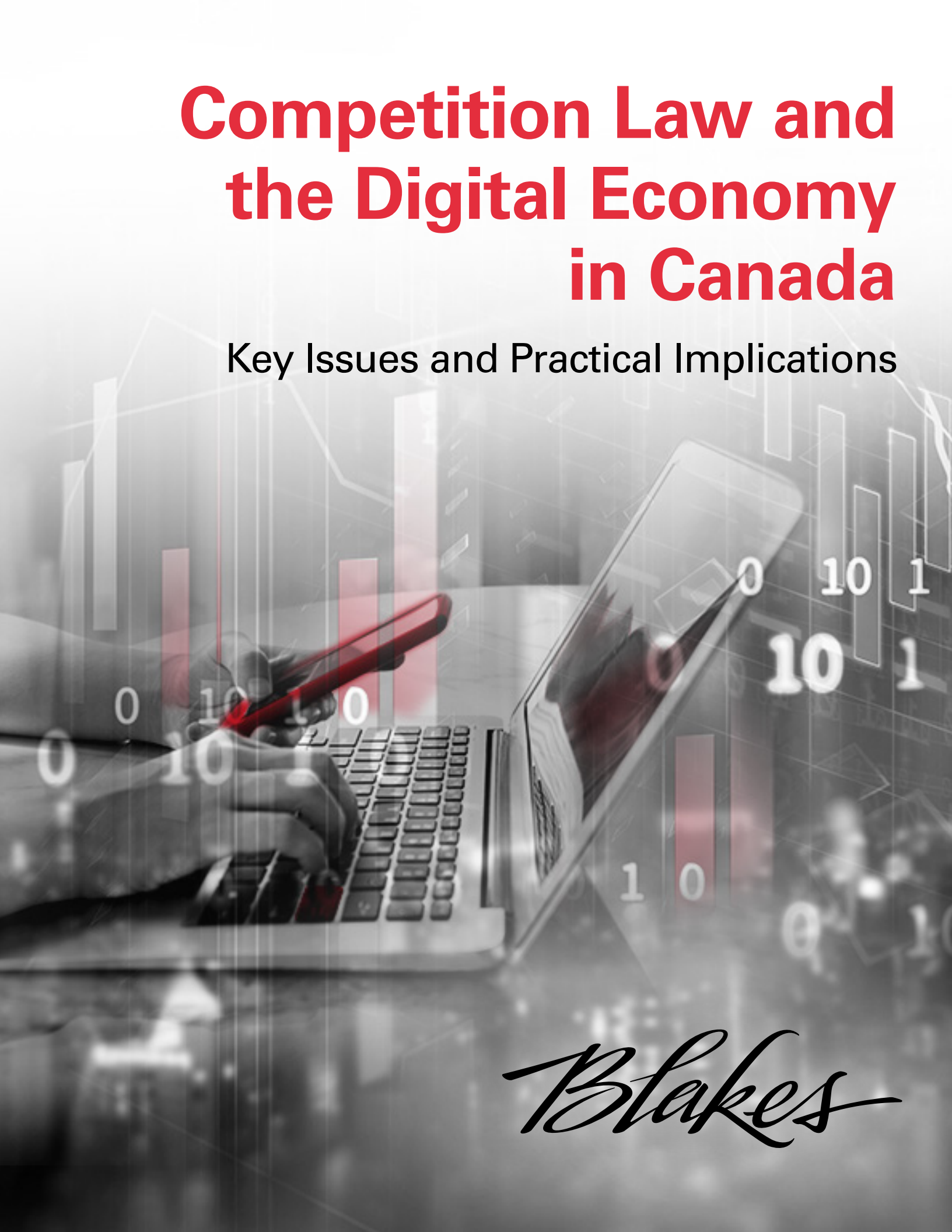
Competition Law and the Digital Economy in Canada

Key Issues and Practical Implications



Blakes

The digital economy, big data and emerging technologies have vaulted to the top of the priority list for antitrust enforcement agencies around the world, and Canada is no exception. This guidebook outlines the most important emerging trends and provides key practical tips for Canadian companies to navigate these issues going forward.

