

COMPETITION BUREAU INVITES COMMENTS TO REVISIONS TO THE COMPETITOR COLLABORATION GUIDELINES

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On July 27, 2020, the Competition Bureau (the “**Bureau**”) released a draft revision (“**Draft Revision**”)^[1] to the *Competitor Collaboration Guidelines* (the “**Guidelines**”) and is inviting comments in a public consultation. The Guidelines set out the Bureau’s enforcement approach to competitor collaborations under both the criminal cartel and civil agreement provisions of the *Competition Act* (the “**Act**”). They were last updated in 2009 after the passage of major amendments to the Act in the same year. The Draft Revision reflects developments in competition law enforcement and the Bureau’s experience over the last decade.

Changes Affecting Mergers

A particularly important change in the Draft Revision relates to mergers and acquisitions. The Bureau already deals with such transactions pursuant to the merger notification and review provisions of the Act, which focus on whether a transaction will or is likely to result in a substantial lessening of competition in a relevant market. Where the Bureau has concerns about the likely competitive effects of a transaction, it may seek remedies to address the lessening of competition. The Draft Revision introduces language in the Guidelines that warns against potential antitrust risks in the conduct of mergers and acquisitions.

The Draft Revision stipulates that where merging parties enter into an agreement that goes beyond the acquisition, amalgamation or combination agreement, the Bureau may consider whether it should investigate or commence an inquiry under other provisions in the Act, including section 45 (the criminal cartel provisions) and section 90.1 (the civil agreement provisions). To make this determination, the Draft Revision states that the Bureau may first gather information through an exercise of its formal investigative powers, including by obtaining court orders to require parties or individuals to produce documents, answer questions or attend oral examination under oath and by obtaining search warrants to seize documents and other evidence.

These changes reflect the Bureau’s experience with the 2017 Torstar/Postmedia transaction, which involved an asset swap of several of their local newspapers. Once the transaction was completed, both parties shut down all but five of the newspapers that were part of the transaction. The Bureau initially investigated this transaction under both the criminal cartel provisions and the merger provisions in parallel,^[2] but subsequently

announced that it was proceeding only with the criminal investigation.^[3] During its investigation, the Bureau obtained warrants to search Torstar's and Postmedia's offices and court orders to examine employees under oath.^[4]

Changes Affecting Merger-Related Non-Compete Agreements

The "ancillary restraint defence" in section 45(4) of the Act provides a defence for agreements that may otherwise fall afoul of the criminal cartel provisions if (i) the agreement is ancillary to a broader or separate agreement between the same parties and is directly related to, and reasonably necessary for giving effect to, the objective of the broader or separate agreement, and (ii) the broader or separate agreement, when considered alone, does not contravene the criminal provisions of the Act.

Generally, the Bureau assesses certain merger-related ancillary agreements that may restrain competition under the civil provisions of the Act, including non-compete provisions in connection with the sale of a business and agreements to abstain from making material changes to a business pending completion of a merger. The Bureau recognizes that these types of agreements entered in connection with mergers generally qualify as such legitimate ancillary restraints, as they generally serve legitimate purposes, such as ensuring that the purchaser realizes the full value of a purchased business by not being required to compete against the vendor for customer loyalty and ensuring that the vendor will not degrade or impair the target business before completion of the transaction.

The Draft Revision does not propose any change to the Guidelines with respect to pre-merger conduct, but does indicate a change of approach with respect to non-compete provisions that apply to merging parties' post-merger conduct. While reiterating the Bureau's general approach to examine non-compete agreements entered in connection to mergers under the civil provisions of the Act, the Draft Revision, for the first time, suggests that there may be rare instances when such non-compete agreements may be examined under the criminal cartel provisions where they may amount to a market allocation agreement. This change evidences an increased willingness by the Bureau to scrutinize agreements or informal understandings between merging parties that are ancillary to merger transactions.

Merging parties regularly face competition risks during the negotiation and implementation of merger transactions. The Draft Revision gives emphasis to a change in focus from the civil to the criminal provisions for attempts at market allocation.

Increased Emphasis on Parties' Ordinary Course Documents

One theme consistent across several changes in the Draft Revision is an increased emphasis that the Bureau will seek to obtain and examine parties' ordinary course documents as part of its investigation.

The Act provides that the Bureau cannot initiate proceedings in respect of a matter under the criminal provisions of the Act if it has already initiated proceedings under the civil provisions in respect of the same matter; and vice versa. While the current version of the Guidelines outlines the factors that the Bureau will consider when deciding whether to pursue a matter under the criminal or civil track, the Draft Revision notes that the Bureau may initially proceed with both tracks of the investigation in parallel, until such time that it has adequate information to decide which track is more appropriate. The Draft Revision further notes that, in addition to relying on evidence already in its possession in making this decision, the Bureau may seek to obtain additional information and records, which may involve the use of its formal investigative powers in addition to voluntary requests for information from the parties.

