Kluwer Competition Law Blog

Canadian Government Consults on Far-Reaching Changes to Canada's Competition Law

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On November 17, 2022, Canada's federal Minister of Innovation, Science and Industry formally announced that the federal government is launching a comprehensive review of the *Competition Act* (Act) and Canadian competition policy. This announcement follows through on the Minister's previous indications that significant reforms were in the works, and comes after the government enacted more limited but nevertheless significant amendments to the Act in June 2022.

The government's objective in commencing the review is to invite a wide-ranging discussion on whether Canada's current competition enforcement framework is "*fit for purpose*" and can "*stand up to new challenges*" brought about by the digital transformation of the Canadian economy. The review will cover a broad array of topics and could set the stage for very significant changes to Canada's competition laws. If implemented, many of the changes being discussed would have important implications for conducting business in Canada, including with respect to pricing, distribution and marketing policies, mergers and acquisitions and joint ventures or other competitor collaborations.

Scope of Potential Reforms

The government has published a discussion paper that sets out its views of where potential reforms may be warranted to "*modernize*" the Act. The discussion paper identifies four central "*themes*" or questions that the government believes need to be addressed:

- Is the legal bar for intervention too high?
- Is the Competition Bureau too constrained in its enforcement role?
- Should the nature and types of competition remedies and sanctions be rebalanced?
- What is required to meet the challenge of data and digital markets?

Within those broad themes, the discussion paper canvasses an array of potential changes that would affect key areas of the Act.

1. Merger Review

Timing. The government raises for consideration whether the limitation period for challenging mergers post-closing should be extended from one year to three years. Amendments passed in 2009 reduced the period from three years to one, but the government is now questioning if this should be reversed, at least for non-notifiable mergers. Another issue for discussion is making the expiration of the limitation period for non-notifiable mergers conditional on voluntary notification. The government also seems to believe that it is "*challenging or impossible*" for the Bureau to decide whether to contest a merger when it has only 30 days from the receipt of supplemental information to make that decision. Again, this time frame was also introduced by the 2009 amendments. The 30-day time frame also aligns with timelines for merger review in the United States.

Notification criteria. Also up for discussion are possible changes to the Act's pre-merger notification criteria, including a possible reduction in the "*size of parties*" threshold for pre-merger notification. This threshold requires that the parties and their respective affiliates (combined) have aggregate assets in Canada, or gross revenues from sales in, from or into Canada, exceeding C$400 million before a transaction will be notifiable. The government is also considering how to better guard against prospective competitive harm – for example, with respect to mergers that affect "nascent" competitors and that may not exceed financial thresholds for pre-closing notification.

Efficiencies. The government is "*resolved*" to examine changes to the efficiencies defence to otherwise anticompetitive mergers. The changes could range from reforming aspects of the defence – for example, by looking to adopt the approaches in the United States, Australia or Europe, which relegate efficiencies to a single factor among many to be considered, rather than an affirmative defence – to abolishing the efficiencies defence altogether.

Merger effects on workers. In what would be a signal shift in approach away from traditional competition policy if enacted, the government raises for consideration whether labour issues should have a more central role in merger analysis – for example, by adding impact on employees as an express consideration in merger review.

2. Unilateral Conduct

Abuse of dominance. The June 2022 amendments enacted important changes to broaden the Bureau's ability to challenge allegedly abusive conduct by dominant firms. However, the government still believes that the Bureau faces an onerous burden in challenging abuses of dominance – for example, because it must prove that the alleged anticompetitive conduct is likely to cause a "substantial lessening or prevention of competition." In the government's view, this particularly impedes effective enforcement action against dominant parties in digital markets. Accordingly, the government will explore different approaches that could involve, among other things, lowering the standard for intervention to allow remedies to be imposed where dominant firm conduct is presumed or merely has the potential to have anticompetitive effects; or there is only an "appreciable risk" rather than a likelihood of harm; or even where the conduct is "*unfair*."

3. Competitor Collaborations

Tacit collusion. The government appears to be concerned about whether the current law

prohibiting collusive agreements between competitors can adequately address the potential for intelligent algorithms to learn to achieve joint profit-maximizing outcomes without human involvement (i.e., agreement). Consequently, the government is considering reforms that would "*deem or infer the existence of an agreement in more circumstances*," so that "*competitive harm could be addressed more flexibly*".

