



DIGITAL MARKETS GUIDE

Editors

Claire Jeffs, Danny Sokol and Susan Ning

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Publisher's Note

The digital economy is transforming day-to-day lives, with an exponential rise in connectivity not only between people but also between vehicles, sensors, meters and other aspects of the Internet of Things. Yet, as noted by Claire Jeff and Nele Dhondt in their introduction, even as the Fourth Industrial Revolution accelerates, traditional concerns are keeping pace and the digital economy has also been a powerful force, increasing competition across a broad sweep of products and services. Practical and timely guidance for both practitioners and enforcers trying to navigate this fast-moving environment is thus critical.

The first edition of the *Digital Markets Guide* – published by Global Competition Review – provides just such detailed guidance and analysis. It examines both the current state of law and the direction of travel for the most important jurisdictions in which international businesses operate. The *Guide* draws on the wisdom and expertise of distinguished practitioners globally, and brings together unparalleled proficiency in the field to provide essential guidance on subjects as diverse as how pricing algorithms intersect with competition law and antitrust enforcement in certain tech mergers – for all competition professionals.

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Americas

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Canada

Elisa K Kearney, Alysha Manji-Knight and Joshua Hollenberg¹

Introduction

While digital markets have been a focus of the Canadian Competition Bureau (the Bureau)'s enforcement and advocacy work for many years, they have gained specific prominence under Commissioner of Competition Matthew Boswell (the Commissioner), who was appointed for a five-year term on 5 March 2019. This increased focus aligns with broader government priorities to update the rules governing the internet and rebuild Canadians' trust in digital markets, including commitments to protect consumers' rights online and bring forward new regulations for large digital companies, as set out in the governing Liberal Party's 2019 and 2021 election platforms.²

The Bureau's Strategic Vision for 2020–2024, published on 11 February 2020, which set out Commissioner Boswell's vision for the Bureau to be 'at the forefront of the digital economy', emphasises this spotlight on digital markets.³ The Commissioner committed to creating a Digital Enforcement Office, building on the appointment of the Bureau's first Chief Digital Enforcement Officer (CDEO) on 2 July 2019 to 'help the Bureau monitor the digital landscape, identify and evaluate new investigative techniques, and boost its digital intelligence

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- 1 Elisa K Kearney is a partner and Alysha Manji-Knight and Joshua Hollenberg are associates at Davies Ward Phillips & Vineberg LLP.
 - 2 See Liberal Party of Canada, 'Forward: A Real Plan For The Middle Class', 2019, online: <https://2019.liberal.ca/wp-content/uploads/sites/292/2019/09/Forward-A-real-plan-for-the-middle-class.pdf>; and Liberal Party of Canada 'Forward. For Everyone', 2021, online: <https://liberal.ca/wp-content/uploads/sites/292/2021/09/Platform-Forward-For-Everyone.pdf>.
 - 3 Competition Bureau Canada, 'The Competition Bureau's Strategic Vision for 2020–2024: Competition in the digital age', 11 February 2020, online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04513.html>.

gathering capabilities.⁴ ‘The use of specialized teams to help investigators better understand the design and business models of digital markets and develop remedies to anti-competitive activity’ was also discussed at a panel at the Bureau’s Digital Enforcement Summit in November 2020.⁵

The Bureau had been hamstrung with budgetary constraints for years, making it difficult for the Commissioner to fulfil the Bureau’s strategic vision. However, in its 2021 budget, the Canadian government committed to providing the Bureau with an additional C\$96 million over five years to enhance the Bureau’s ‘enforcement capacity and ensure it is equipped with the necessary digital tools for today’s economy’.⁶ At the time of writing, the Bureau had not indicated how the new funding will be allocated or what new digital tools will be acquired, but the expectation is that a Digital Enforcement Office will be created. The re-election of the Liberal government in September 2021 means that the additional C\$96 million funding commitment is very likely to continue to be realised over the coming years.

Strategic vision for competition and consumer protection in digital markets and calls for reform

Building on the Liberal government’s 2019 election platform, Prime Minister Justin Trudeau instructed the Minister of Innovation, Science and Economic Development to, among other things, enhance data privacy rights for online users and new regulations for large digital companies to enhance protection of personal data online.⁷ The mandate letter for the same portfolio in January 2021 included,

