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First round of proposed amendments to the Competition Act revealed

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Authors: Shuli Rodal, Michelle Lally, Christopher Naudie, Kaeleigh Kuzma, Danielle Chu, Chelsea Rubin, Gajan Sathananthan

In this Update:

On April 28, 2022, proposed amendments [PDF] to Canada's *Competition Act* (the proposed amendments) were introduced as part of the *Budget Implementation Act, 2022*. The proposed amendments contemplate the criminalization of no-poach and wage-fixing agreements, as signalled by the Minister of Innovation, Science and Industry in February. Other important changes include significantly higher penalties for anti-competitive conduct and, for the first time, private enforcement of the abuse of dominance provisions. Promised changes to the misleading representation provisions to expressly address drip pricing are also included. Consistent with the Minister's statement in February, the proposed amendments, though significant on their own, are expected to represent just the first stage in the government's consideration of a comprehensive reform of the *Competition Act*. It remains to be seen what broader changes, including to Canada's efficiency defence for mergers and other changes proposed by the Competition Bureau (Bureau), will be part of the next round of amendments.

Criminalization of wage-fixing and no-poach agreements

As was expected, the government proposes to expand the criminal conspiracy provision of the *Competition Act* by making it a criminal offence for unaffiliated employers to enter into an agreement to fix, maintain, decrease or control wages or terms and conditions of employment (i.e., wage-fixing agreements) or not to solicit or hire each other's employees (i.e., no-poach agreements). Importantly, the ancillary restraints and regulated conduct defences will be available for no-poach and wage-fixing agreements. This means, for

example, that a customary limited no-poach agreement between unaffiliated employers in the context of the purchase and sale of a business or similar commercial arrangements would not likely raise concerns under the criminal conspiracy provisions but rather would continue to be assessed under the civil provisions of the *Competition Act*. It is also noteworthy that the new provision is clearly limited in scope to employment-related agreements, leaving other types of purchasing agreements to scrutiny on a civil reviewable basis.

While this proposed amendment was expected, once in force this will be a significant change to Canadian competition law and will align it with the enforcement approach taken by U.S. antitrust agencies. The proposed amendments contemplate that this change would come into force one year following the date on which the *Budget Implementation Act, 2022* receives Royal Assent.

Expanded penalties for conspiracy, abuse of dominance and deceptive marketing practices

The proposed amendments create the potential for significantly increased penalties for criminal conspiracies and introduce the possibility of markedly higher administrative monetary penalties (AMPs) for abuse of dominance and deceptive marketing practices.

Fines for contravention of the criminal conspiracy provisions found in section 45 of the *Competition Act* are currently capped at $25 million per count. The proposed amendments contemplate uncapped fines determined at the discretion of the court, consistent with the penalties under the bid-rigging provisions found in section 47 of the *Competition Act*.

AMPs are currently capped at $10 million (and $15 million for subsequent orders) and are available as a remedy for deceptive marketing practices (when undertaken by corporations) and abuses of dominance. The proposed amendments would dramatically increase the quantum of penalties that could be ordered, providing that AMPs will be determined based on the greater of (i) $10 million ($15 million for subsequent orders); and (ii) three times the value of the benefit derived or, if this amount cannot be calculated, three percent of annual worldwide gross revenues. The proposed new penalties provide for a harsher approach to firms and brings Canada closer to the approach to penalties in the U.S. and Europe as they relate to abuse of dominance matters.

A similar penalty formula is contemplated for individuals found to have violated the deceptive marketing practices provisions. In such cases, AMPs are determined based on the greater of (i) $750,000 ($1,000,000 for subsequent orders); and (ii) three times the value of the benefit derived from the deceptive conduct if the amount can be reasonably determined.

Abuse of dominance provisions

Easing the burden of establishing an anti-competitive act

For the Competition Tribunal (Tribunal) to find an abuse of a dominant position pursuant to section 79 of the *Competition Act*, it must be established that

- one or more persons substantially or completely control a class or species of business throughout Canada or any area thereof
- that person or those persons have engaged in or are engaging in a practice of anti-

competitive acts

- the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market

Much of the section 79 jurisprudence has focused on defining and expanding the definition of an "anti-competitive act." Under current case law as well as the Bureau's own guidance, an anti-competitive act has generally centred on circumstances where a dominant firm (or firms) engages in conduct that has a predatory, exclusionary or disciplinary impact on a competitor. Some stakeholders have viewed this definition as being too narrow, allowing a dominant firm to escape enforcement action when engaging in conduct that substantially lessens or prevents competition but does not harm other competitors (and may actually benefit them by reducing competitive rivalry). The proposed amendments include a provision for the first time defining the scope of an anti-competitive act and provides that this means any act "intended to have a predatory, exclusionary or disciplinary negative effect on a competitor, or to have an adverse effect on competition". The proposed amendment explicitly codifies the current case law and, notably, expands upon it to capture acts intended to cause broader competitive harm. This represents an important and significant expansion of the scope of abuse of dominance provision, and highlights the continued importance of the business justification for conduct by firms with a strong market position.

