

# Canada: Interview with Renée Duplantis, PhD,<sup>1</sup> former TD MacDonal Chair in Industrial Economics at the Competition Bureau

**1. Commentators have called for a need to explore new approaches to defining markets and identifying market power in online platform markets in light of network effects and two-sided nature of digital markets. Do you consider that the existing statute in your jurisdiction adequately addresses antitrust law concerns in the digital markets?**

In 2017, the Competition Bureau released a discussion paper entitled *Big Data and Innovation: Implications for Competition Policy in Canada*, the purpose of which was to promote discussion on the digital economy and how Big Data should affect competition law enforcement under the Competition Act.<sup>2</sup> In its subsequent report, the Bureau found that:

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- <sup>2</sup> Competition Bureau Canada, *Big Data and Innovation: Implications for Competition Policy in Canada*, 18 September 2018, available at: [https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Big-Data-e.pdf/\\$file/Big-Data-e.pdf](https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Big-Data-e.pdf/$file/Big-Data-e.pdf), last accessed 3 September 2019.

‘There is little evidence that a new approach to competition policy is needed although big data may require the use of tools and methods that are somewhat specialised and, thus, may be less familiar to competition law enforcement. The fundamental aspects of the analytical framework (e.g., market definition, market power, competitive effects) should continue to guide enforcement.’<sup>3</sup>

This view is shared by the C D Howe Institute, which recently stated that ‘the consensus of the Council was that Canada’s competition law continues to provide a robust framework for confronting new forms of anticompetitive behaviour that may arise in the digital economy.’<sup>4</sup>

The focus of competition law is on whether market participants engage in conduct or practices that result in anti-competitive effects in the market. Such conduct in the digital economy can be addressed under the existing provisions in the Act, albeit potentially requiring advances in analytical methods, economic theory, empirical methodology and innovative (though not unprecedented) approaches to remedies. In this regard, past competition cases involving access to data (*Competition Bureau v TREB*) and multi-sided platforms (*Visa/MasterCard*) reflect the same principles that should apply to anti-competitive conduct in the digital space.

That being said, the Minister of Innovation, Science and Economic Development has asked the Bureau to ‘review recent trends and emerging market practices and international approaches with an eye to ensuring our own law, policy, and practice is keeping pace with the dynamism of the marketplace.’<sup>5</sup>

## **2. Is there a need in your jurisdiction to conduct a detailed review of acquisitions of digital startups by existing high-tech incumbents, especially in cases where such startups have a mine of user data but their asset/turnover is not caught within the existing thresholds?**

Unlike a number of other agencies around the world, the Bureau has the ability to substantively review all proposed and completed mergers – including mergers that are not subject to pre-merger notification in Canada. In this regard, the Commissioner of

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3 Competition Bureau Canada, *Big data and innovation: key themes for competition policy in Canada*, 19 February 2018, p 4, available at: [https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CB-Report-BigData-Eng.pdf/\\$file/CB-Report-BigData-Eng.pdf](https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CB-Report-BigData-Eng.pdf/$file/CB-Report-BigData-Eng.pdf), last accessed 3 September 2019.

4 C D Howe Institute, ‘Competition Bureau already has the “Toolkit” to Handle Big Tech: C D Howe Institute Competition Policy Council’, 16 May 2019, available at: <https://www.cdhowe.org/cpc-communique/competition-bureau-already-has-%E2%80%9Ctoolkit%E2%80%9D-handle-big-tech-cd-howe-institute-competition-policy>, last accessed 3 September 2019.

5 Letter from Minister of Innovation, Science and Economic Development to the Commissioner of Competition, 21 May 2019, available at: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04464.html>, last accessed 3 September 2019.

Competition announced earlier this year that the Bureau has increased its focus on identifying non-notifiable mergers that could potentially raise competition law concerns. To the extent that the Bureau identifies acquisitions of digital start-ups by existing high-tech incumbents that are likely to result in a substantial prevention or lessening of competition, it will almost certainly pursue remedies intended to address its concerns, including applying to the Competition Tribunal where necessary.<sup>6</sup> In addition, the Bureau recently hired a Chief Digital Enforcement Officer, who will help the Bureau monitor the digital landscape, identify and evaluate new investigative techniques, and boost its digital intelligence-gathering capabilities.

