THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Draft Enforcement Guidelines on Competitor Collaboration

NATIONAL COMPETITION LAW SECTION
CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Competition Law Section of the Canadian Bar Association with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Competition Law Section of the Canadian Bar Association,

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I. INTRODUCTION

The National Competition Law Section of the Canadian Bar Association (the CBA Section) welcomes the opportunity to comment on the Draft Enforcement Guidelines on Competitor Collaboration (the Draft Guidelines) issued by the Competition Bureau in May 2009. The CBA Section strongly supports the continuing efforts of the Bureau to clarify its enforcement policies by publishing enforcement guidelines, information bulletins, speeches, press releases and other interpretive aids.

II. EXECUTIVE SUMMARY

The overall tone, perspective and level of detail in the Draft Guidelines is very helpful and provides useful guidance to the business community. Indeed, it is encouraging that the Draft Guidelines acknowledge the benefits of many competitor collaborations and clearly state that the new section 45 is intended to avoid discouraging potentially beneficial alliances. The CBA Section commends the Bureau's introductory comments to the effect that they would not proceed under section 45 against agreements that have some pro-competitive benefits.

While no guidelines can eliminate all uncertainty regarding the scope of the new legislative provisions (which is to some degree inherent in the provisions), some key areas of the Draft Guidelines, in our view, require more discussion or detail to provide greater clarity. In particular:

- The discussion of the relationship between the new provisions and other provisions of the *Competition Act* (mergers, abuse of dominance, etc.) would benefit from greater detail and explanation of the Bureau's views.
- Since the decision between the civil and criminal track is very important, the Bureau should commit to making an election as quickly as possible. Otherwise, it may be exposed to suggestions that it has leveraged or appeared to leverage civil outcomes

against criminal risk, and issues of self-incrimination may preclude the use in criminal proceedings of certain evidence obtained while investigating pursuant to the civil track.

- It would be helpful to clarify the ambiguity in the Draft Guidelines about the elements necessary to establish the existence of an agreement, by revising Section 2.2 to provide that "[a]n agreement … may be inferred from a course of conduct and other evidence", and similarly adjusting Section 3.7.

- It would be helpful to expand upon the discussion of when parties will be considered to be competitors for the purposes of sections 45 and 90.1 and similarly, how the Bureau will determine what is a "product". For instance, would a "product", for these purposes, be no broader than the relevant antitrust product market?

- The Draft Guidelines attempt to focus section 45 on horizontal (rather than vertical) agreements, for example, drawing a distinction between agreements to fix prices among franchisees and a vertical price agreement imposed by a franchisor. An additional approach might be to limit the application of section 45 to agreements with mutual restraints. That is, it is not enough for one party to impose a restraint in respect of pricing, customers or territories, but rather the other party must also agree with respect to its own pricing, customers or territory.

- Consistent with the overall approach of restricting the application of section 45 to "hardcore" restraints, the Draft Guidelines should favour a liberal interpretation of the ancillary restraints defence. Further clarification of the Bureau's approach to: (1) the meaning of "ancillary" in subparagraph 45(4)(a)(i); and (2) the meaning of "reasonably necessary" in subparagraph 45(4)(a)(ii) would help to alleviate uncertainty regarding the scope of the defence.

- In addition, it would be helpful to know how the Bureau views the ancillary restraints defence in comparison to the enforcement approach and developed jurisprudence in the United States and the European Union. For instance, the Draft Guidelines should specifically state that, unlike the United States, the Canadian interpretation of the ancillary restraints defence does not require that the impugned restraint be ancillary to an efficiency enhancing aspect of the agreement/alliance.

- Additional guidance should be provided with respect to the Bureau's views on the application of sections 45 and 90.1 to settlement agreements in respect of IP rights (e.g., "reverse payments" in the pharmaceutical sector).

- The Draft Guidelines suggest that subsequent changes in market structure may affect the susceptibility of an agreement to challenge under section 90.1. If an agreement would not result in a substantial lessening or prevention of competition at the time it is entered into, the basis for challenging such an agreement at a later date is unclear (particularly if the changes are extraneous to the parties to the agreement or the agreement itself).

- Lastly, it would be beneficial if the Draft Guidelines could provide more nuanced or detailed examples to assist businesses in understanding how the Bureau will apply the new provisions in practical situations.

