YEAR IN REVIEW 2019: COMPETITION LAW IN THE DIGITAL AGE

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Under a new Commissioner of Competition, Matthew Boswell, 2019 was a somewhat quieter year for Canada's Competition Bureau in terms of difficult merger cases but saw, if anything, relatively greater enforcement activity on the abuse of dominance and deceptive marketing fronts. In terms of overall approach, the prevailing winds seemed to be steady through the transition, as Mr. Boswell continued to focus on the digital economy and took the opportunity to update both the Abuse of Dominance Guidelines and the Intellectual Property Enforcement Guidelines to reflect ongoing case law developments applicable to these areas.

Sous la tutelle de Matthew Boswell, le nouveau commissaire de la concurrence, 2019 a été une année un peu plus calme pour le Bureau de la concurrence du Canada pour ce qui est des affaires complexes dans le domaine des fusions. Cependant, on a constaté une relative augmentation des activités d'application de la loi visant les abus de position dominante et la commercialisation trompeuse. En ce qui concerne l'approche globale, les principales tendances sont demeurées les mêmes pendant la transition : M. Boswell a continué à axer les efforts sur l'économie numérique et a profité de cette occasion pour mettre à jour tant les lignes directrices sur l'abus de position dominante que celles sur la propriété intellectuelle afin de tenir compte des évolutions de la jurisprudence applicables à ces domaines.

Introduction & Highlights

Canada's Competition Bureau (the "Bureau") welcomed a new Commissioner of Competition in 2019, as Matthew Boswell was confirmed in the role in March. Commissioner Boswell joined the Bureau in 2011 and had previously served as the Senior Deputy Commissioner of both the Mergers and Monopolistic Practices and the Cartels and Deceptive Marketing Practices branches. Prior to joining the Bureau, Commissioner Boswell was Senior Litigation Counsel in the Enforcement Branch at the Ontario Securities Commission and an Assistant Crown Attorney in Toronto with the Ministry of the Attorney General of Ontario.

The Bureau had a relatively quiet year in terms of difficult merger cases, with five cases "concluded with issues" (i.e., the subject of a Consent Agreement, abandoned or undertakings) in 2018-19 compared to seven in 2017-18 and nine in 2016–17. In contrast, the abuse of dominance and

deceptive marketing fronts had relatively busy years, with new investigations announced and several old ones concluded in industries ranging from pharmaceuticals to airlines. The Bureau also updated both the *Abuse of Dominance Guidelines* and the *Intellectual Property Enforcement Guidelines* to reflect ongoing case law developments applicable to these areas. Echoing directives from the Minister as well as enforcement priorities of its colleagues in Europe and the United States, an increasing focus on the digital economy was also at the forefront of the Bureau's activities, as reflected in its 2019-2020 Annual Plan and an invitation to market participants to provide information about competitive concerns in digital markets.

Other highlights of 2019 included:

- In July, the Bureau issued a *Draft Model Timing Agreement* for use in merger reviews where the parties intend to rely on the efficiencies defence.[1]

- The Bureau updated its *Immunity* and *Leniency Programs*, clarifying that cooperating witnesses are not confidential informers and do not benefit from informer privilege.

- The International Consumer Protection and Enforcement Network (ICPEN) designated Canada's Competition Bureau as President-Elect of the Network. The Bureau will lead the Network from July 1, 2020 to June 30, 2021.

- The merger review provisions of the *Canada Transportation Act*, enacted in 2007, were used for the first time in 2019. Despite the Commissioner's conclusion that the acquisition by First Air of Canadian North would substantially lessen or prevent competition between the two airlines serving communities in Canada's far north, the Minister of Transportation approved the tie-up as being, on balance, in the public interest—but subjected it to several conditions.

- Parrish & Heimbecker opted to complete its proposed acquisition of a grain elevator in Virden, Manitoba from Louis Dreyfus Company upon the conclusion of the second 30-day waiting period following certification by the parties of their responses to a Supplementary Information Request. The Bureau responded by challenging the acquisition at the Competition Tribunal—proceedings are ongoing.

- The Competition Tribunal issued its decision in the Commissioner's abuse of dominance case against the Vancouver Airport Authority

(the "VAA") related to the VAA's refusal to allow more than two firms to provide in-flight catering and galley handing services at the Vancouver International Airport. While the Tribunal accepted the Commissioner's argument that the VAA had a "plausible competitive interest" in the galley handling market, it ultimately dismissed the application, concluding that the VAA had legitimate business justifications for its conduct.

