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# A New Era for Canadian Competition Law: Landmark Proposed Changes to the *Competition Act* Announced

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The government announced significant additional amendments to Canada's *Competition Act* in late November 2023, building on those already under consideration by Parliament in Bill C-56 and others enacted in 2022. More specifically, the *Fall Economic Statement Implementation Act, 2023* (FES Implementation Act) contains the proposed amendments previewed in the Fall Economic Statement and outlined in our recent bulletin.

In addition, the Standing Committee on Finance (Finance Committee) recently proposed extensive further amendments to Bill C-56—an existing bill that would enact other significant changes to the *Competition Act*.

The following are the key proposed changes to Canada's competition law landscape and their implications are discussed in more detail below:

- expanding the scope of private litigation under the *Competition Act* to enable litigants to obtain compensation in respect of certain civil matters and to also permit private litigation in respect of the civil anticompetitive agreements and misleading advertising provisions;
- an increased focus on anticompetitive collaborations, including the power to prohibit anticompetitive vertical agreements, and introducing monetary penalties for such conduct;
- revising the test for abuse of dominance and further increasing penalties for such conduct;
- expanding the abuse of dominance provisions to include the imposition of "excessive and unfair selling prices" as an anticompetitive act subject to possible sanction;
- revising the notification and review regime for mergers to be more consistent with Canada's trading partners, including expanding merger notification requirements and making substantive changes to the merger review process and approach, including by repealing the efficiencies defence;
- revising the interim injunctions provisions, prohibiting parties from closing a merger until the Competition Tribunal (Tribunal) has disposed of the Commissioner of Competition's (Commissioner's) interim injunction application;
- a focus on environmental initiatives, with a new clearance mechanism for environmental collaborations and a new civil provision expressly prohibiting certain types of "greenwashing" claims without a prior adequate and proper test;
- empowering the Commissioner to initiate formal market studies; and
- other changes, including expanding and clarifying the scope of the refusal to deal provision; prohibiting reprisal actions against individuals and entities who communicate or cooperate with the Commissioner; and reducing the scope for cost awards against the Commissioner.

## Expanded Private Rights of Action for Civil Reviewable Conduct

The 2022 amendments to the *Competition Act* extended private enforcement to the abuse of dominance provisions but did not change the standard for private parties to obtain leave to bring such cases and did not introduce the possibility of obtaining damages if successful.

The FES Implementation Act would take these additional steps and significantly expand private access to the Competition Tribunal (Tribunal) and enhance remedies available to private litigants. These changes would potentially increase incentives for private parties to bring claims and thus lead to increased activity before the Tribunal.

- **Broader scope for private enforcement**. Currently, private parties can bring claims under the *Competition Act*'s civil provisions with leave of the Tribunal only in respect of certain restrictive trade practices such as price maintenance, refusal to deal and abuse of dominance. The FES Implementation Act will expand the ability of private parties to bring claims (with leave) under the civil misleading advertising and civil anticompetitive agreements provisions.
- **Broadened scope for obtaining leave**. In order to obtain leave, currently a private litigant is generally required to show that it is directly and substantially affected by the alleged conduct. The amendments will broaden the criteria to also permit the Tribunal to grant leave where it is satisfied that it is in the public interest to do so. It remains to be seen how the Tribunal will interpret this legislative direction, including whether it may permit a broader range of private parties to commence litigation. Additionally, the Tribunal may now grant leave for a private right of action regarding the restrictive trade practices and anticompetitive collaborations where the private applicant's business is affected in whole or part.
- **Enhanced remedies**. The FES Implementation Act creates new remedies for private applicants in respect of restrictive trade practices and the civil anticompetitive agreements provisions. Specifically, in addition to being able to order the same remedies available to the Commissioner, the Tribunal will be empowered to order disgorgement to affected persons (including the applicant and to third parties affected by the conduct) of the "benefit derived from the conduct" that is the subject of an order. The enhanced remedies may encourage class-action-type proceedings before the Tribunal.