III. GENERAL COMMENTS

The CBA Section believes that the Draft Guidelines could be streamlined by eliminating duplication in certain areas. In particular:

- What constitutes a "competitor" and an agreement or arrangement (or conspiracy, in the case of section 45) is to a significant degree common between sections 45 and 90.1, making it more efficient to have one section discussing these issues (highlighting any differences between the provisions, e.g., the fact that companies will not be considered competitors if they will be so only because of a [section 90.1] collaboration).

- The discussion of section 90.1 could be restructured to discuss all the factors relevant to a section 90.1 analysis in the general section (e.g., the *Merger Enforcement Guidelines* (MEGs) factors (3.4), whether a collaboration involves significant terms of trade (3.6), whether the collaboration leads to an exchange of competitively sensitive information (3.6 and 3.7), whether agreements contribute to or, conversely, impair innovation (3.8), etc.). Many of the factors currently included in the discussion of specific types of agreements are common to various types of collaborations, and thus could be included in the more general discussion. The discussion pertaining to the specific types of agreements could then focus on those factors that are particularly or uniquely relevant to such agreements.

IV. PART 1 – ANALYTICAL FRAMEWORK

Section 1.2 – Determining between Strategic Alliance/Conspiracy Provisions or Other Provisions of the Act

a. 1.2(a) Mergers

If the Bureau believes it does not have jurisdiction to challenge a merger under section 45 (as opposed to this being simply a matter of discretion), the Draft Guidelines should be express on this point. Alternatively, if the Bureau believes it does have jurisdiction, then that position should similarly be made clear.

The CBA Section believes that the discussion of the interaction with the merger provisions is incomplete. To simply say that sections 45 and 90.1 apply where there is no acquisition of a significant interest, and the merger provisions apply when there is such an acquisition, is too general to provide meaningful guidance – the MEGs define significant interest very broadly, i.e. as the ability to materially influence the economic behaviour of a business. In many cases, such as joint ventures, both section 90.1 and the merger provisions in section 92 could apply to the same agreement. Guidance is needed as to the types of factors the Bureau will consider in determining which provision it will seek to apply. For business, the practical implications include whether merger filings will be rejected by the Bureau, whether parties can rely on the one-year limitation period applicable to a merger, or conversely, whether parties will be required to submit to the merger process because the Bureau does not want to proceed under section 90.1. With this in mind, the CBA Section recommends adding the following paragraph to clarify the dual jurisdiction issue:

> Cases may arise that can be treated as either mergers or competitor collaborations, but which are not notifiable transactions within the merger provisions. In such cases, the Bureau would be willing to receive voluntary filings under the merger provisions or to issue an advisory opinion under section 90.1 at the election of the parties to the transaction.

b. 1.2(b) Agreements Between Federal Financial Institutions (FFIs)

The description of the relationship between sections 45 and 49 should be clarified. The Draft Guidelines should clearly state that, if an FFI is engaged in conduct described in 49(1) but which also falls within an exemption in 49(2), then it is not subject to section 45. Other agreements between FFIs are subject to sections 45 and 90.1.

c. 1.2(d) Bid-Rigging

The Draft Guidelines state that section 90.1 may apply to bidding consortia, even where the consortia make their agreement known to the person requesting the bids or tenders. It is not clear that it is appropriate to subject bidding consortia to possible challenge under section 90.1 where they have complied with the disclosure requirements under section 47. In any event, and perhaps more significantly, section 90.1 will be of limited value for bid-rigging agreements given the limited relief available and the difficulty in obtaining a timely order under section 90.1 in the context of a tender. The Draft Guidelines should also make clear that a bidding agreement complying with section 47 will not be challenged under section 45.

d. 1.2(e) Abuse of Dominance

At page 4, paragraph (e), the Draft Guidelines state that agreements between competitors that are not conspiracies or mergers will "generally be examined by the Bureau under section 90.1" but that such agreements may also be examined pursuant to the abuse of dominance provisions "in certain circumstances". The prospect of significant administrative monetary penalties under the abuse of dominance provisions could creates an undesirable chilling effect on competitor collaborations. As such, clear and detailed guidance should be provided on the specific factors that will cause the Bureau to examine an arrangement or agreement between competitors under section 79 rather than section 90.1.