- The Hudson's Bay Company and Ticketmaster each paid $4.5 million to settle separate allegations of deceptive advertising/pricing practices, the former in relation to advertised sale prices (where evidence of the "ordinary selling price" did not meet the Bureau's standard), and the latter in relation to additional fees added to the advertised prices for event tickets. Consent agreements were registered with the Tribunal to settle the allegations against both companies, neither of which admitted to any wrong-doing.

- The Bureau was also active on the advocacy front, intervening in reviews by both British Columbia and Ontario of liquor legislation and related regulations in those provinces, as well as in the Federal Department of Finance's consultation on open banking, and the Canadian Radio-television and Telecommunications Commission's (the "CRTC's") review of competition in mobile wireless services.

Mergers

Merger Review Thresholds & Filing Fees Increased

The pre-merger notification threshold for the "size of target" increased to $96 million[2] in January 2019 based on either the target's book value of assets or its gross revenues from sales in or from Canada. The threshold for the "size of parties" has not changed since the merger provisions went into force in 1989 and is set at $400 million based on either the total book value of assets or the total gross revenues from sales in, from or into Canada of all parties to the transaction, together with their affiliates.

Of note, for the first time since indexing of the "size of target" threshold began, the threshold has remained the same for 2020 as this article went to press (March 2020). In contrast, the merger filing fee, which is required to be indexed annually for inflation pursuant to the *Service Fees Act,* increased in April 2019 to $73,584 and will increase again to $75,056 for transactions filed on or after April 1, 2020.[3]

Expanded Role for Merger Notification Unit

One of Commissioner Boswell's first moves was to expand the role of the Merger Notification Unit (formerly the MNU), now referred to as the Merger Intelligence and Notification Unit (MINU), to reflect a broader role in actively gathering intelligence about non-notifiable transactions in Canada that might raise competition concerns.[4] In his first major speech as Commissioner at the Canadian Bar Association's Competition Law Spring Conference in May 2019, Commissioner Boswell announced this broadened role for the MINU, and encouraged parties to non-notifiable transactions that could raise competition concerns to voluntarily provide information about the transaction to the Bureau early on, to avoid a post-closing review.[5]

Transport Canada Approves First Air and Canadian North Merger despite Bureau's Objections

In February 2019, for the first time since the provision was enacted in 2007, the Competition Bureau provided a report to the Minister of Transport as part of a public interest review as it relates to national transportation pursuant to section 53.1 of the *Canada Transportation Act*. If invoked, the provision gives the Minister of Transportation—rather than the Commissioner or the Competition Tribunal—the final say as to whether the merger is in the public interest (taking the Commissioner's views of the likely impact on competition into account as only one factor of many). The Commissioner reported to the Minister in this case that the proposed merger of First Air and Canadian North would likely result in a substantial lessening of competition in the provision of passenger travel and cargo services in Nunavut and the Northwest Territories.[6]

After receiving the Commissioner's report and concluding his public interest review, the Minister of Transport approved the merger subject to a series of terms and conditions. Such terms and conditions include a moratorium on price increases for passenger and cargo travel beyond those related to operating costs, no reductions to weekly schedules, access to northern infrastructure for new airlines, increasing Inuit representation across the merged entity's operations, and transparency and accountability measures. The Minister said that the approval with terms and conditions "strikes a balance between any public interest considerations and the need to have a more efficient and financially sustainable northern air carrier."[7]

The merger review provisions of the CTA refer only to the Commissioner's "assessment of the competitive impact" of a merger. They do not explicitly mention the possibility of an efficiency defense to a transaction,

which the Commissioner and the Tribunal would have had to consider if the merger had been reviewed under the *Competition Act*. As a result, the Commissioner refused to consider the various efficiencies which appear to have been a principal basis of the Minister's public interest decision.

Thoma Bravo's Acquisition of Aucerna Approved with Consent Agreement

The Commissioner challenged one aspect of private equity firm Thoma Bravo's acquisition of Aucerna, a company that supplies a reserves valuation and reporting software called Value Navigator to Canadian oil and gas producers, among other products. Thoma Bravo already owned Aucerna's closest competitor in that space, Quorum, which supplies a competing software called MOSAIC.

