

**Submitted To:** The Honourable Howard Wetston, Senator for Ontario

**Submitted By:** Bob Fay, *Managing Director Digital Economy Research*

**Re:** Consultation paper by Ed Iacobucci, entitled *Examining the Canadian Competition Act in the Digital Era*

**Date:** 8 December 2021

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Thank you for the opportunity to comment on the paper “Examining the Canadian *Competition Act* (CCA) in the Digital Era” by Edward M. Iacobucci. I appreciate Senator Wetston’s initiative in commissioning this paper and hope that this consultation will be helpful to the Senator in his work related to the *Competition Act*.

Professor Iacobucci provides a detailed and careful analysis of the CCA, and his paper raises many substantive issues for policy makers to consider on possible reforms to the *Act*. Not surprisingly, how to move forward is not straightforward. As he notes “Whatever is ultimately chosen, the emergence of digital markets, and the emergence of new economic and political concerns associated with competition policy, have put greater importance on amending the *Act* to clarify its purpose.”

The Centre for International Governance Innovation (CIGI) focuses on the governance of digital technologies, and our high-level comments will be framed around this broader issue, which includes competition policy while acknowledging that the goal of the Iacobucci paper was to focus on “statutory amendments to the *Competition Act*”.

**1. Digitalization is transforming all markets and in ways that are challenging all policy frameworks.**

With the ongoing shift towards data and intangibles as drivers of economic growth, regulatory frameworks need to adapt. This new intangibles growth model is vastly different from our traditional tangibles-based economy: it exhibits increasing returns to scale and scope, asymmetric information and network externalities that are manifesting themselves in a winner takes all environment. Moreover, digital technologies are transforming all sectors and creating new market structures that have not been witnessed before. And they are leading to harms that have also not been witnessed before. These transformative changes necessitate a thorough review of the *Competition Act*, which should be undertaken by bringing in a wide range of experts and civil society.

**2. Competition policy and other policy objectives overlap.**

Digital technologies and data have blurred the lines between competition policy and other policy objectives like the protection of personal privacy and data governance, intellectual property, cybersecurity, international trade and so on. Now, competition cannot be easily divorced from these other policy areas and at the same time there is a need to consider the competition-related implications of other policies. Regulations and regulatory processes need to be updated and domestic cooperation mechanisms embedded within them. Canada can look to the United Kingdom and its [Digital Regulation Cooperation Forum](#) as an example to follow. This update is extremely important to maintain trust in our public institutions to show that they are responsive to the changing nature of the economy.

**3. Canada can learn from other jurisdictions and at the same time needs to collaborate with them.**

There is also a need for greater international cooperation. Most other main jurisdictions are reviewing and updating their frameworks – competition, privacy and others -- and Canada can learn from them both from why they are re-examining their frameworks and how they plan to change them. In the area of competition policy, one move is away solely from ex-post enforcement to ex-ante regulations. Further, actions taken in other jurisdictions have a direct bearing on Canada given the global nature of digital technologies, and there may be gains to coordinated actions and information sharing across jurisdictions as opposed to piecemeal – and perhaps contradictory efforts given that different jurisdictions may have different mandates and objectives – that could undermine the goal of greater competition.

Digitalization is transforming all markets and in ways that are challenging all policy frameworks

There is a well-recognized link between competition and innovation, but the nature of that relationship is changing in the digital world. The innovation process at the heart of new digital technologies is driven by data where high-cost sunk investments and near-zero marginal costs give first movers a tremendous advantage to exploit economies of scale, while treasure troves of data allow firms to exploit economies of scope and information asymmetries to build monopoly power, thus pitting firms against each other — those that have large data stores and those that do not. Data may be non-rival, and in principle open to anyone or firm upon which to innovate, but in practice data is excludable creating data monopoly positions that can then be turned into market monopoly positions since the continuing capture of data of big tech firms via their technologies allows them to further entrench their market power. In addition to supply side factors that may inhibit competition, there are also demand side factors pushing in the same direction as consumers tend to “single home”, for example, adopt a particular platform due to factors like familiarity and habits (in other words, path dependence). These factors lead to a winner-takes-all environment. Moreover, it is diametrically opposed to the free trade environment that the world has grown used to and around which our institutions, policies, and regulations have been designed.

