



Blakes



Competition
**Market Studies
Toolkit**

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Blakes Means Business

About Blakes

As one of Canada's top business law firms, Blake, Cassels & Graydon LLP (Blakes) provides exceptional legal services to leading businesses in Canada and around the world. We focus on building long-term relationships with clients. We do this by providing unparalleled client service and the highest standard of legal advice, always informed by the business context.

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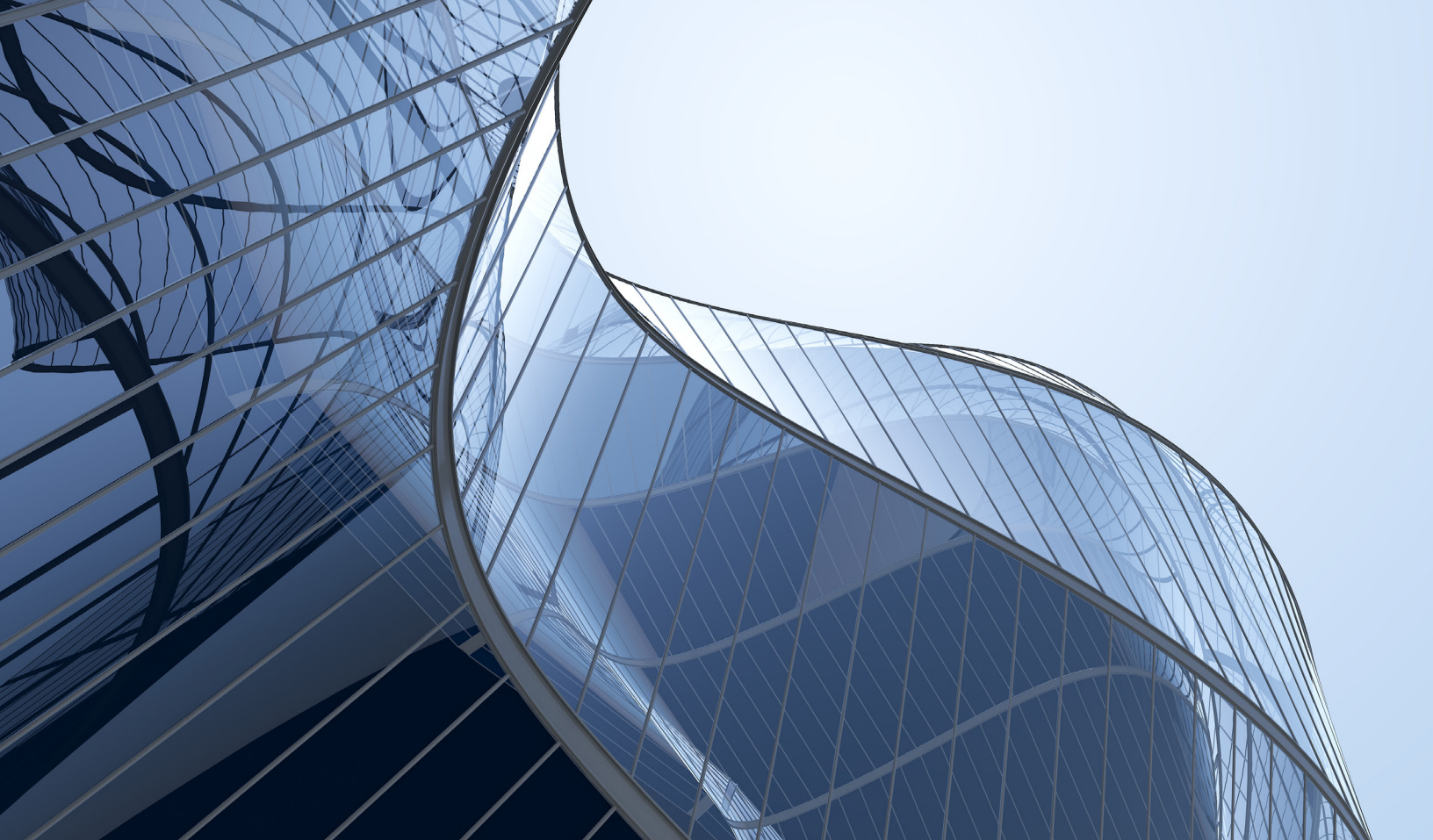
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Introduction

As of December 15, 2023, the Canadian Competition Bureau (“Competition Bureau”) has wide-ranging powers to investigate entire industries or specific market participants such as your business, collect documents and data, interview executives and employees, and – alone or with federal prosecutors – bring expensive and public legal actions with the information it obtains.