Civil enforcement. The government asks whether steps are required to enhance enforcement of the Act's civil conspiracy provision, which applies to conduct that is not caught by the criminal conspiracy offence. In practice, the Bureau has taken formal enforcement action under this provision in only two cases. Among other changes to be considered is a proposal to introduce some form of mandatory pre-clearance mechanism for certain types of competitor agreements that could be caught by the provision, to address issues the Bureau is apparently facing in detecting such agreements.

Buy-side coordination. "*Buy-side*" collaborations between competitors were removed from the former criminal conspiracy offence as part of the 2009 amendments to the Act. The government now seems to be questioning the wisdom of that change. In June, the government amended the conspiracy offence to include "*buy-side*" agreements affecting the labour markets – namely, wage-fixing and no-poaching agreements. However, it is now floating the idea of reintroducing buy-side collusion in general as a criminal offence, or perhaps as a civil violation with no need to demonstrate anticompetitive effects.

4. Deceptive Marketing

The government is considering adopting additional enforcement tools to address "*the nature and ubiquity of digital advertising*" and its potential to give rise to novel deceptive marketing practices. Accordingly, the government is considering potential amendments to better define false or misleading conduct.

5. Administration and Enforcement

One of the government's principal concerns is that the Competition Bureau's powers are too constrained, which it views as limiting the Bureau's ability to intervene authoritatively and in a timely fashion to protect the marketplace. To address those alleged limitations, the government is opening up for consideration reforms such as the following:

- giving the Bureau more leeway to act as a decision-maker (i.e., a first-instance ability to authorize or prevent forms of conduct and to unilaterally compel the production of information) rather than an applicant/litigant in enforcement matters;
- expediting litigation before the Competition Tribunal and courts including through the imposition of limits on rights of appeal, changes to mediation procedures and stricter time frames;
- introducing new forms of civil enforcement as alternatives to criminal prosecution for certain conduct;
- facilitating the use of interim measures (i.e., injunctions) that are already available but rarely used;
- providing the Bureau with a "*reasonable path with respect to the collection of information*

outside of the enforcement context," including for conducting market studies; and
- supplementing Bureau enforcement by allowing private parties to seek compensation for damages suffered from civilly reviewable (non-merger) conduct under the Act such as abuse of dominance, refusal to deal, exclusive dealing, tied selling, market restriction, and price maintenance.

Implications

The government is inviting the public to submit comments on its discussion paper, as well as any other "*options to improve the Act*" by February 27, 2023. Roundtables will be held with key stakeholders to solicit discussion and debate on these themes. The government has also emphasized that it wishes to hear not only from traditional stakeholders but also "*from a wide diversity of individuals and organizations from all corners of our society*". Details regarding timing and participation in these roundtables have not yet been announced.

The potential reforms raised by the discussion paper are indeed sweeping and comprehensive. There is much to consider, but also much to be vigilant about if these discussion topics eventually turn into the next government-backed package of amendments to the Act. This is especially true with respect to the various proposals in the discussion paper to consider watering down the tests that the Competition Bureau must satisfy in order to obtain remedies and exercise its enforcement powers. One of the key principles underlying the Act is that, except in limited and egregious cases (such as "*hardcore cartel conduct*"), the Bureau must show evidence of likely harm to competition before it can invoke the coercive powers of the state. Another fundamental principle, following a seminal decision of the Supreme Court of Canada, is that the Bureau should not fill the combined roles of investigator, judge and executioner, but must go before an independent body (whether the Competition Tribunal or the courts) in order to obtain remedies or utilize its intrusive investigative powers. It would be a dramatic step to erode this division of powers by giving the Bureau "*more leeway to act as a decision-maker*" or by weakening the standards for remedial action, e.g., by replacing the requirement to show that conduct has a negative impact on competition with the even more amorphous and subjective benchmark that the conduct is "*unfair*".

Especially given the law of unintended consequences, it is also hoped that a close survey of prior enforcement action under the Act be undertaken as part of the review to assess whether alleged difficulties are unique to or arise from the Act itself or rather from other factors, including matter-specific circumstances such as case facts or selection and Bureau resourcing.

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