Competition Issues in Data-Driven Consumer and Small Business Financial Services in Canada

July 2020

TABLE OF CONTENTS

Competition Issues in Data-Driven Consumer and Small Business Financial Services in Canada

Executive Summary

Consumers and small- and medium-size enterprises (SMEs) enjoy a competitive market for financial services applications that use their financial data to power innovative products and services—from online lending platforms to payment apps to financial management applications. Consumers and SMEs routinely direct these services to access their financial data, which is often in the possession of financial institutions. This customer-directed data access has become the norm over the last two decades, and data aggregators now securely collect and transmit this data, to enable a highly competitive market for data-driven financial services. These financial services help to improve consumers' financial lives and provide needed assistance to SMEs—which is all the more important in the current perilous economic times.

As the business and technological arrangements underpinning customer-directed financial data sharing evolve, it is essential to maintain competition in the market for these data-driven financial services. Members of the Financial Data and Technology Association (FDATA) of North America stand concerned that competition in data-driven financial services may be stifled when financial institutions override customer direction to share their financial data. These restrictions can range from broad attempts to directly limit third parties' access to data despite customer authorization (outside of individual instances of suspected fraud or unauthorized access); degradation of data sharing that effectively thwarts customer-directed access to financial data; and targeted blocking of sharing specific data fields in way that effectively renders competing services useless. In each of these cases, as evidence shows, competition in data-driven financial services would be substantially inhibited, to the direct severe detriment of consumers.

Efforts to override customer-directed data access for competing financial services in these ways must be closely scrutinized under competition laws. As initial storers of the data that consumers generate in the course of their everyday lives, financial institutions can exercise market power in a way that dramatically limits direct competition with competing financial services. Outside of stopping fraudulent or similar unlawful conduct, broad restrictions on customer-directed data sharing to competitors, or targeted restrictions of certain data fields used by competitors, are not justified by existing law or regulations, regulators' third-party oversight obligations, or consumer protection concerns. Nor do they have procompetitive benefits that would outweigh anticompetitive effects. Particularly as consumers and small businesses face a difficult economic climate, they directly benefit from a vibrant market of competitive options to improve their financial outlook. Anti-competitive behaviors that currently stand in the way of many Canadians' abilities to reap these benefits must therefore be addressed.

Introduction

Consumers and small- and medium-sized enterprises (SMEs) have enjoyed burgeoning competition for financial services in recent years, including for products driven by their own data. These services allow consumers and SMEs to take greater control over their financial lives and opportunities: to find new sources of credit based on innovative underwriting models, to initiate payments to friends, family and vendors in real time and without fees, and to help manage their financial outlook across multiple accounts and plan effectively for the future. In a time of enormous economic uncertainty, these services are more important than ever to help consumers and SMEs navigate difficult financial circumstances.

The innovation in financial services is powered by consumers and SMEs granting permission for access and use of their data, often in conjunction with cutting edge machine learning and other data analytics technology. Much of this financial data is associated with consumers' and SMEs' existing accounts with financial institutions – including transaction history, loan products, and spending habits. For more than two decades, consumers and SMEs have chosen to provide access to this data to additional financial institutions and new competitors (such as financial technology companies, or fintechs) to obtain additional financial services to meet their economic needs.[1] This innovation has occurred while maintaining secure access to financial data. In fact, many financial institutions are willing to permit certain types of access to financial data so long as certain security measures are taken.

As consumers and businesses face a deteriorating economic landscape, it is critical to maintain competition in the market for these data-driven financial services. It is even more essential when certain market participants either individually or collectively have the ability to override a consumer's or SME's decision to direct a potential competitor to access its financial information. While restrictions and limitations to financial data access are frequently contextualized under the banner of customer protection, market participants have been dealing for years with issues related to data protection and regulatory compliance. Steps to override customer-directed access raise critical competition issues under Canadian law. Indeed, the costs of restricting competition in data-driven financial services are severe. A recent Financial Data and Technology Association (FDATA) of North America study indicates that *nearly two billion* existing consumer and SME accounts held by tens of millions of residents in the United States could be rendered useless by overriding access to financial data that was specifically directed by those consumers and businesses. A proportionate share of these accounts likely exist in Canada in that some 3.5 to 4 million Canadians already use data-driven services that offer them convenient ways to manage their finances and their businesses, most often through credential-based access.[2] A direct result will be far fewer options to help consumers and businesses in perilous times—particularly in

[1] FDATA North America (FDATA) is the trade association that represents financial and technology firms whose technology-based products and services allow consumers and small businesses in Canada, the United States, and Mexico to improve their financial wellbeing.

[2] *Consumer-directed finance: the future of financial services*, Department of Finance Canada, January 31, 2020 (https://www.canada.ca/en/department-finance/programs/consultations/2019/open-banking/report.html)

critical areas like credit for small businesses—and inevitably higher prices for consumers and SMEs.

Competition issues cannot take a back seat as the regulatory and technological framework in data sharing continues to evolve. FDATA and its members have long advocated for a regulatory approach that facilitates the sharing of data by customers with, and between, their financial service providers, based on consent and with safeguards for privacy and security. Such "open finance" systems that achieve those two objectives have been implemented in the United Kingdom and are in the process of being deployed in Canada, Australia, New Zealand, South Africa, and many other countries. As this regulatory approach develops, competition laws provide a critical backstop to ensure that existing competition in the market for data-driven consumer financial services is not stifled.

