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Canadian Competition Law and Foreign Investment:

What to Expect in 2020 and How to Stay Ahead of the Curve

All signs point towards a rapidly evolving competition law and foreign investment environment in Canada for the year ahead. Companies doing business in Canada will need to adapt quickly in order to stay ahead of the curve as enforcement agencies confront new challenges. These include developing a coherent antitrust framework for the digital economy, reviewing mergers of all sizes and managing an ever-expanding use of national security review powers.

This publication highlights the key trends in Canadian competition law and foreign investment for 2020 and provides key practical takeaways for businesses to consider throughout the year ahead.

1 Digital is the New Industrial

Continued Focus on Digital Economy Enforcement

The digital economy has vaulted to the top of the priority list for antitrust enforcement agencies around the world, and Canada is no exception. The Canadian Competition Bureau (Bureau) has undertaken several initiatives focused on the digital economy, including publishing position papers, developing enforcement strategies, hiring specialized personnel—including the appointment of the Bureau's first-ever Chief Digital Enforcement Officer—and taking enforcement action against technology companies.

Businesses should be mindful that the Bureau issued a "call-out" in September 2019 for businesses to report potentially anticompetitive conduct in the digital economy, which is expected to generate further enforcement related investigations in 2020. Among other enforcement powers, the Bureau may challenge anticompetitive mergers, as it did in 2019 against the merger of two software companies. The Bureau will no doubt continue to take action in respect of misleading digital advertising, as it is currently doing in respect of online flight sales and marketing practices. The Bureau may also seek to take enforcement action against large technology companies that it believes are using data-related practices to create barriers to entry for new firms.

The Bureau will continue to focus on the digital economy in 2020 as its *2019-20 Annual Plan: Safeguarding the Future of Competition* cites building consumer confidence and supporting competition in the digital economy as top priorities. To give a sense of the Bureau's workload in this area, in a January 2020 speech, a senior Bureau official commented that from April to September 2019, the Bureau launched 16 cases, and it continues to work on 37 active cases, all related to the digital economy.

Key Takeaways:

- The Bureau is likely to closely scrutinize any merger between technology firms that raises competition issues.
- Businesses that engage in misleading online pricing practices can be subject to civil or criminal penalties.
- Companies with significant market share can be subject to investigations and enforcement actions if they seek to harm their competitors; for example, by denying access to key competitive inputs such as data.

Privacy and Competition Law Turf Wars are Heating Up

The Bureau may increasingly consider data privacy matters in determining whether to take enforcement action against businesses operating in the digital economy. Although traditionally not a heavy focus area for the Bureau, recent statements and publications indicate that it considers privacy to be an important component of non-price competition. The Bureau's focus on the privacy of user data is in line with broader Canadian government initiatives, such as the Canadian government's establishment of a national Digital Charter, which includes the importance of digital privacy among its core principles.

In practice, an increased Bureau focus on data privacy could have several important implications for competition enforcement in Canada. For example, in its September 2018 discussion paper regarding big data, the Bureau stated that a merger that allowed the purchasing entity to exercise market power by reducing privacy standards could be anticompetitive. The Bureau has also indicated that its mandate to enforce deceptive marketing practices could mean legal action against businesses that mislead consumers regarding the collection or use of consumer data. Indeed, the Bureau has initiated an investigation of Canada's political parties regarding their use of data and privacy. At issue in the complaint is whether Canadians were misled about how their personal information would be protected, used or shared.

Key Takeaways:

- Businesses that maintain privacy policies may still be subject to competition law enforcement regarding their use and storage of personal data.
- Businesses that collect or use consumer data should ensure that they clearly tell consumers how their data will be used and transmitted and, if they indicate that the user can control their own data, that such control exists.
- Merging parties that use consumer data should be aware that the Bureau may review their data policies and practices to determine whether privacy protection is an aspect of competition that may be lessened as a result of the merger.

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Digital Marketing and Pricing Practices Will Be Under the Spotlight

Influencer Marketing

Innovative forms of interactive marketing using social media tools, customer reviews, and testimonials are also attracting increasing scrutiny from the Bureau. In 2019, it published guidelines on influencer marketing in its *Deceptive Marketing Practices Digest*. The guidelines provide that consumers are entitled to know whether an influencer has a "material connection" to a brand it has endorsed.

