

Next phase of Competition Act amendments on the fast track

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On September 14, 2023, Prime Minister Justin Trudeau unveiled that the Government of Canada plans to introduce a number of further significant amendments to the *Competition Act* (Act). The upcoming amendments form part of an ongoing review of the *Competition Act* and build on recent amendments that, among other things, established new criminal offences prohibiting certain no-poach and wage-fixing agreements, significantly increased criminal fines and civil monetary penalties, expanded access to private parties to challenge behaviour of dominant firms under the abuse of dominance provisions and lowered the bar for establishing an anti-competitive act. Further details on the recent amendments may be found in prior Osler Updates from [June 2022](#) and [June 2023](#).

While the September 14 announcement provides little in the way of detail, it states that the amendments, expected to be tabled shortly, will include

1. giving the Competition Bureau (Bureau) powers to compel information to conduct market studies
2. removing the efficiencies defence
3. empowering the Bureau to act against certain types of anti-competitive “collaborations” that are not squarely captured under the existing provisions of the Act

While this announcement focuses on concerns regarding the competitive dynamics within the grocery sector, these amendments will impact Canada’s competition laws more broadly and have important implications for companies doing business in Canada.

Market studies

Currently, the Bureau can conduct studies to assess the state of competition in a relevant market or industry and can request information from companies for the purposes of such studies. However, information cannot be compelled, so the Bureau relies on receiving information on a voluntary basis.

Market studies are distinguishable from inquiries, which can be opened by the Commissioner and enable the Commissioner to use formal investigatory powers where the Commissioner has reason to believe there is conduct that is actionable under one or more provisions of the Act. By contrast, market studies do not require the Commissioner to believe that actionable anti-competitive conduct is occurring.

In this context, important questions have been raised about whether businesses should be compelled to provide information, which can involve significant burden and expense. It will be especially important to see the specific powers that are proposed when the amendments

are tabled, including whether they provide for appropriate checks and balances on the scope of what can be compelled, associated timelines and due process matters.

Efficiencies defence

While the precise proposal is unclear, the “removal” of the efficiencies defence will be a significant change to the Canadian merger review regime. The efficiencies defence, which is unique to Canadian competition law, allows a transaction that is found to substantially prevent or lessen competition to proceed where the efficiencies that would be lost if an order is made outweigh the anti-competitive effects.

Like the market power studies, the Commissioner has long called for the elimination of the efficiencies defence, including in comments provided in response to a consultation earlier this year by the Government of Canada on amendments to the Act. The outcome of only a handful of merger cases has formally turned on the applicability of the efficiencies defence. However, the availability of the defence has had a broader impact on the merger review process and timelines in Canada.

Collaborations

There are few details on the third amendment referenced in the announcement, which was described loosely as addressing “collaborations” and “in particular situations where large grocers prevent smaller competitors from establishing operations nearby.” It remains to be seen when the amendments are tabled what scope of conduct is intended to be covered that is not already actionable under one of the existing broadly worded provisions of the *Competition Act*.

Next steps

The precise timeline for the tabling of these amendments is unclear. However, it is noteworthy that the announcement concludes with a reference to the broad consultation on the future of the Act that was first announced in Budget 2022 and undertaken in 2023, stating that “[t]he government plans to introduce comprehensive legislative reforms to the *Competition Act* in the coming months.” This statement suggests that additional amendments beyond those specifically mentioned in the announcement may be on the table.

For further information regarding the amendments and how they may impact you, please contact the members of Osler’s Competition and Foreign Investment Group.