

COVID-19 in Canada: Competitor Collaborations, Pricing, Mergers, and Foreign Investment During (and After) the Pandemic

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As the COVID-19 public health crisis continues to unfold around the globe, antitrust considerations remain important for businesses evaluating strategic options and reacting to the pandemic's disruptive impact on business operations. The legality of competitor collaborations, the applicable rules concerning "price gouging" during the pandemic, and whether strategic mergers will attract more (or less) scrutiny under antitrust or foreign investment legislation are but a few of the issues that have arisen and remain relevant. We discuss the Canadian antitrust perspective on each of these issues as well as the latest guidance provided by the Competition Bureau and various branches of the federal and provincial governments in Canada.

Competitor Collaborations

COVID-19 and public health measures to combat the virus have led to significant business disruptions and challenges that may, in some circumstances, justify a coordinated response between competitors that would not otherwise be permissible. Canada's Competition Act¹ (the Act) contains no mechanisms to temporarily suspend any of its provisions based on crisis or emergency situations.² Accordingly, short of new government measures suspending the application of all or parts of the Act either generally or for specific sectors,³ the Act continues to apply to all businesses in Canada and, as a result, it remains critical for businesses to evaluate whether a proposed collaboration with one or more competitors could lead to antitrust enforcement or private actions (including class actions) in Canada.

As a general matter, section 45 of the Act criminally prohibits (and authorizes private actions to recover damages in respect of) agreements or arrangements between competitors to fix or control prices, production or supply, or allocate sales, territories, customers, or markets. This is a per

¹ Competition Act, R.S.C. 1985, c C-34 (Can.).

² In the transportation sector, however, an existing or imminent "extraordinary disruption to the effective continued operation of the national transportation system" provides grounds for the federal cabinet to take steps that are considered essential to stabilize the national transportation system including the imposition of capacity and pricing restraints. Any such order prevails over the Competition Act. Canada Transportation Act, S.C. 1996, c 10, § 47(i)(a).

³ In April 2020, the Canadian Bar Association (CBA) urged the federal government to enact a specific exemption for competitor collaborations considered to be in the "public interest" as determined by the Minister of Innovation, Science and Industry (who oversees the Competition Bureau and is responsible for competition policy and legislation): Canadian Bar Ass'n, *COVID-19 Pandemic and Urgent Competition Act Amendments* (Apr. 9, 2020), <https://www.cba.org/CMSPages/GetFile.aspx?guid=424c7d84-4a1d-448b-bd65-9c1989be0edd>. In addition, in 2009, when the current conspiracy offense was amended to establish statutory per se liability, the CBA also advocated for a power of either the federal Cabinet or the Commissioner of Competition to provide clearances or block exemptions to address unintended consequences of the new per se offense: Canadian Bar Ass'n, *Bill C-10—Amendments to the Competition Act* (Feb. 13, 2009), [https://www.cba.org/Our-Work/Submissions-\(1\)/Submissions/2009/Bill-C-10-%E2%80%94-em-Competition-Act-em-Amendments-\(1\)](https://www.cba.org/Our-Work/Submissions-(1)/Submissions/2009/Bill-C-10-%E2%80%94-em-Competition-Act-em-Amendments-(1)).

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se illegal offense and it is not necessary for the agreement to have any anticompetitive effect. Section 45 contains a defense where competitor coordination is reasonably necessary for the implementation of, and directly related to, a broader and otherwise lawful agreement between the cooperating parties.⁴ This defense is known as the ancillary restraints defense and can apply, for example, to non-competition covenants in agreements of purchase and sale or in a joint venture arrangement between competitors.

In addition, section 90.1 of the Act allows the Commissioner of Competition (the head of the Bureau) to challenge any agreement between competitors that is likely to prevent or lessen competition substantially in a market. Section 90.1 is much broader in scope than the criminal offense. However, absent consent of the respondent, the only potential remedy is an order prohibiting implementation of the agreement, and no monetary penalties can be imposed. Nor does section 90.1 provide a basis for civil actions by private parties.

Competition Bureau Guidance on COVID-19 Collaborations

Early on in the pandemic, the Competition Bureau publicly stated that it is committed to a “reasonable and principled enforcement” of the Act in cases of COVID-19 crisis collaborations, noting that the Act can “accommodate pro-competitive collaborations between companies to support the delivery of affordable goods and services to meet the needs of Canadians.”⁵ A subsequent statement released by the Bureau on April 8, 2020 noted that the Bureau “does not wish to see specific elements of competition law enforcement potentially chill what may be required to help Canadians.”⁶ To this end, the Bureau added:

[I]n circumstances where there is a clear imperative for companies to be collaborating in the short-term to respond to the [COVID-19] crisis, where those collaborations are undertaken and executed in good faith and do not go further than what is needed, [the Bureau] will generally refrain from exercising scrutiny.⁷

The Bureau’s statement specifically highlighted the potential for firms to form buying groups or share supply-chain resources, such as distribution facilities, to ensure access by Canadians to critical goods and services without fear of enforcement under the Act. However, the Bureau emphasized that its enforcement restraint will be limited to situations in which “firms are acting in good faith, and motivated by a desire to contribute to the crisis response rather than achieve competitive advantage.”⁸ The Bureau also said that it will have “zero tolerance” for any attempts to abuse the Bureau’s enforcement flexibility or to use any informal guidance provided by the Bureau “as cover” for unnecessary conduct that would breach the Act.⁹

⁴ Competition Act, R.S.C. 1985, c C-34, § 45(4) (Can.).

