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Canada's New Competition Commissioner Announces Aggressive Enforcement Plans

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Last month, Canada's newly appointed Commissioner of Competition, Matthew Boswell, promised to prioritize more aggressive competition law in Canada. In his first speech since he was appointed to the position for a five-year term, as well as in subsequent interviews and public pronouncements, the Commissioner asserted that the Competition Bureau should be making greater use of its existing enforcement tools, advocated for higher penalties (particularly for "multinational tech firms") and suggested that significant legislative changes to the *Competition Act* may be necessary.

The Commissioner's promise of more vigorous enforcement comes at a time of increasing discussion about the role of antitrust enforcement in the digital economy, particularly as it relates to "big tech." In Canada, for example, the Minister of Innovation, Science and Economic Development (ISED) recently released a Digital Charter, which included a letter from the Minister to Commissioner Boswell with specific suggestions on how the Bureau should enforce its mandate in the digital economy.

We discuss these developments and related implications in more detail below.

Increased Scrutiny of Certain Industries and Practices

The Commissioner has stated that the Bureau intends to "vigorously enforce and promote competition in sectors of the economy that matter to Canadians." Key industries that the Commissioner has specifically identified as being of interest include telecom, pharmaceuticals and infrastructure.

That said, the Bureau's interest in these sectors is not new. For example, the Bureau has repeatedly stated that it is interested in pursuing enforcement in the pharmaceutical sector; however, it appears that the right case has yet to present itself (at least outside the mergers context). Earlier this year, the Bureau announced that it had discontinued an abuse of dominance inquiry with respect to allegations of below-cost pricing and exclusionary conduct by a pharmaceutical supplier in Canada.

The Bureau's interest and activity in the telecom sector is similarly long-standing. In June 2018, the Bureau was directed by the Minister of ISED to assist the Canadian Radio-television and Telecommunications Commission (CRTC) in its investigation of "high-pressure telecom sales practices." The Bureau had previously pointed out that aggressive sales tactics that are not false or misleading are not within the scope of its enforcement mandate. More recently, however, the Bureau obtained orders to advance its investigation into whether Bell Canada has engaged in false or misleading representations in its marketing practices.

In addition, the Commissioner recently sought to obtain significant amounts of information from Canadian telecom companies as part of the CRTC's review of mobile wireless services. Given that the CRTC's review contemplates an assessment of mobile wireless competition, the Commissioner asked the CRTC to request certain information to allow the Bureau to conduct an economic analysis of competition in the sector. The CRTC initially denied the Bureau's information request, noting the significant overlap between the Bureau's request and the existing CRTC request for information, as well as the overly expansive nature of the Bureau's request. The CRTC accepted the most recent iteration of the Bureau's request in May and directed industry participants to respond.

The Bureau also submitted a set of comments to the CRTC in May, providing the Bureau's initial "high-level findings" regarding competition in mobile wireless services in Canada and considerations for designing a regulatory framework. As part of its initial findings, the Bureau noted that its review of recent public pricing data suggests that higher prices exist where there is no strong regional

competitor and that factors such as network quality and population density did not explain these pricing differences. The Bureau also advocated for the need for "a cost benefit" analysis of requiring mandated mobile virtual network operator (MVNO) access as well as any feasible alternative options to allow the CRTC to determine the best course of action. The Bureau noted that although mandated MVNO access may be necessary to increase the affordability of wireless services, such an approach would not be without risk and, in particular, could comprise investments in 5G technologies and potentially undermine the current and future success of existing regional carriers.

We also expect the Bureau will continue to take active enforcement across all industries with respect to false or misleading representations about the use and collection of data (i.e., allegedly false or misleading privacy policies) and pricing. The Bureau's proceeding against Ticketmaster regarding its pricing practices is scheduled to be heard by the Competition Tribunal in the fall and may be an important test of the Bureau's enforcement approach in this area.

Implications

- The Commissioner's statements suggest that companies in the telecom, pharmaceuticals and infrastructure sectors will be facing even more scrutiny and possible enforcement. This underscores the need for awareness of competition compliance issues and appropriate training.

Greater Use of Injunctions

The Commissioner has explained that the Bureau's active enforcement "will include increased consideration of the use of tools such as injunction applications" and that the Bureau will "use these tools more frequently, as resources permit, to interrupt or halt the conduct in question, pending a full hearing." In the mergers context, the Bureau has previously sought interim injunctions, although not that frequently and not always successfully. The Bureau was only partially successful in its most recent (2015) attempt to obtain an injunction in relation to a merger in the retail gas industry.

Although the Bureau's ability to seek injunctions in the mergers context is not new, the Bureau may also seek interim orders under the misleading advertising provisions or the abuse of dominance provisions of the *Competition Act*. For example, the Commissioner may seek a temporary order requiring a person to stop making certain representations if serious harm is likely to ensue and the balance of convenience favours the issuance of the order.

Implications

- We expect the Bureau to apply for interim orders more frequently in the mergers context as well in relation to allegations of misleading representations and abuse of dominance.
- Given that the scope and applicability of the relevant interim order provisions remain relatively untested outside the mergers context, any attempt by the Bureau to obtain such interim orders more frequently is likely to result in increased litigation.

