Update on Bill C-59: More Far-Reaching and Substantive Changes to the Competition Act

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In our previous Guide, we reviewed several of the most significant changes to the *Competition Act* (Canada) (**Act**) made pursuant to **Bill C-19** (*An Act to implement certain provisions of the budget tabled in Parliament on April 7, 2022 and other measures)*, which received Royal Assent on June 23, 2022, **Bill C-56** (*An Act to amend the Excise Tax Act and the Competition Act*), which received Royal Assent on December 15, 2023 and **Bill C-59** (*Fall Economic Statement Implementation Act, 2023*), which is anticipated to receive Royalty Assent early in 2024.

The House of Commons completed its second reading of Bill C-59 on March 18, 2024 and the Bill was sent to the House of Commons Standing Committee on Finance (**Standing Committee**) for review. In his submissions to the Standing Committee made by letter dated March 1, 2024, and by his remarks to the Standing Committee made April 18, 2024, (collectively, **Commissioner's Additional Submissions**), the Commissioner of Competition advocated for additional amendments to the Act.

The Standing Committee completed its review on May 6, 2024 and presented its report with several amendments to Bill C-59 recommended in the Commissioner's Additional Submissions. As it pertains to the Act, these amendments, if enacted, are even more significantly far-reaching and substantive in two principal areas: (a) deceptive marketing practices, with respect to "greenwashing" claims; and (b) the merger provisions, with respect to the onus of proof and available remedies.

Bill C-59 is currently in its third reading at the House of Commons, following which the Senate will review it before becoming law.

Deceptive Marketing Practices – Environmental Claims

The current deceptive marketing practices provisions are focused on claims with respect to a product or service and are not well suited to capture general claims related to disclosures a company makes regarding its commitment to the environment or steps it may be taking to reduce its carbon footprint or get to "net-zero". The Commissioner raised this concern with the Standing Committee and requested "studying whether the reverse onus approach to greenwashing claims could be expanded to require that all environment claims made to promote a product or business interest be supported by adequate and proper substantiation."

In response, the Standing Committee revised Bill C-59 to broaden deceptive marketing practices to include misrepresentations concerning the benefits of business activities generally. Proposed new section 74.01(1) (b.2) reads as follows:

> (b.2) makes a representation to the public with respect to *the benefits of a business or business activity for protecting or restoring the environment or mitigating the environmental and ecological causes or effects of climate change* that is not based on adequate and proper substantiation in accordance with internationally recognized methodology, the proof of which lies on the person making the representation; or

While statements related to a "product's" benefits must be based on "an adequate and proper test", statements related to the benefits of a business or business activity, which may be difficult to test, require "adequate and proper substantiation". In any case, these provisions put a reserve onus on the party making the statement to establish that it is not a misrepresentation.

Under these new provisions, statements must be based on adequate and proper substantiation using an "internationally recognized methodology". It is unclear what an "internationally recognized methodology" is given the

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multitude of methodologies and standards that have been adopted by international organizations, as well as national and provincial or state governments.

Environmental groups, who are already actively asking the Competition Bureau to investigate "greenwashing" claims against companies involved in the oil and gas sector, such as the Royal Bank of Canada, Shell Canada, the Pathways Alliance and the Canadian Gas Association, will be emboldened by these provisions. They may ask the Competition Bureau to investigate, or they may request leave of the Competition Tribunal (**Tribunal**) to take action against companies they consider to be engaged in "greenwashing". The latter remedy, which is a private right of action, will come into effect one year after the amendments come into force and effect. This itself will be a significant departure from the status quo. Prior to these amendments, the only remedy available to private parties was to launch a complaint to the Bureau, which the Bureau then determined whether they wanted to review.

Every company that makes public representations and warranties with respect to the environment and/or climate change, will need to review the same (with the assistance of outside experts) and prepare to substantiate them and/or amend them. Some things to keep in mind:

- Regulatory Frameworks: Understand the specific anti-greenwashing regulations and standards that apply or that you are using to substantiate your claims. For example, are you subject to, or using, the SEC's *Final Climate Disclosure Rules* (which focuses on Scope 1 and 2 disclosures) applicable in the United States, or the European Union's *Corporate Sustainability Reporting Directive* (CSRD), applicable to non-E.U. entities, which requires Scope 1, 2 and 3 disclosures for companies of a certain size.

- Transparency: Be transparent about how you define and measure ESG factors and the impact of these factors on your business. Identify or make it easy to identify the internationally recognized methodology you are using.

- Data Quality: Use reliable and standardized ESG data sources. In instances where data is not available, this may require using estimated data. Ensure the use of estimates is reasonable and transparent.

- Third-Party Verification: Where possible, use data sources that have been verified by third party experts.

- Internal Compliance: Establish internal compliance procedures and governance structures for climate reporting to ensure that your statements adhere to both regulatory standards and internal policies.

