

# Commentary



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## Monopoly Games: Moving past populist rhetoric on 'big digital' services to a post-pandemic competition policy

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This commentary is based on the opening remarks by competition policy and business experts at MLI's June 10, 2021 webinar examining popular concerns about the influence of major digital services like Amazon, Google and Facebook, and proposals to ensure competition, growth, innovation and benefit to consumers in the post-pandemic economy.

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# Why competition policy is suddenly such a hot topic

I've been teaching competition law for the past five years. In that time, we've seen quite a dramatic shift in the popular discourse on antitrust and we've seen some significant movements to try and change competition law.

To be honest, five years ago, competition policy was not a particularly hot topic at the law school. But the recent focus on "big tech" has changed all that.

The list of the biggest companies in the world is dominated by large tech companies. Look at the top 10 companies by market cap and you'll see that most of them didn't exist 30 years ago. The speed of the growth and magnitude of this growth in certain companies is seen by some as bad. There's this idea that "big," by itself, is bad. And different people have different theories about the harm that big tech companies cause:

- Some people are concerned about the privacy implications.
- Some are concerned about the influence on free speech and its potential impact on democracy.
- Some are concerned about the effect on inequality and that people are being left behind.
- Some are concerned that mom and pop shops, bricks and mortar stores are disappearing.

All of these are valid concerns. Certain segments of society are experiencing harm. And some people think that the right way to address these harms is to turn to antitrust: to break up big companies or, at least, regulate their behaviour.

But one of the big questions that we address in my competition policy class is whether antitrust or competition policy is the right tool for dealing with these social problems. It's not immediately obvious to me, for example, that breaking up Facebook would solve the problems of privacy.

Competition policy has, at least in my lifetime, focused on harms to consumer welfare and harms to innovation. It's these harms that economists and anti-trust regulators are better at dealing with – at least the way we've structured our competition laws and the way regulators around the world have been staffed.

Over the past five years of teaching competition law, I've had to change the content of the course quite a bit. Questions about big technology services, the

use and misuse of big data, and how algorithms are being used are creeping their way into every topic. My students are incredibly engaged with these issues. They understand both the benefits and the harms of some of the products of big tech much better than I do.

Initially, my students seem to be less interested in questions like whether there is collusion in the sugar industry or whether a company is seeking to exclude suppliers from the snowmobile industry. But, part of the challenge of teaching this material is to show them that most of these issues are the same issues that arise with the tech giants. You have to understand the underlying theory of collusion before we tackle the question of whether algorithmic price setting is a problem. You have to understand what barriers to entry are before you address the question of whether data portability will be a good solution.

There are, of course, particular topics, such as natural monopolies and network effects, which are deservedly getting much more attention than they used to – but these questions are not particularly new. Even in Canada, we have cases from the last century that look at two-sided markets in the newspaper industry and in the provisions of retail data. Part of the challenge when teaching competition law is trying to tease out what's different about these big tech companies.

And one of the major themes that emerges is that you can't just lump all these companies together and think that there's a one-size-fits-all solution. Each of these large companies raises different potential theories of social harm. Each company uses its data in different ways. Each engages in different strategies that may potentially raise anti-competitive concerns.

These are some of the specific issues that we can dig into more deeply during our panel discussion.

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# E-commerce and a resurgent, adaptive retail sector

The retail industry is by definition an evolving landscape driven by constant innovation. Early disruptors like Sears and Walmart changed the industry forever with unique business models in the 20th century. Fast forward to the new millennium and technology companies have taken on this role – even offering a lifeline to business and consumers alike during the pandemic. One of the differences with these disruptors is that they actually empower small business versus displacing them.

Technology companies need to continue reimagining the retail market without excessive government legislation. By allowing them to grow in Canada, we can reposition our country to a technology-driven service economy.

The advent and dispersion of technology in retail has changed the industry forever. Not only through the development and growth of the Internet but also through advances in artificial intelligence and robotics, harnessing the incredible amount of data that is now available at our fingertips. The Web accelerated globalization and with it came a world-wide market for goods and services. Canadian businesses – large and small – could now sell their goods around the world to new customers and scale their operations quickly, cheaply and efficiently.