The criminal cartel provisions and civil agreement provisions of the Act both target agreements between “competitors”. The Draft Revision provides that the Bureau may seek to obtain ordinary course documents from the parties to help determine whether they actually compete. Such documents may include ordinary course business and strategic plans, marketing and communications with potential customers, and evidence of actual competition for similar customers in neighbouring regions or in respect of similar products, and any other ordinary course records that consider who the parties perceive to be their competitors and the extent to which the parties monitor and/or respond to each other’s competitive behaviour.

In respect of investigations of competitor agreements under the civil provisions, parties may seek to avail themselves of the efficiency exception, under which an otherwise anti-competitive agreement may be justified and saved if parties can establish that the agreement will or is likely to generate efficiency gains that offset or outweigh the agreement’s likely anti-competitive effects. While the current version of the Guidelines provides that such efficiency claims “should” be supported by ordinary course documents “where possible”, the Draft Revision requires that efficiency claims “must” be supported by ordinary course documents.

With the increased emphasis on the reliance on ordinary course documents, parties should be more mindful of the types of documents that they create in the ordinary course of business and the language they use in such documents.

Other Changes

The Draft Revision also proposes several other important changes, including but not limited to the following.

Algorithmic Pricing

The Draft Revision specifically refers to the “pricing algorithm” as a way through which firms may be found to engage in a price-fixing conspiracy. This is in response to the technological advances in artificial intelligence in the last decade and the successful prosecution of an algorithmic pricing conspiracy case by the U.S.

Department of Justice in 2015.^[5]

Agreements between Affiliates

Agreements between affiliates are exempt from the criminal cartel provisions and civil agreement provisions of the Act. The definition of “affiliate” in the Act was amended in 2018 to include non-corporate entities under common control, where it previously applied primarily to corporate entities only. The Draft Revision updates the language regarding the exemption for agreements between affiliates to reflect the change in the “affiliate” definition.

Joint Purchasing Agreements

The Draft Revision makes clear that joint purchasing agreements are not in and of themselves prohibited by the criminal cartel provisions of the Act, unless the purpose of the agreement was to control or fix prices (or output or allocate markets) for the supply of the product. Joint purchasing agreements that do not have this purpose may still be examined under the civil agreement provisions of the Act.

Joint Development Agreements

The current version of the Guidelines states that, for the purposes of the civil agreement provisions of the Act, the Bureau will not consider parties to a collaboration to be competitors in respect of the activities covered by the collaboration if the parties are unable to independently carry out those activities (such as developing a specified product, completing a specified project, etc.). If parties are likely to carry out those activities independently, the Bureau may engage in further review to determine if the collaboration raises concerns under the civil provisions of the Act. The Draft Revision proposes to remove all references to this approach by the Bureau. It is not clear as to the Bureau’s rationale for this change or as to its practical implication on the Bureau’s enforcement approach.

New Section on Civil Remedies

The Draft Revision introduces a new section on remedies in respect of civil investigations of competitor agreements, stating that the Bureau will consider potential remedies early in any investigation to determine the nature, scope and means by which a remedy may be implemented. The Draft Revision provides that the Bureau may seek to remedy the impugned conduct by a consensual resolution with the parties or, if the Bureau is of the view that the case cannot be resolved consensually or that a consensual remedy is not appropriate, the Bureau may make an application to the Competition Tribunal for a remedial order. Where the case can be resolved consensually, the Bureau will require the remedy be formalized in a consent agreement registered with the Tribunal, which will have the same force and effect of a Tribunal order.

Public Consultation

The public consultation regarding the Draft Revision is open until September 28, 2020. Those who wish to participate in the Bureau's public consultation, or wish to learn more about the Draft Revision and its implications, please contact McMillan's competition lawyers.

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[1] Competition Bureau Canada, Enforcement Guidelines, Draft for Public Consultation, "[Competition Collaboration Guidelines](#)" (29 July 2020), Government of Canada.

[2] Competition Bureau Canada, "[Statement from the Commissioner of Competition regarding searches in the greater Toronto area](#)" (12 March 2018).

[3] Susan Krashinsky Robertson, "[Watchdog to question Torstar staff as it narrows scope of Postmedia deal probe](#)" (4 December 2018) *The Globe and Mail*; Sean Stephenson, "[An update on the Torstar-Postmedia investigation](#)" (29 November 2019), *The Canadian Bar Association*.

[4] Competition Bureau Canada, News Release, "[Competition Bureau obtains court order to advance ongoing investigation of Postmedia and Torstar](#)" (4 December 2018), *Government of Canada*

[5] *United States v. Topkins*, No. 3:15-cr-00201-WHO (N.D. Cal. Apr. 30, 2015).