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Competition Bureau confirms that it will not pursue no-poaching and wage-fixing agreements between competitors under the criminal provision of the Competition Act

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On November 27, 2020, the Competition Bureau (the Bureau) issued a statement confirming that no-poaching, wage-fixing, or other buy-side agreements between competitors are subject to review under the civil provisions of the *Competition Act* (the Act) only, and the Bureau will not assess these agreements under the criminal conspiracy provisions of the Act. While the Bureau's guidance is a welcome development and strongly supports the non-application of the criminal provisions to these types of agreements, there remain risks of civil enforcement and private litigation in connection with such arrangements. Businesses should remain vigilant in considering any buy-side agreements with competitors.

Background

Following the enactment 10 years ago of a dual track process for the assessment of agreements between competitors under the Act, it was generally understood (based on the statutory language in the Act) that agreements between competitors in the purchasing of products, as distinct from the supply of products, would not be addressed under the criminal conspiracy provisions of the Act. Rather, such agreements would be subject to review only under the civil reviewable practices provisions. However, stakeholders in Canada's legal and business communities sought confirmation of the approach to upstream agreements between competitors in Canada after the U.S. Department of Justice and Federal Trade Commission issued guidance in 2016 that made it clear that naked no-poaching or wage-fixing agreements that are unrelated to or unnecessary for a larger legitimate collaboration between the employers would be pursued as a criminal matter.

The U.S. guidance was issued in the wake of a number of civil and administrative actions in the U.S. brought against companies for allegedly engaging in illegal wage-fixing or entering into illegal no-poaching agreements. In their guidance, the U.S. agencies indicated that "these types of agreements eliminate competition in the same irredeemable way as agreements to fix the prices of goods or allocate customers, which have traditionally been criminally investigated and prosecuted as hardcore cartel conduct."

The legal framework

The criminal conspiracy provision in section 45 of the Act provides that the following three categories of agreements between competitors are *per se* unlawful (deserving of prosecution regardless of their actual or likely competitive effects), and therefore subject to significant

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criminal sanctions and expose competitors to derivative private damage actions:

45. (1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges

(a) to fix, maintain, increase or control the price for the *supply* of the product;

(b) to allocate sales, territories, customers or markets for the production or *supply* of the product; or

(c) to fix, maintain, control, prevent, lessen or eliminate the production or *supply* of the product [emphasis added]

Other types of non-merger competitor agreements may be subject to review and challenge by the Bureau under the civil competitor agreements provision in section 90.1 of the Act, which prohibits agreements between competitors only where they have lessened or prevented competition substantially or are likely to do so.

The statutory language in section 45 is clear that the types of agreements covered by the criminal provision are those that relate to the "supply" of a product. While the predecessor provision to section 45 that was amended in 2009 and came into force in 2010 included agreements relating to the "purchase" of product, that language was omitted from the amended section 45, suggesting that upstream agreements between competitors were intended to be assessed under the civil provisions only.

The Bureau's Competitor Collaboration Guidelines ("CCGs") recognize this, stating that section 45 does not apply to the purchase of a product (which, under the Act, also includes purchase of a service):

The prohibition in paragraph 45(1)(a) applies to the price for the supply of a product, and not to the price for the purchase of a product. Accordingly, joint purchasing agreements — even those between firms that compete in respect of the purchase of products — are not prohibited by section 45, but may be subject to a remedy under the civil agreements provision in section 90.1 where they are likely to substantially lessen or prevent competition.

On the basis that no-poaching agreements or wage-fixing agreements relate to services that are purchased by the parties to the agreement, not supplied by them, many have been of the view that they are not agreements to which section 45 applies.

November statement

The Bureau has now formally confirmed that it will not assess no-poaching and wage-fixing agreements under section 45. Rather, the Bureau will examine such agreements under section 90.1. This means that the Commissioner of Competition can only seek a remedial order from the Competition Tribunal (the Tribunal) where he believes that an agreement has or is likely to prevent or lessen competition substantially in a market.

The remedies available under section 90.1 are very limited. Specifically, the Tribunal may make an order:

- prohibiting any person (whether or not a party to the agreement) from doing anything under the agreement; or

- requiring any person, with their consent, to take any other action.

Importantly, the Tribunal does not have the authority to order the payment of administrative monetary penalties and, unlike in relation to the criminal conspiracy provisions, the Act does not provide private parties a statutory right to commence private actions for damages for harm suffered as a result of the agreement.

The Bureau's statement comes while the Bureau is in the process of updating the CCGs. The Bureau has stated that it intends to outline its enforcement approach to buy-side agreements in greater detail in the updated guidelines.

Key takeaways for businesses

In light of the 2016 guidance from the U.S. agencies, the Canadian legal and business community had been waiting for the Bureau to confirm that a similar approach to no-poach and wage-fixing agreements does not apply in Canada given the differences in the countries' respective statutory competition law frameworks relating to agreements between competitors.

The Bureau has now provided such confirmation. The Bureau's position is clear: it will not investigate no-poaching agreements and wage-fixing agreements under the criminal conspiracy provisions of the Act; rather, such agreements will be assessed under the civil competitor agreement provisions of the Act. While the Bureau's enforcement policy is not binding on courts, the Bureau explicitly indicated that, in reaching this conclusion, it consulted with the Canadian Department of Justice and the Public Prosecution Service of Canada.

While the Bureau's latest guidance is welcome, buy-side agreements for the purchase of products and services continue to be subject to challenge in other non-criminal forums. First, while the Bureau has essentially eliminated the risk of government action under the criminal provision of the Act relating to no-poaching and wage-fixing agreements, the Bureau has indicated that it may scrutinize such agreements under the civil provisions in section 90.1 of the Act and take enforcement action if warranted. Businesses therefore must remain aware that they continue to be subject to potential civil liability under section 90.1 of the Act if they enter into a no-poaching or wage-fixing agreement with a competitor that is likely to result in a substantial lessening or prevention of competition. Even though enforcement action may not result in the imposition of criminal sanctions or an administrative monetary penalty, civil investigations can be costly and disruptive.

Second, while the Bureau statement provides strong evidence of the non-application of the criminal provision to these types of agreements, the Bureau's guidance is not binding on private plaintiffs. In at least one recent class action, private plaintiffs have asserted that no-poaching and wage-fixing agreements between competitors do indeed violate the criminal provisions of the Act. Given the existence of ongoing public and private enforcement action in connection with such agreements in the U.S., and given the arguments of potential harm to competitive employment or labour markets, it remains to be seen whether the Bureau's statement will deter plaintiffs from continuing to advance claims in connection with such agreements. Further, private plaintiffs have also already resorted to creative arguments in tort for seeking relief for employees on account of alleged acts of wage suppression.

As such, businesses should remain mindful of the potential civil risks associated with such arrangements, and should seek appropriate counsel where necessary.

For further information or any questions regarding the impact of the Bureau's statement or

the opportunities for consultation with the Bureau about competitor collaboration, please contact the members of Osler's Competition and Foreign Investment Group.