

# Enhanced foreign investment scrutiny and a busy year for the Competition Bureau

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The Canadian government's approach to reviews of foreign investment and competition matters is in large part unchanged as a result of the ongoing COVID-19 pandemic. While the federal government issued a policy statement regarding increased scrutiny of certain foreign investments and temporarily extended the timelines for discretionary national security reviews, these changes are relatively restrained as compared to actions taken elsewhere. Similarly, the Competition Bureau (the Bureau) continues to emphasize active enforcement of the *Competition Act* notwithstanding COVID-19, issuing updated guidance in a number of areas, including mergers and competitor collaborations, as well as demonstrating an ongoing focus on enforcement in the digital economy.

## *Investment Canada Act* and foreign investment in light of COVID-19

While the Canadian government took steps in 2020 to adjust its approach to foreign investment in Canada in light of COVID-19, such steps have been relatively restrained. In marked contrast to Australia where monetary screening thresholds for foreign investment were dramatically dropped to zero and review timeframes were extended, the Canadian government did not lower applicable thresholds for mandatory review or expand the scope of investments subject to mandatory review.

Instead, the emphasis of the Canadian government to date has been on communicating its approach to foreign investment. On April 18, 2020, the government issued a [policy statement](#) advising that certain foreign investments will be subject to enhanced scrutiny under the *Investment Canada Act* during the COVID-19 pandemic in order to "protect the health and safety of all Canadians and to stabilize our economy." Specific investments mentioned were those related to public health and critical goods and services, and investments by state-owned investors. The policy statement also raised a potential concern about opportunistic investment. Nonetheless, the only statutory change to the *Investment Canada Act* review process has been the temporary extension of timelines for discretionary review of investments that may be injurious to national security. For more information, refer to our Osler Update entitled "[Canadian government temporarily extends national security review timelines](#)" on osler.com.

## *Competition Act* enforcement during the pandemic and beyond

The Bureau, like other international enforcement authorities, has emphasized in its public communications that the *Competition Act* will be actively enforced during COVID-19. The Bureau has continued its emphasis on enforcement in the digital economy, as well as conducting *Competition Act* merger reviews. It has also provided updated guidance on competitor collaborations.

### Merger review of failing firms

The Bureau has recognized that, while competition law principles must continue to be applied to all *Competition Act* merger reviews, the Bureau must be prepared to conduct merger reviews involving companies facing economic challenges in a timely manner.

Under the *Competition Act*, the fact that a target business is likely failing does not provide a defence for an otherwise anti-competitive merger. Rather, the loss of competition is not attributed to the merger if imminent failure is probable and if, in the absence of the merger, the firm's assets are likely to exit the market because no competitive alternatives exist. Although the Bureau has not changed its longstanding approach to merger review in the case of a firm in financial distress, the Bureau recently published a detailed [summary](#) of its review of American Iron & Metal Company Inc.'s (AIM) acquisition of Total Metal Recovery (TMR) Inc. The summary provides current guidance on the key elements of the Bureau's approach to failing firm claims, as well as expected timelines.

In February 2020, the Bureau closed a three-month review of AIM's non-notifiable acquisition of TMR. Prior to the merger, AIM and TMR were the two largest scrap metal processors in the province of Québec. Despite the resulting reduction in competition from the merger, the Bureau declined to take further action on the basis that TMR was a failing firm whose assets were likely to exit the market in the absence of the merger.

To evaluate TMR's viability, the Bureau engaged a financial expert to assess TMR's financials. Based on this assessment, it was apparent that TMR was insolvent and had a high likelihood of a bankruptcy filing in the immediate future. Once it determined that TMR was likely to fail, the Bureau examined the likelihood of various counterfactual scenarios (i.e., a restructuring, an acquisition by a competitively preferable purchaser or a liquidation) and the likely competition that would exist in such scenarios. The Bureau determined that attempts to restructure TMR would not have prevented its failure, nor enabled it to survive as a meaningful competitor. Similarly, the Bureau determined that liquidation of TMR's individual assets would not have been a determining factor in facilitating entry of a new competitor and was not likely to result in a materially higher level of competition than if the merger did not occur. Finally, the Bureau determined that, while a thorough search for potential alternative purchasers had been conducted, no such purchaser existed. For further details, refer to our Osler Update entitled "[Canadian competition law merger enforcement: \(almost\) business as usual](#)" on [osler.com](https://osler.com).

### Assessment of efficiencies in merger review

A unique aspect of the Canadian *Competition Act* merger review regime is the efficiencies defence. Under the *Competition Act*, the Competition Tribunal may not make a remedial order where it finds that a merger is likely to bring about gains in efficiency that will be greater than, and will offset, the anti-competitive effects of the merger and that the efficiency gains would not likely be attained if an order were made.

The process for the Bureau's consideration of the potential applicability of the efficiencies defence within the statutory timelines applicable to the merger review process has often been an issue for merging parties and the Bureau. In April 2020, the Bureau released a [position statement](#) regarding its 2019 review of Canadian National Railway Company's (CN) proposed acquisition of certain intermodal shipping assets of H&R Transport Limited (H&R). In its review, the Bureau, for the first time, applied its model timing agreement for mergers involving efficiencies claims. The Bureau's model provides a detailed process and timeline for its review and determination of efficiencies claims without resorting to litigation. Osler represented H&R in this matter.

The Bureau found that CN's acquisition of H&R was likely to result in a substantial lessening or prevention of competition for the supply of full truckload refrigerated intermodal services across eight origin-destination pairs. However, the merging parties asked the Bureau to consider whether the efficiencies defence applied to the transaction. The Bureau considered the efficiencies claimed by CN, which related to the elimination of overhead costs and duplicative facilities, IT systems and software licences. While the Bureau disagreed with the quantification of efficiencies claimed by CN, it concluded that the efficiency gains from the transaction outweighed its anti-competitive effects and therefore did not challenge the transaction. For further details, refer to our Osler Update entitled "[Canadian competition law merger enforcement: \(almost\) business as usual](#)" on [osler.com](#).

