

APRIL 9, 2020

Canadian Competition Bureau Provides New Enforcement Guidance on Competitor Collaborations to Address Impact of COVID-19

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The Canadian Competition Bureau announced on April 8, 2020, that tailored and short-term competitor collaborations entered into in good faith to respond to the COVID-19 pandemic generally will not attract Bureau enforcement under the *Competition Act*. The Bureau also announced that it is creating a team to assess requests by parties seeking additional enforcement guidance in relation to specific crisis-related collaborations.

Enforcement Restraint in Relation to “Good Faith” Competitor Collaborations

As we discussed in a previous [bulletin](#), the Competition Bureau had recently committed to a “reasonable and principled enforcement” of the *Competition 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.” The Bureau’s April 8 statement, however, provides additional guidance, noting that the Bureau “does not wish to see specific elements of competition law enforcement potentially chill what may be required to help Canadians.” To this end, the Bureau articulated the following general statement of enforcement policy:

“[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.”

The Bureau 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. **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.”** By contrast, the Bureau 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 *Competition Act*.

Process Established to Address Requests for Additional Enforcement Guidance

The Bureau also recognized that some firms may want greater certainty and more specific guidance about their proposed 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 [of Competition] on what informal guidance the Commissioner might provide [...] to facilitate rapid decisions to enable business to support the crisis response efforts.”

The Bureau highlighted the kinds of information that parties should provide in their requests and cautioned that the Bureau may seek input from market contacts and other stakeholders, including other parts of government, and may impose conditions on proposed collaborations. In addition, any informal guidance would be time-limited, and upon expiry of the relevant time period, parties will need to confirm that the collaboration has ceased or request that the guidance be extended. The Bureau also noted that any guidance provided 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 timeframe (i.e., seven days after receipt of relevant information), the Bureau's announcement is silent on the precise timing of reviews under the new initiative. The U.S. Department of Justice has also been willing to provide its views, in the form of a business review letter, where some aspects of the proposed conduct were already underway. It remains to be seen whether the Bureau would adopt a similar approach.

Implications

The Bureau's recent announcement is helpful and provides clearer guidance about its enforcement intentions. That said, the following considerations should be kept in mind by parties contemplating potential COVID-19 competitor collaborations:

- The Bureau's stated enforcement policy allows it to maintain a substantial degree of enforcement discretion.
- Even where the Bureau refrains from enforcement under its policy, private parties may seek to initiate civil actions based on an alleged breach of the *Competition Act's* cartel offence prohibiting certain competitor agreements on price, market allocation or control of supply.
- Nothing in the Bureau's April 8 statement alters or retracts prior Bureau guidance 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 defence.
- **Parties considering competitor collaborations should consult with counsel and ensure their proposed coordination is tailored to comply with the *Competition Act* or, if necessary, falls clearly within the Bureau's guidance and existing defences. The assessment should be refreshed regularly, and particularly when the emergency situation ends.**
- The Bureau's statement suggests that requests for additional guidance are intended to be the exception, where the Bureau's general statement of enforcement policy (and/or a legal analysis in the normal course) is insufficient to provide businesses the requisite comfort in any particular case.
- The nature and timeliness of any guidance provided by the Bureau under its new process cannot be assured.
- Whether or not additional guidance is sought from the Bureau, parties should carefully document the pro-competitive, 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 the overall objectives of the collaboration.

For additional information and analysis regarding practical COVID-19-related competition law questions, please see our [Q&A for Responding to COVID-19](#).

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