COMPETITION ACT AMENDMENTS ON A ROCKET DOCKET

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Hot on the heels of the Prime Minister's September 14, 2023 announcement that rising grocery prices necessitated *Competition Act* amendments,[1] and while an established process for considering changes to the Act was ongoing, Bill C-56 was introduced to Parliament for first reading on September 21, 2023.[2] Second reading is anticipated within a week. The Bill, which can be cited as the *Affordable Housing and Groceries Act*, seeks to amend the *Excise Tax Act* (to address housing issues) and the *Competition Act* (to address grocery concerns). See a preview of the amendments in our bulletin last week.[3] The proposed *Competition Act* amendments include:

1. Removing the efficiencies defence for mergers;
2. Introducing new powers for the Competition Bureau to conduct Market Studies, including the power to compel market participants to provide information; and
3. Empowering the Bureau to challenge agreements even if not between competitors that have the significant purpose of harming competition.

1. Removal of Efficiencies Defence

The proposed amendments remove the merger efficiencies defence in its entirety. As we discussed in our recent bulletin, the Bureau and other stakeholders have advocated for the removal of the efficiencies defence for some time. It remains an open question whether efficiencies may be considered a factor by the Competition Tribunal when analyzing mergers, as the proposed legislation simply repeals the defence from the Act without adding consideration of efficiencies as a statutory factor. (See our prior bulletin for a detailed discussion of the competing views regarding the merits of the efficiencies defence.)

For transactions that are notified or substantially completed before Bill C-56 receives royal assent the efficiencies defence remains available to merging parties. In some small number of cases this may push parties to rush to notify or close their transactions before Bill C-56 becomes law.

2. New Market Study Powers

While the Bureau has been advocating for the power to initiate Market Studies on its own accord, the proposed amendments envision a new power for Market Studies that can be initiated by the Minister of

Innovation, Science and Industry (the "**Minister**"). Putting this power in the hands of the government raises questions with respect to the optics of the Bureau's independence, and may give the government leverage in discussions with market participants regarding competition, or possibly other matters.

Bill C-56 will require the Minister to consult the Bureau regarding the feasibility, including the costs, of conducting the proposed Market Study. After consultation, if the Minister determines that a Market Study is in the public interest and directs the Commissioner of Competition to conduct such a Study, the Bureau will prepare the terms of reference for the study, which are subject to public comments and the final approval of the Minister. After the Minister publishes the terms of reference, the Bureau has 18 months to complete the study and publish the Bureau's findings. This timeline can be extended by the Minister in one or more periods of up to three months.

While the Bureau has conducted several Market Studies over the past decade, most recently in the grocery industry, it has indicated that such Studies have been hampered by not having the legal power to compel market participants to provide information. The Bureau has advocated for formal powers to improve the quality and breadth of information that it is able to gather successfully. The proposed amendments will give the Bureau the power to apply, on an *ex parte* basis, for court orders to require that the relevant industry participants provide the information the Bureau needs. If granted, the subject of the order will be legally obligated to provide the information demanded in the order.

An "*ex parte*" order means that the Commissioner can apply to a court without the subject of the proposed order being entitled to be heard by the court or even given notice. While there may be some justification for the use of *ex parte* orders in enforcement situations, it is not clear why they are justified in the context of Market Studies, when the proposal for such a study will have been public long before the order is sought from the Court.

As we have written elsewhere, subject to establishing fair procedural rules, the concept of Market Studies seems unobjectionable to most people at first glance. However, there is a very real danger that the subjects of such studies will be participants in industries caught in the political spotlight at any given time – such as the grocery industry now – whether or not there is a legitimate competition law concern. There is also the risk that following an extensive and expensive Market Study, the Bureau may feel some pressure to follow up with enforcement action. Finally, we note that in the distant past, when Canadian competition authorities had such powers, it led them, on a number of occasions, down expensive blind alleys.

