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Canadian Competition Law Compliance: Q&A for Responding to COVID-19

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Disruptions to businesses in Canada and across the globe as the COVID-19 public health crisis continues to unfold are raising a variety of competition law issues that will need to be managed in responding to challenges and opportunities associated with the ongoing pandemic. We highlight some of the key questions below.

Davies' competition and foreign investment review group is available to assist clients and provide further guidance and advice.

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1. Is there a "crisis" exemption from Canadian competition law?

The *Competition Act* contains no mechanisms that provide for the temporary suspension of its provisions based on crisis or emergency situations. Accordingly, short of new government measures clearly suspending the application of all or parts of the *Competition Act* either generally or for specific sectors, the Act continues to apply to all businesses in Canada. **In some other jurisdictions, including the United Kingdom, government proposals to temporarily suspend competition laws for certain purposes have been advanced, but not as yet in Canada.**

Certain other Canadian federal laws may provide for measures that could lead to exemptions from or the suspension of the *Competition Act* for specific purposes. For example, the *Canada Transportation Act* contains provisions allowing the federal Cabinet to issue temporary orders in cases of extraordinary disruption to the effective functioning of the national transportation system that would hurt users and operators of the system where no other legislative means exist to counter such harm. Such orders may direct that steps be taken to stabilize the national transportation system, including the imposition of capacity and pricing restraints; anything done under the authority of such orders is exempt from the application of the *Competition Act*. (This provision was used in 1999, when an order was issued suspending the *Competition Act* to facilitate discussions and possible agreements or arrangements among the major airlines and other interested parties relating to the restructuring of the airline industry.) It remains to be seen whether provisions such as these will be included in emergency legislation and/or put into operation as the COVID-19 situation unfolds.

In addition, conduct that is required, directed or authorized, expressly or impliedly, by or under validly enacted federal or provincial legislation, including legislation that may be implemented in response to COVID-19, may be immune from certain provisions of the *Competition Act* under a common law doctrine known as the regulated conduct defence.

The Canadian Competition Bureau and Public Prosecution Service of Canada retain significant discretion with regard to the conduct they choose to challenge or prosecute under the *Competition Act*. In this regard, and as noted in our March 20 bulletin, the Commissioner of Competition has stated his commitment to "a reasonable and principled enforcement of Canada's competition laws" in the context of the COVID-19 pandemic. **More recently, in a statement made on April 8, 2020, the Bureau provided further guidance, noting that "the exceptional circumstances surrounding the COVID-19 pandemic may call for the rapid establishment of business collaborations of limited scope and duration to ensure the supply of products and services that are critical to Canadians." The Bureau stated that it "wishes to 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, it will generally refrain from exercising scrutiny." That said, the Commissioner's recent statements also signalled continued vigilance with respect to illegal competitor agreements and cautioned that it has "zero tolerance" for any attempts to abuse the Bureau's enforcement flexibility noted above or to use any informal guidance the Bureau may offer "as cover" for engaging in unnecessary conduct that would violate the *Competition Act*.** Even where the Bureau has refrained from enforcement, the risk of civil actions (e.g., class actions) for breaches of any of the criminal offences in the Act remains a consideration for any conduct that may violate such provisions and cause economic harm to any persons or entities. For a more detailed summary of the Bureau's April 8 statement and its implications, please refer to our April 9 bulletin.

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Competitor Collaborations

2. Can I team-up with competitors to face the challenges of COVID-19?

COVID-19 and public health measures to combat the virus have created industry challenges that may, in some circumstances, justify a coordinated response between competitors. Indeed, public authorities may even request that industry participants, including direct competitors, cooperate with one another to combat the crisis. **As a general matter, the *Competition 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; allocate sales, territories, customers or markets; or rig bids. However, as the Competition Bureau noted in a recent statement, **the Act contains exceptions to this prohibition in certain cases, including most notably where competitor coordination is reasonably necessary and directly related to a larger and otherwise lawful agreement between the cooperating parties.** Examples of such a larger agreement might be a joint venture to maximize output of critical products in short supply; to effectively manage supply chain and delivery issues; or to ensure standards of health, safety and security for the benefit of customers, suppliers, employees or other third parties. In addition to the criminal prohibitions, the *Competition Act* contains civil provisions that allow the Bureau to challenge agreements between competitors that are likely to prevent or lessen competition substantially in a market.

