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Significant amendments to the Competition Act on the horizon – key areas to watch

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On February 7, 2022, François-Philippe Champagne, Minister of Innovation, Science and Industry (the Minister), announced that the federal government will be undertaking a comprehensive review of the *Competition Act* (the Act). The next day, the Competition Bureau (the Bureau) published its submission, "Examining the Canadian *Competition Act* in the Digital Era", in response to Senator Wetston's October 2021 invitation to comment [PDF] on Canada's competition policy framework (the Submission). The Submission contains a lengthy and detailed list of recommendations for reform. The announcement follows years of debate and discussion regarding whether the framework of the current Act, which last underwent significant amendments in 2009, is appropriate to address the challenges of the current economic landscape and, in particular, the new "digital era."

The priorities set out by the Minister in the announcement are described at a high level, leaving the full scope of what will be addressed and on what timeline uncertain. However, the areas identified by the Minister for review are broad enough to encompass many of the Bureau's recommendations, including potential reforms that would have a significant impact on companies doing business in Canada or contemplating transactions affecting Canada. Potential amendments include those aimed at putting the Bureau in a stronger position to challenge mergers, increasing the level of scrutiny applied to upstream arrangements between competitors, providing for more substantial penalties for anti-competitive conduct, further opening up enforcement of the Act to private parties, enhancing the consumer protection-focused provisions of the Act, with "drip pricing" as a priority, and compelling businesses to disclose information to the Bureau in a broader range of circumstances.

In an interview with the *Toronto Star*, the Minister indicated that the government is looking at making both discrete changes that "would have an immediate and tangible impact for consumers and businesses in Canada" in the coming months, as well as a "comprehensive modernization" of the Act to occur over a longer timeframe.

Below, we discuss the key areas of potential changes we will be watching as the process of reforming the Act unfolds.

Strengthening the Bureau's position in merger review

The Submission includes a wide range of detailed recommendations relating to reform of the merger review provisions of the Act. While the Minister's announcement does not single out the merger review provisions as a priority area for review, statements from the Minister suggest both technical changes and material amendments will be considered.

A unique and controversial element of Canadian merger law is the efficiency defence set out in section 96 of the Act. This is a statutory defence applicable to a merger that has been found by the Competition Tribunal (the Tribunal) to be anti-competitive but where the merger-specific efficiencies outweigh the anti-competitive effects of the merger. The efficiency defence can be distinguished from the treatment of efficiencies in other jurisdictions such as the U.S., where the efficiencies generated by a transaction are a factor considered in the review rather than an overriding defence that allows for the completion of an otherwise anti-competitive transaction. In recent years, as the efficiencies defence has evolved through judicial interpretation, the defence has played an increasingly important (and, in some cases, decisive) role in the outcome of merger reviews in Canada. Commissioner Boswell, similar to his predecessor, has advocated vigorously for the elimination of the efficiency defence for a number of years. It is therefore no surprise that the elimination of the efficiency defence appears in the Bureau's extensive list of recommendations. While not specifically mentioned in the Minister's announcement, it is noteworthy that the Minister stated during his interview with the *Toronto Star* that the efficiencies defence would be one of the issues to be considered as part of the review of the Act.

In addition to the elimination of the efficiencies defence, the Bureau is recommending several additional measures related to merger enforcement, ranging from closing technical loopholes to more fundamental shifts in the approach to merger enforcement that have not been the subject of material prior consultation. Regarding the latter, most notably, the Bureau recommends

- incorporating an anti-avoidance provision in the merger notification regime to prevent parties from structuring a transaction with the goal of making it non-notifiable
- incorporating a structural presumption of anti-competitiveness based on post-merger concentration levels which, if satisfied, would shift the burden of proof to the merging parties to demonstrate why their transaction would not substantially lessen or prevent competition
- lowering the burden placed on the Commissioner to obtain an interim injunction preventing the closing of a merger
- reversing the limitation period to challenge a closed merger from one year to three years (this is a return to Canada's approach pre-2009 when it adopted the U.S.-style two-phase merger review regime)

Extensive commentary and debate can be expected during the consultation process on these recommendations, though it is uncertain to what degree these recommendations will be included for consideration as part of the review of the Act.

