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Canada's *Competition Act* Reforms Include Expanded Power to Challenge Anticompetitive Agreements

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The Minister of Finance recently introduced Bill C-56 to implement certain proposals announced by the Prime Minister designed to lower prices and "make life more affordable" for Canadians. The bill provides details of the proposed amendments to the *Competition Act* (Act) noted in our bulletin of September 19, 2023. These amendments relate to new market study powers, repeal of the efficiencies defence for mergers and additional powers to address a broader set of agreements that negatively affect competition.

Key Takeaways

- Bill C-56 would repeal the efficiencies defence for mergers, leaving future treatment of efficiencies in merger analysis unclear; however, a defence based on efficiencies would continue to be available under the existing civil provisions relating to agreements between competitors.
- Bill C-56 would expand the civil provisions dealing with agreements that substantially prevent or lessen competition to capture agreements between any two or more persons, regardless of whether those persons are competitors, if it can also be demonstrated that a significant purpose of the agreement (or a portion thereof) is to substantially lessen or prevent competition in a given market.
- Bill C-56 would introduce a new regime for market studies directed by the Minister of Innovation, Science and Industry. Under this regime, the Competition Bureau could apply for court orders to compel market participants to produce information and records or provide testimony. In addition to some level of court oversight, the market study regime provides for ministerial control over the scope of studies and imposes certain procedural obligations on the Bureau.
- The New Democratic Party has proposed its own legislative amendments to the Act that go further than Bill C-56 in material respects. It remains to be seen whether these or other proposals would affect Bill C-56, which is now at second reading. The government also continues to consider a wide variety of significant potential amendments to the *Competition Act*, which may become the subject of future government bills.

Expanded Powers to Challenge Anticompetitive Agreements

The government's initial announcement stated that the Competition Bureau would be empowered to take action against collaborations that stifle competition and consumer choice, particularly where large grocers prevent smaller competitors from establishing operations nearby.

However, Bill C-56 is not limited to the grocery sector or to restrictive covenants with respect to real property. Instead, the bill proposes to broaden the civil "competitor agreements" provisions in section 90.1 of the *Competition Act* to allow the Commissioner of Competition to challenge agreements reached between *non-competitors* where (i) a "significant purpose of the agreement or arrangement, or any part of it, is to prevent or lessen competition in any market"; and (ii) the agreement or arrangement is likely to prevent or lessen competition substantially in a market.

Currently, section 90.1 applies only to agreements or arrangements that include two or more competitors.

In theory, the amended provision would capture any agreement (or part of an agreement) that has the significant purpose of restricting competition in a market. However, it remains to be seen how the Competition Bureau and the Competition Tribunal will interpret the scope of the requirement that an impugned agreement has a "significant purpose" of lessening or preventing competition, including, for instance, whether a valid and pro-competitive business rationale would be relevant to the analysis. To that end, existing jurisprudence under the abuse of dominance provisions that is used to evaluate whether certain conduct is anticompetitive or has a valid business justification may be relevant to the application of this provision as well.

It is also notable that the Commissioner would still have to demonstrate that the challenged agreement is likely to prevent or lessen competition substantially in a market relative to a "but for" scenario reflecting the likely state of competition in the absence of the agreement. Take the example of a restrictive covenant in a lease between a grocer and a landlord (the type of agreement identified in the Bureau's recent Retail Grocery Market Study Report as being of potential concern): if a grocer would have been unwilling to invest in establishing a store in a particular location without an assurance that certain categories of other food retailers would not also be allowed in the same location, then a restrictive covenant of this type may have an overall pro-competitive effect and potentially a legitimate business rationale. In addition, a restrictive covenant that limits the number of grocers in a particular location may have limited impact on competition if rivalry among grocers occurs in a broader relevant geographic market.

The amended section 90.1 may also apply to a wide range of types of "vertical" agreements between suppliers and distributors, creating potential enforcement overlaps in respect of vertical conduct currently addressed under civil provisions in the Act focused on abuse of dominance, refusals to deal, resale price maintenance, exclusive dealing, market restriction and tied selling. That said, Bill C-56 provides some clarity with respect to the government's proposal in several respects:

- It remains the case that only the Commissioner can challenge an agreement under the broader section 90.1, and the sole remedy available to the Competition Tribunal (absent the consent of the respondent) is an order prohibiting a person from doing anything under the agreement or arrangement.
- The amendment to section 90.1 would not come into effect until one year after it is passed by Parliament and receives royal assent, which will provide time for businesses to assess its implications and make any necessary changes to their practices.
- Bill C-56 does not amend any of the defences available under section 90.1, including a defence based on overriding efficiencies resulting from the agreement or arrangement. (As discussed below, the bill would remove the efficiencies defence from the Act's merger provisions.) The bill would also not amend the existing exceptions in section 90.1 for agreements among affiliates, export agreements and certain agreements approved by the Minister of Finance or the Minister of Transport.