This data-driven innovation has substantially changed the nature of marketplaces. In a relatively short period, the digital marketplace has gone from single market firms to two-sided markets to multisided markets to ecosystems with both multisided and multiline (product) markets. For example, Apple and Google each control separate ecosystems in which several lines of business operate and compete (or potentially collude) with each other. These ecosystems are not only transforming digital industries, but they are also transforming all sectors of the economy. This evolution has direct consequences for competition policy. Robertson (2021) points out that the “boundaries between what we understand to constitute a “traditional” multi-sided platform and the point at which this morphs into a digital ecosystem ... are fluid.” She notes that antitrust prefers to identify clear boundaries between markets because, among other things, that helps to calculate market shares. However, even if this were possible, there is uncertainty to the extent that traditional analysis, and indicators, and past analyses and judicial cases are relevant for the digital era. Jenny (2021) notes that “competition authorities are generally reticent to say that the instruments they have relied on in the past and the methodologies they have used have limited applicability in the digital sector for fear that the use of a new conceptual apparatus and new instruments

for this sector would meet the skepticism of judges who value the stability of jurisprudence more than the reliance on new economic thinking or tools”<sup>1</sup>.

Against this background, the intangibles economy requires a different lens on which to assess abuse of dominance and the implications of mergers. For example, in his report, Iacobucci argues that “Canada is a relatively small economy with the scale disadvantages that this implies – borders still matter in determining competitive conditions – there will be cases where the country is better off allowing a merger and attendant efficiencies even if prices might rise as a consequence”. This argument does not appear to consider that in an intangibles-based economy, the welfare consequences of allowing Canadian intellectual property to be moved out of the country via a merger can be very large since the IP might have generated a stream of rents (income) for Canada that would be lost (and for which Canada would have to then pay) in the merger. Further, intellectual property itself can be used as a barrier to competition for example the IP captured in a merger, either from an international or domestic buyer, could lead to market dominance. Relatedly, movements in exchange rates also become relevant in this context since a depreciation can make the purchase of these valuable stocks less expensive with large domestic welfare consequences (Medhora 2018).

Competition policy must account for the acquisition of data that can come about via a merger and the degree to which it would confer additional market power. The argument made in the Iacobucci paper that “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” misses the point that data are excludable for many reasons and the ability to exclude it creates competition issues. As Jenny (2021) notes: “One should also explore the conditions under which interoperability and data portability would unambiguously enhance competition, the cases where they could actually make it more difficult for entrants to grow and, finally the conditions under which the quantity and quality of data gathered by ecosystems would be affected by the conditions put on the use of these data”.

Jenny (2021) also points to the need to improve our methodologies with respect to merger control in the digital sector. He argues that we need to think of mergers in a more dynamic setting, with a “better grasp of the interaction between competition and efficiency in the digital sector and more flexible when it comes to remedies. This will require changes in perspective as well as new instruments.”

One example where the perspective may need to be changed relates to ex-post evaluation of mergers. Because of the economies of scale and scope associated with data, new data may lead to innovations, and issues that may have not been foreseen in an original merger decision. Ex-post reevaluation of mergers should not be seen as undoing the rules of the game, but rather as part of the rules of the game in a dynamic economy where the impact of the merger may only be felt years down the road and where the impact may have evolved in a substantially different manner than anticipated at the time of the merger. To foresee and estimate these dynamic changes is extremely difficult especially when new market structures emerge as a result. Although industry may view this as creating additional uncertainty around prospective mergers, ultimately it would be consistent with a competition authority continually evaluating

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<sup>1</sup> [Frédéric Jenny](#) is a world-renowned expert on competition policy and has chaired the OECD Competition Committee since 1994.

the nature of competition in a dynamic economy especially one that is undergoing rapid change. The approach as suggested by Iacobucci to examine a series of acquisitions by a firm to determine whether it engages in anti-competitive practices (abuse of dominance) also deserves consideration.