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- 4 Competition Bureau Canada, ‘George McDonald joins the Competition Bureau as new Chief Digital Enforcement Officer’, 2 July 2019, online: <https://www.canada.ca/en/competition-bureau/news/2019/07/george-mcdonald-joins-the-competition-bureau-as-new-chief-digital-enforcement-officer.html>. Mr George McDonald served a two-year term as the inaugural Chief Digital Enforcement Officer as part of the Interchange Canada programme. He left the position in July 2021 and a replacement has not been announced.
 - 5 Competition Bureau Canada, ‘Digital Enforcement Summit 2020 Highlights’, 18 December 2020, online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04563.html>.
 - 6 Government of Canada, ‘Budget 2021: A Recovery Plan for Jobs, Growth, and Resilience’, 19 April 2021, online: <https://www.budget.gc.ca/2021/home-accueil-en.html>, at p. 141.
 - 7 Office of the Prime Minister, ‘Minister of Innovation, Science and Industry Mandate Letter’, 13 December 2019, online: <https://pm.gc.ca/en/mandate-letters/2019/12/13/minister-innovation-science-and-industry-mandate-letter>.

in addition to the priorities outlined in the 2019 letter, ensuring the revenues of ‘web giants’ are shared fairly with creators and media, and requiring the web giants to contribute to the creation and production of Canadian content.⁸

Shortly after Commissioner Boswell’s appointment in early 2019, he received a letter from the Minister highlighting the importance of digital transformation and its impact on competition, as well as issues for competition as it relates to data, transparency and control. As part of the letter, the Minister noted the need to ensure Canada’s competition infrastructure is fit for purpose and ‘responsive to a modern and changing economy’.⁹ The Bureau and others within government have been exploring this question of whether the Competition Act is fit for purpose over the past two years.

Early in Commissioner Boswell’s tenure, the Bureau convened a Data Forum in August 2019, which addressed digital platforms, new approaches to regulation, data portability and privacy.¹⁰ The overarching theme of the Data Forum was the need for appropriate regulation only where necessary (e.g., overregulation or poorly designed regulation distorts the market and interferes with creativity, innovation and other market forces). The Bureau’s Data Forum acknowledged that large digital platforms offer compelling user experiences and low prices, and can enhance innovation by providing exit opportunities for small start-ups looking to be acquired. However, concentration of digital platforms can also lead to circumstances where a single entity or a small group gain market power and can lead to environments where large companies stifle innovation and competition.

The Data Forum built on a February 2018 report from the Bureau on big data and competition (the Big Data Report).¹¹ In the Big Data Report, the Bureau considered the impact of big data on the enforcement of competition law around mergers and monopolistic practices, cartels, and deceptive marketing practices.

8 Office of the Prime Minister, ‘Minister of Innovation, Science and Industry Mandate Letter’, 15 January 2021, online: <https://pm.gc.ca/en/mandate-letters/2021/01/15/minister-innovation-science-and-industry-supplementary-mandate-letter>.

9 Minister of Innovation, Science and Economic Development Navdeep Bains, ‘Letter from Minister of Innovation, Science and Economic Development to the Commissioner of Competition’, May 2019, online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04464.html>.

10 Competition Bureau Canada, ‘Highlights from the Competition Bureau’s Data Forum’, 30 August 2019, online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04492.html>. [Data Forum]

11 Competition Bureau Canada, ‘Big data and innovation: key themes for competition policy in Canada’, 19 February 2018, online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04342.html>.

The Bureau concluded that the ‘emergence of firms that control and exploit data can raise new challenges for competition law enforcement but is not, in and of itself, a cause for concern,’¹² and that the emergence of these firms does not by itself demand a new approach to competition policy. These same concerns were discussed at the Data Forum, with the Bureau again concluding ‘that the core principles of competition law are generally up to the task of dealing with the digital economy’.¹³ The Bureau has taken a notably more balanced and conservative position on the regulation of digital markets than has been proposed by domestic advocates for greater enforcement¹⁴ as well as by other jurisdictions, including the United States, Australia and Europe.¹⁵

Three approaches to addressing these competition issues were discussed at the Data Forum: expanding merger reviews to include retrospective reviews and a ‘balance of harms’ test for certain technology acquisitions; speeding up remedies to anticompetitive conduct (including a reduced standard of review to a judicial review standard, increased maximum penalties, and an expanded right to private access for abuse of dominance cases); and introducing a code of conduct for digital platforms deemed to have market power (based on the recommendations of the United Kingdom’s Report of the Digital Competition Expert Panel).¹⁶

The Data Forum also addressed data portability as a method of improving innovation by increasing competition for customers and reducing the barriers to switching service providers. Canadian privacy legislation does not currently include a right to data portability but, as discussed below, draft legislation was proposed at the end of 2020 to introduce the right to data portability in Canada.

12 *ibid.* at p. 14.

13 Data Forum, *supra* note 9 at p.10.

14 See, for example, the Competitiveness in Canada hearings before the Standing Committee on Industry, Science and Technology.

15 See for example, US House Committee on the Judiciary, ‘Investigation of Competition in Digital Markets, Majority Staff Report and Recommendations’, 6 October 2020, online: https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf; Australian Competition & Consumer Commission, ‘Digital Platforms Inquiry’, 26 July 2019, online: <https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report>; European Commission, ‘The Digital Services Act package’, online; <https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package>.