⁵ News Release, Competition Bureau Can., Statement from the Commissioner of Competition Regarding Enforcement During the COVID-19 Coronavirus Situation (Mar. 20, 2020), <https://www.canada.ca/en/competition-bureau/news/2020/03/statement-from-the-commissioner-of-competition-regarding-enforcement-during-the-covid-19-coronavirus-situation.html>.

⁶ News Release, Competition Bureau Can., Competition Bureau Statement on Competitor Collaborations During the COVID-19 Pandemic (Apr. 8, 2020), <https://www.canada.ca/en/competition-bureau/news/2020/04/competition-bureau-statement-on-competitor-collaborations-during-the-covid-19-pandemic.html>.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

While the Commissioner has said that the April 8 guidance “certainly goes further than anything the Bureau has done in the past in terms of competitor collaborations that might cross the line [into] cartel conduct,”¹⁰ the Bureau’s statement nevertheless acknowledged that some firms may want greater certainty and more specific guidance about proposed COVID-19 collaborations “notwithstanding” the Bureau’s general policy statements described above. Accordingly, the Bureau announced that it has “created a team to assess . . . proposed collaborations and advise the Commissioner on what informal guidance the Commissioner might provide . . . to facilitate rapid decisions to enable business to support the crisis response efforts.”¹¹

The Bureau cautioned that it may seek input from market contacts and other stakeholders, including other parts of government, and any informal guidance may be subject to conditions and would be time-limited. The Bureau also noted that any such guidance would not insulate the collaboration from potential private actions, and may be made public by the Bureau in the interest of transparency.

In contrast to recent commitments by the U.S. Department of Justice and U.S. Federal Trade Commission to review proposed COVID-19 competitor collaborations within an expedited time-frame (i.e., seven days after receipt of relevant information), the Bureau’s announcement was silent on the precise timing of reviews under the new initiative. However, we understand that the Bureau has orally provided assurances that it will undertake to provide its views within seven business days of receipt of all relevant information. It also remains to be seen whether the Bureau will be willing to provide its views (as the U.S. DOJ has done with respect to its business review letter procedure) where some aspects of the conduct are already underway, as the Bureau’s typical practice is to provide advisory opinions only for proposed conduct.

Implications and Tips For Competitor Collaborations

In assessing whether a COVID-19-related competitor collaboration complies with the Act, it is most important to consider whether it may be prohibited by section 45—i.e., does it trigger any of the per se prohibitions with respect to price, supply or market allocation? Some types of crisis cooperation between competitors may not involve prices, supply limitations or market allocation. For example, cooperation to share a firm’s transportation resources (e.g., share trucking space or back-haul) to deliver critical goods to consumers may not necessarily trigger the application of section 45.

In addition, the Bureau and some courts have taken the view that section 45 does not prohibit collaborations in respect of an agreement with respect to the purchase of a product. The Bureau’s Competitor Collaboration Guidelines state that “joint purchasing agreements—even those between firms that compete with respect to the purchase of a product—are not prohibited by section 45.”¹² Accordingly, the types of buying groups referenced in the Bureau’s COVID-19 guidance may be outside the scope of section 45 in any event.

¹⁰ *Interview with Matthew Boswell, Commissioner of Competition, Competition Bureau of Canada*, ANTITRUST SOURCE 5 (June 2020), https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/2020/june-2020/jun20_boswell_intrvw_6_17f.pdf.

¹¹ Competition Bureau Canada, *supra* note 6.

¹² Competition Bureau Can., *Competitor Collaboration Guidelines* § 2.4.1 (2009), <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03177.html>. *See also* *Dow Chem. Canada ULC v. Nova Chems. Corp.*, 2019 ABQB 482, para. 1357 (Can. Alta.). On July 29, 2020, the Competition Bureau released an updated draft of its Competitor Collaboration Guidelines for public comment. The updated draft proposes to amend the Bureau’s guidance on this point, noting that in certain cases, joint purchasing agreements among competitors may fall within the purview of the conspiracy provisions if the purpose of the agreement is to control or fix prices (or output or allocate markets) for the supply of the purchased product. News Release, Competition Bureau Can., *Competition Bureau Invites Feedback on Updated Competitor Collaboration Guidelines* (July 29, 2020), <https://www.canada.ca/en/competition-bureau/news/2020/07/competition-bureau-invites-feedback-on-updated-competitor-collaboration-guidelines.html>.

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Where a competitor collaboration involves an agreement on price, supply, or market allocation, the ancillary restraints defense might apply if such agreement is necessary to implement a broader lawful agreement. While it may sometimes be challenging to characterize the scope of an agreement, examples of such a larger, lawful agreement might include joint ventures to maximize output of critical products in short supply, manage supply chain and delivery issues, or ensure standards of health, safety, and security for the benefit of customers, suppliers, employees, or other third parties.¹³ However, to benefit from the application of the ancillary restraints defense, such joint ventures may need to include agreements on matters other than price, supply, and market allocation.

Where a contemplated COVID-19-related collaboration is narrow and focused on, for example, coordinating production or allocating supply to particular markets or persons such that the ancillary restraints defense may not be available, parties may nonetheless take some comfort from the Bureau's April 8 guidance, particularly where the anticipated effect of the collaboration is to increase overall supply and benefit the public relative to likely conditions in the absence of the collaboration.¹⁴ In that case, the prospect of third parties suffering damages (and thereby providing a basis for class actions in respect of such conduct) may be limited as well.

