed to monitor a company's compliance with certain types of remedies that may be well suited to address abuse of dominance in the digital economy. For example, although affirming the anticompetitive effects of credit cards networks' restrictions on surcharging, the Competition Tribunal in *Visa/Mastercard* indicated that it was ill-equipped to craft a remedy since this would likely involve some form of regulatory supervision. Certain Council members also argued that *Visa/Mastercard* highlights the difficulty of imposing remedies in the context of platform competition.[16] Nonetheless, Council members pointed out previous instances where the agreed conditions between the Bureau and a company involved monitoring of compliance by a separate "life cycle" regulatory authority.

Should Canada Regulate Digital Platforms like Utilities?

The consensus among Council members was that any direct regulation of digital platforms requires a clear demonstration of market failure. If a market failure does warrant a regulatory intervention, it should be carefully calibrated to restore economic efficiency. Certain Council members argued that more regular collection and publication of data on market concentration (e.g., four-firm concentration ratios or Hirschman-Herfindahl Indices) by Statistics Canada could assist in ensuring that important policy decisions are not made in a vacuum. Council members also stressed that prescriptive regulation

14 C.D. Howe Institute Competition Policy Council. 2018. *Ottawa Should Re-Invigorate Competition Enforcement in Canada* (8 November). Available online: https://www.cdhowe.org/cpc-communique/ottawa-should-re-invigorate-competition-enforcement-canada.

15 C.D. Howe Institute Competition Policy Council. 2016. *Damage Control: Abuse of Dominance and the State of Private Remedies in the Competition Act* (20 October). Available online: https://www.cdhowe.org/cpc-communique/damage-control-abuse-dominance-and-state-private-remedies-competition-act.

16 Certain Council members also observed that the Tribunal was also unwilling to impose a remedy in *Visa/Mastercard* because of its concerns for additional welfare effects beyond the increase in market power in the provision of credit card services to acquirers. In the context of the multi-sided platform competition, the Tribunal recognized that changes on one side of a platform would "have consequences in other parts, such as cardholder fees and benefits while price reductions to consumers may be undetectable. The law of unintended consequences is likely to be a significant force. It is uncertain that the supposed "cure" will not be worse than the "disease"" (*Visa/Mastercard* at paragraph 398).

should be a last resort and would not be appropriate when competition law provides a robust analytical framework and effective remedies to address the given anticompetitive conduct.

Council members also cautioned about the possible perverse consequences to regulatory intervention: costs of regulatory compliance can erect barriers to entry that entrench incumbents and stymie innovation. Certain members stressed that regulation of digital platforms would face difficulties in establishing the regulated price. For example, how would a regulator define the "just and reasonable return" in a market where value derives from innovative applications and quality of users' experiences? Moreover, certain members commented that compelling open access to a digital platform risks free-riding on the investment that a company has made in establishing a high-quality user experience as well as discouraging further investments.

Nonetheless, Council members recognized the movement towards interoperability and data portability requirements as a way of countering the possible market power created by amassing large amounts of data. Certain Council members cautioned against the assumption that market forces would not address data interoperability in response to consumer demand. Other Council members noted the important initiatives to advance open banking in Canada and commended the role of the Competition Bureau in providing input to the Department of Finance review.[17]

However, Council was divided on whether Canada should lead or follow an international movement towards defining data ownership and data portability rights. On the one hand, certain Council members identified an opportunity for Canada to lead in this area and ensure coherence with a distinct Canadian approach to privacy rights. On the other hand, other members highlighted the risks of being out-of-step with trading partners and urged a cautious wait-and-see approach from experiments in other jurisdictions.

Finally, outside of federal-regulated sectors like banking, it is not clear that the federal government has the jurisdiction under Canada's constitutional division of powers to legislate concerning data ownership or platform operations – for example, by imposing standards for portability of data or regulating contracts between digital platforms and users. Additionally, the regulation of platforms may engage questions of extraterritoriality and limitations on content may infringe freedom of expression rights under Canada's Charter.

17 Competition Bureau, *Submission by the Interim Commissioner of Competition to the Department of Finance Canada – Review into the merits of open banking* (19 February 2019). Available online: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04416.html.

Should Canada "Leave" or "Remain"?

In the face of populist appeals for a revamp of antitrust (a so-called "leave" movement in Philip Marsden's characterization),[18] the consensus of the Council was that Canada should "remain." That is, Canada's current framework for competition law is sufficiently robust and rigorous to counter forms of anticompetitive conduct in the digital age. Council members observed that "what's old seems new," and competition law has been capable of adapting to new technology and forms of market power. Analysis of "essential facilities" in antitrust cases has been around since the 1912 *St. Louis Railway* case,[19] and Canada's Competition Tribunal has already considered issues of platform competition and data access in a variety of cases. However, even if the framework for competition law is up to the task, Canada needs better data on market concentration and more active competition law enforcement. Good laws on the books are not effective if enforcement is weak.