Beyond the burden of complying with a market study, the conclusions from a market study may have important reputational impacts or lead to governmental policy changes, with significant implications for your business. In addition, information obtained during a market study could lead to further investigations or legal actions by the Competition Bureau. These actions could be under the civil provisions of Canada’s *Competition Act*, such as with respect to abuse of dominance or misleading advertising as well as under its criminal provisions, such as with respect to price fixing, output restriction, market allocation or bid-rigging.

Building upon our extensive experience assisting many clients with market studies and Competition Bureau investigations in a variety of industries, including in the grocery, beer, financial technology, and telecommunications industries, this toolkit provides critical background information and practical advice on what to do if a market study is initiated in your industry.

Market Study Overview

The Competition Bureau is not new to market studies powers – it has concluded studies in the past of sectors including grocery stores, broadband internet and digital health. However, these previous studies differ in two important respects from those that will occur under the powers that were recently enacted; first, they relied on the voluntary compliance of the market participants rather than compelling information; and second, they were launched by the Commissioner of Competition (“**Commissioner**”), the Minister of Innovation, Science and Economic Development (“**Minister**”) could not direct a market study. Now, as before, the Competition Bureau will publish its results upon conclusion of its study. It will also publish an overview of the sector it examined, a description of relevant governing laws, policies, or regulations, its research methodologies, an assessment of competition issues uncovered and a set of recommendations for policymakers.

To date, market studies have generally been launched by the Commissioner in response to potential competition related concerns within an industry. Market studies can now be initiated at the direction of either the Minister or the Commissioner after consulting with the other party. Finally, market studies may only last longer than 18 months if the Minister extends the duration.

The Competition Bureau has, until now, had to rely on voluntary participation of market participants with its market study information requests. With its new powers, the Competition Bureau will be able to compel information from market participants by applying for a court order under section 11 of the *Competition Act*. As discussed below, this is the same manner in which the Competition Bureau compels information from companies when it investigates contraventions of the *Competition Act*.

While mandatory market study powers are new to Canada, they have been used in many countries worldwide. For instance, the UK’s Competition and Markets Authority recently carried out a market study on road fuel that compelled information from refiners, wholesalers, and retailers on prices, cost components, operating margins, financial targets, and competitive responses over many regions and periods of time. As a result of its findings, it proposed two UK policy changes related to pricing transparency and ongoing industry monitoring. In the United States, the Federal Trade Commission has conducted similar market studies compelling information on generic drug patents from pharmaceutical companies spanning over a decade.



Market Studies: Commonly Asked Questions

How is a market study started?

Either the Minister or the Commissioner can initiate a market study at any time after consulting with the other party. The impetus for these studies can include complaints, perceptions of market concentration, media scrutiny, political exigency or other factors.

What are the tools available to the Bureau in carrying out a market study?

The Competition Bureau has both voluntary and mandatory mechanisms to conduct market studies. As it has done in the past, the Competition Bureau may simply request certain information or documents from parties on a voluntary basis. However, going forward it is likely that the Competition Bureau will apply to the courts for orders to produce documents, data or written response to questions and to possibly even compel individuals to attend for questioning under oath. Production orders typically require that the company engage in a forensic document collection, review and production process within a fixed timeframe, generally three months based on past production order experience outside the market study context.

How long do market studies last?

Market studies are limited to 18 months from the publication of the final terms of reference to the publication of a report containing the Commissioner's findings. However, the Minister may extend the market study's duration by periods of up to three months (with no limit on the number of extensions the Minister may ultimately grant).

What elements of the market study will be public?

As described above, the Minister must approve the terms of reference for a proposed market study. The draft terms of reference submitted to the Minister must be published for no less than 15 days and the public must be invited to comment on them. In addition, the final terms of reference must also be published following the Minister's approval.

Following the conclusion of the market study, the Commissioner must publish a report of their findings on a publicly available website. Prior to publication, the Commissioner must first send to every person who was required to provide information for the study a complete or partial draft of the report. The market study participant will have three working days to provide the Commissioner with any concerns regarding factual inaccuracies or confidential information that should not be disclosed in the final report.

In addition to the above statutory requirements, the Commissioner will likely take additional opportunities to publicize the market study, including press releases announcing the commencement and conclusion of the market study, calls for public involvement in the study and other similar actions.

