

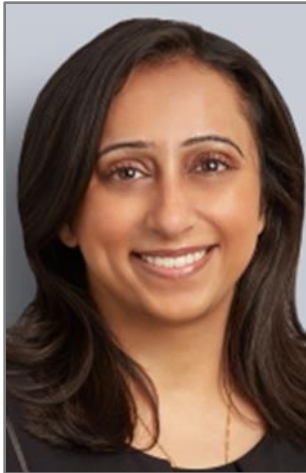
In-House Counsel

Competition Act Amendments: A Move to Retrofit, Modernize

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(August 18, 2022, 11:49 AM EDT) -- Effective June 23, 2022, sweeping and substantial changes to the Canadian *Competition Act* (the Act) came into play (the 2022 Amendments). From criminalizing wage-fixing and no-poach agreements to expanding the Commissioner of Competition's (Commissioner) formal evidence gathering powers, the 2022 Amendments, along with those that are expected to come into force next year on June 23, 2023, (the 2023 Amendments and together with the 2022 Amendments, the Amendments), reflect a significant move to retrofit and modernize the competition law regime in Canada.

The Amendments primarily aim to protect consumers and workers, while also addressing issues resulting from technological advancement and the continued digitization of our economy. On this basis and as set out in further detail below, the Amendments touch upon all aspects of Canadian competition law, and unless otherwise specified, all changes are currently in effect.

1. Criminalization of wage-fixing and no-poach agreements

- Starting June 23, 2023, it will be a criminal offence for employers to enter into agreements to fix, maintain, decrease, or control wages, or any other terms of employment.
- It will also be a criminal offence for employers to enter into agreements to refrain from hiring or trying to hire each other's employees.
- Violating this provision will result in either a fine (which will be at the discretion of the court), imprisonment for a maximum of 14 years, or both.

2. Increase in penalties for violations of deceptive marketing practices, abuse of dominance and conspiracy provisions

Civil administrative monetary penalties associated with the deceptive marketing practices (subparagraphs 74.1(1)(c)(i) and (ii)) and abuse of dominance (ss. 79(3.1)) provisions of the Act have increased.

- For corporations found in violation of these provisions, the administrative monetary penalty is either the greater of \$10 million (\$15 million for each subsequent order) or three times the value of the benefit derived from the deceptive conduct, or if the benefit cannot be reasonably determined, up to three per cent of the corporation's annual worldwide gross revenues.

- For individuals found in violation of these provisions, the administrative monetary penalty is either the greater of \$750,000 (\$1 million for each subsequent order) or three times the value of the benefit derived from the deceptive conduct, if that amount can be reasonably determined.
- Starting June 23, 2023, the fine for violating the conspiracy-related provisions (s. 45) of the Act will no longer be capped at \$25 million. Rather, any such fine will be at the discretion of the court.

3. Introduction of specific civil and criminal prohibitions against drip pricing

- Drip pricing is expressly prohibited under the civil and criminal misleading advertising provisions of the Act (ss. 74.01(1.1) and 52(1.3)).

4. Extension of private right of access to Competition Tribunal for abuse of dominance matters

- Private parties, including competitors, who have been directly and substantially impacted by the conduct of another under the abuse of dominance provisions of the Act, may now apply to the Competition Tribunal for leave to bring an application pursuant to s. 103.1 of the Act.
- In terms of timing, it is important to note that if the conduct in question is no longer occurring, then the application must be brought within one year of the cessation date.

5. Expansion of abuse of dominance provisions

- The definition of what constitutes an “anti-competitive act” has been clarified to be one that is intended to have a predatory, exclusionary, or disciplinary negative impact on a competitor, or to have an adverse impact on competition (s. 78(1)).
- The list of business practices that may be considered under the abuse of dominance provisions of the Act has been updated to include the following: a selective or discriminatory response by a dominant player to prevent or make it difficult for an actual or potential competitor to enter a market, expand, or to remove a competitor from a market.
- The list of factors considered when assessing the competitive impact of business practices under the abuse of dominance provisions of the Act has been updated to include: (i) the effects on barriers to entry (i.e., network effects); (ii) the impact on price or non-price competition, including quality, choice, or consumer privacy; (iii) the nature and extent of change and innovation in the relevant market; and (iv) any other factor that is relevant to competition in the market that is or would be impacted by the practice.

6. Creation of anti-avoidance rule for pre-merger notifications

- Section 113.1 of the Act sets out a new anti-avoidance provision to ensure that pre-merger notification requirements apply to proposed transactions that may have been otherwise designed to avoid notification.

7. Clarifying timing considerations for merger-related matters

- For the purposes of calculating waiting periods under ss. 108(3) of the Act, a “holiday” includes any Saturday, Sunday, and any other publicly observed holiday, and in the event that a publicly observed holiday falls on a Saturday or Sunday, the following Monday would be considered a “holiday.”
- As set out under ss. 108(4) of the Act, any filings or information received after 5 p.m. (EST) will be viewed as being received the next day that is not a holiday.

8. Expansion of merger and competitor collaboration provisions

- Three additional factors will be taken into account when assessing the competitive impact of mergers and competitor collaborations under s. 93 and ss. 90.1(2) of the Act, including (i) the

possible entrenchment of a leading incumbents' market position; (ii) network effects as an additional form of a barrier to entry; and (iii) the impact on price or non-price competition, including quality, choice, or consumer privacy.

9. Expansion of the Commissioner's formal evidence gathering powers

- The Commissioner can compel written information from foreign and domestic affiliates of a corporation pursuant to ss. 11(2) of the Act if the affiliates have or are likely to have records or information relevant to the Commissioner's inquiry.
- As clarified under ss. 11(5) of the Act, persons located outside of Canada who carry on business in, or sell into Canada, are still required to comply with section 11 orders.

The Amendments touch upon all aspects of competition law and represent a significant effort in retrofitting and modernizing the competition law regime in Canada. However, while more changes to the Act are on the horizon, the exact scope of these changes is not known at this time. It is likely that we will see proposed amendments relating to the efficiencies defence, which will be a pivotal part of the upcoming amendments.

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