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AMERICAN BAR ASSOCIATION

November 16, 2017

**Via Fax: 819-934-9293**

Competition Promotion Branch

Competition Bureau

50 Victoria Street

Gatineau, Quebec

K1A 0C9

**Re: Comments regarding the Canadian Competition Bureau's  
Big Data and Innovation Draft Discussion Paper**

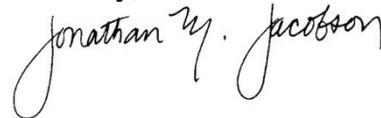
Dear Sir/Madam:

On behalf of the American Bar Association Sections of Antitrust Law and International Law, we are pleased to submit the attached comments regarding the Canadian Competition Bureau's Big Data and Innovation Draft Discussion Paper.

Please note that these views are being presented only on behalf of the Sections of Antitrust Law and International Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the policy of the American Bar Association.

If you have any comments or questions after reviewing this report, we would be happy to provide further comments.

Sincerely,



Jonathan M. Jacobson  
Chair, Section of Antitrust Law



Steven M. Richman  
Chair, Section of International Law

Attachment

**COMMENTS OF THE AMERICAN BAR ASSOCIATION’S SECTIONS  
OF ANTITRUST LAW AND INTERNATIONAL LAW REGARDING THE  
CANADIAN COMPETITION BUREAU’S BIG DATA AND INNOVATION  
DRAFT DISCUSSION PAPER**

*The views stated in these Comments are presented on behalf of the Sections of Antitrust Law and International Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore may not be construed as representing the policy of the American Bar Association.*

November 16, 2017

The American Bar Association Sections of Antitrust Law and International Law (“Sections”) are pleased to offer these Comments on the Competition Bureau’s (“Bureau”) draft discussion paper entitled “Big Data and Innovation: Implications for Competition Policy in Canada” (“Paper”).

The Sections commend the Bureau for undertaking this timely analysis. Rapid and significant improvements and innovations in all facets of information technology (gathering, storing, transmitting, analyzing and using information) have been associated with the emergence and growth of new firms, new products and services, and new business methods in a variety of economic sectors around the world. As a result, within the antitrust community there is active consideration of whether and how these developments, including the emergence of “big data analytics,” may have changed or might in the future change the dynamics of competition in specific markets, and whether these changes give rise to competition issues that are not already addressed (or capable of being addressed) under competition laws in Canada, the United States, and elsewhere. The Sections offer these Comments to further assist the Bureau in developing its analysis of such issues.

When determining enforcement priorities relating to “big data” (to use a short-hand but vague term for ease of reference to these complex phenomena) and innovation, the Sections believe that it is important to consider the underlying policy objectives that competition laws were designed to achieve. Such laws are constructed on the bedrock principle that an increase in market power not earned through competition on the merits may harm consumers and, more broadly, the economy. The cost of market power can be high, as measured by the familiar deadweight loss triangle, which represents the value of production sacrificed when one or more firms with market power reduce output, raise prices, limit product quality, or take other similar steps that truncate efficient and mutually beneficial transactions that would otherwise occur under more competitive conditions. In asking how big data may impact competition, the Sections respectfully submit that the Bureau should consider how competition law principles can be enforced most effectively to ensure that the value produced from society’s scarce resources is not restricted by anticompetitive conduct, and to increase consumer welfare.

## Competitor Agreements

Antitrust / competition law enforcement in the United States over most of the last 127 years and globally over the last quarter-century has focused heavily on collusion that materially injures the competitive process without offsetting efficiencies. Certain collusive conduct in the United States and in Canada is considered *per se* illegal, meaning that it does not require proof of market power or anticompetitive effects.<sup>1</sup> A *per se* rule is properly grounded on judicious consideration of both substantive competitive analysis and decision theory: Use of a *per se* rule may prohibit beneficial conduct in some cases, but if the particular type of conduct nearly always tends to increase market power without offsetting efficiency gains, the net effect of a *per se* rule will still be positive.

