Main Developments in Competition Law and Policy 2020: Canada

Kluwer Competition Law Blog
January 6, 2021

Jim Dinning, Teraleigh Stevenson (Davies Ward Phillips & Vineberg LLP) and Mark Katz (Davies Ward Phillips & Vineberg LLP, Canada)

Please refer to this post as: Jim Dinning, Teraleigh Stevenson and Mark Katz, 'Main Developments in Competition Law and Policy 2020: Canada', Kluwer Competition Law Blog, January 6 2021, http://competitionlawblog.kluwercompetitionlaw.com/2021/01/06/main-developments-in-competition-law-and-policy-2020-canada/

In this article, we highlight the five most important developments and trends in Canadian competition law in 2020 and discuss what to watch for in 2021.

1. Impact of COVID-19

As in other jurisdictions, the enforcement of competition law in Canada last year was affected by the widespread social, health, and economic effects of the COVID-19 pandemic. The Competition Bureau (the "Bureau") issued several statements during the course of 2020 on how its enforcement policies and processes would be affected by the pandemic. We expect many of these statements to remain relevant well into 2021.

In April 2020, for example, the Bureau released a statement on competitor collaborations which clarified that "in circumstances where there is a clear imperative for companies to be collaborating in the short-term to respond to the [COVID-19] crisis, where those collaborations are undertaken and executed in good faith and do not go further than what is needed, [the Bureau] will generally refrain from exercising scrutiny". The Bureau's statement also indicated that such collaborations must not be motivated by a desire to achieve a competitive advantage and that the Bureau would have "zero tolerance" for attempts to abuse its flexibility as "cover for unnecessary conduct that would violate the Competition Act". While this guidance suggests that competitors will be granted some leeway for collaborative responses to the effects of COVID-19, companies should still proceed cautiously. Where firms desire greater certainty about the Bureau's likely treatment of a proposed competitor collaboration, the Bureau has indicated that it is willing to offer an informal but rapid assessment.

The Bureau followed up with a second statement in May 2020, where it announced that it was actively monitoring misleading representations in the marketplace, and taking action where claims would give Canadians the false impression that products or services could treat or protect against COVID-19. At the time of the statement, the Bureau had issued several direct compliance warnings to businesses and cautioned all businesses to consider the severe financial penalties and jail time they could face if they failed to comply with the law. In his recent remarks to the House of Commons Standing Committee on Industry, Science and Technology (the "Industry Committee") in December 2020, Canada's Commissioner of Competition, Matthew Boswell, noted that in response to the Bureau's warnings, most of the recipient businesses had taken corrective action to remove products and cease their misleading claims. We expect the Bureau to continue its vigilance in this area in 2021.

The Bureau has also discussed the impact of the pandemic on the exercise of its merger review powers under the Competition Act. In March 2020, the Bureau issued a cautionary statement that, due to pandemic restrictions, the Bureau's staff might not be able to meet the Bureau's non-binding, service standard timelines for merger reviews. In practice, we have not yet seen a material impact on merger review timelines. However, companies should continue to be aware of the possibility of lengthier reviews when assessing and planning merger transactions in 2021, especially if governments continue to impose lockdowns that could impact the Bureau's ability to obtain information from market participants in a timely manner.

The economic landscape created by the COVID-19 pandemic and associated restrictions have also raised the question of whether the Bureau will give greater consideration to "failing firm" arguments in its merger assessments. The Competition Act expressly provides that in assessing a merger, it is relevant to consider "whether the business or a part of the business, of a party to the merger or proposed merger, has failed or is likely to fail". If this threshold is met, the loss of actual or future competition from the failing firm is not attributed to the proposed merger. The Bureau has interpreted this failing firm "defense" quite strictly in practice, taking the view that the purchasing party must demonstrate that the target is likely to exit the market absent the acquisition, whether due to insolvency, bankruptcy, or receivership. This is a high standard to meet, and the failing firm defense has only been successfully invoked in relatively few transactions. One very recent example is the Bureau's clearance in April 2020 of the merger of Total Metal Recovery Inc. ("TMR") and American Iron & Metal Company Inc. ("AIM"), the two largest scrap metal processors in the province of Quebec. In that case, the Bureau concluded that TMR was a failing firm and that its assets were likely to exit the market in the absence of the merger.