Increased Scrutiny of Non-Notifiable Mergers and Stringent Approach to Efficiencies Claims

Under Commissioner Boswell's leadership, the Bureau's Merger Notification Unit has been expanded to include a Merger Intelligence Unit whose focus will be on gathering intelligence in respect of mergers that were not notified. In the two months since this unit was created, the Bureau has identified two potentially problematic transactions that would not have otherwise been subject to review. In more recent speaking engagements, the Commissioner has specifically noted that the Bureau intends to closely review mergers that involve large technology firms acquiring smaller startup firms, even where notification of such transactions is not mandatory.

The Commissioner has also indicated the Bureau is rethinking its procedural approach to merger reviews where parties assert the efficiencies defence. Canada's efficiencies defence provides that a remedy may not be imposed in respect of a merger that substantially lessens competition when the efficiencies arising from the merger would outweigh the anticompetitive harm.

Although the efficiencies defence is unlikely to be relevant or prove decisive in most mergers, it has been invoked successfully in certain recent mergers. This no doubt explains the Bureau's antipathy to the provision. In this vein, Commissioner Boswell has argued that recent Supreme Court of Canada jurisprudence imposes a significant burden on the Bureau to quantify the anticompetitive effects of a merger (to allow the effects to be weighed against any efficiencies). He has also argued that such an approach is ill-suited to the digital economy in which the adverse effects of mergers on dynamic competition may be especially difficult for the Bureau to quantify.

The Commissioner has said that the Bureau will issue updated guidance later this year on how it will assess efficiency claims in merger reviews. In earlier remarks, the Commissioner signalled that the Bureau may require parties to provide detailed data of expected efficiencies and commit to suspend closing while the Bureau completes its review.

Implications

- Parties to non-notifiable transactions, particularly those in the tech sector involving the acquisition of smaller startups, should assess the competitive impact of any such transactions and consider the best strategy to address any antitrust risk (including in transaction documents).
- Given the Commissioner's express disapproval of the efficiencies defence and potentially stricter assessment of such claims in future merger reviews, in cases where the defence may play an important role in a transaction's overall success, merging parties may opt to spend less time trying to convince the Bureau of the application of the efficiencies defence. Instead, parties may choose to test the defence directly before the Competition Tribunal and appeal courts.

The Digital Charter and Competition Law Enforcement and Policy

With the release of the Digital Charter and accompanying letter to the Commissioner, it is clear that the Minister expects the Bureau to be actively involved in the digital economy. In particular, the Minister asked that the Competition Bureau work with ISED to "consider critical issues such as: the impact of digital transformation on competition; the emerging issues for competition in data accumulation, transparency, and control; the effectiveness of current competition policy tools and marketplace frameworks; and the effectiveness of current investigative and judicial processes."

Participating in a panel discussion at the OECD in June 2019, the Commissioner explained that he views the guidance from the Minister as a "major opportunity to get under the hood" of competition policy in Canada and review the effectiveness of the Bureau's enforcement tools. While the Competition Bureau has long sought greater input into competition policy, it is clear that the Commissioner sees the Digital Charter as an opening to revisit Canada's competition legislation and enforcement tools, particularly as they relate to the digital economy.

The Commissioner also expressed the view that there are "several gaps" in the Canadian regime that "don't measure up to best practices." In particular, the Commissioner pointed to the Bureau's lack of power to conduct market studies (including the ability to compel industry participants to produce information where a competition concern has not been specifically identified). He also expressed his view that the "maximum fines allowed under the Act lack the teeth to deter anticompetitive behaviour particularly when you're talking about large multinational tech firms."

Implications

- The Bureau is likely to seize the opportunity afforded under the Digital Charter to conduct a wide-ranging review of competition legislation and continue to advocate strenuously for greater financial penalties, broad market study powers and the elimination of the efficiencies defence.
- In the longer term, if the Commissioner is successful in obtaining market study powers, these studies could impose significant costs and burdens for Canadian businesses. Indeed, the Bureau's initial requests for information in the CRTC's review of mobile wireless services (discussed above) provide a sense of the potentially expansive and costly nature of such studies.

- The Commissioner's tough talk regarding the need for higher monetary penalties to be available against "big tech" is consistent with the Minister's recent statements in relation to violations in the privacy area by large tech firms. However, the Bureau itself does not have the power to impose any monetary penalties and Canadian courts have, to date, been reluctant to impose penalties that approach the existing maximums available under the *Competition Act* for non-criminal conduct. The reluctance that courts have historically displayed in imposing high penalties for non-criminal conduct may be attributed to the fact that the line between aggressive but healthy competition and anticompetitive behaviour is often difficult to discern.

Conclusion

The Commissioner has charted an aggressive course of action for the Competition Bureau that includes more vigorous enforcement and suggestions that significant legislative changes are necessary. Whether the Bureau will succeed in any or all of these ambitious aims remains to be seen and will depend, in part, on the Bureau's case selection and whether the political winds and courts agree that a more aggressive enforcement and policy direction is warranted.

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