FinTech Market Study May Lead to Important Regulatory Changes in Canada

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The Canadian Competition Bureau has launched a market study into technology-led innovation and emerging services in the Canadian financial services sector. The study is in keeping with the Bureau's commitment in its 2015-2018 *Strategic Vision* document to "promote and advocate for a more competitive marketplace, emphasizing smart regulation focused on achieving legitimate regulatory objectives".

Various financial services, including bank accounts, methods of financing such as crowdfunding, money transfers and payments such as e-wallets, currency exchanges, loans and investments are increasingly being offered in new forms or via new methods through new and innovative technologies, known collectively as "FinTech". The emergence and continued growth of FinTech in the financial services sector should offer consumers benefits in the form of increased choice and reduced costs. However, there are concerns that the emergence and adoption of such technologies in Canada has been slower than in other jurisdictions at least in part due to certain features of the existing Canadian regulatory environment.

According to the Competition Bureau, "[t]he Study will enable [it] to advise and guide financial sector regulators and other relevant authorities on how to ensure that regulation does not unnecessarily impede innovation and competition in the sector". Examples of similar advocacy work by the Bureau include its publication of a white paper and filing of a formal submission with the City of Toronto Taxicab Industry Review calling for the modernization of taxi regulations in light of the emergence of ride-sharing companies such as Uber and Lyft. The Bureau also recently submitted comments to the federal Department of Finance on how best to oversee the Canadian retail payments system with a view to ensuring that "new oversight mechanisms put in place enable innovative and competitive forces to thrive to the greatest extent possible, while maintaining safe and reliable payments systems for Canadians". Past experience and comments made by the Commissioner of Competition (the head of the Competition Bureau) in announcing the FinTech study suggest that it may also be a precursor to increased scrutiny and, ultimately, enforcement activity by the Bureau in respect of the Canadian financial services sector.

The study will focus on financial services innovations impacting Canadian consumers and small and medium businesses, and will be aimed at answering the following key questions:

- What has been the impact of technology-led innovation on the competitive landscape? What is happening to competition? How will innovation impact competition in the future?
- How will consumers benefit from FinTech?
- What are the barriers to entry, expansion, or adoption for FinTech companies? Are they regulatory or structural?
- What is the current state of the regulatory framework for financial services? Does it support or inhibit competition and innovation? Are changes required to encourage greater competition and innovation in the sector?
- Are the consumer protections in place today enough to adapt for the future? What additional protections should be put in place for consumers? Is there a need for greater transparency in fees?
- What issues should be considered when developing or amending regulations to ensure competition is not unnecessarily restricted?

The Bureau has invited interested stakeholders to make written submissions and/or to indicate their willingness to meet with the Bureau to make in person submissions before June 30, 2016. Recent experience with the Bureau's updating of its *Intellectual Property Enforcement Guidelines* ("IPEGs") demonstrates the important impact and influence stakeholder input can have on the Bureau's views on and approach to complex competition policy issues. In September 2014, the Bureau issued a white paper ("Patent Litigation Settlement Agreements: A Canadian Perspective") setting out its preliminary views as to how Canadian competition law could apply to patent litigation settlements between innovator and generic pharmaceutical companies. The white paper gave rise to significant controversy in that it proposed a vague enforcement policy pursuant to which the Bureau would, at the Commissioner's discretion, review patent litigation settlements under the criminal cartel provision in section 45 of the *Competition Act*. Submissions to the Bureau by certain stakeholders in response to the white paper had a substantial impact on the enforcement approach to patent litigation settlement agreements ultimately adopted by the Bureau in its updated IPEGs issued in March 2016. Most importantly, the Bureau made civil review of such settlement agreements the default, adopted two antitrust harbours and significantly restricted the circumstances in which criminal review might occur (see our previous comments). Companies that stand to be affected by potential changes to the Canadian financial services regulatory environment and other stakeholders should accordingly give serious consideration to participating in the market study consultation process.

If you have any questions regarding any of the foregoing, or wish to make written or oral submissions to the Bureau on the study or on any specific issues relevant to the study, please do not hesitate to contact one of the authors.

Davit Akman acted for Innovative Medicines Canada — the national association of leading research-based pharmaceutical companies — and several of its members in respect of the Competition Bureau's IPEG updating process (described above).

By

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