Greener On The Other Side: Proposed Environmental Amendments To The Competition Act

Bill C-59, currently before Parliament, promises significant changes to the *Competition Act* (the "**Act**"). Among the proposed amendments are three additions that will impact the Act's approach to environment-related matters.

First, the Bill updates the Act's civil deceptive marketing provisions, reflecting the Competition Bureau's ("**Bureau**") preferred legal framework for assessing the extent to which environmental claims may constitute deceptive marketing. Parties who make public statements concerning "a product's benefits for protecting the environment or mitigating the environmental and ecological effects of climate change" will be responsible for ensuring those statements are based on "an adequate and proper test". Otherwise, these statements may fall offside the deceptive marketing regime, potentially attracting significant reputational and financial consequences (including injunctions and administrative monetary penalties of up to 3% of worldwide revenues). This change provides greater certainty for advertisers as to how environmental claims will be assessed by the Bureau.

Second, the Bill will permit private access to the Competition Tribunal (the "**Tribunal**") in respect of the deceptive marketing provisions of the Act. Currently, only the Bureau can bring a deceptive marketing application.

Third, the proposed amendments contemplate a new, voluntary pre-approval regime for environmental collaborations that could otherwise run afoul of the Act's criminal or civil competitor collaborations provisions. Upon the application of the parties, if the Bureau determines that a collaboration is for the purpose of protecting the environment and will not result in a substantial prevention or lessening of competition ("**SPLC**"), the Bureau would be able to certify that the competitor collaborations provisions of the Act "do not apply" to the collaboration. The requirement that such agreements do not result in a SPLC stands in contrast to approach adopted by other international agencies on the same issue, such as the European Commission and UK Competition and Markets Authority ("**CMA**"), and may undercut the utility of the certification mechanism.

While Bill C-59's environmental amendments come with both advantages and drawbacks, they could be subject to further refinement as the legislation progresses through Parliament when it resumes on January 29. Looking ahead, assuming the amendments pass

as presently drafted, guidance from the Bureau on environmental collaborations will be especially important.

1. Substantive Amendments to Civil Deceptive Marketing Provisions for Environmental Claims

The current statutory scheme captures several forms of civil deceptive marketing, two of which have been especially important to environmental claims.[1] Currently, a person's conduct will be reviewable under the Act where, to advance a business interest, they:

- make a representation to the public that is false or misleading in a material respect (a "**Materially Misleading Statement**"); or
- make a representation to the public in the form of a statement, warranty or guarantee of the performance, efficacy or length of life of a product (a "**Performance Claim**") that is not based on an adequate and proper test thereof.

The amendments add a new form of conduct reviewable under the Act's civil deceptive marketing provisions, which creates a specific violation where, to advance a business interest, one:

- makes a representation to the public in the form of a statement, warranty or guarantee of a product's benefits for protecting the environment or mitigating the environmental and ecological effects of climate change (an "**Environmental Benefits Claim**") that is not based on an adequate and proper test.

While there was no uncertainty as to whether an Environmental Benefits Claim was already captured in the legislation (since the Bureau has pursued a number of cases already under the civil deceptive marketing provisions), the proposed amendments do clarify for advertisers that statements about the environmental benefits of a product will generally be assessed in the same way as Performance Claims, namely, by requiring an adequate and proper test that is conducted before the claims are made. It should also support the general impression created by the marketing claim. The test should be objective and include controls, such as eliminating external variables, and include multiple independent variables. The test will be assessed in a manner that takes into account both the risk of harm the product is designed to prevent and the real world usage of the product.[2]

2. Procedural Amendments to Civil Deceptive Marketing Provisions for Environmental Claims

The proposed amendments also provide private access to the civil deceptive marketing provisions of the Act. Currently, only the Bureau can bring an application. Under the proposed regime, private parties will be able to seek leave to bring their own deceptive marketing applications at the Tribunal. The Tribunal may only grant leave where the application is in the public interest.