As suggested by the example in this section of the Draft Guidelines, the Bureau may choose to pursue an agreement between competitors under section 79 where the parties are considered dominant and have engaged in a practice of anti-competitive acts, the impact of which is a substantial lessening or prevention of competition. Accordingly, the most important distinction between sections 79 and 90.1 is the requirement, under section 79, to show that the parties have engaged in a practice of anti-competitive acts. The Federal Court of Appeal has defined an "anti-competitive" act as one whose purpose is an intended negative effect on a competitor that is predatory, exclusionary or disciplinary. Many competitor collaborations or alliances could at some level be characterized in some sense as exclusionary (i.e., resulting in a strategic advantage or benefit to those participating in the alliance). The Draft Guidelines should provide guidance or more detailed examples of when an agreement or collaboration between competitors would (or would not) be characterized as exclusionary. For instance, if the Bureau is of the view that legitimate strategic alliances that may be intended to provide a strategic or competitive advantage to its participants would not be considered "exclusionary" in this context, it would be helpful to state that in the Draft Guidelines.

The CBA Section also recommends that the last sentence in this section of the Draft Guidelines be changed from "where the competitors are jointly dominant and the agreement has a negative effect on a competitor that is exclusionary, predatory or disciplinary" to "where the competitors are jointly dominant and the purpose of the agreement is an intended negative effect on a competitor that is exclusionary, predatory or disciplinary". As the Federal Court of Appeal noted in the *Canada Pipe* decision, the focus of the examination under subsection 79(1)(b) must be the purpose of the act, not the effect.[1]

Section 1.3 – Criminal or Civil Track

The timing of, and basis for, the Bureau's decision to proceed on a criminal or a civil track will be important for businesses in assessing the potential risks associated with joint ventures or other collaborative activities and for the Bureau in ensuring the success of its enforcement actions. The CBA Section commends the statement in the Draft Guidelines that the Bureau "will make every effort to arrive at a timely decision" on whether to proceed under section 45 or 90.1. The CBA Section encourages the Bureau to elect whether to proceed on a civil or criminal process as early as possible. A delayed election to proceed on a criminal basis may limit the Bureau's ability to prosecute an alleged offence by giving rise to issues of self-incrimination with respect to information provided by the parties prior to the election. In *R. v. Jarvis*, the Supreme Court of Canada ruled that the Canada Revenue Agency cannot use its civil audit powers for the "predominant purpose" of gathering evidence to lay a criminal charge in tax evasion.[2] Similar restrictions are likely applicable to the Bureau's prosecution of competition offences under a statute with both civil and criminal enforcement regimes.

A delayed election to proceed on a civil track could create the perception that the Bureau is leveraging civil outcomes against criminal risk, particularly where possible resolution discussions take place prior to a determination of whether the matter would proceed as a civil or criminal matter. The determination to proceed on one track or the other should be taken as early as possible in the investigation, and the decision should normally not be revoked.

1 *Canada (Commissioner of Competition) v. Canada Pipe Co. (F.C.A.), 2006 FCA 233 (CanLII).*

2 [2002] 3 S.C.R. 757, 2002 SCC 73.

The CBA Section recommends adding a generalized statement in Section 1.3 that the Bureau will not pursue potentially pro-competitive agreements (which are not deserving of condemnation) on the criminal track without a detailed inquiry into their actual competitive effects. Additional guidance on the Bureau's approach to several common commercial situations would also be of assistance, including, for example:

- a joint advertising program among independent retailers trying to compete against a large retailer (e.g., two independent hardware stores jointly advertise a Saturday sale for specific products, including the prices for those products offered at that sale);
- three competitors in a highly competitive business jointly owning several production facilities and deciding, in response to what they believe is a permanent reduction in demand, to rationalize production by closing one or more of the facilities; or
- two professionals, such as lawyers or accountants, sharing office space and an administrative assistant to reduce costs, and also agreeing to allocate work between them, for example one restricting his services to individuals and the other to small businesses.

