

CONSULTATION RESPONSE: *Examining the Canadian Competition Act in the Digital Era*

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Preamble

My consultation response starts with: (1) a call for more diversity in this debate on competition in Canada; (2) then it includes responses to several key issues raised in Edward Iacobucci's report; and (3) it finishes with an opinion piece of mine published in the *National Post* which summarizes why we need to rethink competition policy and law in Canada in light of the rise of Big Tech.

1. We Need more Diversity in the Competition Debate in Canada

The debate on competition policy and law in Canada is dominated by a limited range of voices and perspectives. As a result, the options for consideration – and especially for change – are usually circumscribed by analytical and political assumptions derived from orthodox economics and law. As a result, the debate to date has been dominated by commentators and experts pushing a narrow perspective supporting the status quo. These commentators and experts assume nothing is wrong with the way Canada regulates Big Tech firms – defined as Apple, Amazon, Alphabet/Google, Meta/Facebook, or Microsoft – and that competition policies developed in another age – in the 1970s and 1980s – are still fit for purpose in a dynamic, digital economy.

I think this orthodox perspective fundamentally misunderstands the nature and power of Big Tech. And, to be clear, I am not the outlier here for holding this view. In fact, Canada demonstrably stands out as the sole country in the G7 not doing anything about Big Tech; see this report [Compendium of Approaches to Improving Competition in Digital Markets](#) published by the UK's Competition & Markets Authority. Many other countries and jurisdictions around the world are developing or introducing new laws and undertaking market studies to examine the problems caused by Big Tech and digital markets. Canada's policymakers aren't doing

anything like that, however. Even the idea of undertaking a market study of digital markets seems anathema to status quo commentators and experts.

As mentioned, I blame Canada's failure to keep up with other countries on the fact that many policy experts in Canada seem unable to comprehend how digital markets and competition are different. To address this failure, this debate needs to be far more inclusive in opening up to a more diverse array of voices and perspectives that can say something about how Big Tech and digital markets impact our society in negative ways. And we cannot split off the economic causes of market power from their social consequences, here, without ceding our capacity to do something about these potentially egregious effects.

A good starting point for supporting a more systemic and inclusive approach to these issues is to address simultaneously both privacy and data protection and competition policy; they are too often treated as distinct and separate issues (see Iacobucci's report for example). Current competition debates are too disconnected from wider societal implications of Big Tech and digital markets. Consequently, we cannot comprehend or address the social, cultural, political, and economic damage caused by Big Tech by focusing on only part of the problem. In fact, there is a good chance that sticking with the status quo in competition policy will simply exacerbate these wider, social harms.

Here are some examples of what the narrow concerns of economists and lawyers miss.

1. Big Tech firms have created personal data enclaves as a result of their market dominance and scale that are almost insurmountable. Not only do startups and competitors face significant barriers to entry, thereby deterring innovation, these data enclaves have also stymied efforts in Canada to regulate these [data assets](#) in pursuit of social or political objectives – a point recently emphasized by the privacy commissioner [Daniel Therrien](#). We need to regulate the collection and use of personal data assets in ways that both respect privacy and open up their use beyond the current data hoarding by Big Tech.
2. The reason to open up data is because there is an increasing concentration of data assets dominating research in artificial intelligence and machine learning. A new arXiv paper called '[Reduced, Reused and Recycled: The Life of a Dataset in Machine Learning Research](#)' shows that research is increasingly dependent on a small number of datasets held by only 12 US and European institutions, including Microsoft, Google, AT&T, and Facebook. As these datasets become the benchmark for research, they shape not only research outcomes but also research objectives – that is, the very questions that get asked. By doing so, these data assets become more valuable with limited (if any) substitutes.
3. This is important because of the way that algorithmic technologies and artificial intelligence are increasingly shaped by corporate concerns and imperatives, over and above other considerations. As [Meredith Whittaker](#) point out in a recent article,

researchers are dependent on Big Tech's datasets and computing power, which is needed to use those datasets. And here the scale of Big Tech and their monopolies of data assets and computing power matter since they further entrench their market power and mean that they can determine the future of development in algorithmic technologies and their societal deployment.

