Intelligence MEMOS

From: Neil Campbell and Sarah Stirling-Moffet

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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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.

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