

Canadian competition body to examine FinTech sector

On 19 May 2016 the Competition Bureau of Canada launched a market study into technology-led innovation in the FinTech sector in Canada. Simon Fuller, Associate Editor at *E-Finance & Payments Law & Policy*, spoke to a number of experts - Eric C. Belli-Bivar, Partner at DLA Piper LLP ('EBB'), Allan Goodman, Partner at Goodmans LLP ('AG'), and Jason Bullen and Chris Hersh, Partners at Cassels Brock & Blackwell LLP ('JB & CH'), about the study.

What has led to the Bureau investigating this area at this particular time?

EBB: The FinTech sector has been steadily growing in Canada, with new products and apps being unveiled all the time. There has also been a corresponding increase in the number of start-up businesses that have entered the FinTech sector.

However, while there has been steady growth in the FinTech space, the Bureau has expressed concerns that Canada is lagging behind other countries in the adoption of FinTech. In a January 2016 report by Ernst and Young LLP, it was found that only 8.2% of digitally active Canadian consumers have used at least two FinTech products in the last six months. This compares to a global average of about 15.5%.

AG: One of the key areas of focus for the Competition Bureau this year is to support innovation that spurs greater competition in its advocacy and enforcement efforts.

What are the Bureau's key aims in launching the study? Have there been any competition concerns regarding the Canadian FinTech sector?

AG: The Bureau will look at the impact of technology on competition in financial services, examining the barriers to entry or expansion of new technology-driven companies, factors influencing the adoption of these new products and services, as well as the state of current regulatory frameworks.

Given the importance of financial services generally to the Canadian economy, the Bureau is interested in deterring anti-competitive conduct that may impede technology-driven new entrants. The Bureau has in years past taken enforcement action in the financial services industry (i.e. the *Interac* and *Visa and MasterCard* cases, bank mergers).

JB & CH: The Bureau has not raised public concerns regarding the Canadian FinTech sector. As stated in the public notice initiating the market study, the purpose of the study is to allow the Bureau to better understand the competitive dynamics of a rapidly evolving industry and consider whether existing or potential regulation might unnecessarily stifle innovation and competition in the sector. In this regard, there appear to be possible parallels between what is happening in the Canadian FinTech sector and the issues surrounding the emergence of disruptive technologies such as Uber. Just as with Uber, the challenge is to balance the need for all industry participants to be subject to an appropriate regulatory and legal framework that protects consumers and businesses, while ensuring that the industry is not over-regulated in a way that stifles innovation and competition.

How does the Bureau's approach here compare with other Canadian regulators who might have an interest in the FinTech area?

AG: The Office of the Superintendent of Financial Institutions is the prudential regulator of the industry. The Minister of Finance and the Federal Department of Finance are key policy-makers in this area. The Bank of Canada also has an important policy interest and role in this sector.

The Competition Bureau on the other hand is not an industry-specific regulator, but enforces the Competition Act, a law of general application to the economy. Its focus is only on competition. The other regulators noted above have other considerations (such as financial system stability and soundness) to consider in the public interest.

I understand that the study will assess various areas, such as peer-to-peer ('P2P') banking and e-wallets; what areas seem most important to the Canadian market at this point?

EBB: E-wallets are a relatively novel addition to Canada's emerging FinTech landscape. For instance, only recently did all five major Canadian banks agree to join Apple Pay. Online lending platforms, available to both businesses and consumers, are also a burgeoning area of growth in Canada. There have also been a lot of developments in the payment system space, with several Canadian firms involved with technological breakthroughs, such as nanoPay.

JB & CH: While the Bureau mentions P2P, e-wallets, crowdfunding and online-based financial advisory services as areas of interest, it is likely that the first two are the priority areas. This is because these types of services are likely viewed as having the greatest impact on Canadian consumers and businesses. In addition, the Bureau will also be interested in gaining insight as to the future

direction of the FinTech industry - both in terms of technologies and services that may still be in the development stage. E-wallets, in particular, present an interesting dynamic as the large Canadian banks assess the threat from large technology companies (such as Apple) and start-ups in the space and consider the extent to which they should partner with other entities versus developing proprietary technology internally.

The Bureau mentions that overregulation has the potential to impact on the competitiveness of a sector; are there any ways in which the Canadian FinTech sector could be said to already be over-regulated?

EBB: Canada has a relatively sparse approach to FinTech regulation, in that very little regulation has been developed specifically with digital-age platforms in mind. Accordingly, some aspects of the FinTech sector can be described as ill-suited to the existing regulatory framework which is, for the most part, a legacy of pre-digital age industry. For instance, the regulatory framework for P2P lending and investment platforms is unclear and inconsistent among securities regulators in Canada.

This has led to criticism from established participants in financial markets that FinTech is too loosely regulated. For instance, many of Canada's traditional banks have suggested that FinTech firms are able to be both nimbler and cheaper largely due to the lack of regulation. This is in contrast to the rigid and complex regulatory regime that governs traditional banking institutions in Canada. In this regard, it is important to note that Canadian financial services regulation is based on the status of the entity in question, and not primarily on what the entity does; this is often cited as a unique and

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somewhat peculiar feature of the Canadian financial services regulatory environment.

JB & CH: The Canadian FinTech sector is not overregulated. As stated above, the issues are similar to those associated with the regulation of Uber - in many jurisdictions, the regulations applicable to the taxi industry did not apply to Uber which gave it a competitive advantage at the expense of consumer protection. In this regard, the goal should be to ensure that regulation of the sector creates a level playing field for industry participants regardless of the technology, while properly protecting consumers and businesses. In this regard, the Bureau will consider whether the existing regulatory framework impedes innovation and competition from the perspective of both non-traditional and established FinTech sector participants.

Once the study is completed, how might the Bureau use the results and how might the Canadian FinTech market be impacted?

AG: The results will provide the Bureau with a much better appreciation of how new technology may impact competition in this area and the potential roadblocks to that new competition from developing. This should give the Bureau a much better understanding of the evolving facts and trends which could support further competition advocacy efforts to change the way the industry is regulated in order to enhance competition. It also could provide a better information base from which to consider whether enforcement action may be warranted in particular circumstances.

JB & CH: The Bureau will use the study to inform its advocacy efforts in this space in terms of how

existing or proposed legislation/regulation or proposed standards might impact the competitiveness of the sector, to assess any concerns regarding possible anticompetitive conduct and to assess the competitive impact of any agreements/mergers among industry participants. Given that the Bureau does not have the ability to implement legislation or regulation, it is unlikely that the Canadian FinTech market will be directly impacted by this study.

Do you have anything further that you'd like to add?

EBB: The Bureau has invited stakeholders in the FinTech industry to make submissions to the Bureau by 30 June 2016. In previous years, submissions to the Bureau by stakeholders have had a tremendous impact on the conclusions the Bureau draws from a study such as this. As a result, stakeholders in the FinTech sector would be well-advised to participate in this submission process.

JB & CH: Market studies are a relatively uncommon occurrence in Canada and the launch of this initiative indicates a desire on the part of the Bureau and Commissioner to take proactive steps to gain insight into an evolving industry so that the Bureau can effectively engage in both advocacy and enforcement activities as they relate to the FinTech sector.

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