The private access regime is likely a response to the current enforcement landscape. By virtue of the Bureau's present-day monopoly over deceptive marketing applications, the greenwashing space is dominated by complaints filed with the Bureau by environmental groups that seek to spur the Bureau to take enforcement action. Now, these groups will be able to bypass the Bureau altogether, and go directly to the Tribunal for relief.

And the relief available is extensive. The Act's civil deceptive marketing provisions provide a host of tools and remedies for applicants. Importantly, before any determination on the merits, temporary injunctive relief is available. To obtain such an order, the party seeking the injunction must demonstrate that (a) serious harm is likely to ensue unless the order is issued and (b) the balance of convenience favours issuing the order.[3]

In terms of permanent relief, where a person is found to engage in conduct contrary to the Act's civil deceptive marketing provisions, the respondents can be ordered to cease the conduct, issue a corrective notice, and/or pay an administrative monetary penalty (up to a maximum of 3% of worldwide revenues, with the exact penalty being subject to mitigating and aggravating factors).

One important nuance concerning these provisions is that, while a disgorgement remedy will be available for other private applications (abuse of dominance), it will not be available for Performance Claims or Environmental Benefits Claims. For further information on the proposed amendments to the abuse of dominance regime, see here.

3. **Proposed Environmental Collaboration Antitrust Immunity Certification**

The proposed amendments also contain a certification mechanism, by which the Bureau can certify certain environment-related agreements, exempting them from the criminal and civil competitor collaborations provisions of the Act. This mechanism – which requires the Bureau to be satisfied that the proposed collaboration will not result in a SPLC – differs materially from the approach in other jurisdictions. Bureau guidance on the substance of its assessment and the procedure the Bureau will follow will likely be a significant influence on the use of this new tool.

1. *The Statutory Framework for Environmental Certificates*

The environment certificate regime exempts certain agreements relating to the environment from the competitor collaborations provisions of the Act (both the conspiracy and bid rigging offences, as well as the civil competitor collaborations provisions). If enacted, private parties would be able to request a certificate from the Bureau that authorizes the proposed collaboration (which certificate can last up to a maximum of 10 years, subject to extensions by the Bureau). In order to grant such an exemption, the Bureau must be satisfied of two things:

1. the agreement is made for the purpose of protecting the environment; and
2. the agreement is not likely to prevent or lessen competition substantially.[4]

The Bureau must consider such a request as soon as practicable, though there is no set timeline. When applying for the certificate, parties must provide relevant information at the Bureau's request.[5] The Bureau can place terms on the certificate. Once issued, the certificate must be registered with the Tribunal; thereafter, the conspiracy, bid-rigging, and civil collaborations provisions of the Act "do not apply" with respect to the agreement.

Bureau guidance will play an important role in determining the substance of its review, and the procedure to be followed. Guidance from other jurisdictions provides a window into the sorts of agreements that might be captured. Typical examples include companies universally adopting a more environmentally-friendly practice in supplying a product (e.g., delivery services switching to electric vehicles), or restricting one's product offering with the environment in mind (e.g., agreeing to

remove an outdated, inefficient class of washing machines from the market).[6]

B. The *Canadian Approach in Context*

The proposed Canadian environmental certificate regime differs from the approaches taken by other agencies, namely, the European Commission and UK CMA.[7]In particular, the proposed Canadian mechanism establishes a different substantive assessment compared with its counterparts in the EU and UK. Those legal frameworks contemplate a prima facie civil/administrative violation for anticompetitive agreements, which can be avoided if the impugned agreement produces specified benefits.[8]While the two frameworks differ in their specifics, a common thread is that environmental agreements that have "appreciable negative effects" on competition,[9] or that are "restricting competition appreciably"[10] are capable of being saved by environmental benefits. This is entirely different from the proposed Canadian framework, where certification would not be available if the agreement is likely to result in a SPLC.

