
# COMPETITOR COLLABORATION GUIDELINES: COMPETITION BUREAU UPDATES KEY GUIDANCE

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**Categories:** Insights, Publications

On May 6, 2021, the Competition Bureau (the "Bureau") released updates to its *Competitor Collaboration Guidelines* (the "CCGs"). The revised CCGs can be found here.

**Background**

The CCGs are a "big deal". The Competition Bureau puts out a significant volume of guidance, addressing various matters respecting its enforcement approach under the *Competition Act* (the "Act"). Virtually all guidance from the Bureau is welcome, but not all is of equal importance. The CCGs are right at the top of the importance hierarchy. One reason is that competitor collaboration – in some cases price fixing or cartel conduct – can involve the most serious competition offences. Consequently, the CCGs are of great interest for businesses seeking to collaborate, legitimately, with competitors while avoiding serious competition law offences.

The other reason is that there is limited judicial guidance on this very important topic. The Canadian law was changed very significantly in 2010, to create *per se* offences with respect to certain types of agreements between competitors (essentially price fixing, market allocation and output restriction agreements), and to remove other types of agreements (such as vertical arrangements) from the ambit of the criminal law. The amendments also created a specific, but not entirely clear, statutory defence to the criminal provisions for some types of joint venture arrangements between competitors. Finally, the 2010 amendments added a new provision (section 90.1) which allows civil challenge to other types of agreements between competitors.

Even the brief overview above demonstrates the complexity of the 2010 *Competition Act* amendments. There has been very limited jurisprudence since their introduction to provide interpretation.[1] Therefore, guidance respecting the Bureau's views in this area is particularly valuable. This Bulletin does not summarize the full content of the CCGs. It focuses on the significant changes from the original version published in 2009.

**Implications for Mergers**

(i) Agreements going beyond a pure merger

The updated CCGs stipulate that where parties to a merger enter into an agreement that goes beyond the pure merger arrangement, the Bureau may consider whether it should commence a potential criminal investigation with respect to those aspects of the transaction which go beyond the merger proper. In this regard, the updated CCGs added the following new language:

> Where parties enter into any agreement(s) that goes beyond the acquisition, amalgamation or combination agreement, whether within or outside said agreement, the Bureau will consider under which provision(s) of the Act any investigation or inquiry should be pursued. The Bureau may utilize its formal powers under sections 11 and/or 15 of the Act to obtain information and/or records relevant to this determination.

(ii) Non-compete agreements

The updated CCGs continue to recognize, as did their predecessors, that non-competition agreements associated with merger transactions can serve legitimate purposes, such as ensuring that a purchaser in a merger transaction realizes the full value of a purchased business by not being required to compete against the vendor for customer loyalty, and they provide that non-competition agreements entered into in connection of a merger will generally be examined under the merger provisions of the Act. However, in a change from the original CCGs, the updated CCGs warn of rare instances when a non-competition agreement entered into in connection with a merger may be examined under the criminal cartel provisions as amounting to a market allocation agreement, or under the civil agreement provision if the effect of the non-competition agreement is uncertain in the merger review. The updated CCGs added the language below:

> However, in rare instances [non-compete clauses entered into in connection with a merger] may be considered under section 45 of the Act, for example where the non-compete may amount to a market allocation agreement, or under section 90.1 of the Act, for example where the effect of a non-compete agreement is uncertain at the time when the merger is reviewable under section 92 of the Act.

The new language may prove to have a significant chilling effect on what the CCGs themselves acknowledge to be normal, and economically beneficial, non-compete agreements which make possible the transfer of the full value of a business in a merger transaction.

**Sham Agreements**

The revised CCGs add a section providing that where the form of any agreement is a sham designed to avoid application of the criminal provisions of the Act, the Bureau will focus on the substance of the agreement or collaboration when determining whether specific conduct should be assessed under the criminal provision. In

this regard, the updated CCGs added the following language:

> The Bureau is cognizant that parties may attempt to structure or design agreements or collaborations to avoid scrutiny under section 45. Regardless of formality or enforceability, where the Bureau has evidence that a collaboration or agreement is a sham it will consider the arrangement under the most appropriate section of the Act.

Commentators had urged the Bureau, if its concern was to capture transactions which were designed to look like mergers but were in substance conspiracies, to articulate a "sham" exception to its guidance that mergers would not attract criminal prosecution, as an alternative to watering down the clear guidance with respect to mergers provided in the original CCGs. In the event, the Bureau elected to do both.

**Vertical Agreements and Dual Distribution**

The revised CCGs state that vertical agreements between customers and suppliers will generally be assessed under the reviewable matters provisions and not the criminal provisions of the Act. However, the revised CCGs weaken the guidance, particularly with respect to dual distribution arrangements – which was one of the strongest portions of the original CCGs. They do this by, first, providing that the guidance applies only to "purely" vertical agreements. Second, they provide that vertical arrangements that include an agreement between competitors to fix price, allocate markets or limit the supply of a product will generally be assessed under the criminal provision.

