

Davies Ward Phillips & Vineberg LLP - Top Five Competition Trends and Issues for 2018

Kluwer Competition Law Blog

February 8, 2018

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Please refer to this post as: Mark Katz, 'Davies Ward Phillips & Vineberg LLP - Top Five Competition Trends and Issues for 2018', Kluwer Competition Law Blog, February 8, 2018, <http://competitionlawblog.kluwercompetitionlaw.com/2018/02/08/davies-ward-phillips-vineberg-llp-top-five-competition-trends-issues-2018/>

The following item was prepared by my colleagues Jim Dinning and David Feldman

In the annual Davies forecast of the year ahead for Canadian competition law, we discuss the top five issues and trends to watch for in Canadian competition law this year.

1. New Leadership at the Bureau and a Year of Transition

2018 will be a year of transition at the Competition Bureau ("Bureau") as Commissioner John Pecman's five-year term expires on June 5, 2018, with a new Commissioner to be appointed. As the formal search process has yet to be launched, it is not yet clear whether a permanent successor will be appointed by that date or an interim Commissioner will be appointed to bridge the gap.

Whoever is chosen as Commissioner Pecman's successor will direct the Bureau's policies and priorities for the future. While Commissioner Pecman identified the digital economy and innovation as areas of focus during his term, including recently reiterating his emphasis on the vital importance of embracing competition to encourage innovation in Canada, a new Commissioner could switch focus to, for example, more criminal or civil enforcement, or to other sectors of the economy.

Commissioner Pecman is the only Commissioner in the Bureau's history who is an economist by training rather than a lawyer. If the next Commissioner is an economist as well, it may be a sign that the government's vision for the agency has changed in some way, perhaps in recognition of the Bureau's increasingly technical and quantitative enforcement role. It will also be interesting to see whether the new Commissioner is chosen from within the Bureau's ranks or from someone outside the organization.

We will be watching the transition carefully and expect the choice of new Commissioner to have a significant impact on many of the other trends discussed below.

2. The Digital Economy Will Continue to Be an Important Priority

The Bureau devoted considerable thought and resources to digital economy issues in 2017, culminating in the release of its draft "big data" discussion paper in November and its report on innovation in the financial services sector ("FinTech") in December. The Bureau also reported an 80% increase in enforcement cases in the digital sector during its 2016-2017 fiscal year compared to the previous year, and the Bureau's 2017-2018 Annual Plan suggests dozens of digital economy cases are still in the investigative pipeline.

In 2018, we expect the Bureau to continue to make digital economy issues a priority for both advocacy and enforcement activities, with a particular focus on issues involving "big data". To date, the Bureau has taken a relatively balanced approach to "big data" issues compared to regulators in other jurisdictions, notably including the European Union. It will be interesting to see how Bureau's approach evolves going forward, especially under new leadership. We will also watch to see whether the Federal Government takes a more direct policy interest in "big data" or prefers to leave the area to the discretion of individual regulators like the Bureau and the Office of the Privacy Commissioner.

The Bureau continues to show particular interest in online deceptive marketing practices. The Bureau's 2017-2018 Annual Plan lists "high-impact enforcement cases against deceptive marketing practices" in the digital economy as its first priority, referring specifically to practices involving online "astroturfing" (e.g., employees posing as customers to review their company's products), "drip pricing" (e.g., additional charges revealed in subsequent steps in the purchase process),

and hidden terms and conditions such as “subscription traps”. For example, on January 25, 2018, the Commissioner initiated proceedings against Ticketmaster and its parent company, Live Nation, for allegedly making deceptive claims to consumers when advertising prices for sports and entertainment tickets. The Bureau’s investigation determined that Ticketmaster’s advertised prices were deceptive because consumers must pay additional fees added later in the purchasing process. We expect the Bureau to remain active in this area in 2018 and anticipate enforcement efforts in areas such as paid social media endorsements that may not be adequately identified as such. Such paid posts have been an interest of other enforcers, including the U.S. Federal Trade Commission, for some time.

