

COMPETITION ACT AMENDMENTS PROCEED AT PACE

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Hot on the heels of our last Bulletin^[1] advising of additional Competition Act amendments, on December 15, 2023, Bill C-56, the *Affordable Housing and Groceries Act*, received Royal Assent. Bill C-56 was introduced on September 21, 2023, as part of the federal government's efforts to overhaul the *Competition Act*. The stated purpose of Bill C-56 is to specifically address unaffordable housing and high grocery prices. That being said, Bill C-56 does not directly address these issues and, in fact, will have a broad impact on businesses throughout Canada. When considered in light of the first round of amendments to the *Competition Act* implemented in 2022 as a part of the *Budget Implementation Act, 2022*,^[2] and the transformative amendments currently being considered under Bill C-59, the *Fall Economic Statement Implementation Act, 2023*, the impact on businesses will be significant. These amendments are discussed in great detail in McMillan's prior bulletin^[3].

However, additional changes have been included in Bill C-56 as a result of amendments made by the House of Commons Standing Committee on Finance.^[4] The changes enacted by Bill C-56 are briefly summarized below.

Market Studies

Bill C-56 creates a framework to allow the Commissioner of Competition ("**Commissioner**") to conduct market studies and compel the production of information.

Of interest, a significant portion of the Minister's comments on these new market study powers refer to the Commissioner's complaints respecting the limitations on the Bureau's powers found in the Bureau's 2023 Grocery Report.^[5] The new market studies provisions, which came into force on December 15, 2023, empower the Commissioner to conduct market studies of any market or industry, not limited to the grocery sector.

Expansion of Abuse of Dominant Position

Bill C-56 introduces numerous amendments to the abuse of dominant position provisions, which amendments cannot be viewed in isolation from the amendments implemented in 2022 and those proposed in Bill C-59.

However, for the purpose of this bulletin, Bill C-56 expands the scope of abuse of dominance, introduces novel concepts, reduces the standard to obtain a prohibition order against a dominant firm (or firms) and increases the consequences of being found to be engaged in abuse, noting in particular:

(i) Bill C-56 introduces a new example of an anti-competitive act: “imposing excessive and unfair selling prices”. This new example was not included in the initial draft of Bill C-56. It is an entirely novel concept in Canadian competition law. Given that the Bureau did not recommend this provision, and it is not conduct that it typically believed to constitute an abuse of dominance, it remains to be seen what approach the Bureau will take.

(ii) Bill C-56 adopts a new test that lowers the standard for obtaining a prohibition order in respect of conduct by a dominant firm (or firms) engaged in abuse. It is no longer required that a dominant firm have engaged in both a “practice of anti-competitive acts” and the practice is likely to substantially lessen or prevent. Instead, the amendments provide that a firm (or firms) that is dominant may be found to be engaged in abuse of dominance if:

- a. such firm (or firms) has engaged in a practice of anti-competitive acts (defined largely with reference to the firm’s anti-competitive intent for the conduct), **or**
- b. such firm (or firms) has engaged in conduct that had, is having or is likely to have the effect of preventing or lessening competition substantially in a market in which the firm (or firms) has a plausible competitive interest, which effect is not a result of superior competitive performance (i.e., an anti-competitive effect requirement).

Accordingly, under the amended section 79(1), the Tribunal may make a prohibition order against a dominant firm if either the anti-competitive intent for the conduct or the anti-competitive effect requirement is met.

(iii) Bill C-56 provides the Tribunal may make an additional order for anti-competitive acts. In respect of an application under this amended section 79(1), if the Tribunal finds that a practice of anti-competitive acts amounts to conduct that has had or is having the effect of preventing or lessening competition substantially in a market in which the firm (or firms) has a plausible competitive interest, and the Tribunal determines that a prohibition order is not likely to restore competition in that market, the Tribunal may, in addition to or in lieu of making a prohibition order, make an order directing any or all persons against whom an order is sought to take actions, including the divestiture of assets or shares, that are reasonable and necessary to overcome the effects of the practice in that market.

Note the standard to obtain an order from the Tribunal (other than under the amended section 79(1)), will continue to require that (i) a firm (or firms) that is dominant had (ii) engaged in a practice of anti-competitive acts, and (iii) the practice had, is having or is likely to have the effect of preventing or lessening competition substantially in a market.

(iv) The increase of the maximum administrative monetary penalties (AMP) upon a finding that a firm (or firms) has engaged in a practice of anti-competitive acts that amount to conduct that has had or is having the effect

of preventing or lessening competition substantially in a market in which the firm has a plausible competitive interest, the Tribunal may also order the firm to pay an AMP up to the greater of (a) C\$25 million in the first instance and up to C\$35 million for subsequent orders, and (b) up to three times the value of the benefit derived from the anti-competitive practice, or if that cannot be determined, 3% of the firm's annual worldwide revenue.

The amendments to the abuse of dominance provisions came into force on December 15, 2023.

The Efficiencies Defence is Repealed

Mergers

Bill C-56 repeals the efficiencies defence for mergers, on the basis that mergers which are found to prevent or lessen, or to be likely to prevent or lessen competition substantially, should not be allowed to continue, even if such merger has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, any anti-competitive effects.

This amendment came into force on December 15, 2023, provided that the amendments will not apply to a proposed transaction where a notification under Part IX was filed prior to then or a transaction that was substantially completed prior to then.

Non-criminal agreements (section 90.1)

The Bill also repeals the efficiencies defence as it applies to non-criminal agreements that prevent or lessen competition (section 90.1). That amendment will come into force with one year delay, on December 15, 2024.

Non-criminal agreements (section 90.1)

Bill C-56 has expanded the definition of the type of non-criminal agreements caught by section 90.1 to include not only agreements between competitors, but agreements between any persons if a "significant purpose" of the agreement, or any part of such agreement, is to prevent or lessen competition in any market, even if the parties to the agreement are not competitors.

According to Minister Champagne's statement, this amendment was motivated by restrictive covenants in the retail grocery industry that limit new entrants' ability to lease premises near incumbent retail locations, which the Bureau identified in its 2023 Grocery Report as a reason for the lack of competition in the retail grocery industry.^[6] However, this amendment will have application well beyond restrictive covenants.

This amendment will come into force with one year delay, on December 15, 2024.

[1] See: [Transformative Change: Your Guide to Canada's Breathtaking Competition Act Changes - McMillan LLP](#).

[2] See: [Round One of Competition Act Amendments Passed; National Security Review Regime Amended](#).

[3] *ibid*.

[4] See: [Committee Report No. 13 - FINA \(44-1\) - House of Commons of Canada \(ourcommons.ca\)](#).

[5] See: [Canada Needs More Grocery Competition; Competition Bureau Retail Grocery Market Study Report](#).

[6] See: Senate of Canada - [Debates of the Senate \(Hansard\)](#).

by [McMillan's Competition & Antitrust Group](#)

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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