Given that the Bureau has for many years taken a very cautious approach to issuing advisory opinions outside the merger context, and the last one disclosed on the Bureau's website is from 2010, it seems unlikely that many businesses will seek such opinions in the COVID-19 context, particularly given the prospect of delay, publicity, and conditions attached to any resulting guidance. In addition, the marginal comfort provided by a Bureau advisory opinion would be limited by the fact that it would not necessarily preclude actions by private parties. Indeed, as of July 31, 2020, the Bureau has not disclosed the issuance of any COVID-19-related advisory opinions and it seems clear that the Bureau expects that businesses may take comfort from the Bureau's April 8 statement without necessarily seeking an advisory opinion from the Bureau.¹⁵

In any event, potential competitor collaborations on pricing would warrant particular caution, especially in light of the Bureau's April 8 statement that competitor collaborations regarding "what price to charge for products or services" are likely to be viewed as problematic unless they would qualify for a specific legal defense.¹⁶

¹³ For example, a COVID-19 competitor collaboration that was the subject of a business review letter issued by the U.S. DOJ related to, among other things, monitoring and identifying areas of increased demand for and potential critical shortages of medication and health care supplies. Press Release, U.S. Dep't of Justice, Justice Department Issues Business Review Letter to AmerisourceBergen Supporting Distribution of Critical Medicines Under Expedited Procedure for COVID-19 Pandemic Response (Apr. 20, 2020), <https://www.justice.gov/opa/pr/justice-department-issues-business-review-letter-amerisourcebergen-supporting-distribution>.

¹⁴ For instance, Brazil's Administrative Council for Economic Defence (CADE) announced on June 4, 2020 that its competition tribunal had approved a memorandum of understanding between Ambev, BRF, Coca-Cola, Mondelez, Nestle, and PepsiCo to enable them to collaborate in respect of special financing plans, discounted distribution terms and extended payment options to help retailers impacted by COVID-19 replenish their stock and inventories. Press Release, Admin. Council for Econ. Def., Cade Authorizes Collaboration Among Ambev, BRF, Coca-Cola, Mondelez, Nestle and PepsiCo due to the New Coronavirus Crisis (June 5, 2020) (Braz.), <http://en.cade.gov.br/cade-authorizes-collaboration-among-ambev-brf-coca-cola-mondelez-nestle-and-pepsico-due-to-the-new-coronavirus-crisis>. If a similar collaboration were entered into in Canada, given that it may include an arrangement/agreement in respect of the price at which a product is to be supplied (e.g., a specific discount in distribution terms), it could raise questions about the application of section 45. That said, the Bureau's April 8 guidance suggests that generally such forms of collaborations (assuming they are time-limited and have a goal of improving access to supply or goods) would generally not result in enforcement action by the Bureau.

¹⁵ Interview, *supra* note 10, at 5–6; *Enforcers Roundtable*, ANTITRUST SOURCE 3 (June 2020), https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/2020/june-2020/jun20_enforcer_rndtbl_6_17f.pdf.

¹⁶ Competition Bureau Can., *supra* note 5. Such caution should also extend to any agreement or discussion between competitors to not to increase prices (or increase prices by only a certain amount) during the pandemic.

While the Commissioner's COVID-19-related guidance and willingness to provide advisory opinions also applies to the exercise of his enforcement discretion under the broader civil competitor agreement provisions in section 90.1 of the Act, parties are much more likely to be comfortable with self-assessing the potential application of this provision, given the limited scope of potential consequences under section 90.1. To the extent that COVID-19 collaborations are time-limited and designed to enhance supply to consumers, they would also be less likely to substantially prevent or lessen competition relative to the likely circumstances in the absence of the agreement.

It would also be prudent to refresh the antitrust analysis of any COVID-19 collaborations regularly, and particularly when the emergency situation ends, to ensure that the assumptions underlying the legal analysis remain valid—e.g., that an ancillary allocation of markets or customers remains reasonably necessary to achieve a legitimate objective of a broader agreement to ensure continuity of supply.

Whether or not additional guidance is sought from the Bureau, parties should carefully document any procompetitive, efficiency enhancing, or other legitimate aims of their proposed collaborations. This should include whether the proposed coordination is being undertaken at the request or suggestion of public authorities, customers or other stakeholders whose interests are being protected, as well as the reasons why any restraints on competition (particularly price, supply, and markets served) are reasonably necessary to achieve broader overall objectives of the collaboration.

Price Gouging During COVID-19

Nothing in the Act prohibits a retailer from unilaterally setting its own prices for its products or services, and the Act contains no prohibition on excessively high pricing. However, as a result of perceived price gouging associated with COVID-19, some Canadian provinces have either introduced new measures or triggered the application of existing emergency measures that prohibit excessive pricing of certain types of essential products.