What's Inside

Introduction

Competition law enforcement agencies have undertaken many new initiatives focused on the digital economy, including publishing position papers,[1] developing enforcement strategies,[2] hiring specialized personnel,[3] and taking enforcement action against technology companies. Like its international counterparts, the Canadian Competition Bureau (the Bureau) is focused on issues related to the digital economy.

The Bureau Has Been Actively Building Digital Economy Capacity

The Bureau's 2019–2020 Annual Plan cites building consumer confidence and supporting competition and innovation in the digital economy as top priorities. **The Annual Plan describes the Bureau's commitment to building capacity in digital enforcement and prioritizing high-impact digital economy investigations.**[4]

In September 2019, the Bureau published a **"call-out" for information to assist with its enforcement activities in the digital economy.** The Bureau may use information received in response to the call-out to investigate conduct by technology companies.[5]

In July 2019, the Commissioner of Competition **appointed the Bureau's first Chief Digital Enforcement Officer**, whose role is to help the Bureau monitor the digital landscape, identify and evaluate new investigative techniques and boost the agency's digital intelligence-gathering capabilities.

In May 2019, the Bureau was appointed incoming president of the International Consumer Protection and Enforcement Network. The Bureau announced that it intends to use its presidency to **promote truth in online advertising and build consumer confidence in the digital economy.**[6]

Also in May 2019, the Bureau led a data forum, gathering government, legal and tech-industry experts to **discuss issues surrounding competition policy in the digital era.** The Bureau published highlights from the forum in August 2019.[7]

In September 2017, the Bureau published a discussion paper on **the implications of big data for the enforcement of anti-competitive mergers, cartels, deceptive marketing practices and other competitive conduct.**[8] The Bureau then published a follow-up analysis in February 2018 of the key themes that emerged from the feedback the Bureau received on the discussion paper.[9]

The Bureau's focus on the digital economy is in line with broader Canadian government initiatives. For example, in February 2018, the government announced the formation of a Digital Technology Supercluster intended to use big data and digital technologies to assist economic development in health-care, forestry, manufacturing and other important sectors of the Canadian economy.[10] The government has also established a national Digital Charter, which outlines 10 principles to guide future governmental actions in the digital economy.[11]

Mergers in Technology Industries

The Bureau has the jurisdiction to investigate and take action against anti-competitive mergers of any size. Because the *Competition Act*'s financial thresholds for mandatory pre-merger notification are based on the book value of the parties' assets or revenues, rather than expected earnings or future growth potential, many mergers involving technology firms are not subject to the pre-merger notification requirement. However, even where a merger does not require pre-merger notification, the Bureau's recent focus on the digital economy is likely to result in increased scrutiny of mergers between technology firms or those that involve technology-related issues. As an example of Bureau attention to mergers in the digital economy, the Bureau's most recent challenge concerned the merger of two software providers.

The Bureau's publications on big data have provided some indication of the competitive features that it considers relevant to a review of mergers between technology companies. The Bureau has identified that big data can be an output that is sold and priced just like any other good, but it can also be an input that is neither sold nor priced. In the latter scenario, the Bureau will be attuned to the issues that can arise with respect to digital platforms and network effects. For example, for platforms, the Bureau recognizes that high prices on the buy side may not be evidence of market power by the platform, but rather low supply on the sell side. Further, the Bureau has stated that network effects can be both an efficiency that benefits consumers and a barrier to entry that may limit competition, both of which may be relevant in the context of a merger review.[12]

