Proposed amendments to the Competition Act become law

July 18, 2022

On June 23, 2022, important amendments to the *Competition Act* came into force as part of the Budget Implementation Act, 2022, No. 1 (the Amendments). The Competition Bureau views the Amendments as a preliminary phase in "modernizing Canada's competition regime", and note that the Amendments aim to "fix certain loopholes in the law, tackle business practices harmful to workers and consumers, and increase penalties and access to justice, and adapt the law to today's digital reality".

Key changes to the *Competition Act* include:

- criminalization of wage-fixing and no-poach agreements;
- increased maximum fines and penalties for criminal conspiracies, abuse of dominance and deceptive marketing practices;
- recognition of drip pricing as a deceptive marketing practice that is reviewable under both the criminal and civil provisions of the *Competition Act*;
- private access to the to the Competition Tribunal (Tribunal) in abuse of dominance cases;
- expanded definition of anti-competitive conduct;
- expanded list of factors to be considered when assessing competitive impacts, including codification of non-price considerations such as quality, choice, and consumer privacy; and
- expanded evidence-gathering powers for the Bureau.

Wage fixing and no-poach agreements

The Amendments add a new offence to the criminal conspiracy provisions that will make it an offence for unaffiliated employers to agree to "fix, maintain, decrease or control salaries, wages or terms of conditions or employment or to not solicit or hire each other's employees."[1] The former are referred to as wage-fixing agreements while the latter are known as no-poach agreements. The penalty for entering into wage fixing or no poach agreements includes imprisonment for up to 14 years or a fine to be set at the discretion of the court, or both. Additionally, private parties will be able to seek to recover damages suffered from such conduct, including through class action lawsuits. Previously, such agreements were subject to review only under the civil provisions of the *Competition Act*, and could not be the subject of private actions. Defences that have

traditionally applied to the criminal provisions of the *Competition Act*, most importantly the ancillary restraints defence and the regulated conduct defence, will similarly be available for wage fixing and no poach agreements.

This new provision will not come into force until June 23, 2023, to allow businesses time to adapt their practices.

This change largely aligns Canadian competition law with the enforcement approach taken by U.S. antitrust agencies. This means that businesses operating in both countries now have a strong incentive to align their compliance practices. Meanwhile, companies operating only in Canada will also need to ensure that they update their compliance procedures, including their HR policies, to ensure that their policies and procedures take into account the changes in the law, in or order to avoid exposure, to significant criminal risk.

Increased fines and penalties for conspiracies, abuse of dominance and deceptive marketing practices

Pursuant to the Amendments, firms and individuals engaged in anticompetitive conduct may be subject to significantly increased fines. For instance, the $25 million cap on fines for criminal conspiracies will be removed.[2] This provision comes into force next year on June 23, 2023, and will also apply to wage fixing and no-poach agreements. The caps on civil administrative monetary penalties (AMPs), which can be imposed for abuse of dominance or violation of the civil misleading advertising provisions, have also increased very significantly. Currently, the maximum fine that a corporation can incur is $10 million for a first violation, and $15 million for each subsequent violation. Under the Amendments, the maximum AMPs that can be imposed on corporations under the abuse of dominance provisions and the civil misleading advertising provisions will be the **greater** of:

i. $10 million ($15 million for each subsequent violation); and
ii. three times the value of the benefit derived from the anti-competitive conduct, **or** if the Tribunal cannot reasonably determine the amount of the benefit, the maximum penalty will be 3 per cent of that corporation's annual worldwide gross revenues.

This change could potentially see companies facing penalties in Canada that are calculated based on their worldwide revenues (including affiliates), which, in theory, could lead to penalties that extremely high relative to the companies' Canadian revenue.

Individuals who violate the misleading advertising provisions will also be subject to higher penalties. Currently the maximum penalty for individuals is $750,000 for a first violation and $1 million for each subsequent violation. The new maximum penalty for individuals will be the greater of:

i. $750,000 ($1 million for each subsequent violation) and
ii. three times the value of the benefit derived from the deceptive conduct, if that amount can be reasonably determined.

The expanded limits on fines and penalties bring the Canadian competition regime closer to the regimes in similar jurisdictions, and reflect the Bureau's view that properly structured, such penalties "can provide a strong financial incentive for business to comply with the Act." However, the potential use of a company's worldwide revenues as a basis for such penalties leaves open the possibility that Canadian penalties could be higher for certain conduct than the penalties in most other jurisdictions.