4. In shaping future research, Big Tech ends up extending the inferential harms it already causes. By this, I mean the harms resulting from data analytics that draw in everyone, whether they have notionally agreed to hand over their personal data or not. As [Salomé Viljoen](#) points out, the collection and use of personal data – by Big Tech or otherwise – now affects everyone since inferences can be made about each of us on the basis of personal data collected from other people. And we can't opt out of that; those data assets can harm us even if we have not consented to the use of our own personal data. As a result, the market concentration and power of Big Tech enables these firms to expand their reach beyond those who have consented to data collection.

In order to address these issues – and they are only a selection – requires diverse expertise and experiences. Narrow disciplinary perspectives can only get at a small part of the complexity of the digital economy and the role of Big Tech in it. Any reworking of competition policies in Canada should, for example, draw on experts who look at:

- Social and political implications of digital technologies;
- Racial, gender, and sexual identity implications of digital technologies;
- Social, political, and economic shaping of digital technologies;
- Technical dimensions of digital technologies;
- Governance of digital technologies;
- And many others.

By drawing on a wider array of experts, we can debate the broader implications of competition policies to society and develop a more systemic approach in response to the specific problems emerging from the digital economy and rise of Big Tech.

2. Response to Edward Iacobucci's Report

There are a number of problems with Edward Iacobucci's report on Canada's *Competition Act* worth highlighting:

- *Digital Markets*: a key issue is the analytical focus on "digitally-based products", which perhaps reflects the current dominant assumptions in competition law. A major issue in the digital economy is not that products can be different, but that the asset base of companies changes quite significantly as the result of new kinds of digital asset, specifically personal data assets. As research shows, see [Birch et al. \(2021\)](#) for example, the valuation of Big Tech firms is premised on the treatment of digital data as an asset. As an asset, data not only provides a market advantage, but it can also very easily

entrench a dominant market position through the capacity it provides firms to develop new products and services, which means it becomes a major entry to barrier for competitors and startups.

- *Complementarities in Digital Ecosystems*: as a recent [European Commission report](#) highlights, a key aspect of digital markets is that they operate as ecosystems, which enable interdependencies and complementarities between a range of potentially diverse markets. It is, therefore, hard to identify a 'relevant market' to determine substitutes and anti-competitive effects, yet certain companies can still have significant market power through their control of an ecosystem (e.g. Apple's iPhone, App Store, iTunes, etc.). This means it is not enough to look at a company in isolation, they operate within and across different ecosystems that complicate the identification of relevant markets.
- *Recent Antitrust Debates*: there is a surprising omission in the report; nowhere does it mention or engage with the arguments of Lina Khan, the new Chair of the US FTC. This is surprising because her 2016 article '[Amazon's Antitrust Paradox](#)' can be reasonably described as one of the most important legal articles on antitrust and competition in recent history, and one that focuses specifically on the problems with competition policy and laws in digital markets. Any discussion of competition law and digital markets needs to engage with Khan's arguments; not doing so is idiosyncratic at best.
- *Focus on Toronto Real Estate Board (TREB) case*: the report's arguments are underpinned by a focus on the TREB case, despite the circumstances of the case not reflecting current data dynamics in the digital economy. It is obvious why; namely, there are so few cases in Canada to draw on in discussions of competition policies, and especially in relation to Big Tech. However, the details of the TREB case bear little relation to how personal data is collected, used, governed, or valued by digital firms, especially [Big Tech](#). First, and as a recent [report co-authored by Mariana Mazzucato](#) points out, there is considerable secrecy around the way that Big Tech actually monetizes and assetizes personal data, so there is no way to compare current practices with TREB. Second, TREB concerns the data collected from its constitutive members, who use that data themselves in their operations – just not digitally; this is nothing like data collection from platform and ecosystem users. Users, for example, are not constitutive members, they do not use the data themselves, they are not potential competitors, they might even be unaware that their data is collected, and so on. The understanding of personal data needs to be rethought in competition policies.

