

UP TO THE TASK

Why Canadians don't need
sweeping changes to
competition policy to
handle Big Tech

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Executive Summary

The meteoric growth of tech platforms has led to increased calls for stronger antitrust laws and regulation to protect against unlawful or unfair business practices. The larger digital platforms, also known as “big tech” (Google, Amazon, Facebook, Apple, and Microsoft) are facing a populist backlash. Some have called for broad, sweeping regulations that would largely replace the current model of enforcement that emphasizes careful analysis of the competitive effects of specific business practices.

Digital markets raise interesting questions for competition policy. Issues such as economies of scale, ecosystems, “self-preferencing” (in which a firm favours its own offerings over those of a competitor), privacy, network effects, and control over data are deservedly getting more attention than they used to.

But much of the push to regulate large digital players around the world seems to be based on the idea that “big is bad.” As such, some have argued that competition authorities should place greater emphasis on more political goals. This fundamental shift away from economic objectives and towards political objectives threatens both the process and outcomes of competition policy.

Populism in antitrust is nothing new. History is replete with examples of antitrust authorities pursuing an “anti-big” agenda. Such policies can have the unintended consequence of harming consumers through higher prices, lower quality, reduced product offerings, and a chilling effect on innovation.

The United States and Europe have introduced a number of legislative proposals that seek to regulate the behaviour of these digital platforms – or even break these companies apart. The new regulations seek to impose broad prohibitions on self-preferencing and to permit competitors to have greater access to the data controlled and used by digital platforms.

In Canada, some commentators have suggested that the competition policy framework should be amended or even completely overhauled to promote much more aggressive enforcement against big tech companies. But that would be counterproductive. Canada’s competition law framework is capable

of adequately discouraging anti-competitive behaviour by digital platforms. The *Competition Act* is sufficiently flexible to deal with anti-competitive conduct.

If self-preferencing and restrictions on access to data are truly exclusionary and have anti-competitive effects, then such behaviour will be captured under section 79 of the *Competition Act*, the prohibition against abuse of dominance. Under this provision, firms that are dominant in a market are prohibited from engaging in a practice of anti-competitive conduct that substantially prevents or lessens competition.

The proposed laws in Europe and the United States may cause more harm than good. The term self-preferencing captures a wide variety of conduct. Self-preferencing in retail has been a very common practice for generations. It is generally efficient and beneficial for consumers. Self-preferencing in e-commerce, for example, where the platform focuses on making its own product better, is not conduct that should raise concern.

Some have suggested that vast amounts of data (Big Data) held by large digital platforms could be treated as an essential facility – in other words, an asset to which a third party needs access to offer its own product or service. This would likely hinder innovation, which again, would ultimately harm consumers.

Canada should not follow in the footsteps being proposed in the United States and Europe. Simply put, radical changes to the *Competition Act* are not required. There are some incremental changes to the competition law framework that may serve to promote and encourage pro-competitive behaviour. The recent budgetary increase to the Competition Bureau will provide additional resources to better enforce the law against abuse of dominance. This is welcome news. And there are good reasons to think that increasing penalties for abuse of dominance and perhaps allowing private rights of action for section 79 cases would further discourage anti-competitive conduct.

But regulations that restrict integration of digital platforms and affect the ability of platforms to control their data will likely fail to capture the very diverse ways in which digital platforms compete and innovate. Instead of safeguarding consumers from big tech, such regulations will likely chill innovation and harm consumers.

Sommaire

La croissance astronomique des plateformes technologiques a intensifié le mouvement en faveur d'un renforcement des lois antitrust et de la réglementation contre les pratiques commerciales illégales ou déloyales. Les grandes plateformes numériques, qu'on appelle également les « *Big Tech* » (Google, Amazon, Facebook, Apple et Microsoft) subissent le contrecoup du populisme. Certains exigent des réglementations générales et radicales visant essentiellement à remplacer le présent modèle de surveillance axé sur une analyse minutieuse des effets concurrentiels de pratiques commerciales précisément définies.

Les marchés numériques soulèvent des questions intéressantes pour la politique de concurrence. Les enjeux en lien, par exemple, avec les économies d'échelle, les écosystèmes, l'« autofavoritisme » (lorsqu'une entreprise privilégie ses propres offres par rapport à celles d'un concurrent), le respect de la vie privée, les effets de réseau et le contrôle des données suscitent, à juste titre, davantage d'attention qu'auparavant.

Or, les pressions exercées pour réglementer les grands acteurs mondiaux du numérique semblent reposer en bonne partie sur l'idée que « ce qui est gros est mauvais ». On prétend que les autorités compétentes devraient mettre davantage l'accent sur des objectifs plus politiques. Cet abandon fondamental des objectifs économiques vers les objectifs politiques menace à la fois le processus et les résultats en matière de politique de concurrence.

Le populisme en matière de politique antitrust n'est pas nouveau. L'histoire regorge d'exemples d'autorités antitrust poursuivant un programme hostile aux grandes entreprises. Un tel programme risque, contrairement aux intentions, de nuire aux consommateurs en entraînant une hausse des prix, une baisse de la qualité, une réduction de l'offre de produits et un effet dissuasif sur l'innovation.

Les États-Unis et l'Europe ont adopté un certain nombre d'amendements législatifs qui visent à réglementer le comportement de ces plateformes numériques, voire à démanteler ces grandes entreprises. Les nouvelles réglementations cherchent à imposer de larges interdictions sur l'autofavoritisme et à offrir aux concurrents un plus grand accès aux données contrôlées et utilisées par les plateformes numériques.

Au Canada, certains commentateurs ont proposé d'amender le cadre de la politique de concurrence, voire de le remanier en profondeur, afin de promouvoir une application beaucoup plus agressive de la loi contre les Big Tech. Cela serait toutefois contre-productif. Le cadre législatif canadien en matière de concurrence peut décourager efficacement tout comportement anticoncurrentiel de la part d'une plateforme numérique. La Loi sur la concurrence

est suffisamment souple pour y faire face.

Dans l'éventualité où l'autofavoritisme et les restrictions d'accès aux données constitueraient vraiment des pratiques d'exclusion aux conséquences néfastes pour la concurrence, alors ces agissements seraient visés par l'article 79 de la *Loi sur la concurrence*, qui interdit l'utilisation abusive d'une position dominante. Conformément à cette disposition, il est interdit aux entreprises occupant une position dominante sur un marché de se livrer à une pratique anticoncurrentielle qui empêche ou diminue sensiblement la concurrence.

Les propositions de loi en Europe et aux États-Unis pourraient causer plus de tort que de bien. L'« autofavoritisme » recouvre une grande variété de conduites. Dans le commerce de détail, il s'agit d'une pratique très courante depuis des générations. Elle est généralement efficace et bénéfique pour les consommateurs. L'autofavoritisme dans le commerce électronique, par exemple, qui permet à une plateforme d'améliorer ses propres produits, ne devrait pas susciter d'inquiétude.

Certains soutiennent que les vastes quantités de données (*Big Data*) détenues par les grandes plateformes numériques pourraient être qualifiées d'essentielles – en d'autres termes, à titre d'actif devant être mis à la disposition d'un tiers pour lui permettre d'offrir son propre produit ou service. Cela entraverait probablement l'innovation, ce qui, là encore, nuirait en fin de compte aux consommateurs.

