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Proposed Amendment to Canada's Competition Act to Prohibit "Unjustified" Cross-Border Price Discrimination

Mark Katz (Davies Ward Phillips & Vineberg LLP, Canada) · Wednesday, February 12th, 2014

On February 11, 2014, the Canadian government included in its federal budget a proposed amendment to the Competition Act to prohibit unjustified price discrimination to reduce the gap between consumer prices in Canada and the United States. The Minister of Finance made clear that the Commissioner of Competition, the head of Canada's Competition Bureau, would have the power to enforce the new rules. More details are to be provided in the coming months.

If enacted, this amendment could introduce considerable uncertainty and risk for multinational suppliers or retailers that sell products in Canada. For example, such firms may now 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 would likely 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 this requirement especially daunting. (It is not yet clear whether the legislation would apply only to price discrimination between Canada and the United States.)

The 2014 federal budget in which the amendment is announced refers to companies with market power charging higher prices in Canada that are not reflective of legitimate higher costs. Accordingly, it is possible that the new legislation may apply only to suppliers that possess market power.

In any event, this amendment signals a potentially dramatic shift in Canadian competition policy to broaden the types of conduct that are considered to be anti-competitive. The Competition Act is generally focused on conduct that harms the competitive process and does not purport to regulate prices.

This point was made by officials at the Competition Bureau who testified in 2012 before a committee of the Canadian Senate that was examining an alleged "Canada-USA Price Gap". As highlighted in the committee's final report, the officials underscored 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 proposed amendment also appears 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.

Next Steps

An assessment of the full scope and implications of the proposed amendment to the Competition Act will have to await release of the actual proposed 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 provide detailed cost justification of cross-border differentials resulting in higher prices in Canada.

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