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Canada Proposes Significant Amendments to the *Competition Act*

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Earlier this week, the Canadian government introduced the *Budget Implementation Act, 2022, No. 1* (Bill) to enact measures announced in its April 7, 2022 budget (Budget). The Budget foreshadowed that the Bill would contain amendments to the *Competition Act* (Act) that are described as "a preliminary step in modernizing the competition regime" with the goal of "fixing loopholes; tackling practices harmful to workers and consumers; modernizing access to justice and penalties; and adapting the law to today's digital reality." This intention was also consistent with the February announcement by the Minister of Innovation, Science and Industry that the government was evaluating measures to improve the operation of the Act, which we discussed in an earlier bulletin.

Although the government has characterized its intention as taking only "preliminary steps" to revise the Act, the proposed amendments go well beyond that. Certain proposed amendments appear to be designed to expand the scope of the Act to more easily target conduct by big tech firms (but are likely to have much broader impact) and increase the scale of potential penalties available for various types of conduct. More specifically, if enacted, the proposed amendments will

i. expand the substantive scope of the Act's abuse of dominance provisions and introduce a private right of application for persons (including competitors) that allege they have been harmed by such conduct;

ii. expand the Act's criminal conspiracy offence by criminalizing wage-fixing and no-poach agreements between employers and by removing the (already high) cap on potential criminal fines for prohibited conspiracies;

iii. buttress the Act's civil and criminal misleading advertising provisions by adding "drip pricing" to the types of conduct specifically prohibited;

iv. substantially increase the penalties for abuse of dominance and misleading representations to the public;

v. include a new "anti-avoidance" provision to the Act's pre-merger notification regime; and

vi. clarify the jurisdiction of the Competition Bureau (Bureau) to obtain orders seeking records from foreign entities.

Despite the significance of the proposed amendments and the deliberate policy choices they entail, it is notable that these proposals have not been developed through public consultation with stakeholders – a process that has been used before and has been requested again by members of the Canadian competition law bar. The government's use of budget legislation to amend the Act without consultation is, however, consistent with the approach used in 2009, the last time that significant amendments to the Act were enacted.

The proposed amendments and their potential implications are considered in more detail below.

Abuse of Dominance

The Bill proposes significant amendments to expand the scope of the Act's abuse of dominance provisions.

The abuse of dominance provisions may prohibit dominant firms from engaging in anticompetitive acts when that practice has the effect of preventing or lessening competition substantially in a market. Jurisprudence has established that an "anticompetitive act" is one that is

intended to have a predatory, exclusionary or disciplinary negative effect on a competitor in a market that the dominant firm substantially or completely controls, although the competitor and dominant entity need not necessarily be in the same market.

The Bill expands the definition of anticompetitive act broadly to mean "any act intended to have a predatory, exclusionary or disciplinary negative effect on a competitor, *or to have an adverse effect on competition* [emphasis added]."

This amendment, which dilutes a key screening tool for distinguishing between aggressive pro-competitive conduct and an abuse of dominance, will upend established jurisprudence, could significantly expand the scope of the provision and may introduce significant uncertainty to one of the cornerstone provisions of the Act.

The Bill further expands the limits of what constitutes abuse of dominance by providing that the Competition Tribunal (Tribunal) may also consider the following factors in its assessment of the impact of the conduct on competition:

i. the effect of the practice on barriers to entry in the market, including network effects;

ii. the effect of the practice on price or non-price competition, including quality, choice or consumer privacy;

iii. the nature and extent of change and innovation in a relevant market; and

iv. any other factor that is relevant to competition in the market that is or would be affected by the practice.

The effect of these changes is to explicitly include non-price factors (such as quality and choice) as relevant considerations and also to give legislative support to the Bureau's efforts to expand its purview into privacy concerns. These proposed amendments are likely a response to ongoing criticisms by the Commissioner of Competition (Commissioner) and other commentators of the dominant market position of certain big tech firms. Indeed, the Bill proposes adding the same factors as considerations for the assessment of non-criminal agreements between competitors (section 90.1) and mergers (sections 92 and 93). The impact of this expanded set of factors is to introduce significant uncertainty for the conduct of firms that could potentially be considered dominant (or jointly dominant) in Canada.