In Ontario, a provincial government order issued on March 27, 2020, and subsequently renewed several times, prohibits the sale or offer for sale by retailers of “necessary goods,” including masks, gloves, non-prescription medications for the treatment of symptoms of COVID-19, disinfecting agents, and personal hygiene products, at an “unconscionable price.”¹⁷ The concept of an unconscionable price is not comprehensively defined in the order but expressly includes “a price that grossly exceeds the price at which similar goods are available to like consumers.”¹⁸

British Columbia also recently enacted a similar prohibition in reaction to price gouging concerns arising from COVID-19 with respect to a slightly different scope of goods (e.g., explicitly

¹⁷ Order Under Subsection 7.0.2(4)—Prohibition on Certain Persons Charging Unconscionable Prices for Sales of Necessary Goods, O. Reg. 98/20, § 2(1) (Can. Ont.). Penalties for violating the order include a ticket of \$750 or a charge under the Emergency Management and Civil Protection Act or “EMCPA” with the possibility of a court-imposed fine not exceeding \$100,000 for individuals (or \$500,000 for a director or officer of a corporation) and imprisonment for up to one year or, for corporations, a fine not exceeding \$10 million. In addition, the EMCPA provides that a person is guilty of a separate offense for each day on which the conduct occurs or continues. Emergency Management and Civil Protection Act, R.S.O. 1990, c E.9, § 7.0.11(1) (Can. Ont.). This order was renewed several times and on July 21, 2020, was extended for a further 30 days. Reopening Ontario (A Flexible Response to COVID-19) Act, 2020, R.S.O. 2020, c. 17, (Can. Ont.).

¹⁸ Order Under Subsection 7.0.2(4)—Prohibition on Certain Persons Charging Unconscionable Prices for Sales of Necessary Goods, O. Reg. 98/20, § 2(2) (Can. Ont.).

[T]he guidance provided by the provincial governments suggests that higher prices during the pandemic may be justified by increased costs, including costs associated with supply and delivery issues or health and safety concerns.

including food).¹⁹ The British Columbia order follows a similar approach to the concept of an unconscionable price, providing that “in relation to selling or offering to sell essential goods and supplies, [unconscionable price] means a price that grossly exceeds the price at which similar essential goods and supplies are available in similar transactions to similar consumers.”²⁰

Some other provinces, such as Alberta and Saskatchewan, have relied on existing consumer protection legislation to pursue allegations of price gouging. In particular, Alberta’s Consumer Protection Act (CPA) provides that it is an offense for a supplier “to charge a price for goods or services that grossly exceeds the price at which similar goods or services are readily available without informing the consumer of the difference in price and the reason for the difference.”²¹ Similarly, the Financial and Consumer Affairs Authority (FCAA) in Saskatchewan has explicitly prohibited “grossly excessive pricing of products or services” during the pandemic, stating suppliers that engage in this conduct “could face regulatory action and prosecution” pursuant to The Consumer Protection and Business Practices Act (CPBPA).²² In addition, the FCAA has released guidance which states that, while the concept of grossly excessive prices is not explicitly defined, “a reasonable third party should be able to quickly identify whether a given price increase is grossly excessive.”²³

While each province has taken a slightly different approach to what constitutes price gouging (as well as the penalties available), a common factor in Ontario, British Columbia, Alberta, and Saskatchewan is that the guidance provided by the provincial governments suggests that higher prices during the pandemic may be justified by increased costs, including costs associated with supply and delivery issues or health and safety concerns.²⁴

Nova Scotia’s *Emergency Management Act* contains the most expansive prohibition on price gouging and provides:

[D]uring a state of emergency or state of local emergency, no person in the Province may charge higher prices for food, clothing, fuel, equipment, medical or other essential supplies or for the use of prop-

¹⁹ Order of the Minister of Public Safety and Solicitor General—Prohibition on Unconscionable Prices for Essential Goods and Supplies (COVID-19) Order, M.O. 115/2020, § 1(a) (Can. B.C.).

²⁰ *See id.* § 1.

²¹ Consumer Protection Act, R.S.A. 2000, c C-26.3, § 6(2)(d) (Can. Alta.). Contravention of the CPA could lead to a fine of not more than \$300,000 or three times the amount obtained as a result of the offense (whichever is greater) or imprisonment of not more than two years or both. In addition, each day that an offense continues constitutes a separate offense, however, the total term of imprisonment cannot exceed two years. *See id.* § 164(2).

²² News Release, Gov’t of Sask., Price Gouging Prohibited In Saskatchewan During Pandemic (Apr. 13, 2020), <https://www.saskatchewan.ca/government/news-and-media/2020/april/13/price-gouging>.

²³ Fin. and Consumer Aff. Authority, Grossly Excessive Prices (“Price Gouging”) Guidance, https://fcaa.gov.sk.ca/public/CKeditorUpload/Consumer%20Protection/FCAA_Guidance_-_Price_Gouging_-_April_7_2020.pdf. Failure to comply with the CPBPA may result in fines of up to \$100,000 for the first offense by a corporation and up to \$5,000 and imprisonment for a term of up to one year for the first offense by an individual. The Consumer Protection and Business Practices Act, S.S. 2013, c C-30.2, § 108(2) (Can. Sask.).

²⁴ With respect to Ontario, see Ont. Consumer Protection, *Report Price Gouging Related to Coronavirus (COVID-19)* (Apr. 27, 2020), <https://www.ontario.ca/page/report-price-gouging-related-coronavirus-covid-19>; with respect to British Columbia, see Graeme Wood, *B.C. to Levy \$2,000 Fines for Price Gouging and Reselling Medical Supplies*, TRICITY NEWS (Apr. 19, 2020), <https://www.tricitynews.com/b-c-to-levy-2-000-fines-for-price-gouging-and-reselling-medical-supplies-1.24120626>; with respect to Alberta, see Alta. Consumer Protection and Complaints, *File a Consumer Complaint Against a Business* (2020), <https://www.alberta.ca/file-consumer-complaint.aspx>; with respect to Saskatchewan, see Fin. and Consumer Aff. Authority, *supra* note 23.

erty, services, resources or equipment than the fair market value of the same thing immediately before the emergency.²⁵

However, notwithstanding the declared state of emergency in Nova Scotia on March 22, 2020, and the broad EMA prohibition, the premier of the province was quoted on March 25, 2020 as stating that he was not aware of significant price-gouging concerns in the province.²⁶

Implications and Tips for Pricing

Since the onset of COVID-19, provincial authorities have received thousands of complaints, initiated hundreds of investigations, issued warning letters and, in at least one publicly reported case, brought charges in respect of alleged COVID-19-related price gouging.²⁷ Provincial authorities may, however, be cognizant of the risk that aggressive enforcement may deter at least some suppliers from selling higher volumes of needed goods in the province.²⁸ However, suppliers of essential products would be well advised to consider price-gouging laws when setting prices in the relevant provinces.

