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The Digital Economy, Disclosures and “Debunking” Efficiencies Claims: Canada’s Competition Bureau Plans for the Year Ahead

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Canada’s Competition Bureau published the final version of its [2018-19 Annual Plan](#) on May 30, 2018. The Annual Plan coincides with the retirement of John Pecman, who served as Canada’s Commissioner of Competition for the past five years. The Annual Plan, together with recent Bureau publications and speeches, reveals the Bureau’s likely focus in the coming year. Key elements of the plan include continued focus on digital economy issues and the detection of possible bid-rigging in public infrastructure contracts, as well as a renewed emphasis on the health and biosciences sector and continued concern about the efficiencies defence for mergers.

Continued Focus on the Digital Economy

The Annual Plan confirms that the digital economy will continue to be a key enforcement priority for the Bureau. As the Bureau has itself acknowledged, the “digital economy” encompasses a broad range of activities that includes not only the tech sector itself but also any digital advertising or e-commerce aspects of traditional bricks and mortar businesses. The Bureau has planned several initiatives to support its enforcement efforts in this area.

New Investigations: With over 49 ongoing digital economy investigations carrying over into the 2018-19 year, the Annual Plan sets an ambitious goal of commencing 10 additional digital economy investigations and closing five ongoing investigations. These expanded enforcement efforts are expected to be heavily weighted toward Internet-based misleading advertising. More specifically, the Bureau has stated that it intends to build on recent “wins” in misleading advertising cases involving online marketing practices and to “prioritize digital economy investigations with high-impact and consumer focus, such as drip pricing practices.” The “wins” the Bureau is referring to are settlements it has reached with [Avis and Budget](#), [Hertz and Dollar Thrifty](#) and [Enterprise Rent-A-Car Canada](#) to resolve Bureau allegations that these companies had imposed additional mandatory charges that were not disclosed as part of the initially advertised prices (but were instead “dripped” out to the consumer over the course of the purchase process). According to the Bureau, these additional charges rendered the initially advertised prices false or misleading in a material respect. The Bureau’s theory that “drip pricing” amounts to false or misleading advertising, however, has not been adopted or confirmed by any Canadian court. The first opportunity for this theory to be tested may arise in the recently initiated proceedings against [Ticketmaster/Live Nation](#), which also involve allegations of improperly disclosed or “dripped” charges as part of broader allegations of deceptive marketing by these parties. Those proceedings are currently scheduled to be heard by the Competition Tribunal beginning in October 2019.

New Digital Pricing Market Study: The Bureau also plans to soon launch a new market study regarding digital pricing practices and techniques. More details about the Bureau’s approach will become available this summer, but the stated purpose of the study is to “help Canadians better understand digital pricing practices, including new and evolving pricing techniques,” and to “ensure that digital pricing practices are fair and transparent.”

New Broadband Market Study: The Bureau also [announced](#) a new market study regarding the provision of broadband Internet services. This study invites stakeholders to address four broad issues: (i) have broadband resellers been able to deploy competitive service offerings; (ii) how have consumers reacted to new competitive alternatives in this area; (iii) how does regulation affect the economic behaviour of broadband suppliers; and (iv) how do other countries manage and regulate broadband competition? The Bureau has set August 31, 2018, as the deadline for stakeholder submissions and requests for interviews, and expects to publish a final report in spring 2019. The Bureau has already come under criticism from certain market participants for focusing on broadband wireline (rather

than wireless) services, and its market study is expected to generate significant debate about the appropriate roles of the Bureau and other regulators in this area.

Appointment of Chief Digital Enforcement Officer: The Bureau also intends to build up its “digital enforcement capacity to better understand and protect Canadians against new and evolving technologies that have the potential to impede competition and innovation, such as pricing algorithms and blockchain technologies.” In furtherance of this goal, the Bureau has committed to create a new Chief Digital Enforcement Officer role within the Bureau. The addition of tech-specific subject matter expertise is similar to initiatives undertaken by U.S. and European Union antitrust authorities, including in connection with the U.S. Federal Trade Commission’s recently announced [Blockchain Working Group](#) and the European Commission’s appointment of a Digital Markets Advisory Panel.

Renewed Focus on Health and Biosciences

The Annual Plan also confirms that the health and biosciences sector will be a priority for the Bureau in 2018-19, with a number of initiatives planned.

Increased Interaction with Other Regulators: The Bureau intends to strengthen its relationships with international and domestic counterparts in the health and biosciences area, such as the Canadian Patented Medicine Prices Review Board and Health Canada, including through formal inter-agency agreements. Increased information sharing through such relationships is likely intended to help the Bureau stay abreast of developments that may impact competition in this sector. For instance, for some time, the Bureau has signalled its interest in pursuing a case to challenge “product hopping” in the pharma sector (where a branded pharma company allegedly extends available patent protection in order to impede generic competition by introducing modest changes to its product formulation, thereby driving customers to the new formulation before the expiry of the current patent). Information sharing among these agencies may accelerate the Bureau’s search for such a case.

