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Centre for International  
Governance Innovation

Conference Report – Virtual Workshop, January 25, 2023

# Rethinking Canada's Competition Policy in a Digital Economy





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## About CIGI

The Centre for International Governance Innovation (CIGI) is an independent, non-partisan think tank whose peer-reviewed research and trusted analysis influence policy makers to innovate. Our global network of multidisciplinary researchers and strategic partnerships provide policy solutions for the digital era with one goal: to improve people's lives everywhere. Headquartered in Waterloo, Canada, CIGI has received support from the Government of Canada, the Government of Ontario and founder Jim Balsillie.

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## À propos du CIGI

Le Centre pour l'innovation dans la gouvernance internationale (CIGI) est un groupe de réflexion indépendant et non partisan dont les recherches évaluées par des pairs et les analyses fiables incitent les décideurs à innover. Grâce à son réseau mondial de chercheurs pluridisciplinaires et de partenariats stratégiques, le CIGI offre des solutions politiques adaptées à l'ère numérique dans le seul but d'améliorer la vie des gens du monde entier. Le CIGI, dont le siège se trouve à Waterloo, au Canada, bénéficie du soutien du gouvernement du Canada, du gouvernement de l'Ontario et de son fondateur, Jim Balsillie.

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## Introduction

On January 25, 2023, the Centre for International Governance Innovation (CIGI) hosted a virtual workshop with international and Canadian experts on the topic of potential directions for a revitalized competition policy in Canada and how that policy might address the competitive challenges present in the digital economy.

Building on CIGI's ongoing work on competition policy and platform and data governance (Nyabola, Owen and Tworek 2022), the participants aimed to explore the implications of digital data for markets and rethink the policy frameworks underlying those markets in light of the Government of Canada's ongoing consultation on the Competition Act. The discussion centred on two themes: first, the policy action that international peers have taken and what Canada might learn from these examples, and second, how regulatory coordination and coherence across interlocking frameworks (possibly in tension) might play a role in addressing present and future challenges in a digital economy.

This report shares key takeaways from the participants' discussion during the workshop, which was held under the CIGI Rule.<sup>1</sup> It does not purport to represent a consensus among the participants, nor to convey the views of any individual or organization; rather, its goal is to communicate the challenges that participants identified and the potential directions they proposed that competition policy, and other policy areas related to the digital economy, might take.

High-level messages emerging from the discussion are summarized in Box 1.

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## Canada's Opportunity amid a Global Competition Policy Movement

Although Canada is now making its first foray into potentially revitalizing its competition framework, it has been a laggard in the rapidly evolving global competition and antitrust policy space. While the federal government has opened the Competition Act to broader consultation, peer jurisdictions have concluded in-depth examinations of how *their* current laws fare in the digital economy and have already updated, or are in the process of updating, their frameworks to reflect the lessons of those examinations. But while Canada's conversation on competition in a digital economy may be underdeveloped relative to its peers', domestic policy makers benefit from the findings of international investigations and studies and can adapt them to the contours of the Canadian economy. Concern remains, however, that this process will lead to Canada simply catching up to international partners rather than springboarding from lessons learned to create its own made-in-Canada approach to the next generation of competition policy.

In the spirit of building on what peer countries have learned, the first half of the workshop centred on a survey of policy reviews and reforms related to competition policy and their application to the digital economy that was curated by Kean Birch and 'Damola Adediji (2023). In particular, the survey focused on the treatment of digital personal data and the unique challenges to competition policy posed by markets with digital personal data at their foundation. Themes emerging across the results of global reviews and three delineating categories of challenges to competition in the digital economy — structural, systemic and techno-economic — were brought forward and discussed. Common structural challenges included the economies of scope and scale enjoyed by digital economy firms, the multi-sided nature of major platforms, and the gatekeeper power conferred by the combination of the two characteristics. At the systemic level, a view of the digital economy as a series of ecosystems and of the potential returns for companies in creating enclaves or walled

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<sup>1</sup> See [www.cigionline.org/about/cigi-rule/](http://www.cigionline.org/about/cigi-rule/).