The FES Implementation Act will also subject out-of-court settlements to challenge by the Commissioner once leave is granted in a private application. Currently under the *Competition Act*, parties to a private action can choose to settle their dispute through a consent agreement registered with the Tribunal or an out-of-court settlement agreement. A registered consent agreement has the same force and effect as an order of the Tribunal, and the Commissioner can seek an order of the Tribunal to vary or rescind a consent agreement registered by private litigants if the Commissioner believes that the agreement has or is likely to have anticompetitive effects. Similar to the requirements for a registered consent agreement, the FES Implementation Act would impose a new obligation on private litigants who reach an out-of-court settlement after leave has been granted to provide a copy of the settlement agreement to the Commissioner. The Commissioner can then apply to the Tribunal to vary or rescind the settlement agreement if the Tribunal finds "that the [settlement] agreement has or is likely to have anticompetitive effects." It is unclear what ability the Commissioner or Tribunal would have to enforce a variation or rescission of a settlement agreement since such a settlement agreement, unlike a consent agreement, would not be expressly deemed to have the force of a Tribunal order. This requirement may incentivize parties to settle disputes prior to leave being granted and litigation being commenced at the Tribunal, since there would be no requirement to serve a copy of a settlement agreement on the Commissioner in such circumstances. Alternatively, it may encourage settling parties to seek to involve the Commissioner before finalizing "out-of-court" settlements to enhance certainty.

Back to top

## Expanded Powers to Challenge Anticompetitive Agreements

Bill C-56 proposes to broaden the civil "competitor agreements" provisions in section 90.1 of the *Competition Act* to allow the Commissioner to challenge agreements 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 prevents or lessens or 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 but it does not include a requirement to demonstrate an anticompetitive purpose in addition to likely anticompetitive effects.

The FES Implementation Act and the Finance Committee's amendments to Bill C-56 would allow private parties to seek leave to challenge agreements under section 90.1 (as discussed above) and expand the ambit of section 90.1 in the following ways:

- **New remedies**. In addition to prohibition orders and other remedies currently available on consent for conduct contrary to section 90.1, the Tribunal will now have the ability to
  i. impose monetary penalties of up to the greater of $10 million for the first order (and $15 million for each subsequent order) and three times the value of the benefit derived from the agreement (or if that amount cannot be reasonably determined, 3% of the person's annual worldwide gross revenues);
  ii. require respondents to take any other action, including divesting of assets or shares, necessary to overcome the effects of the unlawful agreement; and
  iii. in private litigation, order disgorgement in an amount up to the value of the benefit derived from the challenged agreement to be distributed to private applicants and others affected by the agreement.
- **Prior conduct can be challenged**. Prior agreements could now be challenged and subjected to penalties and remedial orders within three years of the termination of the agreement.
- **Efficiencies defence removed**. Consistent with existing proposed amendments to the *Competition Act*'s merger review provisions in Bill C-56, the bill will also now repeal the efficiencies defence for conduct covered by section 90.1.

The expansion of section 90.1 to include agreements between non-competitors and the ability of private parties to seek orders and financial payments would not take effect until one year after the relevant amendments receive royal assent. However, the ability to challenge past agreements within three years of their termination, and the potential for the Tribunal to impose monetary penalties and broader remedial orders to restore competition would take effect immediately when the FES Implementation Act receives royal assent.

Back to top

## Abuse of Dominance: Revised Legal Test and Increased Penalties

Currently, three elements must be established for the Commissioner or a private litigant to establish an abuse of dominance under section 79 of the *Competition Act*: (i) one or more persons must substantially or completely control a class or species of business throughout Canada or any area thereof; (ii) within the previous three years, such person(s) must have engaged in or be engaging in a practice of anticompetitive acts; and (iii) the practice must have had, be having or be likely to have the effect of preventing or lessening competition substantially in a market.

Bill C-56 now proposes a new framework for abuse of dominance that would apply a different test depending on whether the remedy sought is: (i) a prohibition order (i.e., an order prohibiting the dominant entity from engaging in the conduct in question) or (ii) other remedies such as monetary penalties or an order to restore competition.

*Prohibition Order*

If Bill C-56 is implemented, to obtain a prohibition order, the Commissioner or a private litigant will only need to establish that (i) a firm is dominant (or a group of firms are jointly dominant); and (ii) the firm(s) engaged in conduct with either anticompetitive intent *or* effect.