Similar to what has been done by other agencies around the world, in December 2019, the Bureau issued letters to nearly one hundred brands and marketing agencies involved in influencer marketing in Canada; the Bureau advised recipients to review their marketing practices to ensure compliance with the *Competition Act* (Act), including disclosing relationships with the brands they promote and ensuring testimonials are based off of honest experience. Moving forward, brands, agencies and influencers themselves could be liable for violations. In the coming year, the Bureau can be expected to monitor the conduct of those that received its letters and may take enforcement action against recipients that fail to comply. It remains to be seen whether the Bureau will act against the influencers themselves; notably, the letters were sent only to brands and agencies.

Online Pricing

Online pricing practices were a primary concern for the Bureau in 2019 and it shows no signs of shifting focus in 2020. In a recent speech, the Canadian Commissioner of Competition (Commissioner) announced his intention to prioritize investigating misleading pricing representations made online. The Bureau has already obtained significant settlements against companies engaged in misleading pricing practices. For example, in July 2019, it reached a C$4.5-million settlement with Ticketmaster regarding allegations that the company had engaged in "drip pricing" by adding mandatory fees at the time of checkout. The Bureau has stated that it intends to provide additional guidance on drip pricing and plans to monitor such conduct with continued intensity. The Bureau is also investigating hidden fees imposed for online flight sales.

This year, the Bureau will assume its role as president of the International Consumer Protection and Enforcement Network (ICPEN), where it plans to use its presidency to promote truth in online advertising and build consumer confidence in the digital economy.

Astroturfing and Self-preferencing

The Bureau has also held that other forms of online advertising may run afoul of the Act, including "astroturfing" and "self-preferencing."

"Astroturfing" occurs when a business creates commercial representations about its products that are masqueraded as authentic opinions, such as posting fake customer reviews. The Bureau has already imposed a significant fine against at least one company for online reviews posted by incognito employees and can be expected to monitor this practice moving forward.

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"Self-preferencing" is a practice where an online platform gives preferential treatment to its own products that compete with third-party products also available via the platform. Foreign enforcement agencies, including the European Commission, have stated that such conduct may be considered anticompetitive when engaged in by a dominant digital platform.

Although the Bureau has not yet engaged in any enforcement action related to self-preferencing, technology firms should be aware that the Act contains provisions regarding abuse of dominance that could provide a legal basis for challenging this type of conduct. We can expect the Bureau to direct its investigative efforts toward detecting conduct like astroturfing and self-preferencing in 2020.

Key Takeaways:

- Businesses may be liable for misleading representations by influencers who receive payment or other benefits from those businesses and do not disclose their material connections to the supplier. Continuous monitoring and an ability to modify non-compliant representations by influencers is a key method for businesses to reduce their competition risks.
- Businesses should review their online practices (e.g. timers, search pages, banner ads, etc.) to ensure up front disclosure of mandatory fees. Promotions and sales should also not make exaggerated claims.
- Businesses should inform employees that if they provide reviews of their business's products, they must disclose that they are employed by the business.

Cross-border Coordination and Information Sharing by Enforcement Agencies

The Bureau has stated that the existence of digital giants requires a globally coordinated approach to enforcement. On July 18, 2019, competition authorities of the G7 countries, along with the European Commission, released a "common understanding" highlighting opportunities and challenges raised by the digital economy. The common understanding emphasizes that, given the "borderless nature" of the digital economy, competition authorities must enhance cooperation with their international counterparts.

The Bureau currently has cooperation instruments relating to competition and consumer protection laws with 15 non-Canadian jurisdictions, including the U.S., EU, Mexico, New Zealand, Australia, People's Republic of China, Brazil, Chile, Colombia, Hong Kong, India, Japan, Peru, Korea and Taiwan. The Bureau has already taken steps to increase its coordination with foreign enforcers, including a commitment to assume the presidency of ICPEN from July 1, 2020, to June 30, 2021. As mentioned, the Bureau's term will focus on promoting truth in online advertising and building consumer confidence in the digital economy.

Businesses should be aware that this could lead to an increase in enforcement activity both in Canada and abroad. Canadian businesses engaged in online advertising should be particularly cognizant that the Bureau is working with international agencies to promote compliance in this area.