The transaction had closed on May 13, 2019. In its investigation of this transaction, the Bureau concluded that the transaction was a merger to monopoly in the oil and gas reserves software market in Canada for medium and large producers. On June 14, 2019, the Bureau challenged the acquisition by filing an application with the Tribunal under section 92 of the *Competition Act*. Thoma Bravo subsequently entered into a consent agreement with the Bureau, the terms of which require Thoma Bravo to divest Quorum's MOSAIC business to a purchaser approved by the Commissioner.[8]

This was the first contested merger challenge filed with the Tribunal since 2015.

Commissioner Challenges P&H's Acquisition of Grain Elevator from Louis Dreyfus in Manitoba

The Commissioner also challenged the Parrish & Heimbecker (P&H) acquisition of a grain elevator in Virden, Manitoba from Louis Dreyfus Company in 2019. P&H's proposed acquisition of Dreyfus's 10 grain elevators in Western Canada was publicly announced in September 2019, and the Bureau responded by issuing a Supplementary Information Request. The transaction closed on December 10, 2019, just two days after the expiry of the second 30-day waiting period under the *Competition Act,* and over the Bureau's objections.[9]

On December 19, 2019, the Commissioner filed an application with the Competition Tribunal for an order requiring P&H to sell either its own elevator in Moosomin, Saskatchewan, or its newly acquired elevator in Virden. The Commissioner also sought a five-year prohibition on P&H acquiring

any other grain elevators in the relevant markets unless it notifies the Bureau of any such transaction.[10]

The Commissioner applied to the Tribunal for an expedited proceeding in this case before P&H filed its reply—the first proposed use of the (optional) alternative rules.[11] P&H opposed the use of the expedited proceeding process on the basis that the issues in dispute in this case are more complicated than the Commissioner made them out to be and that the Commissioner has an informational advantage. P&H also pointed out that the Commissioner retains the ability to seek an interim order under section 104 of the *Competition Act* to remedy any alleged imminent harm, although he had not done so. The Tribunal denied the Commissioner's application for an expedited proceeding, finding that the Commissioner had not persuaded the Tribunal that using the expedited process would be a reasonable and advisable option in light of the circumstances of this specific matter and considerations of fairness.

The hearings in this case are set for two weeks in November 2020.[12]

Efficiencies Defence in Merger Reviews: Bureau Issues Draft Model Timing Agreement

On July 16, 2019, the Bureau issued a draft model timing agreement for use in merger reviews where the parties intend to rely on the efficiencies defence in section 96 of the *Competition Act*.[13] The efficiencies defence provides that the Tribunal cannot impose a remedy with respect to a merger that is likely to substantially lessen or prevent competition if the efficiencies likely to be gained from the merger are greater than, and would offset, the anticompetitive effects, and these efficiencies would likely be lost if the remedy were to be imposed.

As stated in its news release, the purpose of the timing agreement is "to ensure that the Bureau has the time and information it requires to properly assess the parties' claimed efficiencies." In order to do so, "the model agreement establishes timed stages for the parties' engagement with the Bureau, including the production of evidence and information, throughout the review."[14]

As of March 2020, the Bureau had received comments from several parties and had not yet finalized the Model Timing Agreement. While increasing the procedural certainty of merging parties, several commentators[15] noted that the rigidity of the Agreement could serve to lengthen reviews—particularly in light of the (apparently new) refusal of the Bureau to consider

the efficiency defence until after the conclusion of its analysis of the likely competitive effects of the transaction.

Merging parties are not required to enter into a timing agreement with the Bureau, but if parties intend to rely on the efficiencies defence and wish to receive confirmation from the Bureau that it will not challenge the transaction, the Bureau will now insist on some form of a timing agreement. Alternatively, parties may choose to close after the statutory waiting period expires and test their efficiencies defence before the Competition Tribunal, if challenged.

Bid-Rigging and Conspiracies

Four Guilty Pleas and Two Settlements in Quebec Municipal Bid-rigging Scheme

On January 17, 2019, the first of four engineering executives charged in connection with a municipal bid-rigging conspiracy in Quebec pled guilty. Dave Boulay, the former Director and Assistant Vice-President, Outaouais for engineering firm Dessau Inc. ("Dessau") pled guilty to participating in a bid-rigging scheme from 2006 to 2008 and was sentenced to 12-months, including 6 months of house arrest and 6 months under curfew.[16]

On February 19, 2019, Dessau reached a settlement with the Public Prosecution Service of Canada ("PPSC") and agreed to pay $1.9 million in relation to bid-rigging on municipal infrastructure contracts in Quebec from 2003 to 2011.[17] The settlement took into account Dessau's participation in the Government of Quebec's Voluntary Reimbursement Program and the fact that Dessau is no longer in operation and had begun the process to dissolve the company.