As well, policymakers should remain aware of the limits of antitrust. We should not risk competition law becoming a politicized vessel for directly addressing other policy concerns such as income inequality, data ownership or political influence. Other regulatory tools may be appropriate to achieve non-economic policy objectives or where persistent and demonstrable market failures impair economic efficiency.

18 *Supra* note 3.

19 *United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912).

Members of the C.D. Howe Institute Competition Policy Council

Members of the Council participate in their personal capacities, and the views collectively expressed do not represent those of any individual, institution or client.

George N. Addy, Partner, Head of Competition and Foreign Investment Review, Davies Ward Phillips & Vineberg LLP. Director of Investigation and Research, Competition Bureau, 1993-1996.

Grant Bishop, Associate Director, Research, C.D. Howe Institute, Co-Chair, Competition Policy Council of the C.D. Howe Institute.

Marcel Boyer, Research Fellow, C.D. Howe Institute. Professor Emeritus of Industrial Economics, Université de Montréal, and Fellow of CIRANO.*

Tim Brennan, International Fellow, C.D. Howe Institute. Professor of Public Policy and Economics, University of Maryland Baltimore County. T.D. MacDonald Chair of Industrial Economics, Competition Bureau, 2006.

Neil Campbell, Co-Chair, Competition and International Trade Law, McMillan LLP.

Jeffrey R. Church, Professor of Economics, University of Calgary. T. D. MacDonald Chair of Industrial Economics, Competition Bureau, 1995-1996.*

Renée Duplantis, Principal, The Brattle Group. T.D. MacDonald Chair of Industrial Economics, Competition Bureau, 2014.

Brian Facey, Chair of Competition, Antitrust & Foreign Investment Group, Blake, Cassels & Graydon LLP.*

Adam F. Fanaki, Partner, Competition and Foreign Investment Review and Litigation, Davies Ward Phillips & Vineberg LLP, Co-Chair, Competition Policy Council of the C.D. Howe Institute.*

Peter Glossop, Partner, Competition/Antitrust, Osler, Hoskin & Harcourt LLP.

Calvin S. Goldman, Head of Competition, Antitrust and Foreign Investment Group, Goodmans LLP. Director of Investigation and Research, Competition Bureau, 1986-1989.

Lawson A. W. Hunter, Q.C., Senior Fellow, C.D. Howe Institute. Counsel, Stikeman Elliott LLP. Director of Investigation and Research, Competition Bureau, 1981-1985.

Susan M. Hutton, Partner, Stikeman Elliott.

Edward Iacobucci, Dean, and James M. Tory Professor of Law, Faculty of Law, University of Toronto. Competition Policy Scholar, C.D. Howe Institute.

Elisa Kearney, Partner, Competition and Foreign Investment Review and Litigation, Davies Ward Phillips & Vineberg LLP, Interim Co-Chair, Competition Policy Council of the C.D. Howe Institute.

John Pecman, Senior Business Advisor in the Antitrust/Competition & Marketing group at Fasken. Commissioner of Competition at the Competition Bureau Canada from June 2013 until May 2018.

Madeleine Renaud, Former Partner, Competition Group, McCarthy Tétrault.*

The Hon. Marshall Rothstein, Former Puisne Justice of the Supreme Court of Canada.*

Margaret Sanderson, Vice President, Practice Leader of Antitrust & Competition Economics, Charles River Associates.

The Hon. Konrad von Finckenstein, Senior Fellow, C.D. Howe Institute. Commissioner of Competition, Competition Bureau, 1997-2003.*

Omar Wakil, Partner, Competition and Antitrust, Torys LLP.*

Roger Ware, Professor of Economics, Queen's University. T.D. MacDonald Chair of Industrial Economics, Competition Bureau, 1993-1994.

The Hon. Howard I. Wetston, Senior Fellow, C.D. Howe Institute. Director of Investigation and Research, Competition Bureau, 1989-1993.

Lawrence J. White, International Fellow, C.D. Howe Institute. Robert Kavesh Professor of Economics, Stern School of Business, New York University.*

Ralph A. Winter, Canada Research Chair in Business Economics and Public Policy, Sauder School of Business, University of British Columbia.*

---

* Not in attendance, April 23, 2019.

Non-member observing April 2019 meeting:

Erika Douglas, Assistant Professor of Law, Temple University Beasley School of Law.