

*CPI's North America Column Presents:*

# Dethroning the Digital Platform Champions

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One has to applaud the success of the so-called “Tech Superstars”, often referred to as “GAFA” (Google, Amazon, Facebook, Apple). The great innovations they have developed for consumers and businesses alike contribute significantly to Canada’s gross national well-being. Their collective success should be admired both by those of you who believe in the power of capitalism to grow the economy and by those of you that believe the most innovative and efficient companies, those that invest and take risks, should reap the rewards, along with their shareholders, for having tipped the “winner takes all” race. These companies are the champions of today’s digital markets.

Competition Authorities around the world encourage and promote competitive races where there are winners and losers. A fundamental principle of antitrust doctrine is that success ought not to be condemned, even when it leads to large firms which possess market power. To do otherwise would destroy the incentives that drive our free and open economies. It is understood by knowledgeable industrial organization economists that many markets in our economy are naturally concentrated (in Canada, competition laws are monopoly friendly by design, but that is a subject for further commentary). Market concentration is often the result of the competitive process. Increasing concentration in many sectors is a result of growing economies of scale which results in larger, more efficient firms as opposed to smaller ones. Quite rightly, competition authorities worry about, and are empowered to take action against, companies with market power who engage in anti-competitive behavior to maintain or enhance their market power.

Peter Thiel, co-founder of PayPal, once said, “Competition is for losers. If you want to create and capture lasting value, look to build a monopoly.”<sup>2</sup> Warren Buffet invests in companies which have built impenetrable moats to protect their dominant market positions.<sup>3</sup> The major digital platforms are highly concentrated. Notable policymakers around the world, led by Margrethe Vestager, European Commissioner for Competition, and Elizabeth Warren, Democratic presidential nominee in the US, believe this concentration will persist with detrimental consequences for consumers and business. Ms. Warren has famously vowed to break up the so-called ‘Big Tech’ companies as a solution to the market power problem.<sup>4</sup>

By tipping the platform markets in their favor, Big Tech companies have built moats around their core product lines that are deep and wide. Recently published international studies and reports, such as the final report of the Stigler Committee on Digital Platforms have confirmed this view. Digital platforms are winner-take-all markets on account of traditional economic factors which create durable barriers to entry. These factors include: (i) economies of scale and scope (ii) network effects, (iii) consumer behavioral biases, (iv) incumbent data advantages, and (v) strong brands and access to capital.

In view of these powerful winner-take-all factors in the digital platform markets, it would seem unlikely that one or more of the Big Tech incumbent champions can be beaten by newer, deeper-pocketed or even more innovative competitors. For example, Microsoft’s accumulated

losses in search have been estimated in the billions of dollars with minimal gains on Google's dominance. Despite the fact that many dominant technology companies and platforms in the past seemed unassailable (e.g. Microsoft's dominance of operating systems and browsers), Google overtaking Yahoo in search, and Facebook displacing MySpace in social media, has many politicians, competition authorities, and scholars believing that Big Tech's platform markets require government intervention, outside the realm of antitrust law, to restore competition.

The Stigler Report has proposed mandating not only an open, but also a common, Application Program Interface ("API") which would allow different messaging systems to connect to one another - a common API guarantees interoperability and eliminates the network externalities that drive the winner-take-all nature of the social media market. It also proposes changing merger guidelines for digital platforms, strengthening antitrust enforcement and creating a new Digital Authority which would oversee all aspects of digital platforms, similar to the UK's proposed Digital Markets Unit. Furthermore, the Stigler Report proposes empowering the FTC to: (i) have access to digital platforms' internal databases and studies, (ii) perform their own independent research on how platforms impact different areas of our society, and (iii) moderate independent researchers' access to these databases. And if all other solutions fail, it proposes the introduction of fiduciary duties on digital platforms.

In Canada, the application of competition law and policy to Big Tech platforms is slowly making its way on to the government agenda. In September 2017, the Competition Bureau released a discussion paper to engage stakeholders in the topic of big data and competition law to contribute to the debate. In February 2018, the Bureau released its final report, *Big Data and Innovation: Key Themes for Competition Policy in Canada*, which summarizes the Bureau's enforcement approach. In its internationally awarded final report, the Bureau, based on its own experiences, noted that firms' use of big data may raise challenges for competition law enforcement. The Bureau identified the need to adapt its tools and methods to this evolving area, while its antitrust investigations and analysis will continue to be guided by its traditional framework for market definition, market power and competitive effects.

A few days following the Bureau's pronouncement that the *Competition Act*<sup>5</sup> was fit for purpose to tackle Big Tech, the Senior Deputy Governor of the Bank of Canada called for a modernization of competition policy with respect to big data.<sup>6</sup> Canada's Minister of Innovation, Science and Economic Development announced a new Digital Charter in May 2019 including among its 10 principles "Transparency, Portability and Interoperability."<sup>7</sup> A Government white paper to reform Canadian privacy law proposes a new general data portability right.<sup>8</sup> In addition, a recent report from the Senate Committee on Banking Trade and Commerce specifically recommended that a consumer data portability right be added to the *Personal Information Protection and Electronic Documents Act*<sup>9</sup> and examines the merits of Open Banking.<sup>10</sup>

Competition authorities and experts, including the Bureau in its report recommending Open Banking,<sup>11</sup> the UK's *Report of the Digital Competition Expert Panel*,<sup>12</sup> the Australian Competition and Consumer Commission,<sup>13</sup> and the Stigler Report suggest personal data portability encourages new entrants, enables innovation and enhances consumer welfare. In the EU, a regulatory approach has been taken to consumer data rights through the implementation of the General Data Protection Regulation<sup>14</sup> which creates a legal right for consumers to port their data.