In general, an increased focus by the Bureau on mergers involving technology companies would be in step with enforcement trends in other jurisdictions. One area of focus in some jurisdictions is "killer acquisitions" – a term used to refer to the acquisition by large digital companies of small rivals with growth potential. In March 2019, an expert panel convened by the U.K. government highlighted killer acquisitions as a competition issue of particular importance in the technology sector, and Germany and Austria have already amended their pre-merger notification thresholds to capture acquisitions with large deal sizes even where the target is relatively small by other metrics. Despite a previous statement from a U.S. Federal Trade Commission (FTC) official that evidence of a particularly high rate of anti-competitive acquisitions of start-ups by technology firms is lacking, in September 2019, the FTC indicated that it may consider changes to its merger notification rules in order to capture killer

acquisitions.[13] It remains to be seen whether Canada will follow suit, although the Bureau has already announced that it will intensify its efforts to identify anti-competitive mergers which fall below the notification thresholds.[14]

MERGERS IN TECHNOLOGY INDUSTRIES – KEY TAKEAWAYS FOR BUSINESSES

- The Bureau is likely to closely scrutinize any merger between technology firms that raises competition issues, now or for the future, regardless of their size and regardless of whether pre-merger notification is required.
- Businesses should plan early to identify and prepare for possible competition issues and anticipate a Bureau review of the transaction.
- Businesses should consider mechanisms and structures that can be used to allocate regulatory risk between merging parties.

Online Pricing Rules

Companies that advertise prices online or make online sales are subject to the deceptive marketing provisions of the *Competition Act*. Violation of the provisions can lead to civil or criminal penalties. In addition to the *Competition Act*'s general restrictions on deceptive marketing (which are broad enough to apply to online activities), the legislation also includes provisions specific to e-commerce, such as sanctions for misleading representations in electronic messages.[15]

In recent years the Bureau's focus on limiting misleading online advertising has increased significantly.[16] On the public awareness front, the Bureau has frequently engaged in initiatives regarding online pricing, both to educate businesses on compliance and to alert consumers to the potential risks.[17]

The Bureau has also been active on the enforcement side:

- Recently, in July 2019, Ticketmaster agreed to pay C$4.5-million to resolve a Bureau action regarding allegedly misleading pricing claims for online ticket sales. The action alleged that Ticketmaster engaged in "drip pricing" by adding mandatory fees to tickets purchased on its website and mobile application at the time of checkout. As part of the settlement, Ticketmaster also agreed to establish a compliance program to ensure their advertising does not contravene the *Competition Act*.[18] The Bureau intends to provide additional guidance on drip pricing and monitor such conduct with continued intensity.
- In January 2017, a Bureau investigation concluded that an online retail platform's regular "List Price" claims created the impression that prices for items were lower than prevailing market prices. The Bureau considered the conduct problematic because the platform relied on its suppliers to provide list prices without verifying that those prices were accurate. Ultimately, the platform agreed to a C$1-million penalty to settle the Bureau's allegations.
- During the past few years the Bureau has also reached sizeable settlements with several car rental companies for engaging in misleading price claims through a variety of channels, including on mobile applications, online and in emails. The pricing practices at issue included advertising prices that were unattainable due to mandatory fees added later during the purchasing process, advertising rebates that gave the misleading impression that consumers would get a percentage off of their total bill and describing certain fees as mandatory taxes or surcharges imposed by various governments where the fees were actually imposed by the advertiser.[19]

ONLINE PRICING – KEY TAKEAWAYS FOR BUSINESSES

/ Businesses that engage in misleading online pricing practices can be subject to civil or criminal penalties.

/ Businesses should review their online pricing practices (e.g., timers, search pages, banner ads, etc.) to ensure upfront disclosure of mandatory fees.

/ Promotions and sales should not make exaggerated claims.

/ Businesses can stay onside deceptive marketing practices laws by implementing tailored compliance programs.

