
# CARTELS IN A TIME OF COVID

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**Categories:** Insights, Publications

The current COVID-19 crisis is having a significant impact on businesses all across Canada. Tough times often call for creative solutions, and sometimes such creative solutions may involve collaboration with your competitors. However, one person's creative collaboration can be another person's conspiracy. The pressure of changing circumstances, and of financial hardship, can sometimes drive fast and aggressive decisions. But, competition laws continue to operate during times of crisis.

The Canadian Competition Bureau, as well as enforcement agencies around the world, reminded the business community of this at the time of the 2008/09 recession. Similarly, the Commissioner of Competition issued a statement on March 20, 2020, reiterating that the Competition Bureau "remains vigilant against potentially harmful anti-competitive conduct by those who may seek to take advantage of consumers and businesses during these extraordinary circumstances", including collusion by competing businesses.

The *Competition Act* makes three types of agreements with competitors criminal, and therefore also subject to class actions for damages. Those three types of agreements, as set out in section 45(1) of the *Competition Act*, are agreements between competitors to (a) fix prices, (b) allocate markets, or (c) restrict supply or output.

In addition, other sorts of agreements between competitors may be prohibited if the Competition Tribunal, on an application by the Commissioner of Competition, finds that an existing or proposed agreement between competitors prevents or lessens, or is likely to prevent or lessen, competition substantially in a market. The remedy here is a cease and desist order, with no damages or criminal finding.

Given the consequences flowing from potential criminal enforcement and class actions, the key risk is found in section 45(1), and particularly the prohibition on agreements to restrict supply. Marketplace participants know that agreeing on prices or market allocation is generally unambiguously wrong. The legality of output restrictions, however, can be more complex and the concerns less obvious. For example, various forms of collaboration, including those put in place to deal with emergency situations, may require a supply restriction, by way of an agreement to specialize in the supply of agreed products, for instance, in order to operate efficiently.

Fortunately, the *Competition Act* contains an "ancillary restraint" defense in section 45(4). The "ancillary

restraint" defence provides that an agreement between competitors to fix prices, allocate markets or restrict supply is not a criminal offence if the parties to the agreement can establish that (a) the agreement is ancillary to a broader or separate agreement between the same parties that itself does not contravene section 45(1), and (b) the agreement is directly related to, and reasonably necessary for giving effect to, the object of that broader or separate agreement.

Unfortunately, this "ancillary restraint" defense, which was enacted only ten years ago, is yet to benefit from any meaningful judicial interpretation. So, what to do if you are contemplating a collaboration that looks like it may implicate one of the prohibited types of agreement under section 45(1) (particularly the output restriction provision), but may be a part of a broader legitimate arrangement — perhaps in connection with combating the economic crisis — that may fit within the section 45(4) defense? Well, one thing you can do is get legal advice. But of course, given the risks sometimes you want more than the views of even your favourite lawyer.

In light of the need for businesses, now particularly, to offer timely, creative solutions, last week the US Department of Justice and Federal Trade Commission issued a joint statement that they would provide expedited response to all COVID-19-related requests for advisory opinions concerning proposed conduct and would seek to resolve those requests addressing public health and safety within seven days of receiving all necessary information. Similarly, the European Commission has set up a dedicated channel that businesses can use to seek antitrust guidance on specific initiatives.

In Canada, section 124.1 of the *Competition Act* provides that the Commissioner of Competition may, upon request and for a fee of C$15,000,[1] provide a binding written opinion on the applicability of provisions of the *Competition Act* to a proposed course of action. However, while in the past the Competition Bureau would provide substantive guidance, it has more recently been the Competition Bureau's policy that it will not provide an assessment of effects on competition of a party's proposed conduct or practice or provide an assessment of defences that may be available to a party who may be subject to enforcement action by the Bureau, including the applicability of section 45(4).[2]

Given the announced intention of the US and EU antitrust authorities to assist businesses with timely advice as to antitrust laws in the circumstances of the present economic situation, it is to be hoped that the Commissioner of Competition may revisit the Bureau's current policy. Timely advisory opinions from the Competition Bureau with respect to collaborations and joint ventures in a time of national and international crises may be one additional way in which the Canadian government can help.

Naturally, should you have any questions related to proposed collaborations amongst competitors, arising out of the current economic situation or otherwise, members of McMillan's Competition and Antitrust group would be delighted to assist.


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[1] Fees for written opinions are $15,000 (plus tax) in respect of competitor collaborative conduct and abuse of dominance, $1,000 (plus tax) in in respect of deceptive marketing practices; $5,000 (plus tax) in respect of other provisions of the *Competition Act*.
[2] Competition Bureau Fee and Service Standards Handbook for Written Opinions, August 31, 2017.

**A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.