### Box 1: High-Level Messages Emerging from the Workshop

- Canada has been a laggard in the rapidly evolving global competition and antitrust policy space. While the federal government has opened the Competition Act to broader consultation, peer jurisdictions have concluded in-depth examinations of how their current laws fare in the digital economy and have already updated or are in the process of updating their frameworks to reflect the lessons of those examinations.
- However, international study and policy related to the digital economy offer Canada a suite of potential policy tools it can use in rethinking its approach to competition, ranging from establishing dedicated regulatory bodies to setting portability, interoperability and data-sharing requirements and mandating adherence to these standards.
- Operating outside of traditional competition policy, a public data utility could interoperate between government silos, and make the clean data held within those silos available to support domestic firms looking to scale up.
- Often, actors involved in competition policy are assumed to be those working at global or national scales. However, subnational actors, including municipalities, are increasingly acting to craft market frameworks that take seriously the role of data in determining market outcomes.
- While intellectual property (IP) rules are an important avenue by which firms can realize value and scale based on data-driven innovation, that role can serve to fence off market positions and limit competitive intensity.
- Analysis of data assets and their value should be incorporated into the system that notifies Canada's competition authority, Competition Bureau Canada, of mergers with the potential to harm competition.
- There are valuable lessons to be learned from the history of sectoral regulation in areas such as finance, telecommunications and transportation, and we should be aware of the through lines between those sectors and allegedly novel conduct in the digital economy.
- Canada's selective application of a public interest lens in competition matters involving transport, banking and telecommunications could be made more robust and be centred on a definition of the kind of competition we wish to see play out in our economy.
- The work to protect and promote competition in Canada could take a more federated approach, in line with the country's overall governing structure, to unlock the creativity of an approach involving the provinces and territories, as seen in other policy areas.
- Despite competition policy conversations continuing to focus on a conception of the data-driven economy, we may already be in a new phase in which competition policy plays only a residual role and other regulatory tools are needed, a phase in which governance of and policy on artificial intelligence (AI) could have a relatively larger role to play in shaping the competitive outcomes of this phase of the digital economy.

gardens to reduce competition were seen as key issues. Finally, discussion of techno-economic challenges focused on the consequences of design and conduct that increased switching costs, such as constrained interoperability and data portability.

Shifting to the solutions either considered or put in motion internationally in response

to challenges in each of the three categories, the participants suggested paths forward for Canadian policy makers to explore in the reform of Canada's competition policy:

- establishing specialized digital economy regulators, such as a dedicated digital economy unit;



- developing further understanding of digital markets, for example, through market studies;
- mandating portability, interoperability and data access;
- standardizing accounting and accountability for data assets;
- breaking open data silos and closed ecosystems; and
- enhancing cooperation between regulatory agencies.

Expanding the discussion beyond the traditional definition of competition policy and the solutions proposed by competition authorities and governments in their investigations of the digital economy, participants proposed the potential role of a public data utility in addressing some of the identified challenges. Unlike the big tech platforms at the heart of the digital economy, the public data utility would be conceived as an institution with a mandate to unlock the value of data for the public good instead of for solely private gain. Beginning with the data held by the government itself, the public data utility would make these holdings interoperable with one another, capturing the value of network effects and economies of scope and scale that to date have only served private platforms. By operating as a source of clean data intended for public use, the utility could help offset the first-mover advantage of data-driven products and services and support the start-up and scale-up of domestic firms. Firms making use of the data utility could create new data-driven business models to challenge the power of entrenched incumbents, creating a new avenue for increased competitive intensity. But beyond just fostering new competitors, the utility would have the broader purpose of answering the question of how to strategically manage data for the public good. Forays into this kind of institution are already in progress, with Ontario having taken the first steps to establish an Ontario Data Authority in 2021 and with proposals to make Statistics Canada the centre of a national data-sharing commons (Fay and Girard 2021).

Taking the theme of a usually global or national conversation down to the local level, participants raised the recent activities of municipalities in taking a more assertive approach to competition in markets based on a foundation of digital personal

data. In particular, New York City was given as an example of a jurisdiction that was moving to mandate data sharing between food delivery apps and the restaurants they serve, attempting to rebalance data asymmetries that could be stymying the competitive position of local businesses. Highlighting an evolving tension between competition and privacy goals, participants noted that the corporate resistance centred on the potential privacy implications of the data-sharing mandate. While the use of the argument in the New York case may have ultimately been self-serving, much as with discussion in Canada on open banking, it highlights how efforts to foster competition cannot help but touch multiple policy areas, some of which may work at cross-purposes.

