

Canada updates collaboration guidelines

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Canada's Competition Bureau has published a draft revision of its competitor collaboration guidelines, recommending changes to the guidance for the first time since it was introduced in 2009.

The agency last week began a public consultation on the new draft [guidelines](#), which are intended to help businesses avoid unintentionally breaching rules that prohibit anticompetitive collaboration.

The updates do not drastically change the authority's approach to enforcement, but they do introduce additional clarifications on the evidence that the agency will consider, among other amendments, the bureau said.

The agency also emphasised that the guidelines have not been updated in response to the coronavirus pandemic. The bureau [issued](#) specific covid-19 guidance in April, which will continue to apply until further notice, it said.

The draft guidelines provide clarification on who qualifies as a competitor, within the meaning of the country's Competition Act. Canadian antitrust law, like most other jurisdictions, prohibits certain agreements between parties that compete or are potential competitors in a given product market.

The revised guidance clarifies that this prohibition applies to vertical agreements that facilitate a horizontal cartel. "A wholesaler who facilitates a price-fixing conspiracy among its retail clients may be a party to the conspiracy even if it does not compete in the retail market," the draft guidelines note.

The guidance also states that, in cases involving differentiated goods, additional information may be needed to determine if the parties to the agreement are competitors. This extra information could include business and strategic plans; marketing and communications with potential customers; and evidence of actual competition for similar customers in neighbouring regions or product markets.

The revisions also update the definition of price-fixing agreements to include the possibility of algorithmic collusion, while clarifying that joint purchasing agreements will not fall foul of competition law unless the purpose of the agreement is to fix or control prices.

Anita Banicevic, a partner at Davies Ward Phillips & Vineberg in Toronto, said the draft guidance could signal a more aggressive position on vertical agreements between suppliers and resellers that is not necessarily supported by jurisprudence in Canada.

She noted that the existing guidelines clarify that the bureau will not seek to apply criminal provisions to vertical agreements, whereas the new draft guidance would qualify that position by stating purely vertical agreements "will generally be assessed" under civil provisions not criminal cartel rules.

"Such qualifiers would introduce significant uncertainty without identifying any supporting jurisprudence or providing an explanation for the changes," she said.

Calvin Goldman at Goodmans in Toronto said the existing collaboration guidance is widely viewed as one of the more important sets of guidelines provided by the bureau.

They are relied upon to address and consider various matters that may give rise to the application of the Competition Act. "The new guidance provided is very much welcome even though the changes are relatively modest," he added.

Fellow Toronto-based Goodmans partner David Rosner said the revised guidance gives the bureau more enforcement discretion or scope to take decisions in individual cases. "The general theme running through cases is that the bureau recognises competition takes place differently today and companies do not always compete in the same direct way," he said.

In recognition of that, the bureau gives more emphasis to hub-and-spoke arrangements where companies may compete with their competitors but use someone else to facilitate the conspiracy, Rosner said.

“None of the changes are controversial and are clearly within case law and economic theory,” he said, noting that the bureau recognises that competition is more asymmetrical and dynamic than ever before.

Stakeholders have until September 28 to submit their comments on the draft guidelines.