

## Transportation Industry: Competition Law in Canada

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Competition law is constantly evolving in Canada and around the world. Canadian and global entities are finding that merger reviews are increasingly onerous, and business practices are being scrutinized more closely by enforcement agencies for competition law considerations.

## About Blakes

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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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## Introduction

The transportation industry is a major driver of the Canadian economy and has attracted significant attention from the Competition Bureau (Bureau) in Canada. This guide outlines key issues and trends to watch and best practices for navigating an increasingly complex and global industry.

# Competition and Transportation Merger Control Regimes

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All mergers in Canada are potentially subject to review by the Competition Bureau. However, transactions involving a transportation undertaking that meet the financial thresholds for notification under the *Competition Act* are also subject to a separate review under the *Canada Transportation Act* (CTA).

## Competition Act Review

Where mergers exceed certain size thresholds, transacting parties are required to file a pre-merger notification under Part IX of the *Competition Act*. As of 2021, the pre-merger thresholds are:

- **Size of Transaction Threshold:** The target must have at least C\$93-million in assets in Canada or revenues in or from Canada.
- **Size of Parties Threshold:** The parties, along with their respective affiliates, must have assets in Canada or revenues in, from or into Canada of at least C\$400-million.

Part IX notifications require information regarding the transaction, the parties, their relevant affiliates, as well as top supplier and customer information and transaction planning documents. The Bureau's review can take as little as 14 days for non-complex transactions. For complex transactions, reviews are typically completed within 45 days, unless a supplemental information request (SIR) is issued that extends the timeframe for review until 30 days after the parties have complied with the SIR.

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## Canada Transportation Act Review

In addition to the Part IX notification obligation above, notifiable transactions involving federally regulated transportation undertakings are subject to a second review under the CTA. The CTA requires that the Minister of Transport be notified of every proposed transaction that is notifiable under Part IX of the *Competition Act* and involves a transportation undertaking.

The notice provided under the CTA includes all of the information required under the *Competition Act* notification and an assessment of the public interest impact of the proposed transaction as it relates to national transportation in Canada.

If the transaction involves an air transportation undertaking, the transaction must also be notified to the Canadian Transportation Agency. Unless the Minister of Transport decides within 42 days that the transaction does not raise public interest issues, the Canadian Transportation Agency must also determine that the transaction would result in an air transportation undertaking that is "Canadian" as defined under the statute, before the transaction may close. It is important to note that the CTA requirements that an air transportation undertaking must be "Canadian" apply to all transactions, whether or not notifiable under Part IX of the *Competition Act*.



## Description of Process and Timelines for Review

If a notifiable transaction involving a transportation undertaking does not raise public interest issues, the Minister of Transport must confirm this by issuing a notice within 42 days of receiving a filing. The notice allows the transaction to be completed without any further review under the CTA. If, however, the Minister of Transport determines that the proposed transaction does raise issues with respect to public interest as it relates to national transportation, the Minister may appoint the Canadian Transportation Agency or any other party to examine those issues. The CTA mandates that the person conducting the public interest examination must report back to the Minister “within 150 days or within any longer period that the Minister may allow.” Once the Minister decides that a public interest examination is warranted, the proposed transaction may not proceed until it is approved by the Governor in Council.

In addition, the Commissioner of Competition (Commissioner) will file a report to the Minister regarding any potential prevention or lessening of competition that may occur as a result of the transaction. The report must be filed within 150 days after the Commissioner is notified of the proposed transaction or within any longer period that the Minister may allow.

After receiving the Commissioner’s report and the report on public interest, the Minister will consult with the Commissioner on any overlapping concerns between the two reports. If necessary, the Minister will request that the parties to the transaction address any concerns the Minister has regarding public interest as it relates to national transportation or the Commissioner has with respect to competition.

After obtaining the Commissioner’s assessment of any undertakings proposed by the parties to address identified concerns, the Minister will make a recommendation to the Governor in Council about the proposed transaction. The Governor in Council may approve the transaction if it is in the public interest to do so and will specify any terms or conditions they consider appropriate.

### Key Takeaway:

Transactions involving transportation undertakings may be subject to a unique “double review” process involving the Commissioner of Competition and the Minister of Transport where the Minister deems a public interest examination to be appropriate.