E-commerce has created a marketplace where companies increasingly work cooperatively. Whether through small- and medium-sized companies working with Amazon or Shopify to market their wares, or Walmart partnering with PenguinPickUp to make online shopping more convenient, smaller players can leverage the resources that larger players offer to build competitive advantage.

Never had these technologies become more important than during the pandemic. With the world shut down, our main way of communicating, educating, searching, shopping and getting help was through technology. Can you imagine a world were COVID-19 spread around the globe without these enablers? How would we have survived?

As we begin to exit the pandemic in earnest, many of the changes we witnessed in retail during COVID-19 will remain. We will see fewer brick and mortar stores as customers and businesses right size the mix between e-commerce and legacy formats. Some stores will become pick up outlets for customers ordering online. Remaining stores will be further integrated with online and

other technologies to enhance customer experience while keeping customers and staff safe from current and future outbreaks. Touchless retail will become the norm with technology leading the way. Smart phones will allow customers to learn, share, shop and transact as much in store as they do at home. Advanced analytics will serve up relevant product and service offerings in real time before customers even realize that they need them. Customers will continue to use virtual shopping appointments via videoconferencing as well. More people will become part-time merchants as they utilize marketplaces to sell new or used products to supplement income and monetize a hobby. Technology fuels the gig economy.

To enable this massive change within retail, Canada will benefit from requisite infrastructure development and job creation. Billions of dollars of investment will be spent, and tens of thousands of jobs will be created, to build and operate supply chain infrastructure. These include fulfilment centres, warehouses, delivery stations and new smart stores. New jobs will be created to deliver last-mile parcels and design, manage and operate country head offices for leading domestic and foreign technology companies. We are literally redrawing the tangible and intangible assets used to buy and sell products in Canada.

Regulation plays an important role to protect society from unlawful behaviour and bad actors. Without it, our economy would grind to a halt. But regulation should not impair innovation nor limit societal gains from new technologies. Over time, natural market forces of supply and demand will identify winners and punish those who fail to listen to customers.

Some of today's goliaths will be disrupted themselves in due course through the natural evolution of the retail industry. If we shackle innovation through excessive regulation, we run the risk of missing out not only on the growth and betterment of retail but also in becoming a destination for technology firms as they expand and grow their global footprint.

**Bruce Winder** is a retail analyst and author of  
*RETAIL: Before, During & After COVID-19.*

# A global blizzard of regulatory action

Legislation in the US from Senator Amy Klobuchar, Senator Josh Hawley, and a report by the House Judiciary Committee’s antitrust subcommittee majority staff have recommended fundamental changes to antitrust laws, specifically targeting “BigTech.” And similar regulatory initiatives aimed at digital platforms are underway around the world, including in the European Union, United Kingdom, Japan, Korea, and India, among other jurisdictions. The blizzard of regulatory action swirling around platforms is producing new rules and laws, expanded powers for existing regulatory authorities, and the establishment of new regulatory authorities.

However, three main problems limit how digital platforms can offer services. First, the record of such types of separation has not been generally positive in banking, commerce, or airlines. Second, newer or smaller platforms are using data and various products and services to compete against larger or dominant platforms in ways that benefit users. All of this tends to create more choice for consumers. Third, while new restrictions are designed to target the Big Tech companies, they could hinder business model innovation and the digital transformation of incumbents in traditional sectors that are increasingly adopting platform-based business models and building their own ecosystems to remain competitive, such as in health care, supply chain management, and agriculture.

## What should be done?

First, preserving business model innovation should be the top priority. Platforms represent a new and evolving way of organizing economic activity and coordinating independent multiple actors to expand the set of value propositions to customers. Banning critical levers of the platform business model through overly restrictive regulation would put a brake on business model innovation for all firms; mandating specific design choices will constrain particular innovation opportunities. It’s likely that neither will promote competition and benefit consumers.

Instead, regulators should focus on particular problematic activities by platforms – such as undue restrictions to access their marketplaces or “biased” recommendation systems that may unduly favour their own products and services against those of competitors – and aim to write restrained policy that allows platforms to continue to grow and innovate.