The Bill also introduces private applications for abuse of dominance. Currently, only the Commissioner can bring an abuse of dominance application before the Tribunal; private applications are permitted only for certain other types of conduct prohibited by the Act. If enacted, the Bill would permit the Tribunal to also grant leave for applications by private parties alleging harm caused by conduct constituting an abuse of dominance. (Notably, the Tribunal is not empowered to order the payment of damages to a private applicant.) This could result in a significant increase in activity for the Tribunal, as the Bureau receives numerous complaints under the abuse of dominance provisions (341 in 2020/21 alone), but takes very few cases to the Tribunal.

Wage-Fixing Agreements

The inapplicability of the criminal conspiracy provisions in section 45 of the Act to buy-side agreements such as "no_poaching, wage-fixing and other types of agreements between purchasers" gained public and political prominence after allegations surfaced that certain of Canada's largest grocers had discontinued employees' temporary pay increases related to the COVID-19 pandemic. As a result, the House of Commons Standing Committee on Industry, Science and Technology subsequently issued a report in June 2021 supporting the inclusion of these agreements under the Act's criminal conspiracy provisions.

The Bill proposes a new provision that would make it a criminal offence for employers to "fix, maintain, decrease or control salaries, wages or terms and conditions of employment" or to "not solicit or hire each other's employees." While the proposal does not extend beyond the employment context to apply to all input agreements, the new section does not appear to be limited to agreements between competitors or to agreements between employers who compete in respect of procuring labour from the class of employees to which the agreement relates. On its face, the new provision could also affect non-competition agreements in the context of business acquisitions, subject to the application of the ancillary restraints defence. This defence permits otherwise unlawful restrictions provided that they are ancillary to and reasonably necessary for giving effect to a broader, lawful agreement. The Canadian business community will likely seek Bureau guidance and potential legislative clarifications in this respect.

The Bill would also remove the cap of $25 million for fines under the criminal conspiracy offence – including the proposed new wage-fixing offence – and instead permit fines "in the discretion of the court," with no express limit.

The amendments to the conspiracy provisions would come into effect one year after the Bill receives royal assent. This mirrors the one-year delay in implementing changes to the Act's conspiracy provision (section 45) when it was amended in 2009, and is designed to provide time for businesses to adapt to the new rules. The 2009 amendments prompted the Bureau to publish guidance to assist businesses in complying with the new criminal conspiracy provisions. It remains to be seen whether the current amendments will lead to updated or new Bureau guidance. It is also unclear whether the Bureau will permit businesses to request opinions from the Bureau regarding the compliance of existing agreements, as was done in 2009.

Drip Pricing and Increased Penalties for Misleading Advertising

Drip pricing is a marketing practice whereby businesses are alleged to advertise attractive prices that are unattainable in practice because they add non-optional fees later in the purchasing process. The Commissioner has previously brought cases challenging drip pricing practices under the Act's civil false or misleading representations provisions. However, drip pricing is not explicitly prohibited by the Act, and the Bureau has stated that it must expend "significant resources in order to be ready to prove to the court, in every case, why drip pricing is deceptive."

If enacted, the Bill would provide that drip pricing or "the making of a representation of a price that is not attainable due to fixed obligatory charges or fees" would constitute a false or misleading representation under both the criminal and civil misleading advertising provisions of the Act provided that the relevant charges or fees are not imposed by government (e.g., a tax). It remains unclear what is intended to be captured by the inclusion of the word "fixed" in the proposed provision and the extent to which drip pricing will be pursued criminally by the Bureau. Future Bureau guidance could assist in clarifying both issues. However, it is worth noting that even with Bureau guidance, the inclusion of the drip-pricing amendment in the criminal misleading representation provisions may serve to enable private class actions premised on an allegation of drip pricing.

Increased Penalties

The Bill would increase the maximum administrative monetary penalties that could be imposed under the abuse of dominance and civil misleading advertising provisions of the Act. Currently, the maximum administrative monetary penalty that can be imposed on a corporation is $10 million for a first contravention. The Bureau has stated that these current penalties "can be effective in ensuring compliance for many small and medium-sized businesses, but for the world's largest firms, who earn billions of dollars in revenues, these penalties could often amount to a pittance."

