



Make like the buffalo

Competition Bureau of Canada announces flexibility for competitor collaboration amid COVID-19 pandemic

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Over the past several weeks, Alberta Premier Jason Kenney has repeatedly described herds of buffalo standing together facing winds head on, as they find protection as a herd to weather storms. The buffalo are a metaphor for the collective effort required to survive the COVID-19 pandemic and the subsequent economic downturn.

At the federal level, the Canadian Competition Bureau (the **Bureau**) recognized in a statement released on April 8, 2020, that the unprecedented times we face may call for unprecedented business collaborations. In a move that may allow Canadian businesses to protect themselves like the buffalo, the Bureau indicated that it would be unlikely to challenge collaborations between competitors acting in good faith that are “motivated by a desire to contribute to the crisis response rather than achieve competitive advantage.” This policy shift is summarized in the following statement provided by the Bureau:

“[I]n circumstances 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, it will generally refrain from exercising scrutiny.”

The Bureau highlighted, as examples, collaborative buying groups or shared supply chain resources to ensure the supply of products and services that are critical to Canadians. The rationale is to help Canadians weather the pandemic together. The Bureau notes that it “does not wish to see specific elements of competition law enforcement potentially chill what may be required to help Canadians.”


The Bureau has opened a line of communication for businesses to obtain informal guidance on a case-by-case basis where greater certainty and more specific guidance is required. If seeking additional guidance, the following information will be required:

- the firms involved and the parameters of the collaboration, including its proposed scope and duration;
- a detailed description of how the collaboration is intended to achieve a clearly identified COVID-19 related objective in the public interest;
- an explanation of why the collaboration is necessary to meet this objective; and
- a description of any guidance sought from relevant authorities on whether the collaboration contemplated will actually further Canada’s response to COVID-19.

Prospective collaborators are under no obligation to seek the Bureau’s feedback. Rather, the Bureau’s statement suggests that requests for additional guidance should be the exception where the general policy statements provided in the Bureau’s announcement is insufficient for the structure of a particular collaboration. Any guidance provided may be subject to conditions and would be time limited with a specific requirement to provide written confirmation of the termination of the collaboration at the conclusion of the allocated time period. The Bureau also noted that it may seek input from other parts of government as well as stakeholders and market contacts. The Bureau did not set a timeline for responding to a request for informal guidance.

The Bureau was quite clear that it will be taking a zero tolerance policy for companies who opportunistically and/or deceptively engage in prohibited and reviewable activities amid the COVID-19 pandemic. It is also important to note that the Bureau’s policy to “refrain from exercising scrutiny” does not insulate businesses from the possibility of private lawsuits based on an infraction of the criminal cartel provisions of the *Competition Act* to fix prices, allocate markets or customers or to control the production or supply of a product

Companies who are considering engaging in competitor collaborations should consult with legal counsel and carefully structure the proposed collaboration to comply with the Bureau’s policy statement, as well as the relevant provisions of the *Competition Act* (to the extent possible).



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