THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

November 28, 2017

Via email: vicky.eatrides@canada.ca

Vicky Eatrides
Deputy Commissioner
Competition Promotion Branch
Competition Bureau
50 Victoria Street
Gatineau, QC K1A 0C9

Dear Ms. Eatrides:

Re: Big Data's Implications for Competition Policy in Canada

The Competition Law Section of the Canadian Bar Association (CBA Section) welcomes the opportunity to comment on the draft discussion paper *Big data and Innovation: Implications for Competition Policy in Canada* issued by the Competition Bureau on September 18, 2017.

The CBA Section supports the Bureau's continuing engagement with stakeholders about the potential impact of new technologies on competition. In particular, we acknowledge the discussion paper's balanced approach and recognition of the importance of avoiding both under and over-enforcement when assessing big data's potential impact on competition.

1. Big Data, Mergers and Monopolistic Practices

a. Overview

We support the Bureau's statements regarding the need to preserve incentives to innovate and resist intervention to regulate outcomes or remedy market power obtained through legitimate means. Similarly, we agree that simply acquiring valuable data through competition on the merits is not, on its own, subject to scrutiny under the *Competition Act* – even if it results in a company obtaining market power. We also agree with the overarching premise that it is neither necessary nor appropriate to apply different rules to big data simply because it involves data, as opposed to a physical product. Indeed, many if not all of the competition considerations relevant to data are not new and do not require a departure from well-established competition principles.

b. Market Definition

The CBA Section supports the Bureau's general intent to use its standard tools to define markets and identify market power. This approach permits companies to continue to rely on the Bureau's predictable analytical framework.

With respect to market definition in cases involving big data, we also note that such analysis may need to take into account industry participants in a neighbouring market that have the same (or similar) data sets and are therefore poised to compete through entry or in some other way.

With regard to the application of the hypothetical monopolist test to multi-sided markets (where a price is charged or a service is provided to more than one set of customers that interact), it would be helpful if the Bureau could add clarity – for example under what circumstances it will define a relevant market encompassing all sides of the platform or when it might be sufficient to do so with respect to a single set of customers. We note that the academic literature on multi-sided platforms and antitrust is evolving as is the jurisprudence on multi-sided markets.

In the concluding paragraph of the market definition discussion, the discussion paper states "for certain cases involving big data or platforms in the digital economy it may be appropriate to rely on alternative methods to assess market definition, or to forgo market definition as an initial step and focus on direct evidence of competitive effects". We are of the view that in most circumstances, market definition is an important step and can act as a safeguard to prevent over-enforcement. However, to the extent that the Bureau believes that departure from this well accepted principle could be necessary, guidance from the Bureau would be helpful on when it might be appropriate to use an alternative method or forgo market definition, and what types of alternate methods it believes would be appropriate to evaluate market power.

c. Market Power

The discussion paper discusses the potential for data to be a critical input and that both restricted access to data or high data-related switching costs may create barriers to entry or expansion. However, it would also be useful to understand which factors might lead the Bureau to conclude that access or switching costs do not create barriers to entry or expansion. For example, we would expect that evidence of consumers switching platforms or adding/sampling from multiple platforms (multi-homing) would generally be viewed as indicating very low to zero switching costs in an online environment.

The discussion paper also raises the potential for data to "represent a barrier because of network effects" but does not provide any real discussion or examples where this could arise. Again, examples of when data could give rise to network effects that would be considered a potential barrier to entry or expansion in digital markets would be useful. Similarly, it would be useful to give examples where network effects would not present a barrier to entry or expansion. This is especially so given the variety of real world examples in the digital area of entry in the face of extensive incumbent networks.

The discussion on market power could also benefit from reference to the economics literature and practical examples. In addition, it would be helpful to discuss the analysis the Bureau would consider to determine whether the dominant firm's superiority results from network effects or scale, as opposed to simply having a better product.

d. Assessment of Purpose

It would be helpful to expand the discussion of the criteria or screens the Bureau believes are useful to evaluate a business justification and how it will approach this issue. For example, although the TREB case contains an extensive discussion of business justification (as do other cases), the discussion paper refers only to the "no economic sense" test. The discussion paper would benefit from a discussion of other possible approaches. Further, the discussion paper simply references the "no economic sense" test, and then indicates that the Bureau "may use" it with the caveat that this "may be challenging." Given the potential significance of this issue, further discussion and additional direction on how the test would be applied would be helpful.

The discussion paper rightly acknowledges that "antitrust does not usually impose on firms an obligation to share data that they have collected and developed [because it may] chill innovation." The discussion paper should clearly indicate that a requirement to supply competitors with data is an extraordinary and highly unusual remedy in any case, let alone a case involving data where additional complexities arise (e.g., privacy, information sharing and cost recovery to name a few).

