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Virtually There: Canada's Competition Bureau Continues to Chart a Digital Course

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While Canada's Competition Bureau (Bureau) has been working remotely during the COVID-19 pandemic, its enforcement and activity levels have remained healthy and robust. The latest speech from the Commissioner of Competition (Commissioner) and the Bureau's recent enforcement efforts both underscore a continued emphasis on proactive competition law enforcement and focus on the digital and tech sectors. We review in more detail below a few important developments and their implications for businesses operating in Canada.

Commissioner's Speech and Bureau Annual Plan Confirm Focus on Digital Enforcement

In a [speech](#) given in late October, the Commissioner reaffirmed the need for continued vigilance and antitrust enforcement both during and after the pandemic, particularly in the digital sector. Commissioner Boswell pointed to the Bureau's [annual plan](#) for 2020/2021, in which the Bureau highlighted its intention to "increase proactive enforcement" and "use all available tools to address anti-competitive activity."

Focus on Proactive Enforcement

Available enforcement tools are expected to include seeking injunctions (used with some regularity in merger cases but also in a recent advertising case), issuing warning letters and developing algorithms and artificial intelligence (AI) to detect, for example, possible bid-rigging in procurement and potentially problematic mergers or acquisitions that fall below the financial thresholds for mandatory notification to the Bureau. In particular, the Commissioner made reference to developing an algorithm to identify mergers or acquisitions that were not notified prior to closing, and we expect that the Bureau could use such tools to monitor various public sources, including social media and regulatory filings.

In addition, having recently established an "intelligence" function for its mergers unit in the fall of 2019, the Bureau now intends to establish a similar intelligence function for its monopolistic practices unit, whose aim will be to "examine and analyze trends in the marketplace to deter anti-competitive behavior before it happens." This intelligence function is expected to include increased use of AI to monitor marketplace conduct, as well as cooperation and information-sharing with its international counterparts. In fact, the Bureau [recently announced](#) that it has entered into a new multilateral agreement with five agencies that is expected to improve their collective cooperation efforts.

Focus on Key Sectors

According to its annual plan, the Bureau intends to focus its enforcement efforts on "key sectors of the economy, such as digital services, online marketing, financial services and infrastructure," and it pledges to "vigorously advance enforcement," particularly in relation to the digital economy.

- **Infrastructure.** In its annual plan, the Bureau explained that it intends to advance its "bid-rigging detection tool using public procurement data" (following an approach implemented by other international antitrust authorities) and continue to promote its existing bid-rigging tip line, which generated 71 tips during the previous fiscal year (2018/2019). The Bureau's focus on infrastructure is not surprising since, as the Commissioner noted, new government procurement projects are expected to increase significantly to

support post-pandemic stimulus measures, and the Bureau has recently secured a number of guilty pleas in respect of bid-rigging in the infrastructure area.

- **Digital.** The Bureau's digital focus is evident from the enforcement agenda for ICPEN (the International Consumer Protection Enforcement Network), an international network of consumer protection authorities of which the Bureau assumed presidency in July of this year. In particular, the Bureau highlighted its plan for ICPEN to look at "exploring the benefits of AI as an investigative tool, as well as potential ways businesses may use [AI] to mislead consumers" and to consider "data privacy concerns and third-party responsibility associated with digital platforms."
- **Health and Telecommunications.** The Bureau stated that it intends to continue to "advocate for competition with a focus on the health and telecommunications sectors by working with policymakers and regulators to provide evidence-based recommendations that improve competitive outcomes." The Bureau's advocacy efforts are already evident from the launch of the Bureau's "market study" of digital health initiatives that sought input from stakeholders regarding any barriers to innovation and growth in the digital health area. The Bureau received over 30 submissions from a variety of stakeholders and is expected to prepare a preliminary report summarizing the submissions. In addition to the market study, the Bureau recently made a submission to the Government of Ontario with respect to the benefits of promoting interoperability for digital health initiatives.
- **COVID-19 Claims.** Finally, the Bureau noted that it intends to continue to respond to the effects of the COVID-19 pandemic by "actively monitoring the market for scams and deceptive marketing practices related to COVID-19 and taking appropriate enforcement action."

Recent Enforcement and Investigations

The Bureau's priorities are also reflected in its recent enforcement activity and efforts, as discussed in more detail below.

Investigation of Amazon

In August, the Bureau issued a public call for information and assistance as it conducts a wide-ranging investigation into whether Amazon's conduct is affecting competition "to the detriment of consumers and companies that do business in Canada." The Bureau's press release states that the Bureau is examining Amazon's conduct under the restrictive trade practices provisions of the *Competition Act* (which include exclusive dealing and tied selling) with a possible focus on abuse of dominance.

