

DO NOT GO DIRECTLY TO JAIL – JUST YET ANYWAY: COMPETITION BUREAU CONFIRMS ITS VIEW THAT BUY-SIDE AGREEMENTS BETWEEN COMPETITORS ARE NOT CRIMINALLY UNLAWFUL

Posted on November 30, 2020

Categories: [COVID-19 Resource Centre](#), [COVID-19 Publications](#), [Insights](#), [Publications](#)

On November 27, 2020, the Canadian Competition Bureau [clarified](#) its view that the criminal cartel provisions of the *Competition Act* do not apply to agreements between competitors with respect to purchasing products or services – so-called buy-side agreements, including to no-poach agreements (*i.e.*, agreements not to hire one's competitors' employees), wage-fixing agreements and other types of agreements between competing purchasers of goods and services.

In 2016, the US antitrust authorities announced a new enforcement approach to apply US antitrust laws to no-poach and wage-fixing agreements, indicating that, going forward, no-poach and wage-fixing agreements may be investigated criminally. Since that time, the Bureau has been urged to clarify its position on similar agreements. Such calls have become particularly pronounced recently, as several large, grocery chains each elected within days of each other in June to cut employee bonuses that were introduced at the beginning of the COVID-19 pandemic.

Many Canadian legal commentators have held the view that, following amendments to the *Competition Act* in 2009, the criminal conspiracy provision of the Act does not extend to buy-side agreements because the amended section 45 made unlawful only certain agreements relating to the production or supply of a product or service. Since buy-side agreements rarely relate to production or supply of a product or service, they are not prohibited, and this would include no-poach and wage-fixing agreements. The Bureau's statement formally confirms that the Bureau agrees with this interpretation. However, as Canadian courts have not definitively addressed this issue, it remains a possibility that civil litigants, including class action claimants, may seek damages in connection with alleged losses suffered from buy-side agreements and argue that the civil remedy for breaches of the criminal provision should apply to these arrangements.

Importantly, however, the Bureau did note in its statement that many buy-side agreements are anti-

competitive without any pro-competitive consequences or justifications. The Commissioner of Competition can investigate and may take action against such buy-side agreements under section 90.1 of the *Competition Act*, which is a civil provision allowing the Commissioner to challenge any agreement between competitors that is found to prevent or lessen competition substantially. If such a case is made out before the Competition Tribunal, the Tribunal may prohibit the parties to the agreement from doing anything under the offending agreement. However, no fines or administrative monetary penalties can result without the parties' consent.

As we noted in our previous [bulletin](#) on this topic, the Bureau is currently updating its *Competitor Collaboration Guidelines* and released a consultation draft in late July 2020. The Canadian Bar Association [expressed concerns](#) about the Bureau's approach to buy-side agreements in its comments on the consultation draft, and an [op-ed by Joshua Krane, James Musgrove and William Wu](#) also raised concerns about these issues. The Bureau has now signalled that the updated *Competitor Collaboration Guidelines* will provide further guidance regarding the Bureau's enforcement approach in respect of buy-side agreements building on last week's clarifying announcement.

The Bureau's statement highlights important differences in how the competition and antitrust authorities in Canada and the United States will treat wage-fixing and no-poach agreements, largely as a result of differences in the statutory language of the relevant criminal conspiracy provisions on each side of the border. In light of the public scrutiny over the COVID-19 bonus issue over the last several months, the Bureau's statement last Friday and other [recent statements by the Commissioner](#) may prompt Parliament to consider legislative changes to address no-poach and wage fixing agreements — in fact, members of the two leading political parties at the federal level both [recently made statements in response to the grocery bonus-cutting story](#) indicating that they are considering possible amendments to the *Competition Act* to address this perceived gap in the law.

If you have any questions about these developments, please do not hesitate to reach out to us or to any of the members of the Competition or Labour & Employment groups.

by William Wu, Joshua Chad, Dave McKechnie

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.

© McMillan LLP 2020