Finally, the Bureau could provide greater clarity in its discussion of when proceedings under section 45 may be precluded as a result of the commencement of prior proceedings under another section of the Act. Section 1.4 of the Draft Guidelines provides that where the Commissioner has initiated proceedings under section 76, 79, 90.1 or 92 of the Act, she will not refer the same agreement to the DPP for prosecution under section 45 "provided there has been no material change in circumstances". This section of the Draft Guidelines differs from the wording of section 45.1, which stipulates that where the Commissioner seeks an order under section 76, 79, 90.1 or 92, no proceedings may be commenced against the same party under section 45 "on the basis of facts that are the same or substantially the same". It is unclear whether the formulation in the Draft Guidelines broadens or narrows the scope of the principle articulated in the legislation. It is not apparent from the Draft Guidelines whether the Bureau would shift its ground only where there is an actual change in the factual basis on which the Commissioner initiated the non-section 45.1 proceedings, or whether the accumulation of additional facts in the course of the civil proceedings might change the Bureau's perception of the circumstances. The CBA Section strongly encourages the Bureau to articulate more precisely how it will address the possibility of parallel proceedings in the Draft Guidelines. If the standard expressed now in the Draft Guidelines is maintained, the Bureau should explain how that approach is compatible with the Act.

V. PART 2 – THE CRIMINAL PROHIBITION

Section 2.2 – What Constitutes an Agreement

There is some ambiguity in the Draft Guidelines about the elements necessary to establish the existence of an agreement. Section 2.2 states that "An agreement ... may be inferred from a course of conduct <u>or</u> other evidence" [emphasis added]. Section 3.7 states that "activities which assist competitors in monitoring each other's prices <u>or</u> conduct otherwise consistent with the existence of an agreement may be sufficient to prove that an agreement was concluded between the parties". These statements suggest that conscious parallelism alone – a mere "course of conduct" – might be considered sufficient for charges to be laid. However, Section 2.2 also states (consistent with the relevant case law[3]) that the Bureau does not consider conscious parallelism sufficient to establish an agreement for the purpose of section 45(1) of the Act, and that parallel conduct *coupled with* facilitating practices may be sufficient. As a basis for the inference that an illegal agreement exists, Section 2.2 should read "[a]n agreement ... may be inferred from a course of conduct <u>and</u> other evidence", and similarly in Section 3.7.

Section 2.3 – Who Is a Competitor

a. General

The Draft Guidelines should expand on how the Bureau proposes to determine who is a competitor for purposes of section 45 or 90.1 In the CBA Section's view, the last paragraph on page 10 is a circular definition of competitors as parties offering "competing" goods and services in the same or "competing regions". Sections 2.3 and 3.3 provide no further clarification on this point.

The Draft Guidelines should discuss the conceptual framework that the Bureau will employ to determine who is a competitor. An important question to consider at the outset is whether the determination of a "competitor" for purposes of section 45 should be the same as for purposes of section 90.1.

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3 *Atlantic Sugar Refineries Co. Ltd. v. A.G. Canada* (1980), 54 C.C.C. (2d) 373, at p. 396.

Given the objective of the amended section 45 to avoid a detailed economic analysis and debate of competitive effects, it is understandable that the Bureau may prefer to avoid a detailed economic analysis to determine who is a "competitor" for purposes of this criminal provision. Indeed, a detailed economic analysis of the relevant market would not be necessary where the parties to the agreement supply the same product or very close substitutes. However, in all other cases, some consideration of the economic and market circumstances is unavoidable. For example, if the Toronto Blue Jays and the Toronto Maple Leafs were to agree to ticket prices, would the Bureau consider this an agreement among competitors in a sports entertainment market? Given the substitution possibilities for changes in relative prices of a wide range of products, where and how would the Bureau draw the line?

In the civil provisions for abuse of dominance and merger review, the Bureau has a well-developed conceptual framework for market definition and hence competitor definition. It needs to articulate a similar framework for the criminal provision. Without an economic framework, enforcement decisions could be based on *ad hoc* and subjective factors that undermine transparency and predictability. The standard market definition methodology used for the civil provisions may be the most logical choice, even if in some cases that requires some economic evidence.

Some have suggested that market definition in criminal conspiracy is self-defining in that firms would not enter into an agreement unless they were competitors and therefore stand to benefit from it. While this argument has some superficial appeal, it assumes that any agreement on, say, price between two firms whose products compete at all would be anti-competitive. For example, firms may have agreements on pricing or output on goods that are stronger complements than competitors (e.g., a theatre and restaurant setting a price on a dinner-and-movie package, even though the restaurant and theatre might be viewed as competing in a broad "entertainment" market).