Le Canada ne doit pas emprunter la voie proposée aux États-Unis et en Europe. En termes simples, il n'est pas nécessaire de modifier radicalement la *Loi sur la concurrence*. Une évolution progressive du cadre réglementaire en matière de concurrence peut servir à promouvoir et à encourager une conduite qui favorise la concurrence. D'ailleurs, la récente augmentation du budget du Bureau de la concurrence permettra d'offrir des ressources supplémentaires pour mieux appliquer la loi contre l'utilisation abusive d'une position dominante : il s'agit d'une excellente nouvelle. En outre, il y a de bonnes raisons de croire que l'alourdissement des peines, et même que l'ouverture aux individus de droits d'engager une action en application de l'article 79, dissuaderaient encore davantage les conduites anticoncurrentielles.

Néanmoins, il est probable que les réglementations qui restreignent l'intégration des plateformes numériques et compromettent le contrôle qu'elles exercent sur leurs propres données soient incapables de saisir les manières très diverses dont elles se font concurrence et innove. Ces réglementations risquent de freiner l'innovation et de nuire aux consommateurs plutôt que de protéger ces derniers contre les *Big Tech*.

Introduction

E-commerce has grown enormously in recent years. The welfare effects for consumers of e-commerce growth have been positive in several ways as a review of the empirical literature demonstrates. The benefits include lower inventory costs (Brynjolfsson et al. 2009, 1755; Ferreira et al. 2015), a reduction in the difference between search and experience costs (Ratchford et al. 2003, 193; Huang et al. 2009, 55), the greater welfare that is created when an online channel can attract consumers who are otherwise not reachable by conventional physical sales (Zhang 2009, 1009), lower prices (Brynjolfsson et al. 2000, 563; Clay et al. 2003, 351; Morton et al. 2008, 501), and reduced price dispersion (Cavallo 2017, 283).

The empirical work emphasizing the benefits of e-commerce is extremely important given the increasing rise of antitrust populism and a backlash against value creation by online technology platforms.¹

We are in the midst of a global revolution in competition law and antitrust policy. Competition authorities worldwide are being increasingly pressed to ramp up their enforcement efforts against large technology players.

Many of the largest companies in the world are digital platforms that did not exist 30 years ago.² The speed and magnitude of their growth has raised concerns that antitrust has not been enforced with enough vigour. There is a growing sense that “big is bad.” This, in turn, has led to calls to break up big tech, or, at the very least, that their conduct should be more stringently regulated in a way that is different from the traditional way that competition law is enforced.

There has, in particular, been a global push toward breaking up or regulating the largest of these players: Google, Amazon, Facebook, and Apple (GAFA) or Google, Amazon, Facebook, Apple, and Microsoft (GAFAM). These providers of search engines, e-commerce marketplaces, social networks, and cloud services have been characterized as “gatekeepers” of digital services that have the power – because of their size – to raise barriers to entry and destroy rivals.

A populist wave on both sides of the political aisle in the United States is pushing for greater government control over the activities of these large digital players, which have very different business models, core areas, and potential competitive effects. This has led to various legislative and agency proposals (see, e.g., Khan 2017, Warren 2016, Tepper with Hearn 2019, and Wu 2018). In proposing five new bills, Rep. David Cicilline, the House’s antitrust subcommittee chair, stated:

Right now, unregulated tech monopolies have too much power over our economy... they are in a unique position to pick winners and losers, destroy small business, raise prices on consumers, and put folks out of work. (Cicilline 2021)

In part, the bills seek to prohibit digital platforms from exhibiting preference to its own products and offerings (e.g., “self-preferencing” behaviour),³ ban acquisitions of competitive threats,⁴ and call for greater access to the data of online platforms, requiring interoperability and data portability.⁵

These legislative proposals reflect similar suggestions that have been made in Europe. The *Digital Markets Act*, proposed by the European Commission, seeks to prevent “gatekeepers” of digital services from self-preferencing (a catch-all term for actions that favour a platform owner’s offerings over those of its competitors). It also aims to impose limits on how digital platforms can use and combine datasets (European Commission 2020). Similar legislation has been enacted in Germany (*Competition Act Amendments* (Germany 2021), aka *Digitization Act*), which has placed new emphasis on various types of self-preferencing (*Digitization Act*, Section 19a) and expressed concerns about digital platforms unfairly impeding access to network effects (*Digitization Act*, Section 20(3a)).

Should Canada follow in the footsteps of Europe and United States? The Canadian Competition Bureau recently released a report arguing that the “federal government should conduct a rigorous and comprehensive review of the *Competition Act* to ensure that it is fit for purpose” (Competition Bureau Canada 2021).⁶

At the same time, some commentators have suggested that the competition policy framework in Canada should be shaken up to promote much more aggressive enforcement against big tech companies. Indeed, some have suggested that Canada should completely overhaul the *Competition Act* (Bednar and Shaban 2021a), because the Competition Bureau is “toothless” when it comes to big tech (Bednar and Shaban 2021b).

We do not agree. Competition law in Canada does not need an overhaul. In this report, we argue that dramatic changes to the Canadian *Competition Act* are not required to best foster competition in the Canadian economy. Indeed,

such changes would likely be harmful.

Our argument proceeds in three parts. First, much of the recent push for change around the world is based upon a populist idea that big is bad. Such an objective for competition policy is misguided. “Big is bad” is bad policy. Some commentators claim that big tech is responsible for a variety of social and political harms, such as inequality and degradation of free speech and democracy. These are not harms that competition authorities were designed to cure. Calls to change the objectives and priorities of competition authorities should be resisted. In this report, we argue that the experience from the United States is instructive. History has shown that when regulators seek to appeal to broad populist causes, it is likely to lead to higher prices for consumers and adverse effects on innovation.

Second, to the extent that there are genuine concerns about anti-competitive conduct in specific digital markets, we argue that the Canadian *Competition Act* is capable of dealing with it. The Act is sufficiently flexible that it covers such conduct. Both anti-competitive self-preferencing and exclusionary conduct that restricts access to data can be dealt with under the Act’s prohibition against abuse of dominance. Wholesale dramatic changes – such as those proposed in Europe and the United States – are simply not required.

Third, there are genuine harms from over-regulation or misguided regulation. Overly broad and sweeping regulation of the activities of digital platforms or punitive actions will likely have unintended, negative consequences on competition and innovation, including for smaller entrepreneurial firms.

Canada should not embrace populist views of competition law

The current state of Canadian competition law

To describe antitrust populism and how it looks different from the current state of Canadian competition law, we must first define the basic precepts of antitrust in Canada. Canadian competition policy has largely been characterized by economically justifiable outcomes, predictability, administrability, and respect for due process and transparency.

The objectives of Canada’s competition law are clearly set out in section 1.1 of the *Competition Act*. The Act’s purpose is to maintain and encourage competition in Canada in order to:

- promote the efficiency and adaptability of the Canadian economy;

- expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada;
- ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy; and
- provide consumers with competitive prices and product choices.