I. Consumers Benefit From a Competitive Market for Data-Driven Consumer and SME Financial Services.

A. The Market For Data-Driven Consumer and SME Financial Applications is Robust.

A wide range of applications use consumer and SME financial data to power innovative products and services to meaningfully improve their customers' financial lives. As discussed in more detail below, these include: online lending platforms for consumers and SMEs that leverage the availability of data for underwriting decisions; payment apps that access customers' accounts to enable faster and more efficient payments; and financial management applications that advise consumers and SMEs on options to improve their financial outlook.[3]

These types of applications depend on consumers and SMEs granting access to their financial data—data often in the possession of depository and other legacy institutions with which consumers and SMEs have a relationship. To facilitate data sharing with these financial services providers, companies known as data aggregators have emerged, via the competitive market, to safely and securely collect and transmit financial data at customers' direction. All of the companies in this ecosystem depend directly on and answer to their customers, who give explicit permission for access to their financial data. Additionally, companies operating data-driven financial services must compete on critical issues like data security, reliability, and customer service.

Since 2017, Canada's fintech adoption rate has more than doubled, with 78% of Canadian consumers using at least one fintech payment and money transfer service. EY's Global FinTech Adoption Index revealed fintech adoption in Canada increased from 18% to 50%. Currently, Canada has 989 fintech companies operating, with a 171 of them founded in the past three years.[4] The key factors driving the increased adoption rate are attributable to better rates and fees (42%), ease of setting up an account (19%), and proliferation of more innovative products and services

[3] This is not meant to be an exhaustive list of applications. For example, tax preparation services can use customer-directed access to data to help taxpayers quickly and accurately complete tax returns.
[4] FinTech Growth Syndicate, Maple database, May 2020.

(10%).[5] Canadians are typically more risk-averse and comfortable banking with traditional institutions, but nearly one-third of consumers surveyed were ready to use products from new financial services companies, if they partnered with an incumbent.

Canadian fintech companies have also seen a striking rise in funding in recent years, as well as deal activity, raising $776 million in 2019, a 104% increase from 2018. Deal count in the fintech sector rose to 59, up 11 percent year over year.[6]

Canada's global finance footprint is rapidly growing – with exports reaching $14 billion in 2018 and one-third of revenue generated from the 5 largest banks generated abroad. Financial services accounted for the largest share of Canadian foreign direct investment abroad in 2018, reaching $643 billion— half of Canada's total foreign direct investment.

Toronto is North America's second-largest financial centre, with the city's financial services sector growing and exerting a significant influence on the local economy and increasing Canada's international footprint. Toronto has had the highest growth rate globally for fintech investment from 2010 to 2018. In the last decade, employment in Toronto's financial services sector grew at the fifth-highest rate in the world and has the highest concentration of financial services employment in North America, at 8.3%.[7]

This mirrors the experience in the United States, where the past decade has seen an explosion of growth and competition in financial technology, including in the market for data-driven financial products and services. Key highlights of the U.S. data reveal:

- A July 2018 U.S. Department of the Treasury report notes that from 2010 to the third quarter of 2017, more than 3,330 new technology-based firms serving the financial services industry were founded, and the financing of such firms reached $22 billion globally in 2017;[8]
- Accenture has estimated that investments in fintech companies reached $53 billion globally in 2019; [9] as of 2018, lending by such firms made up more than 36% of all U.S. personal loans, up from less than 1% in 2010;[10]
- Survey data indicate that up to one-third of online U.S. consumers use at least two fintech services — including financial planning, savings and investment, online borrowing, or some form of money transfer and payment;[11]

---

[5] Global FinTech Adoption Index 2019 https://www.ey.com/en_ca/news/2019/10/2019-canadas-fintech-adoption-rate-more-than-doubled-since-2017

[6] "Another Record Breaking Year For Canadian VC As AI, Fintech, Cybersecurity Reach New Heights". Betakit. February 10, 2020. https://betakit.com/another-record-breaking-year-for-canadian-vc-as-ai-fintech-cybersecurity-reach-new-heights/

[7] Toronto Finance International, The Impact of Toronto's Financial Sector, 2019

[8] U.S. Dep't of the Treas., *A Financial System That Creates Economic Opportunities Nonbank Financials, Fintech, and Innovation* (July 2018), at 5, *available at* https://home.treasury.gov/sites/default/files/2018-08/A-Financial-System-that-Creates-Economic-Opportunities---Nonbank-Financials-Fintech-and-Innovation_0.pdf [hereinafter "Treasury Report"].

[9] Michael Del Castillo et al., *The Forbes Fintech 50: The Most Innovative Fintech Companies In 2020*, Forbes (Feb. 12, 2020), https://www.forbes.com/fintech/2020/#6ba7e6904acd.

[10] Treasury Report at 5.

[11] *Id.* at 18.

- Fintech firms compete to offer similar products: in 2020, for example, *Forbes* listed a dozen personal finance startups among its top 50 fintech companies.[12]
- As the 2018 U.S. Treasury report notes, some digital financial services reach up to 80 million members, while financial data aggregators can serve more than 21 million customers.[13]

These more recent market entrants compete both with each other and with traditional depository financial institutions to provide innovative financial products that greatly benefit consumers, including by lowering costs and expanding access by filling gaps in the market.

