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Important changes to the Competition Act, including the abuse of dominance provisions, now in effect

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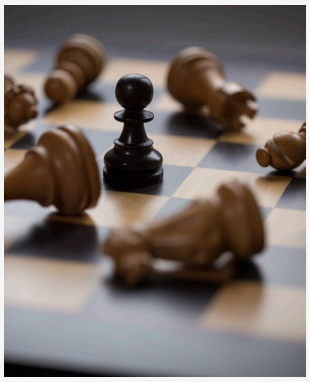

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On December 15, 2023, Bill C-56, the *Affordable Housing and Groceries Act*, received royal assent. When first tabled in September 2023, Bill C-56 proposed to amend the *Competition Act* (the Act) to introduce a formal market studies power, expand the civil collaborations provision to include vertical agreements and repeal the efficiencies defence for mergers. (Refer to our prior Osler Update for a discussion of these amendments.) Each of these proposed amendments has been enacted largely as originally proposed. However, Bill C-56 as passed also substantially expands Canada's monopolization law as set out in the abuse of dominance provisions of the Act.

During the legislative process, Bill C-56 was revised by the Standing Committee on Finance to include significant amendments to the abuse of dominance provisions in sections 78 and 79 of the Act. These provisions had already undergone amendment in 2022 to expand the concept of acts that could be considered anti-competitive to those made with intent to prevent or lessen competition generally (rather than just to harm competitors).

The new changes, which take effect immediately, expand the abuse of dominance provisions further, importing legal concepts into the Act that are not defined in the legislation and have not yet been interpreted by Canadian jurisprudence. This creates significant uncertainty for businesses in Canada. Business are now also exposed to higher penalties and increased enforcement risk with prohibition orders now available even in the absence of an "anti-competitive act", as well as where an "anti-competitive act" has no actual or likely impact on competition in any market.

Section 79 is subject to a three-year limitation period whereby an application may not be made in respect of a practice of anti-competitive acts or conduct more than three years after the practice or conduct has ceased.

The implications for businesses of the changes made by Bill C-56 should also be understood in light of Bill C-59, the *Fall Economic Statement Implementation Act, 2023*, which is currently making its way through the legislative process. Among other things, Bill C-59 proposes to introduce new penalties as well as a broad civil private right of action (with leave) with the possibility of financial recovery. For further information on Bill C-59, refer to our prior Osler Update.

Below is an overview of the changes to the abuse of dominance provisions made by Bill C-56, and what they mean for businesses in Canada.

1. What constituted an abuse of dominance before the enactment of Bill C-56?

Before Bill C-56 was enacted, the Competition Tribunal (the Tribunal) could only exercise its discretion and order a remedy pursuant to the abuse of dominance provision where the Commissioner of Competition (the Commissioner) or a private litigant (having obtained leave) established on a balance of probabilities that

(i) one or more persons substantially or completely control a class or species of business throughout Canada or any area thereof (referred to as a finding that a firm is dominant or two or more firms are jointly dominant in a market)

(ii) such person(s) must have engaged in or be engaging in a practice of *anti-competitive acts*

(iii) the practice must have had, be having or be likely to have the effect of preventing or lessening competition substantially in a market (not necessarily the same market in which dominance or joint dominance is established), referred to as an SLPC

For purposes of element (ii), an *anti-competitive act* was (and remains) defined in section 78 as an act that is "intended to have a predatory, exclusionary or disciplinary negative effect on a competitor, or to have an adverse effect on competition". Section 78 sets out a non-exhaustive list of anti-competitive acts.

Jurisprudence interpreting the meaning of "anti-competitive act" has confirmed that business justification is the paramount consideration. The Tribunal has affirmed that conduct will only be considered anti-competitive if its "overall character" or "overriding purpose" is anti-competitive in nature. The analysis requires an assessment of whether a legitimate business justification for conduct exists (i.e., a credible efficiency-based or pro-competitive rationale unrelated to anti-competitive effect such as improving quality or service, or otherwise assisting the person in question to better compete in the relevant market).