Abuse of dominance framework expanded

The Amendments also introduce several significant changes to the abuse of dominance provisions. First, the *Competition Act* now defines an "anti-competitive act" as "any act intended to have a predatory, exclusionary, or disciplinary negative effect on a competitor, *or to have an adverse effect on competition* [emphasis added]." While the first part of this definition codifies the existing case law, the second part of the definition "an adverse effect on competition", significantly expands the case law to allow the Tribunal and the courts to consider wider harm to competition. Secondly, the Amendments expand section 78 of the *Competition Act* that enumerates a non-exhaustive list of acts deemed to be anti-competitive, to now include "a selective or discriminatory response by a dominant player to make it more difficult for a competitor to enter a market, or grow, or to remove a competitor from the market."

Thirdly, the Amendments expand the list of factors that the Tribunal may consider in assessing the impact of anti-competitive practices on competition and include some that may arise in digital commerce, although the factors are broadly applicable. The additional factors the Tribunal may consider include:

- the effect of the practice on barriers to entry in the market, including network effects;
- the effect of the practice on price or non-price competition, including quality, choice or consumer privacy; and
- the nature and extent of change and innovation in a relevant market.

The expanded list codifies the consideration of non-price factors such as quality and choice under the abuse of dominance provisions. Similar additional factors have been included in competitive impact assessments under the merger provisions (s. 93) and civil competitor collaboration provisions (s. 90.1(2)) of the *Competition Act*.

Private access to the tribunal

The Amendments will now allow private parties to bring applications before the Tribunal in abuse of dominance cases. Previously, only the Commissioner could bring an abuse of dominance application and parties were limited to launching complaints with the Bureau. Section 103.1 of the *Competition Act* will now allow any person who is "directly and substantially affected" in their business by anticompetitive acts of another to seek leave from the Tribunal to bring an abuse of dominance application.

Allowing private access to the Tribunal is one way to address the Bureau's limited resources that has seen the Bureau, in its own words, "prioritize certain cases over others." The Tribunal will likely see increased activity in abuse of dominance cases that will hopefully clarify aspects of the law and remove uncertainty for businesses. Another

motivating factor that likely informed allowing private access is that business are typically more familiar with the facts of the industries in which they operate and can often act faster than the Bureau, which requires time to conduct investigations and ascertain facts.

However, the Amendments do not allow private litigants to recover damages, contrary to some other jurisdictions such as the United States, where private litigants can recover damages for similar conduct. The Tribunal will still have the discretion to levy AMPs in privately brought abuse of dominance cases (which are paid to the government), but given the lack of ability to recover damages, it is likely that private parties will only seek to bring such cases where their businesses are significantly affected by the alleged harm.

Drip pricing explicitly prohibited

Drip pricing occurs when an advertiser promotes a product or service at a price that is unattainable, because consumers must also pay additional non-government-imposed charges or fees to buy the product or service. Previously, the Commissioner has taken enforcement actions against this practice using the general false or misleading provisions of the *Competition Act* (s. 74.01), but noted that such actions have "required significant resources" to prove, in every case, why drip pricing is deceptive. The Amendments add a new provision regarding drip pricing to both the civil and criminal prohibitions on false and misleading advertising.[3] The provisions will not apply where the additional charges are entirely government imposed. One practical effect of the inclusion of drip pricing in the criminal provisions is the possibility of claimants launching class actions based on such violations.

Bureau gets expanded evidence gathering powers

Lastly, the Amendments expand the Bureau's evidence gathering powers by allowing the Bureau to obtain court orders to compel a corporation to make and deliver a written return of information in the possession of an affiliate, whether they are in or outside of Canada. Further, the court may make an order against a person outside of Canada who carries on business in Canada, or sells products into Canada. This change clarifies what had previously been a question about the extent of the Bureau's power to gather evidence from non-Canadian affiliates of entities that the Bureau was investigating.

For more information on the proposed amendments to the *Competition Act,* please reach out to any of the key contacts below.

[1] *Competition Act*, RSC 1985, c C-34 at s. 45(1.1). (*Competition Act*).

[2] *Competition Act* at s. 45(2).

[3] *Competition Act,* at ss. 52 & 74.01.

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