Kluwer Competition Law Blog

Main Developments in Competition Law and Policy 2022 – Canada

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Significant amendments to Canada's Competition Act (Act) dominated discussion about Canadian competition law policy and enforcement in 2022. Given the full implementation of the first round of amendments and the formal commencement of public consultation on further amendments, potential legislative reforms are certain to remain at the forefront of Canadian competition law discourse in 2023. We address the implications of these changes and proposals for additional reform in more detail below. We also discuss current trends in key enforcement areas such as merger review, misleading advertising and private civil actions. And we suggest how businesses operating in Canada should factor these trends into their decision-making.

Significant Amendments to the *Competition Act*

Major amendments to the Act were enacted last year with the passing of the federal government's 2022 budget implementation legislation. The most significant changes are described below.

Abuse of Dominance

The amendments expand the types of conduct captured by the abuse of dominance provisions to include practices that "*have an adverse effect on competition*" or are "*a selective or discriminatory response to an actual or potential competitor*".

The amendments also relate to conduct that negatively affects non-price considerations such as quality, choice and consumer privacy. In addition, the amendments significantly increase the potential financial penalties for abuse of dominance from a maximum of $10 million to up to three times the value of the benefit derived from the conduct. The amendments also permit private parties to apply to the Competition Tribunal (Tribunal) for relief against alleged abuses of dominance (although private parties are unable to seek compensatory damages).

Criminal Cartels

The amendments extend the current criminal conspiracy offence to prohibit employers from entering into wage-fixing agreements and no-poach agreements, unless they can be shown to be reasonably necessary for giving effect to a lawful broader or separate agreement (the "*ancillary restraints*" defence). In addition, the amendments increase the potential fines for violations of the criminal conspiracy offence, including the new employer-specific offences, to permit fines "*in the discretion of the court*" with no express limit. These amendments will come into force on June 23, 2023.

Misleading Advertising

The amendments introduce an explicit prohibition against "*drip pricing*" – the practice of advertising a product at an unattainable price due to the failure to disclose mandatory fees – which had previously been addressed under the existing civil and criminal misleading advertising provisions. Similarly to the changes to the abuse of dominance and criminal cartel provisions, the amendments also substantially increase the penalties available under the civil misleading representations provisions to three times the value of the benefit derived by the conduct.

Merger Review

The amendments expressly state that the Competition Bureau (Bureau), the government agency responsible for enforcing the Act, can consider non-price factors such as network effects, quality, consumer choice and consumer privacy in assessing the competitive effects of a transaction. In addition, the amendments introduce a new anti-avoidance provision that may apply to bring a non-notifiable transaction that was "d*esigned to avoid*" the pre-merger notification regime within the scope of the notification requirements.

The amendments affect competition law enforcement and compliance considerations and warrant careful consideration. For example, the expansion of the abuse of dominance provisions renders some of the established jurisprudence obsolete. It also dilutes a key legal screening tool by broadening the provisions to capture actions intended to have an adverse effect on competition (as opposed to a specific competitor). At the same time, the amendments raise the stakes of violating these (expanded) provisions, either through increased penalties or through private actions before the Tribunal.

Separately, businesses should carefully assess their human resources (HR) practices well in advance of June 2023 to ensure compliance with the new wage-fixing/no-poaching offence that will come into force then. For example, businesses should determine if they are parties to any such agreements or engage in discussions on these topics – for example, through an industry organization that may share employment-related information as part of benchmarking exercises. Businesses should also ensure that internal competition law compliance materials and training encompass a discussion of potential HR risks and that HR personnel receive such compliance training.

More Changes to Come: The ISED Consultation Process

On November 17, 2022, Canada's federal Minister of Innovation, Science and Industry (Minister) announced the launch of a comprehensive review of the Act and Canadian competition law policy. In a discussion paper published contemporaneously (ISED paper), the federal government outlined its views on, and discussion questions related to, potential reforms, including with respect to the following.

Merger Review

The ISED paper considers several potential reforms to the merger review process.

