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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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Consumer data rights and competition – Note by Canada

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This document reproduces a written contribution from Canada submitted for Item 3 of the 133rd OECD Competition Committee meeting on 10-16 June 2020.

More documents related to this discussion can be found at
<http://www.oecd.org/daf/competition/consumer-data-rights-and-competition.htm>

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Canada

1. Introduction

1. Canada's Competition Bureau ("Bureau") is pleased to provide this submission to the OECD Competition Committee's June 12, 2020 roundtable entitled "Consumer Data Rights: Impacts on Competition".¹

2. Headed by the Commissioner of Competition ("Commissioner"), the Bureau is an independent law enforcement agency of the Federal Government of Canada. Among other things, the Bureau is responsible for the administration and enforcement Canada's competition law – the *Competition Act*.² In carrying out its mandate, the Bureau ensures that Canadian businesses and consumers prosper in a competitive and innovative marketplace.

3. The Bureau welcomes this important forum to discuss and share experiences regarding businesses' collection and use of consumer data. The digital marketplace is the fastest growing part of the Canadian economy, and now represents a larger portion of Canadian GDP than oil and gas extraction – sectors often associated with Canada's economic strength.³ However, the rapid rise of the digital economy is a borderless phenomenon that requires close collaboration and cooperation between competition authorities. Accordingly, as a complement to its domestic activities, the Bureau places significant focus on international fora such as this one.⁴

4. In this submission, the Bureau describes its past enforcement and advocacy efforts relevant to businesses' collection and use of consumer data. Through its enforcement experiences, the Bureau has identified situations where businesses have used data to exercise market power, erect barriers to entry, and engage in deceptive marketing practices. In the advocacy context, the Bureau has recognized opportunities for governments to enact pro-competitive policies supported by data portability and open data standards.

2. What is the role for competition law enforcement?

5. Businesses' collection and use of data may be relevant to the enforcement provisions of the *Competition Act* in four principle ways:

1. First, to the extent that any business uses data in a manner that is valuable to consumers,⁵ such as the development of personalized products that bring about greater value to a consumer, this may form a dimension of competition that could

¹ This submission is based on public information, and is made in the context of this consultation. The Bureau's answers in this submission may not be complete or exhaustive owing to, among other factors, the confidentiality requirements of the Canadian *Competition Act*. Accordingly, this submission will not predetermine the Commissioner's position in any current or future investigation or intervention pursuant to the *Competition Act*.

² [Competition Act](#), R.S.C., 1985, c. C-34.

³ Statistics Canada. (2019) [Measuring digital economic activities in Canada, 2010-2017](#).

⁴ See, for example, Competition Bureau. (2020) [Competition in the Digital Age: The Competition Bureau's Strategic Vision for 2020-2024](#).

⁵ This concept follows from paragraph 2.2 of Competition Bureau. (2011) [Merger Enforcement Guidelines](#).

be relevant to the assessment of mergers, agreements between competitors, and abuse of dominance;

2. Second, when large amounts of consumer data are necessary to compete effectively in a marketplace, this may form a barrier to entry that could be relevant to the assessment of many types of competition cases;
 3. Third, if businesses mislead consumers about whether and how their data will be used, this may raise concerns under the deceptive marketing provisions of the *Competition Act*;⁶ and
 4. Finally, wherever data collection and use enables price fixing or other forms of collusion, this may raise concerns under the relevant provisions of the *Competition Act*.⁷
6. This section of the Bureau's submission will focus on five recent investigations under the *Competition Act* where data collection and usage was particularly relevant. This may not constitute a complete list of such Bureau investigations; under the confidentiality provisions of the *Competition Act*, the Bureau is only able to discuss matters that have been made public.⁸

7. In May 2011, the Commissioner brought an abuse of dominance case against the Toronto Real Estate Board ("TREB"). At the time of the Commissioner's application, TREB had instituted a set of rules restricting its members from broadly disclosing historical real estate sales data online. The Commissioner alleged that these restrictions were an anti-competitive act that had the effect of lessening or preventing competition substantially.⁹ Ultimately, the Canadian Competition Tribunal ("Tribunal") agreed with the Commissioner that TREB's restrictions prevented greater access to new and innovative real estate services, more in-depth listing information, and innovative online analytical tools.¹⁰ The Tribunal ordered TREB to remove its restrictions, thereby allowing TREB's real estate agent members to publish historical real estate sales data online.¹¹

8. From 2013 to 2016, the Bureau conducted an extensive investigation of allegations that Google LLC ("Google") engaged in anti-competitive business practices contrary to the *Competition Act*.¹² Part of this investigation involved a marketplace allegation that, because of Google's access to superior information as a result of its integration across the online display advertising ecosystem, Google may have been able to engage in conduct to exclude rivals in each segment of the exchange-based online display advertising market. Ultimately, the Bureau's investigation failed to find sufficient evidence that Google's behaviour, in this context, contravened the *Competition Act*.

