

Competition in the Transportation Industry and Recent Amendments to the Competition Act

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Over the last five years, there has been a rising concern by consumers about the cost of goods and services linked to the transportation industry. The COVID-19 pandemic disrupted supply chains, resulting in increased cost of goods, and also affected services such as air transportation. Air passengers have seen rising costs of air travel. However, there is a rising concern that the increased costs are not solely the result of the pandemic but of anti-competitive behaviour of some players in the transportation industry.

On 29 July 2024, the Competition Bureau launched a market study of competition in passenger air travel service in Canada. Market studies allow the Bureau to look at the state of competition in a market and identify laws, regulations, policies or other factors that may affect competition. Through market studies, the Bureau makes findings and provides evidence-based recommendations on how to increase competition in a sector.

The Bureau noted that the airline industry provides essential transportation for communities across Canada. For many remote and northern communities, air transportation is the only available option.

The Bureau noted that recent developments have raised questions about the state of competition in the industry:

- The domestic air travel market is concentrated with only two major airlines;
- Domestic airfare in Canada appears to be relatively high;
- Canadians have filed more complaints about air travel services in recent years; and
- New airlines appear to face challenges entering the Canadian market.

As a part of its study, the Bureau is examining three key topics:

- the state of competition in Canada's airline industry;
- barriers to entry and expansion; and
- impediments to informed customer choice.

Recent changes to the *Competition Act* have given the Bureau additional information-gathering powers when undertaking market studies.

Recent amendments to the *Competition Act* became law on December 15, 2023, following Royal Assent of Bill C- 56, *An Act to amend the Excise Tax Act and the Competition Act*. The Government of Canada "made amendments to the Competition Act as a part of the ongoing modernization of Canada's competition regime."

A new framework under the *Competition Act* allows the Bureau's Commissioner of Competition or the Minister of Innovation, Science and Industry to initiate a market study, and sets out the framework through which it must be conducted.

There are other amendments of note. The amendments also repealed the efficiency exception under the merger review provisions of the Act (section 96). The *Competition Act's* efficiency exception, commonly known as the "efficiency defence", prevented the Competition Tribunal from making an order against an anti-competitive merger where parties could demonstrate that efficiency gains outweighed the merger's anti-competitive effects. The exception has been removed.

The amendments also restructured the legal test for abuse of dominant position. In some cases, dominant firms act to undermine competitive market forces. Prior to the amendments, an abuse of dominant position occurred under the Act (section 79) when a dominant firm (or group of firms) engaged in an intentional practice of anti-competitive acts, with the effect of substantially lessening or preventing competition. To constitute an abuse of dominant position, three elements needed to be established: dominance, anti-competitive intent, and anti-competitive effects.

Following the amendments, the Competition Tribunal may make a prohibition order against a dominant firm (or group) if their conduct meets either the anti-competitive intent or effect requirement.

For the purposes of establishing the anti-competitive intent of an abuse of dominance, the *Competition Act* enumerates a non-exhaustive list of acts that may be considered a practice of anti-competitive acts when engaged in by a dominant firm (section 78). Following the amendments, the practice of "directly or indirectly imposing excessive and unfair selling prices" has been added to this list.

In prior amendments to the *Competition Act* in June 2022, drip pricing was expressly recognized as a harmful business practice under the law.

Drip pricing is a sales technique where a headline price is advertised at the beginning of the purchase process, followed by the incremental disclosure of additional fees, taxes or charges. The objective of drip pricing is to gain a consumer's interest in a misleadingly low headline price without the true final price being disclosed until the consumer has invested time and effort in the purchase process and made a decision to purchase. Drip pricing is considered as a false or misleading practice under the *Competition Act*, unless the additional fixed charges or fees are imposed by the government, such as sales tax.

Drip pricing is controversial because it can deceive consumers and distort competition by making it difficult for businesses with more transparent pricing practices to compete on a level playing field. In the transportation industry, for example, drip pricing of unavoidable additional charges on air fares is outlawed in the European Economic Area, and a similar ban is being contemplated in the United States (where drip pricing is referred to as "junk fees"). The U.S. Congress introduced the *Junk Fee Prevention Act* in 2023 to require merchants to disclose the total cost (including all fees) of an item *prior* to purchase, and in October 2023, the Biden Administration announced several actions to reduce drip pricing and junk fees. First, the Federal Trade Commission ("FTC") issued a proposed rule (called the Rule on Unfair Deceptive Fees) requiring merchants to prominently disclose the total price of a product or good before the consumer consents to pay, and forbidding merchants from misrepresenting the total costs of goods and services by omitting mandatory fees from advertised prices. At least 19 states Attorney Generals support the proposed rule, and the FTC is expected to issue the final rule soon.