3. What Makes Big Tech Different

Published in the [National Post](#) (29 November)

Big Tech poses challenges our outdated competition laws were not designed to address

Everywhere we look around the world, competition policy and laws are being redrawn in response to the growing concerns about the impacts of Big Tech. But not in Canada.

This month, European Union member states came to an agreement about the implementation of a new “digital markets act,” to regulate the “gatekeepers” of the digital economy — namely, Big Tech firms like Apple, Amazon, Google, Facebook and Microsoft. We’re not seeing anything like this in Canada. Earlier in 2021, the United Kingdom launched a dedicated Digital Markets Unit inside its Competition and Markets Authority to tackle the threats to competition posed by Big Tech. Here, the Canadian Competition Bureau has created a new Digital Enforcement and Intelligence Branch, but its scope stretches across the whole economy. In 2021, the Biden administration in the United States appointed the Big Tech critic and antitrust scholar Lina Khan as chairperson of the Federal Trade Commission and continues to pursue the legal cases brought against Facebook and Google last year by the previous administration. Again, we’re not seeing anything like this happening in Canada.

The debate in Canada over how to handle the harms caused by Big Tech tends to be polarized between those who see a real and immediate problem with the growing power of Big Tech over our markets, and those who defend the status quo with claims that “we don’t need new laws.” Those who fall into the latter category fundamentally misunderstand the nature of Big Tech on several fronts.

First, there seems to be a tendency by status quo pundits to equate the massification of personal data collection with past practices of data collection, including loyalty card schemes and things like that. However, it is not for nothing that international institutions like the World Economic Forum call personal data a “new asset class,” as it is the resource that underpins 21st-century economies. Personal data collection by Big Tech firms provides them with an insurmountable market position, since their economies of scale enable them to keep collecting data, but limit the capacity of any competitors to grow to anywhere near their size. Even if a startup thought it could compete, no venture capitalist would fund it because the likelihood of it maturing is slim-to-none. Economists and others have morbidly likened this to the establishment of a “kill zone” around these Big Tech firms.

Second, status quo pundits don’t appreciate the competitive advantage that these personal data enclaves provide to Big Tech. As Meredith Whittaker — founder of Google’s Open Research group — points out in a recent article, the concentration of data and computing power in Big Tech firms gives them excessive influence over the direction of important research areas, like artificial intelligence. Whittaker notes that artificial intelligence developments end up being driven by the objectives of Big Tech firms because researchers are dependent on those firms for access to the data and computing power necessary to undertake their research.

Third, status quo pundits argue that Big Tech firms are too diverse to treat the same way. This is true, but they are also similar in many ways — and their similarities matter. Simplistically, we could say that Facebook and Google sell ads, Amazon sells spots on its digital shelves and Apple and Microsoft sell products and services. They are similar, though, in terms of the fact that they have become the architecture on which much of our digital economies depend: firms operate through Facebook; firms use Google to advertise; firms sell on Amazon and buy their web services; firms sell their products through Apple’s app store; and firms are still very much

reliant on Microsoft's software. The dependence of other firms on Big Tech means that the Big Tech firms have immense market power and they effectively set the rules in our digital economies.

Finally, status quo pundits keep their eyes trained on short-term price effects, but end up missing everything else. We need to rethink the structural role of Big Tech in our economies, a point highlighted by Lina Khan in her famous article, published in the Yale Law Journal, "[Amazon's Antitrust Paradox](#)." Her main point was that the digital platforms and ecosystems controlled by Big Tech firms have come to underpin our markets, leading to a range of problematic outcomes. A complementary issue, though, and one not addressed by Khan or others to my knowledge, is that Big Tech firms not only have oligopolistic positions in certain markets, but also control the ecosystems in which other firms, organizations, users and technologies operate. In this sense, they are characterized as much by the ease with which others can integrate into their ecosystems, as they are by their size. This enables them to further abuse their market positions by limiting access to their digital ecosystems and data enclaves — something that competition policy has historically not been designed to address.

Now is an opportune time for the Liberals to act and to "provide a clear set of rules that ensure fair competition in the online marketplace," as promised in their election platform. They need to commit to a robust process to operationalize their commitment to address the issues with Big Tech that so many are raising around the world.