Second, regulators should focus on why ecosystems are competitive, not on

who is winning. Does the mere presence of a gatekeeper in a core service create structural impediments to competition? Current regulatory thinking seems to assume that reducing gatekeeper power will consequentially unlock competition, but this might not happen. To keep platforms competitive and innovative, the regulatory focus should be on specific anticompetitive practices that create structural barriers to competition between ecosystems – not the dominance of a few companies.

Consider the importance of data. Accruing more data makes platforms better able to serve customers, but it also can lock customers into a given platform because that's where all of their data is stored. One regulatory solution to this problem would be to make data more portable – allowing customers to use it on more than one platform – rather than try to partition platforms or dictate which business a given platform should or shouldn't be in. That way, the benefits of a successful ecosystem can be shared more broadly by allowing “porting” of services across competing ecosystems while leaving the platform still in control over its own ecosystem. Some platform scholars refer to this as “in situ information exchange,” where data, instead of being transferred to a competitor's interface, is used at the location it is collected.



*Keeping platform markets contestable does not imply breaking up a specific platform.*

Third, it's important to stay focused on fostering market contestability in adjacent segments. To avoid one extreme – platforms being able to restrict market access at will – regulatory proposals seem to go the other extreme, imposing an “open platform” model for gatekeepers to create greater standardization across platforms, whereby free entry and complete fungibility of products and services across platforms become standard. Would such an approach create more competition among existing platforms or allow newcomers to challenge existing players? Research suggests probably not. Once the sources of differentiation among platforms are removed, size of the platform network becomes the most powerful driver of value, and users will tend to choose the bigger platform.

Keeping platform markets contestable does not imply breaking up a specific platform to parcel one market among many similar contenders. It should rather aspire to preserve opportunities for platforms to differentiate themselves. The disruptor that will successfully challenge incumbents will not be providing more of the same but something different, and there are clear benefits to that.

Fourth, regulators should hold “gatekeepers” accountable, but not tell them what to do. The traditional permission-based regulatory approach prescribing specific permissible conduct (dos and don'ts) is largely inadequate to police a domain that has no clear boundaries, is hard to monitor, and evolves rapidly

as firms continue to innovate their business models and data practices. Regulation generally performs poorly in dynamic markets with rapid technological change. As experience with traditional public utilities indicates, regulation setting fixed prescriptions can easily fail to meet its objectives as technology evolves.

What can be done to this end? One solution might be to move to a decentralized, data-driven accountability regulatory system, whereby gatekeepers would provide data application programming interfaces (APIs) for public auditing, perhaps to ad-hoc digital agencies. This mechanism would not force platforms to disclose their algorithms, and so would therefore protect the value of their innovation.

If regulation isn't limited to targeting anticompetitive behaviour, it threatens to distort platform industries across the economy and hurt small businesses and consumers who rely upon these platforms, and likely do little to promote competition.

A different approach is needed to design an appropriate regulatory framework for the digital economy; one that builds general principles that should guide actions while leaving to antitrust (specialized) units to derive criteria to implement those principles to specific issues on a case-by-case basis. This can guarantee that regulatory institutions can learn and adapt to the dynamic digital environment. The principles proposed here are but a starting point in this direction:

1. *Proportionality.* Have solutions that focus on the problem to be solved. In other words, do not destroy the benefits of the digital economy.
2. *Inclusion.* Platforms have created opportunities for disadvantaged groups around the world to become linked to the global economy. Part of the value of platforms has been the ability to promote business opportunities for traditionally underrepresented groups. Further, the two-sided nature of platforms with at least one side free really matters for those for whom the alternative to free (higher prices) is particularly difficult financially on tight budgets.
3. *Flexibility.* Do not create limits and prohibitions for a few players that limit value creation across all companies. As more part of the economy becomes digitized, we need to think carefully about where problems may exist and may be in more need of regulation than others. There is an optimal mix of formal regulation, shared governance and self governance, and this needs to be considered in the design of formal regulation.

