Competition Bureau addresses COVID-19 competitor collaborations

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As COVID-19 continues to present great challenges worldwide, antitrust regulators have sought to help to facilitate businesses working together to solve vital problems, even where such collaboration might normally violate competition laws (including those against "price fixing" and information-sharing among competitors). On April 8, 2020, Canada's competition regulator, the Competition Bureau (Bureau), released a "**Statement on competitor collaborations during the COVID-19 pandemic**", outlining how it will approach competitors working together in responses to COVID-19, and establishing a Bureau team to provide expedited guidance to parties considering such collaborations.

What you need to know

- The Bureau's statement acknowledges that the exceptional circumstances surrounding the COVID-19 pandemic may require business to form collaborations to ensure the supply of critical products and services to Canadians during this time. The Bureau confirms that it will not challenge instances "where those collaborations are undertaken and executed in good faith and do not go further than what is needed".
- The statement confirms that the Bureau has established a team to conduct expedited reviews and issue rapid decisions regarding proposed collaborations where parties require certainty as to whether the Bureau might take enforcement action against them.
- The Bureau's approach is consistent with those already announced by a number of foreign antitrust authorities, including the United States and European Union, and with the statement released on April 8, 2020 by the International Competition Network (ICN), a body composed of most of the world's national and multinational competition authorities.

Canada's approach

In Canada, section 45 of the *Competition Act* (Act) makes it a criminal offence for competitors to agree to fix prices, allocate markets or restrict output, subject to certain limited exceptions. However, the Bureau's statement acknowledges that the exceptional

circumstances surrounding 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". The Bureau agrees that different businesses may, for example, need to form collaborative buying groups or share supply chain resources, in order to meet the needs of Canadian during these tumultuous times, and recognizes that competition law enforcement might potentially "chill" the beneficial synergies of firms working together in good faith.

In response to these concerns, the Bureau issued the statement to make clear that "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" the Bureau will generally not challenge them. Critically, the statement also confirms that the Bureau has established a team to conduct expedited reviews and issue rapid decisions regarding proposed collaborations where parties require certainty as to whether the Bureau might take enforcement action against them. While in the normal course, the Bureau seeks to respond to requests for opinions on proposed collaborations among competitors within a minimum of six weeks, it is clear that this rapid response team will provide guidance much more quickly, provided that parties provide the Bureau with all required information that is listed in the statement.

Global competition authorities' responses to COVID-19

The Bureau's response is consistent with the steps taken by other leading antitrust enforcement agencies.

The United States' federal competition agencies, the Department of Justice's Antitrust Division (DOJ) and Federal Trade Commission (FTC) released a joint statement on March 24, 2020 stating that in their enforcement decisions, they would "account for exigent circumstances in evaluating efforts to address the spread of COVID-19 and its aftermath." As the Bureau has done, they also committed to expediting the review processes by which they will provide opinions to parties on whether proposed conduct violates antitrust laws. While these processes typically take several months, the agencies committed to providing responses within 7 days for conduct relating to addressing public health and safety.

Similarly, on April 8, 2020 the European Commission also released its "Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak". Like the U.S. DOJ/FTC and the Bureau statements, the framework outlines possible forms of cooperation between competitors in order to ensure the supply and adequate distribution of essential scarce products. It also provides a procedure by which the Commission will provide guidance to parties considering specific cooperation initiatives by means of *ad hoc* "comfort" letters.

In its April 8, 2020 statement addressing enforcement activity during COVID-19, the ICN stated that it is "appropriate for competition agencies to accommodate collaboration between competitors necessary to address the circumstances of the crisis to the extent that their laws permit".

Conclusion

The Bureau's April 8 statement makes clear that it is well aware of the imperative for some competitors in Canada to work together in response to the current crisis. However, businesses must be careful to ensure that their collaboration is not beyond the scope of what the Bureau considers acceptable for this limited purpose.

Businesses who seek to take advantage of the Bureau's expedited review mechanism must aim to provide all required information in a timely manner to the Bureau so that its opinion can be relied on with confidence.

Businesses looking to engage in in any competitor collaboration are reminded to consult legal counsel to ensure compliance with prevailing competition law. Please contact any member of BLG's highly experienced Competition and Foreign Investment Review Group for assistance in this regard.

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