We understand that the Bureau intends to resort to section 45 proceedings only where the parties are obviously close competitors. If that is the case, the Bureau should state that.

Otherwise, as a starting point, the Bureau may want to state that it would not consider, for the purposes of section 45, two persons to be competitors if they did not supply products in the same antitrust "market", as defined in the MEGs. The Draft Guidelines might also add that the Bureau would look at the available evidence of who is a competitor, including:

- the internal business documents and plans of the parties as to their views on whom they compete with;
- views of other industry participants not party to the agreement including customers and competitors;
- industry studies and surveys;
- similarities in terms of the functional product characteristics, pricing and customers among the firms to the agreement; and
- economic evidence or studies on market definition.

With respect to section 90.1, a full competitive effects analysis is required. Accordingly, there appears to be no reason for not undertaking the usual market definition analysis found in the merger and abuse of dominance provisions.

In the discussion of what constitutes a potential competitor, the Draft Guidelines indicate that the Bureau would consider evidence that the parties were planning to offer or likely to offer competing products in the same or competing regions. The concept of "planning" or "likely" to offer creates a broad scope for investigation. The Draft Guidelines should indicate that speculation on a company's part is insufficient and the Bureau would require actual evidence of plans to offer a product or enter a market in a timeframe consistent with the agreement. Similarly, evidence of actual competition in other regions not subject to the agreement should not, on its own, be sufficient to demonstrate that parties are potential competitors. Also, occasional sales into a particular area should not automatically make a firm a competitor of other suppliers of that product in that area.

Finally, it would be helpful to explain in more detail what is intended in footnote 17 to Example 2, which suggests that the term "product" includes differentiated products that "compete". Again, this should be guided by a sound analytical approach based in economics.

b. Trade Associations, Directors, Officers and Employees

The Draft Guidelines state that trade associations may be considered a principal party to an offence under section 45. However, as a trade association cannot be a "competitor", and could only be charged in connection with a section 45 offence by virtue of the aiding and abetting provisions or counselling provisions of the *Criminal Code.*

Similarly, during the Toronto roundtable consultations, Bureau representatives suggested that a director, officer or employee of Firm A might not be a "competitor" of Firm B or any of its directors, officers or employees, even if Firms A and B are competitors, but that such individuals may be charged as parties to a section 45 offence by virtue of the companion liability provisions of the *Criminal Code* (This position is apparently based on the contrast to the prior wording of section 45 under which any "person" (natural or legal) could be liable.) The Draft Guidelines should clarify the Bureau's position on these points in the discussion of the definition of "competitor".

c. Intellectual Property Rights and the Definition of "Competitor"

In addition to a general discussion of competitors for the purpose of sections 45 and 90.1 of the Act, the Draft Guidelines should acknowledge the uniqueness of intellectual property (IP) rights in this context. IP rights warrant special attention because, by operation of law, they restrain competition between persons who otherwise may actually (or potentially) compete with one another. The holder of an IP right may enter into agreements with other persons where the agreements expressly limit the ability of the other persons to compete, having regard to the holder's IP right. The Draft Guidelines should identify whether the Bureau would consider persons to be competitors where:

- one of them has the right to exclude others from producing or selling a product at all, or in a particular way, through the exercise of an IP right; and
- one of them is an IP rights holder and licenses or allows another person to use an IP right, but then seeks to fix prices, markets or production levels of that other person in respect of that right.

Since IP rights, by law, eliminate competition, the Draft Guidelines should state that as long as the IP rights holder is exercising and not extending its rights, section 45 or 90.1 do not apply. Persons should not be considered competitors where one of them has the right to exclude others from producing or selling a product through the exercise of an IP right. In addition, where an IP right holder licenses others to sell a product entirely protected by an IP right, but places limitations in the licence as to where the product can be sold, at what price or how much can be sold, the Draft Guidelines should clearly state that section 45 or 90.1 will not apply as the legal right to exclude or limit competition flows from the IP right, not from the licensing agreement, and the IP licensees are not competitors for the purposes of section 45 or 90.1.