Specifically, where the Commissioner or a private litigant can establish that a dominant firm has engaged in a practice of "anticompetitive acts," that is, acts "intended to have a predatory, exclusionary or disciplinary negative effect on a competitor, or to have an adverse effect on competition," there will no longer be a need to establish that the challenged practice is having or is likely to result in a substantial prevention or lessening of competition. However, we expect that a respondent can seek to justify its conduct and avoid a prohibition order based only on intent by demonstrating that the conduct had a legitimate business justification, for example by demonstrating that the purpose of the conduct was not anticompetitive but rather efficiency-enhancing or pro-competitive. It is unclear how the Tribunal will deal with conduct intended to have a range of effects, only some of which may be viewed as exclusionary or anticompetitive.

Alternatively, any conduct by a dominant firm that has or is likely to have the *effect* of preventing or lessening competition substantially may be subject to a prohibition order on that basis, provided that the effect is not a result of superior competitive performance.

As a result, these amendments may significantly increase the risk of challenges to conduct by dominant firms in Canada, although the full implications of the amendments are not certain and may remain unclear pending further guidance from the courts and the Competition Bureau.

*Orders to Restore Competition and Monetary Penalties*

Consistent with the current law, where a dominant firm has engaged in a practice of anticompetitive acts and that practice prevents or lessens, or is likely to prevent or lessen, competition substantially, the Tribunal remains empowered to order dominant firms to take other action to restore competition, and to pay monetary penalties. However, the maximum monetary penalties will be increased, up to the greater of $25 million for an initial order (and $35 million for each subsequent order) and three times the value of the benefit derived from the conduct, or if that amount cannot be reasonably determined, 3% of the person's annual worldwide gross revenues.

*Disgorgement in a Private Application*

Similarly, on a private application, where a practice of anticompetitive acts also has the effect or likely effect of substantially preventing or lessening competition, the Tribunal will now also be permitted to order disgorgement in an amount that does not exceed the value of the benefit derived from the impugned conduct, payable to the applicant and any third party affected by the conduct. In determining a monetary penalty, the Tribunal would be able to take any disgorgement payments into account. As noted previously, the enhanced disgorgement remedy may encourage class-action-type proceedings before the Tribunal.

Back to top

## Expansion of Abuse of Dominance to Include the Imposition of "Excessive and Unfair Selling Prices"

The Finance Committee's amendments to Bill C-56 also add a new example of an anticompetitive act, namely "directly or indirectly imposing excessive and unfair selling prices." Notably, this proposal was not included in the detailed package of changes recommended in the Competition Bureau's submission to the government.

The term "excessive and unfair selling prices" is undefined, and no similar concept is found elsewhere in the *Competition Act*. The concept is, however, contained in the European Union competition law framework and that of some other jurisdictions, but is not commonly invoked. EU courts have assessed whether a price is excessive or unfair in relation to a range of benchmarks, including measures of costs and prices charged in other situations or markets deemed to be comparable. The concept of excessive and unfair prices is in tension with long-standing approaches in Canadian competition law that possessing market power, including the power to increase prices, is not (by itself) actionable conduct but rather may be the (possibly short-run) outcome of superior competitive performance, such as investments in innovation. It remains to be seen how the Tribunal would evaluate whether a price is excessive or unfair. As currently proposed, this amendment would be effective immediately upon royal assent to Bill C-56.

Back to top

## Mergers: Expanding the Scope of Notifiable Transactions

The FES Implementation Act revises the "size of transaction" threshold for merger notifications to include sales by a target company "into" Canada generated by foreign assets, in addition to sales "in or from" Canada generated by Canadian assets. This amendment is consistent with merger notification thresholds in many foreign jurisdictions, which are often based on "turnover," that is, sales by customer location. That being said, the Canadian threshold will still require that export sales by a target company "from" Canada be included in the calculation, and can still also be independently satisfied based on the value of the target's assets in Canada.

While the "size of transaction" test (as well as the existing additional "size of parties" test) can now be met solely as a result of sales into Canada, it is notable that the merger notification provisions still apply only where there is an acquisition of an "operating business." An operating business is defined as "a business undertaking in Canada to which employees employed in connection with the undertaking ordinarily report for work." This may mean that a target company must still have some operations in Canada beyond mere sales into Canada from foreign operations in order for the notification obligations to apply.