It is clear that competition authorities face many challenges especially since this environment likely calls for more bespoke analysis thus placing a larger weight on the need for suitable resources and skills to carry out market studies to assist in enforcement and abuse of dominance cases. Yet the Canadian Competition Bureau is handcuffed in its ability to do market studies that other competition agencies can undertake because it is unable to compel information from firms (other than via a court order in conjunction with an investigation) and must generally rely on publicly available information. As noted above, markets are now extremely complex. Indeed, as the Competition Bureau notes “Market studies usually address complex issues, particularly if the sector in question is subject to comprehensive regulation or is in a period of transition resulting from emerging technologies or new business models”. Further, given the lack of public transparency that is pervasive in digital platform operations, the limitations place on the Bureau to access pertinent information severely limits its ability to do its job, and would negatively impact, for example the newly created Digital Enforcement and Intelligence Branch. It would be reasonable to expect that allowing the Bureau to access the information that it needs would lead to better decisions and more timely enforcement if required. This is particularly important given Canada’s unique – and controversial -- “efficiencies defence” (Section 96). As the OECD (1995) notes many years ago: “Because competition authorities face an inherent informational disadvantage, efficiency claims and supporting evidence must be assessed with caution.” This statement is truer today than ever before.

Finally, focusing on efficiency as a way to get predictability is not as straightforward as seems to be implied in the Iacobucci report. Economists have (finally) realized that efficiency cannot be viewed in isolation from distributional impacts of factors like technology. In other words, an increasingly skewed distribution of income and wealth directly impacts efficiency. To the extent that the observed increased industry concentration and income and wealth is a result of rising monopoly power from digital technologies is a factor that competition policy must address. Thus the “efficiencies” defense, if not scrapped, must be interpreted more broadly. Iacobucci rightly notes that the competition authority may not have the requisite instruments to deal with all of the various externalities, but it is essential to evaluate tradeoffs to assess which policy instrument(s) are the most appropriate to maintain public trust in our institutions.

#### Competition policy and other policy objectives overlap

One area where competition is now being linked explicitly is to data governance and privacy. For example, the recent executive order on promoting competition by the Biden Administration establishes “greater scrutiny of mergers, especially by dominant internet platforms, with particular attention to the acquisition of nascent competitors, serial mergers, the accumulation of data, competition by “free” products, and the effect on user privacy”. Jenny (2021) notes that: “What is clear at this point is that there is considerable controversy on how data and privacy issues could be integrated into the competition assessment of ecosystems and whether they should be. There is strong resistance in many jurisdictions to using competition law to deal with privacy issues but as there are cases pending in several jurisdictions, time will tell in which direction the courts will go. I would not be so quick to dismiss this issue.” Iacobucci also notes that non-efficiency arguments are likely to be important. Take as an example the “surveillance

capitalism” model of social media platforms and the amplification of disinformation that is fed by the acquisition of personal data. There is a role for a competition authority to deal with the targeted advertising business model that drives amplification while other agencies deal with the harms that result. Together this would lead to a more effective solution, but it requires coordination among different agencies. More generally the harms that have manifested themselves with digital platforms need a closer examination by competition authorities together with other agencies to determine the way forward to deal with them.

There is a way forward to maintain the independence and focus of a competition authority while accounting for the links to other policy areas. The UK provides an approach to consider. It has created the Digital Regulation Cooperation Forum. It brings together the Information Commissioner’s Office (responsible for privacy regulation); Office of Communications (the telecoms and media regulator responsible for content and online harms regulation); and the Competition and Markets Authority (responsible for competition and consumer policy). The goal is to ensure cooperation and strong working relations between the three independent bodies and reflects the interconnected nature of their mandates. At present it is voluntary, but the UK is considering whether to make it mandatory. The European Union is also contemplating the creation of a High Level Group of Digital Regulators under its Digital Markets Act to bring together relevant regulators<sup>2</sup>. Canada has ample experience with these types of structure and has used them effectively. For example the Canadian [Senior Advisory Council](#) brings together the heads of the Bank of Canada, OSFI, CDIC, FCAC and DM of Finance to support “the provision of advice to the Minister of Finance, and serves as a forum to coordinate actions among the agencies so that they reinforce each other. Adopting such an approach would be consistent with the statement by Iacobucci that “This is where sustained oversight by an expert sectoral regulator would be appropriate, rather than enhanced antitrust scrutiny by a competition authority” but it differs in the sense that it does not preclude enhanced antitrust scrutiny and coordination with the Competition Bureau.