While section 1.1 outlines a number of objectives, including equitable opportunities, the case law in Canada has tended to emphasize that the Act is “economic” in its purpose. For example, in *Canada v. Southam*, Justice Iacobucci noted:

The aims of the Act are more “economic” than they are strictly “legal”. The “efficiency and adaptability of the Canadian economy” and the relationships among Canadian companies and their foreign competitors are matters that business women and men and economists are better able to understand than is a typical judge. (*Canada (Director of Investigation and Research) v. Southam, Inc.*, [1997] 1 SCR 748, at para 48)

Case law in Canada has largely reflected this economically oriented view, typically focusing on lower prices, increased quality and other non-price factors, and innovation. This focus on prices, quality, and innovation is also borne out in antitrust case law in the United States.⁷

But much of the push to regulate large digital players around the world seems to be based on the idea that competition authorities should focus on different – often non-economic – objectives and priorities. Commentators have argued that instead of merely seeking to reduce prices, improve quality, and foster innovation, competition authorities should expand their objective function to include other populist and public interest goals. They argue that competition authorities should redress a wide variety of harms caused by GAFA and other large technology companies. These include goals such as ensuring that free speech and maintaining democracy are upheld (United States, Committee on the Judiciary 2021).

There are calls for competition authorities to place greater emphasis on wealth inequality and wage inequality. Some have raised concerns that digital players in e-commerce are eroding the presence of “mom and pop” stores and bricks-and-mortar stores from Main Street.⁸ While some of these goals are reflected in part by the objectives of section 1.1 of the *Competition Act* – particularly the objective of ensuring that “small and medium enterprises have an equitable opportunity” – some of the proposed goals seek to infuse competition law in Canada with more political objectives that are distinct from calls to enforce existing competition laws more aggressively.

This fundamental shift away from economic factors as the guiding principle of analysis threatens both the process and outcomes of competition policy (Johnson 2021). A competition regime that makes economic analysis of competitive effects the sole method for analyzing consumer harm removes, as much as it can, political factors from the competitive analysis. As such the market will determine winners and losers rather than antitrust authorities; antitrust only intervenes when there is the unlawful exercise of market power. From a normative standpoint, this is desirable because the incorporation of fairness-related concerns may lead to results that hurt consumers. This is true in part because “fairness” is a highly variable concept (Kaplow 2012, 5 and n. 4). Who should determine which of these fairness objectives should take precedence? How would one mediate across conflicting goals and would there be a hierarchy of such goals? Would these political goals of antitrust change with the government?

“Big is bad” is bad policy

This recent push to inject antitrust with broader, more populist objectives is not particularly new. Indeed, antitrust populism has a long history in the United States. In 1890, when Congress was debating the *Sherman Act*, Senator John Sherman of Ohio stated:

If we will not endure a king as a political power, we should not endure a king over the production, transportation, and sale of any of the necessities of life. (Sherman 1890)

History teaches us that a simple philosophy of big is bad is bad policy for competition authorities. During the 1910s to 1930s in the United States, ideas about “new,” “fair,” and “open” competition enjoyed a strong bipartisan support, although, in effect, this again meant neglect of antitrust enforcement. Then, like now, well-intended but uninformed reformers concluded that the protection of competition and protection of small businesses are one and the same. The historian Richard Hofstadter summarized that episode in history as follows: “Historians have often made sport of the contrast between aspiration and performance, particularly of the reputation of Theodore Roosevelt as a trustbuster, which survived his repeated repudiations of the trustbusting philosophy” (Hofstadter 1965, 188).

Populism in antitrust law did not die with the pre-WWII era. Much of the US antitrust enforcement from the 1950s and 1960s is an embarrassment by today’s standards of careful economic analysis. Back then, big was bad, merger efficiencies were ignored, vertical restraints were illegal, there was tightening of rules for refusals to deal, licensing of intellectual property was subject to tight restrictions, horizontal restraints were unnecessarily applied, and the *Robinson-Patman Act* was aggressively enforced (Sokol 2015a, 1251; and *Robinson-Patman Price Discrimination Act*, 15 U.S.C. § 13 (2012)).⁹

Unlike other antitrust statutes, the *Robinson-Patman Act* as it was drafted was expressly protectionist. Further, it had an unambiguously negative economic effect on efficiency. Academics and practitioners have attacked the *Robinson-Patman Act* for decades because of the clear harm to consumers that its enforcement created (Neal, Baxter, Bork, and Fulda 1968; Posner 1976; US Department of Justice 1977; American Bar Association 1980; Antitrust Modernization Commission 2007). Thus, on consumer welfare grounds the Act is an abomination. In this sense, both antitrust enforcers on the left and the right had a shared vision of the Act – the economics were disastrous. This was the consistent view of antitrust studies of Robinson-Patman (Blair and DePasquale 2014; Elzinga and Hogarty 1978; Hovenkamp 1983; Luchs, Geylani, Dukes, and Srinivasan 2010; Ross 1986).

Nevertheless, the *Robinson-Patman Act* has been shrouded in “democratic” values, which are populist in nature. The original idea behind the *Robinson-Patman Act* was to protect small retailers from larger, more efficient competitors (large buyers). Originally titled the *Wholesale Grocer’s Protection Act*, there were no multiple purposes to the Act akin to the *Sherman Act* such that one could reasonably claim any sort of efficiency rationale for Robinson-Patman. Rather, the Act was protectionism of a special interest under the guise of “fairness” (Hovenkamp 2000).



History teaches us that a simple philosophy of big is bad is bad policy for competition authorities.

In fact, size (and potential scale-related efficiencies) is what drives prices down for consumers. Thus, to protect inefficient competitors, Robinson-Patman required a trade-off that hurt end consumers. Because Robinson-Patman originally served to stymie the growth of the largest supermarket, the result was a regressive trade-off – those economically vulnerable consumers who needed lower prices were the ones most hurt by choosing a “fair” approach to antitrust to protect small stores.

This anti-bigness bias was pronounced in decades of Robinson-Patman jurisprudence in which large companies were punished merely for using buyer size to offer price reductions. Robinson-Patman created some of the worst decisions in antitrust history in the sense that they hurt consumers. Those consumers who benefit the most from low prices – the poor – bore the brunt of higher food prices. To the extent that there was a trade-off that supported smaller and inefficient competitors, such competitors benefited over the most vulnerable and diverse members of society. Such a lesson bears remem-

bering today as populist policies would likely hurt the poor through higher priced goods.

Utah Pie Co. v. Cont'l Baking Co. (386 U.S. 685 (1967)) epitomized the failure of Robinson-Patman. This case involved primary line injury: it was claimed that price discrimination by national pie sellers resulted in injury to a competitor. In *Utah Pie*, national competitors entered the Salt Lake City market where *Utah Pie* had two-thirds of the share of the market. As a result of competition, the price of pie decreased. However, *Utah Pie*'s market share decreased to just under 50 percent even while its sales and profits increased. The Supreme Court ruled in favor of *Utah Pie* (protection of a competitor) and against competition. Worse, during this period, Robinson-Patman was enforced criminally. Thus, a low-cost pie that benefited consumers could potentially land a baker in jail. Such is the perverse effect of populism in antitrust.