It appears that the Tech Superstars have developed and maintained their dominant positions principally through innovation and popular products. A regulatory approach which mandates data-sharing with competitors or other companies in the ecosystem is the first step being taken, or proposed, by governments to temper their durable market power. Interestingly, Google, Facebook, Apple, Microsoft, and Twitter launched their own Data Transfer project in 2018 to allow data portability between multiple online platforms.<sup>15</sup>

Will data mobility designed to level the playing field chill innovation and investment by the incumbent firms? Will consumers benefit from lower prices, quality improvements, expanded choices, and accelerated innovation as the economic textbooks suggest will transpire with increased competition? As the championship belts are being removed from Big Tech and governments ponder improved antitrust laws to address the market power challenge, policymakers must strike the right balance between taking steps to prevent anti-competitive behavior and over-regulation that chills innovation and dynamic competition.

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- <sup>2</sup> Peter Thiel, “Competition Is for Losers,” *The Wall Street Journal* (September 12, 2014) <https://www.wsj.com/articles/peter-thiel-competition-is-for-losers-1410535536>.
- <sup>3</sup> Warren Buffett and Carol Loomis “Mr. Buffett on the Stock Market,” *Fortune Magazine* (November 22, 1999) <https://fortune.com/1999/11/22/warren-buffett-on-stock-market/>. The concept of “economic moats” came from a 1999 Fortune article by Warren Buffett. “The key to investing is [...] determining the competitive advantage of any given company and, above all, the durability of that advantage. The products or services that have wide, sustainable moats around them are the ones that deliver rewards to investors.”
- <sup>4</sup> Elizabeth Warren, “Here’s how we can break up Big Tech,” *Medium* (March 8, 2019) <https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c>.
- <sup>5</sup> (R.S.C., 1985, c. C-34).
- <sup>6</sup> Carolyn A. Wilkins (Senior Deputy Governor, Bank of Canada), *At the Crossroads: Innovation and Inclusive Growth*, Speech, Montebello, Quebec (February 8, 2018) [https://www.bankofcanada.ca/2018/02/crossroads-innovation-inclusive-growth/?\\_ga=2.150879798.1694945891.1539634425-1323339142.1526081496](https://www.bankofcanada.ca/2018/02/crossroads-innovation-inclusive-growth/?_ga=2.150879798.1694945891.1539634425-1323339142.1526081496).
- <sup>7</sup> Canada, *Minister Bains announces Canada’s Digital Charter*, News Release (May 21, 2019) <https://www.canada.ca/en/innovation-science-economic-development/news/2019/05/minister-bains-announces-canadas-digital-charter.html>; Canada, *Canada’s Digital Charter: Trust in a digital world* [https://www.ic.gc.ca/eic/site/062.nsf/eng/h\\_00108.html](https://www.ic.gc.ca/eic/site/062.nsf/eng/h_00108.html).
- <sup>8</sup> Canada, *Strengthening Privacy for the Digital Age: Proposals to modernize the Personal Information Protection and Electronic Documents Act* (May 21, 2019) [https://www.ic.gc.ca/eic/site/062.nsf/eng/h\\_00107.html](https://www.ic.gc.ca/eic/site/062.nsf/eng/h_00107.html).
- <sup>9</sup> (S.C. 2000, c. 5).
- <sup>10</sup> The Honourable Senator Doug Black, Q.C., Chair and The Honourable Senator Carolyn Stewart Olsen, Deputy Chair, *Open Banking: What it Means for You*, Report of the Standing Senate Committee on Banking, Trade and Commerce (June 2019) <https://sencanada.ca/en/info-page/parl-42-1/banc-open-banking/>.
- <sup>11</sup> Canada, Competition Bureau, *Technology-led innovation in the Canadian financial services sector* (December 14, 2017) <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04322.html>.
- <sup>12</sup> United Kingdom, *Unlocking Digital Competition: Report of the Digital Competition Expert Panel*, also known as the “Furman Report” (March 2019) [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/785547/unlocking\\_digital\\_competition\\_furman\\_review\\_web.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf).
- <sup>13</sup> Australian Competition & Consumer Commission, *Digital platforms inquiry*, final report (July 26, 2019) <https://www.accc.gov.au/focus-areas/inquiries-ongoing/digital-platforms-inquiry/final-report-executive-summary>.
- <sup>14</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation) (2016) *Official Journal* L 119/1 <https://eur-lex.europa.eu/eli/reg/2016/679/oj>.
- <sup>15</sup> *Data Transfer Project* <https://datatransferproject.dev/>.