

Canadian Competition Law and Foreign Investment: Top 5 Things to Watch for in 2019



1 ■ **New Leadership at the Competition Bureau**

A new Commissioner of Competition (Commissioner) is expected to be appointed in the first half of 2019. The Commissioner has significant discretion to investigate and bring enforcement actions in Canada regarding mergers, criminal conspiracies, abuse of dominance allegations, misleading advertising and other areas. The Commissioner is typically appointed every five years and sets the agenda priorities for the Canadian Competition Bureau (Bureau) annually. It will be interesting to see how the new Commissioner intends to tackle the key competition issues of the day – use of big data, consumer protection in a digital age and heightened scrutiny of mergers to name a few – and whether this will lead to other changes in enforcement policies at the Bureau.



2 ■ **Mergers Will Continue to Be Closely Scrutinized**

We anticipate that the Bureau will continue to closely scrutinize mergers in the coming year, relying on the pre-merger notification obligations on parties as well as other tools at the Commissioner's disposal to investigate non-notifiable deals. In 2018, the Bureau carefully reviewed a number of mergers even though the parties were not head-to-head competitors, either on the basis of a vertical theory of harm or on the basis that the transaction might prevent future competition that would otherwise occur absent the transaction. We expect this trend of increased scrutiny and the exploration of novel theories of harm to continue. In addition, as antitrust agencies around the world become more wary of large mergers, the Bureau will continue to look to coordinate with foreign agencies – such as the U.S. Department of Justice and Federal Trade Commission (FTC) and the European Commission – in multinational merger reviews, while maintaining a keen eye for Canadian-specific issues.

The Bureau is also due to finalize an information bulletin on the use of the unique “efficiencies defence” in Canada – a statutory provision that allows the Bureau to clear mergers that generate efficiencies that outweigh a transaction's likely anti-competitive effects. The information bulletin should provide guidance to merging parties regarding the Bureau's outlook and approach toward assessing efficiencies in merger reviews; however, merging parties should be aware that the Bureau's proposed approach toward efficiencies is out of step in many respects with recent governing jurisprudence. For more information, [see commentary on the law on efficiencies in Canada, from Blakes](#).



3 ■ Digital Economy and Innovation Will Remain Priority Agenda Items

In its most recent *Annual Plan*, the Bureau emphasized that the digital economy will remain an important priority area from an enforcement and policy perspective. We see this trend continuing into 2019 and likely beyond. The Bureau is set to appoint a new Chief Digital Enforcement Officer (expected early 2019), who will likely be tasked with overseeing and coordinating enforcement activities in this area. The Bureau also published a report on the competition policy implications of big data and innovation and conducted a market study on fintech. We expect that thinking to evolve into new investigations and likely enforcement activities in the coming year; indeed, the Bureau has publicly stated that it is seeking to commence at least 10 new digital economy investigations and has begun reporting statistics on its digital economy activities. According to recently released data, the Bureau concluded 10 digital economy cases from April 1 to September 30, 2018 and had 27 ongoing digital economy cases as of September 30, 2018.

Other factors also suggest that the digital economy and innovation will come into greater focus in 2019 at the Bureau. In particular, antitrust agencies around the globe – including the U.S. FTC and the European Commission – have focused their recent policy and enforcement initiatives on consumer protection and technology. The Bureau’s emphasis on the digital economy and innovation is also in line with broader federal government initiatives such as the *Digital Technology Supercluster*, which seeks to align government policy in a way that enhances innovation and competitiveness in Canada and the federal government’s consultations on open banking. Some areas to look for regarding greater enforcement include: misleading advertising cases involving online and social media, mergers that involve acquisitions of startup technology companies, and potential big data issues. For these reasons, we see no reason why the Bureau would change course; its focus on the competition policy implications of big data, privacy, the digital economy and innovation are likely to continue in the coming year.



4 ■ Foreign Investment Reviews – National Security Reviews Likely to Be More Prevalent

The *Investment Canada Act* contains two separate regimes for reviewing acquisitions of Canadian businesses by foreign investors – the “net benefit to Canada” regime and the national security regime. In 2019, we expect to see a significant focus on the use of the national security review regime in Canada given, among other things, the increased scrutiny that U.S. agencies such as the Committee on Foreign Investment are applying to foreign investments, particularly in the technology industry.

The focus of a number of foreign investment and national security matters have involved investments from China, and we expect that focus to continue in 2019. However, the federal government has maintained its broad discretion to initiate national security reviews for foreign investments from any non-Canadian jurisdiction and in a range of sectors that may be important to the Canadian economy including not just technology, but also critical infrastructure, energy and health care.

For foreign investment matters not involving national security, special investment rules and thresholds still apply for state-owned enterprise (SOE) investors and investments in cultural businesses. Higher thresholds are in place for non-SOE investors from World Trade Organization member countries and countries that have a trade agreement with Canada, which will be impacted by recent and continuing events such as the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* and the outcome of current Brexit discussions. For further information, please see our January 2019 *Blakes Bulletin: The CPTPP and Brexit: Implications for Foreign Investment into Canada*.



5

Important Case Law Developments in Abuse of Dominance and Class Actions

Several important competition law cases are expected to be decided in 2019. In the area of abuse of dominance, the Competition Tribunal is expected to rule on the Commissioner's application against the Vancouver Airport Authority (VAA). The VAA has been alleged to abuse a dominant position for catering services at Vancouver International Airport by denying licences to catering service providers. The case is expected to have important implications for industries that require participants to be licensed or permitted to operate at specified locations, and could expand the scope of enforcement activity in the area of abuse of dominance generally. Another important case law development is expected in the area of class actions. The Supreme Court of Canada (SCC) recently heard arguments in the appeal of *Godfrey v. Sony Corporation*, and the SCC's decision is expected to touch on a number of important issues such as: whether consumers who purchased products from non-conspirators can claim they were overcharged because of a price-fixing conspiracy that affected the entire market; the requirements for certification of a class action; and the relationship between the *Competition Act's* price fixing provision and common law causes of action. Depending on the outcomes of these cases, the potential for competition law liability could become more expansive in 2019 – highlighting again the importance of having sound competition law compliance policies in place.

If you have any questions regarding these developments, please do not hesitate to contact your usual Blakes contact or any member of the [Blakes Competition, Antitrust & Foreign Investment](#) group.