3. Possible Changes to Canadian Merger Review Process

The Bureau’s merger review process continued to be the subject of attention and concern during 2017. Statistics in the Bureau’s quarterly report at the end of September 2017 suggest that the year will be consistent with an overall trend for the number of reviews designated “complex” to climb over the past several years, while the proportion of complex cases in which the Bureau meets its service standard continues to shrink or at best remains flat. Supplementary Information Requests are also becoming increasingly common, even in relatively straightforward mergers.

Along with others in industry and the bar, Davies’ competition group has written extensively about these issues and proposed various measures in response, including adjustments to notification thresholds and new exemptions from notification requirements for certain types of transactions. 2018 may be the year that widespread frustration over process issues begins to translate into concrete change.

One area to watch is the Bureau’s merger filing fee for pre-merger notifications and ARC requests. In a public consultation in late 2017, the Bureau noted that its filing fee has not increased since it was fixed at \$50,000 in 2003, even as the cost and complexity of merger reviews has increased with the growing volume of documents and the evidentiary burden placed on the Bureau by the Competition Tribunal (“Tribunal”) and the courts. Accordingly, the Bureau is seeking approval from the Minister of Innovation, Science and Economic Development to increase the flat fee for both pre-merger notifications and ARC requests to \$72,000. The

Bureau predicts that the increased fee will fund 100% of the Merger Directorate's activities (including litigation, review of non-notifiable mergers, and preparation of general guidance documents) and enable it to hire economic, industry and legal experts more frequently, which may suggest that reviews are likely to become even more thorough going forward. However, the Bureau also argues that increased fees will allow it to continue to improve its document management and review processes, which may help to make review more efficient and timely. The Bureau intends to treat merger and notification fees as a general revenue stream to fund all "merger review activities", which would presumably include merger the review of non-notifiable transactions and any merger-related litigation. The public consultation on merger filing fees may provide the platform for further constructive dialogue on potential improvements to increase the efficiency and transparency of the Bureau's merger review process.

4. Guidance Concerning the Efficiencies Defence

Another area to watch relates to Canada's efficiencies defence. Canada's merger regime is unusual in that it allows merging parties to raise a positive defence based on merger efficiencies. In certain cases, this can mean that a merger that substantially prevents or lessens competition is nevertheless allowed to occur because the efficiencies involved will be greater than, and will offset, the merger's anticompetitive effects. Legal and practical questions about when and how this defence should apply are still the subject of debate, but the Supreme Court offered some guidance in its early 2015 decision in the Tervita case that has yet to be reflected in the published Bureau guidance, including the Merger Enforcement Guidelines, which have not been updated since 2011.

In a speech in September 2017, the Senior Deputy Commissioner of Competition for Mergers and Monopolistic Practices, Matthew Boswell, indicated that the Bureau would shortly publish new materials that would clarify the Bureau's approach to efficiencies analysis. In particular, the guidance is expected to explain how the Bureau approaches such issues as the quantification of potential price and non-price anti-competitive effects, and the impact of mergers on dynamic efficiency and innovation. The guidance would also identify the types of information and supporting evidence the Bureau expects to receive from merging parties advancing efficiency claims in the merger review process. Practical advice from the Bureau on these matters will be welcome.

5. Possible Changes to Immunity Program

The Bureau released a revised version of its Immunity Program for public consultation on October 26, 2017. The proposed changes to the program were designed to allow the Bureau and the Crown to be sure their cases are “prosecution ready”, apparently by imposing stronger cooperation and disclosure obligations on immunity applicants. Under the proposed changes, the program will permit the Bureau to record proffers and witness interviews, create a new “interim” stage during which the applicant receives only conditional immunity (with full immunity granted only after the Public Prosecution Service of Canada is satisfied that the applicant’s cooperation is no longer required), and require more comprehensive disclosure.

The Bureau’s proposed changes to the Immunity Program could have a chilling effect that would reduce the effectiveness of the program, making it more difficult for the Bureau to detect conspiracies. We will be watching closely to see whether the Bureau makes further adjustments before finalizing any revisions to the program.