The Bureau is asking market participants to provide information regarding (i) any of Amazon's efforts or strategies that may influence consumers to purchase Amazon's products over those offered by competing sellers (such as promoting or preferring its products); (ii) any past or existing Amazon policies that may affect third-party sellers' willingness to offer their products for sale at a lower price on other retail channels; and (iii) the ability of third-party sellers to succeed on Amazon's marketplace without using Amazon's "fulfilment by Amazon" service or advertising on Amazon.ca.

Antitrust authorities in some other jurisdictions, including the United States, Germany, India and the European Union are reported to also be investigating Amazon. In fact, the European Commission issued a "statement of objections" this week, setting out its initial concerns with respect to Amazon's conduct.

Investigation of Vidéotron Employee Reviews

In August, the Commissioner obtained a court order requiring Vidéotron to produce documents and information as part of an investigation into whether some Vidéotron employees engaged in misleading representations by posting favourable reviews of Vidéotron's online application, or app, without disclosing their employment status with Vidéotron. The Bureau has previously stated that, in the absence of such disclosure, it will regard employee reviews as false or misleading. In 2015, the Bureau reached a resolution with Bell Canada after concluding a similar investigation involving employee reviews of one of Bell Canada's apps.

According to the court filings, Vidéotron advised its employees not to comment on the application (app) when it was released. However, the Bureau subsequently identified Vidéotron employees who had reviewed the app favourably without disclosing their relationship with Vidéotron. The investigation is in its early stages, and the Commissioner appears to be evaluating the nature and frequency of the relevant online reviews and representations and whether Vidéotron was diligent in preventing the alleged conduct. If the investigation progresses, it may provide a helpful test of the due diligence defence, which is available in cases where a company has taken steps to prevent the allegedly misleading conduct from occurring.

Facebook Resolution for Privacy Related Representations

In May, the Bureau announced that Facebook had agreed to enter into a consent agreement and pay a \$9-million penalty to resolve allegations of misleading representations concerning the use of Canadian Facebook users' personal information and the privacy controls that were available to such users. The Bureau's investigation of Facebook was initiated in October 2018, shortly after the U.S. Federal Trade Commission was reported to have commenced an investigation into whether Facebook had contravened a prior consent decree dealing with similar issues. As a result of its investigation, the Bureau concluded that certain Facebook representations made between 2012 and 2018 created a false or misleading "general impression" that users would be able to control with whom and how their data would be shared.

Although this is the first resolution that the Bureau has reached regarding representations concerning the use and collection of data, the Bureau has been foreshadowing its enforcement interest in this area since 2018 and the press release about this case makes it clear that the Bureau is interested in hearing about any other instances in which consumers believe that they have been misled by a company's privacy-related representations.

Misleading Representations in Connection with COVID-19

Throughout the pandemic, the Bureau has been monitoring representations related to COVID-19 and has sent compliance warnings to businesses asking them to stop making unfounded claims that their products and services can protect against the virus. According to the Bureau, the products concerned have included masks, food and natural products as well as ventilation and air-purification products. The businesses involved have included a "major national retailer" as well as other businesses located in several provinces.

Competitor Collaborations During and After COVID-19

As we discussed in an earlier publication, in April, the Bureau issued a statement concerning its enforcement approach to competitor collaborations during COVID-19. As part of that announcement, the Bureau also created a new process under which it would offer advisory opinions with respect to any proposed COVID-19-related competitor collaboration. During his October speech and the Q&A that followed, Commissioner Boswell indicated that, to date, no company or firm has chosen to seek such an advisory opinion from the Bureau.

The Commissioner also noted that the Bureau intends to "clarify" its position regarding whether agreements between competitors relating to the purchasing of products or services may be pursued criminally. Any determination that the Bureau could pursue such conduct criminally could raise significant uncertainty and concern in the business community. This is particularly so given the legislative history of the criminal conspiracy provision (which was amended in 2009), as well as the Bureau's prior guidance that such agreements would be pursued only under the civil provisions of the *Competition Act*, and not under the criminal conspiracy offence.

Implications

As other antitrust agencies around the world continue to focus on "big tech," it is perhaps not surprising that the digital practices of businesses operating in Canada are also being scrutinized by the Bureau. We expect this trend to continue. As the Facebook settlement illustrates, the fact that a company has reached a settlement outside Canada does not necessarily prevent further investigation and enforcement in Canada. Indeed, cooperation with the Bureau's international counterparts may prove to be of significant assistance in the Bureau's own investigations and settlements.

In addition, companies operating in Canada would be wise to review and examine the accuracy and general impression of their representations relating to the use and collection of data, environmental claims, product reviews and COVID-19, as the Bureau's interest in these areas is likely to guide its intelligence efforts and may also spur competitors and consumers to lodge complaints.

Finally, as the Bureau sharpens and expands its investigative toolkit to include a variety of new digital tools, the scope of conduct that the Bureau pursues may expand more readily beyond matters that are brought forward by complainants to include more conduct discovered as a result of the Bureau's own initiatives.

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