Canadian Competition Law Issues for the Financial Services Sector

Emerging Trends and Recent Developments

Blakes

Executive Summary

In recent years, the financial services sector has seen the emergence of new business models and services, including in areas like Internet payments and intermediary platforms. At the same time, the financial services sector has emerged as a key area of focus for potential advocacy initiatives and enforcement by the Competition Bureau.

At Blakes, we routinely advise a broad range of our financial services clients regarding industry developments and antitrust risk. In this document, we provide an overview of the current landscape and some of the questions firms should consider in order to proactively mitigate risks we see emerging in this sector.

> *"FinTech has the potential to significantly change the way Canadians access financial services. It promises to increase choice and convenience, while also lowering prices and frictions existing in the marketplace today [...] The Bureau expects to continue working with regulators as FinTech and other innovations continue to emerge in the financial services sector."*
>
> *– Matthew Boswell,*
> *Commissioner of Competition*
> *June 2019*

How

has the financial sector been impacted?

- Emerging technologies, such as those based on blockchain and third-party payment platforms, offer new opportunities and increased functionality but present potential risks from a competition law standpoint.
- "Big Data" has emerged as a revolutionary concept that presents novel competition issues as a strategic business asset that may give industry players a competitive edge over their rivals.
- Competition and other regulatory investigations may lead to civil actions, including class actions.
- Large-scale, multi-jurisdictional investigations have resulted in global financial firms entering guilty pleas and paying unprecedented levels of fines.

What

do financial institutions need to do?

Senior management needs to ensure compliance programs are adequate in light of new developments. Firms should:

- Review and strengthen competition compliance programs.
- Implement new or enhanced training and professional development programs to educate staff on issues around restrictive trade practices, collusion and other areas of recent focus.
- Consider new areas of potential concerns being identified by regulators, including in payment processing, intermediary platforms and blockchain technology.
- Foster a culture of compliance by ensuring senior management buy-in through their active participation in the compliance program and their holding highly visible roles in its promotion.
- Conduct periodic audits to confirm the effective and proper implementation of the compliance program.

Where

has there been a direct impact in Canada?

- As early as 2011, the Competition Bureau, in conjunction with foreign agencies, investigated alleged collusive conduct in setting Yen LIBOR (the Bureau's investigation was discontinued in 2014 due to lack of evidence)
- Canadian class actions were launched in 2015 alleging FX manipulation and gold price manipulation
- Emerging technologies, while offering new opportunities to increase competition and promote innovation, are also attracting increased scrutiny from competition and antitrust authorities.
- Antitrust enforcement in the digital economy continues to be a top priority for the Competition Bureau, which has shown increasing interest in the financial services sector in recent years.
- There has been growing concern in Canada and abroad over concentration in the digital marketplace, which has led some to criticize antitrust agencies for failing to stop acquisitions of smaller tech companies dubbed by many as "killer acquisitions".
- The Competition Bureau's Competition Promotion Branch has been particularly active in recent years advocating for various initiatives in the financial services sector, including open banking and FinTech.
- The Competition Bureau will continue to work with foreign antitrust agencies, which is important for cross-border sectors like financial services.

Bureau Financial Services Competition Promotion Initiatives

December 2017

Following an extensive 18-month market study, the Competition Bureau published its FinTech Market Report, which included 30 recommendations to Canada's regulators and policy-makers.

May 2018

The Competition Bureau responded to the Department of Finance's consultation on the topic of Canada's anti-money laundering regime, supporting the Department's efforts to encourage greater innovation and competition in the financial services sector, while ensuring the safety and soundness of the industry.

July 2018

The Competition Bureau provided a submission in response to the Department of Finance's consultation paper regarding the Canadian Payments Act, recommending broad access to payments infrastructure to encourage significant competition between incumbent retail payment services providers and future providers.

September 2018

The Competition Bureau followed up on its 2017 FinTech Market Report and published a progress report, which discussed 11 of the Bureau's initial recommendations that focused on striking the appropriate balance in regulation between protection and promoting innovation.

February 2019

The Competition Bureau submitted a response to the Department of Finance's public consultation on the topic of open banking, asserting that open banking would promote greater competition among financial institutions and enable consumers to gain access to a broader range of services.

June 2019

The Competition Bureau provided a submission to the OECD's Competition Committee's discussion on "FinTech and Disruptive Innovation in Financial Markets" and encouraged regulators to develop principles-based frameworks that promote competition to foster innovation in the financial services sector.

September 2019

The Competition Bureau renamed its Merger Notification Unit, the Merger Intelligence and Notification Unit, reflecting its broader focus on active intelligence gathering on smaller non-notifiable merger transactions that may raise competition concerns.

Questions for Consideration

1. **How should my organization raise awareness of competition laws among front office employees?** What additional steps (e.g., training and professional development programs) should my organization be taking to instill a strong culture of compliance around competition law issues?

2. **Would the Competition Bureau consider my current compliance program to be "reasonably designed, implemented and enforced"?**

3. **Has my firm identified all activities that involve benchmarks and benchmark-related activities more generally (including where my firm is submitting data) and ensured that existing governance and oversight of such activities is adequate?**

4. **Does my organization participate in trade association activities? If so, do all employees who attend such activities have prior and appropriate competition law training?**

5. **If a breach of our compliance program is identified, do we have procedures in place to ensure we react quickly?** Given the benefits that come from being an immunity applicant or a first-in leniency applicant, it is important for management to act quickly where company employees are suspected to have engaged in illegal conduct. Under the Competition Bureau's newly revised Immunity and Leniency Programs, corporations with a "credible and effective" corporate compliance program are eligible for a reduction in the fine that an applicant may otherwise face.

