

Goodmans^{LLP} Update

Competitor Collaborations in Canada in Response to COVID-19

Key points:

- Certain types of agreements among competitors related to prices, sales and specific other matters are contrary to the criminal provisions in *Canada's Competition Act* (the "**Act**"). As a result, collaborations among competitors create risks the Act will be contravened.
- In guidance published April 8, Canada's Competition Bureau (the "**Bureau**") signaled it will generally refrain from exercising scrutiny over short-term collaborations that are vital to respond to COVID-19, and are undertaken and executed in good faith (and do not go further than what is needed).
- The Bureau established a new process for companies seeking increased certainty that their collaborations in response to COVID-19 will not result in enforcement action under the Act.
- Even with the Bureau's new process, risks remain for companies that enter into collaborations with competitors in response to COVID-19. Counsel can advise on procedures to help further reduce and mitigate those risks.
- The Bureau's new process is similar to processes established by competition law agencies in other jurisdictions in response to COVID-19.

Background

Canadian competition law prohibits certain types of agreements among competitors that, among other things, fix prices, allocate sales or otherwise control the supply of a product. Such agreements can result in a criminal conviction for companies and individuals, and a fine of up to CAD \$25 million per count (and jail time for individuals). In addition, private persons can recover damages from companies and individuals that are parties to such agreements (including through class actions).

The Bureau published [Competitor Collaboration Guidelines](#) that provide guidance about the types of agreements or conduct that might attract either criminal enforcement under the Act or civil review. In a civil review, agreements or conduct are examined for their competitive effects. The Bureau will only take enforcement action for such conduct if it (i) prevents or lessens competition substantially, (ii) the competitive effects are not outweighed by any efficiencies, and (iii) the conduct, if subject to enforcement action, can only be prohibited by a civil order of a court (i.e., the conduct is not subject to criminal conviction, fines or jail time, or private actions). The Bureau's guidance is general in nature; it is not tailored to the circumstances of the COVID-19 pandemic.

New Developments

When the COVID-19 pandemic arose, the Bureau publicly [warned](#) it would watch for conduct that may contravene the Act, including illegal agreements among competitors. Companies have responded to the economic and health crises unfolding, and are seeking novel ways to supply products and services to market. The Bureau is mindful Canadian businesses face a number of unprecedented challenges arising from the COVID-19 pandemic and published a new [statement](#) to assist companies considering competitor collaborations. The

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Bureau acknowledged the response to the pandemic may “call for the rapid establishment of business collaborations of limited duration and scope to ensure the supply of products and services that are critical to Canadians.”

To Bureau’s statement is intended to serve two principal purposes:

- It is a “signal that in circumstances where there is a clear imperative for companies to be collaborating in the short-term to respond to the 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.”
- It announces a new procedure whereby the Bureau will provide “informal guidance” to companies seeking “greater certainty and more specific guidance on whether the Commissioner of Competition would take enforcement action to proposed business collaborations necessary to meet the urgent needs of Canadians during the crisis”.
 - To provide this guidance, the Bureau established a team devoted to providing “rapid decisions” in response to such requests from companies.
 - Before issuing guidance, the Bureau expects companies to submit information about their collaboration, including a description of the scope and duration of the collaboration, a description of what the collaboration is directed at, why it is necessary to achieve a COVID-19 related objective, and a description of any guidance from Canadian authorities.
 - The Bureau retains the right to make the guidance public to support transparency.
 - The Bureau’s new process is separate from the Bureau’s existing processes of issuing “Written Opinions” in response to questions about the legality of specific conduct. Significantly, obtaining a “Written Opinion” requires the payment of a CAD \$15,000 filing fee, whereas guidance related to the response to COVID-19 does not.

The Bureau also noted any guidance it provides would not immunize the collaboration from a civil suit.

Discussion

While the Bureau’s statement provides assistance to Canadian companies in these exceptional circumstances, the guidance is relatively general in that it focuses on the good faith of the parties engaged in collaboration. It is also notable for what it does not contain. Among other things:

- It does not contain descriptions of what conduct is “close to the line” and should not be subject to enforcement action if it is engaged in as part of the response to COVID-19.
- The offer to provide informal guidance in specific situations does not contain an offer that the Bureau will monitor the collaboration. This would potentially give the companies additional comfort their conduct does not contravene the Act.
- It does not contain a specific time period in which the Bureau will endeavour to provide the “rapid assessment” and otherwise respond to requests for guidance.

Companies seeking to rely on the Bureau’s guidance are well advised to have in place procedures to govern and document their collaborations on an ongoing basis. Such procedures reduce and mitigate residual litigation risks by supporting any “after-the-fact” efforts to demonstrate compliance to the Bureau and to defend against possible civil suits.

Counsel can advise on procedures that do not hinder business activity and are easy to implement.

International Perspectives

The Bureau's statement, and the process it establishes, is similar to initiatives by competition law agencies in other jurisdictions to facilitate business collaborations in response to COVID-19. Jurisdictions that have established similar procedures include:

- **United States.** The Antitrust Division of the US Department of Justice and the US Federal Trade Commission issued a joint [statement](#) announcing their intention to respond to all COVID-19 related requests within seven calendar days. The US Department of Justice issued its first response to such a request on April 4, advising in a "business review" [letter](#) issued to a number of distribution companies that it would *not* prosecute cooperation among them related to the supply of personal protective equipment (PPE) and medications for COVID-19. Among other things, the letter noted that distributors' cooperative conduct would offer Americans several "unique competitive benefits," including "increase[ing] the supply of and access to PPE... at a time when supply shortages could threaten the health and safety," which would "outweigh any hypothetical anticompetitive harm." The letter also noted that the conduct was at the direction of other US government agencies (FEMA and Health and Human Services), the US Department of Justice would participate in the monitoring of the collaboration, and that the companies would only disclose competitive sensitive information to the US government agencies (and not among themselves).
- **United Kingdom.** The UK Competition and Markets Authority published [guidance](#) about how it will prioritize its enforcement actions during the COVID-19 pandemic. That guidance recognizes that the pandemic may "trigger the need for companies to cooperate in order to ensure the supply and fair distribution of scarce products and/or services affected by the crisis to all consumers." The authority will not take enforcement action if temporary coordination by companies satisfies enumerated criteria. Although the guidance warns it is not a "free pass", it should provide comfort to those companies acting in the public interest and for the benefit and wellbeing of consumers.
- **European Union.** The Directorate-General of Competition for the European Commission and the European Competition Network have each published statements acknowledging the positive role coordination among businesses can play in responding to COVID-19, and establishing new processes for providing informal guidance for companies wishing to engage in such collaborations in a manner that complies with all applicable laws.

If you have any questions about Canadian competition law during the COVID-19 pandemic, please contact any member of our [Competition, Antitrust and Foreign Investment Group](#).

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