Intelligence MEMOS

From: Neil Campbell and Sarah Stirling-Moffet

To: Canadian Competition Watchers

Date: August 24, 2021

Re: **SHOULD THE *COMPETITION ACT* GO GREEN? (PART II)**

Yesterday, we examined how the *Competition Act* may deter or penalize collaboration on environmental issues, restricting industry-wide approaches and other agreements among competitors to pursue sustainability and reduce climate change impacts. Legislative changes should be considered to address this policy conflict and turn Canadian competition law into an enabler of collaborations that promote sustainability.

**An Environmental Exemption for the Conspiracy Offence**

In order to fully address the uncertainty and potential chilling effects of the conspiracy offence and private right of action to recover damages on sustainability collaborations, the exemption for environmental agreements – removed from the conspiracy offence when the *Competition Act* was amended in 2009 – should be re-introduced and upgraded.

Prior to 2010, the *Act* stated that "the court shall not convict the accused if the conspiracy, combination, agreement or arrangement relates only to one or more of the following: … measures to protect the environment." It appears that this exemption was removed because a general ancillary restraints defence (ARD) was introduced as an element of the *per se* conspiracy offence. However, as we noted, the ARD will only protect some sustainability collaborations. Moreover, the demanding statutory conditions that must be proved on a balance of probabilities by the parties to the agreement will leave many uncertain about potential exposure to serious criminal penalties and class actions to recover damages.

The pre-2010 environmental exemption was not available if the agreement was likely to lessen competition unduly in respect of prices, quantity or quality of production markets or customers, or channels of distribution. Those limitations existed as an interface with the general undueness test in the former conspiracy offence, and effectively resulted in a relatively narrow environmental exemption.

An exemption to the current conspiracy offence would not require a similar limitation. Since 2010, the *Act* contains a non-criminal reviewable practice that considers competitive effects, as described below.

We encourage the government to reintroduce and strengthen an exemption to the conspiracy offence for agreements that protect or benefit the environment. Making it clear that such agreements are not hard-core cartel conduct, cannot be criminally prosecuted, and do not give rise to private damages actions, would remove the current chilling effects and ensure such agreements would be assessed as reviewable practices.

**The Competitor Agreements Reviewable Practice**

The competitor agreements provision allows the Commissioner to challenge any agreement or arrangement "likely to prevent or lessen competition substantially" (section 90.1). The Commissioner may seek prohibition or other remedial orders from the Competition Tribunal at any time prior to or after implementation of any agreement between firms that are, or would likely be, competitors in relation to a product.

Whether agreements that relate to the introduction of new environmental technologies, products or processes would be subject to challenge under this provision will depend on whether they are likely to lessen or prevent competition "substantially", relative to the "but-for" scenario without the agreement. This may involve all price and non-price dimensions of competition, and agreements that would reduce the supply or raise the prices of environmentally damaging products could be challenged if the effects in the relevant market are substantial.

The framework for assessment of competitor agreements is similar to the mergers framework and includes an efficiencies defence in section 90.1(4). It can be invoked if efficiencies are shown to outweigh the negative competitive effects of any agreement. However, some positive environmental outcomes may not qualify. For example, it is not clear whether reductions of damage to the environment (e.g. lower greenhouse gas emissions) would be regarded as an eligible type of efficiency.

An environmental defence is needed to address this gap. It would allow the environmental benefits of competitor or industry collaborations to be weighed against the negative economic welfare impacts arising from reduced competition. There may be challenges in balancing the quantitative and qualitative dimensions of environmental benefits and competitive effects, since both have some measurement challenges. However, the efficiencies defence involves somewhat similar challenges that have been worked out through litigated cases and guidelines.

**Concluding Observations**

The government is reportedly considering possible legislative amendments to the *Competition Act*, and the Standing Committee on Industry, Science and Technology has been examining Canada's competition law framework. With the constitutionality of Canada's carbon tax regime recently confirmed by the Supreme Court in the greenhouse gas case, the government should seize this opportunity to enhance Canada's competition laws through amendments that affirmatively promote important sustainability and environmental goals.

*Neil Campbell is a partner and Sarah Stirling-Moffet is an associate in the Competition Group at McMillan LLP in Toronto.*

*To send a comment or leave feedback, email us at blog@cdhowe.org.*