Given the significant economic impact of COVID-19 restrictions and the interest in preventing Canadian jobs from permanently disappearing, there have been calls from market observers to expand the scope of the failing firm defence for target firms adversely affected by the pandemic. Although the Bureau did not make express reference to the pandemic when it announced its clearance of the TMR/AIM transaction, some observers pointed to this example as the hopeful sign of relaxation in the Bureau's position. However, in September 2020, the Deputy Commissioner in charge of the Bureau's Mergers branch published an article in which she wrote that the Bureau did not intend to relax its standards to accommodate firms weakened by pandemic restrictions. Accordingly, even though we expect that the failing firm defence will be raised more frequently in the year ahead, merging parties thinking of relying on this argument should not expect an easier path forward simply due to COVID-19.

Finally, and perhaps not surprisingly, the pandemic had a material impact on the number of merger transactions reviewed by the Bureau in 2020. Based on Bureau statistics, a robust 13 percent year-over-year increase in merger reviews in the first quarter of 2020 was followed by year-over-year declines of 55 percent and 40 percent for the second and third quarters, respectively. Things do not seem to have improved in the fourth quarter of 2020 either, as merger reviews in October and November declined by 33 percent compared to the previous year. As such, a key development to watch for in 2021 is whether this trend will be reversed or whether the Bureau will have to find something else for its merger review officers to do in the coming year.

2. Focus on the Digital Economy

Since his appointment in 2019, Commissioner Boswell has repeatedly stated that the digital economy is an enforcement priority for the Bureau. The Commissioner has explained that this focus is a natural by-product of the "explosive growth" in the digital sector, which "means that digital is more important to our economy than many of the more traditional sectors".

The Bureau's "Strategic Vision for 2020-2024" and "2020-2021 Annual Plan: Protecting Competition in Uncertain Times" confirm that enforcement in the digital economy will remain a priority in the coming year. The Strategic Vision set out the Bureau's goal of being "a world-leading competition agency, one that is at the forefront of the digital economy and champions a culture of competition for Canada". To achieve this goal, the Bureau committed to (i) protecting Canadians through enforcement action; (ii) promoting competition in Canada; and (iii) investing resources to ensure it keeps pace with the digital economy. The Annual Plan echoed the digital-focus of the Strategic Vision and set out concrete steps for each of its three objectives. For example, the Bureau committed to furthering its enforcement action by focusing on key economic sectors (including digital services, online marketing, and financial services) and continuing to advance early detection technologies. With respect to promoting competition, the Bureau committed to continued engagement with policymakers, particularly in the health and telecommunications sectors, and to maintaining its leadership roles internationally.

Over the past year, the Bureau reached a consent agreement with Facebook and initiated an investigation into Amazon's business practices with a focus on potential abuse of dominance. While these cases have not reached the scale of investigations by the Bureau's counterparts in the United States and the European Union, who have recently commenced high-profile cases against Facebook and Amazon, we expect the Bureau to continue its focus on digital economy issues in the coming year.

3. Interface Between Competition Law and Privacy Law

As we move into 2021, we expect the Bureau to continue its efforts to expand the ambit of the Competition Act into areas affecting privacy concerns. In particular, the Bureau will continue to investigate whether the failure of companies to protect the privacy interests of consumers also constitutes a violation of the Competition Act prohibition against misleading representations.

This effort was best exemplified in 2020 by the Bureau's consent agreement with Facebook. The Bureau alleged that Facebook had shared users' information from its 'Messenger' application in a manner that was inconsistent with the representations it made in its privacy policies. In the consent agreement, Facebook agreed to pay an administrative monetary penalty of $9 million and to cease misrepresentations regarding its protection of users' privacy.