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Key Takeaways:

- The Bureau and international antitrust enforcement agencies share information with each other in order to increase the efficiency and effectiveness of investigations, particularly in the digital space.
- Companies should be mindful that the Bureau does not seek a waiver of confidentiality protections from parties before sharing information with other competition authorities.

2 Mergers (Regardless of Size) Will be Subject to Greater Scrutiny

Heightened Enforcement, Including for Smaller-scale Acquisitions

The Bureau's merger review and enforcement regime remains busy. The Bureau recently sued to unwind a completed merger between software companies Thoma Bravo and Aucerna, leading to a consent agreement under which Thoma Bravo agreed to certain divestitures. This represented the first Bureau challenge of a completed merger in four years. In December 2019, the Bureau followed with another challenge, this time challenging Parrish & Heimbecker's (P&H) acquisition of a primary grain elevator in Manitoba from Louis Dreyfus Company (LDC). Both enforcement actions suggest an intention to ramp-up intelligence gathering and merger enforcement efforts moving forward.

Regarding enforcement of smaller-scale acquisitions, in September 2019, the Bureau issued a news release announcing that its Merger Intelligence and Notification Unit (MINU) will be stepping up its market surveillance efforts to uncover non-notifiable mergers that may raise competition concerns. Though parties are only required to notify the Bureau of transactions that meet certain financial and other thresholds in Canada, the Bureau can review mergers of any size to determine if they raise significant competition concerns. The Bureau can also challenge a merger for up to one year from closing.

The Bureau's focus on intelligence gathering signals an intention to increase enforcement efforts for mergers that do not meet notification thresholds in Canada, but which may nonetheless create competition concerns. This effort reflects a globally growing trend in which competition agencies are increasingly focused on scrutinizing smaller deals. This is particularly prevalent in the technology sector, as the financial thresholds for mandatory notification—which are based on current assets and revenues as opposed to future growth—may not represent the competitive significance of an emerging player. This trend also affects potential acquisitions of nascent or startup entities where the competitive significance of the acquisition is less clear or predictable. Traditionally, merger reviews are considered under a standard of whether the acquisition is likely to prevent competition substantially in a market, but with nascent or startup acquisitions, predicting market outcomes can be more challenging.

Key Takeaway:

- Parties to any merger involving companies that do business in Canada should carefully consider the risk of Bureau enforcement, even if the deal does not require pre-merger notification to the Bureau.

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When it Comes to Efficiencies, the Best Defence Is a Good Offence

The Act includes an express efficiencies defence that enables mergers likely to prevent or lessen competition substantially to proceed, so long as the efficiency gains to the Canadian economy are greater than and offset the anticipated anticompetitive effects. Canadian merger review takes into account fixed-cost savings and dynamic efficiencies, not just variable cost savings. As a result, the efficiencies defence in section 96 of the Act may result in mergers being cleared in Canada with no remedies, or only limited remedies, as compared to other jurisdictions where no similar defence exists.

The Bureau has cleared several mergers relying on the efficiencies defence without parties needing to resort to litigation before the Competition Tribunal (Tribunal), starting with the *Superior Plus/Canexus* merger in 2016. More recently, however, the Bureau has signalled less willingness to give full credit to all efficiencies claims. In 2018, the Bureau introduced draft efficiencies guidelines that may have limited the scope of the efficiencies defence in a number of circumstances, but these draft guidelines were never finalized following public consultation. In 2019, the Bureau introduced a model mergers timing agreement setting out the Bureau's proposed process for evaluating efficiencies claims, but this also has not been finalized to date.

As a result, the efficiencies defence remains a valuable tool for getting highly strategic mergers cleared in Canada. To rely on the efficiencies defence, merging parties typically retain efficiencies experts to work with the merging parties, and prepare an expert report for the Bureau setting out which synergies estimates constitute quantifiable efficiencies that are legally recognized under the Act.

Key Takeaways:

- The efficiencies defence can be an important tool for getting your deal through when the right criteria are met.
- Merging parties should closely analyze the deal efficiencies in order to determine whether the efficiencies defence may be viable in the context of a Bureau merger review.