Cartel conduct that is subject to *per se* condemnation is the subject of vigorous criminal enforcement in the United States and Canada. The main evidentiary challenge to establishing a *per se* violation is proof of an “agreement to restrain trade” in the United States, which is roughly equivalent to the requirement to prove an “agreement or arrangement” under Canadian law. Although an agreement may be inferred, the requirement to prove the existence of an agreement, either through direct or circumstantial evidence, is essential and is appropriate for conduct that is subject to criminal prosecution.

The Bureau concludes – correctly, in the Sections’ opinion – that “big data does not alter the core elements of a cartel case . . . the offence is still rooted in the *agreement* itself.”<sup>2</sup> The existing competition laws and the judicial precedents interpreting them, in the Sections’ view, can generally be applied to the use of big data analytics or algorithms to fix, manipulate or control market prices. For example, Professors Maurice Stucke and Ariel Ezrachi discuss two such scenarios in a recent paper exploring the use of new technologies in online markets.<sup>3</sup> In the first scenario, firms agree to collude and design a pricing algorithm to effectuate the terms of their agreement. As the United States Department of Justice recently demonstrated in the online poster case, U.S. antitrust laws may be used to prosecute this type of classic collusive agreement to restrain trade.<sup>4</sup> In the second scenario, a single firm creates a common pricing algorithm, which is then adopted by the consent of the market participants. This is a variation of a “hub-and-spoke” type of conspiracy, which also is within the ambit of current U.S. antitrust law prohibitions and precedents.<sup>5</sup>

Stucke and Ezrachi discuss two additional scenarios that extend beyond the traditional reach of competition laws. In the first scenario, multiple firms unilaterally adopt pricing algorithms that act as “predictable agents,” continually monitoring and adjusting to market

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<sup>1</sup> See Competition Act, RSC 1985, c. C-34, ss. 45-47; Sherman Act, § 1, 15 U.S.C. § 1.

<sup>2</sup> Paper at 29.

<sup>3</sup> “How Pricing Bots Could Form Cartels and Make Things More Expensive,” Maurice Stucke and Ariel Ezrachi, Harvard Business Review, October 27, 2016, available at <https://hbr.org/2016/10/how-pricing-bots-could-form-cartels-and-make-things-more-expensive> (“Stucke and Ezrachi”).

<sup>4</sup> U.S. Department of Justice, “Former E-Commerce Executive Charged with Price fixing in the Antitrust Division’s First Online Marketplace Prosecution,” Press Release, April 6, 2015, available at <https://www.justice.gov/opa/pr/former-e-commerce-executive-charged-price-fixing-antitrust-divisions-first-online-marketplace>.

<sup>5</sup> See e.g., cases arguably adopting this theory include *Interstate Circuit v. United States*, 306 U.S. 208 (1939); *United States v. Masonite Corp.*, 316 U.S. 265 (1942); *Klor’s, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960); *United States v. Gen. Motors Corp.*, 384 U.S. 127 (1966). Although the first four of these cases have been questioned in some respects based on later cases, the last (General Motors) has received recent endorsement on this point. See also *VI Phillip E. Areeda & Herbert Hovenkamp*, Antitrust Law, 11 ¶ 1402c (3d ed. 2010).

changes, which may result in oligopolistic pricing outcomes. In the second, aided by artificial intelligence, algorithms effectively engage in autonomous decision-making, “expanding tacit collusion beyond price, beyond oligopolistic markets, and beyond easy detection.”<sup>6</sup> In both scenarios, the unilateral decisions to adopt such pricing strategies would appear to be beyond the reach of current laws applicable to interactions between competitors in the United States and Canada. Big data and algorithmic pricing may therefore raise important competition policy issues that the Canadian Parliament may wish to address in the future.