The discussion of intellectual property is quite limited and would benefit from a more in-depth analysis. Big data is often collected and processed using proprietary technology and the dividing line between mere factual information and IP is often unclear. In our view, the suggestion that IP "may be a relevant consideration" in big data cases underestimates the likely significance of IP. Moreover, the reference to the narrow statutory definition of IP in subsection 79(5) of the Act does not effectively address the broader question of how the Bureau will view other proprietary information such as trade secrets or how it will balance an assertion of ownership over data on the one hand with an assertion of a need for access to it on the other.

e. Assessing Competitive Effects

We note the emphasis on the potential prevention of competition issues that the Bureau believes can arise in big data cases. Given the prospective nature of effects analyses in big data matters, it would be useful to discuss the cautions raised in the *Tervita* decision on the reliability of these assessments. These cautions are especially relevant and suggest a need for restraint in rapidly evolving digital markets where predictability is inherently difficult, innovation is constant and intervention has a high potential for stifling innovation and distorting market outcomes.

With respect to the potential for big data to facilitate coordinated effects, we believe that the ability to automate the monitoring of real-time pricing is just as likely to promote competition, as it to facilitate coordination. In this regard, it is helpful that the discussion paper acknowledges the uncertain impact of price monitoring technology on the potential for coordinated anti-competitive effects.

While the CBA Section appreciates that measuring non-price effects and assessing qualitative evidence poses challenges, it would be helpful to clarify the Bureau's proposed approach in this area as much as possible.

Further, we have some concerns on the treatment of "privacy" as a non-price effect in competition analysis. Taking privacy dimensions into account would risk importing "public interest" considerations into competition analysis. To the extent that privacy is to be treated as a parameter of competition, there would need to be very clear evidence that consumers make purchasing decisions (or decisions to use) based on privacy considerations. In practice, we expect such a scenario would be quite rare. In addition, any negative impact on privacy (if assumed to be a legitimate non-price effect) would likely need to be weighed against any product or service improvements arising from greater data about users.

f. Remedies

The discussion of remedies in big data cases closely mirrors the Bureau's general preference for structural over behavioural remedies. We reiterate our concerns about addressing competition issues through mandated access to data or through divestitures. This is particularly the case given the related issues that arise in cases involving data including the treatment of intellectual property, third party consents and the potential to chill incentives to invest and innovate. Again, it would be helpful to reiterate in the remedies discussion that mandated access to data would be limited to exceptional cases.

2. Big Data and Cartels

In the discussion of the role of big data and cartels, the Bureau helpfully summarizes its perspective on the impact of big data on hard-core cartel behaviour, conscious parallelism and facilitating practices. The CBA Section supports the Bureau's general position that, while in certain cases big data and associated technologies (such as algorithms) may introduce enhanced transparency or ability to monitor competitor pricing, there is no need to change the existing legal framework.

Much has been made by certain commentators on the need for additional regulation and changes to legislation to address concepts such as conscious parallelism. We commend the Bureau for confirming that conscious parallelism is not within the purview of the cartel provisions of the Act. Further, we agree with the Bureau's observation that any attempt to change the well accepted approach to conscious parallelism would "likely chill innovative, procompetitive uses of big data".

As the Bureau is aware, the distinctions between illegal agreements, conscious parallelism and facilitating practices are notoriously difficult to navigate. For this reason, additional discussion as to on how and when the Bureau may view conduct involving big data as a facilitating practice and how the Bureau would analyse such conduct would be helpful. Further, the discussion paper refers to the potential application of section 90.1 of the Act to facilitating practices. However, if facilitating practices fall short of an agreement or understanding between competitors (the possibility of which is acknowledged in the discussion paper), it is not clear how this provision could apply (given that section 90.1 requires an agreement or arrangement between competitors).

3. Big Data and Deceptive Marketing Practices

The discussion paper confirms that protecting consumers from deceptive marketing practices in the digital economy remains a Bureau enforcement priority. While we understand the Bureau's position, it is not clear that the misleading representation provisions can or should be used to address certain types of conduct described in the discussion paper.

For instance, the discussion paper notes that deceptive marketing concerns may arise in cases where data collection is not noticeable or adequately disclosed to consumers. However, given that the *Personal Information Protection and Electronic Documents Act* (PIPEDA) addresses collection of personal information without knowledge or consent, our view is that these concerns are likely better addressed under the existing privacy law framework.

4. Summary

The CBA Section supports the Bureau's general approach that the potential competitive effects in cases involving big data can, in most cases, be assessed using traditional analytical tools and addressed using traditional remedies.

That being said, the discussion paper raises several areas where the Bureau has identified possible challenges when applying traditional methods to cases involving big data. While we recognize that the purpose of the discussion paper is to engage with stakeholders and is not intended to be a guidance document, additional discussion of certain challenges would give useful direction to all stakeholders without impairing the enforcement approach the Bureau may choose in a particular case.

Importantly, the discussion paper acknowledges the need to take a balanced approach in big data cases to avoid the potentially negative consequences of both under and over-enforcement. We acknowledge the Bureau's role as an advocate for industry-specific regulation that is minimally intrusive for the competitive process, or in other words, that minimizes any negative or unintended effects of current or new restrictions on competition. Big data is another area where the Bureau may have reason to remind other regulators (whose jurisdiction extends to this matter) that regulation can have unintended consequences that are broader than the legitimate public policy objectives the regulation is intended to address.

We commend the Bureau for engaging in meaningful public consultations prior to finalizing any policy documents involving big data. We look forward to an ongoing dialogue on the implications of big data for Canadian competition policy.

Yours very truly,

(original letter signed by Marc-André O'Rourke for Anita Banicevic)

Anita Banicevic
Chair, National Competition Law Section