Increasing scrutiny of upstream agreements between competitors

The application of the Act to upstream agreements between competitors (often referred to as "buy-side" agreements) has been the subject of substantial discussion and public commentary in recent years. Such discussion has primarily focused on the exclusion of no-poach and wage-fixing agreements from the scope of competitor agreements that are prohibited as a criminal matter under section 45 of the Act. At present, such agreements can be addressed only on a civil basis, and solely by the Commissioner, with limited remedies and no financial penalties.

The limitation of the criminal conspiracy offence to three categories of agreements between competitors in the downstream supply of a product distinguishes Canada from jurisdictions

such as the U.S., where there is greater flexibility in enforcement approach and no-poach and wage-fixing agreements have been the subject of recent scrutiny on a criminal basis. The Canadian approach results from the amendment of the criminal conspiracy provision in 2009 to make certain agreements between competitors illegal *per se*. Prior to 2009, the criminal conspiracy provision applied to a broad range of potential agreements but required proof of an "undue" impact on competition. To reduce the obstacles to the successful prosecution of what were regarded as the most harmful anti-competitive agreements (such as price fixing and market allocation), section 45 of the Act was amended in 2009 to create a *per se* offence applicable to three categories of agreements. These agreements are treated as illegal on their face, subject only to narrow defences and with no requirement for the prosecution to prove anti-competitive effect. The corollary of taking this approach was to make all other agreements not deemed worthy of criminal condemnation without a broader evaluation of their rationale and market impact subject to assessment and enforcement on a less stringent civil basis. Buy-side agreements between competitors were included in this broader category in recognition of the fact that many such agreements may be pro-competitive.

Certain commentators have called for upstream agreements between competitors more generally to be included within the *per se* offences under section 45. Such a broad approach would raise challenging policy issues and the Bureau has recommended against identifying all buy-side arrangements as criminal. In doing so, the Bureau noted (as it has done previously) that some purchasing agreements between competitors could be pro-competitive.

It remains to be seen how a stronger enforcement approach to buy-side agreements will be formulated, including the scope of upstream agreements that will be identified as worthy of a more rigorous approach. At a minimum, however, there appears to be support from both the Minister and the Bureau for re-examining as a priority the treatment of agreements between competitors relating to labour matters. Both the Bureau and the Minister have identified the treatment of "wage-fixing" agreements in particular as a priority area for review.

Increasing financial penalties

Increasing penalties under the Act is clearly on the agenda for reform. The Bureau has for a number of years expressed concern that the fines available under the criminal provisions of the Act, as well as the financial penalties available under the civil provisions, are out of step with practices in other jurisdictions and may be viewed by some, particularly very large global companies, as a "cost of doing business."

The Submission recommends changes that would allow for increased financial penalties across multiple criminal and civil provisions. Recommendations include the introduction of financial penalties to remedy conduct contrary to the civil competitor collaboration provisions found in section 90.1, where remedies are currently limited to a prohibition order or a remedy to undertake "any other action" only with the consent of the subject party. The Minister's announcement includes "modernizing the penalty regime to ensure it serves as a genuine deterrent against harmful business conduct" as an area to be considered for reform, which indicates that the examination of penalties will be on the legislative agenda.

Broadening scope of private enforcement

Private litigation activity in Canada based on competition-related claims has increased in recent years, but the scope for private enforcement of the Act in Canada remains limited. The Minister's stated areas of focus include "increasing access to justice for those injured by harmful conduct", suggesting that expanding the avenues for private litigants with claims

under the Act will be considered for reform.

