

Kluwer Competition Law Blog

Key Competition and Foreign Investment Review Trends for Canada in 2015 (co-written with Charles Tingley)

Mark Katz (Davies Ward Phillips & Vineberg LLP, Canada) · Friday, January 30th, 2015

Three key themes will shape Canadian competition and foreign investment law in 2015. Specifically, we see developments in these areas unfolding in a regulatory environment in which administration and enforcement is increasingly:

- consumer-facing: The Competition Bureau's focus on enforcement in consumer-facing industries will continue into 2015, with policy emphases and recent or open dossiers related to health and pharmaceuticals, premium texting, grocery retailing, digital taxi dispatch services, iPhones and deceptive marketing practices in the digital environment, among others.
- influenced by electoral politics: As Canadians prepare to head to the polls later this year, federal politicians are calibrating policies and legislative agendas accordingly, including recently proposed amendments to the Act that will fall to the Competition Bureau to enforce in 2015 and beyond. Foreign investment reviews under the ICA will, in particular, be influenced by the election cycle, tending to heighten political sensitivities and reduce predictability in the review process.
- international in scope and consequence: Cooperation between competition agencies in different countries continues to reach new heights, requiring vigilance on the part of investigated parties regarding the treatment of their confidential information and extraterritorial access by competition enforcers to evidence out of jurisdiction.

Focus on Consumer-Friendly Industries

The Competition Bureau has made a point in the last several years of focussing its enforcement and advocacy efforts on consumer-facing industries, where its actions are immediately discernible and relevant to the Canadian public: real estate, airlines, retail gasoline, cell phones, water heaters, digital taxi dispatch services, and even hockey helmets, to name a few.

This trend will continue in 2015 with the Bureau's pursuit of open dossiers related to the following matters:

- real estate agents (an abuse of dominance application against the largest association of realtors in Toronto);
- premium texting (proceedings against leading telecom companies and a trade association regarding pricing representations made by third party providers of digital content);
- grocery retailing (an inquiry into the pricing practices of one of Canada's largest grocery retailers as they affect suppliers); and

- iPhones (an inquiry into potentially anti-competitive clauses in agreements between Apple Canada Inc. and Canadian wireless carriers).

In addition, 2015 will see the Bureau:

- help enforce Canada's Anti-Spam Legislation ("CASL"), much of which came into force on July 1, 2014;
- continue advocacy efforts on telecommunications and wireless issues through interventions and submissions to Canada's telecom regulator (the "CRTC") – the Bureau made several submissions to the CRTC in 2014 strongly supporting targeted regulatory intervention in the wholesale mobile wireless industry to eliminate incentives for incumbents to prevent entrants from becoming fully effective competitors;
- complete a market study into the different functional levels of the retail beer industries in Ontario and Quebec;
- refine its approach to important issues affecting competition between branded and generic pharmaceutical companies, such as "product hopping" and "reverse payments"; and
- continue its aggressive enforcement against deceptive marketing practices such as misleading representations (particularly on mobile devices), inadequate disclaimers, performance claims, ordinary selling prices, misleading testimonials (e.g., "astroturfing"), green claims, and inadequate disclosure of charges (e.g., "drip-pricing").

As discussed in the next section, the Bureau's focus on consumer-facing industries dovetails with the current federal government's pre-election agenda of portraying itself as the champion of ordinary Canadians. As such, businesses involved in these industries should be particularly sensitive to the potential for heightened scrutiny and thus the need to take appropriate steps to ensure competition compliance.

Impact of Federal Election

As Canadians prepare to head to the polls later this year, federal politicians are calibrating policies and legislative agendas accordingly. Although the Bureau is an independent enforcement agency, it is not immune to the federal government's pre-election policy agenda. Indeed, the Bureau's 2014-2015 annual plan identifies one of the Bureau's four stated priorities as being to "align with and deliver on Government of Canada priorities".

