Dec 5, 2014

Antitrust Advisory: Dos and Don’ts for Communications with Competitors

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There are a variety of circumstances in which company representatives may find themselves communicating with their competitors, including:

- trade association and industry activities;
- joint bidding arrangements;
- strategic alliances and joint ventures;
- dual distribution arrangements (e.g., where a company operates at more than one level of the distribution system, such as both a wholesaler and a retailer);
- standard-setting and patent pools; and
- merger negotiation and related integration planning.

While these are generally legitimate business activities, dealings with competitors potentially give rise to unique competition law risks. Careless or improper conduct in these circumstances may lead to allegations of an illegal conspiracy or bid-rigging arrangement (refer to our Antitrust Advisory: Cartels and Antitrust Advisory: What You Need to Know About Canada’s Bid-Rigging Offence for further details regarding these provisions of the Competition Act). Accordingly, these activities require extra vigilance to manage and mitigate potential competition law risks.

To ensure that you stay on track, the following are some key “dos and don’ts” to bear in mind when communicating with competitors.

**DO**

- **Obtain legal advice** prior to participating in any meetings or discussions with competitors.
- **Ensure that there is a legitimate business purpose** for all such communications and document the legitimate business objective and rationale.
- **Establish written protocols** governing dealings with competitors as part of a comprehensive competition law compliance policy.
- **Ensure that any permitted discussions and meetings follow a pre-set agenda** and that the conversations/conduct do not go beyond the scope of the agenda.
- **Exercise common sense and careful judgment** in all written and oral communications including (but not limited to) internal memoranda, personal notes, email and text messages, and avoid aggressive,
ambiguous or speculative language suggesting an anti-competitive intent or purpose. Highlight the pro-competitive purposes for all such collaborative activities.

- **Always object to and terminate** any discussion that you think is or may be questionable or inappropriate:
  - If in a meeting or on a phone call, object in an obvious way and ask to have your objection recorded. If the discussion is not terminated, leave the meeting/call and promptly report to legal counsel.
  - If in an email or other written communication, consult with legal counsel as soon as possible before responding.

**DON’T**

- **Discuss competitively sensitive matters**, particularly relating (but not limited) to current or future pricing, input/production costs, production/output levels, marketing/business plans, customer/market allocation matters, or specific bids or tenders.
- **Participate in private meetings**, “off the record” discussions or social encounters with competitors concerning competitively sensitive matters.
- **Take any action or make any statements** which could be construed as suggesting or expressing an agreement or understanding to: jointly set prices or other sale terms (including credit terms or discounts); fix or agree on bids (or agreements not to bid); allocate markets or customers; reduce or control production or output; or boycott, penalize or otherwise discriminate against another company or person.
- **Relax competition law compliance rules** in the context of pre-merger discussions with a competitor. The risk of competition law exposure to “gun jumping” is real: the U.S. Department of Justice recently entered into a US$5-million settlement related to illegal pre-merger coordination.
- **Hesitate to seek legal advice** regarding concerns you have about the appropriateness of any communications with a competitor, even if you are not directly involved.

**Bottom Line:** Improper communications between competitors may be used as evidence of an illegal agreement under the conspiracy or bid-rigging provisions of the *Competition Act*. These provisions contemplate significant penalties including multimillion-dollar fines and potential jail time as well as exposure to damages claims, reputational damage and possible debarment from federal government procurements. For further guidance on how to ensure your communications do not cross the line, contact Osler’s *Competition/Antitrust and Foreign Investment Group*.

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