



April 9, 2020

Via email: ised.minister-ministre.isde@canada.ca

The Honourable Navdeep Bains, P.C, M.P.
Minister of Innovation, Science and Industry
Innovation, Science and Economic Development Canada
235 Queen Street
Ottawa, ON K1A 0H5

Dear Minister:

Re: COVID-19 Pandemic and Urgent Competition Act Amendments

I am writing on behalf of the Competition Law Section of the Canadian Bar Association (CBA Section) to urge the federal government to amend the *Competition Act* to allow the Minister to exempt certain agreements between competitors and mergers from the application of the Act on public interest grounds. We envision that this power would be exercised expeditiously and only in extraordinary circumstances. We also recommend that this new power be clearly explained in guidance from the Minister.

The Canadian Bar Association is a national association representing over 36,000 jurists, including lawyers, notaries, law teachers, and students across Canada. We promote the rule of law, access to justice, effective law reform and provide expertise on how the law touches the lives of Canadians every day. The CBA Section promotes a greater awareness and understanding of legal and policy issues relating to competition law and foreign investment

The CBA Section commends the federal government and the Competition Bureau for their actions to address the COVID-19 crisis. We value our constructive relationship with the Bureau, which has allowed an open dialogue on how we can work together to enhance the effectiveness of competition policy in Canada. We understand that the Bureau issued further competitor collaboration guidance applicable to the crisis on April 8, 2020¹.

In the current environment, we believe urgent action is required to ensure the *Competition Act* does not have a chilling effect on businesses' ability to supply products and services to meet the needs of Canadians. As the COVID-19 emergency deepens and lengthens, there is a real potential for supply chains to seize-up, businesses to fail and essential products and services to become unavailable.

¹ See [online](#), Competition Bureau Statement on Competitor Collaborations During the Covid-19 Pandemic

Competitor collaborations and mergers to resolve these issues should not be prohibited or discouraged through the normal course application of the Act. The public health emergency risks becoming a social and economic disaster. These are not sentiments we express lightly.

In our view, the Minister and not the Bureau should exercise these exemption powers. The Act currently contemplates the possibility of Ministers exempting certain agreements and mergers in certain industries on public interest grounds and we believe this model should be adopted, with appropriate modifications.

The Bureau, as an enforcement agency, is not well suited to carry out public interest assessments, which require a balancing of policy considerations best left to elected officials. This approach is similar to the UK *Competition Act 1998*, which permits the Secretary of State to exclude “a particular agreement” or “any agreement of a particular description” where he or she “is satisfied that there are exceptional and compelling reasons of public policy.”

We believe that an exemption from the criminal and merger provisions of the Act – in extraordinary circumstances and on a public interest basis – is the best solution. Although general or fact specific guidance may be useful in some circumstances, in some cases agreements or mergers that are in the public interest will contravene the Act. It may be difficult or impossible for the Bureau to issue guidance to the contrary.

A legislative amendment is the only way to shield businesses from private actions. Concerned with potentially significant liability in civil litigation, many businesses will refuse to engage in necessary collaborations with competitors that are in the public interest, regardless of any assurances the Bureau gives on the exercise of its enforcement discretion. As noted in the Bureau’s April 8, 2020 statement, its guidance would not insulate conduct from the possibility of private action. Further, mergers that are critical to realize synergies and aggregate production and distribution capacities to meet demand for required products and services should be subject to this public interest override where appropriate and avoid the normal review process.

We have extensive experience commenting on draft legislation and proposed enforcement guidelines and would be pleased to assist in any way we can.

Yours truly,

(original letter signed by Marc-André O’Rourke for Huy Do)

Huy Do
Chair, Competition Law Section

CC Matthew Boswell
Commissioner of Competition Matthew.boswell@canada.ca
Paul Halucha
Privy Council Office (Assistant Secretary to the Cabinet, Privy Council Office Paul.Halucha@pco-bcp.gc.ca)