- Documentation: Ensure you maintain a fulsome record of your assessments and compliance efforts. It is important to document your due diligence and commitment to regulatory compliance.

Merger Provisions - Reverse Onus

In order to exercise remedies in respect of a merger or proposed merger, the Tribunal must make a determination that the merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially in a relevant market. The onus is on the Commissioner of Competition to satisfy the Tribunal that this test is met.

Under the proposed changes, consistent with the recommendations set out in the Commissioner's Additional Submissions, if the Tribunal finds that a merger or proposed merger results in or is likely to result in a *significant increase in concentration or market share*, the Tribunal must also find that the merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially, *unless the contrary is proved on a balance of probabilities by the merging parties*. **In other words, the onus of proof shifts to the merging parties to prove to the Tribunal that the merger or proposed merger does not or will not prevent or lessen, or does not, or is not likely to prevent or lessen, competition substantially**. The reverse onus will make the Bureau's job of challenging a merger much easier but will require the merging parties to provide more evidence (which may include a more routine use of expert evidence from economists), adding more time, resources and costs to merger filings.

For purposes of determining whether the presumption applies (i.e. the merger would result in a significant increase in concentration or market share), the proposed amendments adopt the "**HHI**" or Herfindahl-Hirschman Index, which is not legislated in the United States, but is a concentration measure used by the U.S. Department of Justice & Federal Trade Commission in the *Merger Guidelines § 2.1 (2023)*. A market with an HHI of less than 1,500 is considered to

be a competitive marketplace, an HHI of 1,500 to 2,500 is moderately concentrated, and an HHI of 2,500 is highly concentrated.

Under the proposed amendments to the Act, the concentration index or HHI in a relevant market is defined as "the sum of the squares of the market shares of the suppliers or customers". Under the proposed revisions:

> "A merger or proposed merger results or is likely to result in a significant increase in concentration or market share if, in any relevant market, as a result of the merger or proposed merger,
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> (a) the concentration index increases or is likely to increase by more than 100; and
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> (b) either
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> (i) the concentration index is or is likely to be more than 1800, or
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> (ii) the market share of the parties to the merger or proposed merger is or is likely to be more than 30%."

The proposed amendments give the Governor in Council the ability, by regulation, to prescribe different values than those set out in the Act. This provision provides flexibility to amend the thresholds without requiring further legislative action.

While the HHI provides relative simplicity to the determination, it does so at the expense of certainty and specificity. If the specific market is ill-defined or is not defined in a proper or realistic manner, the HHI will not be an appropriate indicator of market concentration. In addition, market concentration should not be used as a proxy for market power, which is a function of the structure of the market. HHI does not take into account the complexities of either market structure or firm behaviour, and so should not be used to imply the presence of market power. The presumption of market power that the proposed legislation contemplates will require parties to a merger or proposed merger to dedicate more resources (time and money) to challenging the Competition Bureau's definition of the relevant market(s) and to establishing the elements of the market structure and firm behaviour that rebut the presumption of market power.

In addition, section 93 (g.4) has been amended to so that "any change in concentration or market share" resulting from a merger or proposed merger can be considered in determining whether a merger is anti-competitive. Previously, this section focused on any "effect from" a change in concentration or market share.

Merger Provisions – Remedies to Restore Competition to Pre-Merger Levels

As noted above, in order to exercise remedies in respect of a merger or proposed merger, the Tribunal must make a determination that the merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially. In case of such a finding, the Tribunal is empowered to prohibit a person from doing any act or thing the Tribunal "determines to be necessary to ensure that the merger or part thereof does not prevent or lessen competition substantially".

Although the triggering language of section 92 will be amended as a result of the concentration index and reverse onus that is placed on the parties, the objectives of the merger remedies available to the Tribunal are also proposed to be significantly amended. With the proposed changes, the Tribunal will be guided to make an order in respect of a merger or proposed merger "*in order to restore competition to the level that would have prevailed but for the merger*" and will be empowered to prohibit a person from doing any act or thing the Tribunal "determines to be necessary to ensure that the merger or part thereof does not prevent or lessen competition."

The objective of restoring competition to pre-merger levels and ensuring the merger does not prevent or lessen competition at all is a far different objective than ensuring the merger does not prevent or lessen competition substantially. These changes will provide the Tribunal with the power to address any anti-competitive impacts of a merger (whether or not substantial).

As stated in the Commissioner's Additional Submissions, "[m]erger control should seek to preserve the level of competition in these markets as much as possible rather than allow it to be eroded through anti-competitive consolidation that is only partially remedied."

Final Thoughts

The proposed changes to the Act presented by the Standing Committee represent a fundamental and far-reaching shift to the Canadian competition law landscape. We will closely watch Bill C-59 as it progresses through the legislative path toward law and will continue to keep you updated. Companies and their legal counsel will need to be prepared.