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Top Competition and Foreign Investment Review Trends and Issues for 2020

In our annual forecast of the year ahead for Canadian competition and foreign investment review law, we evaluate how developments in 2019 will influence these areas of the law in 2020. We discuss below the main issues and trends to watch for this year.

Continued Focus on Enforcement in the Digital Economy

Given the Competition Bureau's stated priorities during the tenure of current Commissioner of Competition Matthew Boswell, we expect the digital economy to remain an area of focus for the Bureau in the year ahead. As Commissioner Boswell has stated, "explosive growth means that digital is more important to our economy than many of the more traditional sectors."

The Competition Bureau has taken a number of steps in the past year to position itself to take more active enforcement in the digital space. Indeed, the Bureau has appointed a Chief Digital Enforcement Officer to assist the Bureau in its enforcement efforts. Further, in September 2019, the Bureau issued a "call-out" to market participants to provide information and complaints concerning potentially anticompetitive conduct in the digital economy. The consultation period for this call-out ended in November, and it remains to be seen whether the Bureau has gathered relevant information through this process sufficient to result in any enforcement.

In addition to any new areas that may come to light as a result of information gathered via the call-out, one area of likely focus is the acquisition of smaller targets by larger technology companies, an issue that the Commissioner has focused on in recent speeches.

Finally, with the introduction of Canada's Digital Charter in 2019, issues relating to the digital economy may be seen by the Bureau as an opportunity to advance broader legislative and policy changes. Notably, the Bureau has stated that regulations in many sectors of the Canadian economy are outdated in the data-driven economy and, as a result, discourage innovation and deter investment. We expect the Bureau will continue to use its advocacy efforts to support the removal of outdated regulations and to encourage innovation. We also expect the Bureau to capitalize on the opportunity to consider advocating for possible amendments to the *Competition Act*. For instance, the Commissioner of Competition has publicly stated his concern that the penalties available under the *Competition Act* are insufficient to deter anticompetitive conduct by large tech firms. It remains to be seen, however, how any efforts by the Competition Bureau to update the *Competition Act* and other regulations will align with the federal government's stated intent of appointing a Data Commissioner whose mandate is expected to include responsibility for new regulations for large digital companies.

Misleading Advertising as Enforcement Priority

The Bureau's focus on enforcement in the digital space may be particularly relevant in the context of its enforcement against misleading advertising.

In particular, we expect to continue to see active enforcement in respect of misleading pricing representations or "drip pricing." For example, in June 2019, the Bureau announced that Ticketmaster agreed to pay $4.5 million to settle allegations of false and misleading representations on its website. Ticketmaster's advertised prices were found by the Bureau to be unattainable because of mandatory fees added in later stages of the buying process. On this basis, the Bureau determined the original price representations to be misleading, despite the full amount of the fees being disclosed before completion of the transaction.

Additionally, in late 2019, the Bureau issued a news release announcing that it had sent letters to nearly one hundred brands and marketing agencies involved in influencer marketing in Canada, recommending that they ensure their marketing practices comply with the *Competition Act*. This includes, most notably, the Bureau's position that any material connections between brands and influencers be

clearly and conspicuously disclosed in any advertising, including social media posts. In the Bureau's view, it is important for consumers to know whether they are receiving an independent review or opinion, or viewing a paid endorsement.

This move by the Bureau follows a similar approach taken by the FTC in 2017. While the Bureau has yet to commence any formal enforcement action related to influencer advertising in Canada, it has previously taken action on the basis of the same principles against Bell for product reviews that were posted by its employees. We expect to see enforcement in this area and it is clear that digital advertising in general will continue to be an area of focus for the Bureau in the year ahead.

Increased Scrutiny of Non-Notifiable Transactions

In 2019, the Bureau expanded its Merger Notification Unit, now called the Merger Intelligence and Notification Unit (MINU), to include a broader focus on active intelligence gathering on non-notifiable transactions that may raise competition concerns.

While all mergers may be the subject of review by the Bureau for up to one year after closing, only those meeting certain thresholds trigger notification requirements. The advent of the MINU indicates that the Bureau will seek to more actively review mergers that don't meet the notification thresholds.

In fact, the Bureau's call-out (referenced above) included a specific request for any concerns about "creeping acquisitions" of actual or potential competitors. This follows a report published in late August in which the Bureau summarized highlights from its Data Forum and referred to a debate about whether there is an "endemic merger problem" in the tech industry.

Our experience over the past year has been that the Bureau has been more active in monitoring and investigating non-notifiable mergers, and all signs point to that trend continuing in the coming year. Merging parties, regardless of size, will need to carefully evaluate whether a proposed transaction may have anticompetitive effects, even when the transaction is not subject to mandatory pre-merger notification, because the chances of "flying under the radar" have been reduced. When potential competition issues are identified in non-notifiable transactions, parties may choose to voluntarily seek clearance from the Commissioner or be prepared to address, or possibly contest before the Tribunal, any issues that the Commissioner may raise prior to, or within one year of, closing.

Continued Interest in Non-Controlling Common Ownership

As discussed in last year's forecast, the Bureau (along with other competition regulators around the world) recently increased its scrutiny of non-controlling ownership interests held by financial investors.

Some academic papers have asserted that common ownership by large institutional investors in competing firms in concentrated industries has resulted in higher prices and less innovation in those markets. Concerns relate to both (i) unilateral effects of such ownership on the incentives of each firm to compete and (ii) increased risk of coordination between the firms in the industry.

