

# Blakes Bulletin

## Competition, Antitrust & Foreign Investment

### Ready for Competition Act Amendments Concerning Competitor Agreements? Bureau's Competitor Collaboration Guidelines Offer Guidance

As previously reported in our March 2009 *Blakes Bulletin on Competition, Antitrust & Foreign Investment*, on March 12, 2009, Bill C-10 received royal assent and an array of significant amendments to the *Competition Act* came into force as a result. The amendments to the provisions of the Act governing agreements among competitors did not come into force on royal assent. Those amendments will enter into force on March 12, 2010, less than two months from now.

These amendments apply to all currently existing agreements between competitors, including those entered into prior to March 12, 2009. In anticipation of these legislative changes, the Competition Bureau published a draft version of its *Competitor Collaboration Guidelines* in June 2009. A final version of these Guidelines was released on December 23, and includes significant variations from the language of the initial draft (to view, click [here](#)).

The Guidelines provide an overview of the Competition Bureau's approach to enforcing the new amendments, including its views on various categories of competitor collaborations such as joint ventures and strategic alliances. They also discuss potential defences, remedies and leniency provisions for agreements that may violate the new provisions. Procedurally, the Guidelines discuss how the Bureau will conduct an investigation involving competitor collaboration, including its decision whether to review a matter under the criminal or the civil provisions of the *Competition Act* (section 45 and section 90.1, respectively).

Key changes from the initial draft of the Guidelines discuss the Bureau's decision whether to review a matter under the criminal or the civil provisions and the process for resolving matters by negotiation with the parties to an agreement.

### BUREAU'S DECISION WHETHER TO REVIEW UNDER SECTION 45 OR SECTION 90.1

- Section 45 of the Act provides for criminal investigation of agreements between competitors that are considered anticompetitive *per se* (cartel behaviour including price fixing, output restriction etc.). Section 90.1 provides for the non-criminal investigation of agreements between competitors that are not anticompetitive *per se*.
- Once the Bureau has communicated to the parties that it will review a matter under section 90.1, the Guidelines state that the Bureau will not refer the matter for criminal prosecution on the basis of the same or substantially the same facts. The draft Guidelines had indicated that the Bureau would not refer such a matter for criminal prosecution unless there was "a material change in circumstances."
- No guidance is provided on the circumstances in which the Bureau *will* refer a matter for criminal prosecution. Rather, the final guidelines describe only the circumstances in which this will not be done – for example, when the Bureau determines that the agreement is ancillary to a broader or separate agreement between the same parties which is pro-competitive. The initial draft of the Guidelines had suggested that the Bureau would refer matters for criminal prosecution when it specifically determined that no defence or exception applied, unless in its sole discretion, it determined that referring that matter for criminal prosecution was not in the public interest.
- The final Guidelines state that agreements that are overt – rather than being limited to covert agreements – can be subject to criminal prosecution. This is significant because the actions that characterize criminal cartel behaviour are typically not overt, and it has been suggested that overt agreements among competitors be specifically exempted from criminal investigation by the Competition Bureau. The draft Guidelines had been silent on this point.

CONT'D ON PAGE 2

CONT'D FROM PAGE 1

- Territorial licensing agreements are not specifically addressed. The draft guidelines had indicated that such agreements should be subject to review under the civil provision rather than the criminal provision.

### NEGOTIATED RESOLUTION OF CASES

- The Guidelines describe the process by which agreements between competitors are investigated under the criminal provisions. Parties can approach the Bureau to resolve a criminal matter before the matter is referred to the Director of Public Prosecutions (DPP). However, once the matter has been referred, the DPP is responsible for plea and sentencing discussions. When the DPP and the parties are negotiating, Competition Bureau officers will assist the DPP and the Commissioner of Competition will provide recommendations. The draft Guidelines had not included guidance on these points.

- Also new to the final version of the Guidelines, the Bureau will consider alternative dispute resolution options in appropriate cases, including instances where the economic harm is negligible and there are no aggravating, and significant mitigating, factors.

The Guidelines are intended to assist firms in evaluating whether their existing agreements, including strategic alliances and joint ventures, may violate the new competitor collaboration provisions. However, while the Guidelines provide a general overview of the Competition Bureau's approach to the new law on collaboration between competitors, they leave some areas unclear, including the Competition Bureau's interpretation of how to apply the ancillary restraints defence where an agreement that restrains competition is part of a broader pro-competitive agreement.

The amendments to the competitor collaboration provisions of the *Competition Act* will be in force in less than two months. Canadian businesses should determine whether their existing agreements are in compliance with the new rules. Compliance risks are not limited to criminal prosecution (as described in the final version of the Guidelines) but also encompass civil liability for damages and/or injunctive relief.

For further information, please contact any member of the Blakes Competition, Antitrust & Foreign Investment Group.

Go to [blakes.com/english/subscribe.asp](http://blakes.com/english/subscribe.asp) to subscribe to other Blakes Bulletins.

NEW YORK	MONTRÉAL	OTTAWA	TORONTO	CALGARY	VANCOUVER		
	CHICAGO	LONDON	BAHRAIN	AL-KHOBAR*	BEIJING	SHANGHAI*	blakes.com
	* Associated Office						