Unpacking Vertical Mergers

Over the next year, competition agencies around the world will be giving serious thought to how they analyze vertical mergers going forward. This follows the U.S. Department of Justice's (DOJ) loss in its challenge of the *AT&T/Time Warner* merger in 2019 based on concerns about vertical relationships between the merging parties and other competitors. On January 10, 2020, the U.S. Federal Trade Commission (FTC) and DOJ released *Draft Vertical Merger Guidelines* for public comment. Once finalized, the draft guidelines could significantly impact merger reviews involving Canadian businesses that are vertically integrated in the U.S. and have an important influence on how the Competition Bureau assesses vertical mergers. The Bureau's stated approach to vertical mergers is set out in its own *Merger Enforcement Guidelines*, although the *Draft Vertical Merger Guidelines* released in the U.S. may cause the Bureau to revisit this approach.

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Vertical mergers involve a combination of firms or assets operating at different stages of the same supply chain, such as the acquisition by an upstream manufacturer of a downstream retailer that resells its products. As a result, vertical mergers raise unique competition law issues. For example:

- Vertical mergers could create an opportunity to harm upstream or downstream rivals by raising their costs or foreclosing their access to necessary inputs or customers.
- Vertical mergers can have procompetitive effects, including incentives to lower prices for consumers and unique efficiencies from the combination of complementary business operations and the removal of contractual complications.

Key Takeaway:

- Cost savings and other procompetitive benefits from a merger should be carefully documented by parties when planning a merger to ensure these procompetitive effects are given full weight.

Enhanced Domestic Interagency Cooperation on Mergers

The past year has seen extensive cooperation between the Bureau and other government agencies during merger reviews, which will continue for mergers involving industries subject to review by multiple regulators. In particular, the airline and telecommunications industries have seen significant interagency coordination given the overlapping jurisdiction between the Bureau and sector-specific regulators like Transport Canada and the Canadian Radio-television and Telecommunications Commission (CRTC) in merger review.

For example, on February 26, 2019, the Bureau provided a report to the Minister of Transport in connection with Transport Canada's review of the *First Air/Canadian North* merger. The Bureau's report raised concerns about the impact of the merger on competition, but the Government of Canada approved the deal based on broader public interest considerations, including ensuring an efficient and financially sustainable northern air carrier.

Key Takeaway:

- Businesses should carefully coordinate strategy when mergers are subject to review by multiple government agencies.

3 New Rules of the Road for Abuse of Dominance

Expanded Range of Practices Subject to Abuse of Dominance

In October 2019, the Tribunal dismissed an abuse of dominance application brought by the Commissioner against the Vancouver Airport Authority (VAA) with respect to in-flight catering and galley handling services at the Vancouver International Airport (YVR). The Commissioner initially filed its application in September 2016.

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The Commissioner claimed that VAA restricted competition by limiting the number of providers of galley handling services at YVR and excluding new-entrant firms; in addition, it was claimed that VAA tied access to the airport airside—the portion of an airport that lies inside the security perimeter—with the leasing of airport land from VAA for the operation of catering kitchen facilities, contrary to the abuse of dominance provisions in s.79 of the Act.

The Tribunal found that VAA's conduct did not constitute abuse of dominance, as VAA demonstrated legitimate business justifications for its conduct. The Tribunal dismissed the Commissioner's application and awarded costs of over C$1.3-million to VAA. Notwithstanding the dismissal, the Tribunal's ruling should be viewed as expanding the scope of potential enforcement actions by the Bureau. First, the Tribunal ruled that the VAA, which itself does not provide galley-handling or catering services, was nonetheless dominant because it controlled access to the airport. Second, the Tribunal found that, in this case, the regulated conduct doctrine (RCD) did not apply to the abuse of dominance provisions of the Act. The RCD can act to shield certain conduct required or authorized by a valid federal or provincial law or regulation—whether expressly or by implication—from enforcement.

Key Takeaways:

- The Tribunal's decision provides key insight into the application of the RCD to the abuse of dominance provisions of the Act and suggests that the RCD does not apply to the civil provisions of the Act more broadly. This likely widens the range of practices subject to the abuse of dominance provisions.
- Further, the decision clarifies the test for application of the abuse of dominance provisions to non-market participants and develops the "plausible competitive interest"—building off of the The Federal Court of Appeal's recent decision in *Toronto Real Estate Board v. Commissioner of Competition*—which can potentially impact other areas where a non-market participant controls access to key inputs or resources required to compete in downstream markets.
- Finally, the VAA decision demonstrates that the Tribunal is receptive to evidence of legitimate business justifications for potentially exclusive conduct, and the importance of documenting such business justifications in company decision making processes.

