

# Big data and innovation: Implications for competition policy in Canada

## Submission to Competition Promotion Branch, Competition Bureau

Prepared by the Canadian Bankers Association

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## **Introduction**

The Canadian Bankers Association welcomes the opportunity to provide comments on the Competition Bureau's White Paper on big data. The CBA is the voice of more than 60 domestic and foreign banks that help drive Canada's economic growth and prosperity. The CBA advocates for public policies that contribute to a sound, thriving banking system to ensure Canadians can succeed in satisfying their financial goals while obtaining banking products and services through existing and evolving channels.

Banks are strong proponents of a competitive and innovative financial services sector, and are consistently using technology to better serve their customers. Canadian banks have always been very active in the development of technologically enabled financial innovation, including through the responsible use of data. A key driver of innovation is the ability to analyze and utilize data to better understand the needs of consumers in order to provide customers with more relevant and improved products and services.

Given the competitive benefits (including innovation, efficiencies and enhanced value for consumers) that can be gained by harnessing data, we agree with the Bureau's position that it is important to strike the right balance in matters of competition law enforcement. The CBA believes that the Bureau's current analytical framework – which provides for intervention to prevent or stop an abuse of dominance, to punish a cartel or a deceptive market practice – needs little adjustment in cases involving big data.

This letter sets out additional factors that should be considered by the Competition Bureau in its enforcement decision-making in cases involving big data. These include the need for careful consideration of the issues around access to data and the need to consider the work currently being done by other Canadian regulators.

## **Access to Data - an Exceptional Competition Law Remedy**

The White Paper recognizes that “[b]eyond requiring a firm to cease a particular course of conduct, an appropriate remedy may, *in exceptional cases*, require that data be made available to competitors for use as an input, for example through the compulsory licensing of intellectual property, which is not new to antitrust”. The White Paper highlights some of the complications related to addressing competition issues through mandated access to data, including the treatment of intellectual property rights and the structure of the relationship with data providers and specifically recognizes that mandating licensing of data can potentially chill incentives to innovate.

In the context of the banking sector, the complications about remedial orders mandating access to data are further complicated by the legal framework under which banks have collected data and, given the nature of the data collected, the systemic risk to the market from potential misuse of data. Banks and other financial institutions are trusted custodians of their customers' information based in

part on how they structure, manage, safeguard and ensure the accuracy of the data they hold. Furthermore, they collect sensitive personal and confidential information under a variety of regulatory and contractual constructs that govern their ability to use and disclose data. Canadian banks have invested significant resources to creating well-established information security and data warehouses. Therefore, it is imperative that in the narrow circumstances that any potential remedy or outcome is used that could result in opening up third party access to customer data considers and fully mitigates risks arising in the following contexts:

- Intellectual property rights
  - ensuring rights over how data is structured, held or characterized are protected;
- Customer identity and request verification
- Informed consent and privacy obligations
  - ensuring customers fully comprehend the scope and use parameters around data sharing, including the ability to withdraw consent, and the risks associated with different types of data;
  - ensuring consumers fully understand who has custody of their data and are able to request access to their data; and
  - assessing implications of increased complexity of data access and sharing arrangements for adherence to applicable privacy laws;
- Security of customer data and protection against fraud
  - ensuring sufficient levels of security safeguards across market players that currently have varying levels of controls;
  - ensuring that third parties given access to data are accountable and subject to reviews and audits once data is accessible;
  - assessing the impact on fraud and cybercrime risk, including possible account takeover by third parties and identity theft, with respect to systems of both banks and other market players;
  - ensuring secure transfer and storage of data by all market players; and
  - ensuring prevention of data misuse once it has been shared with a third party;
- Propagation of malware and other cyber risks leading to wider systemic risk
- Risk allocation
  - Allocation of liability among market players in situations of data breach, fraud or misuse.