6. **Does my organization conduct periodic audits that would allow us to detect whether our compliance program is effective and properly implemented?**

Specific Antitrust Risks Under Canada's Competition Act

Tied Selling Restrictions under the Bank Act

Section 459.1 of the *Bank Act* states that banks may not impose undue pressure on, or coerce, an individual to obtain a product or service from the bank and any of its affiliates as a condition for obtaining another product or service. Note that this does not prevent a bank from offering a product or service on more favourable terms or conditions than they would otherwise offer, where the more favourable terms and conditions are offered on the condition that the person obtain another product or service from the bank.

Criminal Offences

Financial Institutions. Section 49 prohibits agreements or arrangements between federal financial institutions with respect to: the rate of interest on deposits, the rate of interest or charges on loans, the amount or kind of loans made to a customer, services provided to a customer and the charges for such services, and persons to whom a loan or other service is provided or withheld. There are a number of exemptions to otherwise prohibited conduct under section 49, including agreements or arrangements (i) with respect to joint customers where the customer has knowledge of the agreement, (ii) with respect to a bid for or purchase, sale or underwriting of securities by federal financial institutions, or (iii) requested or approved by the Minister of Finance.

Conspiracy. Section 45 prohibits naked (general) restraints on competition – specifically, any agreements or arrangements between competitors (or potential competitors) to fix prices, allocate customers or markets, or restrict output. A violation of section 45 is a per se offence (that is, no effect on competition must be proven).

Bid-Rigging. Section 47 prohibits bid-rigging (that is, an agreement between two or more parties, to submit a prearranged bid or not to submit a bid, in response to a call for bids or a request for tenders). Where the agreement has been made known to the person requesting the bid, at or before the time the bid is submitted, the agreement is not illegal. Like section 45, a violation of section 47 is a per se offence.

- Conduct that could be captured by sections 45 and 47 of the *Competition Act* (Act) includes participation in a conspiracy to fix benchmark prices, such as foreign exchange or commodity prices.

Foreign Directives/Instructions. Section 46 prohibits the implementation, by a corporation, of a foreign directive or instruction that gives effect to an agreement that would have contravened Canadian law if it had been arranged in Canada. The corporation will be liable even where the corporation's officers or directors in Canada were unaware of the foreign conspiracy or did not know that the actions they were directed to carry out were intended to further that conspiracy.

Civil Actions/Class Actions

Section 36 provides that any person who has suffered loss or damage arising out of conduct that contravenes the criminal provisions of the Act, has the right to commence a private right of action to recover the damages suffered, plus legal costs. Such actions

are generally accompanied by claims for breaches of various common law torts (e.g., civil conspiracy) and restitution, and they can be brought as class actions.

Civilly Reviewable Conduct

Section 77 prohibits the following (where competition is likely to be substantially lessened):

- Exclusive dealing: the practice of requiring or inducing a customer to deal only or primarily in products of the supplier by means of more favourable terms or conditions
- Tied selling: the practice of requiring or inducing a customer to buy a product as a condition of supplying the customer with another product
- Market restriction: the practice of requiring a customer to sell a product only in a defined market as a condition of supplying that product

Section 79 provides that an abuse of market power will be found where each of the following three elements is established on a balance of probabilities:

- Dominance: one or more persons substantially or completely control(s) a market
- Anticompetitive conduct: the dominant firm(s) has (have) engaged in a practice of anticompetitive acts
- Substantial prevention or lessening of competition (SPLC): the anticompetitive conduct has had, is having, or is likely to result in an SPLC in a relevant market

Credible And Effective Compliance Program

The most effective way for a company to limit its exposure to antitrust risk is to have an effective corporate compliance program in place. The Competition Bureau considers the pre-existence of a credible and effective compliance program as a mitigating factor when assessing remedies and making its recommendations to the Crown.

In June 2015, following participation by the Commissioner of Competition in the 2014 Canadian Competition Law Compliance Workshop hosted by Blakes, the Bureau released its bulletin with a model corporate compliance program framework that can serve as the starting point for developing a program tailored to a company's needs. The bulletin identifies seven elements the Bureau expects to see in a corporate compliance program:

1. **Management commitment and support:** critical for any program to successfully work

2. **Risk-based corporate compliance assessment:** requires an assessment of the potential risks faced by a company so that the program can properly design compliance strategies to address those risks

3. **Corporate compliance policies and procedures:** should be clear and easy to understand and tailored to the operations of the business; they should establish internal controls that reflect its risk profile

4. **Compliance training and communication:** includes ongoing training of, and communication to, all employees who are in a position to potentially engage in, or be exposed to, conduct in breach of the Act (including providing guidance on specific business conduct that should be avoided)

5. **Monitoring, verification and reporting mechanisms:** this includes conducting periodic ad hoc audits to ensure compliance and reporting any breaches to those responsible for ensuring compliance with the Act

6. **Consistent disciplinary procedures and incentives for compliance:** such procedures and incentives demonstrate the seriousness with which the business views conduct in breach of the Act and its commitment to compliance

7. **Compliance program evaluation:** the program must be continuously assessed to ensure it is working and to allow for the monitoring of new business developments or changes in the law that could impact the program

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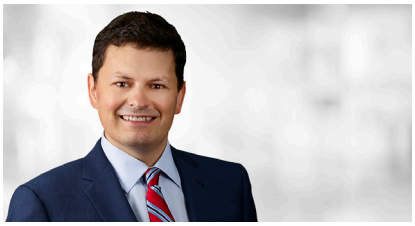

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