2. What are the key changes to the abuse of dominance provisions made by Bill C-56?

1. *A potential abuse of dominance is no longer limited to "anti-competitive acts" and now includes any conduct that had, is having, or is likely to have a substantial anti-competitive effect in a market in which a person has a "plausible competitive interest" where such effect is not a result of "superior competitive performance".*

Bill C-56 eliminates the need to establish an anti-competitive act to secure an injunctive remedy under the abuse of dominance provisions. Any conduct by a dominant firm(s) that results or is likely to result in an SLPC is at risk of contravening section 79 unless the SLPC can be attributed to "superior competitive performance". While prior to the amendments the Tribunal was required to consider superior competitive performance in its assessment of whether competition was being substantially prevented or lessened, that assessment was made after a finding that a dominant firm had engaged in a practice of anti-competitive acts. Now, superior competitive performance is a required justification for conduct of a dominant firm that substantially prevents or lessens competition or is likely to do so, without any need to establish a practice of anti-competitive acts.

It remains to be determined, likely through future jurisprudence, what scope of conduct is or is not attributable to superior competitive performance, including the role of legitimate business justification as interpreted in the existing jurisprudence relating to anti-competitive acts in the determination of superior competitive performance.

Important related and additional questions include how the concept of superior competitive performance would apply to a person who does not compete in a market in which the effect on competition occurs, how the concept could be applicable to firms that are jointly dominant and the legal analysis that would apply in the case of firms that operate in regulated markets.

1. *A prohibition order (injunctive remedy) can now be ordered to require a firm to cease a practice of anti-competitive acts without the need to show a practice had, is having or is likely to have any impact on competition.*

As a result of the amendments, the Commissioner, or a private plaintiff with leave, no longer has to provide any evidence of market impact in order to seek an injunctive order. All that must be established is dominance and a practice of anti-competitive acts.

The Tribunal now has the discretion to issue a prohibition order where the Commissioner or a private litigant (having obtained leave) has established that

1. a firm is dominant (or a group of firms are jointly dominant)
2. the firm(s) engaged in conduct with either anti-competitive intent *or* anti-competitive effect (i.e., an SLPC) that is not the result of superior competitive performance

To obtain a remedial order other than a prohibition order the Tribunal must find that an anti-competitive act has occurred, that such act has had, is having or is likely to have an SLPC in a market (in which the firm(s) has a plausible competitive interest) and that a prohibition order is not likely to restore competition in that market. Similarly, an administrative monetary penalty (AMP) can only be ordered where it is established that an anti-competitive act has had, is having or is likely to have an SLPC in a market (in which the firm(s) has a plausible competitive interest).

1. *"Excessive pricing" is now explicitly an "anti-competitive act".*

The non-exhaustive list of anti-competitive acts in section 78 has been revised to add (as a new example) "directly or indirectly imposing excessive and unfair selling prices." Interestingly, this new example was not one of the changes to the Act recommended by the Competition Bureau (Bureau) — likely for many good reasons (e.g., undermines/diminishes incentives to invest, innovate and compete; institutional inability to define when a price is excessive; and challenges in crafting a remedy).

While the concept of excessive pricing has been applied and interpreted by courts under E.U. competition law, it has not been considered to be anti-competitive behaviour under competition law in Canada (or under U.S. antitrust laws). The addition of this new example is particularly notable considering the framework of the Act to date has not treated the mere exercise of market power as actionable under competition law. It remains to be seen how "excessive and unfair prices" will be interpreted by the Bureau and the courts.

1. *Higher penalties*

The maximum AMP has increased to the greater of $25 million for an initial order (and $35 million for each subsequent order) and three times the value of the benefit derived or, if that amount cannot be reasonably determined, 3% of the person's annual worldwide gross

revenues. As noted above, to obtain an AMP it must be demonstrated that a dominant firm(s) has engaged in a practice of anti-competitive acts which has had, is having or is likely to have an SLPC in a market (in which the firm(s) has a plausible competitive interest).

3. How does Bill C-56 impact the changes made to the Competition Act last year?

In June 2022, amendments to the Act came into force that, among other things, expanded the abuse of dominance provision in several important ways, including the following:

- "Anti-competitive act" was defined as any act "intended to have a predatory, exclusionary or disciplinary negative effect on a competitor, or to have an adverse effect on competition". As a result of jurisprudence, prior to the June 2022 amendments the definition of anti-competitive act was limited to conduct intended to have a predatory, exclusionary or disciplinary effect on a competitor. Following this amendment, any conduct intended to harm competition or the competitive process is now captured.
- The non-exhaustive list of potential anti-competitive acts in section 78 was expanded to include "a selective or discriminatory response to an actual or potential competitor for the purpose of impeding or preventing the competitor's entry into, or expansion in, a market or eliminating the competitor from a market".
- AMPs were increased from $10 million (and $15 million for subsequent orders) to the greater of (i) $10 million ($15 million for subsequent orders) and (ii) three times the value of the benefit derived or, if this amount cannot be calculated, 3% of the person's annual worldwide gross revenues. In addition, private parties were provided with the ability to seek leave to bring an application under section 79.