16 Digital Competition Expert Panel, HM Treasury, Government of the United Kingdom, ‘Unlocking Digital Competition’, March 2019, online: <https://www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel>.

In an attempt to identify potentially anticompetitive conduct in digital markets, the Bureau issued a public ‘call out’ on 4 September 2019 seeking input from market participants on concerns that digital markets (e.g., including online search, social media, display advertising and online marketplaces) have become increasingly concentrated and are negatively impacting consumers and businesses.¹⁷ Again taking a balanced approach, the Bureau advanced two theories for concentration in certain digital markets – on the one hand market characteristics that favour the emergence of a single winner or a small group of winners; and on the other hand the use of anticompetitive strategies by market participants. Especially in markets with winner-take-all characteristics, the Bureau highlighted the need to identify and address anticompetitive strategies used in digital markets such as refusal to deal, self-preferencing, margin squeezing, most-favoured-nation requirements and creeping acquisitions. Given the Bureau’s enforcement record over the past two years, as discussed below, it is not apparent whether the Bureau’s ‘call out’ generated significant evidence that participants in digital markets in Canada have been engaging in anticompetitive strategies.

Calls for reform of Canada’s competition laws have grown stronger. In April 2021, the federal Standing Committee on Industry, Science and Technology (the INDU Committee) held a series of four meetings to study competitiveness in Canada, Competition Act reform, and related matters, and a second series of four meetings to consider the proposed merger of Rogers Communications Inc. and Shaw Communications Inc., two of Canada’s largest telecommunications companies. Certain sections of the Competition Act came under heavy scrutiny during both series of the INDU Committee hearings, including the efficiencies

17 Competition Bureau Canada, ‘Competition Bureau call-out to market participants for information on potentially anti-competitive conduct in the digital economy’, 4 September 2019, online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04494.html>.

defense in Section 96 and the one-year statute of limitations on merger reviews.¹⁸ Providing the Bureau with the power to compel data from market participants for market studies was also discussed.¹⁹

In June 2021, the Bureau convened a Competition and Growth Summit where the need for a ‘rigorous and comprehensive review of the Competition Act to ensure that it is fit for purpose’ was again recognised.²⁰ The importance of addressing new issues arising out of digital transformation and the rise of large digital platforms acting as gatekeepers across a number of markets was identified as a notable challenge facing the Bureau and other competition authorities.²¹ While no specific solutions were discussed, there was general agreement that competition authorities need to adapt their tools to these markets and may require additional powers and resources to carry out their mandates in this new reality. At the same time, significant emphasis was placed during the Summit on the need to promote competition to strengthen post-pandemic growth, ensure Canada’s competition law enforcement framework is robust and well-resourced, take advantage of opportunities for regulatory reform, and have the Bureau take advantage of all the tools it has available.²² Although digital markets were a major topic of discussion, these takeaways were framed to apply to markets broadly and not exclusively to online issues.

As described below, competition law is not the only tool in the government’s toolkit for addressing consumer harms in the digital economy. Significant new legislation strengthening privacy protections and increasing the regulation of data and digital platforms had been introduced, but died on the order paper when

18 See Canada, Parliament, House of Commons, Standing Committee on Industry, Science and Technology, *Competitiveness in Canada*, 43rd Parl, 2nd Sess, No. 33 (22 April 2021) (Chair: Sherry Romanado), online: <https://www.ourcommons.ca/DocumentViewer/en/43-2/INDU/meeting-33/evidence> (see testimony of Ms. Kaylie Tiessen at 1130); and Canada, Parliament, House of Commons, Standing Committee on Industry, Science and Technology, *Competitiveness in Canada*, 43rd Parl, 2nd Sess, No. 30 (22 April 2021) (Chair: Sherry Romanado), online: <https://www.ourcommons.ca/DocumentViewer/en/43-2/INDU/meeting-30/evidence> (see testimony of Mr David Vaillancourt at 1250).

19 Canada, Parliament, House of Commons, Standing Committee on Industry, Science and Technology, *Competitiveness in Canada*, 43rd Parl, 2nd Sess, No. 29 (7 April 2021) (Chair: Sherry Romanado), online: <https://www.ourcommons.ca/DocumentViewer/en/43-2/INDU/meeting-29/evidence> (see testimony of Commissioner Boswell at 1510).

20 Competition Bureau Canada, ‘Canada Needs More Competition: takeaways from the Competition and Growth Summit’, June 2021, online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04595.html>.

21 *ibid.* at p. 7.