On March 13, 2019, the engineering firm Genivar (now WSP Canada) was ordered to pay $4 million as part of a settlement with the PPSC that concluded the Bureau's investigation into the company's role in a bid-rigging scheme between 2002 and 2011.[18] This settlement also took into account WSP Canada's participation in the Government of Quebec's Voluntary Reimbursement program and the fact that the company has implemented a corporate compliance program designed to prevent further anticompetitive activity by employees.

On June 20, 2019, Michel Famery, formerly a Regional Vice-President for Dessau, pled guilty to rigging bids for City of Gatineau infrastructure

contracts between 2004 and 2006 and was sentenced to 18-months, including 9 months of house arrest and 9 months under curfew.[19]

On July 25, 2019, two more engineering executives pled guilty to participating in the bid-rigging scheme. André Mathieu, formerly Vice-President and Associate for Cima+ admitted to playing a lead role in the scheme between 2004 and 2008. He was sentenced to 22 months, including 7 months of house arrest and 15 months under curfew, and was ordered to perform 140 hours of community service. Claude Marquis, formerly Regional Director, Outaouais for Genivar, admitted to joining the scheme in 2005.[20] Marquis was sentenced to 6 months of house arrest, 13 months under curfew and 120 hours of community service.

Bureau Updates Immunity and Leniency Programs

The Bureau released a slightly updated version of its *Immunity* and *Leniency Programs* on March 15, 2019. The update states that cooperating witnesses are not considered "confidential informers," and do not benefit from informer privilege.[21] The update was triggered by an Ontario Superior Court of Justice ruling in the bread price-fixing case.[22] In that case, the Court held that two cooperating witnesses were confidential informers. The Bureau's update, which states that the opposite is true, is a reaction to the Court's decision in that case which seems to be at odds with aspects of the Bureau's Immunity and Leniency Programs. In particular, a cooperating witness has an ongoing duty under the Programs to cooperate with the investigation, which is at odds with the informer privilege that is tied to the granting of confidential informer status.

This update followed a significant revision to the Programs in September 2018, which had ended the automatic provision of leniency afforded to a corporate immunity applicant's officers, directors and employees, and instead required that any implicated individuals must provide cooperation in order to qualify. That revision had also changed how fine reductions for leniency applicants are calculated, basing them on the value of cooperation, as opposed to the order in which the applicants first contacted the Bureau. Both updates had been criticized by the defendants' bar for making the Programs less attractive to potential applicants, while the Bureau took the view that the amendments would encourage fuller and more timely cooperation by those participating in the Program.[23] Given the confidential nature of such discussions, there were limited indications in 2019 of whether and how these and other changes made to the Programs are working in practice.

Abuse of Dominance

As noted above, 2019 was a relatively busy year on the monopolistic practices front, as the Bureau pursued several abuse of dominance investigations, concluded others and decided not to appeal the decision of the Tribunal to dismiss its application against the VAA. It also requested public comments on potential abuses by so-called digital platform businesses and updated the Abuse of Dominance Guidelines to reflect the Tribunal's decision in the Toronto Real Estate Board (*TREB*) case regarding the role of business justifications in the assessment of whether conduct is anti-competitive.

Bureau Continues Investigation of Predatory Pricing Allegations Against WestJet and Swoop

The Bureau's investigation into allegations that WestJet's low-cost carrier division, Swoop, is engaging in predatory pricing began in November 2018. Flair Airlines ("Flair"), an "ultra low-cost carrier" ("ULCC") based in Edmonton, complained to the Bureau that WestJet and Swoop were offering below cost prices on six routes on which Flair operated and alleged that the intent of these low prices was to force Flair and other ULCC competitors out of the market.[24] Flair withdrew from the Edmonton-Hamilton route and claims that it lost about $10 million because of WestJet and Swoop's actions.[25] The Commissioner filed a motion with the Federal Court seeking Section 11 orders against WestJet and Swoop on December 5, 2018, requiring them to produce documents relevant to the intent behind certain pricing and capacity decisions, the competitive landscape on certain routes and the impact of WestJet/Swoop's decisions on competition.[26] These orders were granted by Chief Justice Crampton on December 11, 2018.[27] The Order also compelled WestJet's Vice-President of Pricing and Revenue Management, John Weatherhill, to answer questions under oath. The Federal Court granted a second motion to the Commissioner, compelling a second WestJet senior employee, corporate planning manager Michael Claren, to be examined on April 29, 2019.[28] The Bureau has made no further statements about the investigation, which is presumed to be ongoing.