## Continued focus on competition law advocacy and enforcement in the digital economy

In early 2020, the Bureau released its four-year [Strategic Vision](#) which set out the Bureau's objective to be a "world-leading competition agency, one that is at the forefront of the digital economy." In July, the Bureau assumed the position of Presidency of the International Consumer Protection and Enforcement Network for a one-year term and intends to focus its tenure on issues of consumer trust in digital markets. Through October and November of this year, the Bureau hosted its first annual Digital Enforcement Summit, which was intended to allow the Bureau and its international counterparts to share best practices and explore new tools and strategies for tackling emerging enforcement issues in the digital era.

The Bureau has continued to be active in investigating competition in the digital economy. Most recently, in August, the Bureau sought [input](#) from market participants to assist with its abuse of dominance investigation into conduct by Amazon. Specifically, the Bureau's investigation focuses on Amazon policies that may impact third-party sellers' willingness to offer their products for sale at a lower price on other retail channels or may impede the ability of third-party sellers to succeed on Amazon's marketplace without advertising on Amazon's website or using its fulfilment service. The Bureau is also looking into strategies Amazon may use to influence consumers to purchase Amazon products over those offered by competing sellers.

## Competitor collaboration during the COVID-19 pandemic

In a [policy statement](#) released on April 8, 2020, the Commissioner acknowledged the extraordinary circumstances of the COVID-19 pandemic and advised businesses that the Bureau would be unlikely to challenge good faith efforts at competitor collaboration that were aimed at responding to the crisis and meeting the essential needs of Canadians. The Commissioner also opened a channel for businesses to obtain informal guidance from the Bureau's Cartels Directorate on proposed competitor collaborations. This guidance followed on the heels of similar statements of enforcement flexibility by other international antitrust regulators.

In his statement, the Commissioner recognized that businesses might need to establish collaborative buying groups or share supply chain resources to deliver essential goods to Canadians, and the Bureau did not want its existing enforcement policy to “chill” prompt and effective responses that might be required to help Canadians.

As a statement of enforcement intent, the Bureau’s guidance does not change Canada’s existing criminal prohibitions on anti-competitive agreements relating to pricing, market allocation or output restrictions. Moreover, it does not bind the Public Prosecution Service of Canada, the authority responsible for enforcing Canada’s criminal competition law. Nor does it insulate businesses from the possibility of private lawsuits seeking damages.

On a related note, on July 29, 2020, the Bureau released for public consultation an [update](#) to the 2009 Competitor Collaboration Guidelines. These Guidelines are important as they set out the Bureau’s enforcement approach to collaborations between competitors or potential competitors under both the criminal cartel and civil agreement provisions of the *Competition Act*. There are very few changes proposed by the Bureau. However, the changes do reflect the Bureau’s experience with certain issues such as hub-and-spoke conspiracies and non-competes, as well as its approach to assessing the extent to which artificial intelligence or algorithms may be employed to facilitate collusion. The consultation period has closed, and we expect the Bureau to release final updated guidelines in the new year.

## Competition Bureau confirms approach to no-poaching and wage-fixing agreements between competitors

On November 27, 2020, the Bureau issued a [statement](#) confirming that no-poaching, wage-fixing, and other buy-side agreements between competitors are subject to review under the civil provisions of the *Competition Act* only, and the Bureau will not assess these agreements under the criminal conspiracy provisions of the *Competition Act*.

Following the enactment 10 years ago of a dual track process for the assessment of agreements between competitors under the *Competition Act*, it was generally understood (based on the statutory language in the *Competition 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 *Competition 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 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 *Competition Act*; rather, such agreements will be assessed under the civil competitor agreement provisions of the *Competition 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.

The remedies available under the civil competitor agreement provisions of section 90.1 are very limited and do not include the potential for administrative monetary penalties. Importantly and, unlike in relation to the criminal conspiracy provisions, section 90.1 does not provide private parties a statutory right to commence private actions for damages for

harm suffered as a result of the agreement.

Buy-side agreements for the purchase of products and services continue to be subject to challenge in other non-criminal forums. As noted, the Bureau has indicated that it may scrutinize such agreements under the civil provisions in section 90.1 of the *Competition Act* and take enforcement action if warranted. The Bureau is in the process of updating the Competitor Collaboration Guidelines and has stated that it intends to outline its enforcement approach to buy-side agreements in greater detail in the updated guidelines. Businesses therefore must remain aware that they continue to be subject to potential civil liability under section 90.1 of the *Competition 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. In addition, 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 who may still choose to commence a private action for damages based on an alleged violation of the criminal provisions of the *Competition Act*.

## Continued emphasis on advocacy

The Commissioner has continued to be very active in fulfilling his mandate to advocate for policies at all levels of government that support vibrant, competitive markets, in addition to participating in numerous public hearings and consultations regarding the telecommunications markets, Canada's monetary policy framework, the digital agenda and the health care sector. On August 20, 2020, the Bureau launched the [Competition Assessment Toolkit](#) (Toolkit) for policymakers. The Toolkit is designed to assist regulators and policymakers at all levels of government to tailor law and policies appropriately to maximize the benefits of competition to the economy. The Toolkit offers a five-step process for policymakers to assess the impact of new and existing regulation and policies on competition.

As emphasized by the Commissioner in a recent speech, going forward we should expect the Bureau to focused on "making competition more central to Canada's economic affairs" in order to "reap the rewards of healthy competition in our economy: a more productive, dynamic and resilient economy that empowers consumers."