Kluwer Competition Law Blog

Legislative Amendments Usher in Tougher Competition Enforcement Regime in Canada

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On June 20, 2024, the Canadian Parliament passed important changes to Canada's Competition Act (Act) with the enactment of Bill C-59, the Fall Economic Statement Implementation Act, 2023 (Bill C-59). The amendments to the Act contained in Bill C-59 mark the third (stage in the Canadian government's extensive overhaul of Canadian competition law, which began with a series of amendments to the Act passed in June 2022, followed by additional amendments in December 2023.

We have previously summarized the key changes that were made to the Act in June 2022 and December 2023, as well as those that were proposed in Bill C-59. These amendments affect all areas of Canadian competition law, with the general objective of strengthening the Competition Bureau's (Bureau) enforcement powers and ability to challenge anticompetitive conduct.

Of note are two additional amendments that were introduced into Bill C-59 as part of Parliament's deliberative process, both of which will impact the Act's merger review process in important ways. Interestingly, these amendments were imported from recommendations made by the Bureau to Parliament and had been deliberately left out of the original version of Bill C-59 because they were not supported by the federal ministry (Ministry of Innovation, Science and Economic Development – ISED) that is responsible for policy making with respect to the Act.

We discuss each of these additional amendments and their implications below.

Market Share Presumptions for Merger Review

Prior to the recent round of amendments, the Act (section 92(2)) provided that a merger could not be found to be anticompetitive based on market shares alone. This never meant that market shares and concentration levels were irrelevant in Canadian merger review – far from it – only that they could not be determinative in and of themselves. Other factors – such as effective remaining competition, barriers to entry, countervailing power of customers, etc. – would also have to be assessed (see section 93 of the Act).

In the initial version of Bill C-59, the government decided to repeal the bar against the Competition Tribunal (Tribunal) issuing a merger remedy solely on the basis of evidence of concentration of

market share. Accordingly, the Bill proposed repealing section 92(2) of the Act, potentially leaving it open for the Bureau – and ultimately the Competition Tribunal/courts – to reject a merger as anticompetitive based on increases in market shares/concentration alone.

However, in submissions made to Parliament regarding Bill C-59, the Bureau argued that the amendments should go even further (See Recommendation 4). The Bureau proposed that the Act also incorporate a rebuttable presumption that a transaction is likely to be anticompetitive if post-merger market shares/concentration levels would exceed certain thresholds to be set out in the statute. The Commissioner argued that this would make the Act consistent with the enforcement position in the U.S., where the U.S. antitrust agencies have adopted a similar type of presumption in their merger guidelines.

Notably, representatives of ISED, the federal ministry which is responsible for developing competition policy in Canada, disagreed with the Bureau's recommendation. They observed that there is insufficient evidence regarding how many additional transactions a rebuttable presumption would catch. They also noted that incorporating the rebuttable presumption in the Act, rather than in guidelines as is done in the U.S., would make it more difficult to adjust the thresholds to reflect developing circumstances.

Ultimately, the decision was made to follow the Bureau's recommendation and so Bill C-59 as enacted provides that mergers will be considered presumptively unlawful if they (a) combine firms accounting for more than a 30% market share; or (b) have a post-merger HHI "concentration index" (determined by squaring the market shares of the participants in the relevant market) of more than 1,800, and an increase of more than 100 from pre-merger levels. The amendment also provides that these thresholds can be revised by regulation, and so will not require new legislation if changes are to be made. (See section 249 of Bill C-59.)

The amendments thus shift Canada's merger review regime from one in which post-merger market shares were an important but not determinative factor to one in which parties may be obliged to argue against a presumption of illegality based on market shares alone. Moreover, the 30% share threshold at which the rebuttable presumption is triggered marks a departure from the Bureau's longstanding view that it will generally not challenge mergers resulting in post-transaction shares of below 35%.

The Bureau has stated, however, that it will approach the trigger thresholds with some flexibility, using a sliding scale based on the extent to which post-merger shares will exceed the new thresholds. Specifically, the higher the parties are above the threshold, the stronger the evidence needs to be to rebut the anticompetitive presumption; conversely, the less post-merger shares exceed the 30% threshold, the easier it will be to rebut the presumption of illegality. That said, it remains to be seen how the Bureau's enforcement policies will evolve in practice. At the very least, the new legislation means that merger transactions that would have escaped scrutiny before the enactment of Bill C-59, may now be subject to enhanced review and the risk of prohibition or potential remedy.