Competition Bureau Discontinues Investigations into Water Heater Rentals

On September 19, 2019, The Bureau announced that it had discontinued its investigation into Enercare Inc.'s water heater rental contracts and return practices in Ontario.[29] The Bureau concluded that, while Enercare

holds a dominant market position and that Enercare's use of "buyout only, useful life" contracts ("BOULC") has an exclusionary intent, the evidence obtained by the Bureau to date had not supported a conclusion that Enercare's conduct is having or has had the effect of substantially lessening or preventing competition.[30] In particular, the evidence did not establish that the BOULC assists Enercare in maintaining materially higher rental rates and was insufficient to establish that the BOULC had the requisite negative impact on entry or expansion by competitors.[31] The end of this investigation comes nearly five years after the Bureau was successful in obtaining consent agreements with water heater rental companies related to similar anti-competitive conduct in the same geographic region.[32]

Competition Bureau Concludes Investigations into Abuse of Dominance in the Pharmaceutical Industry

The Bureau concluded two investigations into alleged abuses of dominant positions in the pharmaceutical industry in 2019. One involved alleged restrictions on off-label use of vaccines provided to a provincial public immunization program and the other involved allegations of predatory pricing and exclusionary conduct related to biosimilar drug competition.

The vaccines investigation focused on the proposed inclusion of a clause in a procurement contract which would have restricted public health authorities from using the vaccine for off-label uses.[33] The Bureau concluded that there was no contravention of the *Competition Act* because the proposed clause was not ultimately included in the procurement contract. However, the Bureau implied in its position statement summarizing the investigation that it viewed such a clause as potentially having an anti-competitive purpose and that the use of similar restrictions in other contexts could be scrutinized.[34]

The Bureau's predatory pricing investigation focused on whether Janssen Inc. engaged in conduct that inhibited the entry or expansion of biosimilar products in Canada that compete with Jansen's biologic product, Remicade.[35] The Bureau found that Janssen was engaging in conduct that could raise concerns under the abuse of dominance provisions of the *Competition Act,* but concluded that it lacked sufficient evidence that the conduct was likely to substantially lessen or prevent competition.[36] Janssen's alleged anti-competitive conduct included supplying hospitals with Remicade for 1 cent per vial, providing free Remicade to patients who are not eligible to receive reimbursement under a public or private insurance plan, entering into contracts with hospitals and public and private insurers that require or induce

them to favour Remicade over its biosimilars, and entering into exclusive contracts with third-party infusion clinics that prohibit them from infusing biosimilar alternatives to Remicade.[37] These practices are similar to the practices that led to Hoffmann La Roche's conviction under the former *Combines Investigation Act* (the pre-cursor to the *Competition Act*), which included giving away Valium to hospitals and selling it in government contracts for $1 to eliminate a competitor from the hospital market and prevent other competitors from entering.[38] However, in this case, the Bureau did not find sufficient evidence to support either a predation theory of harm (as there was insufficient evidence that Janssen's low pricing strategy was sufficiently widespread that it was likely to eliminate, discipline or deter entry by one or more competitors) or an exclusionary theory of harm (as there was insufficient evidence that, absent Janssen's conduct, biosimilar firms would have likely competed more vigorously with Janssen on dimensions of competition like price, quality and service).[39] The Bureau did indicate that it would continue to monitor the biologic and biosimilar industry for anti-competitive conduct. Of particular interest to the Bureau is the implementation of "switching" policies by public and private insurers, as these policies have benefitted competition for other classes of pharmaceuticals and for biologics in other jurisdictions.[40]

Competition Tribunal Rules Against the Commissioner in Vancouver Airport Authority Case

2019 saw the conclusion of the Commissioner's challenge of VAA's alleged abuse of dominance related to its decision to refuse to allow new firms to provide in-flight catering and galley handing services at the Vancouver International Airport. The Commissioner had argued that by restricting the provision of in-flight catering and galley services to two firms, the VAA had restricted airlines' choices and increased the costs of running an airline in Canada.[41]

