

Competition Law

January 12, 2010

Competition Bureau Provides Guidance Regarding Enforcement of New Criminal Conspiracy and Civil Agreements Provisions

The Competition Bureau (“Bureau”) has published guidelines regarding its enforcement of the new criminal conspiracy and civil agreements provisions (the “Guidelines”), clarifying that it will generally not seek to apply the new criminal law to dual distribution and franchise agreements. As reported in earlier updates, the criminal conspiracy provision of the *Competition Act* has been substantially changed to bring the law into closer conformity with U.S. cartel law. Effective March 12, 2010, all conspiracies, agreements or arrangements between competitors on price, output or sharing of markets (with limited exceptions) will potentially be subject to criminal prosecution, regardless of the actual or potential effect on competition. In addition, all other types of agreements or arrangements between competitors will be subject to a new civil law provision that provides for remedial action where such an agreement or arrangement prevents or lessens, or is likely to prevent or lessen, competition substantially in a market.

The new criminal conspiracy provision has created considerable uncertainty as to its potential scope as a literal reading of the provision could lead to its application to situations that are competitively benign or even pro-competitive. Although not binding, the Guidelines provide important guidance regarding the Bureau’s enforce-

ment stance in relation to some of the more problematic areas raised by the breadth of the provisions. For example, with respect to dual distribution agreements, where a manufacturer both supplies distributors and competes with distributors for end customers, the Bureau has indicated that it will not review such agreements under the criminal law except in limited circumstances. Similarly, with respect to franchise agreements, it generally will not apply the criminal law to legitimate franchisor-franchisee relationships. In terms of buying groups, the Bureau has indicated that it will not attack such agreements or arrangements under the criminal law, but could review them under the civil provisions.

However, much uncertainty remains as to how the new law will be applied in practice. The criminal law contains a defence for restraints that are ancillary to a main agreement and that are directly related to, and reasonably necessary for giving effect to, the objective of that main agreement. These words create broad latitude for interpretation. For example, a standard non-compete clause in a purchase and sale agreement makes sense to protect the value of what is being bought. However, if the non-compete provision is for a very long period of time or concerns products not subject to the purchase and sale agreement, the defence will likely not be available. The Guidelines also indicate that if other practical, significantly less restrictive alternatives were reasonably available when the agreement was entered into, the Bureau’s view is that the defence would not apply.

It also must be borne in mind that private litigants are in no way bound by the Guidelines or by the Bureau’s approach to enforcement generally. Such parties may use the strategic opportunities created by the new criminal law to find creative ways to attack agreements between competitors and seek damages, even where the Bureau has declined to proceed.

The Government has purposefully postponed implementation of the new conspiracy law until March 12, 2010 in order to provide companies with a grace period in which to review existing agreements and bring

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them into conformity with the new law. Companies should now be reviewing all of their agreements and arrangements with competitors, even where there appears to be little competitive effect, to ensure compliance with the new law. After March 12, 2010, the grace period will be over and continuing conduct pursuant to existing agreements and arrangements could be subject to criminal or civil law scrutiny under the new provisions.

We would be pleased to provide further information and guidance about the new law on an individual client basis. For further information, please contact Richard Annan or Michael Koch or any other member of Goodman's Competition Law Group:

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