

The Handbook of Competition Enforcement Agencies

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Overview

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Canadian competition law is governed by the Competition Act (the Act), which includes criminal provisions, provisions for merger review and civil provisions relating to abuse of dominance.

The commissioner of competition (the commissioner) heads the Competition Bureau (the Bureau) and has responsibility for administration and enforcement of the Act. Criminal cartel cases are prosecuted by the director of public prosecutions (the DPP) in the courts. The Competition Tribunal (the Tribunal) can, on application to the commissioner, grant remedial orders in merger and abuse of dominance cases. Guidelines published by the Bureau set out the commissioner's approach to enforcing the merger, abuse of dominance and cartel provisions.

Cartels

Recent amendments to the cartel provisions have made hardcore cartels a per se offence and other agreements among competitors that result in a substantial lessening or prevention of competition subject to review by the Tribunal on application by the commissioner.

The criminal cartel provision prohibits agreements among competitors or potential competitors to:

- fix, maintain, increase or control the price for the supply of a product;
- allocate sales, territories, customers, or markets for the production or supply of the product; or
- fix, maintain, control, prevent, lessen, or eliminate the production or supply of the product.

The maximum penalty has increased from a C\$10 million fine and five years' imprisonment to a C\$25 million fine and 14 years' imprisonment.

Immunity and leniency programmes

Where certain requirements are met, immunity from prosecution for criminal conduct is available through the commissioner's immunity programme. Immunity may be offered to the first party to disclose evidence of criminal activity of which

the Bureau was previously unaware, or to a party that comes forth before there is sufficient evidence for the DPP to effectively prosecute the illegal conduct.

A leniency programme established by the Bureau permits parties who have missed the 'first in' requirement for immunity to cooperate and receive a reduction of up to 50 per cent of the general fine and no penalties for individuals. Subsequent leniency applicants may receive a reduction of up to 30 per cent of the fine, and penalties less than those recommended by the Bureau against non-cooperating parties involved in cartel activity.

Merger notification and review

Merger transactions that exceed annually adjusted financial thresholds (currently, when the parties' combined assets or revenues exceed C\$400 million and the size of the transaction exceeds C\$70 million) must be notified to the Bureau and may not be completed until the expiry of a 30-day statutory waiting period, unless the commissioner grants an earlier termination. The commissioner may, within the 30-day period, issue a supplementary information request (SIR), which extends the initial 30-day review period to 30 days from the date on which a complete response to the SIR has been provided.

If an application for an advance ruling certificate (ARC) is made and the commissioner is satisfied that there would not be sufficient grounds to challenge the merger, an ARC may be issued. Issuance of an ARC exempts a transaction from merger notification, and precludes the commissioner from invoking a subsequent challenge to the transaction.

It is common for parties to merger transactions to require an ARC or an informal clearance called a 'no-action' letter from the commissioner as a condition of closing. For practical and commercial reasons, litigation before the Tribunal in merger cases is rare and the parties in difficult cases often negotiate a remedy with the Bureau that will permit the transaction to close.

Even if a transaction does not trigger the

merger notification provisions under the Act, it may be reviewed by the commissioner up to one year after closing, under statutory provisions relating to mergers which substantially lessen competition.

Abuse of dominance

The Act authorises the Tribunal, on application by the commissioner, to issue remedial orders where one or more firms have market power and are engaging in a practice of anti-competitive acts resulting in a substantial prevention or lessening of competition in any market.

The Tribunal can order remedies including an injunction prohibiting the conduct, an administrative monetary penalty of up to C\$10 million for a first offence and C\$15 million for a subsequent offence and, in certain cases, divestiture orders.

Anti-competitive acts are those intended to have a negative effect on a competitor that is predatory, disciplinary or exclusionary. Conduct that has been the subject of abuse of dominance proceedings includes loyalty programmes, exclusivity agreements, long-term contracts with automatic renewals and predatory pricing.

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