## Mergers: Changes to Substantive Review Process and Approach

The FES Implementation Act proposes extending the limitation period for challenging non-notified mergers to three years post-closing. However, the existing one-year limitation period is maintained for notified transactions, including transactions below the notification thresholds for which the parties voluntarily seek Competition Bureau clearance.

The FES Implementation Act also proposes repealing section 92(2) of the *Competition Act*, which states that a finding of a substantial lessening or prevention of competition cannot be grounded solely on the basis of evidence of concentration or market share. However, even with this amendment, it is unclear how evidence of market shares alone, for example in the absence of consideration of barriers to entry, could be sufficient to establish a substantial prevention or lessening of competition, and it remains to be seen how the Competition Bureau will update its *Merger Enforcement Guidelines* in light of this change.

Another proposed change explicitly permits the Tribunal to make a remedial order where it finds that a merger substantially lessens or prevents competition in labour markets. Whether this change will have any practical impact on merger review is not certain since the Tribunal was not previously restricted from considering impacts on labour markets; however, parties may face a new focus on labour market effects in the Bureau's merger reviews.

Bill C-56 also continues to propose the elimination of the efficiencies defence for mergers.

Back to top

## Interim Injunctions

Another provision introduced by the FES Implementation Act relates to interim orders. When challenging a merger, the Commissioner can seek an injunction to prevent parties from closing a transaction. The process of obtaining an injunction takes some time, and some parties have previously sought to quickly close before the Tribunal rules on the injunction application. The Commissioner has argued that, without a short-term stopgap to prevent closing, parties may be able to close before the Tribunal can decide on the interim injunction application, rendering the process moot. This new provision will foreclose the ability to complete the merger until the application for an interim order has been disposed of by the Tribunal. This change may make it more difficult to close in the face of opposition from the Competition Bureau.

Back to top

## Environmental Initiatives – New Clearance Mechanism for Environmental Collaborations and "Greenwashing"

The FES Implementation Act also proposes two amendments in furtherance of the government's focus on environmental issues.

First, it would create a new mechanism permitting the Commissioner to issue a certificate confirming that the Commissioner is satisfied that a proposed agreement is for the purpose of protecting the environment *and* is not likely to prevent or lessen competition substantially in a market. Where such a certificate is granted the criminal conspiracy provisions (section 45 and related provisions) would not apply to the agreement. Such a certificate will also immunize the proposed agreement from the civil anticompetitive agreement provisions (section 90.1) of the *Competition Act*.

Such certificates would be valid for 10 years (with the potential for extension on request). However, the ability to obtain a clearance certificate does not appear to be available for existing agreements, nor does the mechanism appear to assist with respect to agreements that prevent or lessen competition substantially but have significant offsetting environmental benefits. It remains to be seen whether

parties will have the incentive to undertake the time and effort to seek such a certificate, given the limitations of the provision and an obligation to provide any requested information to the Commissioner once such a certificate is requested.

Second, the FES Implementation Act would create an explicit new misleading advertising provision prohibiting statements, warranties or guarantees "of a product's benefits for protecting the environment or mitigating the environmental and ecological effects of climate change" that are not based on an adequate and proper test. It is notable that the provision does not address "green" performance claims other than those promoting a product's benefits for "protecting the environment" or mitigating the "effects of climate change." However, the *Competition Act*'s general misleading advertising provisions may still apply to such other green claims.

Back to top

## Formal Market Studies with Information Gathering Powers

As initially drafted, Bill C-56 introduced a proposed new regime for formal market studies directed by the Minister of Innovation, Science and Industry (Minister). Under this regime, the Commissioner 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 initially provided for ministerial control over the scope of studies and imposed certain procedural obligations on the Commissioner.

The Finance Committee's amendments to Bill C-56 provide the Commissioner with the power to initiate such market studies subject only to a requirement that the Commissioner first consult with the Minister. The bill also still permits the Minister to direct that the Commissioner undertake a market study. Other elements of the proposed market study regime are unchanged from the initial draft of Bill C-56.

