Ottawa to launch review of competition laws, catching up to ‘today's digital reality’

By JAREN KERR, JOSH O’KANE

The federal government is launching a broad review of Canada’s competition laws for the first time in more than a decade amid concerns that the country’s Competition Bureau lacks sufficient enforcement power to effectively block monopolistic practices.

François-Philippe Champagne, Minister of Innovation, Science and Industry, announced Monday that the government will assess ways to improve the Competition Act. Ottawa’s priorities include closing loopholes that allow for harmful conduct and adjusting the penalty structure to serve as a more effective deterrent against anti-competitive behaviour.

The Competition Act was last reviewed in 2008, when e-commerce and social media were still relatively nascent.

Matthew Boswell, the commissioner of the Competition Bureau, called for a review of the act last year, and argued that Canada’s antitrust rules have lagged behind those of its international peers. In November, he told The Globe and Mail that Canada’s competition regime should align more with the U.S. Federal Trade Commission, which would increase the bureau’s enforcement power and allow it to hand out larger fines.

Mr. Boswell said that criminal and civil fines for anti-competitive behaviour are not high enough to effectively deter monopolistic practices. Currently, $25-million is the most that a company can be fined for cartel behaviour or harmful advertising practices.

Jennifer Quaid, an associate professor at the University of Ottawa and an expert on competition law, said Canada needs a new approach to how it levies fines. Instead of charging a $10-million fine - the most the Competition Bureau can charge a company for an initial infraction - penalties should represent a percentage of a company’s sales, or its market capitalization.

"They have to stop using numbers and start putting in formulas," she said. "Make it adaptable to the size of the enterprise, then you don't have this problem of huge exposure for really small companies and basically nothing for big companies."

Dr. Quaid pointed to a $9-million penalty the bureau levied against Facebook - now Meta Platforms Inc. - in 2020 for making misleading privacy claims.

The company has a US$632-billion market capitalization.

"$9-million to Facebook, what do they care?" she asked.
Handling the conduct of social-media giants will likely be a priority for the Competition Bureau. In its news release, the federal government said there is a need to adapt the law to "today's digital reality" and better address harmful behaviour online.

Canada's foot-dragging on competition reform has often left it lagging on matters in the digital realm, where market power can be expressed in non-traditional ways. Though the bureau recently announced an investigation into Google's advertising business, including the brokering of YouTube ads, this came after the European Union announced a similar probe.

The EU and its member countries have taken several big swings at Big Tech on antitrust grounds. Germany's competition regulator tried three years ago to prohibit Facebook from sharing data across its platforms - Instagram, WhatsApp and Facebook itself - in a case now sitting before the European Court of Justice.

The American Innovation and Choice Online Act, meanwhile, is now before U.S. Congress, proposing to make it illegal for digital marketplace owners to give unfair preference to their own products when third-party products are available. "It's time for Canada to think about what that behaviour means for independent, smaller firms who want to advertise and compete online," said Vass Bednar, the executive director of McMaster University's master of public policy in digital society program.

Experts will also pay close attention to how the review affects the efficiencies defence in the Competition Act. That provision allows a merger that lessens competition if the financial synergies it creates are "greater than and offset" the harm the deal causes to competition. Dr. Quaid says the defence is uniquely Canadian, and not present in the competition frameworks of other developed economies.

"In the times when it's been applied, it's allowed mergers to go through where there were fairly significant problems," she said, referring to the effect economic concentration often has on raising prices for consumers.

"The question is always: what's going to be enough to push back at efficiencies defence because the commissioner has never been able to counter it."