The proposed amendments would increase the maximum administrative monetary penalty that could be imposed on a corporation to the greater of (i) $10 million (for a first contravention) and (ii) three times the value of the benefit derived by the conduct or, if the quantum of the benefit cannot be reasonably determined, up to 3% of the corporation's annual worldwide gross revenues. Similar increases in the maximum administrative monetary penalty for individuals are also proposed.

Increased penalties, especially for abuse of dominance, were a major component of the Bureau's "wish list" for tackling big tech. If enacted, the Bill could result in significantly increased maximum penalties being imposed on large corporations for abuse of dominance or misleading representations. Given that the prospect of large administrative monetary penalties has previously been the subject of constitutional challenges, it is possible that such a significant increase will again raise the issue of the constitutionality of such provisions.

Notifiable Transactions: Anti-Avoidance

In advocating for amendments to the Act, the Bureau has, among other things, asserted that technical "loopholes" that permit merging parties to escape the Act's pre-merger notification provisions need to be addressed. Instead of directly addressing any perceived loopholes, the Bill proposes that a general anti-avoidance provision be added to the Act's pre-merger notification regime. This provision would mean that if a transaction were designed to avoid the application of the pre-merger notification requirements, these notification requirements (including the fact that a failure to file without good reason is a criminal offence) would apply nonetheless to the substance

of the transaction. It is not clear how, in practice, the Commissioner would determine whether a transaction was structured with the intent to avoid notification and how such conduct could be pursued criminally.

Section 11 Orders: Foreign Affiliates

Section 11 of the Act authorizes the Commissioner to apply for court orders to compel the production of records and information relevant to his inquiries. Subsection 11(2) permits the Commissioner to seek an order for the production of records from a Canadian company that are in the possession of a foreign affiliate. This section has been the source of some controversy, because foreign affiliates have in some cases refused to provide their Canadian affiliates with the requested information, leading the Commissioner to challenge the Canadian company's claims that it was unable to provide the information.

The Bill would expand section 11 to explicitly permit orders to be made against persons outside Canada who carry on business or sell products into Canada. It would also expand the provision to permit the Tribunal to issue an order for the production of relevant records "likely" to be in possession of a foreign affiliate and permit the Commissioner to seek orders requiring foreign affiliates to produce not just records but also written returns of information. While these amendments would clarify the Commissioner's jurisdiction to seek these orders, territorial jurisdiction questions about the ability to compel such information from a foreign entity remain unanswered as the Bureau may need to seek an order from a foreign court to seek to have the section 11 order enforced against a foreign entity in circumstances where the documents to be produced under the section 11 order reside outside of Canada. It is also unclear how the amended section might interact with laws in other jurisdictions that constrain or preclude entities from providing certain information without a search warrant from that jurisdiction, such as the *Stored Communications Act* in the United States.

Next Steps

Having received its first reading in Parliament, the Bill will follow the standard legislative procedure of votes at second and third readings, then study by a standing committee in the House of Commons and then the Senate's three readings and study before it receives royal assent and becomes law. However, once introduced, the Bill, and specifically the proposed amendments to the Act (which form only a small portion of the much broader Bill implementing the Budget measures), is unlikely to face significant challenge or amendment in the legislative process, since the governing Liberal Party and the New Democratic Party (NDP) have entered into a supply and confidence agreement whereby the NDP has agreed to support the legislative agenda of the Liberals. The two parties will have the votes needed to pass the Bill into law with limited ability by the opposition Conservative Party to slow the process.

The implementation bill for the 2021 budget received royal assent 60 days after it was introduced for first reading. The timeline may differ for the current Bill due to several factors, such as scheduling; however, the Bill will be the government's top legislative priority and will be moved through the legislative process without delay. All provisions of the Bill relating to the Act will come into force when the Bill receives royal assent, with the exception of the amendments to section 45 of the Act, as discussed above.

Due to the relatively minor status of the amendments to the Act in the context of the Bill, there is likely to be little opportunity for comments and feedback by interested parties, as efforts will be made to minimize standing committee witnesses in favour of expediency.

Finally, the Bill does not address several significant issues that have previously been raised by the Commissioner and other commentators, most notably the efficiencies defence to the merger provisions of the Act and the need for the Bureau to have a "market studies" power. These and other issues will likely be addressed in future draft legislation that is focused specifically on amending the Act, potentially with greater opportunity for stakeholder engagement.

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