Given the mechanism in Canada would be voluntary and would provide no safe harbour for collaborative agreements that do have significant anti-competitive effects, it is unclear how private parties contemplating such collaborations are incentivized to come forward and seek a certificate. This is particularly so in light of the existing alternatives available under the Act which serve to insulate some environmental collaborations from the criminal provisions of the Act. For example, the "ancillary restraints defence" protects agreements that are ancillary to a broader legitimate agreement and are reasonably necessary for achieving the objective of that broader agreement. Overall, a rigid and conservative approach to issuing environmental certificates may result in a seldom-used mechanism, and in that way fail to advance environmental objectives.

Footnotes

1. While the Act also includes a criminal misleading advertising framework, it has not been modified under the proposed amendments, and is not the subject of this bulletin. In light of the significant amendments proposed throughout the rest of the Act, this omission may imply that legislators and enforcers alike prefer to regulate advertising through a civil framework.

2. *The Commissioner of Competition v. Imperial Brush Co. Ltd. and Kel Kem Ltd. (c.o.b. as Imperial Manufacturing Group)*, 2008 Comp. Trib. 2 at paras 122, 128; Competition Bureau, "Performance claims not based on an adequate and proper test", online: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/00520.html; Competition Bureau, "The Deceptive Marketing Practices Digest – Volume 2", March 7, 2016, online: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04029.html#section2_5.

3. It must also "appear to" the Tribunal that conduct in violation of the deceptive marketing provisions of the Act is occurring.

4. The inclusion of the civil collaboration provisions (s. 90.1) within the scope of the exemption is also unusual, as section 90.1 requires, as a constituent element, a SPLC. The intent appears to be to provide parties with greater certainty, by having this determination made prior to entering into the agreement, rather than seeing parties implement an initiative and risk enforcement action. But any such certainty is limited, as the Bureau can apply to have the certificate rescinded or varied if it ultimately does result in a SPLC.

5. We anticipate the government will set a fee for environmental certificates under the *Department of Industry Act*, as the Bureau currently charges fees for other similar activities under the Act, such as assessing the competitive effects of a merger and issuing written opinions.

6. See Competition & Markets Authority, *Green Agreements Guidance*, October 12, 2023, p. 12, accessible at: https://assets.publishing.service.gov.uk/media/6526b81b244f8e000d8e742c/Green_agreements_guidance_.pdf (electric vehicles example); European Commission, *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements*, July 21, 2023, Chapter 9: Sustainability Agreements, Example 5, para 603, accessible at: https://competition-policy.ec.europa.eu/system/files/2023-07/2023_revised_horizontal_guidelines_en

.pdf (washing machines example).

7. Note that the American federal antitrust regime has no safe harbor threshold or exemption for climate-related activities.

8. The European Commission's regime is enshrined in Article 101 of the *Treaty on the Functioning of the European Union*. Simply put, Article 101(1) identifies certain agreements as inconsistent with the European internal market, including those to fix prices and limit or control production, among others. Article 101(3) then provides for exceptions where the impugned agreement is indispensable "to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit" and does not eliminate competition in respect of a substantial part of the products in question.

Similarly, the *Competition Act 1998* houses the UK's civil regime prohibiting agreements between businesses that have "as their object or effect the prevention, restriction, or distortion of competition". It separately provides for exceptions where agreements "contribute to improving the production or distribution […] or to promoting technical progress, while allowing consumers a fair share of the resulting benefit".

9. See, e.g., European Commission, *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements*, July 21, 2023, Chapter 9: Sustainability Agreements, Example 5, para 603, accessible at: https://competition-policy.ec.europa.eu/system/files/2023-07/2023_revised_horizontal_guidelines_en.pdf.

10. See Competition & Markets Authority, *Green Agreements Guidance*, October 12, 2023, Chapters 5 & 6, accessible at: https://assets.publishing.service.gov.uk/media/6526b81b244f8e000d8e742c/Green_agreements_guidance_.pdf.

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McCarthy Tetrault LLP