Kluwer Competition Law Blog

Canada Proposes Significant Amendments to its Competition Law

Jim Dinning, Mark Katz (Davies Ward Phillips & Vineberg LLP, Canada) and Joshua Hollenberg (Davies Ward Phillips & Vineberg LLP) · Tuesday, May 3rd, 2022

In February 2022, Canada's Minister of Innovation, Science and Economic Development announced that the Canadian government was evaluating ways to improve the operation of Canada's *Competition Act* (Act). The Minister said that changes would be made in multiple stages, with some initial amendments to be proposed in the following months that would have "an immediate and tangible impact for consumers and businesses", with a "more comprehensive modernization" of the law to follow.

On April 26, 2022, the Canadian government followed through on this promise by introducing legislation to implement the 2022 federal budget (Bill) which also contains within its provisions proposed amendments to the Act. Although the government has described these proposed amendments as merely " a preliminary step in modernizing" Canadian competition law, they in fact go well beyond that. If enacted, the proposed amendments would entail significant substantive changes to the Act's abuse of dominance provisions, one of the core aspects of the Act. The Bill also proposes to expand the Act's criminal conspiracy offence by criminalizing wage-fixing and no-poach agreements between employers and by removing the (already high) cap on potential criminal fines for prohibited conspiracies. The Bill would also significantly increase the potential penalties for abuse of dominance and misleading representations.

Despite the significance of the proposed amendments, they were not developed through public consultation with stakeholders – a process that has been used before and has been requested again by members of the Canadian competition law bar. Instead, the government released the proposed amendments for the first time in the Bill. Moreover, the budgetary legislative process ensures that the amendments are likely to be enacted more or less as is, with little or no meaningful input from stakeholders.

Below is a summary of the Bill's key proposed amendments.

Abuse of Dominance

(i) Expanded Scope

The Act's abuse of dominance provisions authorize Canada's Competition Bureau (Bureau) to

apply to the Competition Tribunal (Tribunal) for orders prohibiting dominant firms from engaging in anticompetitive acts when that practice has the effect of preventing or lessening competition substantially in a market. The Tribunal also has the power to impose "administrative monetary penalties", i.e., fines. Only the Bureau may bring abuse of dominance applications to the Tribunal; private applications are not permitted (in contrast to the provisions relating to other types of conduct, such as exclusive dealing). Jurisprudence has established that an "anticompetitive act" is one that is intended to have a predatory, exclusionary or disciplinary negative effect on a competitor in a market that the dominant firm substantially or completely controls, although the competitor and dominant entity need not necessarily be in the same market.

The changes to the abuse of dominance provisions are the centerpiece of the Bill's proposed amendments to the Act. This is not surprising as the Bureau has argued that it needs an enhanced arsenal to rein in the allegedly anticompetitive conduct of dominant Big Tech firms.

Most significantly, the Bill expands the definition of anticompetitive act broadly to mean "any act intended to have a predatory, exclusionary or disciplinary negative effect on a competitor, *or to have an adverse effect on competition* (emphasis added)".

This amendment, which dilutes a key screening tool for distinguishing between aggressive pro-competitive conduct and an abuse of dominance, will upend established jurisprudence, could significantly expand the scope of the provision and may introduce significant uncertainty to one of the cornerstone provisions of the Act.

The Bill further expands the limits of what constitutes abuse of dominance by directing that the Tribunal also consider the following additional factors, which are especially relevant for Big Tech:

- the effect of the practice on barriers to entry in the market, including network effects;
- the effect of the practice on price or non-price competition, including quality, choice or consumer privacy;
- the nature and extent of change and innovation in a relevant market; and
- any other factor that is relevant to competition in the market that is or would be affected by the practice.

The effect of these changes is to explicitly include non-price factors (such as quality and choice) as relevant considerations and also to give legislative support to the Bureau's efforts to expand its purview into privacy concerns. This expanded set of factors will introduce significant uncertainty for the conduct of firms that could potentially be considered dominant (or jointly dominant) in Canada.

Finally, the proposed amendments would also expand the list of anti-competitive acts in the abuse of dominance provisions to include "a selective or discriminatory response to an actual or potential competitor for the purpose of impeding or preventing the competitor's entry into, or expansion in, a market or eliminating the competitor from a market". This also seems to be directed at Big Tech and the allegation that these companies exploit their market dominance to deter nascent competition.