Secondary-line injury cases were equally problematic. The seminal case in this area is *FTC v. Morton Salt Co.* (334 U.S. 37 (1948)). Morton Salt sold its product, Blue Label table salt, to wholesalers and large retailers. In turn, the wholesalers resold the salt to smaller retail grocery stores that competed directly with the large retailers.

Although volume discounts were available to all of its customers, only five firms (all large grocery chains) purchased enough salt to qualify for Morton Salt's volume discount. The volume discounts allowed the large grocery retailers to charge retail prices for Blue Label salt that were below the wholesalers' prices to the smaller grocery retailers. The Supreme Court, without showing any actual harm, condemned the price discrimination.

In the 1970s (importantly, before the impact of Bork's Antitrust Paradox), the antitrust agencies shifted their thinking on Robinson-Patman. The Federal Trade Commission (FTC) reduced its Robinson-Patman enforcement significantly. When called to testify before the House Small Business Committee, FTC Bureau of Economics head Professor F.M. Scherer discussed how Robinson-Patman had become focused on small producers. Professor Scherer's congressional testimony pointed to stunning statistics about the nature of the FTC's enforcement of Robinson-Patman. Indeed, "the brunt of the Commission's [enforcement] effort fell upon the small businesses Congress sought to protect."¹⁰

During this same period, the Department of Justice's (DOJ) Antitrust Division took a different approach. DOJ had conducted both civil and criminal enforcement of Robinson-Patman. By the mid-1970s, DOJ unilaterally stopped its Robinson-Patman enforcement and issued a report that called the Act "protectionist" with a "deleterious impact on competition" (US Department of Justice 1977).

Antitrust populism subsided, including with respect to the *Robinson-Patman Act*. Thereafter, from the 1980s to the 2010s, courts shifted Robinson-Patman analysis to a more economics-based approach (Sokol 2015b; Luchs, Geylani, Dukes, and Srinivasan 2010). For 40 years, Congress acquiesced to the courts' transformation of Robinson-Patman and other marketing practice restraints towards an economic based approach.

Canadian competition law is capable of dealing with anti-competitive conduct of digital platforms

This section addresses the ability of Canadian competition law to promote competitive conduct in the digital economy. As noted in the introduction, some commentators have argued that the competition system needs to be overhauled. This type of argument rests on the notion that Canada's *Competition Act* and the enforcement powers of the Bureau are inadequate to discourage anti-competitive conduct by large digital platforms. We disagree. Competition law in Canada does not need a radical change.

Some calls for change are based on the idea that there is something **different** about digital markets. Under this view, the existing framework for dealing with digital platforms through antitrust law is insufficient. But what exactly is different about digital platforms?

Indeed, we agree that the rise of digital markets does raise some interesting questions for competition policy. Issues such as economies of scale, ecosystems, self-preferencing, privacy, network effects, and control over data are deservedly getting more attention than they used to.

But these questions are not particularly new. Even in Canada, where adjudicated cases in competition law are relatively rare, we have examples of cases that have explored questions of two-sided markets – i.e., platforms with two distinct groups of users. For example, cases have explored mergers between newspapers who cater to both their readers and to advertisers (*Canada (Director of Investigation and Research) v. Southam, Inc.*, [1997] 1 SCR 748) and the alleged anti-competitive conduct of credit card companies who serve both merchants and customers (*The Commissioner of Competition v. Visa Canada Corporation and MasterCard International Incorporated*, 2013 Comp. Trib. 10).¹¹ Further, there are cases in Canada that have dealt with questions about how preventing access to data can act as a barrier to entry (*Canada (Director of Investigation and Research) v D & B Companies of Canada Ltd* (1995), 64 CPR (3d) 216 (Comp. Trib.)) and a barrier to innovation (*The Commissioner*

of *Competition v The Toronto Real Estate Board*, 2016 Comp. Trib. 7).

In this section, we focus on questions of self-preferencing conduct by big tech firms and exclusive use of data by big tech companies to raise barriers to entry.

We suggest that the toolkit for addressing these concerns does not need to be radically changed. Prohibitions of these types of potentially anti-competitive conduct are found in and enforced under Canadian competition law. In particular, section 79 of the *Competition Act* prohibits abuse of dominance. Under this flexible provision, firms that are dominant in a market are not permitted to engage in a practice of anti-competitive acts that substantially prevents or lessens competition.

Section 79 captures a broad array of anti-competitive acts. An act is considered to be anti-competitive if it is intended to have a predatory, exclusionary, or disciplinary negative effect upon a competitor. The overall objective of section 79 is to ensure that competition is not substantially prevented or lessened. The aim is to enhance efficiency and ensure that consumers are not harmed.

Self-preferencing

Antitrust authorities in other jurisdictions are increasingly concerned by self-preferencing behaviour by big tech. For example, the European Commission levied a 2.42 billion fine against Google in 2017 for giving its products preferential treatment over third-party products. A coalition of states, led by Texas, have recently brought a complaint against Google for similar conduct in the United States (*Complaint, Texas et al v. Google, LLC*, ECF 1 (E.D. Tex., Dec 16, 2020)).

Does Canada need a more stringent law or *ex ante* regulation to prevent large digital platforms from self-preferencing their products over other products? We think not. First, let's consider what self-preferencing is. The term self-preferencing captures a very broad set of conduct. It is a catch-all term for actions that favour a platform owner's offerings over those of its competitors.

Economic analysis suggests that many, if not most, types of self-preferencing practices are actually beneficial to consumers. Self-preferencing in e-commerce, where the platform makes its own product better, as opposed to harming third-party rivals, for example, is not conduct that should raise concern.

Indeed, self-preferencing in retail has been a very common practice for generations. Perhaps best known to US consumers (and to Canadian consumers through the knock-off store Pirate Joe's) is Trader Joe's. The majority of products sold by Trader Joe's are store-label rather than from traditional labels. Other stores that are more familiar to Canadians such as Loblaw's, Target, and

WalMart do the same. A substantial body of empirical work on supermarket self-preferencing in competition shows that consumers are better off with it than without it (Chintagunta, Bonfrer, and Song 2002; Sayman, Hoch, and Raju 2002; Pauwels and Srinivasan 2004; Morton and Zettelmeyer 2004; Geyskens, Gielens, and Gijsbrechts 2010).

To be sure, digital platforms are different than traditional bricks-and-mortar stores in at least three respects: e-commerce platforms have more data (but what you do with it matters),¹² there is endless “shelf space,” and there are more sophisticated algorithms that constantly evolve.

“ *Many, if not most, types of self-preferencing practices are actually beneficial to consumers.* ”

There are indeed situations where self-preferencing conduct can be anti-competitive. For example, a platform with an existing monopoly may seek to maintain this monopoly by eliminating potential competitors. Self-preferencing may be one way to achieve this. The Microsoft case in the United States is an example of this type of action, where Microsoft sought to maintain its near monopoly in operating systems by preferring Internet Explorer at the expense of other browsers, such as Netscape Navigator (*United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001)). Tying browsers to the operating system allowed Microsoft to protect against competition in the operating system market because of the possibility that browsers would evolve to compete with operating systems.