22 *ibid.* at p. 12.

the government was dissolved and an election was called on 15 August 2021. To date, the approach being proposed in Canada is multi-pronged with four different federal regulatory bodies (the Bureau, a sector specific telecommunications and broadcasting regulator, a privacy regulator, and a Data Commissioner²³) enforcing laws that impact marketplace conduct in digital markets.

Enforcement in digital markets

In the Bureau's Strategic Vision for 2020–2024, the Commissioner identified timely and proactive enforcement action as essential given the rapid pace of change in a digital economy. The Bureau's record in this regard is mixed, however.

Mergers

Thoma Bravo Acquisition of Aucerna

The Bureau took the unusual step of unwinding a small acquisition of a digital software company in 2019. Thoma Bravo, an American private equity firm, acquired Canadian technology company Aucerna on 13 May 2019. Quorum Business Solutions, a portfolio company of Thoma Bravo, supplied specialised software to the Canadian oil and gas industry. This product, MOSAIC Reserves Software, was the closest competitor of Aucerna's Value Navigator software.

Thoma Bravo notified the Bureau of the transaction on 13 February 2019, although it is unclear whether the transaction met the minimum thresholds in the Competition Act. After a three-month investigation, the Bureau indicated that it had concerns with the transaction, but the transaction nevertheless closed after the statutory waiting period expired on 11 May 2019. The Bureau filed an application challenging the transaction on 14 June 2019, following which a hold-separate agreement was filed on 24 July 2019 in respect of Quorum's MOSAIC software, and a consent agreement on 20 August 2019. Pursuant to the consent agreement, Thoma Bravo agreed to spin off and sell the MOSAIC software to a Bureau-approved purchaser. This case illustrates the Bureau's focus on pursuing mergers below the minimum thresholds that raise competitive issues, particularly those involving the digital economy, as well as the Bureau's power to unwind a transaction post-closing.

23 The concept of a Data Commissioner was introduced in Prime Minister Justin Trudeau's 2019 mandate letter to then-Minister of Innovation, Science and Economic Development Navdeep Bains included in the federal government's 2021 budget; however, the specifics of the position have not been released as at the time of writing.

Abuse of dominance

Toronto Real Estate Board investigation

In a landmark dispute that began in 2011 and lasted more than seven years and touched on a number of issues common to digital market cases, the Bureau successfully challenged the Toronto Real Estate Board (TREB)'s conduct as it related to data. In particular, and as further described below, the Bureau was successful in setting a precedent on the control and use of data as well as the use of privacy and intellectual property as defences to abuse of dominance claims. The tension between privacy and competition was apparent in this case where it was acknowledged that otherwise anticompetitive restrictions on access to and use of data could be valid if such restrictions were put in place to comply with privacy laws. The privacy justification was not accepted in this case.

TREB owns and operates a database containing current property listings and historical sales data, such as sold prices, for real estate transactions in the Greater Toronto Area, called Multiple Listing Service (MLS). The Bureau alleged that TREB was abusing its dominance by restricting access to, and the use of, MLS data by real estate agents. The Bureau further argued that TREB used its control of MLS data to protect its members from innovative products developed by current or potential competitors, including by restricting the use of virtual office websites. The Competition Tribunal (the Tribunal) sided with the Bureau,²⁴ the Federal Court of Appeal (FCA) denied TREB's appeal,²⁵ and the Supreme Court of Canada (SCC) declined to hear an appeal of the FCA's decision in 2018.²⁶

The TREB case illustrates that control of significant amounts of data can be a source of market power, and restrictions on access can be a barrier to entry. Further, as confirmed by the Tribunal, an organisation or company that controls data does not need to compete with the parties allegedly harmed by the conduct for there to be a finding of an abuse of dominance. TREB argued that the limitations put in place on the access to and use of its data were justified as necessary in order to protect individual privacy and as a valid exercise of its intellectual property. The court rejected both arguments. On privacy, the court found that TREB had introduced the policies restricting the use of its data based on a desire

24 *The Commissioner of Competition v The Toronto Real Estate Board* (27 May 2011), CT-2011-003, online: Competition Tribunal <https://decisions.ct-tc.gc.ca/ct-tc/cd/en/item/462552/index.do?q=CT-2011-003>.

25 *The Toronto Real Estate Board v. Commissioner of Competition*, 2017 FCA 236, online: <https://www.canlii.org/en/ca/fca/doc/2017/2017fca236/2017fca236.html> [TREB].