In its 2018 report entitled "The Canadian fintech landscape," KPMG notes that proposed regulatory and legislative changes to the *Bank Act* and other statutes in Canada will have a number of positive impacts on Canadian banks' and financial institutions' ability to engage in innovative fintech activities:

> "A key highlight is the removal of current stifling obstacles to certain types of relationships between banks and fintechs. Many of these barriers, such as the need for a lengthy regulatory approval process for partnerships, are from a time when technology was not as integral to banking or financial services. The changes will allow for improved collaboration between banks and fintechs, better enable banks to use fintechs' products and services, reduce delays associated with regulatory approvals and enable financial institutions to further strengthen their investment in fintech-related technologies."[14]

The direct line between competition and innovation is well-chronicled, as the 2018 U.S. Treasury report notes:

> The increasing scale of technology-enabled competitors and the corresponding threat of disruption has raised the stakes for existing firms to innovate more rapidly and pursue dynamic and adaptive strategies. As a result, mature firms have launched platforms aimed at reclaiming market share through alternative delivery systems and at lower costs than they were previously able to provide. Consumers increasingly prefer fast, convenient, and efficient delivery of services. New technologies allow firms with limited scale to access computing power on levels comparable to much larger organizations. The relative ubiquity of online access in the United States, combined with these new technologies, allows newer firms to more easily expand their business operations.[15]

Depository institutions also use the financial account data they collect to offer data-driven financial services, including lending products, wealth management services, and digital payments solutions. Indeed, banks' competition with one another in offering these products is often based

---

[12] Kelly Anne Smith, *The Future of Personal Finance: Fintech 50 2020*, Forbes (Feb. 12, 2020), https://www.forbes.com/sites/kellyannesmith/2020/02/12/the-future-of-personal-finance-fintech-50-2020/#346ce4a6fd43.
[13] Treasury Report at 5.
[14] https://assets.kpmg/content/dam/kpmg/ca/pdf/2018/10/the-canadian-fintech-landscape.pdf
[15] *Id*. at 6.

on customer-directed data aggregation services that enable relevant data sharing *between banks*.[16] While fintechs have emerged as a significant part of the market, and often fill specific gaps to market to certain underserved customers, traditional depository institutions remain competitors in this market.

Data-driven innovative financial services include (but are not limited to) products and services in the following areas, each of which explicitly depends on explicit consumer direction to access the consumer's financial data:

Financial management. Personal financial management applications enable consumers to leverage information drawn from a range of accounts, including bank accounts, to assist with important budgeting, cash flow management, and strategies for better financial success. These services can also help consumers avoid overdraft and other unnecessary fees. SMEs can also use financial management tools to aggregate and analyze financial information to better manage financial performance and cash flow and to improve decision making.

Lending. Lenders can rely on detailed consumer and small business data, such as cash flow data for small businesses, in making lending decisions. The analysis of such large data sets, rather than simply relying on traditional credit scoring, has been shown to expand access to credit for small businesses.[17]

Payments. Consumers enjoy having a wide range of payment options that meet their needs with respect to convenience, speed, and privacy. In particular, peer-to-peer and consumer-to-merchant payment applications allow consumers to quickly send funds remotely, without needing to rely on cash or cheques.

Importantly, in each of these use cases, consumers and SMEs make an active choice to allow access to their financial data in order to facilitate services that benefit them. Consumers seeking the benefit of personal financial management applications, for example, rely on real-time access to their financial accounts to obtain the benefit of the service—indeed, that is the very point of the service. Likewise, small businesses that obtain loans based on their cash-flow data rely on real-time data access to provide evidence that their business is viable. Competitors in these areas are incentivized to be fully transparent with their consumers in the process of obtaining authorization for account access.

The ability to process and analyze large data sets has enabled—and will continue to unleash—substantial advances in the ability of these services to assist consumers and SMEs. As one example, small business lending based on cash-flow data is dependent on large sets of transaction data and a steady stream of account-level data. Additionally, innovative companies

---

[16] *See* Vaibhav Gujral, Nick Malik, and Zubin Taraporevala, *Rewriting the rules in retail banking*, McKinsey & Company (Feb. 2019), https://www.mckinsey.com/industries/financial-services/our-insights/rewriting-the-rules-in-retail-banking; Rip Empson, *Yodlee Partners With Bank Of America To Bring Its Financial Apps To Online Banking* Tech Crunch (Oct. 26, 2011), https://techcrunch.com/2011/10/26/yodlee-partners-with-bank-of-america-to-bring-its-financial-apps-to-online-banking/.

[17] *See* FinRegLab, The Use of Cash-Flow Data in Underwriting Credit: Market Context & Policy Analysis (Feb. 2020), *available at* https://finreglab.org/the-use-of-cash-flow-data-in-underwriting-credit-market-context-policy-analysis; FinRegLab, Empirical Research Findings (Feb. 2020), *available at* https://finreglab.org/cash-flow-data-in-underwriting-credit-empirical-research-findings [hereinafter "FinRegLab Policy Report"].

continue to explore how machine learning and artificial intelligence (AI) can be applied to large and complex data sets to help enable underwriting decisions or financial management applications.

As the U.S. Treasury report notes, technologies like cloud computing and machine learning/AI "enable firms to store vast amounts of data and efficiently increase computing resources," and "[u]nsurprisingly, for financial services firms, data analytics and machine learning (or artificial intelligence) are two of the top three areas of tech investment."[18] Thus, we can expect data-driven innovative financial services to continue to expand.