There had been concerns that the Bureau's forays into privacy law might result in a bureaucratic "turf war" with the federal Office of the Privacy Commissioner, which has primary responsibility for enforcing Canada's national privacy legislation. However, efforts appear to be underway to address these concerns and to promote cooperation between the two authorities. In November 2020, for example, the Bureau, along with the Office of the Privacy Commissioner and the Canadian Radio-television and Telecommunications Commission, issued letters to 36 companies raising concerns about their advertising practices and treatment of personal information with respect to mobile applications. Moreover, draft federal privacy legislation tabled in November 2020 would, if enacted, increase the ability of the Commissioner of Competition and the Privacy Commissioner to coordinate with each other by sharing information about their activities. Businesses operating in Canada should therefore be aware of the increasing risk that their privacy policies may be scrutinized by both the Commissioner of Competition and the Privacy Commissioner.

4. Revised Approach to Competitor Collaborations

In addition to its guidance on competitor collaborations in the context of COVID-19, the Bureau published draft revisions to its "Competitor Collaboration Guidelines" in July 2020 and invited public comments on the proposed changes. These proposed revisions would mark the first update to the guidelines since they were issued in 2009. The public consultation ended in September 2020, and we expect to see a final version of the revised guidelines in the coming year.

While the draft revised guidelines did not signal any major changes in the Bureau's enforcement approach to competitor collaborations, they did highlight a few issues of interest. For example, in the current version of the guidelines, the Bureau suggests that it would review non-compete clauses in merger agreements under the Competition Act's civil provisions rather than as possible criminal conspiracies. However, the draft revised guidelines now open the possibility that the Bureau could review non-compete clauses in purchase and sale transactions under the Competition Act's criminal cartel provisions in "rare instances". For example, the draft revised guidelines suggest a non-compete clause could be subject to scrutiny as a potential criminal offence where it "may amount to a market allocation agreement". Unfortunately, the draft revised guidelines do not provide any further examples of non-compete clauses that could be subject to review under the Competition Act's criminal offence provisions, nor do they provide details on the Bureau's likely analysis of such clauses.

In a similar vein, the draft revised guidelines now caution that the Bureau may investigate a merger under the Competition Act's criminal conspiracy offence if the merging parties are competitors and enter into an associated agreement that "goes beyond the acquisition, amalgamation or combination agreement, whether within or outside said agreement". This statement appears to stem from a recent Bureau investigation into a transaction where the Bureau alleged that the parties had also agreed to close down competitive, overlapping operations once the merger transaction was completed.

The draft revised guidelines also contain a more in-depth discussion of "hub-and-spoke" conspiracies. The hub-and-spoke conspiracy is an established doctrine in U.S. antitrust law and refers to agreements between horizontal competitors facilitated by a non-competitor (usually a customer or supplier of the colluding parties). In that regard, the current guidelines note that "[w]here an agreement involves competing and non-competing parties, the fact that some parties are not competitors does not insulate the competing parties from prosecution under section 45". The draft revised guidelines now go beyond that to state more directly that "a wholesaler who facilitates a price-fixing conspiracy among its retail clients may be a party to the conspiracy even if it does not compete in the retail market". Again, this appears to reflect the Bureau's experience in several recent cases where it alleged that parties at one level of the supply chain had facilitated a conspiracy among parties at another.

Finally, although not covered in the current draft of the revised guidelines, the Bureau has since indicated that it intends to include a discussion of whether the Competition Act's criminal provisions apply to "buy-side agreements" between competitors in the final version of the revised guidelines. The issue has arisen particularly in the context of agreements between competitors not to "poach" employees from each other, and agreements affecting wages and terms of employment. The Bureau issued a statement on this topic on November 27, 2020, which presumably foreshadows the position that is likely to be adopted in the finalized guidelines. In that statement, the Bureau says that while it views such agreements with concern, the particular language of the criminal cartel offence limits its application to agreements between competitors affecting the "supply" of products and services, and not agreements affecting the "purchase" of products and services, such as services from employees. To the extent that buy-side agreements raise competition issues, the Bureau will investigate them under the Competition Act's civil provision prohibiting anticompetitive agreements between competitors. Unlike the criminal cartel offence, this civil provision does not permit the imposition of sanctions such as fines and imprisonment. Rather, remedies are largely limited to orders prohibiting parties from engaging further in offending conduct.