The most obvious example of the impact of politics on enforcement is the federal government's recent initiative to use the Competition Act to address "unjustified" cross-border price discrimination and reduce the gap between consumer prices in Canada and the United States. Pursuant to draft legislation tabled in the Fall of 2014 (Bill C-49), the Bureau would be granted new authority to investigate and publicly report on the extent and reasons for Canada/U.S. cross-border price differences but would not be authorized to apply to prohibit or impose penalties for such differential pricing. Significant questions remain around the price-gap proposals in Bill C-49, including in relation to the effectiveness of a non-remedial regime in addressing country pricing, the potential complexities involved in analysing cross-border price differences and how the Bureau will select the products, suppliers and levels of distribution to investigate under these new powers. Despite these and other questions, the federal government has focused significant attention on Bill C-49 and appears strongly committed to its passage in 2015.

We also expect to see a higher level of political sensitivity in 2015 around proposed transactions

subject to government review and approval under the Investment Canada Act (“ICA”). With parties well into campaign mode, transactions subject to ICA review are likely to face closer scrutiny and consequently longer and/or less predictable review timeframes and increased pressure to deliver on “net benefit” undertakings with political value. This is particularly true of reviewable investments that could have a significant impact on Canadian employment, involve state-owned enterprise (“SOE”) investors, and/or raise possible matters of national security for Canada or its close allies. The election cycle phenomenon compounds what in our experience is already an increased level of Cabinet and prime ministerial involvement and control over ICA reviews in sensitive cases, which has made the regulatory approval calculus more challenging for foreign investors.

International Cooperation

The globalization of business conduct has resulted in an associated increase in cooperation between competition authorities. The Competition Bureau is one of the leaders in the trend towards increased international cooperation, and we expect the Bureau to continue to strengthen its relations with foreign counterparts in 2015. In 2014, this commitment to international cooperation was reflected in, among other developments, the Competition Bureau’s signing of a memorandum of understanding with the Competition Commission of India to facilitate communication and collaboration between the agencies, meetings with Chinese competition authorities to advance inter-agency cooperation, and the joint issuance with U.S. federal antitrust agencies of a best practices document outlining how the Bureau and U.S. DOJ/FTC will cooperate with one another in cross-border merger investigations.

One recent example demonstrates just how extensive agency interaction and coordination can be in practice. In July 2014, the U.S. District Court of Maryland ordered a company located in the United States to produce documents to the U.S. FTC on behalf of the Bureau in connection with the ongoing proceedings against wireless telecommunications carriers and their industry association in respect of alleged deceptive marketing of premium text messaging services. The company was required to produce the documents in accordance with U.S. Civil Code provisions permitting U.S. courts to assist litigants before foreign tribunals. This is the first time a U.S. court has granted this kind of investigative assistance to obtain information for the Bureau. The decision to seek information in this way signals that the Bureau is prepared to bypass normal evidence gathering methods, such as established mutual legal assistance frameworks for inter-agency cooperation and direct evidence gathering mechanisms, including discovery in civil proceedings, that involve oversight by Canadian courts and standing for investigated parties. Established evidence gathering powers may also expand if proposed amendments in Bill C-49 (discussed above) are passed that would broaden the Bureau’s ability to directly compel the production of information from foreign affiliates of entities operating in Canada.

In another instance of international coordination, 2014 witnessed the first ever extradition of an individual from Canada to face antitrust charges in the United States. The individual in this case was charged with, among other things, engaging in bid-rigging in connection with an environmental cleanup project in New Jersey.

These developments illustrate the ever-increasing ability of both the Bureau and its counterpart agencies abroad to reach beyond domestic borders in the administration and enforcement of competition laws. They also underscore the need for parties to be aware of the potential international repercussions of their conduct.

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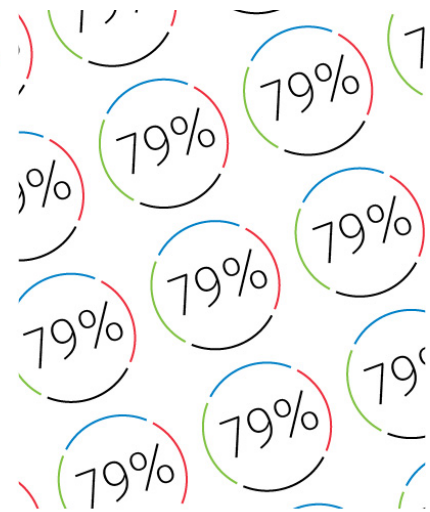
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