Canadian regulators face pushback as they race to catch up with U.S. and European efforts to rein in tech giants

By JOSH O'KANE

Canada's Competition Bureau is trying to find its place in a world where other jurisdictions are using antitrust measures to combat the increasing market power of Big Tech companies, while influential Canadian voices often loudly champion the status quo.

The federal government and the bureau itself both said last week that they hope to bring Canada's competition rules in line with the realities of a digitally driven economy. Meanwhile, some of Canada's most vocal advocates of competition policy reform released a 31,000-word study that argues the Competition Act isn't equipped to deal with how market dominance is achieved today.

All of this aligns with the increasingly aggressive antitrust measures levelled in the United States and Europe against companies such as Facebook owner Meta Platforms Inc., Google operator Alphabet Inc. and Amazon.com Inc.

Regulators and politicians there have argued that the consumer data collected by these companies and their enormous market capitalizations give them power to strong-arm not just markets and individual competitors, but consumers themselves. Everyday citizens, policymakers argue, often have little choice but to use the world's top platforms to connect with people, information and commerce, trading away data about their digital travels and reinforcing platform dominance along the way.

Ipsos also reported last week that 88 per cent of Canadians believe the country needs more competition "because it's too easy for big business to take advantage" of consumers. The subject is a touchy one: People's online lives are largely shaped by a handful of massive companies, and consumers' wallets are now being pillaged by levels of inflation not seen in a generation.

While advocates for reform believe current competition policy doesn't accommodate new ways that data-collecting firms can assert their dominance, other members of the relatively small community of Canadian competition experts argue for a business-as-usual approach, underpinned by faith in the Competition Act's stringent focus on economic matters.

"You harm economic growth by imposing too many rules and regulations,"
said John Pecman, who served as Competition Commissioner from 2013 to 2018. (He is now a senior business adviser at Fasken Martineau DuMoulin LLP, but said he was speaking for himself, not his firm.)

Some regulations being imposed and discussed by U.S. and European regulators, he said, focus on prohibiting some conduct without a chance for review. But "that's not what competition laws are designed to do," Mr. Pecman said. "They're designed to protect the process, not to coddle small players so they can grow."

Jennifer Quaid, a University of Ottawa law professor who studies competition, says the shallow pool of Canadian competition experts has shaped debate in different ways than in similar countries.

"The people in the competition world like their little world - it's neat and tidy and delineated," Prof. Quaid said. But it's crucial, she added, to examine competition law in the context of the evolving global economy, which other jurisdictions do.

"Canada is not keeping up with the big picture. Yes, competition is part of the big picture.

But if you just rely on those who are experts in competition, you're not going to get much progress."

The Canadian government appears to have picked its side. Innovation Minister François-Philippe Champagne, whose department oversees the Competition Bureau, said at a Canadian Chamber of Commerce event last week that he hoped antitrust policy could be reformed to respond to the shape-shifting digital economy.

"I would think the vast majority of Canadians would see that as essential to maintain a competitive environment - to maintain affordability," he said.

Though matters of competition stretch well beyond today's biggest tech platforms, those platforms have dominated global discussions around competition in recent years. The bureau is investigating Amazon's competitive conduct, in part to see if the company might be self-preferencing its own products and services, rather than those of competitors. The bureau is also following the EU in examining Google's advertising business, including the brokering of YouTube ads. Both companies have said they're co-operating, and that they work to benefit competitive markets.

Competition Commissioner Matthew Boswell was not available for an interview, but has shown a similar interest in reform, and the bureau released its own recommendations on the matter last week. They included the addition of language that "captures conduct intended to harm competition, and not just conduct intended to harm a competitor," and updated measures to assess "anti-competitive conduct aimed at emerging competitors in the digital economy."

Mr. Boswell's predecessor, Mr. Pecman, said that he commended the bureau for "embracing the traditional purpose of the law" and not "moving wholeheartedly" into increasing regulation.

Two of Canada's most vocal advocates of competition law reform, Vass Bednar and Robin Shaban, and another author, Ana Qarri, published a report last week commissioned by the Innovation Ministry. Data collected by large platforms give them insights into what consumers want, the authors explain, giving the platforms large advantages in developing and marketing their own wares. The trio also argue that parts of the Competition Act might prevent the bureau from challenging acquisitions by large data collectors that "neutralize" smaller competitors.

Mx. Shaban, senior economist at Vivic Research in Ottawa, said the bureau's comments last week were surprising, given its relative lack of independence in the government. But the recommendations may help establish a meeting place between the "two distinct intellectual communities" debating Canadian competition policy: reformists like them, and the stay-the-course crowd, many of whom come from Bay Street's halls of power.

"It provides some sanity to the conversation," Mx. Shaban said in an interview. Previously, "we didn't get a lot of serious dialogue within the competition community."

Last year, Independent Senator Howard Wetston, who formerly held the equivalent job of Competition Commissioner, launched a consultation about the future of the federal Competition Act.

It kicked off with a paper from past University of Toronto law dean Edward Jacobucci, who argued that "digital markets present not only idiosyncratic competitive characteristics ... but new product markets altogether.

But this does not imply that the Act needs an overhaul." Instead, he reasoned, Canada's competition law is flexible - "there is no reason why the Act would not apply to new practices in new markets."
He used the example of self-preferencing, in which large platforms allegedly disadvantage competitors in search results.

This might happen if, say, a large retailer gave its own white-label products preference in a marketplace, or if Google were to preference YouTube links in a video search (which Toronto videoplatform company Rumble Inc. has alleged in a U.S. federal court, and which Google claims as "baseless").

The United States is considering legislation to outlaw these kinds of actions. But in Canada, Mr. Iacobucci said, they could be considered an abuse of dominance under the existing Competition Act, mitigating the need for new measures.

The two dozen submissions to the consultation reflect a range of views. One former special adviser to the Competition Bureau wrote that "Canada has yet to do its homework" on competition digital markets. Omar Wakil, chair of the Canadian Bar Association's Competition Law and Foreign Investment Review Section, agreed with Mr. Iacobucci's argument that Canada may want to consider regulating some digital markets.

As the consultation collects its reports, some experts have taken their views to more public fora.

Earlier this month, for example, Mr. Pecman made his views clear in a Financial Post column that argued that "self-preferencing may enable companies to offer lower-cost or higher-quality products to consumers."

Similarly, a paper published by the MacDonald Laurier Institute last November suggested the antitrust-oriented pushback against large technology companies is a "populist" movement that believes "big is bad." The Competition Act is already up to the task of preventing the abuse of market dominance, write the paper's law-professor authors, Anthony Niblett and Daniel Sokol.

But the duo also suggest the bureau could put some of its recently increased funding toward enforcement measures, and say "there are good reasons" that boosting penalties would discourage anti-competitive action, which aligns the bureau's own recommendation.

In an interview, Mr. Sokol, a University of Southern California law professor who has written widely on global antitrust regulation, said he believes there is a "political game" being played in the U.S. and Europe. But Canada's Competition Bureau is "pound for pound, the most effective authority out there," he said.

"Canada's approach has always been ... wait and see what happens elsewhere. And there's a certain second-mover advantage to that, because you don't make the same mistakes that other jurisdictions make."