The judicial members of the Competition Tribunal agreed with the Commissioner that the VAA had substantial or complete control of the market for galley handling services through its control of airside access at the airport and also agreed that the VAA had a "plausible competitive interest" in the market for galley handling services.[42] The Tribunal's finding on "plausible competitive interest" clarified the concept, which had been introduced in the *TREB* case, explaining that it serves as a screen intended to filter out conduct that is unlikely to fall within the purview of section 79(1)(b) at an early stage of the Tribunal's assessment.[43] The Tribunal also elaborated on the meaning of "plausible," concluding that "plausible" should be

interpreted to mean "reasonably believable" and that there must be "some credible, objectively ascertainable basis in fact" to find a plausible competitive interest.[44] However, the Tribunal accepted VAA's argument that it had legitimate business justifications for its conduct, namely that its intent was to preserve existing competition by ensuring that airlines at the airport were served by at least two full-service caterers—but that traffic conditions near the airport did not permit reliable catering by off-airport providers.[45]

The Tribunal also concluded that VAA's conduct did not have the effect of preventing or lessening competition substantially in the market.[46] Although the Tribunal found that "but for" VAA's conduct there may have been some limited and positive price and/or non-price effects in the Galley Handling Market, it ultimately concluded that the Commissioner did not demonstrate that the requirements of section 79(1)(c) were met.[47]

The Tribunal also concluded that the Regulated Conduct Defence ("RCD") does not apply to section 79 (abuse of dominance) nor to any of the reviewable conduct provisions of the *Competition Act*.[48] The Tribunal noted that section 79 does not contain the required "leeway language"[49] which would have allowed the RCD to apply and that the rationales which supported the development of the RCD doctrine are not present in respect of section 79.[50]

On November 20, 2019 the Commissioner announced that he would not appeal the Tribunal's ruling. The Commissioner said that the decision provided valuable jurisprudence and helped to clarify certain aspects of the law and in particular that the Bureau was pleased that the Tribunal had confirmed that not-for profit and regulated entities are not exempt from complying with the abuse of dominance provisions of the *Competition Act*.[51]

Competition Bureau Asks Businesses to Report Potentially Anti-Competitive Conduct in the Digital Economy

In May 2019, the Minister of Innovation, Science and Economic Development, The Honourable Navdeep Bains, wrote a letter to the Commissioner requesting his assistance with considering critical issues related to the digital economy.[52] The Minister asked the Competition Bureau to work with policy leads in the Strategy and Innovation Policy Sector of ISED to look into the impact of digital transformation on competition, the emerging issues for competition in data accumulation, transparency, and control, the effectiveness of current competition policy tools and marketplace frameworks and the effectiveness of current investigative and judicial processes.[53] In order to support this work, on September 4, 2019, the Bureau published a call-out

for information from Canada's business community about conduct in the digital economy that may be harmful to competition.[54]

The Bureau is examining potential concerns that certain core digital markets have become increasingly concentrated, to the detriment of consumers and businesses. The Bureau sought information from participants in potentially affected markets to understand whether, and if so why, this is the case.

The Bureau's background paper outlined two potential explanations of concentration in digital markets: 1) digital markets may have 'tipped' to a dominant firm through legitimate market forces, or 2) dominant firms may have engaged in anti-competitive conduct rather than competition on the merits.[55] Legitimate market factors which may 'tip' digital markets and lead to less competition could include network effects, economies of scale and access to large volumes of data.[56] Anti-competitive strategies that could create or reinforce a dominant position include refusals to deal, self-preferencing, margin squeezing, most-favoured-nation requirements, and creeping acquisitions.[57] The Bureau is looking for information on these factors and strategies from market participants in order to potentially support investigations, inform how the Bureau analyzes anti-competitive strategies in the digital economy, and develop potential guidance to market participants.[58]

Other jurisdictions such as the UK and the United States had already launched investigations into antitrust issues in the digital economy. The United States Justice Department started an antitrust review into internet companies such as Facebook, Google, Amazon and Apple in July 2019.[59] The UK's Competition and Markets Authority also began an investigation into Facebook and Google's alleged dominance in digital advertising in July.[60] Other jurisdictions, such as the EU, Germany and Australia have also launched investigations and studies on Big Tech.

