Kluwer Competition Law Blog

CANADA GRAPPLES WITH PRICING ISSUES

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Introduction

With the exception of hard-core cartel conduct such as price-fixing and bid-rigging, Canadian competition law has de-emphasized in recent years the importance of pricing conduct as a source of anti-competitive harm. Thus, although the Canadian Competition Act historically contained a variety of criminal offences targeted at pricing conduct – price discrimination, predatory pricing, geographic price discrimination, promotional allowances, and price maintenance – it was only the latter offence that attracted any material enforcement activity. The other pricing offences, although formally "on the books", were rarely prosecuted, if at all.

It is not surprising, therefore, that a series of amendments to the Competition Act in 2009 included provisions repealing these pricing offences in their entirety. The only element of pricing conduct to remain subject to an express prohibition was price maintenance, which was transformed from a per se criminal offence into a civil "reviewable practice". However, the level of enforcement has not increased appreciably even under this new civil regime, with Canada's competition authority, the Competition Bureau, having brought only one price maintenance case since 2009.

In the last few months, though, pricing issues have again achieved some prominence in Canada.

First, after a wait of five years, the Competition Bureau has finally published a draft of its enforcement guidelines on the civil price maintenance provision. These guidelines are intended to answer some of the questions that have arisen since the provision was enacted in 2009.

Second, and more importantly, the Canadian government has announced its intention to incorporate into the Competition Act a new civil prohibition against "unjustified" cross-border price discrimination. The intention is to authorize the Competition Bureau to apply for orders against companies with cross-border operations that (i) charge higher prices for products in Canada than they do in the United States and (ii) cannot justify this price discrepancy on the basis of higher operating costs in Canada. In effect, this will re-introduce geographic price discrimination as a prohibited practice in Canada, albeit in a more limited form than was the case under the former criminal offence.

These two developments are discussed in the remainder of this article below.

Price Maintenance Guidelines

The Competition Act's civil price maintenance provision (section 76) authorizes the Competition Tribunal to issue an order in any of three scenarios:

• where a supplier, by agreement, threat, promise or any like means, directly or indirectly influences upward or discourages the reduction of the price at which the supplier's customer, or any other person to whom the product comes for resale, supplies or offers to supply or advertises a product within Canada;
• where a supplier discriminates against any person because of the low pricing policy of that person; or
• where a person (e.g., a retailer) has, by agreement, threat, promise or like means, induced a supplier, as a condition of doing business, to refuse to supply another person (e.g., another retailer) because of the low pricing policy of that other person;
provided that the conduct in question has had, is having, or is likely to have, an "adverse effect on competition in the market".

In other words, contrary to the price maintenance offence which was repealed in 2009, and which imposed liability on a per se basis, the current civil provision requires evidence of market impact as the basis for an order – i.e., an adverse effect on competition.

The switch from a per se criminal offence to effectively a "rule of reason" approach was designed to give suppliers more flexibility to impose resale pricing restrictions that previously would have been strictly prohibited, such as minimum advertised pricing (MAP) policies and minimum retail pricing (MRP) policies. This shift is consistent with much current economic and legal thinking, which recognizes that price maintenance (and other types of previously prohibited pricing conduct) can be pro-competitive and thus should not be automatically proscribed.

As noted, the Competition Bureau has only brought one application under the price maintenance provision since 2009. That case, which was dismissed by the Competition Tribunal, involved an unusual context relating to the imposition of restrictions on retailers by credit card networks. As such, there has been little or no guidance on what we may term "garden variety" forms of resale price maintenance covered by section 76.

The Competition Bureau's draft Price Enforcement Guidelines ("Draft Guidelines"), issued in March 2014, attempt to address this gap by outlining the Bureau's enforcement approach to the Competition Act's price maintenance provision.

The Draft Guidelines provide several helpful clarifications. For example, they state that:

• a simple increase in a wholesale price will not be regarded as price maintenance even though the effect may be to increase the retail price;
• non-pricing conduct may constitute an "indirect" influence on a retailer's price, for example, the terms and conditions on which the supplier provides a product to a retailer;
• with respect to the refusal to supply aspect of section 76, the Bureau will consider whether the retailer's "low pricing policy" was "a factor informing" the supplier's conduct, i.e., it need not be the only or even the primary reason for the conduct.

Most importantly, the Draft Guidelines set out the Bureau's view on when price maintenance is likely to result in an "adverse effect on competition".

According to the Draft Guidelines, the Bureau will be concerned with price maintenance conduct

only where it is likely to create, preserve or enhance “market power” – namely, the ability to behave relatively independently of the market.

The Bureau’s general approach is that a market share of less than 35% will typically not prompt further examination of whether a firm possesses market power. However, the Draft Guidelines also point out that a firm with a market share of less than 35% could have a degree of unilateral market power in some instances, depending on the characteristics of the relevant market.