26 *Toronto Real Estate Board v. Commissioner of Competition*, 2018 CanLII 78753 (SCC), online: <https://www.canlii.org/en/ca/scc-l/doc/2018/2018canlii78753/2018canlii78753.html>.

to restrict competition and maintain control over the data, and that there was no evidence that the data restriction policies had been informed by TREB's privacy policies. The court acknowledged that privacy could be a valid justification for limits on the use of, or access to, data if such limits were enacted to meet some regulatory or statutory obligation. With respect to TREB's argument that the restrictions were a valid exercise of its intellectual property in the MLS system, both the Tribunal and the FCA rejected this argument, finding that there was no copyright in the MLS database and that the Competition Act 'precludes reliance on copyright as a defence to an anti-competitive act.'²⁷

Amazon investigation

On 14 August 2020, the Bureau announced its investigation into whether Amazon engaged and is continuing to engage in anticompetitive behaviour on Amazon.ca, its Canadian marketplace. The Bureau highlighted three specific areas of interest:

- any past or existing Amazon policies which may impact third-party sellers' willingness to offer their products for sale at a lower price on other retail channels, such as their own websites or other online marketplaces;
- the ability of third-party sellers to succeed on Amazon's marketplace without using its 'Fulfilment By Amazon' service or advertising on Amazon.ca; and
- any efforts or strategies by Amazon that may influence consumers to purchase products it offers for sale over those offered by competing sellers.

The abuse of dominance investigation is ongoing and there has been no conclusion of wrongdoing thus far.²⁸

The Bureau previously investigated Amazon's marketing practices, finding that representations made regarding the ordinary selling price of products on Amazon.ca were misleading. The investigation concluded with a consent agreement registered on 11 January 2017 and Amazon paying C\$1.1 million in fines.²⁹

27 TREB, *supra* note 12 at Para. 176.

28 Competition Bureau Canada, 'Competition Bureau seeks input from market participants to inform an ongoing investigation of Amazon', 14 August 2020, online: <https://www.canada.ca/en/competition-bureau/news/2020/08/competition-bureau-seeks-input-from-market-participants-to-inform-an-ongoing-investigation-of-amazon.html>.

29 Competition Bureau Canada, 'Competition Bureau statement regarding its inquiry into Amazon's price advertising in Canada', 11 January 2017, online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04187.html>.

Deceptive marketing

Deceptive marketing has been a primary focus of the Bureau in recent years. Since Commissioner Boswell was appointed, the Bureau has been active in this area and concluded investigations into deceptive marketing practices by way of registered consent agreements with FlightHub Group Inc., StubHub Inc. Ticketmaster and LiveNation, and Facebook. Canada took over the presidency of the International Consumer Protection and Enforcement Network (ICPEN), a body made up of competition regulators across the globe, in 2020–2021. It focused its one-year presidency on building consumer trust in a changing marketplace³⁰ mirroring the importance of consumer trust for innovation and a digital economy expressed in Canada's Digital Charter,³¹ as well as statements by the Bureau that deceptive marketing hurts Canadians and lowers trust in the marketplace.³²

Facebook investigation

In a case highlighting the Bureau's use of the Competition Act's deceptive marketing provisions to address privacy concerns, the Bureau and Facebook ended an investigation into Facebook's representations about the disclosure of personal information with a settlement agreement registered on 19 May 2020.³³ Pursuant to the agreement, Facebook agreed to pay C\$9 million in fines and an additional C\$500,000 in costs.³⁴ From its investigation, the Bureau concluded that Facebook had given users the impression that they had greater control over access to their personal information than was actually provided. Instead, access to personal information of users and their friends was provided to third party developers in a manner that was inconsistent with its privacy claims.³⁵ Further, Facebook agreed

30 Competition Bureau Canada, 'Closing remarks – ICPEN Conference 2021', 24 June 2021, online: <https://www.canada.ca/en/competition-bureau/news/2021/06/closing-remarks--icpen-conference-2021.html>.

31 Innovation, Science and Economic Development Canada, 'Canada's Digital Charter in Action: A Plan by Canadians, for Canadians', 21 May 2019, online: https://www.ic.gc.ca/eic/site/062.nsf/eng/h_00109.html.

32 Competition Bureau Canada, 'Our Year in Action: Safeguarding Competition in a Digital World', 6 November 2020, online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04542.html>.

33 Facebook, Inc. (19 May 2020), CT-2020-004, online: Competition Tribunal <https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/471812/index.do>.

34 Competition Bureau Canada, 'Facebook to pay \$9 million penalty to settle Competition Bureau concerns about misleading privacy claims', 19 May 2020, online: <https://www.canada.ca/en/competition-bureau/news/2020/05/facebook-to-pay-9-million-penalty-to-settle-competition-bureau-concerns-about-misleading-privacy-claims.html>.

35 *ibid.*

not to make false or misleading representations about the disclosure of personal information, including about the extent to which users can control access to their personal information on Facebook and Messenger.

