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Significant amendments to Canada's Competition Act with far-reaching implications

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Businesses take note. The *Fall Economic Statement Implementation Act, 2023* [PDF] (the budget implementation bill), introduced in Parliament on November 28, proposes substantial amendments to Canada's *Competition Act* (the Act) that, if implemented, will have far-reaching consequences for businesses, including an increase in enforcement activity by the Commissioner of Competition (Commissioner) and by private parties, as well as heightened exposure to additional significant penalties and damages.

Proposals

Fundamental changes proposed in the budget implementation bill include the following:

- For the first time, agreements between competitors not captured by the criminal provisions of the Act and subject only to the civil reviewable provision in section 90.1 of the Act (e.g., competitor collaborations) will be subject to potential penalties and remedial action, as well as private actions (with leave). Currently, there is no private right of action under section 90.1 and remedies are injunctive in nature. Dramatically increased potential consequences include
  - orders for divestiture of assets or shares that are reasonable and necessary to overcome the effects of the agreement
  - an administrative monetary penalty (AMP) in an amount not exceeding the greater of (a) $10,000,000 (or $15,000,000 if it is a subsequent order) and (b) three times the value of the benefit derived from the agreement or, if that amount cannot be reasonably determined, 3% of the person's annual worldwide gross revenues
  - private actions (with leave) and damages to private parties in the amount of the benefit derived from the conduct

Separate amendments contained in Bill C-56 propose to expand section 90.1 to include vertical agreements (i.e., agreements between non-competitors). If these proposals become law, the above noted penalties, remedies and private rights of action would potentially apply to a broad range of commercial agreements.

- For the first time, private parties (with leave) will be able to seek a form of damages under

the civil reviewable trade practices provisions of the Act (refusal to deal, exclusive dealing, tied selling, price maintenance abuse of dominance, and 90.1).

- Damages are defined as "an amount, not exceeding the value of the benefit derived from the conduct that is the subject of the order, to be distributed among the applicant and any other person affected by the conduct, in any manner that the Tribunal considers appropriate."

- The test for leave to bring a private action has been expanded such that the Competition Tribunal (the Tribunal) may grant a private party leave to make such an application if the Tribunal has reason to believe that the applicant is directly and substantially affected in the whole *or part* of the applicant's business by any conduct referred to in one of those sections *or if the Tribunal is satisfied that it is in the public interest to do so*.

- For the first time, private parties including consumers (with leave based on a public interest standard) will be able to seek orders from the Tribunal under the civil deceptive marketing provisions of the Act where penalties include AMPs (as described above), prohibition orders and restitution orders.
  - An explicit green-washing provision will also be added, specifying that a representation in the form of a statement, warranty or guarantee of a product's benefits for protecting the environment or mitigating the environmental and ecological effects of climate change that is not based on adequate and proper testing is misleading for the purposes of the deceptive marketing provisions.

- The evidentiary burden for proving that a merger exceeds the anticompetitive threshold will be changed and non-notified mergers will be subject to challenge within a longer period following closing.
  - The current prohibition on the Tribunal determining that a merger is likely to prevent or lessen competition substantially based on evidence of concentration or market share alone will be eliminated. Instead, any effect from the change in concentration or market share that the merger has or is likely to bring about has been added as an explicit factor to be considered by the Tribunal.

  - The Commissioner will be able to challenge, for three years following closing, mergers that were not subject to mandatory notification or for which an Advance Ruling Certificate (ARC) request was not filed (an increase from the current one-year post-closing period within which the Commissioner may challenge a transaction). This potentially creates an incentive to file a request for an ARC in advance of closing for a transaction that is not subject to the mandatory pre-closing notification regime.

- The introduction of a new regime prohibiting "reprisal actions", with significant AMPs for individuals or corporations engaging in such conduct.
  - Reprisal actions are defined as actions taken to "penalize, punish, discipline, harass or

disadvantage another person" because of that person's communications with the Commissioner or their cooperation (or expressed intention to cooperate) in an investigation or proceeding.

  - Upon application by the Commissioner or an affected party to a federal or provincial court, the court may grant a prohibition order and levy significant AMPs (as described above) against anyone engaging in the reprisal action.

- The creation of a new certificate regime for agreements and arrangements made "for the purpose of protecting the environment".
  - If the Commissioner is satisfied that such an agreement is not likely to prevent or lessen competition substantially, they will issue a certificate that is then registered with the Tribunal. This immunizes the agreement from the application of the criminal conspiracy and civil competitor collaboration provisions of the Act.

These proposals are in addition to and will be impacted by the amendments to the Act sought by Bill C-56, which includes elimination of the efficiencies defence, the addition of a formal market studies power and, as noted, a significant expansion of section 90.1 (please refer to our prior Osler update on Bill C-56 for additional commentary). The possibility of further amendments to Bill C-56 has also been raised, including changes to the test for establishing an abuse of a dominant position.

Next steps

The budget implementation bill is proceeding through the legislative process. Bill C-56 is currently being reviewed by the Standing Committee on Finance. We will provide a more comprehensive update on the amendments once Bill C-56 and the budget implementation bill are finalized and passed by the Senate.