In Ontario, British Columbia, Saskatchewan, and Alberta, the concept of price gouging requires that the price being charged “grossly exceed” the price at which similar goods are being offered. As a result, it is unlikely that a relatively small price differential (e.g., below 10%) would be considered sufficient to meet the definition of “grossly” exceeding the price at which similar goods are being offered. Otherwise, to assist in demonstrating that a price is not grossly excessive or unconscionable, it may help to:

- Document (and potentially disclose or explain to the public) valid business reasons for price increases (e.g., increased production costs or increased prices from suppliers). It may be more defensible for a seller to increase its prices if it is not increasing its margins, but only reflecting cost increases. Similarly, it may be helpful for a new supplier in the province to set prices at margins typical of those it has received on the sale of other products it supplied before the emergency.
- Keep any available records of prices of other suppliers, e.g., customer-supplied information on competing bids or, in the case of retailers, flyers or screenshots of online prices. It would be helpful to demonstrate that other suppliers are offering similar or higher prices for similar goods.

²⁵ Emergency Management Act, S.N.S. 1990, c 8, § 16(1) (Can. N.S.). Contravention of the Emergency Management Act (EMA) may result in the imposition of fines of up to \$100,000 for a corporation and \$10,000 for an individual or fines “equal to the financial benefit” realized as a result of the violation as well as imprisonment for up to six months. *See id.* § 23, 23A.

²⁶ Tim Bousquet, *Daily COVID-19 Update: The Premier Says There Is No Price-Gouging*, HALIFAX EXAMINER (Mar. 25, 2020), <https://www.halifaxexaminer.ca/featured/daily-covid-19-update-the-premier-says-there-is-no-price-gouging/>.

²⁷ One business in Alberta has been charged with price gouging of certain critical supplies such as masks and hand sanitizer. Alta. Gov’t news, *Calgary Business Charged with Price Gouging* (May 8, 2020), <https://www.alberta.ca/release.cfm?xID=713029911D64B-C72D-1CAC-23EEB31CDFCC332>. In addition, in Ontario, the media has reported that 500 businesses have received warnings and 200 have been referred for further investigation. Marc Montgomery, *COVID-19: Company Charged for Price Gouging During Pandemic*, RADIO CAN. INT’L (May 12, 2020), <https://www.rcinet.ca/en/2020/05/12/covid-19-company-charged-for-price-gouging-during-pandemic/>. In British Columbia, the media has reported that between March 1 and May 14, 2020, there were over 2,000 price gouging complaints which led to 357 investigations. Of these investigations, 25 were resolved after the companies involved agreed to lower their prices. David Molko & Andrew Weichel, *Why Hasn’t B.C. Fined Any Pandemic Price-Gougers?*, CTV NEWS (June 24, 2020), <https://bc.ctvnews.ca/why-hasn-t-b-c-fined-any-pandemic-price-gougers-1.4997357?cache=yes&clipId104062%3FautoPlay%3Dtrue>.

²⁸ Ann O’Brien & Brady Cummins, *The Price of Price-Gouging Laws*, ANTITRUST SOURCE 1 (June 2020), https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/2020/june-2020/jun20_obrien_6_17f.pdf.

- Ensure that premium products are clearly described as such to avoid comparison to prices of more basic products.

In Nova Scotia, however, the prohibition against selling at above pre-emergency market prices could well deter some suppliers from selling into the province at all, either directly because of increased costs of supply or indirectly because of opportunities to sell at higher prices outside Nova Scotia.

Impact of COVID-19 on Canadian Merger Reviews

The Competition Bureau can review any merger and seek remedies from the Competition Tribunal if the Commissioner finds that the merger is likely to prevent or lessen competition substantially. While the COVID-19 pandemic is clearly having a dramatic impact on many industries, the Bureau has to date made relatively little comment on how COVID-19 is impacting their assessments of the likely impact of transactions. In the case of the proposed acquisition of Air Transat by Air Canada, however, the Commissioner issued a report in late March 2020 to the Canadian Minister of Transportation based entirely on pre-COVID-19 data (identifying a number of routes of concern) and indicated that the Bureau was not able to assess the longer term effects of COVID-19 on the airline industry.²⁹

Failing Firms

It can be expected that some businesses experiencing financial difficulty and potential failure during COVID-19 may pursue strategic options including a sale of the business or its assets. The Competition Act specifically provides that a factor to be taken into account in assessing the competitive effects of a merger is whether the target business has failed or is likely to fail.³⁰ The social benefits of acquiring such a target, such as the preservation of jobs, will not be directly relevant to the Bureau's analysis. However, proof of the target's probable exit from a relevant market may mean that the loss of competitive influence of the failing firm post-merger cannot be attributed to the merger itself. While this can be a fruitful line of inquiry, "failing firm" arguments may not be strategically necessary or desirable in many circumstances, particularly since they can be onerous and time consuming to advance. As a practical matter, parties typically advance a failing firm defense only in concentrated markets where the Bureau may otherwise conclude that the transaction is likely to prevent or lessen competition substantially.