Although the *Competition Act* contains a mechanism for parties to request binding written opinions from the Competition Bureau about the application of competition laws to proposed competitor collaborations, the Bureau has in the past been reluctant or unable to provide timely and meaningful enforcement opinions, especially when it cannot be sure of all relevant facts. **That said, the Bureau announced on April 8, 2020, 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 seeking informal guidance should provide 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 guidance provided by the Bureau would be time-limited, and upon expiry of the relevant time period, parties would need to confirm that the collaboration has ceased or request that the guidance be extended. The Bureau also noted that its informal guidance would not insulate conduct from the possibility of 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 competitor collaborations in the face of COVID-19 within a particular expedited timeframe (i.e., 7 days after receipt of relevant information), the Bureau's announcement is silent on the precise timing of its reviews under the new initiative. A more detailed summary of the Bureau's April 8 announcement and its implications is available in our April 9 bulletin.

Parties considering collaborating with competitors to address COVID-19 should involve counsel in the design of any proposed conduct. In any event, it would be helpful to document the pro-competitive, efficiency-enhancing or other legitimate aims of such collaboration (including whether the proposed coordination is being undertaken at the request of public authorities, customers or other stakeholders whose interests are being protected) and the reasons why any restraints on competition are reasonably necessary to achieve the overall objectives of the collaboration. Legal assessment of COVID-19 collaborations should be refreshed regularly, and particularly when the emergency situation ends.

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3. What information can I share with competitors to ensure a coordinated and effective response to COVID-19?

The mere exchange of information between competitors, on its own, is not prohibited under the *Competition Act*. However, exchanges of competitively sensitive information between competitors may lead to (or be viewed as evidence of) prohibited agreements or understandings on, for example, prices, output or customer or market allocation. Competitor communications may also raise potential concerns about "softening" of competition through increased price transparency and the enhanced ability of competitors to coordinate their business strategies without reaching actual agreements.

As with other competitor collaborations, **agreements or arrangements involving the exchange of information between competitors should be carefully managed to minimize enforcement risk under the *Competition Act*, including by documenting the efficiency and other legitimate benefits being facilitated through the sharing of information**. Each case of information exchange must be evaluated on its own facts; however, as a general matter:

- Information to be exchanged should be limited to what is reasonably required by the legitimate objective being pursued – **wherever possible, parties should seek to achieve their lawful aims through exchanging information that is not (or is less) competitively sensitive (e.g., avoiding the exchange of forward-looking pricing/strategic intentions or detailed input cost information).**

- Where competitively sensitive information must be exchanged, parties should consider
  - using an independent third party to manage the collection, processing and distribution of competitively sensitive information to minimize direct communications between participating competitors and the identification of sensitive information relating specifically to particular market participants; and/or
  - implementing strict confidentiality safeguards including, in appropriate cases, obligations to limit access to information within participating organizations to "clean teams" that comprise individuals who are not involved directly in day-to-day pricing, marketing or other competitively sensitive functions.
- With respect to industry meetings involving competitors, usual competition law safeguards should be applied, such as adhering to appropriate pre-agreed agendas and documenting the discussion.

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4. The disruption to our company's business is requiring an urgent re-think of employee compensation and benefits – can we benchmark HR practices with competitors?

Human resource topics have recently become competition law "hot spots" due to several high-profile antitrust proceedings in the United States and the prioritization of criminal enforcement resources in that country to combat wage-fixing and employee no-poach agreements reached between employers who compete for labour.

In Canada, **the *Competition Act* does not clearly prohibit price-fixing or market allocation in relation to the purchase (as opposed to the production or supply) of inputs such as labour.** Indeed, when the Act's criminal conspiracy offence was substantially amended in 2009, the then-existing reference to the "purchase" of a product or service was removed; the Competition Bureau's existing guidance suggests that it will assess competitor agreements with respect to purchases only under the *Competition Act*'s civil competitor collaboration provisions to determine whether they are likely to lessen or prevent competition substantially. **However, given the prominence of U.S. antitrust enforcement in labour markets (which may extend across borders) and the Bureau's own statements that it is revisiting its existing guidance, it would be prudent to avoid conduct that could be perceived to involve an agreement with competitors about the compensation or hiring of employees. Employers would also be wise to follow the general cautions noted above in relation to any proposed competitor collaborations and information-sharing arrangements for industry benchmarking purposes.**

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Marketing Practices

5. How can I market my products and services to meet urgent consumer needs during the pandemic?

As discussed in our March 20 bulletin, **the Competition Bureau has stated that it is prioritizing enforcement against deceptive marketing practices by those seeking to take advantage of consumers during the COVID-19 situation. In particular, the Bureau is actively monitoring for evidence of "false or misleading claims about a product's ability to prevent, treat or cure the virus."** In addition to prohibiting materially false or misleading representations made in connection with the promotion of a product, service or other business interest, the *Competition Act* contains provisions directed specifically toward ensuring the accuracy of performance claims. Any claims about the performance or efficacy of a product must be based on **prior** adequate and proper testing, regardless of whether the claims can subsequently be demonstrated to be true.