Data Privacy, Security and Portability

The Bureau may increasingly consider data privacy, security and portability in determining whether to take enforcement action against participants in the digital economy. Although previously not a heavy focus of the Bureau, recent statements and publications by the Bureau indicate that it considers those factors to be an important component of non-price competition.[20] As a recent example, in a speech titled "Competition in the Age of the Digital Giant," a Bureau official argued that data portability may lower barriers to entry for potential competitors in sectors of the digital economy.[21]

The Bureau may be motivated to raise competition issues related to data privacy, security and portability in order to keep pace with its international counterparts. In the United States, the FTC has already initiated significant enforcement efforts to ensure privacy and data security. For example, in July 2019, a social media platform agreed to pay a US$5-billion penalty and to implement structural safeguards to settle FTC charges alleging that the platform misled users as to their ability to control the privacy of their personal information. The FTC has also raised complaints against Uber, smartphone maker BLU and tenant-screening company RealPage, among others.[22] The Bureau is likely paying close attention to the FTC's enforcement activities and has noted approvingly that other jurisdictions have attempted to spur innovation by mandating data portability and interoperability.[23] The Bureau has emphasized that improved data portability and interoperability is necessary for competition in Canada and, in that regard, Canada should follow the example set by other jurisdictions.[24]

In practice, an increased Bureau focus on data privacy, security and portability 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 anti-competitive.[25] This means that the Bureau may plan on taking enforcement actions against such mergers in the future. The Bureau has also indicated that its mandate to enforce deceptive marketing practices could mean legal action against businesses that mislead consumers as to the collection or use of consumer data.[26]

DATA PRIVACY, SECURITY AND PORTABILITY – KEY TAKEAWAYS FOR BUSINESSES

/ Businesses that are compliant with privacy laws 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 provide appropriate disclosure of their data collection policies.

/ Merging parties that use consumer data should be aware that the Bureau may review their data policies and practices as part of a merger review.

"Self-Preferencing" Technology

"Self-preferencing" refers to a platform giving preferential treatment to its own products or services where those products and services compete with third-party products and services available via the platform. Enforcement agencies, such as the European Commission, have stated that such conduct may be considered anti-competitive when engaged in by a dominant digital platform that can leverage its market power to distort competition in the downstream market.[27]

Enforcement agencies continue to actively scrutinize self-preferencing and have, in some cases, responded to this practice with serious penalties. In 2017, the European Commission levied a €2.42 billion fine against an online search company for abusing the market dominance of its search engine by promoting its comparison-shopping product over third-party products. More recently, in April 2019, two investigations were launched into potential self-preferencing by technology companies. First, the Dutch authority announced that it was investigating whether a technology company gives preferential treatment to its own apps on its app store. Second, Italy's competition enforcer opened an investigation against an online retail platform centered on allegations that the platform discriminated on its e-commerce platform in favour of third-party merchants using the platform's logistics services.

Though the Bureau has not yet engaged in any enforcement action related to self-preferencing, technology firms should be aware that the *Competition Act* contains provisions regarding abuse of dominance that could provide a legal basis for challenging this type of conduct. A successful challenge by the Bureau could result in behavioural remedies as well as significant monetary penalties.

SELF-PREFERENCING – KEY TAKEAWAYS FOR BUSINESSES

/ While self-preferencing is generally permissible in Canada, the Bureau may investigate and enforce self-preferencing if it considers the conduct to be anti-competitive.

/ Penalties for platforms which engage in anti-competitive self-preferencing may include fines or restrictions on business conduct.

Platforms and Multi-Sided Markets

Platforms are multi-sided marketplaces that bring together consumers and suppliers. Platforms exist for a wide range of other goods and services, such as food delivery, grocery shopping, dog walking and more.

For Canadian companies operating platform businesses, it is important to keep in mind that the Bureau considers platforms as potential targets for competition enforcement. For example, a recent article published by three Bureau officers regarding PayPal's acquisition of Hyperwallet discussed a possible framework for evaluating the competitive effects of mergers involving multi-sided platforms.[28] The Bureau could also take action against a dominant platform for anti-competitive unilateral commercial activities.