How might a market study affect my business?

As in the case of Competition Bureau investigations, businesses subject to market study inquiries may be required to spend significant resources to review, process and deliver large amounts of records, data and other information.

Beyond the burden of complying with a market study, the conclusions from a market study may have important reputational impacts or lead to governmental policy changes with significant implications for your business. In addition, information obtained during a market study could lead to further investigations or legal actions. These actions could be under the civil provisions of the *Competition Act*, such as with respect to abuse of dominance, or misleading advertising, as well as under its criminal provisions, such as with respect to price fixing, output restriction, market allocation or bid-rigging.

Can market studies result in fines or imprisonment?

The Competition Bureau cannot seek fines, imprisonment or other penalties under the market study provisions of the *Competition Act*.

However, information the Competition Bureau collects in the process of carrying out a market study could result in further investigations or prosecutions for violations of the *Competition Act*. For instance, fines at the discretion of the court can be ordered for criminal cartel conduct and bid-rigging. Civil actions for damages generally follow on criminal convictions. Substantial administrative monetary penalties and, for deceptive marketing, restitution can be ordered for violations of numerous civil provisions of the *Competition Act* (most notably for abuse of dominance).

How can Blakes help?

Blakes can assist from the onset of contact from the Competition Bureau or publication of a market study's terms of reference, including in preparing and submitting voluntary responses to market study inquiries. In the context of an order compelling production or testimony, we can assist in the response to the order in whatever form that takes.

If competition compliance issues arise, we can also conduct an internal investigation to assess the company's potential exposure, develop a strategy for defending the company's interests in the market study outcome and in respect of any *Competition Act* enforcement or action that may result and we can assist with government and public relations support as appropriate. We can work with you to prepare or update the company's compliance and training program, including conducting mock exercises, and educating employees and senior officers. We can also assist with conducting an audit to identify potential competition law risks and recommend steps to address compliance gaps.



What To Do if a Market Study is Initiated

Provided below are considerations and tools that will assist companies in dealing with various aspects of a possible Competition Bureau market study, including those involved in a production or attendance order.

Sample Hold Notice

This sample hold notice sets out direction to personnel to retain all relevant materials in response to a Competition Bureau market study and/or an internal investigation, related to, for example, a potential such study.

Dear Employee,

We are writing regarding a [market study currently underway] by the Canadian Competition Bureau under the supervision of the Legal Department. The purpose of this communication is to outline: (i) the steps in which your participation may be required, and (ii) what you may expect as this process proceeds.

The current investigation pertains to: (a)(b)(c) (the "Study Subject").

You are required to preserve all correspondence, emails, drafts, documents, agreements, files, calendar records, voicemails and other written or electronic records in your possession related to the Study Subject, whether in hard copy or electronic forms.

You must not destroy, delete, or reconfigure any material, which shall be monitored until this hold is formally lifted by further communication from the Legal Department.

Representatives from the Legal Department will contact you shortly to review the appropriate steps necessary to preserve and collect these materials, and to schedule interviews if required. Please provide your full cooperation to [•].

Please do not hesitate to contact me should you have any questions with this document hold notice.

Document Creation Considerations

As part of its market study process, the Competition Bureau has the power to obtain and review all documents and data (including emails, handwritten notes, spreadsheets, presentations etc.) relevant to its study. As a result, companies should take care in creating documents as they can be misunderstood or mischaracterized without the proper context.

Companies should generally avoid language that indicates any market dominance, opportunities to deny access to competitors, or that suggests only a limited set of competitors exists for any product or service. Companies are also encouraged to accurately state the competitive nature of their industry, ongoing and improving benefits they offer consumers and how they plan on competing more effectively. They should also incorporate appropriate context in any documents analyzing or discussing competitors to reduce the risk of misinterpretation.

It is often helpful for counsel to review strategic planning (e. g. sales or marketing) and transaction documents involving senior management before they are finalized.

Protecting Privilege

Maintaining privilege is a vital consideration regardless of the circumstance. When used effectively, privilege renders confidential (e.g., from the Competition Bureau) the results of an internal investigation or market analysis. Typically, privilege is maintained over legal counsel's work product, such as internal investigation reports, so long as an investigation is being conducted by legal counsel to assist in legal counsel's provision of legal advice or for the dominant purpose of contemplated litigation. However, pre-existing documents do not become privileged by virtue of an internal investigation – only the work product generated under the direction of legal counsel is subject to privilege. Documents created by or for counsel should be marked "Privileged and Confidential" on each page and dated.