The Bureau's position on buy-side agreements stands in contrast to the position of the Antitrust Division of the US Department of Justice, which recently brought criminal proceedings against a party for allegedly participating in a conspiracy to lower the rates paid to physical therapists in the State of Texas. Nonetheless, companies doing business in Canada are cautioned that while they may not be subject to criminal sanctions for this type of conduct, the civil consequences for doing so can still be very serious. Therefore, care should be taken whenever a party is considering participating in an agreement with competitors that involves coordination on buy-side matters, including one affecting employees.

5. Possible Amendments to the *Competition Act*

In May 2019, the Minister of Innovation, Science and Industry published an open letter to the newly appointed Commissioner Boswell, inviting him to consider whether the Competition Act should be amended in order to increase its impact and effectiveness. The Commissioner has been considering this question since then and used an appearance before the House of Commons Industry Committee on December 3, 2020, to provide a glimpse of the Bureau's possible shopping list for reform.

In response to the Committee's questions, the Commissioner suggested that current criminal financial penalties are inadequate and would have more of a deterrent effect if scaled to the size of the offending enterprise, in line with the approach of competition authorities in other jurisdictions. The Commissioner also suggested that the conduct for which civil "administrative monetary penalties" are currently available could be expanded (these penalties are now limited to cases of abuse of dominance). Finally, the Commissioner made repeated reference to the fact that the Bureau does not have authority under the Competition Act to conduct meaningful "market studies" or to impose "codes of conduct" on industries. He compared this situation unfavourably to the powers available to competition authorities in other jurisdictions (for example, in the UK and Australia), where codes of conduct governing relations between grocery retailers and their suppliers have been established.

Some of the Commissioner's "wish list" items are longstanding – for example, the Bureau's desire to have expanded powers to conduct market studies. Others are more recent, including the proposed increase or expansion of criminal and civil financial penalties.

To some degree, all of the proposals outlined above are driven by the Bureau's focus on possible anticompetitive conduct in the digital economy, and its concern that it lacks sufficient powers to investigate these allegations and impose meaningful sanctions. Interestingly, the Commissioner did not address the anti-competitive effects of acquisitions of start-ups and nascent competitors by large market incumbents, an issue that has garnered recent global attention in the digital space. For example, in response to concerns that Facebook's acquisition of WhatsApp nearly avoided merger control review in the EU, Germany introduced amendments to its merger notification regime to capture certain acquisitions of nascent companies. In the United States, both the Federal Trade Commission and 48 state attorneys general have announced cases alleging Facebook engaged in illegal behaviour in its acquisitions of WhatsApp and Instagram. Given these actions by its counterparts in other jurisdictions, it will be interesting to see if the Bureau will seek to broaden Canadian merger notification requirements or otherwise amend the Competition Act's merger provisions to better capture acquisitions of nascent companies by incumbents.

There has been no formal indication to date of any intention by the Bureau or the Canadian government to introduce amendments to the Competition Act in 2021. However, the last time major amendments were enacted to the Competition Act (in 2009), they were proposed with no advance warning and were adopted with no meaningful opportunity for discussion or input from stakeholders. As such, this is an issue that bears continued attention in the coming year.

Conclusion

As with all aspects of life in 2020, the COVID-19 pandemic dominated the narrative in Canadian competition law last year. The Bureau has also repeatedly stated its view that strong competition law enforcement is essential to post-pandemic economic recovery. As such, we expect the Bureau to maintain an active approach to policy and enforcement throughout 2021, as the COVID-19 pandemic hopefully runs its course. This will include a continued focus on enforcement in the digital economy, and continued expansion into the area of privacy protection. It is also possible that the Bureau may seize the opportunity afforded by the pandemic and push forward with reforms to the Competition Act, which will no doubt be controversial if they involve expanded powers to conduct broad market inquiries and impose codes of conduct on industries.