Whether the Bureau chooses to take enforcement action against a platform will often depend on whether it determines that the relevant merger or commercial activity is anti-competitive. The Bureau has provided some guidance as to the factors it will consider in making the determination. For example, the Bureau has noted that high prices on one side of a platform may not be evidence of anti-competitive behaviour. This is because the high prices on one side could result in low prices on the other side and no corresponding change in the profitability of the platform. For example, a ride-sharing application may implement "surge" pricing during times of high demand in order to pass on the receipts from such prices to drivers and thereby ensure consistent supply. The Bureau has also provided some insight into the competitive significance of "network effects" – the benefits to a consumer of a product when other consumers increase their consumption of that product. The Bureau considers that network efforts may be positive for Canadians in that they create economies of scale, but conversely, network effects could prevent small competitors from effectively challenging incumbents.[29]

PLATFORMS – KEY TAKEAWAYS FOR BUSINESSES

/ Platforms considering corporate transactions should engage competition counsel early in the transaction planning process to allow for a review of possible risks and possible theories of anti-competitive harm.

/ Platforms operating in multiple jurisdictions should seek advice from Canadian counsel as the Bureau's approach to evaluating platforms is evolving and may differ from other enforcement agencies.

Misleading Advertising Laws and Social Media

Innovative forms of interactive marketing using social media tools, customer reviews and testimonials are increasingly attracting scrutiny from the Bureau. Under certain circumstances, such marketing could be subject to enforcement under the *Competition Act*'s misleading advertising provisions.

One emerging area of social media marketing that creates enforcement risk is a business's use of online personalities – "influencers" – to advertise the business's products to consumers. The explosion of social media has led influencer endorsements to become a primary advertising tool for many brands. To that end, the Bureau recently published guidelines on influencer marketing in its Deceptive Marketing Practices Digest.[30] The Bureau maintains that consumers are entitled to know whether the individual endorsing a product has a relationship with the brand and that endorsements that fail to disclose an influencer's "material connection" with the brand may run afoul of the *Competition Act*. The Bureau has indicated that the brand and influencer themselves may be held liable for such violations.

"Astroturfing," the practice of a business creating commercial representations about its products that masquerade as authentic experiences and opinions, is another potentially problematic social media marketing practice. A classic example of astroturfing is a business posting fake consumer reviews. The Bureau may consider a review misleading even where the real identity of the reviewer is disclosed or if the reviewer does not disclose its material connection to the brand, among other situations.

The Bureau may be encouraged to engage in additional enforcement by the example set by the Bureau's international counterparts. In September 2017, the FTC settled an action against influencers who endorsed their online gambling company over Twitter without disclosing that they owned it. The settlement included behavioural commitments by the influencers.[31] Both the FTC and the CMA have sent several warning letters to influencers cautioning them about deceptive marketing laws.[32] Further, the FTC has initiated several claims against brands, such as Lord and Taylor, for misleading influencer campaigns.[33]

SOCIAL MEDIA MARKETING – KEY TAKEAWAYS FOR BUSINESSES

/ Businesses may be liable for misleading representations by influencers who receive payment or other benefits from those businesses.

/ Continuous monitoring and an ability to modify non-compliant representations by influencers is a key method for businesses to reduce their competition risk.

/ Businesses should inform employees that if they provide reviews of their business's products, they must disclose that they are employed by the business.

Competition in FinTech and Banking

Financial technology (FinTech) can be used by companies to provide financial services and includes such innovations as cryptocurrency and mobile banking. Given FinTech's potential benefits to the financial services available to Canadians, the Bureau has made FinTech an area of focus.

