Major changes are coming to Canadian competition law

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Canada appears to be on the verge of implementing “generational” changes to its antitrust/competition laws. While they have not been finalized yet, the changes proposed have the potential to significantly impact businesses across the economy, and to impose standards that meaningfully differ from those that apply in other countries.

Following the release of the government's Fall Economic Statement promising major changes to the *Competition Act* (Act), the changes were introduced in Parliament on November 27, 2023. These supplemented other changes to the Act that were already proposed and working their way through Parliament in Bill C-56, which is being studied by a parliamentary committee. The parliamentary committee then introduced further significant amendments on November 30, 2023.

What you need to know

Businesses operating in — or considering entering — Canada need to be aware of a number of significant changes that will result when these amendments, which are almost certain to become law, take effect. We are preparing a series of updates on the potential implications of these changes, which include many more than those highlighted below, but the most consequential are likely to be:

- For the first time, private parties will be able to bring proceedings before the Competition Tribunal seeking civil monetary recovery for non-criminal conduct such as abuse of dominance (similar to monopolization), refusal to deal, tied selling, competitor collaborations falling outside criminal conspiracy, and non-criminal deceptive marketing. Additionally, it will be easier for private parties to obtain “leave” to bring such proceedings.
    - This addresses criticism that recent amendments enabling private parties to bring cases before the Competition Tribunal (Tribunal) did not lead to any significant number of such cases being brought, arguably because of the lack of ability to recover damages. This change may lead to a significant increase in private competition litigation in Canada.
- The test for abuse of dominance will be amended to make it significantly easier for a claim to succeed. The amendment will remove the requirement for Commissioner of Competition/private parties to prove that a dominant player’s

conduct caused a substantial lessening or prevention of competition in a market, which has always been an essential element of the test. Instead, it will be possible for a dominant party to be found liable solely because it engaged in anticompetitive acts, irrespective of effects. The non-exhaustive list of examples of anticompetitive acts will also now include "directly or indirectly imposing excessive and unfair selling prices". What constitutes "excessive" or "unfair" selling prices is not defined, and will have to be established through caselaw.
    - In tandem with this change, minimum monetary penalties will also increase, to C$25 million for a first violation and $35 million for subsequent violations. Penalties can be higher, and these are in addition to any civil monetary recovery ordered under the new provision making that available.
- The period during which mergers that are not subject to mandatory notification to the Competition Bureau (Bureau) can be challenged will be **tripled**, from one year to three years after closing.
    - This is likely a response to concerns about "killer acquisitions", deals in which companies purchase likely future strong competitors before they can grow enough to be a competitive threat. Parties will have to consider whether it makes sense to voluntarily seek clearance of non-notifiable deals in certain cases to avoid this extended period.
- Also for the first time, monetary penalties and/or civil monetary recovery by private parties will be available for agreements or arrangements that harm competition but that do not rise to the level of criminal cartel agreements, including purely vertical agreements. Agreements that do not include any competitors or potential competitors will be able to be caught, if a significant purpose of any part of the agreement is to prevent or lessen competition. Previously, no monetary penalties or damages were available for such conduct.
    - This is likely a response to public concern about restrictive covenants included in some retailers' lease agreements that restrict property owners' ability to lease to the retailers' competitors. It is unclear what the impact of this is likely to be, but at minimum, businesses will need to consider these provisions when structuring their arrangements with other businesses, including at different levels of the supply chain.
- Specific provisions designed to support the "right to repair" of devices and products by consumers will be added to the Act for the first time. The refusal to deal provision of the Act will be updated to prohibit parties from refusing to provide a means of diagnosis or repair of a product, which includes diagnostic and repair information, technical updates, diagnostic software, or tools and any related documentation and service part.
    - Combined with the amendments described above to allow more private claims, monetary penalties and civil recovery, manufacturers of a variety of products, from tech to farm equipment, will need to carefully consider any limitations imposed on the right of consumers to repair their products.

These are merely the highlights, with more changes already proposed, and more likely to be proposed before the end of 2023. It is likely that all of the proposed amendments will take effect in early 2024.

Conclusion

While every business will react to and be impacted by these changes differently, **virtually every business will be affected**. New risks and considerations will apply to

existing business practices, and new opportunities may arise in certain sectors. We will be releasing a series of updates in the coming weeks looking at the important changes in more detail, and considering the impacts they may have.

By

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