Timing of Reviews

The ISED paper contemplates permitting the Bureau to challenge a transaction up to three years after its implementation. This proposed reform would replace the current limitation period of one year and return the review period to what it was prior to the 2009 amendments to the Act.

Thresholds

The ISED paper raises the possibility of requiring pre-merger notifications for acquisitions of businesses without assets in Canada but with sales into Canada, reducing the "*size of parties*" threshold from the current C$400-million minimum, and restructuring the financial thresholds to capture acquisitions of "*nascent*" competitors that may not meet the standard financial thresholds for mandatory notification.

Substantive Review

The ISED paper echoes the Bureau's long-standing concerns with the "*efficiency defence*", which prohibits the Tribunal from making an order to block a transaction if certain efficiencies generated by the transaction are likely to outweigh its likely anticompetitive effects. Consistent with the recent focus on labour considerations, as exemplified by the new employer-specific cartel provisions, the ISED paper also raises the possibility of including impacts on labour in the competitive analysis of a proposed transaction.

Remedy Standard

The ISED paper examines the possibility of revisiting (and lowering) the standard for merger remedies. Under the current standard established by Supreme Court jurisprudence, "*the appropriate remedy for a substantial lessening of competition is to restore competition to the point at which it can no longer be said to be substantially less than it was before the merger*".

Abuse of Dominance

Although the June 2022 amendments expanded the scope of the abuse of dominance provisions, the ISED paper raises concerns that the Bureau continues to face an onerous burden in challenging alleged abuses of dominance, particularly in digital markets.

To address these concerns, the ISED paper canvasses possible additional amendments, including lowering the standard for intervention to allow remedies to be imposed when dominant firm conduct is presumed or merely has the potential to have anticompetitive effects; or when there is only an "*appreciable risk*" rather than a likelihood of harm; or even when the conduct is "*unfair*".

Deceptive Marketing

Noting the novel issues created by "*the nature and ubiquity of digital advertising*", the ISED paper raises the possibility of amendments to the Act to better define false or misleading conduct.

Competitor Collaborations

The ISED paper proposes amendments to three areas affecting agreements between competitors.

Civil Agreements

The ISED paper expresses concern that the Bureau has struggled to detect agreements between competitors. The paper raises the possibility, among others, of either a mandatory notification or a voluntary clearance mechanism for certain types of competitor agreements.

Criminal Offences

The ISED paper questions whether the current law can adequately address the use of algorithms to achieve an effective price-fixing arrangement without any human agreement. To mitigate this (theoretical) concern, the ISED paper suggests reforms to "*deem or infer the existence of an agreement in more circumstances*", so that "*competitive harm could be addressed more flexibly*".

Buy-Side Agreements

While the employer-specific cartel provisions in the June 2022 amendments address one form of buy-side arrangements, the Act currently does not include a general criminal prohibition on buy-side agreements. The ISED paper raises the possibility of reintroducing buy-side collusion as a criminal offence.

Administration and Enforcement

The ISED paper asks whether the Bureau's current set of tools is too narrow and limits its ability to intervene to protect the marketplace. Potential reforms to expand these powers include the following:

- Giving the Bureau more leeway to act as a decision-maker, including the ability to authorize or prevent forms of conduct and to unilaterally compel the production of information (i.e., without resorting to the Tribunal and/or the courts);
- Expediting litigation before the 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 by the Bureau 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 alternative means of collecting information, 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.

In canvassing sweeping potential reforms, the ISED paper brings Canada in line with a number of initiatives advocating for significant reforms to competition laws in other countries, including in the United States. Importantly (and unlike in the previous round of amendments), the public is invited to comment on the proposed reforms. Submissions can be made in the consultation process until March 31, 2023. While the government has not provided a timeline for the process after the submission deadline, it seems likely that the Minister and Innovation, Science and Economic Development Canada will focus on considering these changes in the coming year.