B. The Market for Data-Driven Financial Services is Premised on Decades of Customer-Directed Data Sharing.

1. Customer Financial Data Access and Sharing is the Status Quo.

The range of data-driven financial services exists because customer-directed data sharing is the status quo of the online financial services market. As a practical matter, the market for services powered by consumer and SME financial data has existed since at least the early 2000s, when traditional financial institutions and others began using customer-directed data sharing to offer new products and services to consumers.[19] Indeed, some FDATA members have been dealing with permissioned access to account-level data for more than two decades, even before the recent growth of fintechs – including by facilitating data sharing between financial institutions. The U.S. Office of the Comptroller of the Currency (OCC) issued guidance on bank approaches to data aggregation services as far back as 2001[20] and most recently released updated guidance in March 2020. In short, data-driven financial services have evolved in a market where customers' permissioned access to their financial information is the norm. This status quo in Canada is buttressed by access to personal information obligations codified in the *Personal Information Protection and Electronic Documents Act*[21] (PIPEDA). In Canada, laws relating to access to data are jointly governed by federal and provincial privacy legislation. PIPEDA is the federal privacy law for private-sector organizations. PIPEDA sets the ground rules for how private-sector organizations collect, use, and disclose personal information in the course of for-profit, commercial activities across Canada. It also applies to the personal information of employees of federally-regulated businesses such as: banks, airlines, and telecommunications companies.

All businesses that operate in Canada and handle personal information that crosses provincial or national borders are subject to PIPEDA regardless of which province or territory they are based in. PIPEDA does not apply to organizations that operate entirely within Alberta, British Columbia, and Quebec unless that personal information crosses provincial or national borders.

---

[18] Treasury Report at 8.
[19] Request for Information Regarding Consumer Access to Financial Records, 81 Fed. Reg. 83806, 83808 (Nov. 22, 2016).
[20] Office of the Comptroller of the Currency, OCC Bull. 2001-12, Bank-Provided Account Aggregation Services: Guidance to Banks (2001), *available at* https://www.occ.treas.gov/news-issuances/bulletins/2001/bulletin-2001-12.html/.
[21] https://laws-lois.justice.gc.ca/eng/acts/P-8.6/index.html

These three provinces have general private-sector laws that have been deemed substantially similar to PIPEDA.[22]

Schedule 1 of PIPEDA sets-out ten fair information principles. Principle 9 deals with individual access. Individuals have a right to access the personal information that an organization holds about them. Record holders are required to give people access to their information at minimal or no cost, or explain the reasons for not providing access. Providing access can take different forms. For example, a record holder may provide a written or electronic copy of the information, or allow the individual to view the information or listen to a recording of the information.[23] In the data-driven financial services marketplace, aggregators play the role of electronic copy carriers, porting data with consumers' consent.

The federal *Bank Act*,[24] for example, contains provisions permitting the regulating of the use and disclosure of personal financial information by federally regulated financial institutions (although no such regulations have been promulgated). Provincial laws governing credit unions typically have provisions dealing with the confidentiality of information relating to members' transactions. Most provinces have laws dealing with consumer credit reporting. These acts typically impose an obligation on credit reporting agencies to ensure the accuracy of the information, place limits on the disclosure of the information, give consumers the right to have access to, and challenge the accuracy of, the information.[25]

As data-driven financial services have proliferated, the need for formal structure has come to the fore. Such efforts have the benefit of leveraging the historical existence of consumer data access. FDATA and others have argued that new legislation or regulations would speed the path toward practical implementation of open banking. In Canada, both the Department of Finance Canada and the Senate of Canada held consultations on open banking beginning in 2018.

The Senate of Canada Standing Committee on Banking, Trade and Commerce released its report in June 2019 entitled *Open Banking: What It Means For You*[26] (the Senate Report). The Senate Report called on the federal government to develop an open banking framework. In the long-term, the Senate Report called on the federal government to modernize PIPEDA to align it with global privacy standards and to include a consumer right to direct that their personal financial information be shared with another organization.

On January 31, 2020, an Advisory Committee assembled by the Minister of Finance to study open banking released its report entitled *Consumer-directed finance: the future of financial services*[27] (the Finance Report). The Finance Report acknowledged that credential-based access was the most common current method of sharing financial data. It noted that as a technological

---

[22] British Columbia's Personal Information Protection Act; Alberta's Personal Information Protection Act; Québec's An Act Respecting the Protection of Personal Information in the Private Sector.

[23] https://www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/the-personal-information-protection-and-electronic-documents-act-pipeda/p_principle/principles/p_access/

[24] https://laws-lois.justice.gc.ca/eng/acts/B-1.01/page-75.html#h-16213 at s. 459

[25] https://www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/02_05_d_15/

[26] https://sencanada.ca/en/info-page/parl-42-1/banc-open-banking/

[27] https://www.canada.ca/en/department-finance/programs/consultations/2019/open-banking/report.html

solution, credential-based access has limitations; however, eliminating credential-based access would end the possibility of new data-driven financial tools being offered to a broader group of Canadians and would set Canada behind global developments that are digitalizing the financial sector.

The Finance Report recommended that the federal government move forward to enable customer-directed finance. The Finance Report saw the role for government as setting-out the objectives that an ultimate framework must meet. Next steps are further discussions with industry stakeholders about the question of how the technical means of customer access should be dealt with and how to build an ecosystem that is accessible to all participants, amongst others. The Finance Report recommended that the Department of Finance develop a white paper on a proposed consumer-directed finance framework for further consultation with stakeholders.

