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Canadian Competition Bureau and Tribunal Issue Notices on the Impact of COVID-19 on Merger Review, Enforcement and Adjudication Processes

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The Canadian Competition Bureau and the Canadian Competition Tribunal have each issued public statements outlining how the COVID-19 pandemic is affecting their respective operations. While the Bureau remains open for business, with staff operating remotely where possible, the Bureau acknowledges that delays may occur and it may not be able to meet its service standards for completing notifiable merger reviews. The Bureau has also signalled that urgent competition-related issues in the marketplace may need to be prioritized over ongoing enforcement matters. These urgent issues may include false and misleading claims about a product's ability to prevent, treat or cure COVID-19 and collusion between competitors such as agreements about what prices to charge for products or services. For its part, the Tribunal has announced the temporary suspension of in-person hearings but is equipped to hear urgent matters by teleconference. Each has committed to providing further updates and guidance as the situation continues to evolve.

Key aspects of the [Bureau](#) and [Tribunal](#) notices, each issued on March 18, 2020, are set out below. In addition, the Bureau made a [subsequent statement](#) on March 20, 2020, discussing areas of enforcement vigilance during the COVID-19 situation.

Competition Bureau

Merger Review

The Bureau acknowledges, among other things, that it may have difficulty meeting its published service standards for reviewing notifiable mergers for a number of reasons, including the potential inability of Bureau staff to make market contacts in a timely manner and possible challenges encountered by parties in preparing and delivering document productions and information in response to Bureau requests. Parties engaged in complex mergers are encouraged to contact case teams and management in the Mergers Directorate as early as possible and throughout the review process. Where service standards cannot be met, the Bureau will make efforts to communicate to parties "realistic timelines based on prevailing conditions at that time."

Despite the potential for delays in merger reviews, it should be noted that statutory waiting periods applicable to notifiable mergers in Canada remain unchanged, and the Bureau has not at this time signalled major changes to its review processes, including filing procedures; but instead, the Bureau has emphasized that it will prioritize matters to maximize resources and meet service standards where possible. This is in contrast to some other antitrust agencies that have responded to COVID-19 by requesting parties to delay filings for non-essential mergers or by considering whether to request that parties already subject to ongoing reviews agree to extensions to timing agreements in order to permit reviews to be completed prior to closing. It is possible that the Bureau may issue further guidance, including an announcement of similar measures to those implemented by foreign antitrust authorities, as the pandemic evolves. It would be prudent for merging parties to anticipate and, where possible, mitigate the potential for delay in merger review by, for example, engaging early with the Bureau and ensuring that business and legal teams are available to address Bureau questions and furnish requested documents remotely if necessary. In addition, parties may consider providing additional contact information (e.g., email addresses, cell phone numbers) for third parties such as customers and suppliers, in order to facilitate the Bureau's efforts to make timely market contacts in a remote working environment.

Other Enforcement Matters

With respect to Bureau investigations more generally, the Bureau also acknowledges in its notice that delays may be experienced in some criminal cases that may involve face-to-face interviews with applicant witnesses under the Bureau's immunity and leniency programs, the operationalization of solicitor-client protocols, meetings with complainants, and plea or other settlement negotiations.

In addition, the Bureau highlights that urgent marketplace issues requiring immediate action to protect Canadians may need to be prioritized by the Bureau, which may have implications for the Bureau's ability to address other ongoing matters. Although no specific examples of such "urgent marketplace issues" are provided, these could conceivably include addressing misleading or false claims regarding COVID-19, reviewing mergers or acquisitions involving targets under significant financial distress or evaluating urgent industry collaboration, including potentially among competitors, designed to address challenges related to COVID-19. In this regard, it may be noted that criminal prohibitions against agreements among competitors with respect to prices, customer or market allocation and controlling production or supply, as well as bid-rigging, continue to apply and should be considered in the context of proposed industry collaboration, even where the parties may have some legitimate intentions.

Indeed, in a subsequent statement, the Bureau said that it "remains vigilant against potentially harmful anti-competitive conduct by those who may seek to take advantage of consumers and businesses during these extraordinary circumstances" and highlighted deceptive marketing practices and opportunistic collusion between competitors in relation to COVID-19 as areas of particular focus. Notably, however, the Bureau also stated that it is "committed to a reasonable and principled enforcement of Canada's competition laws" and that Canadian competition laws "accommodate pro-competitive collaborations between companies to support the delivery of affordable goods and services to meet the needs of Canadians." While these statements suggest a degree of enforcement flexibility on the part of the Bureau, as noted above, collaborations involving competitors, particularly with respect to price, market allocation or production or supply, may raise significant competition law issues, and the Bureau cautioned in its statement that businesses considering collaboration to address COVID-19 issues must ensure compliance with the law.

Competition Tribunal

According to the Tribunal's notice, the Tribunal remains in operation but its premises are closed until further notice. Tribunal members and employees are working remotely and will continue to provide services to parties and the public as needed. Paper filings will not be accepted for the time being; however, the Tribunal's electronic filing system is fully operational and should be used by parties to Tribunal proceedings.

The Tribunal states that no in-person hearings will be held until April 17, 2020, although urgent matters will continue to be heard by telephone conference. All deadlines as well as hearings, including hearings of motions, currently scheduled for after April 17, 2020, are currently contemplated to be maintained.

The Tribunal strongly encourages counsel and the parties to work together when seeking extensions of time, and the Tribunal is committed to being flexible in assisting the parties and the public in dealing with situations arising from COVID-19.

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