3. Agreements with Anti-Competitive Purpose

The proposed amendments add a new category of agreement or arrangement that the Bureau can challenge before the Competition Tribunal. Section 90.1 of the Act currently empowers the Tribunal, upon application by

the Commissioner, to challenge agreements and arrangements between competitors that prevent or lessen competition substantially or are likely to prevent or lessen competition substantially.

The proposed amendments will expand the provision to include agreements and arrangements between persons who are *not* competitors, if the "significant purpose" of such agreement (or any part of it) is to prevent or lessen competition in a market. As currently drafted, it is unclear whether the Tribunal will still be required to find that such agreements or arrangements prevent or lessen competition substantially. Moreover, in applying this new provision, the Tribunal will have to define the meaning of the phrase "significant purpose… to prevent or lessen competition in any market".

In this regard we note that the Act now contains various tests to determine whether conduct can be challenged. Some conduct is "per se" unlawful without requiring the showing of any anticompetitive effects. Some conduct requires evidence of a "substantial lessening of competition", while other conduct requires a finding of a "substantial prevention or lessening of competition". The Act also requires the Tribunal to proscribe certain conduct where there is an "adverse effect" on competition. Each of these tests has a different meaning. With the Bill C-56 amendments, we will likely have yet another test, which requires showing that a "significant purpose" of an agreement or part of an agreement is to prevent or lessen competition. There may be insight from past rulings. The Federal Court of Appeal's has ruled that the "abuse of dominance" provisions require that, to be found anti-competitive, an act must have an "intended negative effect on a competitor that is exclusionary, predatory or disciplinary". The Tribunal ruled that if an act is motivated by a legitimate business justification it cannot be anti-competitive because it is not undertaken with an anti-competitive purpose.[4]

Based on the Prime Minister's recent comments announcing these amendments, and the Competition Bureau's grocery products Market Study, it appears likely that the impetus for this amendment was to provide the Bureau with a tool to challenge restrictive covenants in leases for grocery stores that, in the Bureau's view, limit the ability of smaller grocers to compete with larger players. However, these types of restrictive covenants, and similar contractual restrictions, are by no means limited to the grocery industry. It remains to be seen how broadly the new provisions may be employed by the Bureau.

Other Notes

We also note that the NDP separately introduced a private member's bill proposing more drastic amendments to the *Competition Act*, including establishing market share thresholds for determining whether mergers are anti-competitive, significantly changing the framework for finding abuse of dominance, creating liability for large price increases absent any agreement or other improper conduct, removing the ability to obtain cost awards against the Government in Competition Tribunal litigation, even if it loses and is found to have acted unreasonably. At this time, we do not know whether the Government will consider adopting any of these NDP

proposals.

Conclusion

As noted at the outset, there is currently an ongoing process with respect to reforming the *Competition Act*. Given that the amendments discussed in this bulletin are described as being targeted at cost-of-living issues and given that these amendments are being framed as the Government's "first" set of amendments to the *Competition Act*, more amendments may be expected in the coming months. McMillan's Competition Group will continue to provide updates as proposed changes to materialize.

[1] The Prime Minister's September 14th announcement also focused on other issues impacting the cost-of-living in Canada, which primarily related to introducing new measures to address the lack of affordable housing.
[2] Bill C-56, *An Act to Amend the Excise Tax Act and the Competition Act* (First Reading – September 21, 2023).
[3] The Government just made significant amendments to the *Competition Act* in mid-2022, as we reported here. The 2022 amendments were designed to address "shortcomings in the law that were readily identifiable", and we expect the Bill C-56 amendments to represent the first wave of additional amendments to the Act that flow from the Government's recent consultation on the Act.
[4] To be found to be a legitimate business justification, the Tribunal must find that the firm that allegedly engaged in the anti-competitive act has a credible efficiency or pro□competitive explanation for the act, unrelated to an anti□competitive purpose, for why it engaged in the conduct alleged to be anti□competitive. See *Commissioner of Competition v Vancouver Airport Authority*, 2019 Comp Trib 6.

by The McMillan Competition Group

A Cautionary Note