

Kluwer Competition Law Blog

Canada: Seeing Green – Sustainability Blossoms as an Area of Interest for the Competition Bureau

Teraleigh Stevenson, Mark Katz (Davies Ward Phillips & Vineberg LLP, Canada) · Wednesday, October 5th, 2022

In its first in-person event in more than two years, Canada’s Competition Bureau (the “**Bureau**”) hosted a summit on September 20, 2022, exploring the intersection between competition law and environmental/sustainability initiatives (details on the Competition and Green Growth Summit are available [here](#)). In doing so, the Bureau joins other agencies that have examined the impact of environmental/sustainability issues on competition law (e.g., the European Commission and the UK’s CMA), and foreshadows a heightened enforcement focus on these topics in Canada.

Key Points from the Summit

In his opening [remarks](#), Matthew Boswell, the Commissioner of Competition (the “**Commissioner**”), argued that competition law and policy can help further Canada’s transition to a greener economy (which he took as a necessary and desirable objective) by fostering innovation and helping consumers make informed choices. The Commissioner clarified that the Bureau’s intention was not necessarily to expand the role of competition law, or to change the applicable legal tests for judging anticompetitive conduct; instead, the Bureau’s current focus is on how the transition to a green economy may impact the Bureau’s mandate and *vice versa*. While the panels that followed covered a range of topics and viewpoints, three areas of potential Bureau enforcement discussed at length during the summit are worth noting in particular:

- **Misleading Advertising:** “*Greenwashing*”, or the use of false or misleading ads or claims to promote products or services based on enviro-friendly attributes, has been an enforcement focus for the Bureau for several years and will now unquestionably continue as such. Environmental claims must comply with the general requirements for advertising under the Competition Act (*g.*, be supported by evidence, accurate, and appropriately and clearly qualified). Caution is now particularly advisable in light of the amendments to the Competition Act passed earlier this year, which substantially increase the potential penalties for all false or misleading advertising, including false or misleading environmental claims. Panellists also discussed a new potential area of enforcement focus, namely applying the misleading representation provisions to statements made to investors in the context of, for example, ESG (environmental/social/governance) reporting and the promotion of investment opportunities.
- **Competitor Collaborations:** The Commissioner suggested in his opening remarks that

competition law and policy should leave room for collaboration between market participants to achieve environmental/sustainability objectives. Some panellists raised concerns that existing competition laws may chill or prohibit such collaborations, while others cautioned that any guidance or legislative changes permitting such collaborations should be carefully constructed to avoid inadvertently permitting harmful, anticompetitive collaborations that impede new entry and disrupt innovation. For example, industry-standard-setting by incumbents – often viewed as highly efficient and pro-competitive – may be subject to increased scepticism where environmental standards are perceived to be hindering new entry or innovation.

- **Mergers:** The Commissioner also suggested in his opening remarks that the Bureau expects environmental considerations to become a greater factor in merger review, as a merger of competing environmental companies could increase prices, decrease prices, and harm both the market and competition. The Commissioner did not elaborate further in his remarks, but some panellists suggested that the impact of mergers on green technologies warrants heightened scrutiny, including in respect of so-called “killer” acquisitions of innovative startups and other potential disruptors by incumbent firms.

What’s Next?

The Bureau’s Green Growth Summit is the latest manifestation of its steady evolution under Commissioner Boswell’s leadership towards a more “*progressive*” (or “*hipster*” if you prefer) view of competition law and policy. That said, there were no novel or startling policy announcements at the Summit – for the moment, it seems that the Bureau will focus on the more traditional agenda items of misleading advertising (greenwashing) and ensuring that mergers and other competitor collaborations do not prevent innovation and entry. Time will tell whether the Bureau’s green enforcement agenda grows beyond these concerns.

For now, therefore, it is important that environmental and sustainability claims and any potential collaborations related to environmental/sustainability objectives continue to comply with the relevant provisions of the *Competition Act*. The problem, however, is that the Bureau’s approach to enforcement in these areas remains far from clear. For example, the Bureau archived its [Environmental Claims](#) guide in November of last year, and the Bureau offered no commitment at the Summit to issue a replacement. Similarly, the Bureau’s [Competitor Collaboration Guidelines](#), released in May 2021, do not refer to potential collaborations for environmental objectives, although prior to their repeal in 2010, provisions in the *Competition Act* exempted agreements or arrangements relating only to “measures to protect the environment” from the criminal conspiracy offence. Panel discussion at the Summit noted the potential benefit of reintroducing legislative safe harbours for environmental collaboration and/or guidance about the Bureau’s exercise of enforcement discretion in such matters. However, the Bureau did not commit to any such steps.

Given the Bureau’s emphasis on environmental and sustainability issues, one hopes that it will take the opportunity to update its enforcement guidelines in order to give businesses operating in Canada a clearer understanding of the expectations in this regard.

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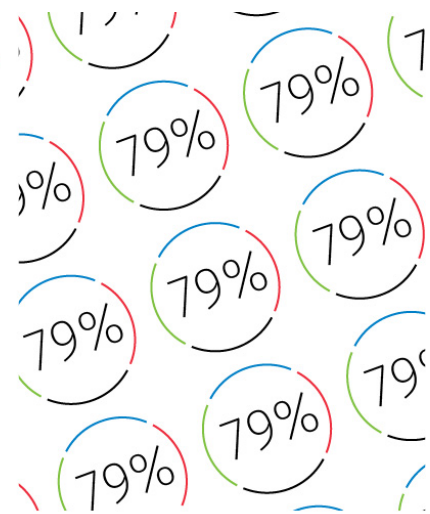
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