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Federal Government Enacts Significant Amendments to Canada's *Competition Act*

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Significant amendments to Canada's *Competition Act* (Act) were enacted on June 23, 2022, with the passing of the federal government's 2022 budget implementation legislation.

The amendments foreshadow more aggressive Competition Bureau (Bureau) enforcement of the Act, especially regarding the abuse of dominance provisions, with companies operating in digital and high-tech industries of particular interest. The amendments also may lead to a new wave of private enforcement actions, whether private applications to the Competition Tribunal alleging abuse of dominance violations or private civil actions for damages resulting from alleged involvement in wage-fixing, no-poaching agreements, or drip-pricing conduct (all of which will become potential criminal offences). For more on the substance of these amendments, read our previous article.

The expanded scope of liability, and the associated increase in potential penalties, means that companies doing business in Canada will have to take into account additional significant considerations in their competition compliance efforts.

Key Aspects of Amendments

Expanding the Abuse of Dominance Provisions

The amendments will

i. **expand the type of conduct that can be caught** by the abuse of dominance provisions to include practices intended to "have an adverse effect on competition" or "a selective or discriminatory response to an actual or potential competitor," as well as conduct that negatively affects non-price considerations such as quality, choice and consumer privacy;

ii. **significantly increase potential financial penalties** from the current maximum of $10 million (for a first violation) to as much as three times the value of the benefit derived from the conduct or, if the value of such benefit cannot be reasonably determined, up to 3% of a party's annual worldwide gross revenues; and

iii. **permit private parties to apply to the Competition Tribunal for relief** against alleged abuses of dominance (currently only the Commissioner of Competition can bring enforcement action for abuse of dominance).

Expanding the Criminal Cartel Provisions

One year after royal assent, on or about June 23, 2023, the amendments will

i. **extend the Act's criminal conspiracy offence to prohibit (a) "wage-fixing" agreements** that "fix, maintain, decrease or control salaries, wages or terms and conditions of employment" **and (b) "no-poaching" agreements** to "not solicit or hire employees"unless they can be shown to be reasonably necessary for giving effect to a lawful broader or separate agreement; and

ii. **substantially increase potential fines** for violations of the criminal conspiracy provisions by removing the current cap of $25 million for fines and instead permitting fines "in the discretion of the court," with no express limit.

Expanding the Misleading Advertising Provisions

The amendments will

i. **explicitly prohibit the practice of drip pricing (under both civil and criminal provisions)** – that is, "the making of a representation of a price that is not attainable due to fixed obligatory charges or fees" imposed by a seller; and

ii. **substantially increase the penalties available** for civil misleading representations in a manner similar to abuse of dominance – that is, by raising the maximum corporate penalty to three times the value of the benefit derived by the conduct or, if the value of the benefit cannot be reasonably determined, up to 3% of the entity's annual worldwide gross revenues.

Merger Review

The amendments will

i. **add a new anti-avoidance provision** stating that the Act's pre-merger notification requirements will apply to any non-notifiable transaction that was "designed to avoid" the pre-merger notification regime; and

ii. **expand the relevant factors for assessing the competitive effects** of transactions to include non-price factors such as network effects, quality, consumer choice and consumer privacy (similar to abuse of dominance).

Implications: New Uncertainties and Challenges

The amendments introduce new areas of uncertainty and create novel compliance challenges for businesses in Canada. For example:

i. The changes to the abuse of dominance provisions upend established jurisprudence and dilute a key legal screening tool that may make it more difficult for companies to distinguish between aggressive pro-competitive conduct and anticompetitive abuses of dominance.

ii. The introduction of the new wage-fixing and no-poaching offences could affect legitimate employee-related arrangements between parties in lawful merger/acquisition agreements, such as non-solicit provisions and interim restrictions on changes in salaries, wages and/or terms and conditions of employment.

iii. It is unclear how the Bureau will determine whether a transaction was structured with the intent to avoid the Act's pre-merger notification provisions and how it will try to enforce the notification requirements in those circumstances.

iv. The introduction of novel assessment factors for the review of mergers and dominant firm conduct (such as impacts on consumer privacy) may make outcomes less predictable and could be the "thin edge of the wedge," presaging the incorporation of other non-competition factors, such as impacts on labour and economic inequality.

Compliance Tips

Here are a few key compliance suggestions to help deal with the changes and uncertainties ushered in by the amendments:

1. The heightened potential for abuse of dominance allegations means that parties with sizable market share (50%+, and potentially lower depending on the market structure) must carefully assess the likely competitive impact of their business strategies on competitors as well as on upstream and downstream markets, especially if such acts could be regarded as "selective or discriminatory" responses to competitors. A good place to start is by asking the question: "Why are we doing this?"

2. Parties engaged in merger transactions should avoid using non-solicit clauses or other interim employee-related provisions in transaction agreements that go beyond what would be considered typical (in duration and scope); alternatively, they should be prepared to explain why atypical terms are reasonable and necessary to achieve the objectives of the broader agreement.

3. Although not likely to arise frequently as an issue, merging parties should also be mindful of the new anti-avoidance provision for pre-merger notifications when structuring their transactions. One option for non-notifiable transactions could be to document a clear, credible and uncontradicted business rationale for the transaction's structure to mitigate the risk of avoidance allegations.
4. Companies should audit their human resources (HR) practices to confirm whether they are involved in wage-fixing or no-poaching arrangements with other employers, or in any discussions or exchanges of information on these topics. One area to focus on is whether the company is involved with industry organizations that may share employment-related information as part of benchmarking exercises. Companies will also have to ensure that internal compliance materials and training encompass a discussion of potential HR risks, and that HR personnel are included in compliance training.
5. Advertised prices (including by third-party or affiliate marketers) must reflect all mandatory charges to mitigate the risk of allegations of drip-pricing behaviour.
6. As always, be vigilant in ensuring that internal, ordinary course documents do not create the erroneous impression of anticompetitive intent or conduct, and that they document the pro-competitive nature of business decisions and initiatives.

Final Thoughts

The recently enacted amendments represent only a first wave of anticipated changes to the Act. The Canadian government has said that it is committed to a further "comprehensive review" of Canadian competition law, with more far-reaching reforms likely to be introduced as a result. We will keep you posted as this second stage develops, and we are available at your convenience to address questions regarding the new amendments or any other aspect of Canadian competition law.

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