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ARTICLE

Competition Bureau says wage-fixing is not price fixing

On Nov. 27, 2020, the Canadian Competition Bureau (Bureau) released a statement regarding the application of the *Competition Act* to no-poaching, wage-fixing and other buy-side agreements.¹ Canadian legal and business communities have become increasingly interested in these issues since at least 2016, when American regulators indicated that buy-side agreements could attract criminal liability.²

With today's statement, the Bureau clarifies how it will address buy-side agreements such as no-poaching or wage-fixing agreements – and confirms that Canadian and American antitrust laws will treat them quite differently.

What you need to know

- Buy-side agreements not to hire employees away from competitors (no-poaching agreements) or agreements that set wages at a specific lower level or range (wage-fixing agreements) may have anti-competitive effects in the labour and related product markets.
- However, the Bureau will not consider buy-side agreements for the purchase of products and services – including employee no-poaching and wage-fixing agreements – under the criminal conspiracy and agreements regime outlined in section 45 of the *Competition Act*.
- The Bureau still may assess buy-side agreements under its civil provisions, as outlined in section 90.1 of the *Act*. There are two important thresholds that must be met in order to find that an agreement between competitors contravenes section 90.1:
 - An agreement that is either existing or proposed (not past) must be established; and
 - The agreement must substantially prevent or lessen competition.
- Agreements between competitors to fix the price, allocate markets or limit the supply of a product in a market, regardless of the degree of formality or enforceability of the agreement, will continue to be scrutinized under section 45. But buy-side agreements are not considered to fall within these.
- The Bureau will outline its enforcement approach to buy-side agreements in further detail in a forthcoming update to its [Competitor Collaboration Guidelines](#).

No criminal exposure in Canada

In 2016, the United States Department of Justice Antitrust Division and Federal Trade Commission issued guidance regarding the application of U.S. antitrust laws to no-poaching and wage-fixing agreements between employers.

This joint guidance indicated that the Department of Justice would criminally investigate such agreements. In contrast, the Bureau's statement expressly indicates that buy-side agreements will not attract criminal charges under section 45 of the *Competition Act* – the criminal provision regarding conspiracies, agreements or arrangements between competitors. Rather, the Bureau will investigate buy-side agreements under the civil provision of the *Competition Act*. Specifically, such agreements will fall within the purview of section 90.1, which prohibits agreements when they are likely to substantially lessen or prevent competition.

Reach out to your BLG lawyer or any of the key contacts below if you have questions about the Bureau's decision.

¹ Competition Bureau Canada, "[Competition Bureau statement on the application of the *Competition Act* to no-poaching, wage-fixing and other buy-side agreements](#)" 27 November, 2020, *Government of Canada*

² Department of Justice, "[Justice Department and Federal Trade Commission Release Guidance for Human Resource Professionals on How Antitrust Law Applies to Employee Hiring and Compensation](#)" 20 October, 2016.

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