For many years it has been clear that oligopoly conduct, including consciously parallel pricing, does not attract U.S. antitrust liability absent proof (direct or inferential) of an actual agreement.<sup>7</sup> For the last 25 years, the United States Supreme Court’s *Brooke Group* opinion has provided an additional basis for requiring proof of express agreement, rather than mere non-conspiratorial competitive interactions, in establishing liability.<sup>8</sup> The Sections understand that Canadian competition laws also do not apply to consciously parallel conduct in the absence of an agreement or arrangement between competitors.<sup>9</sup> The Sections commend the Bureau for raising this issue in the Paper and for clarifying that current enforcement policies will continue to reflect Canada’s historical approach to conscious parallelism under its current competition laws.<sup>10</sup>

As Stucke and Ezrachi have noted, however, it is possible that big data and algorithmic pricing may combine to allow conscious parallelism to function more frequently and effectively in various markets, which may generate deadweight losses.<sup>11</sup> On the other hand, sophisticated pricing algorithms, supported by large datasets, may reduce market transparency through the use of individualized pricing, individualized promotions, and real-time or near-real-time pricing, reducing the risk of conscious parallelism. The Sections recommend that the Bureau continue to evaluate these developments closely.

The Sections observe that the Paper also discusses the possibility that big data may create additional scope for competitors to engage in various types of “facilitating practices.”<sup>12</sup> The Sections encourage the Bureau to provide more clarity and detail on what, if any, enforcement policies it will apply to such practices in the context of big data and online market activity.

## Unilateral Conduct

The Sections agree with the recognition in the Paper that:

The ability to improve existing products and services by utilizing large amounts of historical or real-time data has the potential to significantly increase value propositions for consumers. Thus, firms are increasingly harnessing data in ways that drive innovation and quality improvements across

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<sup>6</sup> Stucke and Ezrachi, *supra* n. 3.

<sup>7</sup> *Theatre Enterprises v. Paramount Distributing*, 346 U.S. 537 (1954); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

<sup>8</sup> *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

<sup>9</sup> *Competition Act*, ss. 45 and 90.1; *Atlantic Sugar Refineries Co. Ltd. v. Attorney General of Canada*, [1980] 2 SCR 644.

<sup>10</sup> Paper at part IV.B (“Big data and conscious parallelism”).

<sup>11</sup> Stucke and Ezrachi, *supra* n. 3.

<sup>12</sup> Paper at part IV.C (“Big data and facilitating practices”).

a range of industries. As a result, the competitive performance of firms, particularly in the digital economy, is increasingly driven by the ability to collect, analyze and use data.<sup>13</sup>

The Sections also commend the Bureau for recognizing that the competitive process provides incentives to be early-movers and to compile large amounts of data, and that in some markets this can lead to a small number of firms possessing a degree of market power gained by innovation and competition on the merits, which can provide value to consumers at little or no monetary cost and should be encouraged and not impeded in market-based economies.<sup>14</sup>

These benefits, however, can be offset in some situations by the potential for firms to use big data to raise entry barriers and foreclose competition.<sup>15</sup> The Paper notes that “data are increasingly becoming a critical input in certain markets [and] access to and control over critical data that serve as an essential input may confer market power.”<sup>16</sup> While some datasets may be proprietary to a single firm or a small number of firms, the Sections believe there should not be a presumption that big data leads to market power. As the Paper observes, data are generally replicable: one firm’s collection of data generally does not preclude another’s collection of identical or substitutable data.<sup>17</sup> In many countries, data generally cannot be protected under patent or copyright laws and may be readily replicated or duplicated by other companies. In addition, care should be taken to consider whether data in any given situation would constitute a properly-defined market, or whether, instead, data would be only one of many inputs that affect the quality of a product or service. Since firms often generate or collect data internally and then also use it internally, rather than selling or trading the data, it can be difficult to define a market involving data or to identify how such internal use would cause anticompetitive harm. Consumer data may be particularly difficult for any single company to monopolize because for many products and services, consumers “multi-home” (use more than one provider). The Sections expect that cases where the mere ownership of data will create a genuine competition concern are likely to be rare.