# Key Competition Bureau Enforcement Actions

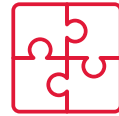
Transportation businesses tend to be asset-intensive operations that require significant capital investments. Some parts of the industry commonly have characteristics that can attract the attention of the Competition Bureau, including:



High market concentration



Barriers to entry



Potential for coordinated conduct

Combined with the high profile of the industry given its importance to consumers and the economy, these factors are behind the Bureau's lengthy history of investigations and enforcement actions in Canada's transportation industry. Key recent investigations and enforcement actions include:

## Proposed acquisition of Air Transat by Air Canada (2020):

- On March 27, 2020, the Bureau submitted a report to the Minister of Transport concluding that the proposed acquisition of Air Transat by Air Canada would harm competition and lead to higher prices for consumers.
- The Bureau specifically highlighted the following negative outcomes that were likely if the deal were permitted to close:
  - A substantial lessening or prevention of competition in the provision of air passenger services and vacation packages on 83 routes between Canada and Europe, Mexico, Central America, the Caribbean, Florida and South America
  - A significant reduction in travel by Canadians in the overlap markets
- Following the Bureau's eight-month review of the transaction and submission of its report, the federal Cabinet approved the transaction subject to certain terms and conditions after an 18-month assessment:
  - Conditions included maintaining Transat's head office and brand in Quebec, encouraging other airlines to take up former Transat routes to Europe, ensuring aircraft maintenance contracts remain in Canada (prioritizing Quebec), launching new routes within five years and committing 1,500 employees to the merged-company's new travel business.

- The Minister of Transport stated that the impact of COVID-19 was a key factor in the final decision to approve the purchase.
- In April 2021, Air Canada and Air Transat terminated the proposed transaction due to the low likelihood that the transaction would be approved by the European Commission.

## Proposed acquisition by CN Rail of H&R Transport (2019):

- In May 2019, CN announced that it had reached an agreement to acquire certain intermodal shipping assets of H&R (i.e., shipping that involves two or more modes of transportation, such as rail or trucking).
- Although the transaction was not notifiable, the Bureau concluded that the proposed transaction would likely result in a substantial lessening of competition across eight routes, noting high combined market shares in excess of 50 per cent, high barriers to entry and limited competing suppliers.
- Despite this, the Bureau approved the transaction on the basis of the efficiencies defence set out in section 96 of the *Competition Act*, noting that the transaction would result in the elimination of overhead costs and duplicative facilities, IT systems and software licences.

### Proposed merger of First Air and Canadian North (2019):

- The Commissioner submitted a report to the Minister that concluded the merger of First Air and Canadian North would likely substantially prevent or lessen competition for passenger travel and cargo services to underserved destinations in Canada's North.
- The Bureau's analysis relied on a finding of high barriers to entry for carriers in Northern Canada, including unpredictable weather, requirements for specialized equipment and high capital costs.
- The federal Cabinet determined that it was in the public interest for the transaction to proceed despite the competition issues and imposed certain conditions on the merging parties, including restrictions on pricing and schedules.

### Northern Airline investigations (2017):

- The Commissioner investigated allegations of predatory pricing and improper competitor collaboration between First Air and Canadian North relating to code-sharing air passenger and cargo services on northern routes.
- While the Commissioner ultimately did not find that First Air and Canadian North engaged in predatory pricing, it noted that the alleged pricing practices likely impacted the entry decision of a potential competitor and issued a warning that any future consolidation or improper cooperation would likely result in enforcement action.

### Air Canada/United Continental Holdings merger/strategic alliance (2010):

- In the late 1990s, Air Canada and United Airlines began coordinating on various aspects of airline services, including code-sharing, and joint fare discounts/incentive programs on Canada-U.S. routes through a series of bilateral agreements. Air Canada later entered into similar agreements with United Continental.
- In 2010, Air Canada and United Continental (then merged) announced a proposed joint venture that would result in further coordination on Canada-U.S. transborder routes.
- The Commissioner filed an application with the Competition Tribunal in June 2011 challenging both the proposed joint venture and the existing collaboration agreements.
- The Commissioner alleged that the airlines' combined share of passengers on several routes was high and would lead to an increase in prices. The airlines disputed these allegations and argued that the airline alliances were procompetitive.
- Ultimately, the parties entered into a consent agreement covering 14 routes, preventing the parties from coordinating on prices, available seats or sharing commercially sensitive information on those routes.



### Key Takeaway:

Transportation-sector transactions often receive considerable scrutiny from the Competition Bureau. However, there is precedent for public interest or efficiencies considerations leading to transaction clearances by the federal Cabinet even in concentrated parts of the industry.





# Foreign Investment and National Security Considerations

## Foreign Investment Regime

All acquisitions of Canadian businesses by non-Canadian investors are subject to the foreign investment regime set out under the *Investment Canada Act (ICA)*. This applies to transportation businesses that can be acquired by non-Canadians. (Some transportation businesses are subject to specific restrictions on foreign ownership, such as airlines that are required to show they are Canadian controlled to maintain their operating licences.)