In addition, the proposed amendments contemplate expanding the current non-exhaustive list of potential anti-competitive acts in section 78 to include a further example: "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 broadly worded example is directed at responses to actual or potential competitors and is noteworthy in the context of the Bureau's recent focus on issues surrounding competitor reactions to new entrants, including in the area of supply to a new entrant. The Bureau has acknowledged that this is a complex area, including in its 2018 report, which noted that forcing firms to supply potential or actual competitors could undermine incentives for firms to develop new and beneficial products and services. The addition of this example highlights the importance of both context and business justifications when considering vertical arrangements with competitors.

Expansion of private access to the Tribunal

The proposed amendments would, for the first time, allow private parties to seek leave from the Tribunal to bring an application under the abuse of dominance provisions. This is an important change, though the full practical implications are uncertain. While the proposed amendments would, if enacted, enable private parties to commence enforcement action, they do not provide a means by which private parties may seek monetary damages for the harm suffered as a result of the impugned conduct. Surprisingly, however, the proposed amendments indicate that the Tribunal could award AMPs in private actions. A structure contemplating private enforcement of public penalties would be unusual and raises several important legal and practical questions. Considering that the legal status of AMPs has been the subject of dispute and debate in a number of prior contexts, this unusual structure can be expected to be the subject of comment and discussion, including before the amendments are finalized.

In addition (and as expected), the proposed amendments include a provision that would allow either the Commissioner or a private applicant to seek interim relief in an abuse of dominance case (i.e., temporary prohibition on continuing the impugned conduct until the Tribunal issues a decision).

Drip pricing explicitly defined as a false or misleading representation

Representations to the public that are false or misleading in a material respect may be subject to penalties under either the criminal or civil false or misleading representation provisions of the *Competition Act*. Drip pricing refers to an advertised low price for a product that does not include additional fees that must be paid. As Minister Champagne signalled in February, the proposed amendments seek to codify the Bureau's established position that drip pricing is a false or misleading representation (subject to limited exceptions for additional fees imposed by law). The remainder of the elements of the offence or practice, as applicable, would still need to be established.

Efforts to thwart new entrants

The proposed amendments include new language in the abuse of dominance, civil competitor agreements and merger provisions, explicitly recognizing that in assessing whether a practice, an agreement or a merger raises substantive competition law concerns, the following factors may be considered:

- network effects
- price or non-price competition including quality, choice, or consumer privacy
- entrenchment of leading incumbents' market position
- the nature and extent of change and innovation in the relevant market

The proposed amendments do not represent substantive changes to the law. In practice, both the Bureau and the Tribunal have considered these factors when assessing the effects of a practice, civil competitor agreement or merger. Accordingly, the proposed factors serve to highlight key considerations, rather than to introduce new ones.

Anti-avoidance provision introduced to merger notification regime

The proposed amendments do not substantially reform the merger provisions of the *Competition Act*. The most notable amendment is the introduction of an anti-avoidance provision to the merger notification regime. Under the newly introduced section 113.1, if a transaction is specifically designed to avoid the application of the notifiable transactions provisions found in Part IX of the *Competition Act*, the provisions pertaining to notifiable transactions (namely sections 114 to 123.1) will still apply to the substance of the transaction.

Compelling production for entities or persons outside of Canada

The proposed amendments provide the Commissioner with expanded tools to gather information when carrying out inquiries. Most importantly, they would allow the Commissioner to obtain information from entities or persons outside of Canada pursuant to the section 11 production order regime.

Next steps

The *Budget Implementation Act, 2022* had its first reading on April 28, 2022. Typically, budget bills move through Parliament at an accelerated pace. When the *Budget Implementation Act, 2022* receives Royal Assent, the proposed amendments (as they may have been revised) will come into force (with the no-poach and wage-fixing provisions coming into effect one year later).

In the meantime, a consultation process on even more comprehensive amendments to the *Competition Act* is expected.

For further information regarding the proposed amendments or other questions relating to Canada's competition law regime, please contact the members of Osler's Competition and Foreign Investment Group.