In sum, data-driven financial services operate in a unique market with an established history and reliance on customer-directed data sharing. FDATA and others have argued that new legislation or regulations would speed the path toward practical implementation of open finance and improve the existing market, while further encouraging competition. That said, as the regulatory landscape develops, the status quo is that consumers and SMEs can—and by the many millions, do—access their financial data and provide it to third parties to enable competitive financial services.

2. As the Market Evolves, Restrictions on Customer-Directed Data Sharing Disrupt Competition.

Both the business and technological arrangements underlying customer-directed financial data sharing are evolving. In general, a portion of the market is moving toward bilateral agreements between financial institutions and data aggregators for handling customer-directed data sharing. Aggregators in turn assist their own customers, data-driven financial services providers, with obtaining the financial data—at their customers' request—necessary for services to function. However, market participants generally recognize that individually negotiated bilateral agreements are an inefficient means of dealing with permissioned data access. In particular, such agreements lack uniformity and provide the potential for specific institutions to exert restrictions on data access, including by seeking to block particular data fields that the customer requested to be shared, such as data that could be used by potential competitors. Additionally, the technology used for data sharing is shifting throughout the market. Many market participants are moving from credential-based access based on consumers providing their login credentials to an intermediary to obtain their financial information[28] to access enabled through an application programming interface (API) provided by a financial institution to a data aggregator. This too enables certain data fields to be unilaterally blocked from being accessed via the API, as the bilateral agreements generally prohibit a data aggregator from accessing data through any means other than the API.

[28] This is often referred to in shorthand as "screen-scraping." However, that terminology conflates the means of providing authentication for data access (providing a credential such as a password), with the means of collecting the data (retrieving it from a screen that is normally designed to be viewed by a consumer). APIs can enable consumers to provide authentication without disclosing credentials to a third party, and also enable more efficient retrieval using data feeds.

One result of these developments is a potentially increased concentration of market power in data-holding financial institutions. For example, on the business side, The Clearing House, a consortium owned by major U.S. banks, released a model agreement for data sharing between financial institutions and data aggregators.[29] On the technical side, major financial institutions, fintechs, and others are part of the Financial Data Exchange (FDX), which is seeking to implement technical solutions for APIs to enable data sharing.[30] In Canada, traditional banks have limitless technological means to block access to the information stored on their networks. This has the ability to enhance their competitive position. In exchange for not exercising this power, traditional banks permit access to financial data on their terms in order to lessen loads on their digital networks.

FDATA members have number of competition concerns about this market:

- Broad attempts to override customer-directed access to financial data, by directly restricting third parties' access to that data despite customer authorization, outside of individual instances of suspected fraud or unauthorized access.
- Relatedly, constructive restriction of customer-directed access to financial data, due to intentional degradation of data sharing, under similar circumstances.
- Targeting and blocking sharing of specific data fields, contrary to customers' authorization, used by directly competing services. Blocking specific data fields can effectively render competing services useless and coerce customers into using services offered by the financial institution that may not be best suited for their needs.
- Restricting the ability of verifying identity to platforms such as SecureKey Concierge that are controlled by a few market participants. [31]

Constructive restriction of customer-directed access is a particular concern. For example, a financial institution may use a token to facilitate permissioned access to financial data via an API. That token can be set to expire after a period of time. Frequent token expiration, causing the customer to need to constantly re-authorize permission for data access, may deter a customer from relying on the financial service, in some cases by adding extensive friction, and in others by undermining services that rely on continual data access. Additionally, some services like small business lending based on cash-flow data, or real-time financial management applications, rely on continuous updating of information and may be rendered unusable by token expiration requirements imposed by a financial institution.

Restrictions on specific data fields also can enable suppression of competition for competing services, even if all data is not blocked. For example, selectively blocking the sharing

---

[29] *See Model Agreement*, The Clearing House, https://www.theclearinghouse.org/connected-banking/model-agreement (last visited Apr. 13, 2020).

[30] Additionally, a number of financial institutions recently obtained an ownership interest in their own data-sharing network. *See* Penny Crosman, *Fidelity's data sharing unit Akoya to be jointly owned with the Clearing House, 11 banks* (Feb. 20, 2020, 9:51 AM), https://www.americanbanker.com/news/fidelitys-data-sharing-unit-akoya-to-be-jointly-owned-with-the-clearing-house-11-banks.

[31] https://services.securekeyconcierge.com/cbs/nav/about-apropos-eng

of some portion of data that a fintech lender uses for underwriting can undermine the lenders' ability to perform effective analysis of creditworthiness, and therefore its ability to compete to provide a competitive loan to the customer. This is true even if the lender has access to some portion of the data—but not all of the data that the customer permissions in order to allow the service to function effectively.

II. Restrictions on Customer-Directed Access to Financial Data Raise Serious Competition Concerns in the Market for Data-Driven Financial Services.

Overriding customer-directed data access for competing financial services in these ways raises issues under antitrust laws. There are fraud-related reasons for restricting data in certain limited circumstances, and market participants are currently working together to address them. However, restrictions on customer-directed data sharing to competitors, and/or targeted suppression of certain data that consumers and SMEs choose to share with competitors, directly thwarts competition and must be closely scrutinized under antitrust laws.

A. Restrictions on Consumer-Permissioned Data Sharing Inhibit Competition.

1. Data-Driven Financial Service Providers and Consumers Would Be Substantially Harmed by Overriding Customer-Directed Access to Financial Data.