To establish a failing-firm defense, the Bureau will require evidence that the target is likely to become insolvent, initiate voluntary bankruptcy proceedings or be petitioned into bankruptcy or receivership or otherwise exit the market.³¹ In addition, the Bureau will need to satisfy itself that alternatives to the proposed transaction are not likely to result in a materially greater level of competition than if the proposed transaction proceeds. This latter evaluation involves consideration of whether (i) a competitively preferable third-party purchaser exists (and that a thorough search for such a purchaser has been conducted); (ii) the target could survive as a meaningful competitor if it retrenched or restructured its operations; and (iii) the target's liquidation could lead to mate-

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²⁹ Competition Bureau Can., Report to the Minister of Transport and the Parties to the Transaction Pursuant to Subsection 53.2(2) of the Canada Transportation Act (Mar. 27, 2020), <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04522.html>.

³⁰ Competition Act, R.S.C. 1985, c C-34, § 93 (Can.).

³¹ Competition Bureau Can., Merger Enforcement Guidelines pt. 13 (2011), [https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-meg-2011-e.pdf/\\$FILE/cb-meg-2011-e.pdf](https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-meg-2011-e.pdf/$FILE/cb-meg-2011-e.pdf).

rially greater competition than if the proposed merger proceeds—for example, by facilitating entry into a market or allowing actual or potential competitors to better compete for the firm’s customers or assets.³²

COVID-19 Impact on Merger Review Timing

Certain types of proposed mergers that exceed prescribed financial thresholds require notification to the Bureau and compliance with a waiting period before closing pursuant to a process that is very similar to that under the U.S. Hart-Scott-Rodino Act. Where a notification has been submitted, an initial 30-day statutory waiting period may be extended by the issuance of a Supplemental Information Request (SIR), in which case the waiting period expires 30 days after compliance with the SIR. In addition to (or in some cases, instead of) a notification, merging parties will typically submit a written submission that provides a competitive assessment of the proposed transaction, addressing overlapping products, market shares, remaining competitors, and other factors. Where the Bureau is satisfied that a proposed merger is not likely to prevent or lessen competition substantially, the Commissioner may issue a no-action letter or an advance ruling certificate which provides that the Commissioner does not intend to challenge the transaction and exempts the transaction from notification obligations.

Pursuant to its non-binding service standards, the Bureau aims to complete a merger assessment within 15 days of receiving sufficient information for non-complex transactions. For complex transactions, the target time for completion of its review is either 45 days or, if applicable, 30 days after compliance with a SIR. However, the Bureau will “stop the clock” on the running of its service standard period if parties do not promptly respond to further information requests during the Bureau’s review.

Even if the Bureau has not completed its review, upon the lapse of the applicable statutory waiting period and in the absence of the Commissioner’s obtaining an order of the Competition Tribunal enjoining closing, parties may lawfully implement a notifiable transaction (assuming other regulatory requirements are satisfied in Canada and foreign jurisdictions). However, closing a transaction (whether notifiable or not) without first obtaining a no-action letter or an advance ruling certificate from the Competition Bureau involves the risk that the Commissioner could seek remedies after closing, including orders requiring divestiture or dissolution.³³

Neither the statutory timelines nor the Bureau’s service standards have changed or been extended as a result of the COVID-19 pandemic. Nevertheless, the Bureau is operating in a remote work environment during the COVID-19 pandemic and has indicated that it may encounter difficulties meeting its non-binding service standards for completing merger reviews.³⁴

³² The Competition Bureau recently issued guidance concerning the approach it took to evaluating failing firm submissions in connection with the review of American Iron & Metal Company Inc.’s acquisition of Total Metal Recovery. Position Statement, Competition Bureau Can., Competition Bureau Statement Regarding the Acquisition of Total Metal Recovery (TMR) Inc. by American Iron & Metal Company Inc. (Apr. 29, 2020), <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04528.html>.

³³ Under the Act, the Bureau may challenge a merger for up to one year after it closes, and the Bureau has not shied away from challenging mergers post-closing including, for example, its 2019 challenge of the acquisition of Aucerna by Thoma Bravo LLC. The Bureau’s challenge ultimately resulted in a negotiated consent agreement pursuant to which Thoma Bravo agreed to divest one of the reserves valuation software businesses it held. Position Statement, Competition Bureau Can., Competition Bureau Statement Regarding Thoma Bravo’s Acquisition of Aucerna (Aug. 30, 2019), <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04493.html>.

³⁴ Competition Bureau Can., Letter from the Commissioner to the Canadian Bar Association Regarding Impacts of the COVID-19 Pandemic (Mar. 18, 2020), <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04523.html>.

Implications and Tips for Merger Review

Merging parties may assist the Bureau in meeting timelines by making appropriate representatives available to respond promptly to Bureau inquiries and, to the extent possible, facilitating the Bureau's market contacts by, for example, providing detailed supplementary contact information for customers and suppliers. As a practical matter, if the Bureau is having difficulty obtaining information from relevant market contacts, that may increase the chances of the parties' receiving an SIR where a notification has been filed.