We believe it is imperative that the implications and potential risks that third party access to financial data may pose for consumers and the functioning of the market be comprehensively assessed before any type of access remedy is sought or ordered.

### **The Collection and Use of Data**

We agree that informed consumers are necessary for a well-functioning economy and to foster the trust needed to drive innovation in the digital age. We note that there are many technology and social

media platforms that empower consumers with options to control how their personal information is collected, used and disclosed. We also agree that, while big data may be a new context in relation to deceptive business practices, the rules relating to misleading advertising apply the same way as they always would (e.g. to validate performance claims, ordinary selling price claims etc.). It is clear that the Bureau is aligned with privacy law priorities in emphasizing that a paramount issue is adequate disclosure to consumers about how their data will be used and maintained. That said, and while we appreciate that the paper is focussed on competition issues, we submit that it is important to more explicitly consider the regulatory overlay that impacts the competition analysis. When the *Competition Act* is being applied, one also needs to take into account other frameworks governing data, such as privacy legislation, as well as the contractual provisions in bilateral agreements between financial institutions and customers regarding data collection, disclosure and use.

For example, in Section V.A. dealing with collection of data, the White Paper recognizes issues related to the need to provide consumers with the information they require to make informed choices, the collection or use of data beyond what customers would reasonably expect and various other privacy matters. The *Personal Information Protection and Electronic Documents Act* (PIPEDA) already provides a framework for the collection, use and disclosure of information. Knowledge and consent are normally required for the collection, use or disclosure of personal information and section 6.1 of PIPEDA provides that consent is only valid where it is reasonable to expect that an individual would understand the nature, purpose and consequences of the collection, use or disclosure of the personal information. Furthermore, subsection 5(3) of PIPEDA restricts collection, use and disclosure of personal information to purposes that a reasonable person would consider appropriate in the circumstances. The Office of the Privacy Commissioner of Canada (OPC) is responsible for overseeing compliance with PIPEDA and has the authority to conduct audits, investigate complaints, issue recommendations and pursue legal action before Federal Courts where matters remain unresolved, among other powers. Thus, many of the concerns addressed in this section of the White Paper are covered under PIPEDA and the current mandate and work of the OPC. This includes the flashlight app example mentioned in the White Paper – where the misleading disclosures would amount to a failure to obtain consent as required under PIPEDA.

Recently, the OPC released three documents that address several of the privacy and consent concerns identified in the data collection section of the White Paper. The OPC's Report on Consent addresses challenges to the consent model in the face of technological innovations such as big data. The OPC's draft guidance on inappropriate data practices – interpretation and application of subsection 5(3), addresses relevant factors for evaluating whether privacy practices are reasonable, in accordance with subsection 5(3). Finally, the OPC's draft guidelines on obtaining meaningful online consent provide guidance to help organizations obtain the individual's informed consent in online and mobile contexts. Although these guidance documents are currently in the consultation phase of their development and the CBA will be providing comments on these documents, we are of the view that many of the White Paper concerns related to informed consumer consent and reasonable privacy practices are being reviewed in a comprehensive way by the OPC, in accordance with the OPC's mandate and mission.

Taking the above points together, we would appreciate further consideration and commentary by the Bureau on the areas where competition law and privacy law intersect. For example, one area that is not directly addressed in the White Paper is that while, as the Bureau has noted, access and ownership of data can in theory confer competitive advantages, restrictions arising out of privacy legislation and customer agreements on how that data can actually be used may materially constrain that advantage.

## **Conclusion**

In closing, we reiterate our support for a competitive and innovative financial services sector in which the use of data plays a part. The use of technology to harness data to improve products and services ultimately benefits the Canadian consumer. We support examining the issue of big data holistically, both from a competition lens as well as through the lens of other policy imperatives. This will ensure that innovation and competition is facilitated in the marketplace while mitigating risks in order to protect consumers and ensure a stable and secure financial sector.

We appreciate the opportunity provide comments on the White Paper. Please contact me if you have any questions.