⁶ For a more detailed discussion, see "Big data and the hidden cost of 'free' digital products and services" in Competition Bureau. (2020) [The Deceptive Marketing Practices Digest – Volume 5](#).

⁷ For a more detailed discussion, see "Cartels" section Competition Bureau (2018) [Big data and innovation: key themes for competition policy in Canada](#).

⁸ See section 29 of the Competition Act, *supra* note 2.

⁹ Competition Bureau. (2011) [Competition Bureau sues Canada's largest Real Estate Board for denying services over the Internet](#).

¹⁰ Competition Bureau. (2018) [Backgrounder: Abuse of dominance by the Toronto Real Estate Board](#).

¹¹ Competition Tribunal. (2016) [Order Further to the Reasons Issued on April 27, 2016](#).

¹² Competition Bureau. (2016) [Competition Bureau statement regarding its investigation into alleged anti-competitive conduct by Google](#).

9. In January 2018, the Commissioner reached an agreement with Softvoyage, Inc. (“Softvoyage”) to end certain business practices that the Commissioner had determined had the effect of substantially lessening or preventing competition in Canada.¹³ Softvoyage, a company engaged in the development of software geared towards the travel industry, included exclusivity clauses in its agreements with customers that prevented those customers from extracting or using their own data that was managed in Softvoyage’s software.

10. In September 2019, the Bureau launched an initiative aimed at soliciting information from Canada’s business community on conduct in the digital economy that could be harmful to competition.¹⁴ As part of this effort, the Bureau identified that access to large volumes of consumer data can act as both an important driver of consumer value, but also can constitute a barrier to entry, and act as a lever for businesses to exclude rivals.¹⁵

11. In May 2020, Facebook Inc. (“Facebook”) agreed to pay a \$9 million penalty after the Commissioner concluded that the company made false or misleading representations about the privacy of Canadians’ information.¹⁶ The Bureau’s investigation found that Facebook disclosed or shared personal information collected through its Facebook platform and Messenger application in a manner that was inconsistent with its consumer-facing disclosures about data usage.

12. What is important to recognize, across these cases, is that competition law enforcement requires more than theory. Evidence-based enforcement is at the heart of the Bureau’s activities, and this requires the Bureau’s decisions to be based on credible evidence that can withstand judicial scrutiny.

3. What is the role for competition advocacy?

13. The Bureau strives to be at the forefront of developments in the digital economy. As noted by the Commissioner in the Bureau’s 2020-2024 Strategic Vision:

For Canadian consumers and businesses to thrive in the digital economy, the Bureau needs to continually seize opportunities to encourage competition and innovation in areas that matter to Canadians. The Bureau needs to take timely enforcement action and invest in new tools suited for the digital age so that Canadians can benefit from strong and vigorous competition.¹⁷

14. Further to this goal, the Bureau has recently completed two major digital economy initiatives. First, in 2018, the Bureau published a comprehensive report on how the establishment of big data could affect competition policy in Canada.¹⁸ This paper

¹³ Competition Bureau. (2018) [Commissioner of Competition and Softvoyage Inc. conclude an agreement following an investigation into allegations of abuse of dominance.](#)

¹⁴ Competition Bureau. (2019) [Competition Bureau calls for businesses to report potentially anti-competitive conduct in the digital economy.](#)

¹⁵ Competition Bureau. (2019) [Competition Bureau call-out to market participants for information on potentially anti-competitive conduct in the digital economy.](#)

¹⁶ Competition Bureau. (2020) [Facebook to pay \\$9 million penalty to settle Competition Bureau concerns about misleading privacy claims.](#)

¹⁷ *Supra* note 4.

