
PROPOSED AMENDMENT TO CANADA'S COMPETITION ACT TO PROHIBIT "UNJUSTIFIED" CROSS-BORDER PRICE DISCRIMINATION

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On February 11, 2014, the Canadian government included in its federal budget a proposal to address what the government (and many Canadians) regard as an "unjustified" gap between U.S. and Canadian pricing for the same goods. Although precise details are only to be provided in the coming months, the gist of the proposal is that the Commissioner of Competition, who heads Canada's Competition Bureau, will have the power to enforce new rules (whatever they may be) against companies with "market power" that charge higher prices in Canada than in the U.S. (or possibly other countries as well) which are not reflective of legitimate higher costs.

The proposal is the government's response to concerns about disadvantageous "country pricing" that have grown in the last several years.

Most notably, the Canadian Senate conducted hearings on the matter which culminated in a report on the "Canada-USA Price Gap" that was issued in February 2013. The Senate reached the tentative conclusion that:

[T]he segmentation of the Canadian and U.S. markets reduces competition and allows some manufacturers – even some Canadian ones – to practice country pricing between the Canadian and the American markets, which may contribute to the price discrepancies between the two countries.

The Senate report offered the following recommendations to address the Canada-U.S. price gap: (1) a comprehensive review of Canada's tariffs; (2) continuing efforts to harmonize product standards without compromising safety; (3) increasing the monetary threshold for low-value goods to be exempt from custom duties; and (4) examining a reduction of the permissible mark-up for Canadian exclusive book distributors of American books.

The Senate did not recommend changes to the Competition Act or other legislative measures to regulate prices of traded goods. It is likely that the Senate was influenced in this regard by the testimony of representatives of the Competition Bureau who stated, among other things, that: the Bureau is "not a price regulator"; "high prices in themselves do not mean that a particular market is uncompetitive"; and, under the current Competition Act, "Canadian businesses are free to set their own prices at whatever levels the market will bear, provided that these high prices are not the result of anti-competitive conduct such as price-fixing or abuse of a dominant position".

The cross-border pricing issue was next raised in the Canadian government's October 2013 "Speech from the Throne" which set out the government's agenda for the 2014 legislative year. Without getting into specifics, the government stated that Canadian consumers "should not be charged more in Canada for identical goods that sell for less in the United States" and committed to take "further action to end geographic price discrimination against Canadians."

At the time, the scuttlebutt surrounding the Speech from the Throne was that the government was examining several legislative options, including possible amendments to the Competition Act. This has now been confirmed with the release of the 2014 Budget.

If enacted, the government's proposal would signal a potentially significant shift in Canadian competition policy to broaden the types of conduct that are considered to be anti-competitive. As noted by the Bureau representatives who testified before the Senate, the Competition Act is generally focused on conduct that harms the competitive process and does not purport to regulate prices.

The proposal would also appear to reverse direction from the 2009 amendments to the Competition Act that repealed a price discrimination offence in recognition that price discrimination is often efficient and may simply

reflect different demand conditions in different markets.

Finally, concerns have been expressed in some quarters that the proposal could introduce uncertainty and risk for multinationals that sell products in Canada. For example, such firms may be required to ensure that any difference in the prices paid by Canadian and foreign customers is fully justified based on differences in the costs of manufacturing or distributing the product in each jurisdiction. Such an analysis could involve a complex cross-border comparison of prices and operating costs over a sustained period, including differences in currency rates, tariffs, transportation costs and labour costs. The inherent volatility in exchange rates could make complying with such a requirement especially daunting. (It is not yet clear whether the legislation would apply only to price discrimination between Canada and the United States.)

An assessment of the full scope and implications of the Canadian government's "country pricing" will have to await release of the actual draft legislation. Both the definition of a cross-border price discrepancy and any exemptions or defences will need to be studied closely. That said, all indications are that the Canadian government intends to require at least certain multinational suppliers to justify cross-border differentials resulting in higher prices in Canada.



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