### **3. How does your jurisdiction prioritise or balance the need for a more efficient market player (who may foreclose competition to players that are comparatively less efficient) with the consumer welfare that may result due to the efficient player's products and services?**

The Bureau's *Abuse of Dominance Enforcement Guidelines* provide guidance on balancing efficiency and effects. With respect to the practice of anti-competitive acts, the Bureau will consider 'the purpose of the impugned acts: whether the dominant firm (or firms) has engaged in a practice of conduct intended to have a predatory, exclusionary or disciplinary negative effect on a competitor.' As part of its investigation, the Bureau will also 'weigh any evidence of anti-competitive intent against evidence that the act was engaged in pursuant to a legitimate business justification, that is, evidence that indicates the purpose of the act was efficiency-enhancing or pro-competitive.'<sup>7</sup> Each matter is considered on a case-by-case basis, having regard to all of the facts and evidence.

### **4. Is implementing a data-sharing mandate a possible way to reduce entry barriers in digital markets? For example, by requiring a dominant digital job search platform to mandatorily share its collected data with vertical players such as recruiting enterprises and advertisers. If yes, how do you as a regulator seek to implement this?**

A data-sharing mandate could be a way to reduce entry barriers in digital markets. For example, a data-sharing mandate may facilitate consumer switching, which lies at the

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6 'No River too Wide, No Mountain too High: Enforcing and Promoting Competition in the Digital Age', Remarks by Commissioner of Competition Matthew Boswell, Canadian Bar Association Competition Law Spring Conference 2019, 7 May 2019, available at: <https://www.canada.ca/en/competition-bureau/news/2019/05/no-river-too-wide-no-mountain-too-high-enforcing-and-promoting-competition-in-the-digital-age.html>, last accessed 3 September 2019.

7 Competition Bureau Canada, *Abuse of Dominance: Enforcement Guidelines*, 7 March 2019, available at: [https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CB-ADEG-Eng.pdf/\\$file/CB-ADEG-Eng.pdf](https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CB-ADEG-Eng.pdf/$file/CB-ADEG-Eng.pdf), last accessed 3 September 2019.

heart of competition. However, such a mandate could be sought by the Bureau only if a dominant market participant has engaged in a practice of anti-competitive acts, with the result that competition has been, is or is likely to be prevented or lessened substantially in a market. Simply being a dominant firm, or even a monopoly, does not in and of itself engage the abuse of dominance provisions of the Act. It is also important to note that the Bureau does not have the statutory power to unilaterally implement such a mandate on a private party. It can negotiate a mutually-agreed resolution with a party under investigation or apply for a remedy from the Tribunal.

Competition agencies are also mindful that issues such as data sharing often raise complex challenges that fall outside the remit of traditional competition enforcement, such as privacy concerns.

**5. Does your jurisdiction consider the organisation of results on online platforms/search engines an antitrust concern? For example, should a dominant platform be regulated in relation to its placement of in-house and third-party results? If yes, what is the special responsibility that dominant incumbents should account for while designing their products?**

Depending on the circumstances, the organisation of results on online platforms/search engines could raise concerns under the abuse of dominance provisions in the Act. For example, as part of its prior investigation into allegations that Google engaged in conduct contrary to these provisions, the Bureau examined allegations that Google engaged in the following conduct to exclude or otherwise disadvantage rivals:<sup>8</sup>

• **Search manipulation**

The manipulation of Google's search results, so that Google-related links appear higher in what is presented to users and/or that competitor-related links appear lower than they otherwise would in an objective ranking based on the relevancy of these links.

• **Preferential treatment of Google services**

The preferential treatment of Google's services (Google Maps, Google Flights, etc) compared to the services of competitors on Google's search engine results page. Ultimately, the Bureau did not find sufficient evidence that Google engaged in these practices for an anti-competitive purpose and/or that the practices resulted in a substantial lessening or prevention of competition in any relevant market in Canada.

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8 Competition Bureau Canada, 'Competition Bureau statement regarding its investigation into alleged anti-competitive conduct by Google', 19 April 2016, available at: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04066.html>, last accessed 3 September 2019.