(ii) Significant Increase in Penalties

The Bill would also increase the maximum administrative monetary penalties that could be imposed under the abuse of dominance provisions. Currently, the maximum administrative monetary penalty that can be imposed is $C10 million for a first contravention and $C15 million for a subsequent one. The proposed amendments would increase the maximum administrative monetary penalty that could be imposed to the greater of (i) $C10 million or $C15 million (as is currently the case) and (ii) three times the value of the benefit derived by the conduct or, if the quantum of the benefit cannot be reasonably determined, up to 3% of a party's annual worldwide gross revenues.

Increased penalties for abuse of dominance were a major component of the Bureau's "wish list" for tackling Big Tech. The Bureau has argued that the Act's current penalties for abuse of dominance "can be effective in ensuring compliance for many small and medium-sized businesses, but for the world's largest firms, who earn billions of dollars in revenues, these penalties could often amount to a pittance."

If enacted, the Bill could result in significantly increased maximum penalties being imposed on parties for abuse of dominance, or at least the threat of such penalties being used by the Bureau as leverage in negotiating settlements. However, it is also possible that the prospect for such historically large fines (far greater than anything else that exists under Canadian law in any context) could give rise to constitutional challenges.

(iii) Private Applications

The Bill also proposes that private parties be allowed to bring applications alleging abuse of dominance directly to the Tribunal (with leave), thereby ending the Bureau's current exclusive right to do so. This could result in a significant increase in activity for the Tribunal, at least initially, as private parties who consider themselves the victims of abuse of dominance may seize on the private application process as an opportunity to finally get their day in court (although civil damages for harm incurred are not available). Currently, the Bureau receives numerous complaints under the abuse of dominance provisions (341 in 2020/21 alone), but takes very few cases to the Tribunal. That said, based on prior experience with other provisions for which private applications can be made, the Tribunal takes its gatekeeper role seriously and very few cases make it through let alone result in favourable findings for private applicants.

One question also raised by the proposed amendments relates to administrative monetary penalties. As noted above, the Tribunal can impose such penalties on parties in applications brought by the Commissioner, with the penalties payable to the Canadian government. Could – or would – the Tribunal also order administrative monetary penalties in private applications? And, if so, to whom would they be paid? It would seem odd for the Tribunal to use a private application to impose fines that would be paid to the public purse.

Cartel Agreements

Although US enforcement authorities began to pay significant attention a few years ago to the impact of no poaching and wage-fixing agreements between employers, the issue never seemed to be of any real concern to the Bureau. That changed after allegations surfaced that certain of

Canada's largest grocers had allegedly coordinated the termination of their respective employees' temporary pay increases related to the COVID-19 pandemic. The ensuing political firestorm led the Bureau to justify its lack of enforcement action by explaining that it was hampered because wage-fixing and other "buy-side" agreements are not covered by the Act's criminal prohibition against hard-core cartel conduct (e.g., price fixing). As a result, the House of Commons Standing Committee on Industry, Science and Technology subsequently issued a report in June 2021 supporting the inclusion of these agreements under the Act's criminal cartel offence.

The Bill now proposes supplementing the criminal cartel offence by extending its coverage to agreements between employers to "fix, maintain, decrease or control salaries, wages or terms and conditions of employment" or to "not solicit or hire each other's employees." Notably, the draft provision does not require that the employers be competitors of each other, at least in the conventional sense, which is the pre-condition for the other conduct covered by this offence. On its face, the new provision could also affect non-solicitation arrangements between parties in business acquisition agreements, although the Bureau otherwise has taken the view that, as a general proposition, non-compete and non-solicitation agreements in purchase and sale agreements are likely not caught by the cartel offence. The Canadian business community will no doubt seek Bureau guidance and potential legislative clarifications in this respect.

One other point to note – as recent experience in the US demonstrates, it is by no means a foregone conclusion that criminalizing wage-fixing and no-poach agreements will lead to successful prosecutions. This may be especially the case in Canada, where the Bureau's success rate in cartel prosecutions is pretty dismal.That said, one additional concern is that by including these agreements as criminal offences, the amendments would also open the door to potential civil class actions for damages by plaintiffs allegedly injured by such conduct, regardless of whether the Bureau takes successful enforcement action or not. (Under the Act, private plaintiffs can sue for civil damages to recover losses allegedly caused by parties claimed to have violated one of the Act's criminal offences; plaintiffs are not obliged to wait for the Bureau to bring a criminal prosecution or for the results of that proceeding in order to launch their claim.)

Finally, the Bill would also remove the cap of $25 million for fines under the criminal cartel offence – including the proposed new wage-fixing offence – and instead permit fines "in the discretion of the court," with no express limit.