As discussed below with respect to Section 2.6, the Draft Guidelines should address licences and settlement agreements predicated on IP rights where one or more of the scope, validity and enforceability of the IP right is uncertain.

d. Section 2.3(c) – Dual-Distribution and Franchise Agreements

The CBA Section generally believes that the Bureau's proposed approach on dual distribution and franchise arrangements is reasonable and helpful. We agree with the Bureau's view that a supplier of a customer should not be considered a competitor of the customer in respect of the product being supplied. Rather, competition between supplier and customer is limited to dual-distribution type arrangements, in which case the Bureau states that arrangements between a single supplier and a single distributor will be addressed under the Act's civil provisions, with section 45 reserved for situations where a (horizontal) agreement exists among "unaffiliated distributors to restrain competition among themselves in their capacity as competitors, such as by allocating markets or fixing prices". More generally, the CBA Section endorses the Bureau's recognition that "it may be difficult to distinguish between a horizontal and vertical restraint in a dual-distribution system where the supplier competes for sales with unaffiliated distributors", leading the Bureau to state, rightly, that such arrangements "are not deserving of condemnation without a detailed inquiry into their actual competitive effects".

This portion of the Draft Guidelines attempts to focus section 45 on horizontal (rather than vertical) agreements, for example, drawing a distinction between agreements to fix prices among franchisees and a vertical price agreement imposed by a franchisor. With the difficulty in distinguishing between horizontal and vertical restraints, an additional potential approach is to limit the application of section 45 to agreements with mutual (rather than unilateral) restraints. That is, in order for subsection 45(1) to apply, it is not enough for one party to impose on the other a restraint on pricing, customers or territories. Rather each party must agree with respect to its own pricing, customers or territory.

While the CBA Section agrees with the Bureau's general approach to dual-distribution and franchise agreements, the Bureau's approach to dual-distribution and franchise agreements could benefit from greater clarity in certain respects:

- The Bureau distinguishes agreements between a single supplier and a single customer from agreements between a supplier and two or more unaffiliated distributors, the latter being susceptible to evaluation under section 45 of the Act. Virtually every distribution arrangement could be interpreted as falling under the latter description. A clearer approach would be to state that distribution arrangements between a single supplier and a distribution network will be assessed under the civil provision, unless there is evidence of an illegal horizontal agreement among the distributors.

- While we believe the Bureau's intent is to adopt a similar approach for evaluating dual-distribution and franchise arrangements, the Draft Guidelines could be interpreted as setting out slightly different approaches. For dual-distribution arrangements, the Draft Guidelines state that the Bureau will examine an agreement involving a single supplier and two or more unaffiliated distributors under section 45, while agreements between franchisors and franchisees will be evaluated under the civil provision except where the agreement is among the franchisees to restrain competition among themselves. Again, the CBA Section believes that both dual-distribution and franchise agreements should be evaluated under the civil provisions except where there is evidence of an illegal horizontal agreement.

- According to the Draft Guidelines, the Bureau will consider the application of section 45 where "a supplier imposes a restraint on distributors not because the supplier was of the view that such a restraint was necessary, but because the distributors acting in concert coerced or requested the supplier to impose the restraint". The reference to "or requested" raises the question of whether the Bureau recognizes any scope for downstream purchasers to advocate in favour of an upstream supplier adopting a resale price maintenance (RPM) policy. In particular, if there is no threat or coercion associated with the advocacy of that policy, it would not be appropriate to view the advocacy as a potential violation of section 45 insofar as the decision to adopt (or to not adopt) the policy must be made by the supplier. The supplier's decision is the type of conduct intended to be addressed under the civil RPM provision, section 76, and not section 45. Additionally, if a franchise enjoys market power, such power resides in the hands of the franchisor and not the franchisees.

- Section 2.3(c) of the Draft Guidelines also refers to licensing of IP, stating that, "subject to certain exceptions", the Bureau does not consider territorial or customer restrictions in IP licensing agreements to be agreements between competitors. Implicit in such agreements is that the IP rights owner licenses the IP in question to multiple licensees, with different licensees enjoying specified rights in geographic territories or customer categories. The Draft Guidelines would be enhanced by a more detailed discussion of the "certain exceptions" contemplated by the Bureau. For example, it would be helpful to articulate those situations where, in the Bureau's view, such restrictions would be regarded as an agreement between competitors.