Facebook voluntarily cooperated with the Bureau in its investigation and entered into the settlement agreement noted above. However, an investigation by Canada's Office of the Privacy Commissioner (OPC) on the same issues and seeking similar remedies has taken a different turn with Facebook challenging the OPC's application to federal court for a declaration that Facebook contravened Canada's privacy law, the Personal Information Protection and Electronic Documents Act (PIPEDA).³⁶

FlightHub investigation

The Bureau concluded an investigation into online travel agency FlightHub by registering a settlement agreement on 24 February 2021, which included a C\$5 million penalty against the company and a C\$400,000 fine each for two of FlightHub's directors.³⁷ The agreement also prohibits FlightHub and its directors from making false or misleading statements or claims as well as requiring the removal of online reviews, which appear to be made by customers but were posted by the company and its employees.³⁸

The Bureau concluded that FlightHub had been misleading customers regarding the price of flights as well as the cost and terms of cancellation, seat selection, and rebooking policies. FlightHub also made millions from fees which it actively concealed from consumers.³⁹

The FlightHub settlement agreement is notable for several reasons. First, the penalty is the largest levied for so-called drip pricing cases. Drip pricing is where a customer is shown a headline price, to which mandatory fees are then added. This form of deceptive marketing has been a significant priority for the Bureau.

36 The Canadian Press, 'Facebook takes Canada's privacy commissioner to court over personal data probe', 20 April 2020, online: <https://www.theglobeandmail.com/canada/article-facebook-takes-canadas-privacy-commissioner-to-court-over-personal/>.

37 FlightHub Group Inc. (24 February 2021), CT-2019-003, online: Competition Tribunal <https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/493395/index.do>.

38 Competition Bureau Canada, 'Investigation of FlightHub ends with \$5.8M in total penalties for company and directors', 24 February 2021, online: <https://www.canada.ca/en/competition-bureau/news/2021/02/investigation-of-flighthub-ends-with-58m-in-total-penalties-for-company-and-directors.html>.

39 *ibid.*

Second, this case represents the first time the Bureau successfully enforced rules against astroturfing – the practice of using fake reviews or engagement to create the impression of a large, supportive community of users or customers.⁴⁰

Other recent drip pricing investigations involving digital markets include StubHub, which resulted in a C\$1.3 million penalty in February 2020;⁴¹ *LiveNation/TicketMaster*, with a C\$4.5 million penalty in June 2019;⁴² as well as into the rental car industry, with penalties ranging from C\$700,000 to C\$3 million between 2016 and 2018.⁴³

An advocate for competitive markets

While the Bureau's enforcement record is somewhat limited, the Bureau has been actively advocating for competition in digital markets over the last number of years. For example, the Bureau hosted a Financial Technology (fintech) Workshop in February 2017, followed by a fintech market study published in December 2017 that looked at the reasons Canada lagged behind peer nations in the adoption of

40 Although the Bureau reached a consent agreement with Bell Canada in October 2015 relating to the posting of post positive reviews and high ratings of Bell apps by Bell employees without disclosing that they were employees of Bell Canada. Bell agreed to an enhanced corporate compliance programme and paid an administrative monetary penalty (AMP) of C\$1.25 million. Competition Bureau Canada, 'Bell Canada reaches agreement with Competition Bureau over online reviews', 14 October 2015, online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03992.html>.

41 Competition Bureau Canada, 'StubHub to pay \$1.3 million penalty for advertising unattainable prices for event tickets', 13 February 2020, online: <https://www.canada.ca/en/competition-bureau/news/2020/02/stubhub-to-pay-13-million-penalty-for-advertising-unattainable-prices-for-event-tickets.html>.

42 Competition Bureau Canada, 'Ticketmaster to pay \$4.5 million to settle misleading pricing case', 27 June 2019, online: <https://www.canada.ca/en/competition-bureau/news/2019/06/ticketmaster-to-pay-45-million-to-settle-misleading-pricing-case.html>.

43 See Competition Bureau Canada, 'Avis and Budget to pay a \$3 million penalty to resolve concerns over unattainable prices', 2 June 2016, online: <https://www.canada.ca/en/competition-bureau/news/2016/06/avis-and-budget-to-ensure-prices-advertised-are-accurate.html>; Competition Bureau Canada, 'Hertz and Dollar Thrifty to pay \$1.25 million penalty for advertising unattainable prices and discounts', 24 April 2017, online: https://www.canada.ca/en/competition-bureau/news/2017/04/hertz_and_dollarthriftytopay125millionpenaltyforadvertisingunatt.html; Competition Bureau Canada, 22 February 2018, 'Enterprise Rent-A-Car Canada to pay a \$1 million penalty for advertising unattainable prices', online: https://www.canada.ca/en/competition-bureau/news/2018/02/enterprise_rent-a-carcanadatopaya1millionpenaltyforadvertisingun.html.

fintech innovations⁴⁴ The federal government introduced legislation in its 2021 budget, the Retail Payment Activities Act, which created a new retail payments oversight framework under the supervision of the Bank of Canada, including a registration process that may be subject to national security review and ongoing operating requirements. The legislation became law on 29 June 2021; however, the majority of the bill is not yet in force.⁴⁵ In January 2021 the Bureau also provided comments to the federal Department of Finance's Advisory Committee on Open Banking in support of competitive and innovative open banking regulatory design.⁴⁶ At the time of writing, the Advisory Committee's work is ongoing and a final report has not yet been released.

