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First Set of Major Changes to Canada's *Competition Act* in Force

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With royal assent to Bill C-56, *The Affordable Housing and Groceries Act*, occurring on **December 15, 2023**, important changes to Canada's competition law framework came into force.

The amendments that came into effect immediately on December 15, 2023:

- **repeal the efficiency defence for mergers.** However, the *Competition Act* allows the Tribunal to take into account factors that are relevant to competition in a market affected by a merger. As recently acknowledged by the Commissioner of Competition (Commissioner) in his testimony to the Senate on Bill C-56, “pro-competitive efficiencies of a merger could absolutely be considered in the framework of whether the merger substantially lessens or prevents competition.”
- **empower the Commissioner to undertake formal market studies with compulsory information-gathering powers** (with court oversight), subject to the requirement that the Commissioner first consults with the Minister of Innovation, Science and Industry Canada (Minister). Under this new market study regime, the Minister may also direct the Commissioner to undertake a market study.
- **enact a new framework for abuse of dominance** that would apply a different test depending on whether the remedy sought is (i) a prohibition order (i.e., an order prohibiting the dominant entity or entities from engaging in the challenged conduct); or (ii) other remedies such as monetary penalties or orders to restore competition.

To obtain a prohibition order under the new framework, the Commissioner or a private litigant who has obtained leave now needs to establish only that (i) a firm is dominant (or a group of firms are jointly dominant); and (ii) the firm(s) engaged in conduct with either anticompetitive intent or effect that is not a result of superior competitive performance.

To obtain other remedies (such as administrative monetary penalties or an order to restore competition), the Commissioner or private litigant will still need to establish that the firm is dominant, it has engaged in a practice of anticompetitive acts and that practice prevents or lessens, or is likely to prevent or lessen, competition substantially.

- **expand the abuse of dominance provisions to include the direct or indirect imposition of “excessive and unfair selling prices” as an anticompetitive act.** In order to be subject to possible sanction, such prices must have been intended to have a predatory, exclusionary or disciplinary negative effect on a competitor, or to have an adverse effect on competition.
- **increase the maximum monetary penalties available for an abuse of dominance** to the greater of C\$25 million for an initial order (and C\$35 million for each subsequent order) or three times the value of the benefit derived from the conduct, (or if that amount cannot be reasonably determined, 3% of the person's annual worldwide gross revenues).

Additional amendments that will come into effect one year following the royal assent of Bill C-56 (i.e., on December 15, 2024) will

- **broaden the current civil “competitor agreements” provisions in section 90.1** of the *Competition Act* to allow the Commissioner to challenge agreements between non-competitors (such as vertical agreements) where (i) a “significant purpose of

the agreement or arrangement, or any part of it, is to prevent or lessen competition in any market" and (ii) the agreement or arrangement prevents or lessens or is likely to prevent or lessen competition substantially in a market; and

- **repeal the efficiency defence** for agreements covered by section 90.1.

Next Steps

The Competition Bureau has stated that it "will work with stakeholders to implement the amendments in the most open and effective way possible. This will include reviewing and updating the Bureau's enforcement guidance to ensure transparency and predictability for the business and legal communities."

Bill C-59, *The Fall Economic Statement Implementation Act 2023*, contains additional significant changes to the *Competition Act*. That bill remains under consideration by Parliament and is expected to pass into law in early 2024.

Further details on the full package of *Competition Act* amendments contained in both of these bills and their implications are available in our previous [bulletin](#).

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