Direct acquisitions can be subject to foreign investment review if certain thresholds are met. The base threshold is C\$5-million (book value of assets). However, this threshold is subject to broad exceptions and grows to C\$1.043-billion (enterprise value) for World Trade Organization (WTO) investors and C\$1.565-billion (enterprise value) for trade agreement investors (which currently covers over 40 countries, including the United States, Mexico, the U.K. and all countries in the EU). The WTO and trade agreement thresholds are subject to annual adjustment.

A reviewable transaction may not be completed unless the investment has been reviewed and the relevant minister is satisfied that the investment is likely to be of “net benefit to Canada.” The non-Canadian proposing the investment must make an application to the Investment Review Division of the relevant Ministry setting out particulars of the proposed transaction. There is then an initial waiting period of up to 45 days, with a possible further extension of 30 days.

Any foreign investment in an air transportation undertaking will be subject to the requirements of the *Canada Transportation Act* to ensure the undertaking remains “Canadian” following the completion of such foreign investment.

## National Security Review

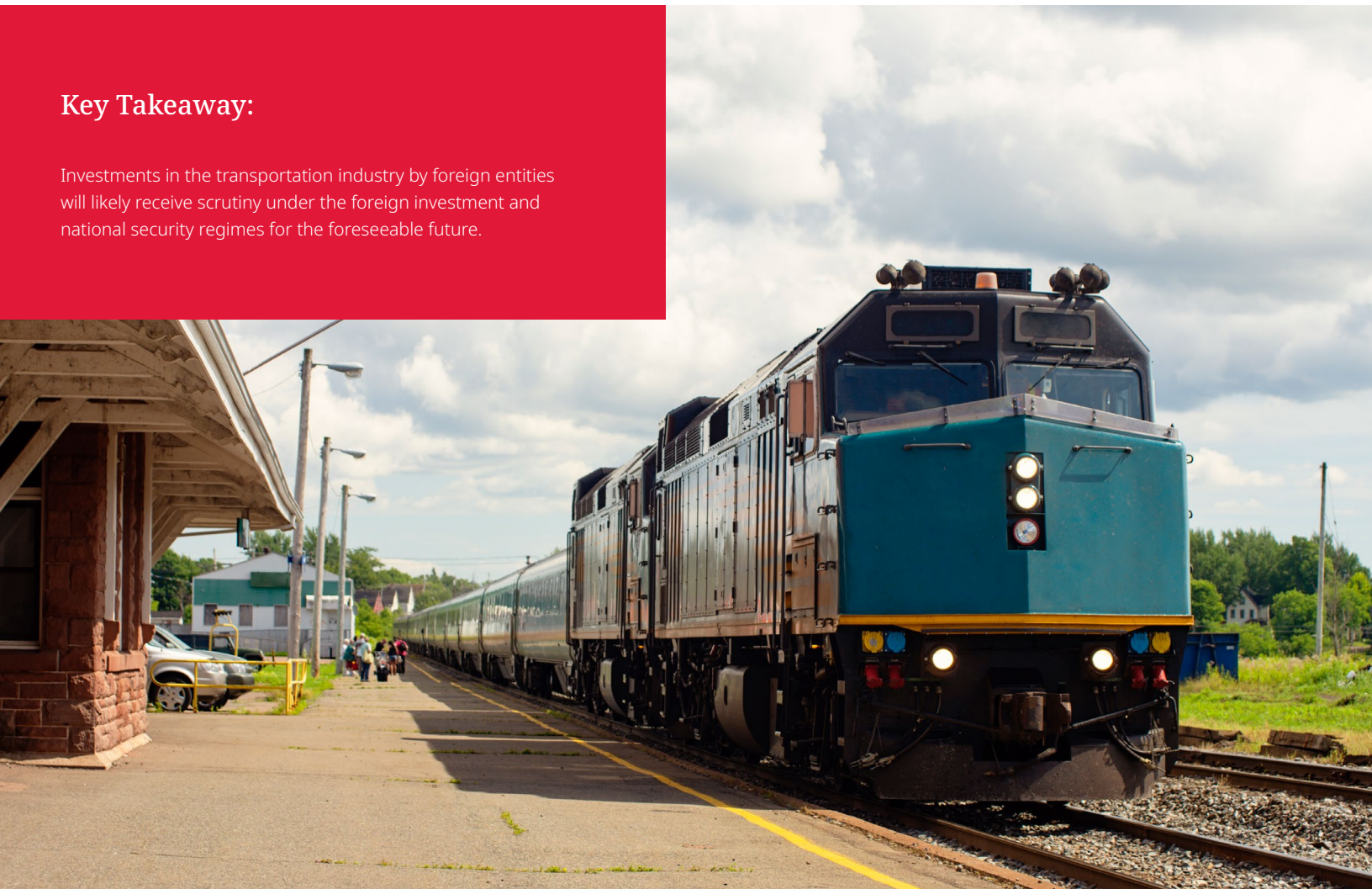
In addition to reviewable transactions, any investment in a Canadian business by a non-Canadian is potentially subject to a national security review, regardless of the size of the target business. Where the Minister of Innovation, Science and Industry has reasonable grounds to believe that an investment by a non-Canadian to acquire all or part of an entity (or to establish an entity) carrying on business in Canada could be injurious to national security, the Minister may notify the non-Canadian that the investment may be reviewed for potential national security concerns.

