



OPINION

New Competition Bureau guidelines deliver chilling message to businesses already feeling the heat

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The Competition Bureau of Canada, as the agency responsible for enforcing laws prohibiting price-fixing and other anti-competitive agreements, periodically releases guidelines to keep the business community informed about how these laws are enforced and allow companies to compete without risking prosecution.

When Parliament changed the rules regarding competitor agreements 10 years ago, the bureau released very helpful competitor collaboration guidelines. A decade on, the bureau is updating these guidelines.

The courts have not issued many decisions regarding the new law on price fixing or competitor agreements, so guidance from the regulator is very important. You might assume that with 10 years' experience, it would provide greater clarity today – but you would be mistaken. Instead, the proposed new guidelines create more uncertainty for Canadian businesses seeking to comply with the law.

One example of the problems created by the new rules involves joint-purchasing arrangements, which are sometimes called “buying groups.” The former guidelines made clear that the bureau would not prosecute such arrangements, which often let small and medium-sized businesses get volume discounts from suppliers. The updated rules introduce unnecessary uncertainty by suggesting that, in some cases, the Competition Bureau could view joint-buying activities as criminal conspiracies.

Another area that raises uncertainty is with respect to research collaborations to develop new products. The former guidelines provided assurance that the regulator would generally not challenge these collaborations if the participants could not develop a new product on their own. This assurance is especially helpful for companies that are responding to crises – such as developing vaccines and treatments for COVID-19 and the means to distribute them to the public. The Competition Bureau has removed this assurance in its update, creating uncertainty in a critical area of co-operation for the Canadian economy.

These are just two examples. By staking out greater ground to bring enforcement actions, the Competition Bureau will chill business collaborations. Research-and-development co-operation, joint ventures and buying groups are important to many Canadian businesses, including small and medium-sized ones, and are necessary to solve the big challenges facing our economy.

There was some indication in April that the bureau would be more supportive of collaborations in response to the COVID-19 crisis – even offering quick feedback to companies looking for the regulator’s blessing. Regrettably, we haven’t seen the same approach being taken in the new guidelines.

While COVID-19 has been an immediate concern for the past seven months, the impact of an aging population, lack of innovation and low levels of productivity are longstanding issues that pose major economic threats which are not going away. With a ballooning deficit, a growing, dynamic, efficient economy is more important than ever for our recovery.

Collaboration is particularly important for a mid-sized economy such as Canada’s. Unlike in the United States, where the purpose of competition laws is

overwhelmingly the protection of the consumer, Canada has long taken a different approach. Because of the vast size of our country, disparate population centres and smaller economy, Canada's modern competition laws were designed to encourage economic efficiency and dynamism, as well as benefit consumers. The guidelines should be giving businesses reassurance that when they are working together to develop a new product, build a new facility, conserve resources, protect the environment or achieve another beneficial purpose, the Competition Bureau will not stand in their way.

Under our competition laws, the only collaborations that attract criminal sanction are agreements between competitors intended to fix prices, limit supply or allocate customers. Even then, agreements with some element of price fixing are lawful provided they are a necessary part of a larger legitimate collaboration. These sorts of agreements can be important to Canada's economic well-being because some ventures would be too risky or expensive for a single company to pursue on its own. But the lack of clarity on the rules will discourage the co-operation we need.

We don't know when the next pandemic or economic crisis will hit. We do know that, after the present storm passes, the Canadian economy will be in a deep hole and the debt load will be heavy. One way to help address that challenge is to have rules that support and encourage a dynamic, innovative, collaborative economy. The updated guidelines go the wrong way.

The Canadian Bar Association has shared its concerns with the proposed changes to the guidelines, as we do here. Canadian businesses that create value through collaborations may also wish to make their voices heard before the new guidelines are finalized.

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