



**Competition Bureau: *Call-out to market participants
for information on potentially anti-competitive
conduct in the digital economy***
Submission from Cybera Inc

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Introduction

Cybera is the not-for-profit, technology-neutral organization responsible for driving Alberta's economic growth through the use of digital technology. One of its core roles is the operation of Alberta's Research and Education Network, called CyberaNet. This is the dedicated network for unmetered, not-for-profit internet traffic used by Alberta's schools, post-secondary institutions, and business incubators to enable research, innovation, and enterprise.

Cybera is guided by a strategic leadership team and is home to some of Canada's top cloud, data, and networking experts, who work with the public sector to build cloud infrastructure, data storage, and advanced networking solutions. In addition, the organization is committed to robust advocacy for the rights of all Canadians to engage in the modern digital economy, unencumbered by any and all barriers, including those that are social, financial, or geographic in nature.

Cybera welcomes the invitation from the Competition Bureau of Canada to openly provide comments on the issue of concentration in core digital markets, and the detrimental effects of this trend on consumers and businesses. The Competition Bureau will be aware that this is an issue which has attracted substantial attention in both academia and popular media. It has also sparked an intense debate in many jurisdictions, with important implications for competition policy and antitrust enforcement.

Digital platforms are a unique and recent phenomenon that continue to challenge policymakers on a number of interrelated fronts, including cybersecurity, privacy, and competition policies, among others. Thus far, traditional markets — including media advertising and distribution — have not been able to remain competitive with the digital platforms market, a trend which is likely to accelerate. This means, at least in the near future, that there will likely be no alternative to challenge the market dominance by large incumbent digital platforms.

In addition, the increasing adoption of big data, analytics, and machine learning will likely solidify and increase concentration in these markets. New market entrants will face significant technological, economic, and structural barriers to competing with platforms that have established economies of scope and scale. This is a phenomenon which will have significant long-term consequences with respect to how Canadians' personal data will be utilized and governed, and will require a regulatory approach focussed on the increasing commodification of personal data.

In its discussion paper, the Competition Bureau presented two distinct and potentially complementary explanations for the increasing concentration in digital markets. These are;

1. **Digital markets may 'tip' to a dominant firm:** characteristics of certain digital markets may favour the emergence of a single winner or a small group of winners; and

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2. **Anti-competitive conduct rather than competition on the merits:** leading firms may not have achieved success by outperforming their competitors, but rather by executing anti-competitive strategies that target existing or potential rivals.

In Cybera's view, it is not obvious that a clear-cut distinction can always be drawn between merit-based competitive advantage and anti-competitive behaviour. While these two dynamics are interrelated to a degree, Cybera argues that it may be necessary to view digital platforms as de facto natural monopolies, wherein strategic market position will inevitably be held by a handful of firms that have achieved extreme returns on scale.

This view is borne out both by the current state of the digital platform marketplace and the emerging technologies within this sector. Digital platforms are network-based and data-driven markets and, by nature, will favour whichever firm is able to reach and provide services to the critical mass. As such, traditional competition tools may not be sufficient to challenge dominant market position. Cybera recommends that policies that support consumer rights and consumer choice within the digital economy be strengthened.

In its 2017 consultation, "Big Data and Innovation: Implications for Competition Policy in Canada", the Competition Bureau advanced the idea that superior retention and analysis of datasets by certain firms that yield novel and innovative products for Canadian consumers should be viewed as a merit-based market advantage, rather than inherently anti-competitive.¹ Likewise, Cybera does not view dominant market share by a given firm as an indication in itself that it achieved this position through anti-competitive practices.

This conceptual separation between legitimate competitive performance and malicious anti-competitive practice should serve as an important contextual basis for addressing the issue of increasing concentration in the digital marketplace. In this context, Cybera recommends that the Competition Bureau be mindful of both over- and under-enforcement.

For this submission, Cybera takes the position that several structural changes need to be undertaken to better regulate the modern data economy, including changes to how issues of competition in the digital marketplace are framed within policy and regulation.

In addition, while not explicitly addressed in the discussion paper to which this submission is a response, Cybera would also recommend that the Competition Bureau include monopolization in telecommunications and related over-the-top (OTT) markets in Canada as a focus of future investigation.

Recommendations:

Adopt an Appropriate Framework: Existing tools within competition policy — including the SSNIP test and Efficiency Test — are outdated in addressing the novel ways in which strategically dominant players interact with the digital marketplace. Because large digital platforms offer a product for free, and because the value their products offer to consumers are

¹ <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04304.html>

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difficult to define, the normal markers of market concentration (increases in price or decreases in quality), will not be evident. Rather, Cybera argues that digital platforms have largely used their strategic market position to monopolize data and algorithms, which in turn have allowed them to degrade consumer welfare and protection through.

Because of the fast-changing nature of the digital marketplace, tracking and addressing competition issues are nearly impossible under the timeframes and standards of proof required by current competition policy approaches. For this reason, Cybera recommends that the Competition Bureau move away from the “efficiencies defense” approach in its competition policy, and instead adopt a consumer welfare standard. This would entail de-emphasizing the analysis of market position in favour of documenting consumer welfare losses/gains that result from a firm’s behaviour. Notably, this has been the approach to addressing digital platform concentration in a number of jurisdictions, including the EU and Australia.²

Data Portability: Currently, the retention of large datasets of personal information by digital platforms constitutes one of their biggest strategic advantages in the marketplace. This is particularly true for advertisement-focused platforms in two-sided markets (Facebook, Google). In Cybera’s view, it is not realistic to assume that new entrants will be able to compete with these platforms without significant regulation. Because it is unclear that such aggressive market intervention is possible given the current structure of Canadian competition law, Cybera recommends that a principle of data openness be advanced within the regulators that are responsible for this issue (Competition Bureau, OPC).