Section 2.4 – Types of Prohibited Agreements

The CBA Section agrees with the Bureau's characterization of section 45 as prohibiting agreements between competitors or potential competitors that constitute "naked restraints" on competition, which the Bureau further describes as "restraints that are not implemented in furtherance of a legitimate collaboration, strategic alliance or joint venture". This general description of section 45's scope broadly captures the intention of section 45, and the need to limit its scope to agreements that are unambiguously anti-competitive in nature.

a. Section 2.4(a) – Price-Fixing Agreements

The CBA Section broadly agrees with the proposed approach to evaluating whether an agreement constitutes a "price-fixing agreement" for the purposes of section 45(1)(a). In keeping with the desirability of constraining section 45's application to so-called "naked restraints", the CBA Section agrees that it is not enough for an agreement to have the effect of increasing prices for section 45(1)(a) to apply, as this would capture legitimate agreements that relate only indirectly to pricing. The CBA Section also supports the Bureau's indication that it would not prosecute joint purchasing agreements under subsection 45(1).

Conversely, the CBA Section believes that the statement that section 45(1)(a) prohibits competitors' "use of a common price list in their negotiations with customers" is overly broad. The Bureau likely intended this statement to capture situations where competitors either agree to a specific price list for use in negotiations with customers, or agree to use an industry standard list for such purpose. Absent such an agreement, however, mere use of a price list by competitors cannot, in the CBA Section's view, offend section 45. Even assuming an agreement to price from an industry standard price list, it is unclear whether this would constitute an agreement to fix prices, as using a common reference for negotiation purposes does not necessarily affect the price at which the product will be supplied by each competitor (where such prices continue to be individually negotiated between competitors and their respective customers). Moreover, an agreement to use a common reference point does not necessarily limit competition, but may assist in setting a viable price in a traded commodity, and thus enhance competition. Indeed, use of "reference" price points is not uncommon, examples being the Brent price of crude oil or pricing lending rates off of LIBOR or prime.

Finally, the Draft Guidelines should state that section 45 only applies to horizontal agreements between competitors. It does not, for example, apply to setting a price between competitors in the context of a *bona fide* purchase and sale transaction between them, because the agreement is not horizontal in nature (i.e., the section is inapplicable to an agreement entered into not in the parties' capacity as competitors, but as supplier and customer, respectively).

b. Section 2.4(b) – Market Allocation Agreements

The CBA Section generally agrees with the proposed approach to evaluating whether an agreement constitutes a "market allocation agreement" for the purposes of subsection 45(1)(a) of the Act. Among other things, the CBA Section supports the statement that it "will not normally apply subsection 45(1)(b) to agreements that allocate markets for the resale of products supplied by a supplier to a customer, even where the supplier also competes with the customer in respect of the sale of that product". As this issue frequently arises in so-called "grey marketing" cases involving IP rights, the Bureau should state explicitly that this approach extends to provisions imposed by suppliers requiring customers to agree not to distribute products outside of certain specified territories.

c. Section 2.4(c) – Output Restriction Agreements

The CBA Section generally agrees with the proposed approach to evaluating whether an agreement constitutes an "output restriction agreement" for the purposes of section 45(1)(c) of the Act. At the Toronto roundtable consultation sessions, however, Bureau officials stated that the Bureau will evaluate group boycotts under the civil provisions rather than under section 45. As such boycotts may be undertaken by competitors and may result in a reduction in output (albeit output of the entity or entities targeted by the boycott), the Draft Guidelines should explicitly set out the Bureau's approach with respect to group boycotts.

The Draft Guidelines should more clearly specify that output restriction agreements will fall within section 45(1)(c) only where entered into by competitors in their capacity as competitors. For example, how would the Bureau treat a situation where competitors co-own several plants and decide to close one or more due to a permanent decline in demand leading to overcapacity? While the agreement would restrict output, the CBA Section does not believe it should be construed as an agreement among competitors to limit output.

Another issue the Bureau should consider addressing relates to arrangements common in the oil sands industry where the resource is located primarily within a small geographic non-urban area. Due to their large scale, such oil sands projects cannot practically proceed concurrently, but require some degree of coordination of development. Arrangements to time these projects are required to manage input shortages and social strains on small communities. In the short run, coordination may indirectly affect the supply of a product by delaying construction in some capacity. However, this effect should be insufficient to invoke section 45 given that there is no anti-competitive intent. The Bureau should state that these types of arrangements will be addressed, if at all, under section 90.1.