4 Competition Law Class Actions Will Cast a Wider Net

The Supreme Court of Canada (SCC) decided several key issues relevant to competition class actions in September 2019 in *Pioneer Corp. v. Godfrey*, 2019 SCC 42 (*Godfrey*), in an appeal of the certification of a class action commenced by B.C. purchasers of optical disk drives (ODDs) and products containing ODDs, including computers and video game consoles (ODD Products).

The SCC decided that:

1. The discoverability principle applies to the limitation period set out in s.36(4)(a)(i) of the Act.

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2. Umbrella purchasers have a cause of action under s.36(1)(a) of the Act.

3. S.36(1) of the Act does not preclude plaintiffs from bringing other common law or equitable claims based on breaches of the Act (i.e. the Act is not a "complete code").

4. Common questions of loss to indirect purchasers can be certified on the basis of a credible expert methodology to demonstrate that overcharges were passed on to the indirect purchaser level; however, the methodology does not need to be capable of showing loss to each and every class member or distinguishing those who suffered loss from those who did not.

Key Takeaways:

- Going forward, more conspiracy class actions will likely include umbrella purchaser claims, expanding the scope of potential liability of companies facing conspiracy class actions.
- *Godfrey* establishes a lower bar for proof of indirect purchaser harm at the certification stage.
- Class members will still be required to demonstrate individual loss before aggregate damages can be awarded. This will likely shift arguments regarding individual loss to post-certification stages of class action litigation.

5 Need for Competition Law Compliance Programs Remain as Important as Ever

In today's enforcement climate, a company can limit its exposure to antitrust risk by having an effective corporate compliance program in place. In addition to helping reduce the risk of violations under the Act, the Bureau may—under their recently updated Immunity and Leniency Programs—consider, and recommend that the courts consider, the pre-existence of a "credible and effective" compliance program as a mitigating factor when assessing a fine against a firm charged with a cartel offence.

The Bureau has released a model corporate compliance program framework that can serve as the starting point for developing a program tailored to a company's needs. Key elements of a credible and effective competition law compliance program include:

1. Management commitment and support
2. Risk-based corporate compliance assessment
3. Corporate compliance policies and procedures
4. Compliance training and communication
5. Monitoring, verification and reporting mechanisms
6. Consistent disciplinary procedures and incentives for compliance
7. Compliance program evaluation

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Key Takeaways:

- Compliance programs must be clear, easily understandable and tailored to the operations, size and scope of the business.
- Ensuring that all key personnel receive initial and ongoing training can be an effective means of avoiding contraventions of the Act.
- The Bureau considers a credible and effective compliance program to be a mitigating factor when assessing remedies and making its recommendations to the Crown.

6 National Security Reviews Becoming More Frequent, Less Predictable

The Canadian government has recently shown a heightened focus on national security reviews of foreign investments—a trend that will likely continue in 2020. While still uncommon, the increased potential for national security reviews is relevant for foreign investors, as such reviews can cause delays and even lead to failed transactions.

The Canadian government's increased willingness to scrutinize investments on national security grounds can be seen in its recent *Annual Report* on foreign investment review under the *Investment Canada Act*. The report states that last year, the Canadian government initiated roughly the same number of national security notices—a preliminary step in the national security review process—and formal national security reviews as it did over the prior three years combined.

In addition to the increase in the number of national security reviews, it is becoming increasingly difficult to discount the possibility of a national security review based on the sector in which the Canadian business receiving the investment operates. As it relates to the Canadian business sectors involved in national security reviews, defence and technology-related industries are likely to continue to be sensitive. However, industries not typically subject to national security reviews, such as urban transit systems, metal hardware manufacturing and credit intermediation, were also involved in national security reviews over the past year.

Key Takeaway:

- The Canadian government has developed an increased willingness to engage in national security reviews. When screening investments for national security risk, it is important to seek counsel to advise on foreign investment at the early stages of a transaction.

If you have any questions regarding these developments, please do not hesitate to contact your usual Blakes contact or any member of the Blakes Competition, Antitrust & Foreign Investment group.

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