Particularly for urgent transactions such as proposed acquisitions of failing firms, given the current prospect of longer time periods for the Bureau to complete a merger assessment, merging parties may need to carefully assess (1) when to make a notification that starts the statutory waiting period, and potentially risk the issuance of an avoidable SIR if the Bureau needs more time to complete its assessment, and (2) their willingness to close and accept the risk of a post-closing challenge if the waiting period expires before the Bureau has completed its review.

[I]f the Bureau is having difficulty obtaining information from relevant market contacts, that may increase the chances of the parties' receiving an SIR where a notification has been filed.

Impact of COVID-19 on Foreign Investment Review

Under the *Investment Canada Act* (ICA),³⁵ a direct acquisition of control of a Canadian business by a non-Canadian is subject to either a pre-closing "net benefit" review (if certain financial thresholds are exceeded) or a notification (which may be filed either before closing or up to 30 days after closing). The financial thresholds for triggering a net benefit review are lower for investors that are considered to be state-owned enterprises (SOEs). For ICA purposes, an SOE is broadly defined to include a foreign government or agency, or an entity that is controlled or influenced, directly or indirectly, by a foreign government or agency.

Foreign investors whose acquisitions are subject to such a review must satisfy the responsible minister³⁶ that the acquisition is likely to be of net benefit to Canada having regard to factors such as the effect on employment, economic activity, productivity, and competition in Canada, and the degree of participation of Canadians in the acquired business. In addition, the minister will consult with the Competition Bureau and typically will not issue a determination that a transaction will be of net benefit to Canada until the Commissioner of Competition has determined that the transaction is not likely to prevent or lessen competition substantially, even if the transaction is below the pre-merger notification thresholds in the Competition Act. Foreign investors are usually required to provide binding undertakings to obtain approval. These can include commitments to make capital expenditures, maintain certain employment levels, and ensure Canadian participation in the management of the business.

In addition to net benefit reviews, the ICA provides for a separate review process that may apply to any investment (even a minority investment) or to the establishment of a new business in Canada that may be "injurious to national security." While the concept of "national security" is not defined in the ICA, the relevant guidelines list nine factors that may be taken into account in assessing whether a national security review is likely to be triggered (such as whether the investment is likely to impact national defense capabilities, enable espionage, or impact critical infrastructure or delivery of critical goods and services to Canadians).³⁷

³⁵ Investment Canada Act, R.S.C., 1985, c 28 (1st Supp).

³⁶ Depending on the nature of the Canadian business that is to be acquired, the review may be conducted by the Minister of Innovation, Science, and Industry or the Minister of Canadian Heritage (or both ministers).

³⁷ Inv. Rev. Branch, Guidelines on the National Security Review of Investments Investment Canada Act (Dec. 19, 2016), <https://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk81190.html>.

Under the current statutory timelines, the national security review process may be initiated up to 45 days after the date upon which a notification or application for review (for transactions that exceed the financial thresholds) is received. An investment that is not subject to notification or review may be voluntarily disclosed to the minister and the minister may notify the investor up to 45 days after closing that a national security review may be required. If the national security review process is initiated prior to closing, the parties are prohibited from completing the transaction until the national security review is terminated or an approval is obtained. Under the current timelines, the entire process can take up to 200 days (or longer if the investor and the minister agree to extensions).³⁸

Recent COVID-19-Related Foreign-Investment Guidance

On April 18, 2020, the federal government released a policy statement announcing its approach to foreign investment review during COVID-19, noting that it “will subject certain foreign investments into Canada to enhanced scrutiny” under the ICA.³⁹ The statement puts foreign investors on notice that:

- The government will “scrutinize with particular attention under the [ICA] foreign direct investments of any value, controlling or non-controlling, in Canadian businesses that are related to public health or involved in the supply of critical goods and services to Canadians or the Government.”⁴⁰
- The government will “also subject all foreign investments by state-owned investors, regardless of their value, or private investors assessed as being closely tied to or subject to direction from foreign governments to enhanced scrutiny under the [ICA]. This may involve the Minister requesting additional information or extensions of timelines for review as authorized by the ICA, in order to ensure that the Government can fully assess these investments.”⁴¹
- Foreign investors are strongly encouraged to “consider the [ICA’s] review process in the early stages of their investment planning,”⁴² including engaging with Innovation Science and Economic Development Canada (ISED) before implementing an investment.

The Policy Statement explains that such enhanced scrutiny is required “to ensure that inbound investment does not introduce new risks to Canada’s economy or national security, including the health and safety of Canadians” and provides that this enhanced scrutiny will be applied until the economy has recovered from the impact of COVID-19.

More recently, on July 27, 2020, the federal government passed legislation that would allow for the extension of certain legislative time limits and other periods due to COVID-19.⁴³ Among other things, the proposed legislation allows federal ministers to extend or suspend specified existing legislative time limits for up to six additional months, with the possibility that the extensions or suspensions can apply retroactively dating back as early as March 13, 2020. However, such sus-

³⁸ For a more detailed discussion of recent experiences with the national security review process, see Mark C. Katz, Charles Tingley & Anita Banicevic, *Canadian Foreign Investment Review Annual Report Confirms Shift in Emphasis Toward National Security Concerns* (Jan. 15, 2020), <https://www.dwpv.com/en/Insights/Publications/2020/National-Security-Concerns-Emphasis>.

