

Competition in the Digital Economy

Competition Bureau vision: Advocacy, transparency, active enforcement

By **Randall Hofley**



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(February 24, 2020, 2:20 PM EST) -- During my time as general counsel and senior enforcement adviser in the Legal Services department at the Competition Bureau in 2018-19, I had the good fortune to work with all levels of the bureau and have emerged with a very good understanding of how they view the law, the economics and the bureau's public interest mandate in different contexts: mergers, anti-competitive conduct such as abuse of dominance and cartels and deceptive marketing practices.

By sitting at the senior management table, I was able to play an active role in the development of commissioner Matthew Boswell's newly released *Strategic Vision for 2020 -2024*, as well as his important efforts to streamline the bureau's management of enforcement and policy matters. The bureau's articulation of a strategic vision provides businesses with greater transparency at a macro level and efforts to streamline management should provide greater transparency at a micro level, especially from the bureau's key decision makers. Other bureau efforts to enhance transparency have come through its updated enforcement guidelines in the areas of criminal cartels, mergers efficiencies, abuse of dominance and intellectual property.

The bureau's focus in its Strategic Vision on the digital economy is not new and is a reflection of its importance to Canadians and the Canadian government. It also reflects the concern of global competition law enforcers that this sector, notably digital platforms, is characterized by business models that are unique and demand heightened scrutiny. We have seen the bureau's focus on the digital economy in the past in the form of its big data whitepaper a couple of years ago and in its callout in September 2019 for information from Canada's business community regarding anti-competitive conduct in the digital economy.

In the years to come, this focus will be increasingly demonstrated in the bureau's enforcement efforts. It is crucial that the bureau apply the law and economics to these issues in a principled manner consistent with how it has done so in the more traditional side of the economy, recognizing the important innovation that digital businesses bring to Canadians and striving not to stifle it.

Similarly, in September 2019, the bureau's expanded intelligence-gathering role for its Merger Notification Unit, as well as repeated references in the Strategic Vision to use "new intelligence gathering tools" to detect anti-competitive conduct, reflects a global competition law enforcement consensus that transactions, especially acquisitions of businesses with cutting-edge innovation in the early stage of development, should not escape merger review nor should other business conduct escape review because of difficulties of detection.

While I expect the bureau's focus in this regard to be the digital economy, it will not exclusively be that. For example, the bureau has shown an increased interest in taking on non-notifiable transactions across industries. Its new approach to non-notifiable mergers simply highlights the importance of considering, carefully and in advance, any *Competition Act* implications of a transaction even if it is not notifiable in Canada or is focused outside of Canada. Particular attention should be paid where the transaction could be said to prevent (future) competition or hinder dynamic competition through innovation.

Aside from the bureau's focus on the digital economy and non-notifiable mergers, businesses should bear in mind the bureau's promise to be more active in its enforcement of the *Competition Act*. This will likely result in a willingness by the bureau to explore (or test) the boundaries of the law where it sees an important competition policy issue. Perhaps this is best said as a less risk-averse enforcement approach, considering the risk of inaction as well as the risk of action.

As a result, in considering any transaction or other action they wish to undertake, it will be all the more important for businesses operating in Canada to obtain advice early to ensure that those actions will not engage the bureau's interest and even if they do, to be in a position to explain the conduct in a manner that avoids the cost in money and time of a protracted bureau review or investigation.

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