

Intelligence MEMOS



From: John Pecman

To: Competition Policy Watchers

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Re: **GREENWASHING PROVISION HAS NO PLACE IN NEW *COMPETITION ACT***

Bill C-59, the last of three recent rounds of amendments to the *Competition Act* that strengthened Canada's ability to tackle anti-competitive and deceptive marketing practices, contained a problematic "greenwashing" provision.

That provision expanded previous prohibitions of misrepresentations about products and services to cover how businesses described their activities, and included a "reverse onus" substantiation of environmental claims in accordance with unspecified, internationally recognized methodology. Slipped into the bill late, with no meaningful public consultation or study, this provision unnecessarily intertwines environmental policy objectives with competition law, and has raised major concerns about liability and even freedom of expression.

The government should repeal it.

In recent years, environmental sustainability has become a corporate strategic priority, with businesses around the world striving to align their operations with the principles of environmental stewardship and growing consumer enthusiasm for eco-friendly products.

Greenwashing arises when a business makes misleading claims about the environmental benefits of a product or service to present a false image of overall environmental responsibility. Before the passage of Bill C-59, false environmental claims were subject to the general misleading representation provisions of the *Competition Act*. For example, the Competition Bureau successfully took enforcement action in cases against deceptive environmental claims about the recyclability of single-use coffee cup pods and fake auto emission testing.

The new provision also specifies severe penalties.

Companies caught greenwashing by the Competition Bureau can face maximum administrative penalties of \$10 million, rising to \$15 million for any subsequent infractions. Alternatively, the fine can be 3 percent of annual global revenue, whichever amount is higher. For individuals involved, penalties can be up to \$750,000. The legal risk and penalties do not end with the Competition Bureau. Beginning in June 2025, private parties will also be able to seek legal actions and to have significant penalties imposed by the Competition Tribunal upon defendants.

These penalties are costly and may work to hinder environmental goals.

First, the requirement to conduct detailed, scientifically validated analysis for environmental claims can be prohibitively expensive for many businesses. The costs associated with third-party audits, lifecycle assessments and other forms of internationally recognized methodologies will be unaffordable for many small and medium-sized companies.

Second, the fear of financial and legal repercussions may discourage businesses from experimenting with new, eco-friendly technologies and practices. The unintended consequence of heavy-handed greenwashing laws could be to hinder progress on sustainability goals.

Lastly, companies might avoid making any environmental claims at all, even truthful ones, to avoid legal liability. Whether greenwashing claims are minor or unintentional, businesses today risk private lawsuits from rivals, environmental groups or even consumers which could result in costly legal battles and damage a company's reputation. Businesses and industry associations, particularly the energy sector, have already withdrawn statements about their environmental practices and goals due to the risk of legal and financial consequences.

A More Balanced Approach is Required

Whatever the intent behind the greenwashing amendment, its potential to harm businesses, stifle innovation and perhaps even impede environmental goals cannot be ignored. Are the hard stance and severe penalties commensurate with the potential harm? Greenwashing misleads those consumers who make purchasing decisions based on environmental claims, usually paying a small premium for a product that is not as green as advertised. Greenwashing can also give dishonest companies an edge over those that abide by the law. The sum of these harms is difficult to quantify, especially given that most consumers make purchasing decisions based on price, and suddenly now, based on economic nationalism.

To more effectively combat greenwashing and promote environmental protection, a better and balanced approach should include:

- i) the establishment of clear enforcement guidelines with standardized criteria for environmental claims and labels;
- ii) providing incentives – tax breaks, grants or preferential procurement policies – for genuine sustainability efforts;
- iii) better consumer education campaigns;
- iv) better collaboration with industry stakeholders; and
- v) using and strengthening existing pre-amendment compliance tools, not least with the Competition Bureau providing real and meaningful advisory opinions as contemplated under the *Competition Act*, along with enhanced whistleblower protections with rewards, and study the requirement for a stronger greenwashing law.

Layering more environmental regulation on top of an effective law only affirms the adage that "regulation begets more regulation." As policymakers search for ways to increase Canada's competitiveness and productivity, repealing the greenwashing amendment is an easy win. If we desire respect for the environment, the federal government must work more collaboratively with businesses and recognize that competition laws are not intended to save the planet.

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