

CPD Bootcamp 2019

Competition Law and Competitive Marketing in the Online World



2019: The Year Competition Law and Policy “Went Digital”?

FTC’s Bureau of Competition Launches Task Force to Monitor Technology Markets

Agency dedicates resources exclusively towards monitoring competition in the tech industry and taking enforcement actions when warranted

February

March

Chancellor to make fresh attempt to curb power of tech giants – The Guardian

Changes to EU antitrust enforcement on Big Tech urged

Report recommends applying competition rules differently in future

April

*“... my administration will make **big, structural changes** to the tech sector to promote more competition.”*

(Elizabeth Warren, Democratic 2020 presidential nomination candidate)

2019: The Year Competition Law and Policy “Went Digital”?

**Nearly 50 states’ attorneys general join in
antitrust investigation of Google**

Facebook is also being investigated in another multistate action lead by New York.

September

A New Sheriff in Town: Digital Focus, Stepped-up Enforcement

Matthew Boswell,
Commissioner of Competition
(March 2019–present)

“Big picture—the vision is for the Bureau to be among the world’s leading competition agencies in terms of how we do all aspects of our work in the digital economy.”

“We will use all of the tools at our disposal to address what we believe to be problematic conduct. This will include increased consideration of the use of tools such as injunction applications in our work.”

“No River too Wide, No Mountain too High: Enforcing and Promoting Competition in the Digital Age”
(Remarks at the CBA Competition Law Spring Conference, May 7, 2019)

Early Developments for the Bureau's Digital Mandate

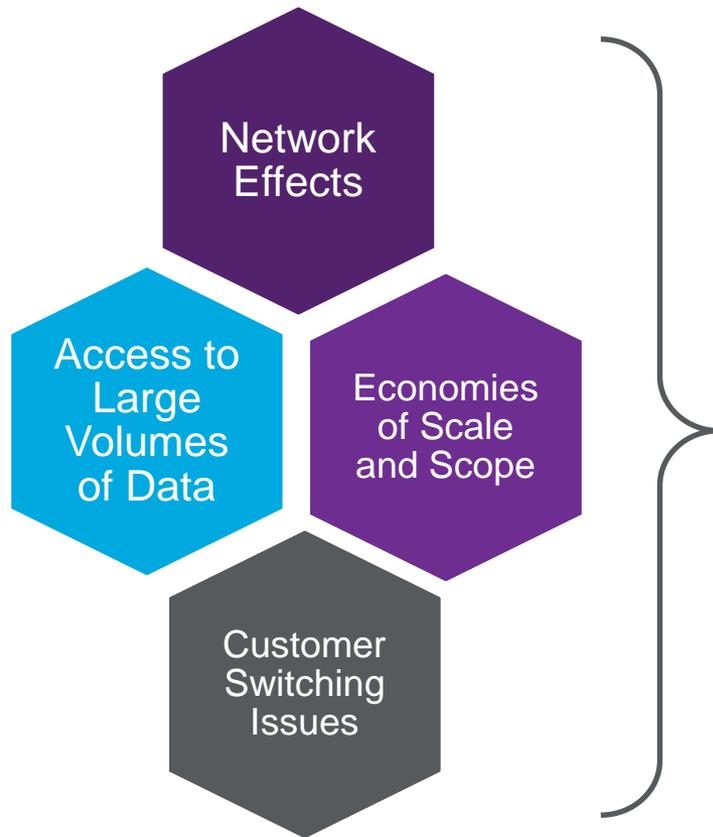
- FinTech study (2016) and Big Data paper (2017)
- In May, **Minister Bains issues a letter** to Commissioner Boswell requesting that the Bureau study four “critical issues” relating to the digital economy and competition
- The Trudeau government simultaneously releases its ***Digital Charter***, including among its principles ensuring “fair competition,” as well as “a level playing field” for Canadian consumers, “in the online marketplace”
- In July, the Bureau hires a **Chief Digital Enforcement Officer** (ex-IBM)

The Bureau's Digital "Call-Out"

- On September 4, 2019, the Bureau issued a *“call-out for information from Canada’s business community about conduct in the digital economy that may be harmful to competition”*
- The Bureau specifically named **online search, social media, display advertising** and **online marketplaces** as examples of “core digital markets” of interest

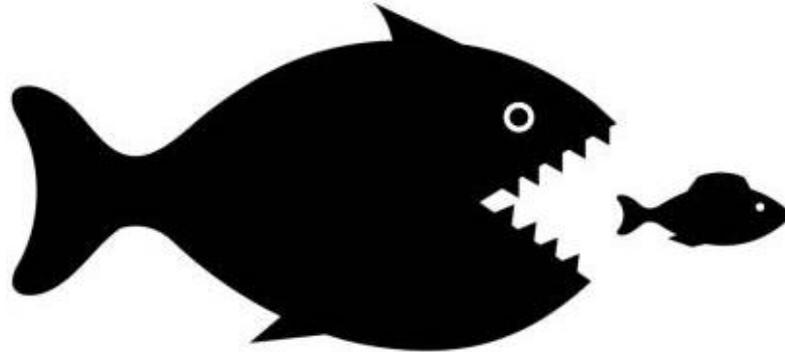
What are the issues of concern to the Bureau in the digital economy?

