Intelligence MEMOS

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To: Canadian Competition Watchers

Date: August 23, 2021

Re: Should the *Competition Act* Go Green? (Part 1)

Governments around the world have identified climate change as an urgent issue and private sector cooperation will be essential to pursue sustainability and reduce climate change impacts.

However, competition laws may stifle such efforts unless changes are made to support competitor collaboration on environmental initiatives.

The Need for Collaboration

Some sustainability initiatives are only workable if undertaken through collaboration between companies or on an industry-wide basis. Joint ventures and strategic alliances to develop and supply more environmentally friendly products, or products produced through more environmentally friendly processes, may be pro-competitive or anti-competitive. However, agreements between specific firms or an entire industry to phase out certain types of products or product attributes that are environmentally damaging may be problematic under many competition law regimes because they involve reductions of supply and/or increases in prices of products that continue to be sold.

Vertical collaborations between firms in supplier-customer relationships are rarely problematic under competition laws. However, most competition law regimes significantly restrict horizontal coordination between competitors – particularly in relation to pricing, sales, marketing and production activities. The risks of criminal sanctions or other penalties as well as exposure to lawsuits may have significant chilling effects on environmental initiatives that reduce product choice, price, output or other dimensions of competition.

Other countries – the Netherlands last year – are already recognizing the importance of adjusting competition laws to enable such cooperation.

What Should Canada Do?

Ottawa should move quickly to provide a clear and supportive framework for collaborations that would reduce environmental damage under the *Competition Act*. The most urgent concern is the broadly-worded criminal offence of conspiracy in restraint of trade, although the non-criminal "competitor agreements" reviewable practice is also a candidate for improvements.

The Conspiracy Offence

The criminal offence in Section 45 of the *Competition Act* prohibits all agreements between competitors that fix prices, allocate customers or markets, or lessen or restrict supply. Since 2010, such conduct is illegal "*per se*" (unlike other competitor agreements, where actual competitive effects must be considered). The sanctions include substantial fines as well as a potential maximum prison term of 14 years for individuals. In addition, private actions are available, and class actions seeking large damage awards are regularly initiated in respect of competitor agreements that may reduce output or increase prices. Such potential penalties and damages can over-deter conduct that is not problematic.

A relatively narrow ancillary restraints defence (ARD) can be invoked in certain circumstances. However, it is only available where the parties to an agreement can establish that: (i) a *per se* illegal price, allocation or output restriction is ancillary to a broader agreement that includes the same parties, (ii) the restriction is reasonably necessary to achieve the objectives of that broader agreement, and (iii) the broader agreement does not contravene the *per se* price-fixing, customer/market allocation or output prohibitions.

This means careful self-assessment is needed for parties to be confident of ARD protection. While an appropriately tailored non-compete provision in a joint venture to develop an environmentally friendly technology may qualify for the ARD, a product phase-out agreement likely would not be ancillary to a broader non-problematic agreement.

Enforcement Guidelines

The Competition Bureau's 2010 Competitor Collaboration Guidelines (CCGs) explained its approach to assessing competitor agreements as either criminal offences or reviewable practices. This guidance provided crucial assurances that the broad language of the conspiracy offence will be applied in practice to "naked restraints on competition" – i.e., hard-core cartel conduct. A wide range of non-cartel commercial conduct – joint ventures, dual distribution, R&D collaboration, etc. –will be dealt with under the competitor agreements reviewable practice in the *Act* because the competitive and economic welfare effects are not clear cut and case-by-case assessment is warranted.

Last May's updating of the CCGs was a missed opportunity to support collaboration in respect of sustainability and climate change. The Bureau's draft revisions in 2020 acknowledged that an agreement among competitors to implement certain environmental measures, or industry standards designed to protect the environment, would not be seen as a criminal price-fixing agreement even if it might increase the costs of producing a product and ultimately result in price increases. The draft revisions did not discuss supply/output restrictions, a critical omission because improved environmental outcomes will often be linked to reducing the supply of environmentally damaging products or production processes.

Unfortunately, the final version of the updated CCGs removed the price-fixing guidance related to environmental matters. The removal, coupled with the guidance about the demanding requirements for the Bureau to accept an ARD claim, leaves businesses and their advisors with an even higher degree of uncertainty about whether, when and how the Bureau may apply the conspiracy offence to environmental agreements between competitors.

Tomorrow, we'll discuss how legislation could address the risks and chilling effects for environmental agreements that exist under Canada's competition laws.

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