Cassels

No Poach, No Problem?

December 1, 2020

No-poaching, wage-fixing, and other buy-side agreements do not violate the *Competition Act's* price fixing provision (section 45), the Competition Bureau has confirmed. This is because section 45 only applies to agreements relating to the **supply** of a product, and not the **purchase** of a product. However, buy-side agreements can be challenged under another, non-criminal, provision (section 90.1), and terminated by the Competition Tribunal if they cause a substantial lessening or prevention of competition.

Hot Topic

The Bureau's statement comes as a result increased interest in the topic, following warnings south of the border in 2016 and 2019 that no-poach agreements may violate US antitrust law. Before issuing its statement, the Bureau sought legal advice on the issue.

Oddly, just two days before the Bureau's statement, the Commissioner of Competition suggested in a speech that coordinated removal of pandemic pay by grocery chains was concerning, because it "would seem to be unrelated to an effective response to the pandemic." It is now clear from the Bureau's statement that such wage fixing would not, in fact, contravene section 45.

Buy Side Agreements Can be Challenged

In its statement, the Bureau also addressed the potential application of section 90.1 to buy side agreements. Section 90.1 provides that if the Competition Tribunal finds that an agreement or arrangement between competitors lessens or prevents competition substantially, it can prohibit the parties (or any other person) from doing anything under the agreement. Effectively, it can terminate the agreement. The Bureau emphasized that proving a substantial lessening or prevention of competition is not a low threshold. Although to date there have been no cases decided in the Tribunal under section 90.1, the analysis mandated by this provision is virtually identical to that applicable to merger cases.

Unfortunately, however, the Bureau's statement mischaracterizes section 90.1 in two respects.

First, the Bureau states that agreements between competitors can "contravene" section 90.1. This is inaccurate. Unlike the criminal provisions, section 90.1 does not prohibit any agreements between competitors; it is remedial in nature, allowing the Tribunal to terminate agreements between competitors only where they lessen or prevent competition substantially.

Second, the Bureau suggests that administrative monetary penalties might be available under section 90.1 with the express consent of the parties. This is disingenuous. Section 90.1 does not provide for the imposition of administrative monetary penalties or for that matter any other penalties whatsoever. In addition to terminating the agreement, the Tribunal can make an order requiring anyone to "take any other action", but only if that person and the Commissioner consent. It is difficult to imagine a circumstance where a party would agree to make a payment to the government when it cannot possibly be forced to do so. A party might volunteer to pay a penalty to avoid a criminal prosecution (as fines can clearly be imposed under the criminal provisions), but since it would be improper for the Bureau to threaten criminal prosecution to obtain a civil settlement (and the Bureau has stated it will never do this), it would be imprudent for the Bureau to accept such a proposal.

Wage Fixing is Still a Bad Idea

The fact that no poach or wage agreements do not violate the *Competition Act* does not mean that they are advisable. These agreements confer little or no benefit on the parties, yet they expose the parties to opprobrium, as the surge of bad publicity that followed suggestions that captains of the grocery industry agreed amongst themselves to roll back pandemic pay demonstrates.