³⁹ Ministerial Statements, Gov’t of Can., Policy Statement on Foreign Investment Review and COVID-19 (Apr. 18, 2020), <https://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/k81224.html>.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ An Act Respecting Further COVID-19 Measures, R.S.C. 2020, c.11 (Can).

pensions may not have the effect of allowing the time limit to extend beyond December 31, 2020. Included in the proposed schedule of legislative and regulatory time periods that may be extended by a federal minister are two key provisions and time limits stipulated under the national security review process for foreign investments pursuant to the ICA.

Accordingly, the minister may be able to extend the existing 45-day statutory time period during which he can issue an initial notice of a potential national security review for up to six months. As a result, the minister could have up to six months and 45 days to decide whether to issue an initial notice of a possible national security review of an investment in a Canadian business. Where an initial notice has been issued, under the existing statutory timelines, the minister would have a further 45 days to decide whether to proceed to a full national security review. The minister could elect to extend this second period as well. It remains to be seen, however, if the minister will choose to avail himself of this ability to extend the time periods and, if so, for how long. Where a national security review is ordered for a proposed transaction, such a lengthy delay to what is already a long review period could lead many parties to abandon their proposed transactions.

Implications and Tips for Foreign Investment Review

The April 18 policy statement and the legislation allowing the minister to put proposed investments, or national security reviews of completed investments, on hold for up to six months has introduced greater uncertainty for at least some types of foreign investment in Canada. Indeed, since the pandemic began, the Investment Review Division of ISED has been applying the ICA's national security review provisions more broadly than has traditionally been the case. For example, in early May 2020, the Minister of Innovation, Science and Industry issued a notice of a potential national security review of a proposed merger of two gold mining companies that were both publicly traded on a Canadian stock exchange but have mines only in Africa. While the Minister subsequently determined on June 25, 2020 not to order a full national security review, the initial notice delayed closing of the transaction until after the June 25 determination.⁴⁴ The April 18 policy statement also appears to signal that the Canadian government may consider not only traditional areas such as critical infrastructure, but also economic security, in its national security assessments.

In light of the recent COVID-19 time period legislation, investors will need to carefully consider not only the likelihood of a national security review but also whether there is any prospect for such a review to be completed within a shorter time period than may be permitted by law. Federal government authorities responsible for ICA national security reviews may be inclined to defer analyses of or decisions on proposed transactions that are viewed as less pressing than other competing priorities in the COVID-19 environment. Accordingly, parties to transactions potentially subject to a national security review may need to take into account the potential risk of such lengthy regulatory delays in allocating risk and negotiating termination rights, for example.

While the applicable thresholds for net-benefit reviews under the ICA have not changed, parties should expect that proposed acquisitions of Canadian businesses in the health or critical goods and services sectors, and acquisitions by SOEs, will be subjected to more detailed and lengthier reviews than prior to the COVID-19 pandemic.

⁴⁴ Steven Chase, Robert Fife & Niall McGee, *Ottawa Eyes National-Security Review of Gold Miner Takeover*, GLOBE AND MAIL (May 24, 2020), <https://www.theglobeandmail.com/canada/article-ottawa-eyes-national-security-review-of-gold-miner-takeover/>; News Release, Endeavour Mining, Endeavour Announces Investment Canada Clearance for SEMAFO Transaction (June 26, 2020), <https://www.endeavourmining.com/news-releases/press-release-details/2020/Endeavour-Announces-Investment-Canada-Clearance-for-SEMAFO-transaction/default.aspx>.

The impetus for increased scrutiny of investments by SOEs appears to be the view that “some investments into Canada by state-owned enterprises may be motivated by non-commercial imperatives that could harm Canada’s economic or national security interests.”⁴⁵ As a result, it appears unlikely that a commercially motivated ordinary course investment by, for example, a foreign pension fund (which may be considered to be an SOE for the purposes of the ICA) would be negatively impacted by such scrutiny.

The policy statement not only encourages early engagement with ISED, it also states that foreign investors who wish to “obtain regulatory certainty . . . must file a notification under the [ICA] at least 45 days before closing.”⁴⁶ However, under the ICA, the notification process is not applicable for minority investments that do not result in an acquisition of control, and indeed a national security review may currently be initiated up to 45 days post-closing for any such investment that is voluntarily brought to the attention of the Minister. It is not yet clear whether this statement means that ISED will accept such notifications absent an acquisition of control during the COVID-19 crisis. However, it is our experience that guidance on the possibility of a national security review can, in some cases, be obtained through informal consultations with ISED, even in the absence of such a notification.

As the federal government recognizes the need to remain “open to investment that benefits Canadians,”⁴⁷ it is unlikely that ordinary course commercial transactions by non-SOEs that do not raise national security concerns will be significantly impacted by additional scrutiny. Regardless, all foreign investors considering any investment into Canada during COVID-19 (and until the economy has recovered) should, at an early stage, assess whether this increased scrutiny is likely to impact their proposed investment, and engage as appropriate with ISED.

Conclusion

As COVID-19 continues to disrupt how businesses in Canada and elsewhere are operating and collaborating, it remains critical for companies to evaluate and react to strategic challenges and opportunities as they arise. While the exact path and scope of the pandemic remains unclear at this point in time, what is clear is that antitrust and foreign investment considerations will continue to play an important role as businesses navigate their way through the pandemic and its effects. In addition, given that the applicable rules and regulations may evolve as regulators and governments react to the impact of the pandemic, it will be important to regularly review and update any such views on the applicable considerations going forward. ●

⁴⁵ Gov’t of Can., *supra* note 39.

⁴⁶ *Id.*

⁴⁷ *Id.*