Since section 45 can only apply to horizontal agreements, this addition is likely to cause significant concern and confusion for those engaged in dual distribution arrangements.

**Broader Concept of "Competitor" Under The Civil Provision**

The prior CCGs stated that the Bureau would not consider parties to an agreement to be competitors for the purpose of the civil agreement provision (section 90.1) only where they compete in respect of products that are subject to the challenged agreement.

In the revised CCG, the Bureau has broadened its approach to competitors. The Bureau now takes the position that the civil agreement provision can apply to any agreement as long as two or more of the parties to that agreement are competitors or potential competitors with respect to any product, although its primary focus is likely to be with regard to the products subject to the agreement. In addition, the revised CCGs note that a party to an agreement who does not compete with any of the other parties to the agreement could still be subject to the sanction of the civil agreement provision if at least two of the other parties to the agreement are actual or potential competitors.

In this regard, the updated CCGs cite the consent agreements it obtained in the E-books inquiry under section 90.1, in which Apple was considered a party to agreements with publishers for purpose of section 90.1 even though Apple did not compete with the publishers.

**Broader Potential Challenges to Competitor Agreements and Joint Ventures**

In the revised CCGs, the Bureau appears open to broadening its enforcement approach to the civil agreement provisions of the Act, in addition to the above-noted broadened definition of competitor. Firstly, they note that the Bureau will consider whether the agreement is likely to prevent or lessen competition substantially in any market, not just the product market subject to the agreement. Secondly, the prior CCGs indicated that the Bureau would consider a challenge to the collaboration only if parties were unable independently to carry out the activities which they instead agree to provide via collaboration. They further noted that even if the parties were likely, independently, to carry out the activity, further investigation may be warranted but that the conduct would not necessarily be subject to challenge. That language has been removed from the updated CCGs.

**Agreements on "Buy Side" and Employment Issues**

In the draft revisions to the CCGs released last summer, there was a suggestion that agreements between firms to buy things or acquire inputs – in particular agreements related to hiring or paying employees – might be subject to the criminal provisions, despite the fact that the wording of the Act does not support that view and that buying groups are often seen as benefitting competition, especially for smaller competitors.

This suggestion provoked some controversy, and in late November 2020, the Bureau released a statement clarifying its view that the criminal cartel provisions of the Act do not apply to no-poach agreements (*i.e.*, agreements between competitors not to hire one another's employees), wage-fixing agreements, and other forms of "buy-side" agreements. Please see our earlier bulletin for a discussion of the implication of that statement.

Updated CCGs reiterate the Bureau's clarifying statement from November 2020 that joint purchasing agreements, employee no-poaching and wage-fixing agreements are not prohibited by section 45 but may be subject to review under the reviewable practices provisions of the Act.

This issue remains a controversial one, and may result in legislative change at some point.

**Guidance Is Good, But Not Determinative**

As we have noted, guidance by the Commissioner of Competition, both with respect to competitor collaborations and more generally, is welcome and important. However, it is not determinative. It may

influence but does not bind either the Competition Tribunal or the courts. They have ruled contrary to Competition Bureau guidance on a number of occasions. Nor, do Competition Bureau guidelines bind the Competition Bureau itself, which has occasionally acted contrary to such guidance. Finally, and perhaps most significantly, the Competition Bureau's guidelines do not bind private plaintiffs, including class action plaintiffs, who may choose to bring actions, alleging breach of the criminal provision of the Act for conduct which the Bureau's guidance advises does not implicate a criminal violation. So, guidance is welcomed, and clear unambiguous guidance, minimizing use of words such as "generally" and "usually" is particularly welcomed, but it does not and cannot address all concerns. Care is important, particularly when venturing, or joint venturing, close to the line.

**Conclusion**

As noted at the outset, the Bureau offers no more important guidance to the legal and business community than that in the CCGs. The issuance of the original CCGs was timely and extremely influential. An update a decade later is appropriate. Similarly, the care which the Bureau has taken in making the changes contained in the revised CCGs is also appropriate, particularly given the limited jurisprudence to date. That said, there are some meaningful changes contained in the updated CCGs and it is important that businesses understand these subtle but important adjustments. They indicate, to some degree, a mildly increased suspicion of business collaborations, and the potential for a somewhat more aggressive enforcement stance in the area. Consequently, particularly when considering joint venture arrangements it will be important to pay close attention to these changes.

Should you have any questions, particularly related to joint ventures or business collaborations amongst competitors, or with respect to dual distribution or similar arrangements, members of McMillan's Competition and Antitrust group would be delighted to assist.

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[1] The most significant decision interpreting of the revised provisions is the judgement of the British Columbia Court of Appeal in *Watson v. Bank of America* 2015 BCCA 362, which confirmed that the new section 45 offence does not apply to agreements between firms which are related only vertically in the distribution chain, and further requires that to be an offence, an agreement between competitors needs to be an agreement dealing with the product with respect to which they compete.

**A Cautionary Note**