Bureau Updates Abuse of Dominance Guidelines

In March 2019 the Competition Bureau released updated *Abuse of Dominance Guidelines*,[61] replacing the previous edition which had been issued in 2012. The updated Guidelines provide more detailed guidance on business justifications and mitigate concerns about a potential increase in mandated access remedies in the context of alleged refusals to supply. The Bureau also replaced the longstanding guidance that market shares of less than 35% will generally not prompt further examination under section 79 with a general statement that it will not investigate a firm with a market share below 50%

unless other evidence indicates that the business possesses a "substantial degree of market power."[62] This change brings the Guidelines into line with recent enforcement practice and case law in the area.

Deceptive Marketing

The International Consumer Protection and Enforcement Network (ICPEN) designated Canada's Competition Bureau as President-Elect of the Network, for a term which will run from July 1, 2020 to June 30, 2021. The Bureau has stated that its term at the head of this international enforcement agency network "will focus on promoting truth in advertising online and building consumer confidence in the digital economy."[63]

In February 2019, the Bureau called on sellers and marketers of natural health products in Canada to ensure that weight loss claims made in their advertising are not false, misleading or unsubstantiated. In particular, it reminded firms operating in this sector that "[u]nder the *Competition Act*, claims about the performance or efficacy of a product must be based on adequate and proper testing".[64]

The Bureau also sent letters to nearly 100 influencer marketing brands and agencies in Canada, urging them to ensure that their marketing practices comply with the law. The Bureau noted that they must make it clear when they have relationships with the businesses, products or services they promote, and that they should base any reviews on actual experience/use.[65]

On October 28, 2019, the Bureau entered into a temporary consent agreement with FlightHub that prohibits it from using false or misleading marketing practices.[66] The Bureau announced it was investigating FlightHub for allegedly misleading marketing practices related to so-called "hidden fees" related to, for example, seat selection and flight cancellation. The Bureau is also investigating allegations that flight prices sometimes increase after flight selection. In its news release, the Bureau emphasized its focus on investigating compliance with deceptive marketing practices requirements in the digital economy.[67]

Ticketmaster was investigated in 2019 in relation to certain practices related to the reselling of its tickets, and then separately paid a negotiated $4.5 million administrative monetary penalty in June for allegedly misleading pricing practices. The Bureau concluded that Ticketmaster's practices in relation to resellers did not contravene the *Competition Act*.[68] However, the investigation into misleading pricing claims in online ticket sales led the Bureau to conclude that "Ticketmaster's advertised prices were not

attainable because they added mandatory fees during the later stages of the purchasing process ... the price representations were misleading even though the amount of the fees was disclosed before consumers completed their transaction ...."[69] Ticketmaster admitted no wrongdoing but decided to settle the matter with a registered Consent Decree including the payment of $4.5 million.[70]

In May 2019, the Hudson's Bay Company (HBC) agreed to a negotiated $4.5 million payment to settle allegations of misleading advertised prices for mattresses.[71] As part of the consent agreement registered with the Tribunal, HBC will ensure that its advertising complies with the *Competition Act*.[72]

Neither FlightHub, Ticketmaster nor Hudson's Bay Company admitted any wrongdoing in relation to these settlements.

Competition/Intellectual Property Interface

Final Version of Revised Intellectual Property Enforcement Guidelines Released

The Competition Bureau released the final version of its revised *Intellectual Property Enforcement Guidelines* (IPEGs) on March 13, 2019.[73] The IPEGs were updated to reflect the Federal Court of Appeal's findings in *Toronto Real Estate Board v Commissioner of Competition* (*TREB*) on the application of subsection 79(5) of the *Act* and the Federal Government's amendments to the *Patented Medicines (Notice of Compliance) Regulations* (the "*PM(NOC) Regulations*).[74] In *TREB*, the Federal Court of Appeal found that subsection 79(5)—which states that "an act engaged in only pursuant to the exercise of any right or enjoyment of any interest derived from [intellectual property] is not an anti-competitive act"[75]—does not shield all assertions of intellectual property rights from allegations of anti-competitive conduct.[76] If a right based on IP is used to engage in anti-competitive conduct, the Bureau may (in some cases) intervene.[77] The IPEGs were also updated to reflect the amendments to the *PM(NOC) Regulations* which removed the prospect of "dual litigation" under both the Regulations and the *Patent Act*, and replaced the PMNOC summary proceedings with a full action which leads to a final determination under the *Patent Act*. Accordingly, the Bureau removed the discussion of the impact of dual litigation from the IPEGs. Notably, "dual litigation" will no longer be an expected cost of patent litigation which the Bureau considers when determining whether a payment in a patent litigation settlement is anti-competitive.