Revised Remedial Standard for Anticompetitive Mergers

Turning to the issue of remedies, Bill C-59 was also amended to institute a new standard for imposing merger remedies under the Act.

Under the Act, mergers are considered to be anticompetitive if they are likely to result in a "substantial prevention or lessening of competition" in the relevant market (section 92, Act). Consistent with that, the Supreme Court of Canada in *Canada v. Southam Inc*., [1997] 1 S.C.R. 748 has established that merger remedies sought by the Bureau must only go so far as to "restore competition to the point at which it can no longer be said to be substantially less than it was before the merger."

In its submission to Parliament regarding Bill C-59, the Bureau argued that this remedial standard unduly restricts its ability to address anticompetitive mergers (See Recommendation 5). Instead it advocated that a new and lower standard should be enshrined in statute, namely that merger remedies should be designed to "preserve or restore the level of competition" that would have prevailed "without the merger". In other words, the Bureau argued that merger remedies should eliminate all anticompetitive effects and restore the status quo ante even though the Act only makes it illegal to substantially prevent or lessen competition and not simply to negatively impact competition in some respect, regardless of the degree.

Once again, ISED representatives appearing before Parliament regarding Bill C-59 disagreed with the Bureau's position. They pointed out that adopting the Bureau's proposed standard would create an inherent contradiction between the legal standard for identifying harm and the legal standard for remedying that harm, leading to perverse results. For example, they asserted that the new remedial standard would mean that transactions that do not cause a likely substantial lessening or prevention of competition would face no remedy, whereas transactions that do cause a likely substantial lessening or prevention of competition would face a remedy requiring elimination of any effect on competition.

Parliament once more decided to defer to the Bureau's views in this matter. And so, with the enactment of Bill C-59, the Act now provides explicitly that the appropriate remedial standard is to "preserve the level of competition that would prevail but for the merger." (Section 249, Bill C-59)

Admittedly, discerning the line between a " prevention or lessening of competition" and a "substantial prevention or lessening of competition" is a bit like the old debate about trying to figure out how many angels can dance on the head of a pin. But the practical impact of the change is clear. The new remedial scope will allow the Bureau to argue for more extensive and far-reaching remedies than before, including that likely anticompetitive mergers be blocked in their entirety rather than be addressed through more targeted divestitures. This, in turn, will increase the Bureau's leverage in negotiating remedies for transactions that raise concerns. Merging parties will now have to take this new prospect into account when assessing the regulatory risk associated with their transactions.

Implications

The two amendments described above are consistent with the general objective of the recent spate of amendments to the Act, i.e. to give the Bureau more extensive tools to address anticompetitive conduct in Canada. In the case of these two amendments specifically, Parliament was prepared to grant the Bureau the changes it wanted over the objections of the bureaucratic echelon that is ostensibly responsible for setting competition policy in Canada.

As mentioned previously, all of this is to the credit of the Commissioner of Competition, Matthew

Boswell. He has successfully persuaded Parliament that a new and robust competition enforcement framework is necessary to address many of the ills that afflict the Canadian economy, such as rising prices and lagging productivity. One can only expect that the Commissioner and the Competition Bureau will be held accountable as it implements the new tools at its disposal.

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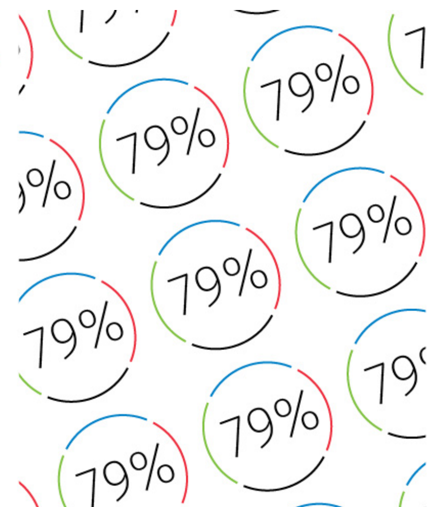

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“>Mergers
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