Bill C-56 further increases the monetary penalties available under section 79.

The broadening of the definition of anti-competitive acts to include conduct that adversely impacts *competition* (rather than *competitors*) is potentially even more significant now that Bill C-56 has lowered the burden for enforcement action where an anti-competitive act can be established (by removing the requirement to prove market effect). The scope of conduct that falls within the expanded definition of anti-competitive act has yet to be tested, though the Bureau has made clear that it views the concept broadly, including in the context of the controversial (and as yet untested) scenario of jointly dominant firms.

In October 2023, the Bureau released for consultation a draft bulletin on the June 2022 amendments to section 79. The draft bulletin provides guidance on the Bureau's interpretation of the new definition of anti-competitive act and its approach to assessing a broad range of conduct under section 79, including agreements between competitors, information sharing, contracts that reference rivals and serial acquisitions. The draft bulletin contains a detailed discussion of the application of section 79 in the context of joint dominance, a notable area that has yet to considered in jurisprudence in Canada. The draft bulletin has not yet been finalized and updates will likely be required to reflect the enactment of Bill C-56.

4. What additional changes to the abuse of dominance provisions have been proposed?

Bill C-59 is currently working its way through the legislative process. As introduced on November 28, Bill C-59 provides for private parties (with leave) to seek a form of damages under the abuse of dominance provisions. (Damages are not currently available.)

Under Bill C-59, damages are defined as "an amount, not exceeding the value of the benefit derived from the conduct that is the subject of the order, to be distributed among the applicant and any other person affected by the conduct, in any manner that the Tribunal considers appropriate."

Bill C-59 further proposes to expand the test for leave to bring a private action such that the Tribunal could grant a private party leave to make such an application if the Tribunal has reason to believe that the applicant is directly and substantially affected *in the whole or part* of the applicant's business by the conduct *or if the Tribunal is satisfied that it is in the public interest to do so*. Currently, the Tribunal may only grant leave to commence an application under the abuse of dominance provisions if the Tribunal has reason to believe that the applicant would be "directly and substantially" affected in its business by the conduct at issue, which the Tribunal has interpreted (largely in the context of section 75, which addresses refusals to deal) to mean as an impact on the whole of the applicant's business.

If implemented, Bill C-59 will significantly expand financial exposure under section 79 and provide an expanded path and greater incentive for private parties to seek leave.

5. What steps should businesses take in light of the amendments to the Competition Act abuse of dominance provisions contained in Bill C-56?

Overall, the amendments to the abuse of dominance provisions have the potential to significantly increase the risk of challenges and both private and public enforcement action relating to conduct by dominant firms in Canada. At this time, it would be advisable for businesses in Canada, especially those with a strong market position or that operate in markets with a smaller number of competitors, to review their market practices carefully.

While a careful assessment of market practices can and should be made, the full implications of these changes are uncertain, with new concepts and important changes to legal tests layered on top of existing concepts that have never been judicially tested (including the scope of "joint dominance" and the meaning of "adverse effect on competition"). While we anticipate that the Bureau will provide guidance, it is likely that clarity on what constitutes an abuse of dominance in Canada will result from judicial interpretation over time.

6. Aside from abuse of dominance, what other changes have been made to Bill C-56 since it was introduced in September?

Bill C-56 previously provided that only the Minister of Innovation, Science and Industry (the Minister) may direct the Commissioner to commence a market study if the Minister is of the view that it is in the public interest. The market studies power has since been broadened to enable the Commissioner, after consultation with the Minister, to decide unilaterally to

conduct a market inquiry if of the view that it is in the public interest.

When first introduced, Bill C-56 only repealed the efficiencies defence from the merger provisions of the Act; however, consideration of efficiencies in the context of non-criminal agreements between competitors in section 90.1 has now also been repealed.

7. When does Bill C-56 come into effect?

While there are some transitional provisions to account for notified or completed mergers prior to December 15, 2023, substantially all aspects of Bill C-56 are now in effect. The exception to this is the provision relating to vertical agreements in section 90.1, which will take effect one year later, on December 15, 2024. The delay is intended to give businesses time to prepare and for the Bureau to issue guidance regarding the application of the new provision.