While the bill contemplates a delay in the coming into force of the amendments to section 90.1, timely guidance from the Competition Bureau on its intended enforcement approach to the new provision would help reduce uncertainty and the potential to deter legitimate business agreements among non-competitors.

Repeal of Efficiency Defence for Mergers

Bill C-56 follows through on the government's stated intention to repeal the efficiencies defence, but would do so only in the context of the *Competition Act*'s merger review provisions. The bill does not propose to provide the Competition Tribunal with any additional guidance on how efficiencies should be taken into account with respect to future mergers, for example by including efficiencies as an explicit factor that may be considered in a competitive effects analysis. However, efficiencies considerations appear to be implicit in some of the existing statutory factors the Competition Tribunal may take into account in merger review. In addition, the Act currently permits merging parties to argue, on a case-by-case basis, that "any other factor" (presumably including efficiencies) is relevant to competition in markets that are affected by a proposed transaction. The Minister of Innovation, Science and Industry (the Minister) highlighted this in his speech to the House of Commons on Bill C-56 when he remarked that "if a proposed merger creates efficiencies that strengthen competition in a sector, the Tribunal would be able to consider them in its deliberations." Nevertheless, given the repeal of the efficiencies defence, the Act's merger provisions would benefit from the clarity of having efficiencies included as an explicit factor that may be considered in a

competitive effects analysis. Such an approach was proposed by the New Democratic Party in its own legislative amendments in Bill C-352 (discussed below).

After the bill's passage, the efficiencies defence for mergers will continue to apply only to proposed transactions that have been notified to the Competition Bureau before the day that implementing legislation comes into force or that have been completed before that day. The bill does not contemplate a one-year delay for businesses to adapt to this amendment.

New Market Study Power

Bill C-56 would also implement the government's promise to allow for compulsory information-gathering powers for market studies conducted by the Competition Bureau. These powers permit the compelled production of information and records in response to market studies conducted at the Minister's direction when grounds for remedial action under the *Competition Act* have not been identified. We have previously noted concerns about the cost, scope and oversight of such compulsory production powers. Indeed, in his speech to the House of Commons on Bill C-56, the Minister acknowledged stakeholder feedback about "the need for safeguards to prevent fishing expeditions" and described the bill's proposed market study framework as being "aligned with international best practices" to "ensure that any burden placed on...companies is limited to what is strictly necessary to achieve public policy objectives."

The bill provides clarity regarding the government's proposed approach to market studies in a number of important respects:

- The Commissioner may seek compulsory production orders for a market study only if the study is commenced at the direction of the Minister following consultation between the Minister and the Commissioner to determine whether a proposed study is feasible, including with regard to cost. In practice, the Minister has previously directed the Commissioner to look into certain industry sectors, including most recently the retail grocery sector. In addition, the Minister already has the power to direct the Commissioner to commence an inquiry under the Act. However, the proposed amendments would create a regime that specifically contemplates market studies directed by the Minister that are subject to specific requirements and some oversight, as discussed in more detail below.
- Upon the Minister's direction to commence a market study, the Commissioner must prepare and publish proposed terms of reference for the inquiry and take into account any comments from the public in setting final terms of reference. The final terms of reference must be approved by the Minister and published on a publicly available website. In addition to formal market studies being initiated by an elected official, the provision for the public to comment on the terms of reference may in some cases lead to broader studies than would otherwise be the case and could lead to increased political pressure regarding the ambit of such studies.
- The Commissioner must then complete and publish a report before the expiry of a period specified by the Minister, not to exceed 18 months, with the potential for the Minister to subsequently extend the period.
- The Commissioner's compulsory powers will be implemented through the same procedures, described below, currently available for inquiries in respect of which the Commissioner has reason to believe that there are grounds for a remedial order under the Act.
  - The Commissioner can apply to a judge on an *ex parte* basis for a court order requiring production of information or records.
  - The Commissioner would also have the power to apply for *ex parte* orders requiring individuals to attend for examinations under oath.
  - Information provided under an order obtained regarding a market study would be subject to the confidentiality protections provided in section 29 of the *Competition Act*. However, that section has an important exception that allows the Commissioner to communicate the information "for the purposes of the administration or enforcement of" the *Competition Act*. Accordingly, there would be no express limitation in the Act on the Commissioner using information obtained in a market study when seeking to enforce the Act. The Commissioner also takes the position that this confidentiality exception allows the Competition Bureau to share information with foreign competition regulators.

- Bill C-56 also requires the Commissioner to send a complete or partial draft of the market study report to everyone who is subjected to a compulsory production or attendance order in respect of a market study. The Commissioner is required to provide three working days for recipients to identify any concerns about factual accuracy or confidential information that should not be disclosed in the final report. While a right for those affected by compulsory orders to review a draft report in advance is critical to protect legitimate interests, the three working days time frame for doing so is likely to be insufficient in many cases, and it remains to be seen if a more reasonable time frame is adopted in any subsequent versions of the bill.

