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COVID-19 Impact: Competition Law Compliance in a Time of Crisis

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The Competition Bureau is watching for evidence of companies taking advantage of consumers by making false or misleading claims about a product's ability to combat COVID-19 or engaging in price fixing, the Commissioner of Competition warned in a recent statement.

The Commissioner added that "Canada's competition laws accommodate pro-competitive collaborations between companies to support the delivery of affordable goods and services to meet the needs of Canadians."

Many Canadian businesses are scrambling to continue to serve their customers' needs, keep their employees safe, and stay afloat. They do not always have time to worry about dotting their i's and crossing their t's. This is especially the case for businesses engaged in critical sectors, including grocery suppliers and retailers, pharmaceutical companies, pharmacy operators, as well as medical supply companies. Companies in critical sectors are properly focussed on ensuring that Canadians have continued access to essential goods and services during the current crisis. Some of these companies have good reasons to work together to maintain the availability of essential goods and services to Canadians – in particular those that are in limited supply.

Last week, the UK government announced that it is introducing a bill to relax UK competition laws so that supermarkets can work together to ensure supply during the ongoing crisis. In its statement welcoming this development, the Competition & Markets Authority stated that it is "very conscious of concerns that competition law enforcement could impede necessary cooperation between businesses to deal with the current crisis and ensure security of supplies of essential products and services, such as groceries" adding that it "has no intention of taking competition law enforcement action against cooperation between businesses or rationing of products to the extent that this is necessary to protect consumers – for example, by ensuring security of supplies." At the same time, the statement cautions companies that the CMA will not tolerate unscrupulous businesses exploiting the crisis.

We believe that the Federal Government and Commissioner of Competition should consider whether taking a similarly pragmatic approach would be appropriate and provide additional comfort to companies who want to cooperate for the purpose of supporting Canadians during this period of crisis. While the Commissioner can adapt his enforcement policies to the current circumstances, he does not have the power to waive provisions of the *Competition Act*, however, nor to bind private plaintiffs. As the crisis deepens, a short-term legislative response similar to that contemplated in the UK may be needed in Canada.

Two Competition Compliance Issues for Businesses

There are two main competition law compliance questions that businesses are asking themselves:

- How should we communicate with our customers about steps we are taking in response to the crisis?
- To what extent can we collaborate with competitors to continue providing services to our customers?

Communicating with Customers About Prevention Measures

Many Canadian businesses have issued statements describing efforts they are taking to keep their customers and employees safe. Here are some guidelines to reduce the risk that these statements will attract Bureau enforcement or civil liability:

- **Be accurate**. Statements about what a business is doing to reduce risks to its customers and employees should be as accurate as possible. For example, if you say that you are stepping up cleaning protocols, be sure that you actually do so.
- **Be restrained**. No one can promise that they can eliminate risks associated with COVID-19 transmission, so avoid giving the impression that the measures you are taking will do so.

While we believe that businesses should tell their customers what they are doing to combat COVID-19 (as we have done),

businesses should be aware that even cautious, responsible descriptions of steps they are taking to mitigate risks may give rise to a duty of care under tort law that could result in liability.

Collaborating With Competitors to Provide Services

Businesses can collaborate with competitors to continue to deliver services to their customers, and they should not hesitate to do so where this will improve their ability to serve their customers.

Canada's *Competition Act* contains provisions to distinguish between so-called "naked cartels" and legitimate collaborations. Agreements between competitors to fix prices, allocate markets, or restrict output are criminal offences carrying penalties of fines up to $25 million and 14 years' imprisonment, as well as civil liability for damages.

Legitimate collaborations between competitors, such as joint ventures, are lawful, even if they contain provisions dealing with prices, markets, or output, provided that these provisions are ancillary to the broader agreement and are directly related to and reasonably necessary for giving effect to the objective of that broader agreement. The broader agreement must not itself be an agreement to fix prices, allocate markets, or restrict output.

Here are some guidelines to reduce the risk that collaborations with competitors will attract Bureau enforcement or civil liability:

- **Legitimate purpose**. Your collaboration must have a legitimate purpose, such as improving delivery of products and services to consumers, and not be just a smoke-screen for a conspiracy to fix prices, allocate markets, or restrict output.
- **Restraints must relate to the object of the agreement**. Any restraints in the agreement (such as joint setting of prices, markets, or output) should relate to the subject matter of the agreement itself, and (for example) not extend to products not covered by the agreement.
- **Write it down**. You do not need to wait for lawyers to draft lengthy contracts, but you should commit the purpose and scope of your collaboration to writing, even if you do this in an email.
- **Be careful about expanding the collaboration**. Once you define the purpose and scope of a collaboration, do not expand the collaboration without considering whether the expanded collaboration is lawful.
- **Don't create a habit**. Collaboration can be habit-forming. Make sure that collaborations undertaken to respond to the present crisis are ended when the need for them has passed, and ensure that your business gets back to competing vigorously.
- **Get legal advice**. This article cannot replace advice from a competition lawyer based on the particular facts of your situation. The Competition & Foreign Investment Group at Cassels has the experience to provide this advice quickly.

Additional resources related to the impact of the COVID-19 pandemic can be found here.