Increasingly Litigious Approach to Merger Review

Although the Bureau has the ability to challenge a transaction before the Tribunal when the Bureau has determined the transaction will likely result in a substantial lessening or prevention of competition, it has done so only nine times since 2009. Nonetheless, the Commissioner remains committed to challenging transactions the Bureau views as harmful to Canadians. In his speech to the 2022 CBA Competition Law Fall Conference, the Commissioner noted that the Bureau is asking the question "*What is the risk of not taking action" more often than it previously had. It is also continuing to build its investigation and litigation capacity "to take timely and evidence-based enforcement action – including injunctions – in both traditional and digital marketplaces*".

In cases in which parties choose to exercise their statutory right to close transactions once the review period has lapsed (but without positive Bureau approval), the Commissioner warned that "*merging firms can expect that we are ready, willing and have the litigation capacity to prioritize protecting the public interest in competition by bringing a responsible case to the Tribunal*".

These statements suggest that the Bureau may be more willing than in the past to advance novel or aggressive theories of competitive harm, less inclined to accept remedies or modifications offered

by parties to a transaction and more inclined to seek to block a transaction. In this regard, the Bureau's approach seems to parallel enforcement trends in the United States.

In an appearance before U.S. lawmakers in the fall of 2022, Jonathan Kanter, Assistant Attorney General for the Department of Justice Antitrust Division (DOJ), stated that "*part of the job that we have before us is to litigate cases and to take risks when it's appropriate and necessary to defend the American public*". These comments followed Kanter's speech earlier in 2022 in which he argued that when the DOJ "*concludes that a merger is likely to lessen competition, in most situations we should seek a simple injunction to block the transaction*" as "*merger remedies short of blocking a transaction too often miss the mark*".

In this environment, parties to a potential transaction should carefully consider any potential competition concerns and be aware of the increased risk of litigation if those concerns are not resolved. For example, the risk of litigation may affect parties' assessment of the likely timeline for potential transactions and, by extension, their planning for financing and integration of the business. In light of these risks, parties may choose to address how far they will pursue potential litigation, if the Bureau were to challenge the transaction, as part of their initial discussions. As several of the proposed amendments in the ISED paper (discussed above) consider expanding the Bureau's decision-making authority and expediting and increasing the effectiveness of the Bureau's ability to litigate, future changes to the Act may further increase the likelihood of an adversarial process, altering the calculus for merging parties.

Misleading Representations: It's Not Easy Being Green

The intersection between competition law and environmental and sustainability objectives has been a focus for the Bureau in recent years. Notably, recent enforcement actions have focused on alleged "*greenwashing*" (the use of false or misleading advertising or claims about the relative environmental attributes of products or services for sale). For example, the Bureau entered into a consent agreement with Keurig Canada Inc. in January 2022 to resolve the Bureau's concerns with respect to certain recyclability representations made in connection with some Keurig products. And in late September 2022, the Bureau opened an investigation into the Royal Bank of Canada for alleged false and misleading representations related to the bank's action on climate change in the bank's investor materials and elsewhere. Finally, in November 2022, the Bureau opened an investigation into the Canadian Gas Association for alleged false and misleading representations that natural gas is "*clean*". All three investigations were commenced following activist organizations' complaints to the Bureau.

While greenwashing allegations occupied centre stage in the Bureau's environmental enforcement actions last year, other potential intersections exist between competition law and environmental considerations. For example, a previous version of Section 45 of the Act (a criminal provision prohibiting certain agreements between competitors) included a specific exemption for agreements or arrangements relating only to "*measures to protect the environment*".

The absence of this exemption in the current prohibition raises questions about the status of collaborations between competitors intended to address environmental concerns (e.g., to adopt standards that may reduce the output of certain products in pursuit of environmental goals). Although regulators in some other jurisdictions (most notably the European Commission) are

actively discussing how to deal with competitor collaborations in the context of environmental and other ESG (environmental, social and governance) considerations, these issues do not appear to be a focus for the Bureau. A return to the previous environmental carve-out was not discussed in the ISED paper.