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# The right tools for the Competition Bureau's job

It is my pleasure to address, from an economic perspective, competition policy in Canada and its applicability to the digital economy.<sup>1</sup>

There have been many discussions lately on the fast-moving, technology-driven digital economy and whether competition authorities around the world, including the Canadian Competition Bureau, have the necessary tools to address potential competition concerns in these ever-changing industries or if a new, modern approach to competition policy is needed. I believe that the Canadian *Competition Act* is flexible enough to handle the issues that arise in the digital economy so a complete re-tooling of the Act is not necessary.<sup>2</sup> That being said, there is always room for improvement. Policy-makers can – and should – consider certain targeted modifications or clarifications that may promote increased compliance with Canada's competition laws.

I will focus on two such changes today as illustrative examples: (1) the use of private access provisions under the Act, and (2) the increased use of certain economic techniques for evaluating potential competitive harm in a digital context.

The Competition Bureau has previously noted that limited “private access provisions were added to the Act to complement the Bureau's public enforcement and increase the deterrent effect of the Act” (Competition Bureau 2015).<sup>3</sup> More recently, discussions within the CD Howe Institute Competition Policy Council (of which I am a member) – as well as discussions during the Competition and Growth Summit hosted by the Bureau last week – have highlighted the need to allow private access to the Competition Tribunal for a broader range of reviewable conduct, including, most importantly, abuse of dominance (CD Howe Institute Competition Policy Council 2016).

Increased rights of private access would serve as an additional enforcement mechanism (and, indirectly, an additional deterrent for potential anti-competitive conduct), as it would allow market participants to challenge what they perceive to be anticompetitive business practices in the platform context and allow the courts to provide clarity in the evolution of law and policy in the digital space. As it is, developments in this area are subject to a relatively resource-constrained agency that must pick and choose cases having regard to internal enforcement priorities, which necessarily limits the scope of enforcement opportunities in this dynamic area of our economy.

Finally, we should seriously consider whether, within the current (or expanded) enforcement framework, we are all working with the latest and best

tools available for rigorous and balanced analysis. In its report titled “Re-thinking Antitrust Tools for Multi-Sided Platforms,” the OECD (2018) highlighted that many of the basic economic tools used in assessing markets in traditional industries require only minor tweaking to account for the unique aspects of multi-sided platforms.

While I agree with this, I do think that agencies need to be open to new economic tools and techniques being developed or utilized in other fields that may be useful in assessing these platform ecosystems. Economists in antitrust, as well as other subfields in economics, have been undertaking cutting-edge research for modelling the interactions between platforms and the direct and indirect network effects at play in these markets. Not only do these models address complex questions regarding the assessment of relative demand and price on both sides of these marketplaces, they are also beginning to take on the equally complex issue of non-price considerations and effects.

This is particularly important as many products supplied by today’s digital companies are offered to consumers at no cost (but with, perhaps, other non-price “costs” that should be considered). As I have written previously, competition policy needs to import tools and techniques from other fields, for example, through the expanded use of consumer surveys and conjoint studies that measure the values consumers place on different product features or attributes.

These types of tools can be particularly important in filling some of the gaps in available data for assessing some of the more important questions relating to demand, both in the actual world and any hypothesized “but for” world (Duplantis and Cass 2017). At a minimum, these models, and those being developed, will help create a more robust analytical environment for the digital economy, which is particularly important in today’s rapidly evolving Canadian economy.

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# Endnotes

- 1 My remarks are my own and do not necessarily reflect the opinions of The Brattle Group, its affiliates or its clients.
- 2 This topic was discussed and supported by the consensus of the CD Howe Institute Competition Policy Council. See CD Howe Institute Competition Policy Council 2019; 2021.
- 3 See also Competition Bureau 2018, which states, among other things, that “[s]ection 36 of the Act serves not only the private interests of consumers to recover losses or damages but also the broader public interest of deterrence.”

*constructive* *important* *forward-thinking*  
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### The Honourable Jody Wilson-Raybould

The **Macdonald-Laurier Institute** has been active in the field of Indigenous public policy, building a fine tradition of working with Indigenous organizations, promoting Indigenous thinkers and encouraging innovative, Indigenous-led solutions to the challenges of 21<sup>st</sup> century Canada. I congratulate **MLI** on its 10 productive and constructive years and look forward to continuing to learn more about the Institute's fine work in the field.

### The Honourable Irwin Cotler

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