In Canada, on 23 September 2024, the Competition Tribunal ordered Cineplex to pay a record penalty of nearly \$39 million for drip pricing. The Competition Bureau found that Cineplex engaged in drip pricing by adding a mandatory \$1.50 booking fee when customers purchased movie tickets online. The Tribunal determined that the representations on Cineplex's website and mobile application constituted drip pricing and that consumers were deceived by contradictory and incomplete information on Cineplex's tickets page. Cineplex has announced it is appealing this decision.

Now that the Competition Bureau is looking at the airline industry with its market study, will it set its sights next on Canadian ports and terminals, rail carriers and ocean carriers? Consumers, shippers and importers have expressed concern about the rising charges imposed by these entities. Detention and demurrage charges have sky-rocketed in the last three years. With the new amendments granting it additional powers, will the Bureau look at these other players?

The United States, in contrast, started looking at detention and demurrage charges at the middle of the pandemic. In June 2022, President Biden signed the *Ocean Shipping Reform Act of 2022*, marking the first major overhaul of the nation's regulations for the international ocean shipping industry for the first time since 1989. The Act revised requirements governing ocean shipping to increase the authority of the Federal Maritime Commission ("FMC") "to promote the growth and development of U.S. exports through an ocean transportation system that is competitive, efficient, and economical." The bill requires the FMC to (1) investigate complaints about detention and demurrage charges (i.e., late fees) charged by common ocean carriers, (2) determine whether those charges are reasonable, and (3) order refunds for unreasonable charges. It also prohibits common ocean carriers, marine terminal operators, or ocean transportation intermediaries from unreasonably refusing cargo space when available or resorting to other unfair or unjustly discriminatory methods. According to the FMC, ocean carriers collected about \$6.9 billion in detention and demurrage costs from 2020 to 2022.

In the U.S., the FMC has fined a number of ocean carriers for unjustly and unreasonably assessing and invoicing detention charges. For example, it fined Hapag-Lloyd for detention charges to a drayage company even though "it failed to provide equipment return location" and "appointments were unavailable for equipment return during the allocated free time." In May of 2023, Ocean Network Express ("ONE") agreed to pay a \$1.7 million civil penalty to the FMC to avoid a formal investigation. The settlement, which was announced publicly, was reached prior to the FMC initiating enforcement action against the carrier. As part of the settlement, ONE was required to refund or waive the contested detention and demurrage fees to the shippers involved in the case. Although ONE did not admit to



any violation of the law, the company committed to complying with the *Ocean Shipping Reform Act of 2022* and the FMC's interpretive rule on detention and demurrage.

As part of its mandate from the *Ocean Shipping Reform Act of 2022*, the FMC recently published its final rule on demurrage and detention billing requirements. It became effective 28 May 2024. The final rule requires common carriers and marine terminal operators to include specific minimum information on demurrage and detention invoices, outlines certain detention and demurrage billing practices, and sets timeframes for issuing invoices, disputing charges with the billing party, and resolving those disputes. The new regulation applies to ocean common carriers trading to or from the US, including vessel-operating common carriers (VOCCs) and non-vessel-operating common carriers (NVOCCs), and to marine terminal operators (MTOs).

In February 2022, it was announced that Canada's Competition Bureau joined the competition authorities of the United States, Australia, New Zealand, and the United Kingdom in a new working group focused on sharing information to identify and prevent potentially anticompetitive conduct in the global supply and distribution of goods.

The working group brings together the Bureau, the U.S. Department of Justice, the Australian Competition and Consumer Commission (ACCC), the New Zealand Commerce Commission and the U.K. Competition and Markets Authority.

In light of pandemic-related disruptions to global markets, the five competition authorities are to share information on potentially anticompetitive conduct affecting global and domestic supply chains. The purpose of the working group is to help identify attempts by businesses to use supply chain disruptions as a cover for price-fixing or other collusive activities that involve competitors cooperating instead of competing with each other.

According to the February 2022 announcement, "[c]ompetitive prices and product choices are vital to consumers and businesses, particularly those struggling to make ends meet in the wake of the pandemic. Competitive markets also play a key role in driving economic recovery and growth, to the benefit of all Canadians."

The announcement added "[t]he Competition Bureau will work closely with its international counterparts and will not hesitate to take action against any conduct in violation of Canada's *Competition Act*."

As of yet there has been no information released regarding this joint working group's work.^[1] A PDF version is available for download [here](#).

[1] The Competition Bureau conducted a Retail Grocery Market Study from October to December 2022. One of the submissions received from Loblaws noted "the current high grocery prices in Canada cannot be attributed to changing competitive dynamics in the Canadian grocery market. Instead, the driving forces behind high food prices and the current inflationary environment in Canada are the unprecedented increases in supply chain and supplier costs that were fueled by the emergence of the COVID-19 pandemic and weather-related events, both of which were later exacerbated by the impact of the war in Ukraine." Terminals and carriers were not pointed to.

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