Speaking to the topic of the lack of standardized accounting for the value of data, participants highlighted that while there may be no common approach to its valuation, data is clearly valued by the companies using it and that value informs acquisitive behaviour. Accordingly, analysis of data assets and their value should be incorporated into the system that notifies Canada's competition authority of mergers with the potential to harm competition. Recent developments in IP policy were then raised, to surface the linkages between IP policy and domestic and international competition and those linkages' potential to distort competitive outcomes. Although IP laws are an important avenue by which to realize the value of innovations and scale up competitive businesses, participants noted these laws' inherent tension with competition policy, as IP protections effectively create temporary monopolies on innovations. Participants raised a trend they perceived of IP protection increasingly being used as a method of foreclosing potential competitors and of conferring benefits on incumbents rather than on new entrants. This issue has a distinctly international angle as Canada recently signed trade deals that include extensions to maximum terms for both copyright and patents. Participants expressed that as Canada looks to competition policy to increase competitive intensity, its legislators should be keeping in mind the other domestic and international policy areas that shape competitive outcomes in our economy.

Challenging the frame of the discussion, participants raised the possibility that the reform of competition policy may be occurring too late, and that we may be attempting to solve

an already outdated set of issues while markets engage in another round of evolution focused on AI. On the assumption that many of the harms of restrained competition in the digital economy have already been incurred, participants noted that the focus of a reformed competition policy may be a solely remedial function, and that AI governance and policy could have a larger role to play in shaping the competitive outcomes of the next phase of the digital economy.

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## Building a Coherent Approach to Competition by Looking Past Its Bounds

The second half of the workshop discussion introduced the contrasting but complementary proposal that policy makers should be wary of the distinctions drawn between allegedly traditional and new economic models, and that past examples of sectoral regulation hold lessons for the future of competition policy in Canada. By assuming that the issues we see today are truly novel, we may overestimate the need for truly new solutions and ignore commonalities in other sectors of the economy.

Arguing for a more general approach to the behaviours and structures impeding competition in the digital economy, participants highlighted that existing regulatory approaches might be powerful inputs to reviving competition and dynamism. Canvassing transportation, finance, energy and telecommunications regulation, participants drew parallels between the challenges outlined in discussions of the digital economy and previous anti-monopoly regulatory battles. In particular, the importance of interoperability and data portability have hallmarks in the history of telecommunications regulation and may provide guidance on how that tool kit might be adapted to the current state. While they may seem unique at a superficial level, many of the challenges in the digital economy relate to the same issues of private control of critical bottlenecks at the commanding heights of technology in the

economy. Accordingly, principles such as open access and common carriage may once again have a role to play in addressing these concerns, with some necessary adaptations to respond to the nuances of today's technological realities.

With the goal of recognizing the multiple policy areas touching competition and improving on previous sectoral approaches to regulation, participants stressed that a cross-cutting approach fostering better communication, cooperation and coherence across an overly siloed regulatory apparatus would be key to an effective regulatory response. Serving as a counterexample to the ideal imagined state, the fragmented interactions between the processes of the Canadian Radio-television and Telecommunications Commission, the Competition Bureau and the minister of innovation, science and industry that characterized the recent Rogers-Shaw transaction provide justification for a more unified approach to the protection of competition. Understanding competition as the keystone for a variety of policy goals, participants urged that a transversal approach that attempts to incorporate rather than shy away from the complexity of those interlocking goals may be more appropriate for this more integrated regulatory future.

Participants noted that while international peers offered a suite of options for reform of competition policy, Canada should keep in mind domestic sectoral regulatory models that have served the public well. Banking regulation, which promotes a public interest framework inclusive of but broader than the goals of traditional competition policy, provides an example of how regulators can not only support competition in the abstract, but define the kind of competition Canadians wish to see in their economy. Participants contrasted the jurisdiction of the minister responsible in the Rogers-Shaw transaction — viewed with a public interest lens applying on only select elements of the transaction, the transfer of the public asset of spectrum licences, rather than over the merger as a whole — with the minister of finance's complete purview over mergers and acquisitions in the banking sector. Because of the linkages between competition and other policy goals, it may be appropriate for future competition policy to more widely apply a similar public interest lens so as to take those linkages more seriously.

