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Competition Bureau Provides Guidance for Competitor Collaborations

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Competitors forming short-term business collaborations that are legitimately aimed at responding to the COVID-19 pandemic will generally not face scrutiny under the *Competition Act*, the Competition Bureau has announced. The Bureau has also created a team to quickly provide specific guidance on proposed COVID-19-related collaborations to businesses seeking greater certainty.

The statement suggests that several factors must be present for a collaboration to benefit from this relaxed enforcement:

- **Public interest**: the collaboration must be intended to achieve a clearly identified COVID-19 related objective in the public interest
- **Necessity**: the collaboration must be necessary to meet the objective.
- **Good faith**: the parties must act in good faith, being "motivated by a desire to contribute to the crisis response rather than achieve competitive advantage."
- **Limited scope**: the collaboration must not go further than what is needed.
- **Limited duration**: the duration of the collaboration must be limited.

This statement is similar to statements issued by competition authorities in the UK and the US in late March. Unlike its UK and US counterparts, the Bureau did not provide any specific guidance on how the COVID-19 pandemic would affect its views about what sorts of business collaborations would be permissible.

The Bureau did mention two examples of competitor collaborations that might be necessary to combat COVID-19: the formation of buying groups and sharing of supply chain resources. Neither of these examples comes within the ambit of the *Competition Act*'s criminal conspiracy provisions. In its *Competitor Collaboration Guidelines*, the Bureau explains that buying groups are not agreements among competitors to fix prices, allocate markets, or reduce output in respect of the supply of a product.

Similarly, an agreement to share supply chain resources is not, on its own, an agreement to fix prices, allocate markets, or restrict output. Indeed, in its *Competitor Collaboration Guidelines*, the Bureau says that an agreement amongst competitors to use common distribution facilities does not constitute an agreement to fix prices, allocate markets, or reduce output.

An agreement to share supply chain resources could have an impact on competition among participants. For example, rationing of those resources could affect the participants' output or the geographic markets

where they operate. The *Competition Act* contains a provision dealing with these so-called ancillary restraints. Restraints that are ancillary to a broader or separate agreement are lawful if they are directly related to and reasonably necessary to achieving the objective of that broader agreement. In the *Competitor Collaboration Guidelines*, the Bureau notes that there is no requirement that the parties choose the least restrictive alternative. Accordingly, the Bureau will not second guess the parties' business decisions, unless there are significantly less restrictive alternatives available.

The fact that a collaboration does not fall within the criminal conspiracy provisions does not mean that it is immune from challenge. While such collaborations are presumptively lawful, a civil anti-competitive agreements provision (s. 90.1) allows the Tribunal to prohibit parties from performing all or part of the agreement if it is likely to lessen or prevent competition substantially. There are no penalties or damages available under this provision. As a result, businesses should focus on potential criminal liability in considering competitor collaborations to respond to COVID-19.

Unfortunately, the Bureau does not possess the power to grant exceptions to the *Competition Act* to allow otherwise unlawful collaborations, even during emergencies. The most it can do is to exercise its enforcement discretion. Its statement suggests that it may exercise this discretion where a collaboration is needed to achieve a public interest relating to the COVID-19 pandemic. However, this would not prevent plaintiffs from starting private litigation, including class actions.

Accordingly, businesses should strive to ensure that any collaborations they contemplate are lawful within the existing legal framework. The following are some guidelines to reduce the risk that collaborations with competitors will be offside:

- **Legitimate purpose**. The 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) must relate to the subject matter of the agreement itself, and (for example) not extend to products not covered by the agreement.
- **Restraints must be reasonably necessary to achieving the object of the agreement**. The question to ask is: can the object of the agreement be achieved without the restraints. If the question is yes, the restraints probably are not necessary.
- **Time-limited**. Restraints that are necessary to achieve an objective during a time of crisis might not be necessary when the crisis is over. Accordingly, collaborations formed to respond to the COVID-19 crisis should have a clear end date or event.
- **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 facts of your situation. The Competition & Foreign Investment Group at Cassels has the experience to provide this advice quickly.

This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.