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Businesses Should be Worried by Recently Proposed Amendments to the Canadian Competition Act

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The federal government has proposed three amendments to the *Competition Act* in Bill C-56, the *Affordable Housing and Groceries Act*, as the "first set" of what are anticipated to be sweeping and fundamental legislative changes to Canadian competition law. According to a statement from the Prime Minister, these initial amendments aim to "enhance competition across the Canadian economy, with a focus on the grocery sector, which would help drive down costs for middle-class Canadian."

For companies doing business in Canada, these proposed changes and those they foreshadow, raise the specter of a more costly and uncertain antitrust regulatory environment and more aggressive enforcement by the Competition Bureau on a decidedly uneven playing field.

Repeal of the Efficiencies Defence

Currently, merging parties can invoke a statutory efficiencies defence which allows otherwise anticompetitive mergers to proceed if the merging parties can prove that their efficiency gains will be greater than and offset the anticompetitive effects of the merger and would not likely be attained if the transaction is prohibited.

Although empirically, the efficiencies defence has only been in issue in a handful of cases (including two recent merger challenges where the respondent failed to establish the defence), the Commissioner of Competition – the head of the Competition Bureau – and others have repeatedly claimed that the defence "permits anti-competitive mergers that are harmful to Canadians" and have made its repeal the centerpiece of a campaign purportedly intended to make the *Competition Act* "fit for purpose in a modern economy".

New Market Studies Powers

When conducting market studies, the Commissioner currently has no ability to seek orders compelling documents and information from market participants. Instead, he must rely on voluntary cooperation. The second proposed amendment would empower the federal government to direct the Commissioner to conduct an inquiry into the state of competition in a given market or industry. Once on inquiry, the Commissioner would be able to apply for court orders compelling companies which are likely to have

information that is relevant to the inquiry to produce records and deliver written responses under oath to questions from the Commissioner as well as to make their executives available to attend to be examined under oath by the Commissioner.

Vertical Agreements May Now be Prohibited

Currently, under section 90.1, the Commissioner may seek orders prohibiting agreements or arrangements between actual or potential competitors that prevent or lessen competition substantially. The third proposed amendment (driven by a concern with restrictive covenants in shopping mall leases which are allegedly being used by "large grocers [to] prevent smaller competitors from establishing operations nearby") would expand the scope of that provision to apply to *any* agreement or arrangement between and among non-competitors if a "significant purpose of the agreement or arrangement, or any part of it, is to prevent or lessen competition in any market."

Good Reason to Worry

The proposed competition law amendments in the *Affordable Housing and Groceries Act* should give companies doing business in Canada cause for concern, not only because of the commercial and regulatory uncertainty and burden they will create but (even more so) because of what they represent and portend.

None of the amendments will meaningfully advance (if at all) the government's stated objectives for proposing them and they (and especially the repeal of the efficiencies defence) were driven by politics rather than sound public policy. For that reason, the proposed amendments suggest that some of the other sweeping, fundamental and troubling changes to Canadian competition law that have been advocated by the Commissioner will be part of the "next set" of amendments. Those potential amendments include a lower standard for condemning mergers as anticompetitive, automatic interim relief and a lower standard for the Commissioner to obtain interlocutory relief blocking mergers pending a challenge and an exemption for the Commissioner from the traditional "loser pays" costs rule in Canadian litigation. The Commissioner's recent losses in the Parrish & Heimbecker case (in which the Commissioner's positions as to product market, geographic market and anticompetitive effects were all rejected by the Competition Tribunal) and the Rogers/Shaw case (which the Federal Court of Appeal described as "far from a close case" in ordering the Commissioner to pay almost $13 million in costs to Rogers and Shaw – a fraction of the money the respondents were forced to spend defending a case that ought never to have been brought by the Commissioner) make clear that what is likely to come next should give companies doing in business in Canada good reason to worry.

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