Advocacy

Bureau Advocates for Increased Competition in Liquor Sales and Banking

The Bureau was also busy on the advocacy front in 2019, in light of its promise to challenge regulators both federally and provincially to consider the impact of their regulatory activities on competition. Notably, the Commissioner made submissions to both British Columbia and Ontario's reviews of legislation and regulations relating to liquor licensing and made submissions to the Federal Department of Finance in response to its consultation paper on open banking.

The Commissioner's letter to the Government of British Columbia focused on how BC's laws apply to the hospitality sector; in particular, the Commissioner expressed support for the recommendations of the Business Technical Advisory Panel to allow hospitality licensees to buy from private liquor retailers and to implement a wholesale pricing system for sales to hospitality licensees.[78] Similarly, the Commissioner urged the Government of Ontario to remove the eligibility criteria for, and the cap on, the number of grocery stores licensed to sell wine, beer and cider, to implement a wholesale pricing system and to allow bars and restaurants to purchase products through private ordering and consignment programs.[79] The Commissioner's submission to the Department of Finance focused on the merits of open banking and how data portability and other technological advancements can increase competition in the banking sector, to the benefit of consumers.[80]

Bureau Continues to Promote Competition in the Telecommunications Industry

The Bureau continued to engage on telecommunications sector competition by submitting recommendations to the Broadcasting and Telecommunications Review Panel regarding Canada's communications legislative framework. The Bureau recommended that the Review Panel apply a competition lens when making recommendations on how to update Canada's legislative and regulatory framework applicable to the broadcasting and telecommunications industries.[81] One of the questions the CRTC is considering is to what extent Canada's major telecommunications companies should be required to enter into agreements with Mobile Virtual Network Operators ("MVNOs"). MVNOs do not own network infrastructure to provide wireless communications services, instead they enter into agreements with mobile network operators to rent or lease use of network

services. Because MVNOs do not have to invest in or maintain the network, they can offer lower prices for wireless communications services.

In May 2019, the Bureau submitted comments to the CRTC in response to its review of mobile wireless services. The Bureau drew attention to its findings from its own nine-month review of Bell's 2017 acquisition of MTS, which included the conclusion that higher prices exist where there is no strong regional competitor and were likely a result of softened competition among the three national wireless carriers.[82] In its comments, the Bureau considered that competitive pressures are currently insufficient to restrain the exercise of market power by the three national carriers, but cautioned that further information is needed to assess whether mandated MVNO access, or the implementation of additional strategies to eliminate the remaining barriers to entry in Canadian wireless markets and stimulate facilities based competition, is the preferable approach.[83]

The Bureau made further submissions to the CRTC in November 2019, including seven key findings:

- Bell, Telus, and Rogers (Big 3) possess market power at both the retail and wholesale level in most regions in Canada;
- Where the Big 3 face a disruptive independent wireless competitor, prices are significantly lower;
- Wireless disruptors offer the most promising path forward;
- Canadians could save substantially through more competition from wireless disruptors;
- MVNOs can drive lower prices and greater choice, but they also could threaten the demonstrated progress in enhancing competition in the industry to date;
- The CRTC should adopt an MVNO policy that is temporary and focused on incentivizing and accelerating facilities-based competition from disruptors; and
- Additional measures, such as mandated seamless handoff, more effective tower sharing and site access rules, and updated roaming rates, can also improve the level of competitive intensity in the Canadian wireless market.[84]

The CRTC held public hearings in this review proceeding early in 2020. The Commissioner, along with other senior members of the Bureau and an independent economic expert, testified during these hearings on February 18, 2020.[85] The deadline for final submissions was March 23, 2020, after which the CRTC will make its final report.[86]

Conclusion

Overall 2019 reflected a continuation of the Bureau's priorities and direction. To some extent, the Bureau has increased enforcement activities, which may reflect Commissioner Boswell's history as a prosecutor. For example, the Bureau has introduced a Model Timing Agreement to set firm timelines and disclosure obligations for evaluating the efficiencies defence; decisions to challenge transactions post-closing at the Tribunal and subject non-notifiable transactions to increased scrutiny are further examples of heightened enforcement. The focus on the digital economy, which began under Commissioner Pecman, is still at the forefront of the Bureau's activities, especially in the areas of deceptive marketing and abuse of dominance. All current signs point to similar priorities in 2020– albeit the year has been made considerably more complicated for both businesses and law enforcers by the COVID-19 crisis.

ENDNOTES

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