Kimmelman (2019) proposes a different approach with a call for a new expert regulator in the United States “equipped with the tools to promote entry and expansion in digital markets could actually expand competition to benefit consumers, entrepreneurship and innovation. The regulatory authority could be housed within an existing agency or, better yet, be a new expert body, focused on digital markets.” Wheeler et al. (2020) subsequently released details for a proposed Digital Platform Agency to regulate tech companies in the United States.

Fay (2021a) also argues that we need to think about the intersection of data and artificial intelligence governance together with competition, privacy and with innovation. He notes that greater antitrust enforcement is a necessary but not a sufficient condition for greater competition. In a digital world, we also need standards for data portability, use and consent; we need to focus on system interoperability; and we need to experiment with different regulatory approaches, including regulatory sandboxes. This view coincides with Fletcher (2020) who notes that “It is far from obvious that standard antitrust, with its threat of high sanctions for breach, is the right way to handle these complex and non-obvious questions”.

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<sup>2</sup> They would include a representative of the Commission, a representative of relevant Union bodies, representatives of national competent authorities and representatives of other national competent authorities in specific sectors including data protection, electronic communications and consumer protection authorities. See [DMA Compromise AMs EN.pdf \(europa.eu\)](#)

She also says that ex ante digital regulation may be the way forward and notes that “the concern that the inherent dynamics of these markets can generate competition concerns, even absent strategic anticompetitive behaviour, is a key rationale for potential EC and UK pro-competitive regulation that goes beyond standard antitrust.” Ultimately, both ex-ante and ex-post approaches are required.

Canada can learn from other jurisdictions and at the same time needs to collaborate with them

Other jurisdictions such as Australia and the European Union and the United Kingdom have each undertaken major studies on the implications of digital technologies that have led to major proposals on the necessity to change policy in response. These are covered to some extent in the Iacobucci paper. More generally other G7 countries have undertaken a wide range of actions as summarized in the recent report [Compendium of Approaches to Improving Competition in Digital Markets](#). What is striking in this report is how few times Canada is even mentioned, revealing the disconnect between the importance and effort taken in assessing competition frameworks in other jurisdictions relative to that in Canada. Canada is an outlier in not carrying out the same detailed consultation and analysis (though this paper is a step in that direction). Further the Biden Administration is clearly focused on the importance of competition with the *Executive Order on Promoting Competition in the American Economy*. What is particularly noteworthy is its call for a “whole of government effort”. Even if Canada were not to embark on an external evaluation and assessment of competition policy, it could nevertheless go through these studies and actions carefully and assess their relevance to Canada. For example, although the UK and the EU take different approaches, each recognizes that Big Tech platforms may require different types of governance and regulation given their “gatekeeper” roles or “strategic market status”. The US sub-committee on anti-trust also came to the same conclusion. If these new approaches come to fruition, they would place ex-ante restrictions on the large digital platforms.

More generally, unlike some areas like finance, competition authorities have no formal mandate to cooperate at the international level although there are a number of international forums and networks in which they share information. Trade agreements also recognize the need for cooperation on competition. Article 21.3 of CUSMA states: “The Parties recognize the importance of cooperation and coordination between their respective national competition authorities to foster effective competition law enforcement in the free trade area. Accordingly, the Parties’ national competition authorities shall endeavor to cooperate in relation to their enforcement laws and policies, including through investigative assistance, notification, consultation, and exchange of information. The Parties shall seek to further strengthen cooperation and coordination between their respective national competition authorities, particularly regarding those commercial practices that hinder market efficiency and reduce consumer welfare within the free trade area.”

At CIGI we have promoted the need to create a new international institution called a Digital Stability Board to achieve global governance for digital technologies (Fay, 2021b). It would be multistakeholder in nature, bringing together regulators, policy makers, and other stakeholders to work on digital governance issues. Its focus would not be solely on competition policy: it would also explore linkages to other policy areas to achieve global coherence in digital policies. The DSB could be a forum to get the required global discussion and coherence on competition policy, and to consider implications of competition policy for other policy

areas, while leaving scope for national competition authorities to meet their own particular circumstances.

### Conclusion

The issues created by digital technologies are complex and touch on almost all policy areas. There is an urgent need in Canada to think more broadly about the role that competition policy plays in mitigating harms created by digital technologies. Given what other countries are in the process of doing, it should inspire Canada both to undertake a more comprehensive re-assessment of competition policy as well as learn from what other jurisdictions are doing. The Iacobucci paper is welcome input that could begin that process.

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