Another way in which self-preferencing could constitute anti-competitive conduct is where a platform may use self-preferencing to leverage market power in the markets for products being sold on the platform.

Any regulations setting out restrictions on self-preferencing, however, would need to be very carefully tailored to only capture such anti-competitive conduct and not capture broader behaviour that is beneficial. Enforcement of regulations would need to carefully analyze the specific competitive effects and the impact upon consumers. Blanket bans on self-preferencing conduct in digital markets are highly unlikely to be beneficial.

Under the current law in Canada, the practice of self-preferencing is generally permissible. But the Competition Bureau may elect to investigate if there is a suspicion that the preferencing conduct is exclusionary in nature and constitutes an abuse of dominance.

In 2013, for example, the Bureau was one of the first competition authorities to investigate preferential treatment by Google in search engines (Harley 2013). The potential for consumer harm, according to the Bureau, was poorer product quality, choice, and innovation if the preferential treatment could be shown to have had an exclusionary effect on competing superior services. But the Bureau did not find adequate evidence that this preferencing treatment had such an exclusionary effect on rivals. Nor was there adequate evidence that there was a substantial lessening or prevention of competition in the market for search engines (Competition Bureau Canada 2016). The Bureau has also undertaken investigations of other platforms for preferencing, seeking to determine whether such conduct is exclusionary in its intent and has the likely effect of lessening competition.

In situations where self-preferencing is genuinely anti-competitive, the existing framework in Canada is broad enough and flexible enough to deal with such exclusionary conduct. Anti-competitive self-preferencing fits squarely within the scope of section 79 of the Act. If the self-preferencing is not exclusionary or it does not have the likely effect of substantially lessening or preventing competition, then meaningful harm to consumers is unlikely. A broader regulation that prohibits a wider range of self-preferencing behaviour would likely be over-inclusive; it would chill incentives to engage in conduct that benefits consumers.

Big data and access to data

Canada's current law can deal with anti-competitive conduct that restricts access to data

Competition regulation in Europe seeks to impose limits on how large digital players can use and combine datasets. It further requires these platforms to open data up to potential competitors. The United States has proposed legislation with similar aims. Underpinning this argument is the idea that large digital players are able to use their big data in such a way that it heightens barriers to entry and excludes competition.

Do we need to change Canada's competition laws to provide competitors with greater access to big data? We are not convinced. Neither, it seems, is the Competition Bureau. In a recent review of the impact big data could have on competition policy, the Bureau noted that many of the issues were the same as those they have addressed before and that the guiding principles remain the same (Competition Bureau Canada 2018).

Anti-competitive behaviour involving a refusal to provide access to data in order to heighten barriers to entry would be captured under section 79 (abuse of dominance) and perhaps section 75 (refusal to deal).

The abuse of dominance provision has been used to prohibit dominant players from restricting access to data where there is an intent to exclude innovative competitors. The decision in *Commissioner v. Toronto Real Estate Board (TREB)* (2016 Comp. Trib. 7) offers a clear example of how restrictions on access to big data can be dealt with under the current law.

In *TREB*, the Competition Tribunal found that the Toronto Real Estate Board had abused its market dominance by restricting access to Multiple Listing Services (MLS) data and by restricting how members used and displayed that data. Those restrictions on the access to and use of data were found to be exclusionary and constituted an anti-competitive act (Ibid., paras. 269-454). Further, the Tribunal found that those restrictions substantially lessened or prevented competition by increasing barriers to entry and expansion, increasing the costs of competitors, reducing the range of brokerage services available to consumers, and reducing quality, innovation, and output, resulting in less pressure to reduce commission prices (Ibid., paras. 455-715). The Tribunal prohibited the Toronto Real Estate Board from enforcing these restrictions and required it to include additional data for all *TREB* members (Ibid., para. 769).

“ *The abuse of dominance provision has been used to prohibit dominant players from restricting access to data.* ”

In *Nielsen*, an earlier decision from 1995, the Tribunal dealt with the issue of a dominant firm using exclusive contracts to monopolize data on retail sales (*Canada (Director of Investigation and Research) v D & B Companies of Canada Ltd* (1995), 64 CPR (3d) 216 (Comp. Trib.)). Here, *Nielsen* was found to have signed exclusive contracts for scanner data and offered significant inducements for exclusive access to the data. The Tribunal found that this conduct was anti-competitive as it heightened the barriers to entry into the market for scanner-based market tracking services in Canada.

The Tribunal in *Nielsen* recognized that, in this particular market where the accumulation and hold on data was key, there would be competition **for** the market, rather than competition within the market (*Canada (Director of Investigation) v D & B* at para 161). By essentially cornering the market on the key input – data – *Nielsen* was found to have engaged in anti-competitive conduct that substantially lessened competition. The remedy in this case was access to historical data. The Tribunal ordered that a potential competitor could, under certain conditions, have access to 15 months of prior data.

Put simply, section 79 is capable of dealing with situations where data is a key input and parties engage in anti-competitive conduct that heighten the barriers to entry. But commentators have claimed that Canada’s current approach to big data is inadequate.

There are, however, valuable lessons to be drawn from examining how courts in the United States have dealt with the question of access to data. The volume of cases in the United States is far greater than in Canada. The United States’ experience helps put the issues relating to greater access to data in Canada into context. In the next subsection, we review the (narrower) approach to access for big data that the United States has taken.

The primary basis upon which commentators in the United States have suggested that antitrust laws could be applied to big data is that large platforms with vast amounts of data may be “essential facilities” such that challenges to the collection and use of big data may be brought under refusal to deal and essential facilities theories (e.g., Lao 2013; and Committee of the Judiciary, Subcommittee on Antitrust, Commercial and Administrative Law 2020, 397-398).

The essential facilities doctrine has not formally been adopted or applied by the courts or the Tribunal in Canada. For example, in *TREB*, despite finding that the respondent restricted some members’ access to MLS data, the Tribunal simply noted that this was “not an ‘essential facilities’ case” (*TREB*, para. 211).

Lessons on access to data from the United States case law

The “refusal to deal” doctrine in the United States considers when Section 2 of the *Sherman Act* imposes on a monopolist a duty to cooperate with its rivals (Areeda and Hovenkamp 2020, s. 773a). The “essential facility” doctrine is a subset of the refusal to deal doctrine, under which a dominant firm may violate section 2 by denying its rivals access to an “essential” input (Areeda and Hovenkamp 2020, s. 773a). That is, an essential facilities claim is not a stand-alone antitrust claim.

To establish liability under the essential facilities doctrine in the United States, the following requirements must be established: (1) control of the essential facility by a monopolist; (2) a competitor’s inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility to competitors (*MCI Communications Corp. v. American Telephone and Telegraph Co.* 708 F2d 1081, 1132-33 (7th Cir 1983)). Where these requirements are met, a firm may be able to obtain access to a rival’s facility where that access would increase short-term consumer welfare. However, courts rarely apply the essential facilities doctrine because economic analysis demonstrates that prohibiting con-

duct under the doctrine would not improve consumer welfare (Areeda and Hovenkamp 2020, ss. 771b, 774; *Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic* 65 F.3d 1406, 1413 (7th Cir. 1995); *Alaska Airlines v. United Airlines, Inc.* 948 F.2d 536, 549 (9th Cir. 1991)).