Similarly, with respect to digital healthcare, the Bureau launched a market study of Canada's healthcare sector on 30 July 2020 to examine how pro-competitive policies can support digital healthcare through greater innovation, choice and access. The market study focuses on three broad topics:

- data and information, including whether there are barriers preventing access, use, or sharing of healthcare data and how those barriers can be reduced;
- products and services, including barriers restricting the range and scope of products and services, how to facilitate the development and approval of digital products and services, and the impact of procurement and commercialisation processes on innovation and competition in the digital healthcare market; and
- healthcare providers, including barriers limiting the ability of providers to deliver digital healthcare to patients as well as the impact of billing codes and compensation mechanisms, medical licensing rules, and rules about the healthcare provider scope of practice on delivery of digital healthcare.

The Bureau will not be considering issues pertaining to privacy, digital infrastructure including access, or the appropriateness and efficacy of specific products and services as part of the market study. The final report is expected in Spring 2022.

44 Competition Bureau Canada, 'Technology-led innovation in the Canadian financial services sector', 14 December 2017, online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04322.html>.

45 Retail Payment Activities Act, S.C. 2021, c. 23, s. 177., online: <https://laws-lois.justice.gc.ca/eng/acts/R-7.36/FullText.html>.

46 Competition Bureau Canada, 'Competition Bureau comments to the Advisory Committee on Open Banking', 18 January 2021, online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04571.html>.

Finally, with respect to telecommunications markets, the Bureau conducted a market study in 2018 into competition in Canada's broadband internet sector⁴⁷ and made submissions to the Canadian Radio-television and Telecommunications Commission (CRTC) in response to notices of consultation relating to mobile wireless services.⁴⁸

Interaction with other parts of government

As noted above, the approach being proposed in Canada is multi-pronged, with four different federal regulatory bodies enforcing laws that impact marketplace conduct in digital markets. The re-election of the Liberal Party in September 2021, albeit with another minority government, means that unrealised priorities of the previous parliament, including legislation to update the Broadcasting Act and PIPEDA, which died on the order papers when the government was dissolved and an election was called on 15 August 2021, will likely be re-introduced and passed into law.

Bill C-10

Bill C-10, An Act to amend the Broadcasting Act and to make related and consequential amendments to other Acts,⁴⁹ proposed to bring all audio and audiovisual content sent and received through the internet under the oversight and regulation of the CRTC. The bill would have allowed the CRTC to set conditions for online undertakings including Canadian content requirements, regulate spending on Canadian content by categories or individual undertakings and levy AMPs of up to C\$15 million. At the time of dissolution, Bill C-10, which would have amended the Broadcasting Act, had passed all three readings in the house and was under review by the Senate – the penultimate step in the legislative process.

47 Competition Bureau Canada, 'Delivering Choice: A Study of Competition in Canada's Broadband Industry', 7 August 2019, online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04470.html>.

48 See for example Competition Bureau Canada, 'Review of Mobile Wireless Services - Comments of the Competition Bureau on Telecom Notice of Consultation CRTC 2019-57', 15 May 2019, online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04431.html>; Competition Bureau Canada, 'Submission to the Telecom Notice of Consultation CRTC 2019-57 – Further Comments of the Competition Bureau', 25 November 2019, online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04510.html>; and Competition Bureau Canada, 'Submission to the Telecom Notice of Consultation CRTC 2019-57 - Final Comments of the Competition Bureau', 15 July 2020, online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04540.html>.

49 Bill C-10, An Act to amend the Broadcasting Act and to make related and consequential amendments to other Acts, 2nd Sess, 43rd Parl, Canada, 2020, online: <https://www.parl.ca/LegisInfo/BillDetails.aspx?Language=en&Mode=1&billId=10926636>.