Continuing the theme of domestic guidance from outside the competition policy space, participants

raised the peculiar lack of federation in the administration and enforcement of competition policy compared to other areas of overlapping federal and provincial jurisdiction. Noting that a more diversified approach to promoting competition in Canada could create a richer body of policy and law, they proposed a greater role for provinces as a potential solution to the sporadic and relatively thin nature of Canadian competition law.

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## Conclusion: It Is Time for Canada to Rethink Its Approach to Competition Policy

There is a growing sense that Canada is an outlier in its use of competition as a driver of its economic policy strategy. While other jurisdictions are leading the way on a renewal and redefinition of a bolder approach to the future of competition within and beyond their own increasingly digital economies, Canada is only now considering what steps it might take. But the potential returns from the opportunity to rethink how Canada approaches competition, rather than the sense of being left behind, should be guiding the policy conversation in Canada. Canada can benefit from studies and developments in competition policy undertaken in other countries, but it should also look to its own past for guidance in how to craft a competition framework that can support a dynamic, evolving and fair economy. With these resources in hand, Canada can build on the global rediscovery of competition as a lever against concentrated corporate power and for the public interest, while still forging a path suited to its own economic position and goals. Canada has a wide range of options available to it in the pursuit of a more competitive, dynamic and fair digital economy, but complacency is not one of them.

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- Nyabola, Nanjala, Taylor Owen and Heidi Tworek, eds. 2022. *The Four Domains of Global Platform Governance* Essay Series, Centre for International Governance Innovation, June 15–July 4. [www.cigionline.org/the-four-domains-of-global-platform-governance/](http://www.cigionline.org/the-four-domains-of-global-platform-governance/).

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# Agenda

January 25, 2023

2:00 p.m.-2:02 p.m.	<b>Welcome Remarks</b> <ul style="list-style-type: none"><li>→ Kean Birch</li><li>→ Robert Fay</li></ul>
2:02 p.m.-2:15 p.m.	<b>Presentation of Paper, “Rethinking Canada’s Competition Policy in the Digital Economy”</b> <ul style="list-style-type: none"><li>→ Kean Birch</li></ul>
2:15 p.m.-2:35 p.m.	<b>Discussant Remarks</b> <ul style="list-style-type: none"><li>→ Andy Best</li><li>→ Salomé Viljoen</li></ul>
2:35 p.m.-3:00 p.m.	<b>Open Discussion</b> <ul style="list-style-type: none"><li>→ All</li></ul>
3:00 p.m.-3:02 p.m.	<b>Opening Remarks</b> <ul style="list-style-type: none"><li>→ Robert Fay</li></ul>
3:02 p.m.-3:20 p.m.	<b>Digital Regulatory Cooperation</b> <ul style="list-style-type: none"><li>→ Jennifer Quaid</li><li>→ Dwayne Winseck</li></ul>
3:20 p.m.-3:55 p.m.	<b>Open Discussion</b> <ul style="list-style-type: none"><li>→ All</li></ul>
3:55 p.m.-4:00 p.m.	<b>Closing Remarks</b> <ul style="list-style-type: none"><li>→ Kean Birch</li><li>→ Robert Fay</li></ul>

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## Participants

**'Damola Adediji**

Ph.D. candidate, Centre for Law, Technology and Society, University of Ottawa

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Executive Director, Master of Public Policy in Digital Society Program, McMaster University; Senior Fellow, CIGI

**Andy Best**

CEO and co-founder of Civic Digital Network

**Keldon Bester (Rapporteur)**

Fellow, CIGI

**Elettra Bietti**

Joint Postdoctoral Fellow, NYU School of Law and Cornell Tech

**Kean Birch (Host)**

Associate Professor, Faculty of Environmental and Urban Change, York University

**Dan Ciuriak**

Senior Fellow, CIGI

**Hayane Dahmen**

Research Affiliate, Bennett Institute for Public Policy, University of Cambridge

**Robert (Bob) Fay (Host)**

Managing Director of Digital Economy, CIGI

**Michel Girard**

Senior Fellow, CIGI

**Jim Hinton**

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**Jennifer Quaid**

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