The Bureau has published two studies regarding the competitive implications of FinTech. Most recently, in February 2019, the Bureau submitted comments on the Canadian Department of Finance's ongoing Open Banking consultation, in which it maintained that the benefits of technology are not yet being fully exploited through open banking in Canada.[34] In December 2017, the Bureau published a study of the financial services sector, addressing topics such as mobile wallets, clearing and settlement systems, peer-to-peer lending, crowdfunding and robo-advisors.[35]

The Bureau has also devoted considerable resources to reviews of mergers between FinTech firms, as evidenced by the Bureau's in-depth review of PayPal's acquisition of Hyperwallet. During its review, the Bureau considered whether the acquisition would create an incentive for PayPal to foreclose Hyperwallet's rivals from accessing PayPal's E-Wallet application.[36] The Bureau's review showed the extent to which the Bureau may probe FinTech transactions for potential anti-competitive effects. Canadian businesses operating in the FinTech space should also be aware that the Bureau has increased its efforts to identify mergers that do not meet the *Competition Act*'s financial thresholds for mandatory pre-merger notification but may nevertheless raise competition issues. The Bureau may therefore be expected to scrutinize acquisitions of small FinTech companies with high-growth potential.

FINTECH – KEY TAKEAWAYS FOR BUSINESSES

/ The Bureau is particularly focused on the payments, lending and investment advisory aspects of the FinTech industry.

/ Given the Bureau's openness to making recommendations on FinTech policy consultations, businesses may want to consider approaching the Bureau proactively with concerns regarding competition-restricting regulation.

Blockchain Technology

Blockchain is transforming the way that companies interact with each other by improving the efficiency, traceability and security of transactions. From a competition policy perspective, blockchain creates opportunities to enhance competition. However, as noted by the Bureau, blockchain also creates risks of anti-competitive conduct.[37]

One potential example of anti-competitive conduct facilitated by blockchain could occur within an industry where competitors use a single blockchain to record transactions. Because each competitor could use the single blockchain to monitor all transactions, such a system could facilitate coordination between competitors by allowing them to identify any deviation from the coordinated behaviour. The single blockchain could also identify the terms on which competitors could collaborate, such as, for example, price or market share. "Smart contracts," which are agreements built into a blockchain that execute automatically when certain conditions are met, could also help competitors coordinate by creating automated punishments for deviations or rewards for raising prices or cutting output.[38]

It remains to be seen to what extent the Bureau will investigate and enforce blockchain-related anti-competitive conduct. One element to monitor is whether the Bureau will seek to access blockchain data in order to monitor and track transactions for suspicious activity, as well as to access blockchain data immediately when investigating mergers. Businesses will likely push back on voluntary requests by the Bureau for vast amounts of blockchain data and such requests would likely raise broader concerns regarding proportionality and over-policing.

SOCIAL MEDIA MARKETING – BLOCKCHAIN – KEY TAKEAWAYS FOR BUSINESSES

/ Merging parties that receive voluntary information requests for blockchain data from the Bureau should consider a range of responses in order to reduce burdens on the parties and avoid undue scrutiny.

/ Decisions by businesses to prevent a competitor or new entrant from accessing a proprietary blockchain may be investigated under the abuse of dominance position provisions of the *Competition Act*.

Competition Bureau Cooperation with Foreign Agencies

The Bureau has stated that the existence of digital giants requires a globally coordinated approach to enforcement.[39] The Bureau has already taken steps to increase its coordination with foreign enforcers, including a commitment to assume the presidency of the International Consumer Protection and Enforcement Network in July 2020. As mentioned, the Bureau's term will focus on promoting truth in advertising online and building consumer confidence in the digital economy. The Bureau considers coordination of particular importance due to the "unique challenges that can defy traditional enforcement methods created by the expansion of the online marketplace across borders."[40]

Most recently, the competition enforcers of the G7 countries, along with the European Commission, released a "common understanding" regarding competition and the digital economy. The common understanding emphasizes that the development of closer cross-border cooperation in the detection and investigation of anti-competitive behaviours and concentrations could help increase the efficiency of competition authorities. Businesses should be aware that such increased cooperation and collaboration 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.

In interactions with the Bureau, companies should also note that the agency does not seek a waiver before sharing information with other competition authorities and should expect that the Bureau will increasingly choose to engage in such information sharing.

