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Canadian Competition Bureau's Updated *Competitor Collaboration Guidelines:* Practical Tips for Businesses

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More than a decade after the Canadian Competition Bureau released its 2009 *Competitor Collaboration Guidelines* (CCGs), which described its general approach to assessing collaborations between competitors under the *Competition Act* (Act), the Bureau has released updated guidelines (New CCGs) to help businesses better assess proposed collaborations with competitors in today's environment. Although changes in the New CCGs, released on May 6, 2021, may have limited practical implications for businesses that have implemented conservative competition law compliance policies, some of the revisions point to areas where the Bureau is asserting a somewhat more expansive scope for review or challenge of competitor collaborations.

In this bulletin we highlight key aspects of the New CCGs and provide tips to assist businesses in avoiding issues under the Act's criminal and reviewable (civil) matters provisions.

Notably, draft revised CCGs published for public consultation in July 2020 contemplated an expanded scope for reviewing joint purchasing agreements between competitors under the criminal provision based on the purpose of the purchasing agreement.

However, the Bureau subsequently issued a statement clarifying that the Bureau will not assess buy-side agreements for the purchase of products and services under the criminal provision, and the New CCGs do not include the language in the July 2020 draft. Nevertheless, some participants in recent hearings of the federal Standing Committee on Industry, Science and Technology's study on competitiveness in Canada have proposed that the criminal provision be amended to prohibit at least some types of purchasing agreements, such as wage-fixing agreements or agreements not to poach a competitor's employees, to be more in line with the approach to such agreements in other jurisdictions such as the United States. (In any event, purchasing agreements between competitors remain subject to potential review by the Bureau under the reviewable matters provisions.)

Background on the Competitor Collaboration Guidelines

The 2009 amendments to the Act introduced a *per se* criminal offence for certain types of agreements between competitors in respect of price, market allocation or control of production or supply that are prohibited without the need to prove that the agreement would have any anticompetitive effect. The 2009 amendments also introduced new reviewable matters provisions allowing the Commissioner of Competition, the head of the Bureau, to challenge any agreement between competitors that is likely to prevent or lessen competition substantially. The Bureau's guidance on competitor collaborations provided helpful clarity regarding the application of the 2009 amendments, particularly with respect to the scope of the new *per se* offence.

Although the reviewable matters and *per se* criminal provisions have been in effect since 2010, given the limited case law relating to these provisions, the CCGs continue to be an important source of guidance for businesses operating in Canada.

Updated Guidelines: What You Need to Know

1. More expansive stance on hub-and-spoke conspiracies

A "hub-and-spoke" conspiracy is an agreement between two or more competitors that is reached indirectly through a common customer or supplier, without direct communication between the competitors. The New CCGs add a new hypothetical example of an illegal hub-and-spoke agreement between two retailers with a common supplier that suggests that the supplier need only advise a retailer of the

other retailer's pricing intentions to establish a pricing agreement between the two retailers. The example also suggests that one retailer can be liable for a broader conspiracy among additional retailers even when that retailer does not know all the other participants in the broader conspiracy. Notably, the New CCGs do not cite any judicial authority for either of these propositions.

Why It Matters

In recent years, international competition authorities have been employing hub-and-spoke agreement theories to advance a range of enforcement actions. While it remains to be seen whether a Canadian court would adopt the expansive positions on hub-and-spoke conspiracies suggested in the New CCGs, the new example highlights the advisability of ensuring that employees dealing with commercial customers or suppliers that also deal with a company's competitors are appropriately trained to avoid even the appearance of hub-and-spoke agreements with competitors. Supplier–customer communications on resale pricing, for example, have become more challenging.

Who It Affects

This revised Bureau commentary may affect any firm engaged in the supply of products (or intermediate products) to competing downstream customers as well as downstream competing customers that have a common supplier or competing suppliers.

Practical Tips

- Reinforce compliance training on avoiding either direct or indirect communications between you and your horizontal competitors.
- As a supplier, avoid discussions with a customer about anticipated future pricing or other competitive actions or decisions of another competing customer.
- Similarly, as a customer, minimize discussions with a supplier about anticipated future pricing or other competitive actions or decisions of another competing supplier – for example, limit such discussions to what is required to negotiate terms with the supplier in your independent interests.
- Do not act as a hub to facilitate pricing or other competitively sensitive communications between customers that compete with each other or suppliers that compete with each other.
- If a new proposal or course of action represents a significant shift from prior business practices, document the purpose of such changes (e.g., changes to supply agreements because of changed economic circumstances or new regulations).
- Consult with competition counsel before communicating with customers about changes to multiple customer agreements, particularly if the changes relate to pricing or other competitively sensitive elements.
- Consult with competition counsel before implementing agreements with customers that involve terms that could be viewed as facilitating horizontal agreements among competing customers (e.g., such as most favoured nation clauses or price maintenance provisions).
- Document competitively sensitive information received from a supplier that also supplies your competitors, particularly where the supplier provides information about a competitor. (Similarly, document such information received from a common customer.)
- Check with competition counsel before attending any meeting arranged by a common supplier that competitors will also attend.

