Criminalise wage-fixing and no-poach agreements, Canadian parliamentary committee urges

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A parliamentary committee has asked Canada's government to ban anticompetitive labour market agreements between rivals, after Canada's Competition Bureau was unable to investigate if three supermarket chains colluded to end an employee pandemic bonus.

In a **report** tabled in parliament on Wednesday, the House of Commons industry committee recommended amending Canada's Competition Act to prohibit cartel-like practices related to the purchase of goods and services, including wage-fixing agreements between competitors.

Following a suggestion from Matthew Boswell, Canada's competition commissioner, the committee said that parliament should align Canadian competition legislation with US antitrust law "to criminally prosecute such agreements".

The committee also asked for the Competition Bureau to be given the resources it needs to effectively enforce the competition rules, particularly when it comes to digital markets.

It further recommended that both the government and the competition watchdog assist provinces and territories in establishing codes of conduct to address inequalities in bargaining power between food producers and

supermarkets.

The report, entitled "Wage Fixing in Canada: And Fairness in the Grocery Sector", came out of the industry committee's study into allegations that the country's three largest supermarkets – Loblaw, Sobeys and Metro – all agreed to end a pandemic bonus paid to staff on the same date.

The supermarkets introduced this bonus at the start of the covid-19 crisis in March 2020, and all ended it on 13 June 2020. While company representatives admitted communicating with each other about ending the bonus, they denied having coordinated these terminations and claimed they made their decisions independently from their competitors.

When Commissioner Boswell testified before the committee in December, he said the communications between the company executives about employee wages was a "slippery slope" toward cartel conduct.

But he noted that agreements between competitors "with respect to things such as wage-fixing and no-poach agreements" are not captured by the Competition Bureau's criminal powers, as a result of 2009 amendments to the Competition Act.

Based on this testimony, the committee's report said the lack of provisions prohibiting purchase-side agreements between competitors that amount to cartel-like practices, such as wage-fixing agreements, is a "significant gap" in the national antitrust law.

Updating the rules to criminally prohibit these types of agreements would clarify competition-related obligations for companies active in both Canadian and US markets and facilitate cooperation between competition authorities in the two countries, the committee said.

Boswell also used his testimony to flag that his agency is one of the least-funded competition enforcers among its peers. Its budget fell by 10% in the last decade and has fewer enforcement personnel now than it did 15 years ago, he noted.

The committee recognised this in its report, recommending that parliament ensure that the Competition Bureau has "the resources necessary to ensure the effective enforcement of the Competition Act".

More resources will particularly help the agency enforce competition rules in the digital economy, it noted.

Sobeys' vice president of communications, Jacquelin Weatherbee, said in a statement that the grocery chain was pleased to see the industry committee accurately reported that Sobeys "did not engage in any discussions with our competitors about employee wages".

Sobeys would welcome any clarification to the legal regime around competitors engaging in wage-fixing and is pleased to read the committee's recommendation to that effect, she added.

Loblaw, Metro and the Competition Bureau did not respond to requests for comment.

"Carefully crafted"

Elisa Kearney, a partner at Davies Ward Phillips & Vineberg in Toronto, said the government will likely give "serious consideration" to amending the cartel provision in Canada's Competition Act to prohibit the labour market practices referred to in the report.

"However, any amendment will have to be carefully crafted to ensure pro-competitive conduct is not stifled by introducing a blanket prohibition on all forms of joint purchasing arrangements," she said.

Any amendments should preserve the cartel provision's ancillary restraints defence to ensure that no-poach or wage-fixing agreements that are necessary for a "larger legitimate collaboration between employers" are not considered a criminal offence, she said.

This defence states that a company will not be found to have violated the cartel provision if they can show that their agreement was ancillary to a broader or separate agreement that, viewed alone, is not anticompetitive.

Allowing such a defence would be consistent with guidance issued by the US Department of Justice's Antitrust Division and the US Federal Trade Commission, Kearney noted.

However, McMillan partner Neil Campbell said using the criminal cartel offence to deal with agreements between employers who purchase labour services "would be an unfortunate reversal of an important policy choice made in 2010 to use non-criminal provisions in the Act to deal with agreements between competitors that are not always inherently welfare-reducing."

There are numerous buying group and other joint purchasing arrangements that may not be anticompetitive – indeed, they may generate efficiencies and enhance the competitiveness of small and medium-sized businesses, he noted.

"I expect the government will give careful consideration to the option of continuing to apply a competitive effects test to these types of conduct, perhaps by fine-tuning the existing competitor agreements reviewable practice," Campbell said.

Under civil provisions known as reviewable practices, the Competition Tribunal of Canada can prohibit an agreement between rivals only if it substantially prevents or lessens competition.

Kaeleigh Kuzma at Osler Hoskin & Harcourt in Calgary also said any amendments should be "carefully considered", especially as the current cartel provisions require no anticompetitive effect for an offence to be

demonstrated.

While the competition enforcer and Canada’s public prosecutor would continue to have discretion as to which cases are investigated and prosecuted, an amendment to broaden the cartel provision “could potentially open the door to more civil actions for damages”, she noted.

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