What Makes the Digital Economy Different?



According to the Bureau, **digital markets may “tip” to a single dominant firm or group of firms**, strengthening incentives to **engage in anti-competitive conduct** when “competing on the merits” is insufficient.

Merger Regulation in the Digital Economy: “Killer Acquisitions”



- Concerns around incumbents allegedly “scooping up” startups to neutralize **potential competitive threats**
 - *But how do we identify these ex ante?*
- In 2019, the Bureau rebranded its Merger Notification Unit (MNU) as the Merger Intelligence and Notification Unit (MINU)—tasking it with more information-gathering on **non-notifiable mergers** (e.g., small targets)
 - The Bureau’s pursuit of non-notifiable mergers is not unprecedented: see *Tervita* (challenge to a \$6 million merger)

Merger Regulation in the Digital Economy: *Thoma Bravo* and Data as Market Power

*“In many digital markets, data is a **key input** needed to develop high quality products and services” (Bureau “call-out,” September 2019)*

- In June 2019, the Bureau challenged U.S. private equity firm **Thoma Bravo**'s acquisition of the Calgary-based oil and gas reserves software company **Aucerna**, maker of the “Val Nav” product
- The Bureau alleged a “**merger to monopoly**”:
 - Thoma already owned **Quora**, maker of the competing “MOSAIC” software that the Bureau alleged was the only material competition in the Canadian reserves software market

Merger Regulation in the Digital Economy: *Thoma Bravo* and Data as Market Power

- The Bureau framed *Thoma Bravo* as a case involving data that was “mission-critical” for upstream customers:

“Reserves Software monitors and evaluates estimated reserves of oil and gas wells. Accurate and complete information about the value of reserves is **critical** for Producers to **make strategic production decisions, acquire and dispose of assets, take out loans and file annual disclosures in accordance with relevant securities legislation and regulations.**”

(Commissioner’s Notice of Application to the Competition Tribunal)



Merger Regulation in the Digital Economy: *Thoma Bravo* and Data as Market Power

- Thoma entered into a consent agreement with the Bureau in August, agreeing to **divest the Quorum business** and avoiding Competition Tribunal litigation
- *Thoma Bravo* evidences the Bureau's interest in monitoring **private equity** acquisitions for competitive impacts, as well as its willingness to challenge a merger **post-closing**
- Where competitive overlap exists, important to do a risk assessment, even for non-notifiable mergers—**small does not mean “safe”**

Conduct Issues in the Digital Economy

- Other issues of concern relate to the Bureau’s ability to bring civil proceedings to address **anti-competitive conduct**, notably under the *Competition Act*’s provisions on “abuse of dominance” (s. 79) and refusal to deal, exclusive dealing, tied selling and market restriction (ss. 75, 77):

“**Self-preferencing**” by a platform owner of its own goods/services

Use of “**most favoured nation**” clauses to dampen competition from rival platforms

Refusals to supply data, or similar exclusivity restrictions
(e.g., *TREB, TMX Group*)

“**Margin-squeezing**” strategies to exclude rivals from an adjacent market

Where is Competition Law Going (Or Not)?

The German *Facebook* case: should competition law be used to tackle conduct **regulated by other regimes**, such as privacy or data protection?

“What are your algorithms doing today?”

“Hipster antitrust”: should competition law go beyond mainstream economics to address social or other concerns—such as inequality?

Using the data they already have, will companies begin **“personalizing” prices** for consumers?

How can **competition enforcement** adjust to this new world?

Overview – Competitive Marketing

1. What do we mean by “competitive marketing”?
2. How legal standards have evolved for the digital marketplace
3. Competition Bureau guidelines and enforcement
4. Ad Standards disputes
5. Best practices to work with your broader team

What do we mean by “competitive marketing”?