Moreover, the essential facilities doctrine only applies where a particular facility is actually **indispensable** (Lao 2013, 288-89),¹³ and it is relatively rare for an asset to be “essential.” There is only a narrow set of circumstances in which assets have been deemed essential, for example, where the asset has natural monopoly attributes such as infrastructure (e.g., bridges, highways, railways, and power grids), price-regulated monopoly utilities, or state-owned enterprises (Hovenkamp 2008, 1, 5; Areeda 1989, 852). These assets may be deemed essential where they are the only gateway available because of the natural monopoly and/or regulated industry nature of the asset such that creating an alternative connection in the infrastructure is economically prohibitive or unfeasible.¹⁴ Even in such circumstances, however, the possible negative impact of an access obligation on long-term investment incentives must be assessed in terms of a structural remedy because of the long-term nature of such a remedy (Motta 2004).

“ The US Supreme Court has, in the single firm context, never recognized the essential facilities doctrine.

The US Supreme Court has, in the single firm context, never recognized the essential facilities doctrine (*Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP* 540 US 398, 611 (2004)). Further, the Areeda-Hovenkamp Treatise is hostile to the doctrine as well. Indeed, one of Areeda’s best known articles attacked the doctrine (Areeda 1989, note 30).

Supreme Court precedent in the United States has imposed only a very limited duty to deal with competitors based on a finding of essential facilities because refusals to deal are mostly pro-competitive and tend to affect competitors rather than consumer welfare. Having recognized the general rule that companies are free “to exercise their own discretion as to the parties with whom they will deal” (US v. Colgate, 250 U.S. 300, 307 (1919)), the Supreme Court articulated in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.* (472 U.S. 585 (1985)) that the narrow exception to that rule is where a monopolist withdraws from a voluntary, profitable dealing with a rival, thereby sacrificing short-term profits for long-term gains achieved by squeezing its rival from the market. Notably, the Supreme Court’s finding of liability in *Aspen Skiing* was based on a prior course of dealing rather than on a finding that essential

facilities doctrine applied (even though the 10th Circuit below had discussed the essential facility doctrine).¹⁵

Subsequent to *Aspen Skiing*, in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko* (540 US 398, 411 (2004)), the Court further narrowed *Aspen Skiing*'s reach and explicitly rejected an essential facilities claim as a justification to force a firm to deal with a competitor, clarifying that in the single firm context, “[w]e have never recognized such a doctrine.” Moreover, in *Trinko*, the Supreme Court expressed significant limitations to refusal to deal claims, holding that the *Aspen Skiing* refusal to deal case was “at or near the outer boundary of § 2 liability” and that the facts did not “justify adding the present case to the few existing exceptions from the proposition that there is no duty to aid competitors” (*Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*, LLP 2004, 411). The Court cautioned that to compel monopolists to deal with competitors “may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities” (*Ibid.*, 4107-08) and further expressed concern about administrability of such sharing (*Ibid.*, 415)¹⁶ *Linkline* extended the reasoning of *Trinko* to unregulated areas (*Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, 555 U.S. 438 (2009)).

With this background, one might ask: Is Big Data an “essential facility”? Notwithstanding that the essential facilities doctrine has not been widely accepted by courts (and never by the Supreme Court), or by regulators and commentators, there is growing debate over whether the doctrine could nonetheless be used to address Big Data through the antitrust laws. Essential facilities are most commonly associated with public utilities and regulated industries. But public utilities have a different dynamic than unregulated markets. As one commentator explains, “the term monopoly in the context of public utilities means that the firm serves 100% of its market, that the firm’s monopoly service has no close substitutes, and that the monopoly status endures over time” (Jamison 2013, 223). He identifies substantial differences between Internet-based platforms and traditional regulated industries, such as electricity and telecommunications. The history of telecommunications from this perspective also explains the salience of the *MCI* case in that particular sector, given the technology of that time, as to an antitrust approach.

Online platforms do not share the same characteristics as traditional network industries. For example, offline and online firms compete for advertising spending. Online platforms also compete vigorously with each other due to multi-homing (i.e., users adopting two platforms for a similar purpose – for example, using both Facebook and TikTok for their social networks). The non-rivalrous nature (i.e., consumption by one person does not make the good less available to another) and near-zero marginal cost of data calls into question whether data could be considered an “essential facility” as datasets can be duplicated and “owned” by many firms at once (Tucker 2019, 691).

Three recent US cases that attempted to impose the forced sharing of large amounts of data have so far indicated that despite concerns about Big Data, courts are hesitant to require firms to share data under the essential facilities or refusal to deal theories, consistent with *Aspen Skiing* and *Trinko*. In *Authenticom, Inc. v. CDK Global, LLC* (874 F.3d 1019 (2017)), CDK allegedly switched from an open system to a closed system for its data (moving from allowing access to third parties to blocking such access), thereby blocking Authenticom and others from scraping its data. Authenticom alleged that the closed system and loss of data would have adverse effects on its business. The district court granted a preliminary injunction requiring CDK to allow Authenticom to have access to the data (*Authenticom, Inc. v. CDK Global, LLC* No. 17-cv-318-jdp, 2017 U.S. Dist. LEXIS 109409 (W.D. Wisc. July 14, 2017), 32-33).¹⁷ The Seventh Circuit reversed that injunction, holding that an order requiring forced data sharing was “inconsistent with *Trinko*,” which cautioned that an order to continue to do business with a firm is proper only if the case fits “within the limited exception recognized in *Aspen Skiing*” (*Authenticom, Inc. v. CDK Global, LLC* 874 F.3d 1019, 1026 (2017)). The court found that there was no such obligation in this case with regard to data sharing.



Despite concerns about Big Data, courts are hesitant to require firms to share data.

In another case, the district court in the Northern District of California dismissed antitrust claims against Facebook, in which the plaintiffs alleged that Facebook maintained an unlawful monopoly over “social data” and prevented competition in the social advertising market by building a “social data barrier to entry” (*Reveal Chat Holdco, LLC v. Facebook, Inc.* 471 F. Supp. 3d 981, 997 (N.D. Cal. 2020)). Plaintiffs further argued that Facebook’s decision to stop selling access to its social data sacrificed significant profits without having any legitimate business justification, and therefore constituted an unlawful refusal to deal (*Ibid.*). Because Facebook was no longer selling social data to any developer, the plaintiff had not pled the narrow duty to deal exception under *Aspen Skiing*, whereby the defendant must have abandoned a profitable course of dealing and refused to provide the plaintiff with access to assets they continued to sell in a retail market to other customers (*Ibid.*, 1002).

