DAVIES

>perspective

Draft Guidelines Confirm that Canadian Competition Bureau Will Apply New Criminal Competitor Collaboration Offence Narrowly

On May 8, 2009, the Competition Bureau issued draft Competitor Collaboration Guidelines. The draft Guidelines describe the Bureau's general approach to assessing competitor collaborations under recently enacted provisions of the *Competition Act* relating to agreements among competitors. These new provisions come into force on March 12, 2010.

The new law will replace the existing conspiracy provision with:

- a *per se* criminal offence for agreements between competitors or potential competitors to fix or maintain prices, allocate sales, customers or territories, or fix or lessen production or supply levels – whether or not the agreement is likely to have any effect on competition (section 45); and

- a civil provision for other types of agreements between competitors or potential competitors that substantially lessen or prevent competition (section 90.1).

THE CRIMINAL OFFENCE

The new criminal offence has raised significant concerns that it may prohibit a broad range of ordinary course agreements between competitors that have no significant anti-competitive effect. The draft Guidelines describe the new criminal offence as applying only to "categories of agreements that are so likely to harm competition and to have no pro-competitive benefits that they are deserving of prosecution without a detailed inquiry into their actual competitive effects". The draft Guidelines add that the Bureau will not seek to apply the new criminal offence to restraints implemented in furtherance of a legitimate collaboration, strategic alliance or joint venture.

This approach is consistent with the new *per se* offence's "ancillary restraints defence", which is available when:

- the restraint is ancillary to a broader or separate agreement that includes the same parties;
- the restraint is directly related to, and reasonably necessary for giving effect to, the objective of such broader or separate agreement; and
- such broader or separate agreement, considered alone, does not contravene section 45.

According to the draft Guidelines, the Bureau generally will not assess the following types of ancillary restraints under section 45, although they may be subject to review under the new civil provision in section 90.1 or another provision of the Act:

- a non-compete clause found in an employment agreement or an agreement for the sale of assets or shares between the parties;
- an agreement among competitors to charge a common price in a blanket licence agreement for artistic works;
- an agreement to abstain from making material changes to a business pending the consummation of a merger; and
- a non-compete obligation between the parent undertakings and a joint venture where such obligations correspond only to the products, services and territories covered by the joint venture agreement.

THE CIVIL PROVISION

The new civil provision applies to agreements between competitors or potential competitors that are likely to substantially lessen or prevent competition in any relevant market. The Bureau may apply to the Competition Tribunal for a prohibition order to deal with such agreements.

The draft Guidelines discuss the Bureau's approach to a range of commercial agreements between competitors that could be reviewed under the new civil provision, including:

- commercialization and joint selling agreements;
- information sharing agreements;
- research and development agreements;
- joint production agreements;
- joint purchasing agreements; and
- non-compete clauses.

OTHER APPLICABLE PROVISIONS

In the draft Guidelines, the Bureau has also confirmed that it will address certain types of agreements between competitors only under other provisions of the Act:

- competitor collaborations which involve a "merger" will be assessed only under the merger provisions of the Act;

- vertical agreements between suppliers and customers, including dual distribution arrangements and franchise agreements, will be assessed only under the reviewable practices provisions, such as the price maintenance and abuse of dominance provisions (this rule may not apply if the agreement is in fact an agreement among distributors or franchisees to which the supplier or franchisor becomes a party); and

- bid-rigging agreements will be assessed only under the bid-rigging provision (section 47) or section 90.1. However, if the agreement includes other restraints on competition apart from bid-rigging that may contravene section 45 (such as where the competitors agree to allocate markets), or if the bid-rigging is part of a broader conspiracy to lessen competition, the agreement may be assessed under either or both sections 45 and 47.

The Bureau also reserves the ability to challenge agreements among competitors that have exclusionary effects on other competitors under the abuse of dominance provision of the Act, where significant administrative monetary penalties and broader remedial orders are potentially available.

IMPLICATIONS

The draft Guidelines offer welcome guidance on the Bureau's approach to competitor collaborations. Perhaps most importantly, the draft Guidelines expressly state that the amended criminal prohibition is reserved for agreements between competitors to fix prices, allocate markets or restrict output that constitute "naked" restraints on competition without pro-competitive benefits, and not for restraints in furtherance of a legitimate collaboration, strategic alliance or joint venture.

That being said, the draft Guidelines are not binding on the Bureau. There is no guarantee that the Bureau will follow them in any particular case. Parties to a challenged agreement will therefore face at least some degree of uncertainty while the Bureau considers whether to proceed against them under section 45, 90.1 or another provision of the Act. Perhaps more importantly, the draft Guidelines are not binding on the courts. The risk of private actions (including class actions) and attempts by competitors to avoid a wide range of contracts will therefore remain until the courts have had an opportunity to rule on the new criminal provision.

The draft Guidelines assume that case law under the current conspiracy provision will apply equally to the new criminal offence in section 45 of the Act. This assumption will likely be vigorously challenged in the courts by the parties to affected agreements.

The approach to agreements among competitors under the new civil provision in section 90.1 will likely be very similar to the applicable analysis under the current conspiracy provision of the Act that prohibits agreements that unduly lessen competition. For example, where competitors who are parties to an information sharing agreement possess market power, they are already well advised to restrict or avoid the sharing of competitively sensitive confidential information. In short, while the new criminal offence requires a careful review of many competitor collaborations, businesses operating in Canada are unlikely to have to make significant changes to their business practices because of the new civil competitor collaboration provision that will come into effect in March 2010.

The draft Guidelines are open for public comment until August 14, 2009 and are available on the Bureau's website at www.cb-bc.gc.ca/eic/site/cb-bc.nsf/vwapj/Competitor-Collaboration-Guidelines-2009-05-08-e.pdf/$FILE/Competitor-Collaboration-Guidelines-2009-05-08-e.pdf.

Click here for more details on other recent amendments to the Act and what they may mean for you.

If you have any questions regarding the foregoing, please contact George Addy, Anita Banicevic, John Bodrug, Jim Dinning, Richard Elliott, Mark Katz, Chris Margison, Hillel Rosen or any other member of the Competition and Foreign Investment Review Group at Davies Ward Phillips & Vineberg LLP at 416.863.0900 (Toronto) or 514.841.6400 (Montréal).

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