While private actions for damages based on alleged violations of the criminal provisions of the Act are provided for in section 36 of the Act, under the current regulatory framework, private parties can only commence actions with respect to civil matters where leave is granted by the Tribunal, and only with respect to certain civil provisions including price maintenance, exclusive dealing and refusals to deal. Noticeably absent from the list are the abuse of dominance provisions and the non-criminal competitor collaboration provisions found in sections 79 and 90.1 of the Act, respectively. In the Submission, the Bureau has explicitly expressed support for opening up the Act to broader private enforcement, recommending that private enforcement be made available for alleged abuses of dominance and competitor collaborations that are likely to result in a substantial lessening or prevention of competition.

The Bureau also recommends that the standard for the Tribunal granting leave to private parties be lowered, commenting that "most firms who apply for leave ultimately fail to meet the standard set out in the Act." Enabling private enforcement with respect to a wider range of conduct may lead to less reliance on the Bureau (which is resource-constrained and must triage matters) to investigate and take enforcement action. However, allowing for increased private actions while also lowering the standard for obtaining leave could potentially lead to frivolous litigation (and increased costs) for conduct that is clearly not likely to have an anti-competitive effect. An important consideration and issue to watch for, if enforcement of the Act is further opened to private parties, would be the remedies available to private parties who are successful in their action.

Focus on consumer protection

The Minister has indicated that, in connection with the review of the Act, priority will be given to measures that would have an "immediate and tangible impact for consumers". It can be anticipated, therefore, that provisions of the Act relating to advertising and marketing may be amongst the areas reviewed on a priority basis. The deceptive marketing provisions of the Act provide that such practices can be treated either criminally or civilly, depending upon the specific practice in question and other factors. The Bureau actively enforces the deceptive marketing practices provisions of the Act.

One particular measure identified in the Minister's announcement, and potentially one of the priority areas for more immediate attention, is further action to address "drip pricing," a practice whereby consumers are advertised a low price for a product that is never attainable due to "fees" that are added to the price of the product as the consumer completes the purchasing process. The practice of drip pricing is not expressly addressed in the Act. The Bureau has previously taken enforcement action under the general misleading representation provisions of the Act based on allegations of drip pricing.

The Submission makes several other recommendations that are intended to improve its ability to enforce the deceptive marketing provisions of the Act, including reversing the onus in ordinary selling price matters; providing the option of both criminal track and civil track enforcement for all deceptive marketing practices; and increasing the financial penalties and range of remedies available.

Better equipping the Bureau to address the digital economy

A further key priority area identified by the Minister in his announcement is to consider amendments "to better tackle emerging forms of harmful behaviour in the digital economy".

Additional details are not provided and so the nature or scope of amendments being contemplated is uncertain, especially considering various areas of focus are separately identified (e.g., penalties, private enforcement, drip pricing). Positioning competition enforcement for the digital economy is a consistent theme reflected in the Submission, with many of the recommendations broadly geared towards issues that arise in the digital economy and strengthening the Bureau's enforcement powers and position more generally. The Bureau has also made a number of specific recommendations that could have important consequences if implemented, such as establishing a more flexible and "workable" standard under the abuse of dominance provisions for demonstrating anti-competitive conduct that prevents emerging competition.

Increasing information disclosure requirements for businesses

The Bureau has resurrected its previous attempts to (a) implement a patent litigation settlement notification registry similar to that which has been in place with the U.S. Federal Trade Commission since 2003; and (b) empower the Commissioner to compel information for use in market studies, rather than limit the Bureau to publicly available information or information that was voluntarily disclosed by stakeholders. In addition, the Bureau is seeking to impose an obligation on federal, provincial and municipal regulators to respond to recommendations made by the Bureau resulting from any market study, an obligation that would mirror similar requirements in the U.K. and New Zealand.

Timeline

The Minister stated that some discrete actions could be taken to adjust the Act in the coming months but has not committed to a firm timeline for the more comprehensive reform of the Act. Though the Minister has indicated that competition law reform is top of mind for the federal government, the timeline before concrete action towards legislative reform is taken is uncertain.

For further information regarding the review of the Act or other questions relating to Canada's competition law regime, please contact the members of Osler's Competition and Foreign Investment Group.