Network effects are also a potentially important consideration in data-intensive markets. Network effects can deliver significant value to consumers and to society by improving quality and efficiency. On the other hand, as the Paper observes, network effects may in certain circumstances enable platforms to foreclose competition in a manner that ultimately harms consumers.<sup>18</sup> The Paper notes that in some situations, consumers receive services free of charge, but in exchange for their personal data, and suggests this may be indicative of market power. The collection and use of data as part of offering a zero-priced product, however, is governed or influenced, at least in part, by consumer protection laws. In a jurisdiction with consumer protection safeguards that prevent involuntary collection and use of consumer data, it may be inappropriate to conclude that the company that possesses such data thereby holds a dominant position or could exercise market power.

Treating big data as a barrier to entry could chill the incentive to acquire proprietary

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<sup>13</sup> Paper at 9.

<sup>14</sup> Paper at 9.

<sup>15</sup> Paper at parts III.C.1 (“Incentives to foreclose with big data”), III.D.1 (“Vertical effects”), and III.D.2 (“Prevention of competition”).

<sup>16</sup> Paper at 15.

<sup>17</sup> Paper at 26.

<sup>18</sup> Paper at 16.

information that makes competitors more efficient and consumers better served. Some competitive assets that may be asserted as barriers to entry, like keeping secret recipes from rivals and knowing your customers better than your competitors do, are a reflection of competition and may create incentives for firms to innovate. The Sections respectfully submit that the possession of data advantages could be indicative of dominance only if, at the very least, the data were necessary to compete and served as an effective barrier to entry because other companies could not develop or access comparable data resources in a timely manner. The Sections encourage the Bureau to provide more specific guidance as to how it will determine whether network effects related to big data, or practices related to its collection and use, have reached a critical threshold in a market power analysis.

The Sections also recommend that the Bureau elaborate on the standards by which anticompetitive foreclosure will be assessed. In this regard, the Sections note the reference to the “no economic sense” test from the *Commissioner of Competition v. Toronto Real Estate Board*<sup>19</sup> decision as a possible method for evaluating whether a party had the subjective intent to foreclose competition using big data.<sup>20</sup> It would be helpful if the Bureau could elaborate on how this test might apply in a situation where the relevant data were developed by a single firm rather than through an association consisting of competitors.

The Paper suggests that in “exceptional cases” where data may be considered to be an “essential facility,” a firm that abuses data-related market power may be required to grant competitors access to its data as a remedy.<sup>21</sup> The Sections note that competition law enforcement institutions are well-advised to adopt a degree of caution in the face of claims that any particular resource or asset held by a firm is an “essential input,” or that even if essential, a mandatory sharing or access regime is justified. The U.S. Supreme Court has recognized the dangers of mandatory sharing – including enhanced risks of cartelization – which may render such a “cure” worse than any “disease” associated with an individual firm’s control of a market through information it has obtained in the course of its own operations.<sup>22</sup>

Given that compulsory access remedies are potentially complex and controversial, it would be helpful if the Bureau could expand on what could constitute an exceptional case where this approach would be considered, and whether there are particular factors that make a compulsory access remedy more or less likely. For example, would such a remedy only be available if a firm had previously granted access? Would firms that have no history of third-party access have to grant access going forward as a result of their monopolistic conduct? Would a firm only have to grant access to competitors in a downstream market? Would the firm potentially have to license to parties that wish to use the data for new purposes unrelated to the monopolistic conduct at issue? What other factors may be taken into account in assessing whether a dataset is an essential facility? Practical guidance on such issues would be very valuable to companies that possess big data, as well as to other participants in their markets.

The Paper also notes that non-price elements of competition, such as product quality, service, and innovation, may be important and that privacy protections may be an additional non-

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<sup>19</sup> 2016 Comp. Trip. 7.