Bill C-10 faced significant and sustained criticism, which led to delays and extensive debate, ultimately preventing its passage before the election was called. Legal and privacy experts expressed concern about the bill's discoverability requirements, whereby the CRTC would set rules requiring Canadian content to be prioritised and other content to be de-prioritised in Canadians' feeds. The goal of these requirements is to promote Canadian stories and content. These requirements, it was argued, would have undermined the principles of net neutrality by obligating companies that provide content – such as Spotify, YouTube and Facebook – to not treat all content in a neutral, equal fashion.⁵⁰ There was also concern that the discoverability requirement would threaten freedom of speech, as the CRTC would be able to mandate the targeted promotion or suppression of content uploaded by individuals onto social media platforms by the social media platforms themselves.⁵¹ The bill would have excluded individuals posting content on social media platforms from being subject to CRTC oversight. (An earlier version of the legislation also excluded the content posted by individuals on social media platforms from being subject to regulation, but the exemption from regulation was rolled back during the legislative process.)

Bill C-11

Introduced on 17 November 2020, the Digital Charter Implementation Act (Bill C-11) would have split PIPEDA into two parts, repealing and replacing the protection of personal information section with a new Consumer Privacy Protection Act (CPPA) and renaming the second part as the Electronic Documents Act. The new CPPA would have overhauled Canada's approach to privacy regulation, including:

- setting up a new Personal Information and Data Protection Tribunal with the power to levy AMPs of up to 5 per cent of a company's gross global revenues;
- new rights regarding data portability and algorithmic transparency; and

50 See Michael Geist, 'Why Bill C-10 Undermines the Government's Commitment to the Principle of Net Neutrality', 27 May 2021, online: <https://www.michaelgeist.ca/2021/05/why-bill-c-10-undermines-the-governments-commitment-to-the-principle-of-net-neutrality/>; and Dwayne Winseck, 'Bill C-10 and the Future of Internet Regulation in Canada', 2 June 2021, online: <https://www.cigionline.org/articles/bill-c-10-and-the-future-of-internet-regulation-in-canada/>.

51 See Bruce Pardy, Fraser Institute, 'Bill C-10 threatens freedom of expression in Canada', 7 June 2021, online: <https://www.fraserinstitute.org/article/bill-c-10-threatens-freedom-of-expression-in-canada>; Brian Lee Crowley, Macdonald-Laurier Institute, 'Bill C-10: A Full Blown Assault On Free Expression', 7 May 2021, online: <https://www.macdonaldlaurier.ca/billc-10-free-expression/>.

- the introduction of a framework of codes of practice and certification programmes by which organisations could apply for OPC approval of a code of practice that met or exceeded the requirements of the CPPA.

The code of practice would have had to include mechanisms to audit and certify compliance as well as penalties for non-compliance. Bill C-11 had been introduced and debated, but had not passed second reading – one of the first steps after introduction – before the dissolution of parliament for the election.

Other proposed legislation

In the previous parliament, the government was planning to also introduce new legislation to address online harms as well as the relationship between the news media and online platforms. The online harms legislation would reportedly create a new regulator modelled on Australia's eSafety commissioner, institute a 24-hour takedown regime, and focus on child sexual exploitation, terrorism, inciting violence, hate speech, and non-consensual sharing of intimate images online.⁵² The news media legislation would create a mechanism for platforms such as Google and Facebook to compensate news media companies for their content. Both pieces of legislation are likely to be introduced by the re-elected government.

Conclusion

Steps taken by the Canadian government (including the Bureau) over past years demonstrate that the government has been exercising diligence in evaluating the various tools it has available to ensure proper functioning digital markets in Canada. With some exceptions, the government is attempting to strike a balance between regulation that promotes trust and fairness in digital markets, while at the same time preserving and encouraging incentives to innovate. The government is expected to move quickly to put a framework in place early in its next mandate. Similarly, the Bureau itself is expected to focus the additional funding and resources it will receive from the government on digital markets. However, it remains to be seen whether amendments will be made to the Competition Act that will impact competition enforcement in digital markets in Canada.

52 Marks & Clerk, 'Federal Government Provides New Details of the Upcoming 'Online Harms' Legislation and Regulator', 15 April 2021, online: <https://www.marks-clerk.com/insights/federal-government-provides-new-details-of-the-upcoming-online-harms-legislation-and-regulator/>.

APPENDIX 1

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The digital economy is transforming day-to-day lives, with a rise in connectivity not only between people but also between vehicles, sensors, meters and other aspects of the Internet of Things. Yet, even as the Fourth Industrial Revolution accelerates, traditional concerns are keeping pace and the digital economy has also been a powerful force, increasing competition across a broad sweep of products and services. Practical and timely guidance for both practitioners and enforcers trying to navigate this fast-moving environment is thus critical.

The *Digital Markets Guide* provides just such detailed guidance and analysis. It examines both the current state of law and the direction of travel for the most important jurisdictions in which international businesses operate. The *Guide* draws on the wisdom and expertise of distinguished practitioners globally, and brings together unparalleled proficiency in the field to provide essential guidance on subjects as diverse as how pricing algorithms intersect with competition law and antitrust enforcement in certain tech mergers – for all competition professionals.

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