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Seeing Green: Sustainability Remains of Interest to the Competition Bureau

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Canada's Competition Bureau (Bureau) hosted a summit in late September, its first in-person event in more than two years. The summit explored the intersection between competition law and environmental and sustainability objectives, indicating that this area remains a high enforcement priority for the Bureau (details on the Competition and Green Growth Summit are available [here](#)). As businesses increasingly incorporate environmental and sustainability objectives into their planning, we summarize a few key compliance points underscored in the summit discussions.

Key Points from the Green Growth Summit

In his [opening remarks](#), the Commissioner of Competition (Commissioner) noted that competition law and policy can help advance Canada's transition to a greener economy: both by fostering innovation and by helping consumers make informed choices. The Commissioner clarified that the Bureau does not intend to expand the role of competition law or change the generally applicable legal tests; its focus is rather on understanding how the green transition may affect the Bureau's work, and vice versa. Notably, however, the Bureau recently archived its [Environmental Claims](#) guide and has indicated that the standards contained in the archived guide may no longer reflect its views.

While the panels that followed covered a range of topics and viewpoints, three areas of potential Bureau enforcement were discussed at length and are worth paying particular attention to.

- **Misleading Advertising.** "Greenwashing," or the use of false or misleading advertising or claims about the relative environmental attributes of products or services for sale, has been an enforcement focus for the Bureau for many years. Businesses should ensure any environmental claims comply with the general requirements for advertising under the *Competition Act* (e.g., that the claims are supported by evidence, are accurate, and are appropriately and clearly qualified). Caution is particularly advisable in light of the amendments to the *Competition Act* passed earlier this year, which substantially increase the potential penalties for all false or misleading advertising, including false or misleading environmental claims. Notably, panelists discussed the potential for Bureau enforcement not only with respect to "green" claims made to consumers but also with respect to representations to investors in, for example, the context of ESG (environmental, social and governance) reporting, investment products and the competition for capital.
- **Competitor Collaboration.** The Commissioner suggested in his opening remarks that competition law and policy should leave room for collaboration between market participants to achieve environmental or sustainability objectives. Some panelists raised concerns that existing competition laws may chill or prohibit such collaboration, and others cautioned that any guidance or legislative changes permitting such collaboration should be carefully constructed to avoid inadvertently permitting harmful, anticompetitive collaboration that may act as a brake on disruptive innovation. Notably, a panelist from the European Union delegation indicated that guidance on this point would be forthcoming in the European Union.
- **Mergers and Abuse of Dominance.** The Commissioner also noted that one important area of intersection between competition law and policy and environmental objectives is the merger review process, and suggested that the Bureau expects environmental considerations to become a greater factor in merger review. Although not necessarily raising novel competition law issues, some panelists suggested green technologies and innovations warrant heightened scrutiny in merger review, including in respect of so-called killer acquisitions of innovative startups and other potential disruptors by incumbent firms. Similarly, industry standard-setting

by incumbents – often viewed as highly efficient and pro-competitive – may be subject to increased skepticism where environmental standards could be perceived to be hindering new entry or innovation. Following recent amendments to the *Competition Act*, private parties may now apply (with leave) for injunctive relief in respect of alleged abuses of dominance, including potentially in respect of standard-setting or other conduct alleged to erect barriers to entry and exclude competitors.

What's Next?

Looking ahead, we expect that the intersection of environmental considerations with competition law and policy will remain an area of Bureau focus. Apart from the Bureau's inherent interest in these matters, it is notable that many of the concerns expressed about the need to maintain competitive markets in an ever-greening economy parallel the Bureau's enforcement agenda in the digital economy. More specifically, the Bureau's focus for the digital economy has included ensuring that new technologies and innovators are not prevented from competing effectively in the digital economy by allegedly dominant platforms, so-called gatekeepers and other incumbents.

That said, the Bureau's current approach to enforcement in this space, including with respect to advertising and competitor collaboration, remains far from clear. The Bureau archived its Environmental Claims guide in November of last year, and the Bureau did not refer to any intentions to provide a replacement at the summit. Further, the Bureau's *Competitor Collaboration Guidelines*, released in May 2021, do not refer to potential collaboration for environmental objectives, although prior to their repeal in 2010, provisions existed in the *Competition Act* that exempted from the conspiracy offence agreements or arrangements relating only to "measures to protect the environment." Panel discussion at the summit noted the potential benefit of reintroducing legislative safe harbours for environmental collaboration and/or guidance about the Bureau's exercise of enforcement discretion in such matters. The Bureau, however, did not commit to any such steps.

While we will continue to monitor any updates to the Bureau's guidance, it is clear that environmental and sustainability claims and any potential collaboration related to environmental or sustainability objectives should comply with the *Competition Act* and the Bureau's general guidance on misleading advertising and competitor collaboration. We encourage you to contact counsel prior to embarking on any new campaigns or collaborations.

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