

competition law bulletin

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a new cartel regime in Canada

Canada's new cartel regime is in force as of today. New competitor agreements provisions were included in the March 2009 amendments to the *Competition Act*, but their operation was suspended for one year. Under the new regime, Canada has a bifurcated approach to the regulation of agreements between competitors: there is a *per se* criminal offence that is intended to apply to hard-core cartels and a civil review provision that is intended to apply to other agreements between competitors.

the new criminal cartel regime

The criminal cartel provision is intended to apply to hard-core cartel agreements. Agreements between competitors (or potential competitors) to:

- fix, maintain, increase or control the price for the supply of a product;
- allocate sales, territories, customers or markets for the production or supply of a product; or
- fix, maintain, control, prevent, lessen or eliminate the production or supply of a product

are *per se* illegal (i.e. such agreements are illegal regardless of their economic effects).

Companies or individuals convicted of violating the criminal cartel provision are liable for fines of up to C\$25 million and up to 14 years imprisonment. In addition, the Canadian *Competition Act* provides a statutory cause of action for loss or damage that results from conduct that is contrary to the criminal provisions of the Act and, therefore, companies and individuals violating the criminal cartel provision also face the risk of follow-on class actions.

An ancillary restraints defence provides a partial "safety valve" for non-hard-core conduct. However, it places the onus on the parties to the agreement to establish that the price, customer/territory or capacity restriction was directly related to, and reasonably necessary to achieve the objective of, a broader and separate agreement between the same parties that, when

considered without the restriction, would not contravene the new criminal offence. This will be a difficult standard to meet in many situations.

the new civil competitor agreement regime

The civil competitor agreement provision is designed to address competitor agreements that do not amount to hard-core cartel conduct, but that are “likely to prevent or lessen competition substantially in a market.” Under this provision, the Commissioner can challenge any agreement or arrangement made between competitors and seek a civil remedial order from the Competition Tribunal.

implications for businesses operating in Canada

There is some risk that the new criminal cartel provision could apply to legitimate arrangements between competitors: on its face, this provision could apply to agreements such as joint ventures, supply agreements or swap agreements between competitors that contain pricing, capacity restrictions or similar terms. The Competition Bureau has indicated that it intends to use its investigative discretion to limit its application of the criminal offence to hard-core cartel conduct. This is an important commitment, however, it does not bind plaintiffs’ counsel or judges (or future Commissioners). There is a risk, therefore, that non-cartel agreements could be subject to private actions under the conspiracy provision. It is important for businesses entering into agreements with competitors or potential competitors to assess this risk and to take steps to insulate agreements against potential challenges.

In addition, the Competition Bureau has indicated that it believes that hard-core cartel agreements will be easier to prosecute under the new regime. This belief has not yet been tested in court, however, it may signal that businesses should expect more aggressive cartel enforcement in Canada in the future.

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a cautionary note

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