Back to top

## Other Changes

### *Refusal to Deal Provisions Broadened*

The FES Implementation Act proposes some additional revisions that expand and clarify the scope of the *Competition Act*'s refusal to deal provision.

In order to make out a refusal to deal claim, it must be established that a person is "substantially affected in their business" due to their inability to obtain adequate supplies of a product anywhere in a market on usual trade terms. This can be a high bar to meet as some jurisprudence has suggested that the substantial effect must be on the person's business as a whole. The FES Implementation Act proposes to revise this standard such that a person must be "substantially affected in *the whole or part of* their business." This revision may lessen the requisite impact that must be established.

In keeping with the government's support of Canadians' "right to repair," the refusal to deal provision would also be amended to clarify that a "product" that can be subject to a refusal to deal claim includes "a means of diagnosis or repair."

### *Prohibition on Reprisal Actions*

The *Competition Act* already contains whistleblower protections that prohibit an employer from retaliating against an employee who reports potential criminal conduct to the Commissioner. The FES Implementation Act adds new provisions to prohibit "reprisal actions" taken to punish, discipline, harass or disadvantage another person because of that person's communications or cooperation with the Commissioner, including with respect to non-criminal matters. Such an application can be brought by the Commissioner or a person directly and substantially affected by an alleged reprisal action, and remedies include prohibition orders to stop a party from continuing such conduct, as well as monetary penalties.

### *Reduced Scope for Cost Awards Against the Commissioner*

Currently, the Commissioner may be ordered to pay a portion of a successful party's legal costs pursuant to established legal principles. Following a recent significant cost award against the Commissioner, the Commissioner and some other commentators advocated that the Commissioner should be immunized against future cost awards as a body acting in the public interest.

The FES Implementation Act proposes to reduce the ability of successful parties to obtain cost awards against the Commissioner to instances where it "is necessary to maintain confidence in the administration of justice" or where "the absence of the award would have a substantial adverse effect on the other party's ability to carry on business." With respect to the latter criterion, given the significant costs of engaging in litigation with the Commissioner, there are likely few scenarios where a party would be able to fully litigate a matter with the Commissioner unless it had the financial means to do so. Given these changes, the Commissioner may be emboldened to bring more (and possibly more aggressive) cases without concern for a potential adverse impact on the Competition Bureau's resources.

Back to top

## Next Steps and Implications

These amendments are the culmination of over two years of debate and broad public consultation regarding possible changes to modernize Canada's competition law framework. The Minister has indicated that no further changes are currently contemplated.

Bill C-56 and the FES Implementation Act will go through the legislative procedure on a truncated timeline, and little debate or room for further revision is expected on the specific proposals. While it cannot be stated with certainty when the bills will be passed into law, passage of each is currently expected in December 2023 or in early 2024. Under the current proposals, the potentially significant revisions to the abuse of dominance provisions, as well as many other changes, including with respect to mergers and greenwashing, will have immediate effect upon royal assent of the amending legislation. However, the expanded scope of the anticompetitive agreement provisions to include non-competitors, and new private rights of action with associated remedies will not take effect until a year following royal assent.

The implications for businesses operating in Canada may be broad-ranging, given that these are the most notable set of amendments to the *Competition Act* since at least 2009.

More specifically, the immediate enactment of some amendments, such as those contemplated for the abuse of dominance provisions, may raise concerns for businesses seeking to understand and comply with the amended legislation. In the past, the government has delayed the coming into force of some significant *Competition Act* amendments for a year in order to allow businesses to bring themselves into compliance with the new laws.

These amendments represent a substantial legislative win for the Competition Bureau with the government adopting many of the Bureau's policy recommendations to broaden the scope of certain prohibitions and expand the Competition Bureau's powers. Combined with considerable recent increases to its budget, there may now be a significant expectation for the Competition Bureau to increase enforcement under the amended provisions. At the same time, it will be important for the Competition Bureau to provide clear and timely guidance to stakeholders on its approach and interpretation of the new provisions.

The Davies Competition Law group will continue to monitor and report on further developments relevant to the proposed amendments to the *Competition Act*.

Back to top

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