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6. My competitors are hiking their prices for consumer goods experiencing a surge in demand – can I do the same?

Nothing in the *Competition Act* prohibits a retailer from unilaterally setting its own prices for its products or services, including adjusting prices to reflect supply and demand conditions and other relevant commercial factors, such as increased input costs. However, prices, including all mandatory fees and charges, should be clearly conveyed upfront to ensure that consumers are not misled about the total cost. **With more purchases being made online during COVID-19, the Competition Bureau may be expected to continue, and even ramp up, enforcement against so-called drip-pricing (whereby mandatory fees/charges are applied late in the purchasing process, such as at the checkout stage of an online transaction).**

As a result of concerns regarding perceived "price-gouging" during COVID-19, other legislation or government measures have been or may be introduced to prohibit such conduct. For instance, **on March 27, 2020, a Cabinet order was issued under the Ontario *Emergency Management and Civil Protection Act* (EMCPA) prohibiting the sale or offer for sale 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."** The concept of an unconscionable price is not strictly limited in the order but expressly includes "a price that grossly exceeds the price at which similar goods are available to like consumers." The order does not apply to manufacturers, distributors or wholesalers and is limited to retailers or individuals who did not ordinarily deal in the "necessary goods" prior to March 17, 2020, when the emergency was declared. **Penalties for violating the order include a ticket of $750 or a charge under the 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 offence for each day on which the conduct occurs or continues. The order is effective for the duration of the declared provincial emergency. Consumers may report any conduct that contravenes the order to Consumer Protection Ontario via a complaint form or a newly established hotline.

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7. I will not be able to supply all my usual customers with the products they are ordering, or even the volumes that they normally purchase. Does the *Competition Act* require me to allocate my production to customers in some proportionate or equitable fashion?

As a general rule, **the *Competition Act* does not prevent suppliers from making their own unilateral decisions regarding to the supply of their products and how they may allocate limited supply among customers.** In some contexts, suppliers may be challenged for discriminating against persons because of their low pricing policies, but as a general rule suppliers will not violate the *Competition Act* because of good faith unilateral decisions on how to allocate their limited supplies arising from an emergency situation such as the COVID-19 pandemic.

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Transaction Planning

8. Our company is considering ways to lend money to or acquire shares in or assets of a competitor. What can we do without triggering mandatory pre-merger notification and waiting periods?

The acquisition (in any manner) of control over a significant interest in the business of another person (including a competitor or potential competitor) may be reviewed by the Competition Bureau under the merger provisions of the *Competition Act* and challenged before the Competition Tribunal up to one year after closing. However, only certain types of transactions (e.g., acquisitions of assets, voting shares, and interests in non-corporate business combinations, as well as amalgamations and the formation of non-corporate business combinations) may give rise to pre-closing notification obligations. Transactions typically falling outside these categories, including loans, acquisitions of non-voting shares and supply agreements, are not subject to mandatory pre-merger notification. Even within the transaction categories that may give rise to notification, additional ownership and other financial thresholds must be crossed before a notification obligation will be triggered. For example:

- **Transactions resulting in certain minority positions are not notifiable** – for example, (i) acquisitions of voting shares that do not exceed 20% (public company) or 35% (private company) of a company's total voting shares or (ii) acquisitions of economic interests in a non-corporate combination, such as a limited partnership, entitling the acquirer to no more than 35% of the profits of the combination or of its assets on dissolution.
- Where minority positions exceeding the above-noted ownership thresholds are already held by an acquirer pre-transaction, a further acquisition will not trigger a notification obligation unless it takes the acquirer's proportion of voting shares or economic interests, as the case may be, over 50%. (Additional acquisitions by parties already holding a majority of a company's voting shares or of a combination's economic interests are not subject to notification.)
- Regardless of the foregoing, no transaction will be subject to notification unless the parties to the transaction and the relevant target business/assets each exceed certain financial thresholds measured by reference to the book value of assets located in Canada and the gross revenues earned from sales in, from or into Canada.