Enforcement and Guidance for Health-Related Claims: The Bureau plans to establish enforcement criteria applicable for false, misleading and fraudulent health-related and performance claims and intends to participate in collaborative enforcement work with its counterpart agencies.

Continuing Emphasis on Detection of Bid-Rigging in Public Infrastructure Spending

The Annual Plan also identifies criminal conduct affecting municipal, provincial and federal infrastructure projects as a continued area of enforcement focus. The Annual Plan states that the Bureau plans to improve its efforts regarding the detection of bid-rigging and other criminal conduct through the use of updated Immunity and Leniency Programs (expected to be finalized in summer 2018), as well as the use of quantitative data-screening methods (such as algorithms) to identify unusual pricing patterns and possible bid-rigging behaviour in government procurement.

The Efficiencies Defence – New Retrospective Study

Canada’s *Competition Act* includes a statutory “efficiencies defence” that allows mergers to proceed where resulting efficiencies outweigh and offset the anti-competitive effects of the merger. Having lost a significant merger challenge before Canada’s Supreme Court due to the successful invocation of the efficiencies defence, it is not surprising that Commissioner Pecman has been outspoken in his criticism of the defence. Some other prior Commissioners had also raised the prospect of repealing the defence.

Against this background, the Annual Plan provides for the launch of a new retrospective study into “efficiencies that have been achieved — or not — as a result of past mergers, with the goal of sparking discussion, promoting innovation and informing merger enforcement,” with a white paper to be published in 2018. This is not the first time, however, that a comprehensive study of the efficiencies defence has taken place. In 2004, the Bureau launched consultations on the role of efficiency gains and appointed an advisory panel to assess the role of efficiencies in the context of Canada’s economy at the time. The advisory panel released its [report](#) in 2005, expressing strong support for the continued availability of the efficiencies defence. Given the Bureau’s previous criticism of the efficiencies defence, if the study shows a lack of realized efficiencies (or lower than anticipated efficiencies), the Bureau may attempt to use the results of the study to support amendment or repeal of the defence. In doing so, the Bureau will have to confront a cornerstone of Canada’s competition policy

to date, namely that Canada should accept higher levels of market concentration because of its small size relative to its key trading partners.

Other Long-Term (and Long-Shot) Initiatives

In a [speech](#) to the Canadian Bar Association Competition Law Section's Spring Conference on May 10, 2018, Commissioner Pecman reflected on the Bureau's achievements during his term as well as longer-term initiatives that he would like to see come to fruition. These suggested changes include improving the Bureau's effectiveness as an enforcer and competition advocate by making it more independent from the Ministry of Innovation, Science and Economic Development; giving the Bureau formal market study powers (e.g., the ability to compel information from market participants); and the implementation of a more robust complementary civil track for cartel enforcement, as well as the introduction of financial incentives for whistleblowers who report cartel conduct. Certain of these long-term initiatives, however, would require significant amendments to the *Competition Act*, and the political appetite for such initiatives from other areas of the federal government is far from apparent.

Conclusions and Implications

Although none of the priorities described above are binding on the current Interim Commissioner (Matthew Boswell) or on the new Commissioner once permanently appointed, they provide a helpful indication of where the Bureau is likely to focus its enforcement in the coming year. With this focus in mind, there are several practical implications for businesses operating in Canada:

- While participation in the broadband market study and the digital pricing practices market study is entirely voluntary, companies operating in these areas should pay close attention to the direction of these market studies, as they are likely to shape the Bureau's future enforcement and advocacy-related initiatives.
- As the Bureau is likely to continue its focus and enforcement regarding alleged "drip pricing" by advertisers, companies advertising in Canada (and in particular those imposing additional mandatory service, processing or other types of surcharges or fees beyond what was initially advertised) should review their digital pricing practices and approach to disclosure.
- Similarly, companies operating in the health sector should review any health-related performance claims (such as claims of weight loss or other health benefits) and ensure that such claims are substantiated by an adequate and proper test.
- With the Bureau's appointment of a Digital Enforcement Officer, companies operating in the tech sector, including blockchain, cryptocurrency and other evolving areas, can expect to see greater interest and presumably more investigations from the Bureau.
- Finally, while merging parties will continue to have the benefit of the efficiencies defence for the time being, we believe that the Bureau is likely to continue to advocate for the repeal or amendment of the defence over the longer term.

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