¹⁸ Competition Bureau. (2018) [Big data and innovation: key themes for competition policy in Canada.](#)

contributes to the ongoing discussion about how emerging challenges related to big data can be addressed to support innovation and competition in the marketplace. As one of the key conclusions of this work, the Bureau found Canada's current competition policy framework is sufficiently robust to handle the near-term challenges of big data.

15. Second, in 2019, the Bureau hosted a Data Forum featuring a range of speakers from across the globe.¹⁹ This event continued the discussion of how competition policy should adjust to the digital economy, with a focus on big data. The Data Forum brought together thought leaders from the business, legal, and academic communities, as well as Canadian regulators and foreign competition authorities. The discussions held during the forum continue to shape the Bureau's thinking when it comes to competition issues in the digital economy.

16. In addition to these two major big data-related activities, the Bureau has been active in ensuring that its capabilities grow in step with the rapid pace of the digital economy. In particular, the Bureau's Big Data paper recognized that analyzing competition in the digital economy "may require somewhat specialized and less familiar tools and methods".²⁰ To meet this challenge, the Bureau has appointed its first Chief Digital Enforcement Officer ("CDEO").²¹ The CDEO's mandate involves not only helping the Bureau monitor the digital landscape, but also identifying and evaluating new investigative techniques, as well as boosting the Bureau's digital intelligence gathering capabilities.

17. In addition to these corporate- and policy-focused steps, the Bureau has been active in advocating for greater competition in big data industries. These efforts are part of the Commissioner's broader vision to support a culture of competition in Canada, where regulators, policy-makers, and the public are tuned to the important role of competition in the success of Canada's economy.²² This remainder of this section focuses on three significant competition advocacy interventions that involve Big Data issues.

18. In 2017, the Bureau completed a major market study of technology-led innovation in Canada's financial sector.²³ While this study contained more than 30 recommendations on how Canadian financial system regulations could adapt to support greater competition, one area of focus of the study was on Open Banking.²⁴ In this context, the Bureau recognized that the establishment of Open Banking standards, supported by data portability, could simplify comparison of financial services products for Canadian consumers as well as foster innovation in the financial services industry.

19. Building on the success of the FinTech market study, in both 2017²⁵ and 2019²⁶, the Bureau made submissions to the Department of Finance Canada advocating for the

¹⁹ Competition Bureau. (2019) [Highlights from the Competition Bureau's Data Forum: Discussing competition policy in the digital era.](#)

²⁰ *Supra* note 18.

²¹ Competition Bureau. (2019) [George McDonald joins the Competition Bureau as Chief Digital Enforcement Officer.](#)

²² *Supra* note 17.

²³ Competition Bureau. (2017) [FinTech Market Study Portal.](#)

²⁴ Competition Bureau. (2017) [Technology-led innovation in the Canadian financial services sector.](#)

²⁵ Competition Bureau. (2017) [Potential Policy Measures to Support a Strong and Growing Economy: Positioning Canada's Financial Sector for the Future.](#)

²⁶ Competition Bureau. (2019) [Submission by the Interim Commissioner of Competition to the Department of Finance Canada – Review into the merits of open banking.](#)

implementation of Open Banking and data portability in the Canadian financial sector. In addition to these submissions, Bureau witnesses testified in front of a Canadian Senate Committee in 2019 to similarly advocate for the benefits of Open Banking and data portability.²⁷

20. In November 2019, the Bureau provided advice to the Province of Ontario's consultation to develop a Data Strategy.²⁸ As a key step to enabling competition, the Bureau advocated that data portability and open standards should act as key pillars for the future treatment of both government and privately held data.

21. The Bureau will continue to place a strong focus on advocacy efforts in digital economy-related industries going forward. This advocacy will take the form of providing forward-thinking advice to governments and regulators on how to unlock competitive potential and deliver the benefits of competition to all Canadians.

4. Conclusion

22. The Bureau welcomes the opportunity to participate in this forum. Roundtables such as this one are an important way to share experiences in considering critical issues involving the key economic forces that are shaping the digital transformation worldwide.

²⁷ Senate of Canada Standing Committee on Banking, Trade, and Commerce. (2019) [Proceedings of the Standing Senate Committee on Banking, Trade and Commerce: Issue No. 51 – Evidence](#).

²⁸ Competition Bureau. (2019) [Submission to the Government of Ontario on Ontario's Data Strategy](#).