- Grabbing attention in a **noisy digital marketplace**
- Digital advertising has hit 50% of the total share
- 70% of digital spend delivered through mobile devices

(Dentsu Aegis Network 2019 Global Ad Spend Report)

- Mobile ad spending will grow over 33% this year – more than a third of all ad spend overall

(eMarketer Digital Ad Spending 2019 Report)

Digital marketing

Format	Focus	Examples
Display / Sponsorship Advertising	Apps Mobile optimized sites	<ul style="list-style-type: none">• banner ads• “brought to you by”• take-overs• video pre-roll
Search	Search directed at mobile users	<ul style="list-style-type: none">• directories (yellow pages)• ratings (restaurants)
Performance	Mobile user action <ul style="list-style-type: none">• CPC (cost-per-click)• CPA (cost-per-action)• CPD (cost-per-download)	<ul style="list-style-type: none">• “apply now”• surveys• downloads• opt-in for texts or emails
Text / Voice Messaging	SMS (Short Messaging Service) MMS (Multimedia Messaging Service) IVR (Interactive Voice Response)	<ul style="list-style-type: none">• standard rate messaging• premium rate messaging (vote, donate, download)

How legal standards have evolved for the digital marketplace

- Growing **International Focus**
 - Cross-border enforcement
 - International guidelines
 - International sweeps
- Canada's **Anti-Spam Laws**: prohibit false and misleading representations via electronic message
- Competition Bureau **Deceptive Marketing Practices** focus on digital marketing

Competition Bureau – Areas of Focus

Examples:

- Online reviews
 - **astroturfing**
 - **ratings wars**
- Performance claims
 - **superiority** (best, fastest, highest, most)

Competition Bureau focus: Marketing to the digital user - disclosures

The *Competition Act* applies “regardless of the medium”

Representations about the **product / service** must be accurate & fair:

- Including text, images, illustrations and audio
- Statements about product performance, efficacy or length of life must be based on an “adequate and proper test”

Representations about your **business** must be accurate & fair:

- Text, graphics, logos, must not mislead the user about affiliations, sponsorship, endorsement

Implications for mobile:

- Limited space means that a lot more is riding on your text and visuals

Competition Bureau focus: Marketing to the digital user - disclosures



- Prominent disclaimer – don't bury or hide
- Accessible disclaimer – regardless of technology
- Repeat disclaimer if necessary – e.g. call to action page + ordering page
- Use “click here for restrictions” or symbols (* or †) to indicate that disclaimer is below – particularly where it's below the fold

Competition Bureau – Enforcement

- Consent agreements
- Fines
- Adverse publicity

- Enforcement examples
 - hidden fees
 - online reviews



Ad Standards

- Who is Ad Standards?
- Advertising Dispute Procedure
- Why are disputes **increasing**?

Ad Standards

- In the case of noncompliance with a decision of the Advertising Dispute Panel, Ad Standards:
 - will **publish a summary of the outcome** of the case;
 - will **publicly refer to an advertiser's unwillingness to participate or comply**;
 - will **advise the exhibiting media** of the non-compliance; and
 - may **notify the Competition Bureau** of the fact of noncompliance

Best practices to work with your broader team

- **Who is the team?**
 - In-house Legal
 - Marketing
 - Agency
 - External Legal
- Risk management **best practices**
- Risk management **tools**

Some of our advertising and marketing work

Service Agreements

Review and advise on developer agreements for mobile campaigns and applications

Agency Agreements

Prepare and advise on agreements between advertisers and their agencies for short and long-term campaigns, including mobile programs

Ad Copy Review

Provide detailed review and clearance on advertising copy for all media and platforms. We address issues such as misleading advertising, proper disclosures, and permitted representations about regulated products. We also advise on Ad Standards and ThinkTV clearance.

Promotional Contests

Preparing long-form rules and minimum disclosures. Advice on sponsorships, events, packaging and point of sale materials, waivers and releases. Advice on multi-country contests, and on how to include Quebec residents as contest participants.

Privacy and Anti-Spam (CASL)

Specialized advice on privacy and CASL policies and procedures for online, gaming, mobile, and other platforms.

Advise on compliance for partner / sponsor marketing, "refer a friend" programs, subscriber programs, and ongoing promotional outreach.

Pricing

Advising on compliance with "ordinary price" and sale pricing rules.

Advising on online "drip pricing" rules.

Regulated Products and Services

Specialized advice to manufacturers, distributors and retailers of food and beverage, liquor, cannabis, and natural health products. Ad clearance support. Representation on investigations and reviews by government regulatory agencies.

Intellectual Property

Expert advice on brand protection and licensing. This includes trade-mark registrations, copyright licensing and assignment, and advice on user generated content, sponsorship agreements, and infringement claims.



Questions

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