This would entail supporting the right of consumers to access and safely transfer their data between platforms in a standard format, on request. This is an approach that several other jurisdictions have taken, including in Article 20 of the EU’s GDPR, and Australia’s 2017 Consumer Data Right. We believe that opening access to the data held by dominant firms could facilitate the creation of secondary players within the marketplace.

Anonymization: A key concern with current attempts to increase consumer autonomy over their data is the potential burden on commercial entities and consent fatigue among users. A 2008 study found that an individual would need around 244 hours — roughly 30 working days — to fully read the privacy policies stemming from the websites they visit.³ As numerous jurisdictions move towards more privacy and consent focused regimes of data governance, there is concern that meaningful access to the digital economy will require digital literacy skills that are out of the reach of many people.

Data anonymization is a possible solution to this problem. As firms continue to use increasingly sophisticated analytical methods on increasingly large datasets, anonymization provides a means to allow for novel and innovative uses of data, while ensuring data openness and consumer protections. However, as analytical methods become increasingly sophisticated, it is important that such approaches remain flexible, realistic and risk-tolerant.

² <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>

³ <https://heinonline.org/HOL/LandingPage?handle=hein.journals/isjlpoc4&div=27&id=&page=CYBERA>

The UK's "Anonymization Code", which sets standards of best practice for organizations utilizing de-personalised data, is a good example of such an approach. It states: "although it may not be possible to determine with absolute certainty that no individual will ever be identified as a result of the disclosure of anonymised data, this does not mean that personal data has been disclosed." The UK's Digital Privacy Act also specifically criminalizes unauthorized re-identification of data.

Data Trusts: As stated earlier in this submission, a main source of strategic market dominance by digital platforms is the collection and retention of large datasets. Currently, personal data is held by digital platforms through contractual agreements with individual users. This has allowed for a general trend of degrading privacy protection, and increasing unmonitored data usage by digital platforms.

Data trusts are a novel form of data governance whereby an intermediary is designated as the trustee of a dataset, making decisions on its use on behalf of the originators of that data. The flexibility inherent to data trusts may provide a framework with which the governance of data can co-evolve with emerging data uses. In addition, data trusts would allow for the consent of a group of beneficiaries to be aggregated into one legal trustee, thereby reducing the existing consent and knowledge burden on individual data subjects. From a competition policy standpoint, removing the monopoly that large platforms have on data would allow for secondary market disruptors to work towards the critical mass needed to compete.

Algorithmic Transparency: Digital platforms, like Facebook and Google, are not just conduits for personal data, and their influence over both the information that is accessed by their users, as well as data about those users, is of huge consequence. As the market for personal information grows, the implications of corporate and governmental surveillance also grows, as well as the potential for behaviour modification. It will become increasingly important for citizens to understand what types of data has been collected on them, and what are the potential uses of that data.

In addition to data portability and data trusts, platforms can work to counter the potential abuses of user data by being more transparent about the types of data they collect, and for what purposes. Governmental regulation can and should be crafted to promote best practices for algorithmic transparency. A good example of existing regulations that address the issue of algorithmic transparency is the EU's GDPR. Article 15 of the GDPR states explicitly that "the data subject shall have the right to obtain from the controller confirmation as to whether or not personal data concerning him or her are being processed," including the categories and purposes of that processing. Article 22 of the GDPR also provides protections against individuals being subject to algorithmic decision-making that negatively affects them.

It should not be expected that these digital intermediaries be completely transparent with every algorithm they deploy. Companies should be able to benefit from user feedback loops in order to maintain a competitive advantage. However, to mitigate the inherently anti-competitive outcomes of user feedback loops, firms should be required to share what types of data they collect about users, and possible uses of that data, in non-technical language. This will allow for

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citizens to understand how their data is being used, and when and where they may want to opt out of a service. It will also allow for potential competitors to gain an understanding of the practices of dominant firms in order to recognize what they must do to compete.

Enforcement: It has been noted by former Competition Bureau Commissioner John Pecman that Canada's competition policy in general has a more favourable orientation towards monopolies than other jurisdictions.⁴ This is a dynamic that is manifested in a number of industries, including transportation and telecommunications. In contrast, jurisdictions such as the EU and Australia have taken a much more aggressive stance against market concentration. In Cybera's view, current standards of practice in Canadian competition policy are inadequate to meet the challenges of the platform economy.

As such, it is clear that the enforcement tools within a number of regulators, including the Competition Bureau, need to be sharpened. While Cybera commends the Competition Bureau for recently creating the position of Chief Digital Enforcement Officer, we emphasize that more needs to be done. Cybera recommends that the Competition Bureau be given increased powers to proactively study market forces and to independently set regulations. This would put Canada's regulation — with respect to competition policy — more in line with other jurisdictions including the EU, Australia and the US.

Conclusion

Cybera thanks the Competition Bureau for the opportunity to provide comments on the issue of concentration in core digital markets.

In this submission, Cybera proposed the following recommendations;

1. **Adopt an Appropriate Framework:** Focus on a consumer welfare approach to competition issues in core digital markets.
2. **Data Portability:** Support the right of consumers to safely transfer their data between digital platforms.
3. **Anonymization:** Support the use of anonymized data in the digital marketplace.
4. **Data Trusts:** Support data trusts as a structure for data governance.
5. **Algorithmic Transparency:** Follow the example of the GDPR in protecting the right of individuals to know how their data is being used.
6. **Enforcement:** Give the Competition Bureau increased powers to proactively address the issue of concentration in core digital markets.

⁴ <https://thetyee.ca/News/2019/03/19/Monopoly-Friendly-Canada-Competition-Policy/>

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