Overriding customer-directed access to financial data, under the circumstances discussed above, would have serious repercussions for financial service providers and the consumers and small businesses they serve. In Canada, upwards of 4 million Canadians already use data-driven services most often through credential-based access.[32] In 2019, FDATA examined the impact of restricting access to a portion of the U.S. market that currently relies on credentialed access rather than APIs. Its findings were based on a survey of its members that were shared with the CFPB. FDATA's conclusion is that overriding consumer-permissioned access to data would be devastating to the market.

Overall, the 78% of Canadian consumers using at least one fintech payment and money transfer service ***would lose functionality*** if customer-directed credentialed data access was completely cut off and only data provided through financial institutions' APIs was permitted. Also impacted would be Canada's global finance footprint (exports reaching $14 billion in 2018) and Toronto position as North America's second-largest financial centre with the highest concentration of financial services employment in North America, at 8.3%.

An additional 1.8 billion consumer and small business accounts in the United States would lose functionality. This number is a conservative estimate since it is based only on data concerning the largest financial institutions. The number would be significantly larger if it took into account consumers and small businesses that have financial services accounts that access data from the thousands of smaller financial institutions across North America. Overall, FDATA estimated that

[32] *Consumer-directed finance: the future of financial services*, Department of Finance Canada, January 31, 2020 (https://www.canada.ca/en/department-finance/programs/consultations/2019/open-banking/report.html)

more than 100 million consumers use digital financial services that may be affected by restricting existing data access arrangements.[33]

2. Restrictions on Customer-Directed Data Sharing Can Be Anticompetitive.

Restrictions on customer-directed data sharing that directly inhibit competition in this way must be scrutinized under well-established competition laws.

In the U.S., financial institutions that control consumer and SME financial data have substantial market power, both in terms of market share and ability to impose barriers to entry on competitors.[34] The same is no doubt true in Canada. According to the Canadian Competition Bureau, 71% of Canadians have been with the same financial institution for the past 10 years suggesting that open banking would increase competition in the financial sector.[35] The Supreme Court of Canada has defined "market power" as "the ability to 'profitably influence price, quality, variety, service, advertising, innovation or other dimensions of competition'".[36]

When working in some combination, and potentially in some instances unilaterally, they can dramatically affect competition in data-driven financial services. As noted above, the potential impact on fintech accounts of restricting a range of data fields would be enormous—it would essentially disable the ability of certain competitors to operate entirely.[37] Additionally, a customer could be effectively coerced into using a particular data-based financial product offered by the customer's primary depository institution if the customer is denied the ability to authorize access to account information by a third party. In fact, that denial could effectively inhibit the customer's ability to obtain a data-driven financial service *from other competitor banks*, many of which use data aggregation services to obtain customer financial information for their product offerings.[38]

Canada's *Competition Act*[39] prohibits **conspiracies, agreements or arrangements** between competitors to:

(a) to fix, maintain, increase or control the price for the supply of the product;

---

[33] John Pitts, *BankThink: OCC did its part to secure customer data. Now it's CFPB's turn*, American Banker (Mar. 16, 2020, 9:40 AM), https://www.americanbanker.com/opinion/occ-did-its-part-to-secure-customer-data-now-its-cfpbs-turn.

[34] See Ind. Fed'n of Dentists, 476 U.S. at 460-61.

[35] Senate Report at 11 (https://sencanada.ca/en/info-page/parl-42-1/banc-open-banking/)

[36] Tervita v Canada (Commissioner of Competition), 2015 SCC 3 at para 44 (https://www.canlii.org/en/ca/scc/doc/2015/2015scc3/2015scc3.pdf)

[37] *See* FTC/DOJ Guidelines at 15 ("An exercise of market power may injure consumers by reducing innovation below the level that otherwise would prevail, leading to fewer or no products for consumers to choose from, lower quality products, or products that reach consumers more slowly than they otherwise would."). Under these circumstances, it is not necessary to perform a detailed market analysis. *See Ind. Fed'n of Dentists*, 476 U.S. at 460-61 ("Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, 'proof of actual detrimental effects, such as a reduction of output,' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.'") (quoting 7 Phillip E. Areeda, Antitrust Law ¶ 1511, at 424 (1986)). *See also* FTC/DOJ Guidelines at 10-11, 26.

[38] *See Eastman Kodak*, 504 U.S. at 463; *see also Virtual Maint.*, 957 F.2d at 1318 (finding that company had market power over separate software support market for those companies doing business with an auto manufacturer with which company had an exclusive license); *Datel Holdings, Ltd. v. Microsoft Corp.*, 712 F. Supp. 2d 974 (N.D. Cal. 2010) (finding that developer of video game enhancement products had stated a cognizable "lock-in" tying claim against a video game system manufacturer).

[39] R.S.C., 1985, c. C-34 (https://laws.justice.gc.ca/eng/acts/C-34/index.html)

(b) to allocate sales, territories, customers or markets for the production or supply of the product; or

(c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.[40]

Senior Competition Bureau staff have repeatedly stated that this subsection will only apply in the most egregious forms of cartel agreement and that the *Competition Act's* other civil provisions will normally apply.[41]

Federal financial institutions are also governed by Section 49 of the *Competition Act,* which prohibits, amongst other things, agreements amongst them with respect to "the kind of service to be provided to a customer." Federal financial institutions may be exempt from this prohibition "with respect to the exchange of statistics and credit information, the development and utilization of systems, forms, methods, procedures and standards, the utilization of common facilities and joint research and development in connection therewith, and the restriction of advertising." The onus would be on those federal financial institutions to prove that they qualify for this exemption. Whether an agreement on which data to provide to certain customers in certain circumstances is captured under the above-referenced exemption has not been litigated in Canada.