Notwithstanding the new regime for formal market studies contained in the bill, it should be noted that nothing in the proposed legislation would bar the Commissioner from continuing to conduct informal market studies in the same manner as has been done in the past (i.e., by relying on voluntary production of information).

NDP Private Member's Bill C-352

On September 18, 2023, following the Prime Minister's announcement but before the tabling of Bill C-56, the leader of Canada's New Democratic Party (NDP) introduced Bill C-352 to amend the *Competition Act*. A private member's bill is not assured of consideration by Parliament, but Bill C-352 may warrant some attention as the governing Liberal Party holds a minority of seats in Parliament and has been relying on support from the NDP pursuant to a supply and confidence agreement that is intended to remain in place until June 2025.

Bill C-352 makes proposals largely similar to Bill C-56 with respect to market studies, but would repeal the efficiencies defence from both the merger provisions in section 92 and what is now the civil competitor agreements provisions in section 90.1.

However, the NDP bill would go much further and dramatically alter the merger and abuse of dominance provisions of the Act by

- mandating the Competition Tribunal to block any merger that is likely to result in a market share over 60% and requiring that any merger that results in a market share between 30% and 60% be blocked unless the parties can demonstrate substantial pro-competitive outcomes, including reduced prices, increased wages and increased product or service quality; and
- empowering the Competition Tribunal to prohibit a dominant firm from engaging in any conduct that is legislatively defined to be an anticompetitive act (including a new category of anticompetitive conduct encompassing "excessive or unfair selling prices") without the Commissioner (or a private applicant) having to demonstrate that the conduct is likely to prevent or lessen competition substantially. There would, however, be a requirement to demonstrate such an anticompetitive effect in order to obtain a monetary penalty or an order to take positive action to restore competition.

The NDP leader has stated that Bill C-352 is his priority in the current parliamentary session, but it remains to be seen whether it will move forward in the parliamentary procedure or whether the government will be amenable to adopting any portions of the NDP bill in any further versions of Bill C-56.

Ongoing Comprehensive Consultation on Further *Competition Act* Reform

The government's recent announcements make clear that it is continuing with its ongoing consultation on the need for further *Competition Act* reform and intends to make further legislative amendments. On September 20, it released a report on the feedback it received from stakeholders and the general public. In the course of reporting on the comments received, the government stated that it is considering a number of potential amendments to the Act, including the following:

- **Mergers.** Revisiting the standard for a merger remedy to better protect against prospective competitive harm and to better account for effects on labour markets; revising the pre-merger notification rules to better capture mergers of interest; easing the conditions for interim relief when the Bureau is challenging a merger and seeking an injunction; and extending (to three years, from one) the limitation period for the Commissioner to challenge non-notifiable mergers, or tying the limitation period to voluntary notification.
- **Abuse of dominance.** Better defining dominance or joint dominance to address situations of de facto dominant behaviour, such as through the actions of firms that may not be unmistakably dominant on their own, but which together exert substantial anticompetitive

influence on a market; creating bright-line rules or presumptions for dominant firms or platforms with respect to behaviour or acquisitions; and crafting a simpler test for a remedial order, including revisiting the relevance of intent and/or competitive effects.

- **Collaborations.** Deeming or inferring agreements more easily for certain forms of civilly reviewable conduct, such as through algorithmic activity; introducing monetary penalties to section 90.1 in respect of agreements among competitors (and, as a result of Bill C-56, potentially others) that prevent or lessen competition substantially; and reintroducing a broad buy-side collusion prohibition into the Act's criminal conspiracy offence.
- **Notification of certain types of agreements.** Introducing mandatory notification or a voluntary clearance process for certain potentially problematic types of agreements, such as pharmaceutical patent litigation settlements.
- **Private enforcement and damages.** Allowing private parties to seek compensation for damages suffered from civilly reviewable (non-merger) conduct under the Act (which is already available in respect of conduct that violates criminal offences in the Act).
- **Expanded Competition Bureau powers.** Giving the Bureau more leeway to act as a decision-maker, such as through simplified information collection or a first-instance ability to authorize or prevent forms of conduct.

The report concludes by noting that the government must now "consider how best to rebalance the regime to better limit concentration and deter anticompetitive practices, while avoiding overcorrection and preserving certainty in compliance". The report further states that the government believes it is appropriately equipped to develop "well-calibrated proposals" for parliamentary consideration which may indicate that the next phase of the government's consideration of further *Competition Act* reform will soon take the form of another bill presented to Parliament. However, it is at this point unclear which of the proposals currently under consideration will advance to legislative proposals.

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