The Draft Guidelines then identify the circumstances in which price maintenance may adversely affect competition in a market and serve to create, preserve or enhance market power:

• Inhibiting competition between suppliers: Price maintenance may be used by suppliers to facilitate less vigorous price competition among them, or to help police a price-fixing arrangement among them.
• Inhibiting competition between retailers: One or more retailers may compel a supplier to adopt price maintenance to facilitate less vigorous price competition among them, or to help police a price-fixing arrangement among them.
• Supplier exclusion: An incumbent supplier may use price maintenance to guarantee margins for retailers that would discourage them from carrying the products of existing or new entrant competitors of the supplier. To the extent that this results in the foreclosure of downstream distribution channels to competing suppliers, it may limit or reduce the ability of such suppliers to discipline the supplier’s wholesale pricing, enabling the supplier to charge a price that is higher than could be sustained absent such conduct.
• Retailer exclusion: A retailer may compel a supplier to engage in price maintenance with a view to excluding competition to the retailer from competing discount or more efficient retailers. (In a recent merger case, the Bureau required the purchaser to refrain from this type of conduct in the context of a larger package of remedies, including divestitures.)

The Draft Guidelines also refer to “price parity agreements” as a possible form of price maintenance that could give rise to concern. Price parity agreements include commitments by retailers to suppliers to charge the same price as other retailers charge for the supplier’s products, or to charge the same price as the retailer charges for products supplied by competitors to the supplier. In recent years, parity agreements have come under increased scrutiny by various competition agencies because of concerns that they may reduce price competition between retailers and/or suppliers. The reference to price parity agreements in the Draft Guidelines possibly signals greater scrutiny by the Bureau of these types of arrangements and other less traditional forms of price maintenance.

The notable aspect of the various scenarios identified above, including price parity agreements, is that they all involve conduct where price maintenance practices are being used to inhibit or exclude competition between competitors. None of them really captures the classic unilateral price maintenance scenario in which a supplier is solely interested in controlling the price at which its products are sold at retail. In other words, the Draft Guidelines imply that, so long as price maintenance policies are not part of a broader anti-competitive scheme, they are unlikely to attract Competition Bureau scrutiny. It will be interesting to see if this relatively “hands off” attitude survives the comment/consultation process, which ended on June 2, 2014.

Country Pricing

On February 11, 2014, the Canadian government included in its federal budget a proposal to address what the government (and many Canadians) regard as an "unjustified" gap between U.S. and Canadian pricing for the same goods. Although precise details are still unclear, the gist of the proposal is that the Competition Bureau will have the power to enforce new rules (whatever they may be) against companies with "market power" that charge higher prices in Canada than in the U.S. and which are not reflective of legitimate higher costs.

This "country pricing" proposal is the government's response to concerns about the Canada/U.S. "price gap" that have grown in the last several years. Most notably, the Canadian Senate conducted hearings on the matter which culminated in a report that was issued in February 2013. The Senate reached the tentative conclusion that "[T]he segmentation of the Canadian and U.S. markets reduces competition and allows some manufacturers – even some Canadian ones – to practice country pricing between the Canadian and the American markets, which may contribute to the price discrepancies between the two countries."

The Senate report offered the following recommendations to address the Canada-U.S. price gap: (1) a comprehensive review of Canada's tariffs; (2) continuing efforts to harmonize product standards without compromising safety; (3) increasing the monetary threshold for low-value goods to be exempt from custom duties; and (4) examining a reduction of the permissible mark-up for Canadian exclusive book distributors of American books.

The cross-border pricing issue was next raised in the Canadian government's October 2013 "Speech from the Throne" which set out the government's agenda for the 2014 legislative year. Without getting into specifics, the government stated that Canadian consumers "should not be charged more in Canada for identical goods that sell for less in the United States" and committed to take "further action to end geographic price discrimination against Canadians."

At the time, the scuttlebutt surrounding the Speech from the Throne was that the government was examining several legislative options, including possible amendments to the Competition Act. This has now been confirmed with the release of the 2014 Budget.

An assessment of the full scope and implications of the Canadian government's "country pricing" proposal will have to await release of the actual draft legislation. It had been thought that the draft legislation would be introduced in May 2014, but that did not occur.

That said, all indications remain that the Canadian government intends to move forward with this proposal and to require at least certain multinational companies to justify cross-border differentials resulting in higher prices in Canada. If so, this would reverse direction from the 2009 amendments to the Competition Act referred to above, which repealed the then-extant price discrimination offences.

Interestingly, if the "country pricing" proposal is adopted, one by-product may be to affect the relative flexibility now afforded suppliers under Canada's price maintenance provision.

For example, if a supplier mandates that its retail customers in Canada price at a level which is higher than in the United States, it could conceivably be investigated for engaging in unjustified cross-border price discrimination, even though its unilateral pricing program may not raise issues under the price maintenance provision.

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