Trying to bridge the gap

Canada takes on cross-border price discrimination

*by **Mark Katz****

As described previously in "An old friend in new clothes" *CLI* 10 June 2014, the Canadian government is determined to remedy what it (and many Canadians) regard as an unjustified gap between US and Canadian prices for the same goods. In particular, the government has focused on what it perceives to be unjustified "country pricing" or "cross-border price discrimination" – ie businesses charging more for goods sold in Canada than in the US beyond what might be justified by the allegedly higher costs of doing business in Canada.

The government's interest in this issue followed a report by the Canadian Senate in February 2013, which tentatively concluded that the segmentation of the Canadian and US markets "reduces competition and allows some manufacturers – even some Canadian ones – to practise country pricing between the Canadian and American markets, which may contribute to the price discrepancies between the two countries".

Controversial use of the Competition Act

The government's first proposal to deal with the cross-border pricing issue was made public in February 2014. Although lacking in detail, the government revealed its intention to amend Canada's Competition Act to prohibit companies with market power from charging higher prices in Canada than in the US, where those higher prices were not reflective of "legitimate" higher costs of operating in Canada.

Interestingly, although the Canadian Senate had offered several suggestions for remedying the Canada/US price gap in its 2013 report, it had not included competition law enforcement as a possible solution to consider. Indeed, representatives of the Bureau who testified before the Senate had essentially stated that the solution for any such problem lay elsewhere, underscoring in their remarks that the Bureau is "not a price regulator" and that "high prices in themselves do not mean that a particular market is uncompetitive".

The government's proposal to use the Competition Act to tackle cross-border price discrimination met with considerable protest. Opponents argued that enforcing the proposed prohibition would be impractical and costly, as any analysis of cross-border price differences would require a complex comparison of prices and operating costs over a sustained period of time. Echoing the Bureau's comments before the Canadian Senate, opponents also said that the government's proposal would require the Bureau to assume a regulatory role for which it is not qualified. Finally, they claimed that other measures, such as tariff reductions and the elimination of government supply management of a number of staple agricultural products, would probably be far more effective in reducing any Canada/US price gap.

The revised plan

Notwithstanding these criticisms, the Canadian government has now forged ahead with its plans, albeit in a modified form. Thus, on 9 December 2014, the Canadian government released bill C-49, the Price Transparency Act, to amend the Competition Act so as to authorise the commissioner of competition, the head of Canada's Competition Bureau, to inquire into whether the selling price of a product or class of products is or was higher in Canada than the selling price of that (or a similar) product or class of products in the United States. The Commissioner may inquire into both the extent of the difference between the selling prices and the reasons for the difference, and issue a publicly accessible report of his conclusions within one year of receiving such information.

In other words, the proposed legislation does not actually prohibit unjustified cross-border price discrimination or prescribe penalties for such conduct; in the words of Canada's minister of industry, it only authorises the Competition Bureau to "investigate price discrimination and expose it". In that regard, bill C-49 would also give the commissioner expanded authority to compel the production of information from entities operating outside Canada.

New questions and concerns

Although it can be presumed that the government's intention was to address at least some of the criticisms levelled against its February 2014 proposal, as is so often the case, the current proposal simply raises new questions and concerns of its own. As an example:

- How will the commissioner decide which companies and products to investigate, particularly as there is no market power requirement?
- Without any legislative standards, how will the commissioner decide if differences between a company's Canadian and US prices are discriminatory or not?
- What rights will parties subject to investigation have to dispute or respond to the commissioner's negative findings before a report is issued?
- In the absence of penalties or other enforcement measures, is the prospect of a potentially negative report being issued by the commissioner enough to persuade companies to change their Canada/US pricing conduct?

A departure from the norm

More fundamentally, bill C-49 represents a departure from the traditional approach of Canadian competition policy, which is to limit enforcement action to cases where a party has engaged in conduct that contravenes specific prohibitions in the Competition Act. For that reason, the Competition Bureau does not have broad powers simply to inquire into markets or to regulate conduct outside of targeted enforcement action. In attempting to deal with the issue of cross-border price discrimination, however, the government seems to have decided that a departure from these traditional norms is justified.

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