

NEED TO COLLABORATE WITH COMPETITORS TO RESPOND TO THE COVID CRISIS? COMPETITION BUREAU IS READY TO PROVIDE GUIDANCE

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Last week, we [wrote](#) to encourage the Canadian Competition Bureau to follow the examples of the US and EU antitrust authorities and provide timely guidance with respect to collaborations and joint ventures to businesses in this time of national and international crisis. On April 8, the Competition Bureau did just that.

In its [April 8 statement](#), the Bureau acknowledged that the exceptional circumstances created by the COVID-19 pandemic “may call for the rapid establishment of business collaborations of limited duration and scope to ensure the supply of products and services that are critical to Canadians.” With this recognition, the Bureau indicated that it generally will not exercise scrutiny “in circumstances where there is a clear imperative for companies to be collaborating in the short-term to respond to the crisis, where those collaborations are undertaken and executed in good faith and do not go further than what is needed.”

Recognizing that this general statement may not be sufficient in all cases, and that businesses may need greater certainty and more specific guidance about proposed business conduct, the Bureau has set up a team tasked with assessing proposed collaborations and providing rapid informal guidance.

The Bureau asks that businesses seeking such guidance provide the following information in order to ensure that the scope and duration of a proposed business collaboration are indeed necessary for responding to the COVID crisis:

- The firms involved and the parameters of the collaboration including its proposed scope and duration;
- A detailed description of how the collaboration is intended to achieve a clearly identified COVID-19 related objective in the public interest;
- An explanation of why the collaboration is necessary to meet this objective; and
- A description of any guidance sought from relevant authorities on whether the collaboration contemplated will actually further Canada’s response to COVID-19.

Further, the Bureau also provided a number of “operational considerations” for COVID-related guidance:

- The Bureau may seek input on the proposed collaboration from other parts of government at all levels, stakeholders, and market contacts;
- The Commissioner may require conditions to ensure the impact on competition is limited only to the extent necessary to meet the critical needs in this emergency period;
- Any informal guidance would be time limited, but could be reviewed after the initial time period should the parties request that the guidance be extended;
- The guidance provided would not insulate conduct from the possibility of private action;
- It would be within the Commissioner's purview to make the guidance public to support transparency; and
- At the conclusion of the time period (if not extended by the Commissioner), each of the parties would be expected to provide written confirmation to the Commissioner that the collaboration has been terminated.

While not expressly stated, we expect that this COVID team will be providing guidance outside the formal written opinion process set out in section 124.1 of the *Competition Act*. Therefore:

- While the Bureau charges a filing fee for formal requests for written opinion, we expect that the Bureau will not be charging any fees for COVID-related guidance;
- While the Bureau ordinarily aims to respond to formal requests for written opinion within its service standard of 6 to 10 weeks, we expect that the Bureau will respond to requests for COVID-related guidance much more quickly, provided that parties provide the Bureau with the requisite information upfront;
- While formal written opinions issued by the Bureau are legally binding on the Bureau, we expect that COVID-related guidance will be "informal" and will not be legally binding on the Bureau. However, provided that parties' collaborative conduct does not exceed the scope and duration as discussed with the Bureau and that parties observe any restrictions the Bureau may impose on a proposed collaboration, we expect that the Bureau generally will not take enforcement actions in a manner inconsistent with the informal guidance it provides.

The Competition Bureau is seeking to strike a balance in its approach. On the one hand, it does not wish competition law enforcement to chill businesses from doing what may be necessary to respond to the crisis, but on the other hand, it wants to guard against businesses abusing the flexibility which the crisis may require and engaging in unlawful conduct under the guise of the COVID emergency. This is a difficult but important tightrope to walk.

Should you have any questions related to proposed collaborations amongst competitors, or wish to seek

guidance from the Competition Bureau, members of McMillan's Competition and Antitrust group would be delighted to assist.

by James Musgrove and William Wu

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.

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