While the Bureau has yet to issue any formal statement on the issue, it has been consulting on its approach to common ownership and has been requesting detailed information about minority shareholders from merging parties as part of its merger reviews. We expect this trend to continue in light of the Bureau's statement that, while "there is no change anticipated to the approach set out in [its] guidelines, [it] will continue to collect the information necessary to conduct an assessment of minority interests."

It remains to be seen whether the Bureau would be prepared to take enforcement steps to address perceived common ownership concerns in isolation. Any enforcement seeking to limit common shareholdings could very well have a chilling effect on investment, be unworkable in practice and raise a host of other legal and policy issues.

Shift in *Investment Canada Act* Enforcement Priorities

Recent years have seen a shift in enforcement priorities under Canada's foreign investment legislation, the *Investment Canada Act* (ICA). This shift came into particular focus in 2019 and is likely to continue in 2020, as we discussed in a recent bulletin.

Specifically, the number of transactions subject to "net benefit" review, a process by which the Canadian government may deny approval to certain investments by non-Canadians on the grounds that they are not of net benefit to Canada, continues to fall as thresholds for review continue to rise. In the federal government's fiscal 2018-19, only nine applications for net benefit review were filed – a historical low. By contrast, an average of 17 applications were filed annually between 2014 and 2017. The clear message for non-Canadian investors is that the ICA's net benefit review process is less and less likely to be a gating item to future transactions.

Conversely, the ICA's national security review process has gained significance. While only seven formal national security reviews were initiated in 2018-19, this represents the most reviews commenced in a single year since the national security review process was introduced in 2009. (Four of these reviews resulted in the parties apparently abandoning the transaction or the requirement for some form of remedy.) Further, the federal government also screens a much broader range of transactions on national security grounds without initiating a formal review process.

However, despite the uptick in formal national security reviews undertaken by the government, investors should keep in mind that the vast majority of investments in Canada are not subjected to a formal national security review. Even for investors from countries that may be viewed as higher risk, most investments will not raise national security concerns.

An Emphasis on Injunctions

In a speech in May 2019, the Commissioner reflected on his vision for the Bureau over the coming years. The primary focus will be active enforcement, and one of the means that the Commissioner identified for improving the Bureau's active enforcement capabilities is "increased consideration of the use of tools such as injunction applications." Not only did the Commissioner indicate that tools such as injunctions be used more for final remedies, but the Bureau will also "use these tools more frequently, as resources permit, to interrupt or halt the conduct in question, pending a full hearing."

Although the Bureau has sought injunctions in the mergers context, the Bureau may also seek interim orders under the misleading advertising provisions or the abuse of dominance provisions of the *Competition Act*.

The implications of the Bureau's new approach are twofold. First, we expect the Bureau to apply for interim orders more frequently in the mergers context as well as in relation to allegations of misleading representations and abuse of dominance. Additionally, given that the scope and applicability of the relevant interim order provisions remain relatively untested outside the mergers context, any attempt by the Bureau to obtain such interim orders more frequently is likely to result in increased litigation.

Potential for Expanded Competition Class Actions in Light of Recent Supreme Court Guidance

In September 2019, the Supreme Court of Canada released its long-awaited decision in *Pioneer Corporation v Godfrey* and *Toshiba Corporation v Godfrey*, two companion appeals that will have significant implications for class actions alleging violations of the criminal conspiracy provisions of the *Competition Act*.

As described in our earlier bulletin discussing the decision, key takeaways from the decision include the following:

- **Umbrella Purchasers.** The Supreme Court held that "umbrella purchasers" can assert claims against defendants in alleged illegal price-fixing conspiracies for damages resulting from higher prices in the overall market, even though they did not purchase from the defendants. Umbrella purchasers are purchasers who acquire products directly or indirectly from non-conspirators, but who nevertheless allege they were overcharged because price-fixing by the conspirators caused other firms that did not participate in the conspiracy to raise their prices.
- **Evidentiary Standard at Certification.** At the certification stage, the plaintiffs need provide only a plausible and credible expert methodology that can establish that loss flowed to the relevant purchaser level. This methodology need not be capable of showing that all members of the proposed class were harmed or of identifying who was harmed and who was not.

As a result of this decision, we expect that umbrella purchaser claims will be included in most future competition class actions in 2020 and beyond. This is likely to result in larger and more complex classes, difficult and complex challenges for plaintiffs related to proving damages caused to umbrella purchasers and increased costs for defendants at both the certification and the merits stages. The decision may also have a substantial impact on the potential quantum of liability for Canadian market participants.

Sights Set on Telecom Industry

Canada's telecommunications industry has been identified as a sector in which the Commissioner intends to "vigorously enforce and promote competition" and an area where we expect to see continued Bureau involvement.

For example, in April 2019 the Bureau announced that it had obtained a court order to advance an ongoing investigation into potentially false and misleading representations made by Bell Canada in promoting its residential services.

Further, later in the year, the Bureau issued a recommendation that Canada's telecom regulator, the CRTC, pursue a Mobile Virtual Network Operator (MVNO) policy whereby the major telecom players (Bell, Rogers and Telus) would be obligated to sell temporary access to their wireless networks to smaller carriers with the aim of incentivizing these carriers to broaden their own networks and compete head to head with incumbents. The Bureau found that prices can be 35% to 40% lower in regions with wireless disruptors, and that the difference is unexplained by other variables, such as population density or network quality.

In the midst of an ongoing review of mobile wireless services by the CRTC, the telecom industry will likely remain a central focus from a competition perspective. Further, given that mobile phone prices were a key component of the Liberal government's recent election platform and will likely form part of its digital economy legislative agenda, it will be interesting to see how closely the Competition Bureau's efforts align with these potential legislative changes.

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