FOREIGN COLLABORATION – KEY TAKEAWAYS FOR BUSINESSES

/ The Bureau and international antitrust enforcement agencies are increasingly sharing information with each other in order to increase the efficiency and effectiveness of investigations.

Conclusion

The increasing importance of the digital economy to Canadians has resulted in a corresponding increase in scrutiny by the Canadian Competition Bureau. Technology firms and other businesses with digital activities are now facing heightened risk of competition law enforcement. Competition counsel can assist businesses in complying with competition laws in a variety of ways, including by designing compliance programs, guiding businesses through merger reviews and providing advice on advertising and other forms of competitive conduct.

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[2] For example, see UK Competition & Markets Authority, "The CMA's Digital Marketing Strategy" (3 July 2019), available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/814709/cma_digital_strategy_2019.pdf, and "GCR, "Japan considers how to address digital economy" (15 March 2019), available at: https://globalcompetitionreview.com/article/1188845/japan-considers-how-to-address-digital-economy.

[3] For example, see Competition Bureau, "George McDonald joins the Competition Bureau as new Chief Digital Enforcement Officer" (2 July 2019), available at: https://www.canada.ca/en/competition-bureau/news/2019/07/george-mcdonald-joins-the-competition-bureau-as-new-chief-digital-enforcement-officer.html.

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[5] Competition Bureau, "Competition Bureau calls for businesses to report potentially anti-competitive conduct In the digital economy" (4 September 2019), available at: https://www.canada.ca/en/competition-bureau/news/2019/09/competition-bureau-calls-for-businesses-to-report-potentially-anticompetitive-conduct-in-the-digital-economy.html.

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[8] Competition Bureau, "Big data and innovation: Implications for competition policy in Canada" (18 September 2017), available at: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04304.html.

[9] Competition Bureau, "Big data and innovation: key themes for competition policy in Canada" (19 February 2018), available at: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04342.html.

[10] Government of Canada, "Canada's new superclusters", available at: https://www.ic.gc.ca/eic/site/093.nsf/eng/00008.html.

[11] Innovation, Science and Economic Development Canada, "Canada's Digital Charter: Trust in a digital world", available at: https://www.ic.gc.ca/eic/site/062.nsf/vwapj/1020_04_19-Website_Placemat_v09.pdf/$file/1020_04_19-Website_Placemat_v09.pdf.

[12] Competition Bureau, "Big data and innovation: key themes for competition policy in Canada" (19 February 2018), available at: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04342.html.

[13] D. Bruce Hoffman, Director, Bureau of Competition, Federal Trade Commission, "Antitrust in the Digital Economy: A Snapshot of FTC Issues" (22 May 2019), remarks presented at GCR Live Antitrust in the Digital Economy, available at: https://www.ftc.gov/public-statements/2019/05/antitrust-digital-economy-snapshot-ftc-issues.

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[15] *Competition Act*, s. 74.011.

[16] For example, see Competition Bureau, "No River too Wide, No Mountain too High: Enforcing and Promoting Competition in the Digital Age" (7 May 2019), available at: https://www.canada.ca/en/competition-bureau/news/2019/05/no-river-too-wide-no-mountain-too-high-enforcing-and-promoting-competition-in-the-digital-age.html.

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[21] Competition Bureau, "Competition in the Age of the Digital Giant", speech by Anthony Durocher, Deputy Commissioner of Monopolistic Practices (13 June 2019), available at: https://www.canada.ca/en/competition-bureau/news/2019/06/competition-in-the-age-of-the-digital-giant.html.

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[26] Competition Bureau, "Big data and innovation: key themes for competition policy in Canada" (19 February 2018), available at: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04342.html.

[27] For example, self-preferencing can be seen as an appropriate reward for management of the platform. See European Commission, "Competition policy for the digital era" (2009), at p. 66, available at: http://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf at p. 66.

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