A significant risk is inadvertent waiver of privilege, such as through disclosure of internal investigation findings or any legal advice to third parties. By way of illustration, accounting firms may provide considerable value in internal investigations or transaction analysis, but they are not afforded the protection of legal privilege. Accordingly, care should be taken at the outset of an investigation to ensure internal investigations are directed by legal counsel and communications involving an accounting firm or any other service provider (e.g., e-discovery provider) does not result in a waiver of privilege. Moreover, organizations should be very careful with respect to the mediums of which records are stored and how that information is distributed. Mechanisms such as common interest privilege agreements may also be utilized to manage sharing information with third parties that have common interests.

While there are situations where an organization may elect to waive privilege at the conclusion of a market study (e.g., in a self-reporting scenario), an organization is best served by protecting privilege at first instance rather than having the decision removed from their control through the inadvertent waiver of privilege or failure to engage proper privilege protections at the outset.



Production/Attendance Order Checklist

This checklist below outlines steps to be taken in response to receiving a production or attendance order from the Competition Bureau.

On Receipt of a Draft Order

- Review the Draft Order to assess the scope of the requested information
- Develop a response plan and circulate an initial hold notice for key personnel
- Schedule a pre-issuance call with the Competition Bureau to raise any issues regarding scope, compliance timeframe, and burden
- Obtain additional information about the market study
- Request any amendments to the Draft Order in writing to the Competition Bureau, including explanations for the proposed amendments (for potential inclusion in the court record)
- Review the court dockets to identify the date and time of the hearing

Once the Order is Issued

- Obtain a copy of the motion record, including the affidavit in support of the Order, from the court
- Finalize a PR response plan immediately, as the application for the Order becomes public
- Circulate an updated hold notice to all key personnel

Data Collection

- Identify data sources and discuss collection with company finance or IT personnel as appropriate
- Ensure data files are extracted in a readable form and prepare any necessary data dictionaries

Written Returns & Certificate

- Draft the written returns and certificate
- Have a senior officer execute the certificate and have it notarized/commissioned

Record Collection

- Consider retaining an e-discovery vendor for record collection and processing
- Identify and interview custodians that have potentially responsive records
- Create a document collection and review plan
- Create a privilege log
- Consider follow-up interviews with relevant custodians based on any key records identified during the review
- Consider submissions to the Competition Bureau as appropriate

Production

- Schedule a pre-production technical call with the Competition Bureau and provide a sample
- Encrypt and courier production medium to the Competition Bureau
- E-mail the certificate, written returns, and decryption information to the Competition Bureau

Oral Examination

- Schedule any oral examinations of company personnel identified in the Order
- Prepare the company personnel for the oral examination, using (amongst other resources) any documents produced
- Attend the oral examination

Sample Internal Resources Contact List

We recommend maintaining an internal contact list of internal resources to which employees can refer when contacted by the Competition Bureau, such as the template below.

| | Legal | Information Technology | Public Relations | Government Relations | Security/Premises |
|--------------------------|--|--|--|--|--|
| Primary Contact | Name: Title: Tel: Cell: Email: | Name: Title: Tel: Cell: Email: | Name: Title: Tel: Cell: Email: | Name: Title: Tel: Cell: Email: | Name: Title: Tel: Cell: Email: |
| Secondary Contact | Name: Title: Tel: Cell: Email: | Name: Title: Tel: Cell: Email: | Name: Title: Tel: Cell: Email: | Name: Title: Tel: Cell: Email: | Name: Title: Tel: Cell: Email: |

Sample Communications Materials

Below is a possible external communication that a company may wish to take in response to a Competition Bureau investigation

Media Statement

The Company confirms that it is aware of a market study by the Competition Bureau into the [subject matter]. The Company is cooperating and has not been charged with or accused of any violation of the Competition Act or any other law.

The Company operates with the highest ethical standards and complies with all laws and regulations.



Conclusion

Competition Bureau market studies are an emerging ‘fact of life’ for companies doing business in Canada. Understanding the possible market studies the company may face, what to do if a market study is proposed or initiated involving the company and how to respond to court orders is of fundamental importance. Similarly, understanding and planning around the potential pitfalls involved in conducting an internal investigation into competition law violations will help an organization to mitigate significant legal risk, reputational harm, unnecessary expense and business interruption. Blakes competition law experts are well positioned to offer advice and representation with respect to any and all of these matters.

Key Contacts

For more information, please contact:



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