The Bureau Goes to Market (Studies)

As noted above, the ISED paper offers for consideration a proposal to expand the Bureau's ability to conduct market studies through "*formal market study powers*" comparable to those available to regulators in some other G7 countries. Over the years, the Bureau has argued that it should have market study powers, which existed in a predecessor to the current Act. One concern that has been raised in response is that it would be unfair to give the Bureau the power to burden businesses with extensive information requests simply to satisfy the Bureau's curiosity, especially when there has been no allegation of wrongdoing.

Moreover, the Bureau has initiated market studies even in the absence of formal market study powers. This past year, for example, the Bureau launched a new market study focused on measures that governments can take to improve competition in Canada's grocery sector. The Bureau's notice of the study cited as motivating factors alleged concentration in the sector and a recent and rapid increase in food prices in excess of the general inflationary rate. Setting up potential support for the ISED paper's proposals, the Bureau's notice explicitly stated that its study of the grocery sector "*will be a tough study for [the Bureau] to do*", in part due to the Bureau's reliance only on information that is publicly available or provided voluntarily. Accordingly, the Bureau's notice stated that it "*might not have enough information to draw firm conclusions*" but expects to recommend measures to improve competition. Submissions to the grocery sector market study were due in December 2022.

Private Actions: The Battle Over Certification Continues

In a notable series of decisions at the close of 2021, the defendants in both *Jensen v Samsung Electronics Co. Ltd.* and *Hazan c Micron Technology Inc.* (DRAM Class Actions) successfully defended the plaintiffs' motions for certification. In the DRAM Class Actions, the Federal Court of Canada and the Québec Superior Court, respectively, denied certification of the class actions, which alleged foreign price-fixing in the sale of DRAM chips, on the grounds that the motion for certification failed to establish a reasonable cause of action or common issues. Ultimately, these courts found the claims to be speculative because there was an insufficient degree of specificity in the allegations.

Continuing this trend, in a recent decision in *Hoy v Expedia Group Inc.* an Ontario court dismissed a proposed class action against several online travel platforms that alleged the platforms had violated Canada's prohibitions against false and misleading representations. In particular, the plaintiffs alleged that the platforms provided search results that were false and misleading, and thereby dissuaded the plaintiffs "*from choosing accommodations of the same quality that [were] less expensive, a better bargain, or better suited*" to the plaintiffs' needs. In dismissing the plaintiff's application, the court found that the plaintiffs had failed to satisfy any of the certification criteria, including failing to demonstrate a cause of action based on a contravention of the Act or

that two or more class members had suffered compensatory harm.

Looking Ahead to 2023

After years of advocacy by the Bureau and movements in Canada and globally to modernize competition laws, the Canadian government introduced significant amendments to the Act in 2022. More changes may be around the corner, although the exact content and timing of the next round of reforms are not yet clear.

Adding to the uncertainty surrounding the future of several key provisions of the Act, the Bureau has taken an increasingly litigious approach to merger review, while remaining an active enforcer in other areas within its purview. As a result, we expect to see competition considerations featuring prominently in merger negotiations, as parties carefully consider how competition risk will be allocated if the Bureau were to raise concerns about a proposed transaction.

As we enter a new year, we encourage businesses operating in Canada to take careful stock of their policies and practices in light of the recent and proposed amendments and trends in competition law enforcement. As one example, companies should review and consider their practices in light of the impending coming into force in June of the new criminal prohibitions against wage-fixing and no-poach agreements.

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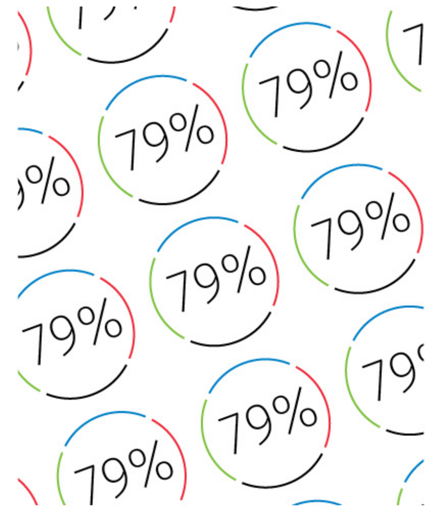

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