The government has identified critical infrastructure, as well as investments that could impact the supply of critical goods and services to Canadians, as areas that can potentially attract scrutiny for national security reviews. Transactions relating to air, rail or marine transportation of goods and services would likely be considered by the government to constitute “critical infrastructure” that impacts the “supply of critical goods”, which could heighten the risk of a national security review.

The Canadian Minister of Innovation, Science and Industry issued a statement in April 2020 announcing that certain foreign investments would be subject to enhanced scrutiny under the *Investment Canada Act* while the Canadian economy recovers from the COVID-19 pandemic. The policy will apply to investments in critical infrastructure (including transportation) and public health or that are undertaken by investors with ties to foreign governments. This enhanced scrutiny may involve the Minister requesting additional information from investors.

### Key Takeaway:

Investments in the transportation industry by foreign entities will likely receive scrutiny under the foreign investment and national security regimes for the foreseeable future.



# Misleading Advertising and All-In Pricing Investigations

In addition to the merger review and foreign investment regimes outlined above, the Competition Bureau has paid considerable attention to the issue of all-in pricing in the context of transportation-related companies, most notably, the rental car industry.



## “All-in” pricing

The Bureau defines “all-in” pricing as the advertising of the total price for a product or service, including all mandatory fees charged by the supplier, but excluding taxes required to be collected by the government (e.g., federal and provincial sales taxes).

From 2016 to 2018, the Bureau entered into consent agreements with four major rental car agencies regarding claims that the agencies failed to properly disclose mandatory fees charged on top of advertised prices to consumers.

The airline industry is also subject to rules on drip pricing through the Air Transportation Regulations, which apply to any person who advertises, through any media, airline prices to the public for travel within or originating in Canada.

The Bureau recently concluded a multi-year investigation of FlightHub for allegations of misleading representations and hidden fees relating to seat selection and cancellation fees. The investigation began in 2019 through the execution of search warrants at FlightHub’s premises and resulted in a consent agreement in which FlightHub agreed to pay an administrative monetary penalty (AMP) of C\$5-million. Two directors also agreed to pay an AMP of C\$400,000 each. Both FlightHub and the two directors are also prohibited from making false or misleading claims for a period of 10 years. A key rationale for the Bureau’s imposition of AMPs and obligations on FlightHub’s directors in their personal capacity was the fact that FlightHub is currently insolvent and under creditor protection, and may not have the means to pay the C\$5-million AMP.

Of note, during the course of its investigation, for the first time ever, the Bureau entered into a temporary consent agreement with FlightHub. The agreement was designed to operate like a temporary order or an interim injunction, and may be a tool used by the Bureau in future investigations.



## “Drip pricing”

The Bureau defines “drip pricing” as the practice of advertising a headline price that does not include all mandatory fees, even where those fees are disclosed in a small-print disclaimer or later in the purchase process.



## Key Takeaway:

The Bureau has applied significant scrutiny to pricing representations in the transportation industry, and that is expected to continue.



# Conclusion

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The transportation industry in Canada is a critical component of the Canadian economy. It has a long history of scrutiny by the Competition Bureau, due in part to high levels of concentration in some parts of the industry. Despite this, public interest and efficiencies considerations play a key role in transportation reviews, leaving room for transactions to proceed even in relatively consolidated parts of this sector.

Given the importance of the transportation sector to Canada's critical infrastructure and the supply of critical goods and services, investors must also be cognizant of Canada's foreign investment and national security regimes and should be prepared for increased scrutiny of foreign investment in transportation businesses in the wake of the COVID-19 pandemic.

The Blakes [Competition, Antitrust & Foreign Investment](#) group has considerable experience helping clients with successfully consummating complex transactions in the transportation sector and complying with deceptive marketing practice rules.

The Blakes [Aviation & Aerospace](#) group has significant specialized experience assisting clients through the Canadian Transportation Agency review process for transactions involving air transportation undertakings.

For further information, please reach out to your regular contacts in either group or the key contacts set out below.



## Key Contacts

Blakes Competition, Antitrust & Foreign Investment Group is frequently retained by major domestic and international companies and by international law firms to provide strategic counsel and representation in merger reviews, cartel investigations, abuse of dominance cases, distribution practices cases, advertising matters and other competition-related matters.

Blakes is also a leading firm with respect to securing approvals for non-Canadian purchasers under Canada's foreign investment laws.



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