2. M&A non-compete covenants could be subject to broader review

The New CCGs add a statement that non-compete clauses entered in connection with a merger may be examined under the criminal provision in rare circumstances, including where the non-compete amounts to a stand-alone restraint such as a market allocation agreement. This addition likely stems from a recent investigation in which the Bureau alleged, among other things, that certain non-compete restrictions violated the criminal provision because they were overbroad and went well beyond simply preventing the vendor from re-entering the same geographic area served by the acquired businesses with the same or similar type of product. (Previously, the

CCGs identified a non-compete clause found in an agreement for the sale of assets or shares between parties as an example of a competitor agreement that the Bureau would generally not assess under the criminal provision.) Notably, the criminal provision expressly exempts agreements (including non-compete covenants) that the parties establish are both (i) ancillary and directly related to a broader and separate agreement between the same parties and (ii) reasonably necessary for giving effect to the objective of that broader or separate agreement.

Why It Matters

The New CCGs may signal an increased willingness of the Bureau to assess whether particular M&A non-compete covenants are unreasonably broader than required to give effect to the related purchase and sale transaction – for example, unreasonably broad in product or geographic scope or duration. While unreasonably broad non-compete covenants may be unenforceable at common law, increased scrutiny from the Bureau may in some circumstances warrant relatively more limited scope to avoid Bureau scrutiny (and ensure enforceability).

Who It Affects

This revised Bureau commentary may affect firms engaged in or planning to engage in M&A opportunities.

Practical Tips

- Document the rationale for the scope and duration of non-compete covenants and be prepared to demonstrate that they are no broader than necessary to give effect to the related transaction – for example, non-competes that cover products that do not relate to the objective of the underlying transaction, or that include territories not connected to the underlying transaction, may be subject to enhanced Bureau scrutiny.

3. Emphasis on agreements that involve common technology

The New CCGs provide a helpful reminder that an agreement between competitors or potential competitors to use a common pricing algorithm could form the basis of an illegal price-fixing agreement. However, the New CCGs also clarify that an independent decision by a firm to adopt a particular pricing algorithm is not, in itself, sufficient to form the basis of a criminal offence.

Why It Matters

A specific reference to algorithmic pricing in the New CCGs reflects the Bureau's focus on technological advances in artificial intelligence over the past decade and, like other international antitrust authorities, the Bureau is committed to investigate pricing conspiracies that involve the use of a common algorithm.

Who It Affects

The use of pricing algorithms is reported to have increased dramatically over the last few years. Accordingly, a firm that uses a pricing algorithm that is also used by other competing firms should take particular care.

Practical Tips

- Document the reasons for adopting a particular algorithm or software, and include any business justifications for such decisions.
- Periodically review and evaluate your algorithms to ensure the algorithms are operating in compliance with competition laws.
- Carefully consider any proposal to adopt a pricing algorithm or software from a third party that is also used by competitors.

4. Extended concept a "competitor" for the reviewable matters provisions

The New CCGs extend the concept of a "competitor" for the purposes of the reviewable matters provisions of the Act to include firms that compete on other products or services beyond the scope of a challenged agreement. For example, the New CCGs indicate that the Bureau may review a commercialization or joint selling agreement even if the parties are competitors or potential competitors with respect to products that are not subject to the commercialization or joint selling agreement. (This is a departure from the previous guidance, which indicated that the reviewable matters provisions did not apply if the parties to a commercialization or joint selling agreement were not competitors or potential competitors in respect of products that were the subject of that arrangement.)

Why It Matters

At least in theory, the extended concept of "competitor" means that the Bureau may challenge a broader range of competitor agreements that may harm competition. In many cases, this expansion would have no significant practical impact given that, to obtain a remedy under the reviewable matters provisions, the Bureau needs to establish that the challenged agreement substantially prevents or lessens competition in a relevant market. However, "vertical" agreements between customers and suppliers can sometimes raise competition issues. Under the Bureau's new view, the Bureau might now investigate under the reviewable matters provisions vertical agreements between parties that compete on some product or service outside the scope of the vertical agreement.

The New CCGs state, somewhat cryptically, as an example, that ongoing collaborations between parties in respect of the development of product A (for which they are not actual or potential competitors) may dampen their incentive to compete vigorously in respect of product B (a product for which they are actual or potential competitors). The New CCGs also state that, when assessing competitive effects under the reviewable matters provisions, the Bureau will consider whether the agreement is likely to prevent or lessen competition substantially in any relevant market, not limited to the markets that contain the products subject to the agreement.

Who It Affects

Firms that collaborate with competitors or potential competitors on commercialization, joint selling, joint marketing, joint distribution or other types of agreements with respect to a product market in which they compete are unambiguously subject to the reviewable matters provisions of the Act. The expanded concept of a "competitor" in the New CCGs means the Bureau may also review collaborations among firms that compete only on products outside the scope of their collaboration.

Practical Tips

- Continue existing compliance with guidelines and procedures with respect to collaborations among parties that compete with respect to products that are the subject matter of the collaboration.
- Consider whether parties to existing or proposed collaborations may be competitors or potential competitors with respect to any products outside the scope of the collaboration. If so, consider whether the collaboration may be viewed as having any significant exclusionary or other anticompetitive effect on customers, suppliers or other market participants.
- Consider whether collaborations with competitors could reasonably be viewed as lessening competition in products upstream or downstream from the collaboration – for example, by affecting products that are essential for upstream or downstream competitors.

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