Misleading Advertising

The Bill also proposes to add an explicit prohibition against "drip pricing" to the Act's misleading representation (advertising) provisions. Drip pricing is a marketing practice whereby businesses are alleged to advertise attractive prices that are unattainable in practice because they add non-optional fees later in the purchasing process. The Bureau has previously brought cases challenging drip-pricing practices under the Act's civil misleading representations provisions. However, drip pricing is not explicitly prohibited by the Act, and the Bureau has complained that it must expend "significant resources in order to be ready to prove to the court, in every case, why drip pricing is deceptive."

If enacted, the Bill would provide that "the making of a representation of a price that is not attainable due to fixed obligatory charges or fees" would constitute a misleading representation

under both the criminal and civil misleading advertising provisions of the Act, unless the relevant charges or fees are imposed by government (e.g., a tax). It remains unclear what is intended to be captured by the inclusion of the word "fixed" in the proposed provision and the extent to which drip pricing will be pursued criminally by the Bureau. Future Bureau guidance could assist in clarifying both issues. However, as with wage-fixing agreements, the inclusion of drip pricing as a criminal offence would allow plaintiffs to bring civil actions for damages regardless of whether the Bureau pursued a given matter criminally or not.

Finally, as with the abuse of dominance and cartel provisions, the Bill also proposes to substantially increase the penalties for misleading representations. In a manner similar to abuse of dominance, the maximum penalty for corporations would be increased to the greater of (i) $C10 million or C$15 (depending if a first or subsequent contravention) and (ii) three times the value of the benefit derived by the conduct or, if the quantum of the benefit cannot be reasonably determined, up to 3% of the corporation's annual worldwide gross revenues. Maximum penalties for individuals would also be increased.

Mergers

In the lead up to the Bill, the Bureau had advocated that a number of significant changes be made to the Act's merger provisions, including repeal of the "efficiencies defence" (which allows otherwise anticompetitive mergers to proceed if they generate efficiencies that outweigh the prospective competitive harm); shifting the burden of proof to purchasers in certain circumstances to demonstrate that their proposed transactions are not anticompetitive; and extending the period within which the Bureau can challenge a merger post-closing from 1 year to 3 years. None of these changes appears in the Bill. Instead, the Bill is largely limited to certain "clean up" changes relating to the Act's pre-merger notification regime.

One exception is the Bill's proposal to amend the Act by incorporating a general anti-avoidance provision for the Act's pre-merger notification regime. This would provide that if the Bureau concludes that a transaction is designed to avoid the application of the Act's pre-merger notification requirements, the Bureau would apply these requirements nonetheless. It is not clear why the Bureau feels it needs an anti-avoidance provision, how the Bureau would determine that a transaction was structured with the intent to avoid notification, or what it would or could do in practice if it reached that conclusion. One thing seems certain – any attempt by the Bureau to enforce this provision would be an invitation for litigation.

Another exception is that the Bill also proposes expanding the relevant factors for consideration in merger reviews to include the new factors discussed above with respect to the abuse of dominance provisions (i.e., non-price factors, network effects, etc.). Again, these seem aimed particularly at Big Tech. The idea had been floated at other times that merger reviews should also take into account effects on matters such as labour, diversity and income disparities, but these are not part of the Bill's proposals.

Next Steps

The Bill is unlikely to face significant challenge or amendment in the legislative process. For one,

the Bill will be the government's top legislative priority and will be moved through the legislative process without delay. Moreover, since the governing Liberal Party and the New Democratic Party (NDP) have entered into a supply and confidence agreement whereby the NDP has agreed to support the legislative agenda of the Liberals, the two parties will have the votes needed to pass the Bill into law with limited ability by the opposition Conservative Party to slow the process. Due to the relatively minor status of the amendments to the Act in the context of the Bill as a whole, there is also likely to be little opportunity for comments and feedback by interested parties, as efforts will be made to expedite the legislative process. Based on prior experience, the amendments could be enacted in as few as 60 days from the tabling of the Bill.

As a result, it is likely that the Act will be significantly changed by Summer 2022. And this is not the end of it. The government has said that its next step will be to propose even more far-reaching changes to the Act. This will likely include the merger-specific proposals mentioned above that were not included in the Bill as well as a proposal to give the Bureau a broad power to conduct "market studies". The one possible saving grace is that these proposed amendments may be incorporated in future draft legislation that is focused specifically on amending the Act, potentially with greater opportunity for stakeholder engagement.

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