Due to the challenges with bringing claims for monopoly leveraging or essential facilities under US law, it is likely that we will see other theories emerge under the antitrust laws or otherwise (Ohlhausen and Huston 2020, 36-37). In *hiQ Labs, Inc. v. LinkedIn Corp.* (273 F. Supp. 3d 1099, 1103-05 (N.D. Cal. 2017)), hiQ moved for a preliminary injunction to prevent LinkedIn from

blocking hiQ from automatically collecting LinkedIn’s publicly available information on profiles of its users (“data scraping”), which hiQ used to sell to businesses to provide a statistical analysis of their workforces based on publicly available data. hiQ did not bring antitrust claims but rather brought its case under the state unfair competition law and other common law causes of action (Ibid., 1103). The district court granted a preliminary injunction under California’s unfair competition law on the basis that LinkedIn’s conduct was “unfair” because it violated the “spirit” of the federal antitrust laws by engaging in unfair leveraging (Ibid., 1117-18). The Ninth Circuit affirmed – expressing concern over “the possible creation of information monopolies” (*hiQ Labs, Inc. v. LinkedIn Corp.*, 938 F.3d 985, 1005 (9th Cir. 2019)).

hiQ subsequently amended its complaint to add federal antitrust claims, but the court largely dismissed those claims (*hiQ Labs, Inc. v. LinkedIn Corp.* 2020 U.S. Dist. LEXIS 164717, 2 (N.D. Cal. Sept. 9, 2020), 2). The motion to dismiss decision highlights the challenges of bringing monopolization claims based on Big Data-related conduct. First, the court denied hiQ’s refusal to deal claim, finding that “the *Aspen Skiing* exception is very narrow” and that hiQ’s theory was implausible (Ibid., 23-28). Second, the court denied hiQ’s essential facilities claim finding that because such a claim requires that a facility have “the power to eliminate all competition in the downstream market,” it could not assess the claim because hiQ did not adequately allege a properly defined downstream market (Ibid., 21-29). Third, the court denied hiQ’s leveraging claim, recognizing that “leveraging by itself is not inherently anti-competitive in nature” (Ibid., 36-37). The court similarly dismissed hiQ’s theories based on lock-in, tying, vertical boycott, and raising rivals’ costs (Ibid., 29-35). The case saga continues as of publication time. The Supreme Court granted LinkedIn’s petition for *certiorari* (i.e., it agreed to review the lower court’s decision) and annulled the decision of the Ninth Circuit 2019. It then sent the case back to the Ninth Circuit (*LinkedIn Corp. v. hiQ Labs, Inc.*, No. 19-1116, 593 U.S. ____).

The potential harms of over-regulation

As it stands, Canada’s competition law is capable of dealing with anti-competitive self-preferencing and other exclusionary conduct, such as restricting access to data. Such conduct falls within the purview of section 79 of the *Competition Act* if the conduct results in a substantial lessening of competition and enforcement against such conduct falls within the ambit of the Competition Bureau. Of course, such conduct may not always be detected by a resource-constrained enforcement agency. For this reason, the recent increase in the Bureau’s budget and the investment in new and innovative tools to better detect such conduct is to be welcomed (Competition Bureau Canada 2020).

Further, expanding private rights of action to include abuse of dominance claims may deter companies from engaging in anti-competitive conduct. Currently, only the Commissioner can bring an action under section 79. Private actions may increase the likelihood of exclusionary conduct being detected, given that rivals may have better information.¹⁸ Empirical evidence supporting this proposition is not overwhelmingly strong in other areas of law where private rights of action exist. With regards to price fixing, the evidence suggests that private actions often merely piggyback on public investigations and enforcement, rather than bringing forth new evidence of harmful conduct (Coffee 1983). In the civil context, the (limited) right of private action in Canadian competition law has very rarely been used, perhaps because litigation is expensive and the remedy, as it stands, is merely a prohibition order (see CD Howe Institute, Competition Policy Council 2016).

There are also good arguments for incremental changes to the Act at the margin. For example, the current maximum administrative monetary penalties in Canada, at just \$10 million for abuse of dominance (or \$15 million for subsequent orders), is likely too low to adequately discourage non-compliance with the *Competition Act*. There is a good argument for raising the maximum penalty here.

But wholesale dramatic changes to the Act in line with some of the suggested changes in Europe and the United States are not required. Radical changes to the Bureau's mandate – or a complete overhaul of the *Competition Act* – could very well be counterproductive. It is particularly unhelpful to think of changing the objectives of the *Competition Act* or drastically changing the priorities of the Canadian Competition Bureau. Doing either may be detrimental to innovation and harmful to Canada's long-term economic growth prospects.

The most severe proposals would dictate a structural breakup of large technology companies, requiring divestiture and separate ownership of each business. Subsection 79(2) of the Canadian *Competition Act* permits the Tribunal to grant structural remedies, such as divestiture, for abuses of dominance. The Bureau has stated that it does not seek structural remedies in the vast majority of cases (Competition Bureau Canada 2019, 33). Agencies in the United States have rarely pursued solutions this extreme, but there are notable exceptions, including the breakups of Standard Oil in 1911 and AT&T in 1984, and the attempted breakup of Microsoft, which instead settled with the DOJ in 2004 with a different set of remedies. This could have a variety of negative effects for consumers, workers, and society at large. In the digital space, structural breakups may unravel the network effects that drive platform growth and produce value.

The costs of breaking up vertical integrated firms were illustrated in the aftermath of the Paramount antitrust case of 1948. In that case, Paramount and seven other vertically integrated movie studios were forbidden from bundling

and using other restrictions, while five of the studios were ordered to sell up to 50 percent of their movie theatres. Ricard Gil looks at the impact of this structural breakup on consumers (Gil 2015). Looking at the behaviour of 393 movie theatres in 26 cities, Gil finds that vertically integrated theatres charged lower prices than non-vertically integrated theatres. Theatres that were subject to vertical divestiture raised prices more quickly than those that were not.

Recent research suggests breaking up companies may also have unintended consequences for workers. While it is typically accepted that reducing market power can benefit workers (by having more firms compete for workers' services), Hiba Hafiz recently argued that breaking up firms can actually lead to worse outcomes for workers (Hafiz forthcoming 2022). Hafiz shows that break-ups can lead to the dismantling of worker power structures. She documents the “devastating effect” that the breakup of Bell System in the 1980s had upon union density within the telecommunications industry.

“*Structural breakups may unravel the network effects that drive platform growth and produce value.*”

Aside from full structural breakups, actions short of such break-ups that create something akin to de facto break-up are structural separation/line of business restrictions. The issue is that sometimes competitors are also suppliers. This exists in both online and bricks-and-mortar settings. The empirical literature overall shows that consumers benefit from vertical integration (e.g., when a manufacturer takes over a retailer or vice versa) through lower prices, as a result of production efficiencies, fewer supply chain disruptions, and reduction of the double marginalization problem (Lafontaine and Slade 2007; Cooper, Froeb, O'Brien, and Vita 2005, 658; Crawford, Lee, Whinston, and Yurukoglu 2018; Kouvelis, Xiao, and Yang 2018; Glenk and Reichelstein 2020; Zhu and Liu 2018; but see Luco and Marshall 2020).

Some legislators in the United States would like to change this situation through new laws, and there is the possibility that FTC competition rule-making (itself a legally ambiguous proposition) might do the same. These legislators and policy advocates suggest the need for line of business restrictions to combat self-preferencing. In its limited form, such a rule might restrict potential bias that may be anticompetitive. In its extreme form, it could forbid vertical integration – a significant source of value in many platform models – by precluding a company from selling its own offerings on its platform, even when they offer superior value to users.