In addition, **non-Canadian investors should keep in mind the potential for mergers and acquisitions to trigger a pre-closing "net benefit" review under the *Investment Canada Act*** (ICA) (although such reviews have become less frequent given the relatively high financial thresholds for review that must be exceeded in the case of most acquisitions of non-cultural Canadian businesses) and that virtually all investments in Canadian businesses are potentially subject to review for national security considerations. In that regard, the COVID-19 pandemic may have expanded the scope of businesses that may be regarded as important to national security.

Determining pre-merger notification or review obligations under the *Competition Act* and ICA in any particular case can be relatively complex, and counsel should be involved early in the planning process to confirm these matters.

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9. How will COVID-19 affect the review of my merger transaction if it is notifiable under the *Competition Act*?

It is important to note that statutory timelines under the *Competition Act* have not changed. Therefore, upon the lapse of statutory waiting periods and in the absence of 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). Proceeding to close without first obtaining clearance from the Competition Bureau involves the risk that the Bureau may not have completed its review and could seek remedies before or after closing, including injunctions, divestiture or dissolution, if it believes the transaction is likely to prevent or lessen competition substantially in any market.

As noted in our March 20 bulletin, the Bureau is operating in a remote work environment and has indicated that it may encounter difficulties meeting its non-binding service standards for completing merger reviews. Parties should, among other things, ensure that appropriate representatives are available to respond promptly to Bureau inquiries and, to the extent possible, take steps to facilitate Bureau efforts to make market contacts in a timely manner – for example, by providing detailed supplementary contact information for customers and suppliers. Depending on the urgency of a transaction, merging parties should consider their filing strategies carefully so as to be able to rely on statutory time frames where necessary. Early and regular communication with the Bureau's Mergers Directorate is advised.

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10. A competitor is considering whether to permanently leave the market in light of anticipated declining demand for our product – can I acquire the competitor or its operating assets without Competition Bureau intervention?

An acquisition of a failing firm does not exempt the acquisition from the Competition Bureau's enforcement jurisdiction or the mandatory pre-closing notification described above. Although such transactions can be extremely time sensitive, care should be taken to respect pre-merger notification and waiting obligations, breach of which may lead to criminal fines and/or exposure

to significant civil penalties. **Similarly, premature integration with a merger target, such as through pre-closing coordination in relation to prices, customers or output, may also raise the risk of substantive "gun-jumping" in breach of the *Competition Act*'s criminal cartel provisions.**

However, special considerations may apply to the analysis of whether a proposed acquisition of a financially distressed business is likely to raise competition issues sufficiently to warrant remedial intervention. Under the *Competition Act*, the Bureau and ultimately the Competition Tribunal may have regard to whether a target business has failed or is likely to fail. 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 the relevant market means that the loss of competitive influence of the failing firm post-merger cannot be attributed to the merger itself. While this may be a fruitful line of inquiry, "failing firm" arguments may not be strategically necessary or desirable in many circumstances and can also be onerous to advance. 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. 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 a thorough search for such a purchaser has occurred); (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 materially 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.

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11. I am a foreign investor looking to acquire a Canadian business; Is Canada's foreign investment review regime under lock-down?

At this time, officials responsible for the administration of the *Investment Canada Act* (ICA) have made no public statements about the impact of COVID-19 on foreign investment reviews and the timelines for conducting them. That said, the widespread impact of the pandemic on Canadian businesses and critical infrastructure may increase the complexity and uncertainty of reviews under the ICA to determine whether an acquisition is likely to be of "net benefit" to Canada or potentially injurious to national security. For example, COVID-19's significant disruption to forward business planning, as well as the potential financial fragility of takeover targets and acquirers alike, may in certain circumstances make it more difficult for the government to assess the net benefit that is likely to flow from a reviewable investment as compared to the situation absent the transaction. In addition, with Canada's critical infrastructure (e.g., healthcare, financial systems, transportation and other key services) under strain and in the spotlight, the federal government's approach to foreign investment may be particularly focused on maintaining local capabilities and control over critical supply chains in any number of industries. Foreign investors contemplating sensitive transactions should continue to involve legal counsel and, where appropriate, government and public relations advisers as early as possible in the planning process.

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