Section 90.1 is a **civil-track provision** that permits the Competition Tribunal (on the application of the Commissioner of Competition) to make remedial cease-and-desist orders in connection with agreements between competitors that substantially lessen or prevent competition. This section is intended to address arrangements between competitors that are not egregiously illegal, but which may substantially lessen competition.[42]

Section 90.1 involves an effects-based test that involves determining whether the agreement or arrangement creates, maintain, or enhances the market power of the parties to the agreement.

The application of the above provisions of the *Competition Act* – namely sections 45, 49, and 90.1 – are premised on financial institutions agreeing on how to share data, as opposed to mere unilateral action.

The *Competition Act* also permits the Commissioner of Competition to bring an application before the Competition Tribunal for an order prohibiting an **abuse of dominant position** where:

(a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,

(b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and

---

[40] R.S.C., 1985, c. C-34, s. 45
[41] *The 2020 Annotated Competition Act*, Omar Wakil, Thomson Reuters 2019, at 107
[42] *Rakuten Kobo Inc. v. Canada (commissioner of Competition),* [2016] C.C.T.D. No. 11, 2016 Comp. Trib. 11, CT-2014-002 at 56 (Comp. Trib.).

(c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market.[43]

Abuse of a dominant position occurs when a dominant firm or a dominant group of firms engages in a practice of anti-competitive acts, with the result that business-to-consumer and business-to-SME competition has been, is, or is likely to be prevented or lessened substantially in a market. To define a market, an evaluation of whether the dominant firm (or firms) has a substantial degree of market power within that market. In this context, markets are defined in reference to both a product and geographic dimension, based on demand substitution in the absence of alleged anti-competitive conduct. Canada's Competition Tribunal has characterized a substantial degree of market power as one that "confers upon an entity considerable latitude to determine or influence price or non-price dimensions of competition in a market, including the terms upon which it or others carry on business in the market".[44]

The second element considers the purpose of the impugned acts: whether the dominant firm (or firms) has engaged in a practice of conduct intended to have a predatory, exclusionary or disciplinary negative effect on a competitor. Disciplinary acts involve actions intended to dissuade an actual or potential competitor from competing vigorously, or otherwise disrupting the status quo in a market, such as rules to prevent information sharing. An evaluation as to the purpose of the act in question is necessary. For example, was the intent of the rules preventing information-sharing to prevent competition?

In some exceptional circumstances, refusals to supply may engage the abuse of dominance provisions where a firm agrees to supply on terms that are sufficiently onerous as to have the same effect as an explicit denial (e.g., charging a prohibitively high price or in the current situation, setting information-sharing rules that are not feasible). The product or service being denied must be both competitively significant and cannot otherwise be feasibly obtained (for example, from other suppliers or through self-supply). In this case, it may be reasonably foreseeable that the purpose of a refusal was to exclude a competitor, in the absence of a legitimate business justification. Compliance with a statutory or regulatory requirement may also constitute a business justification, where an act is required to comply with that statutory or regulatory requirement.[45] Proving that burden falls on the firm claiming the statutory or regulatory requirement.

The final element involves an analysis of whether competition – on prices, quality, innovation, or any other dimension of competition – would be substantially greater in a market in the absence of the anti-competitive conduct. This assessment is a relative one, comparing the level of competition in a market with and without the alleged anti-competitive conduct, rather than an assessment of whether the absolute level of competition in a market is sufficient. The Competition Bureau would consider effects on both static competition (e.g., short-run prices and output), as

[43] R.S.C., 1985, c. C-34, s. 79
[44] The Commissioner of Competition v The Toronto Real Estate Board, 2016 Comp. Trib. 7 at para. 174 (http://canlii.ca/t/gr84t)
[45] *Toronto Real Estate Board v Commissioner of Competition*, 2017 FCA 236, leave to appeal refused (23 August 2018 at para 146 (https://www.canlii.org/en/ca/fca/doc/2017/2017fca236/2017fca236.pdf)

well as dynamic competition (e.g., rivalry driven by product or process innovation).[46] The Competition Tribunal has characterized innovation as "the most important form of competition".[47] Conduct that creates or enhances barriers that reduces innovation is of particular concern to the Competition Bureau.

In *The Commissioner of Competition v. The Toronto Real Estate Board and The Canadian Real Estate Association* (TREB),[48] the Federal Court of Appeal upheld a decision of the Competition Tribunal that certain information sharing practices of TREB prevented competition substantially in the supply of residential real estate brokerage services in the Greater Toronto Area (GTA).[49] TREB maintained a database of information on current and previously-available property listings in the GTA. Some information was publicly available and other information was not. The Commissioner claimed that this practice was an abuse of dominance and that these restrictions substantially lessened competition by preventing alternative brokerage models to thrive. TREB claimed that the restrictions were due, in part, to privacy concerns and that its brokers' clients had not consented to the disclosure of their information.

The Tribunal concluded that TREB's policies to restrict data was motivated by a desire to maintain control over that data in an effort to forestall new forms of competition, and not by any efficiency, pro-competition, or genuine privacy concerns. It called such restrictions a "pretext" and an "afterthought" used to justify its anticompetitive restrictions. It concluded that there was no evidence that TREB's privacy concerns received any real consideration during the development of those policies. The Federal Court of Appeal agreed. The Federal Court of Appeal did confirm, however, that privacy concerns could in any event constitute a valid business justification if those policies had been put in place in order to comply with statutory or regulatory requirements such as those under PIPEDA.