The leading US antitrust law scholar, Herbert Hovenkamp, explains some of the difficulty with this line of business restriction approach:

Senator Elizabeth Warren proposes that large internet sellers such as Amazon should be prevented from selling both their own products and those of rivals on the same platform. It seems clear that no genuine effort was made either to consider the impact of such a policy on competition or – for that matter – even to identify seriously who is injured when a firm such as Amazon sells both its own house brands and the brands of rivals in close juxtaposition on the same site. (Hovenkamp 2021, 540-541)

Antitrust does not ignore when there are concerns regarding exclusion due to vertical integration. This has been seen in the past decade largely in merger cases involving cable, digital platforms, health care, and soda pop (Salop and Culley 2016).

Regulators should seek commercially neutral regulatory outcomes that allow firms to compete on their merits. For example, the *Glass-Steagall Act*, which was repealed in 1999, forced banks to separate retail banking from investment banking. This reduced the advantage that integrated banks had in terms of access to funds, but it also reduced the bets investment banks could make with depositor funds. Studies have shown that there was more banking competition and that bank customers were better off both before the *Glass-Steagall Act* was enacted and after it was repealed (Kroszner and Rajan 1994; Neuhann and Saidi 2018, 66). Recent policy work explores how the Interstate Commerce Commission and airline regulation also stymied growth because of lack of vertical integration (Wilson and Klovers 2020).

Further, broad restrictions on how digital platforms are structured may have deleterious impacts on innovation and competition. Recently, a commissioner at the Japanese FTC expressed concerns that the broad, sweeping regulations against big tech could stifle innovation (see McConnell 2021). There is a real risk that such restrictions may chill business opportunities. For example, incumbents in more traditional retail markets – which today are increasingly blurred between online and offline channels – may be deterred from adopting new platform-based business models, stifling both innovation and competition in e-commerce (Cennamo and Sokol 2021).

Conclusion

E-commerce has grown enormously in recent years. This expansion has benefited consumers greatly, particularly during the pandemic when access to

more traditional retail outlets was restricted. Where there are competition concerns in e-commerce, antitrust has intervened. As we show here, Canada's *Competition Act* – as written – is sufficiently flexible to deal with some of the chief concerns about digital platforms: anticompetitive self-preferencing and preventing access to data. We have argued that changes to the Act are not required. Extra resources for the Competition Bureau to enforce the laws against abuse of dominance will likely have a positive effect, and there are good reasons to think private rights of action and increased penalties would further encourage compliance with the Act.

But sweeping regulations that restrict the vertical integration of digital platforms and affect the ability of platforms to control their data will likely fail to capture the very diverse ways in which digital platforms compete and innovate. This will harm consumers and likely chill innovation.

Many of the calls for greater regulation are driven by the desire to address a variety of broader social and political harms that are perceived to be caused by large digital platforms. The *Competition Act* and the Canadian Competition Bureau are not designed to cure all the ills of society relating to things such as commerce, technology, and employment. Nor should they be. The focus should continue to be on lower prices, higher quality, and – perhaps most importantly – fostering innovation.

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Endnotes

- 1 For an overview, see Shapiro 2018, 716-17 and 721-37 (exploring the data and critiquing populist attacks).
- 2 Amazon was founded in 1994, Google was founded in 1998, and Facebook was founded in 2004. Even Apple, the oldest of the GAFAs (Google, Amazon, Facebook, and Apple) companies, while founded in 1976, traces its resurgence to the return of Steve Jobs in 1997.
- 3 See H.R. 3816 – *American Choice and Innovation Online Act* and H.R. 3825 – *Ending Platform Monopolies Act*.
- 4 See H.R. 3826 – *Platform Competition and Opportunity Act of 2021*.
- 5 See H.R. 3849 – *ACCESS Act of 2021*.
- 6 See Takeaway #4 from Competition Bureau Canada (2021).
- 7 This economically oriented view in case law from the United States is longstanding. See, for example, *National Soc’y of Prof. Engineers v. United States*, 435 U.S. 679 (1978), which says, “Congress, however, did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute’s broad mandate by drawing on common law tradition. The Rule of Reason, with its origins in common law precedents long antedating the Sherman Act, has served that purpose. It has been used to give the Act both flexibility and definition, and its central principle of antitrust analysis has remained constant... [I]t focuses directly on the challenged restraint’s impact on competitive conditions.... the purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition

is in the public interest, or in the interest of the members of an industry.” See also Hovenkamp (2021, 489).

- 8 See, for example, the press release of the House Antitrust Subcommittee Vice Chair Pramila Jayapal, cited in *House Committee on the Judiciary* (2021) above:

“Not only is self-regulation by Big Tech patently ineffective, but it also comes at the direct expense of workers, consumers, small businesses, our local communities, and the free press... From Amazon and Facebook to Google and Apple, it is clear that these unregulated tech giants have become too big to care and too powerful to ever put people over profits. By reasserting the power of Congress, our landmark bipartisan bills rein in anti-competitive behavior, prevent monopolistic practices, and restore fairness and competition while finally leveling the playing field and allowing innovation to thrive.”

- 9 Vertical restraints refer to competition restrictions between firms at different levels of production, distribution or supply. Horizontal restraints are restrictions between competitors at the same level.
- 10 This statement by Frederic M. Scherer can be found in *Recent Efforts to Amend or Repeal the Robinson-Patman Act—Part 2: Hearings Before the Ad Hoc Subcomm. on Antitrust, the Robinson-Patman Act, and Related Matters of the H. Comm. on Small Bus.*, 94th Cong. 141 (1975).
- 11 For an interesting discussion of two-sided markets in the credit card market in Canada, see Mannella, Sonley, and Kelly (2019).
- 12 According to Lambrecht and Tucker (2017), “For there to be a sustainable competitive advantage, the firm’s rivals must be unable realistically to duplicate the benefits of [the] strategy or input.”
- 13 See, e.g., Areeda 1989. at 24: “[A]ntitrust’s essential facility doctrine knows no such distinction. A particular facility or input is not ‘essential’ simply because on particular firm would prefer to rent it from the monopoly rather than provide it for itself. Rather, it must be shown that rivals in general are unable to duplicate the facility”; and Areeda and Hovenkamp 2020, s. 773a-b; and *United States v. Terminal Railroad Association* 224 US 383 (1912).
- 14 While the Supreme Court did not base its reasoning on the essential facilities doctrine, the lower court discussed the case in part as such (*Aspen Highlands Skiing Corp. v. Aspen Skiing Co.* 738 F.2d 1509, 1520-21 (10th Cir. 1984)).

- 15 See also *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP* 540 US 398, 410 (2004)
- 16 The Court specifically said: “An antitrust court is unlikely to be an effective day-to-day enforcer of these detailed sharing obligations.”
- 17 *Authenticom, Inc. v. CDK Global, LLC*. 2017. No. 17-cv-318-jdp, 2017 U.S. Dist. LEXIS 109409, at *32-33 (W.D. Wisc. July 14, 2017).
- 18 See, e.g., literature discussed in Roach and *Trebilcock* 1996.



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