<sup>20</sup> Paper at 16.

<sup>21</sup> Paper at 28.

<sup>22</sup> *Verizon Commcn’s v. Trinko*, 540 U.S. 398 (2004).

price dimension of competition in a big data environment.<sup>23</sup> However, all are challenging to measure. The Sections therefore recommend that the Bureau provide additional guidance as to how it would evaluate a reduction in one or more non-price dimensions of competition in the context of the “substantial lessening or prevention of competition” test that is applicable to various reviewable practices, including abuse of dominant position, under the Competition Act.<sup>24</sup> It would be particularly useful to discuss the considerations that may apply in evaluating the levels of privacy protections.

## **Mergers**

The Sections believe that clear standards for evaluating mergers are very important to the business and legal communities. Some tests and standards that are typically used, however, may be difficult to apply in data-driven markets. For example, the hypothetical monopolist test cannot be applied where the price is zero because a “small but significant and non-transitory increase in price” is meaningless in such a setting.<sup>25</sup> The Paper raises the possibility that such a test could be adapted to consider small but significant changes in quantity, but does not explain how this could be operationalized. As with unilateral effects, the Sections encourage the Bureau to provide additional guidance on how it will evaluate non-price elements of competition in merger reviews.

## **Deceptive Marketing Practices**

The Sections commend the Bureau for discussing how its current enforcement frameworks in the consumer protection context can be applied to cases involving big data.<sup>26</sup> Broadly speaking, the deceptive marketing provisions of the Competition Act cover false or misleading representations made to the public to promote any business interests, directly or indirectly.<sup>27</sup> The Paper helpfully outlines specific criminal offences and reviewable practices where big data may be most likely to raise issues. For example, the Paper indicates that the Bureau may review false or misleading representations involving the purposes for which the data are collected, and the types of data collected, as well as how the data will be used, maintained, and disposed of.<sup>28</sup> The Sections agree with the Bureau that one of the key questions in all these areas is whether consumers are provided with adequate disclosure of information to make an informed decision.

The Sections encourage the Bureau to elaborate on the discussion in the Paper regarding specific measures that may be taken to address consumer protection challenges involving big data. For example, the Sections note that big data is becoming a primary method to assess industry trends and buying behavior. Consumers are leaving digital footprints when they use social media, conduct a web search, or buy or sell something online (sometimes with the use of algorithms). Consumer protection issues include the nature and extent of prior disclosures businesses should make to consumers regarding the data they will be collecting and how that data will be analyzed and used. Finally, the Sections note that the Paper would benefit from a discussion of the complex

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<sup>23</sup> Paper at part III.D.4 (“Dynamic competition and non-price effects”).

<sup>24</sup> Competition Act, ss. 78-79.

<sup>25</sup> Paper at 12.

<sup>26</sup> Paper at part V (“Big data and deceptive marketing practices”).

<sup>27</sup> Competition Act, ss. 52-55.1 and part VII.I.

<sup>28</sup> Paper at parts V.A (“Collection of data”) and V.B (“Use, maintenance and disposal of data”).

issues involving advertising directed towards children and the collection of data from children.

### **Concluding Observations**

The Paper generally concludes that the Bureau can utilize existing enforcement approaches to address issues arising from big data under existing provisions of the Competition Act, provided that the nature and effects of big data are appropriately analyzed in specific situations. In general the Sections agree with this approach. While the Sections recognize that the Paper is not addressing the potential further evolution of Canada's competition laws, they note that there is an emerging policy debate regarding the possibility that big data, algorithms, artificial intelligence, and other innovations may make it relevant to reconsider historic approaches to conscious parallelism and facilitating practices in data-driven and online markets.

The Sections hope these suggestions will be useful to the Bureau and would be pleased to offer any further assistance that may be helpful as Bureau finalizes its Paper.