The Federal Court of Appeal concluded that TREB's rules were not required by PIPEDA. The listing agreements that clients signed were sufficient to allow release of information that was being restricted by TREB.

Last, the *Competition Act* permits the Competition Tribunal (on an application of the Commissioner of Competition or on a private application subject to leave) to order a supplier of a product to cease its **refusal to deal** with a customer where:

> (a) a person is substantially affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms,

---

[46] *Abuse of Dominance Enforcement Guidelines*, Competition Bureau, March 7, 2019 (https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04420.html)
[47] The Commissioner of Competition v The Toronto Real Estate Board, 2016 Comp Trib 7 at para. 712 (http://canlii.ca/t/gr84t)
[48] https://decisions.ct-tc.gc.ca/ct-tc/cd/en/item/462552/index.do
[49] 2017 FCA 236, https://decisions.fca-caf.gc.ca/fca-caf/decisions/en/301595/1/document.do

(b) the person referred to in paragraph (a) is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market,

(c) the person referred to in paragraph (a) is willing and able to meet the usual trade terms of the supplier or suppliers of the product,

(d) the product is in ample supply, and

(e) the refusal to deal is having or is likely to have an adverse effect on competition in a market.[50]

All five elements must be proven. Depending on which financial institutions refuse to provide access, the market for consumer data could be for a given financial institution or a group of them. If a company that is currently employing credential-based access is prevented from doing so, especially in cases where credential-based access is being permitted by the financial institution, the denial must substantially affect their business. It has to be more than *de minimus*.[51]

The refusal to supply also has to have or is likely to have at least some anti-competitive effect on the market as a whole. The remaining market participants must be placed in a position, as a result of the refusal, of created, enhanced or preserved market power.[52] Price, quality and variety of the product must be considered in assessing adverse effect.[53]

The U.S. FTC noted in a case involving "data blocking" agreements over sales data that the restricted sales data was not [the defendant's] to control.[54] Similarly, here, the consumer or small business has the ability to access his or her financial information and provide it to another party, including a third-party competitor. Restrictions on sharing financial data *override* this customer choice to provide that information to third parties.

B. Overriding Consumer-Permissioned Access for Data-Driven Financial Services Generally Do Not Have Procompetitive Benefits.

The anticompetitive effects of restricting customer-directed data sharing to competitors are not generally outweighed by any procompetitive benefits. To be sure, certain restrictions may be necessary to stop fraudulent or similar conduct. In the current marketplace, stakeholders are working together to address fraud and consumer protection concerns while competition continues. A broad restriction on customer-directed data sharing, or targeted restrictions on certain data that is useful for competitors, would not advance these goals.

In Canada, the Interim Commissioner of Competition, as he then was, made submissions to the Department of Finance Canada review into the merits of open banking in February 2019.[55]

---

[50] R.S.C., 1985, c. C-34, s. 75
[51] Canada (Director of Investigation and Research, Competition Act) v. Chrysler Canada Ltd., [1989] C.C.T.D. No. 18, 22 C.P.R. (3d) 83 at 81 (Comp. Trib.).
[52] *B-Filer Inc. v. Bank of Nova Scotia*, unreported (Doc. No. CT-2005-006) at 200.
[53] *Nadeau Poultry Farm Ltd. V. Groupe Westco Inc.,* [2009] C.C.T.D. No. 6, 2009 Comp. Trib. 6 at 369.
[54] *Id*. ¶ 184.
[55] https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04416.html

The Interim Commissioner pointed to research that showed low levels of financial technology adoption in Canada relative to other countries, and limited consumer engagement driven, in part, by frictions associated with shopping around and switching. These factors were symptoms of a market that was not functioning to its full potential. The Interim Commissioner believed that banks would be forced to compete harder for consumers, and consumers would have access to a broader range of services, if the benefits of technology could be more fully exploited through open banking.

This submission built upon a previous submission by the Commissioner of Competition[56] calling for more competition and making it easier for customers to switch between competitors easily. The Commissioner supported the expansion of flexibility for federally-regulated financial institutions to engage in innovative collaboration with fintech entrants. He nevertheless cautioned that some collaboration between competitors could lead to anti-competitive outcomes.

There are two broad concerns that stakeholders must manage in dealing with financial data sharing: regulatory requirements and consumer protection concerns such as fraud and data security. No law or regulation requires financial institutions to broadly restrict customer-directed access to competitors or to selectively restrict sharing of certain data to competitors. And stakeholders have been working collaboratively to deal with consumer protection concerns for years without resorting to broad data blocking or targeted restrictions on certain data, which in fact would undermine those efforts. Indeed, all financial services competitors are subject to consumer protection oversight and accountable to the very customers who direct them to access their financial data.

Conclusion

As Canada explores customer-directed finance, it is critically important to recognize the implications of anti-competitive behavior with regard to financial data access and to design an infrastructure that addresses the issue by mandating broad, unimpeded financial data access rights for consumers and SMEs. Robust competition in data-driven financial services will deliver lower costs, better services, and better outcomes for consumers' and small businesses' financial outlook. Overriding consumers' and SMEs' direction to share data to obtain the benefit of these financial services would pose a significant harm to competition and to consumers and small businesses nationwide.

[56] https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04313.html