Section 2.5 – Ancillary Restraints Defence

The Bureau explained during the Roundtable discussions that it intends to examine legitimate joint ventures (i.e., joint ventures that are not a sham for hard core cartel activity) only under section 90.1 and not section 45. This explanation is helpful and important. The CBA Section recommends including a statement in the Draft Guidelines to this effect.

However, the CBA Section has some concerns about the potential chilling effects arising from the Bureau's interpretation of the ancillary restraints defence in subsection 45(4).

The importance of the ancillary restraints defence stems from the breadth of section 45(1). Legitimate alliances and joint ventures between competitors may involve coordination on pricing or other matters that may appear to contravene section 45(1). Notwithstanding the apparent legitimacy or innocuous nature of the collaboration, the onus will shift to the parties to justify their agreement under the ancillary restraints defence in section 45(4). This is true even where the parties combined have no possible market power and there is no conceivable prospect of harm to competition or consumers.

Two aspects of section 45(4) create considerable uncertainty and the Bureau's enforcement approach with respect to them should be clarified: the meaning of "ancillary" in section 45(4)(a)(i); and the meaning of "reasonably necessary" in section 45(4)(a)(ii).

a. Meaning of "Ancillary"

The Draft Guidelines interpret "ancillary" to mean "functionally incidental or subordinate to the main objective of some broader agreement". Ancillary restraints are then distinguished from "naked restraints", the latter described as "those that are not implemented in furtherance of a legitimate collaboration, strategic alliance, or joint venture".

In most cases where legitimate collaborations include agreements on price or other matters within section 45(1), it will be easy to conclude that the agreements are not "naked" in the sense of existing as standalone agreements. If that in itself is sufficient for the Bureau to conclude that the restraints are ancillary, then the Draft Guidelines should clearly state so. Otherwise, there may be unnecessary uncertainty on whether the restraints are sufficiently "incidental" or "subordinate" to be characterized as merely "ancillary". Coordination of pricing or other matters covered by section 45(1) may often be central or integral to a joint venture or other strategic alliance.

For example, a joint venture may involve substantial integration of activities (including decisions on matters such as pricing and which markets to serve) with effects similar to a merger, but without actually consummating a merger. This could arise due to foreign ownership restrictions or other considerations. (While the Bureau might potentially review the joint venture as a merger under section 92, absent some express guidance from the Bureau on this point, it would be difficult to exclude the possibility of scrutiny under section

45.) The key question is: Would the Bureau consider coordination on pricing and other section 45(1) matters in this situation to be ancillary to the joint venture? If so, the Draft Guidelines should say so to avoid unnecessary inquiry into whether particular restraints are sufficiently incidental or subordinate to be properly classified as ancillary. In addition, the CBA Section recommends that the Draft Guidelines include a hypothetical example along these lines to illustrate that such restraints, irrespective of how core or essential they might be to the legitimate collaboration, will be considered ancillary restraints.

The CBA Section understands that *per se* condemnation under U.S. antitrust law is generally reserved for naked restraints of trade with no purpose except stifling competition and where experience has shown that such a restraint has almost always had demonstrable anti-competitive effects. On that basis, it seems easy to conclude that most legitimate competitor collaborations would not be subject to *per se* treatment. Many joint ventures and other alliances appear to be subject to rule of reason analysis in the U.S. irrespective of whether courts expressly refer to the ancillary restraints doctrine, and the word "ancillary" does not appear in the U.S. *Antitrust Guidelines for Collaborations Among Competitors*. Ancillary restraints doctrine may be a useful way of considering the issue. However, it is unclear whether under U.S. law a strict application of the ancillary restraints doctrine is the only basis for concluding that *per se* treatment is not appropriate. In any event, we believe it would be helpful to clarify that "ancillary" is understood in section 45(4) to mean simply "not naked", and it otherwise does not matter whether the restraints could be considered more than merely incidental or subordinate. More generally, it may be helpful to understand the extent to which the Bureau considers that the ancillary restraints defence may be influenced by the enforcement approach and relevant jurisprudence in the U.S., European Union, or elsewhere. For instance, the Draft Guidelines should specifically state that, unlike the U.S., the Canadian interpretation of the ancillary restraints defence does not require that the impugned restraint be ancillary to an efficiency enhancing aspect of the agreement or alliance.

In a recent joint venture case, the U.S. Supreme Court held the ancillary restraints doctrine to be inapplicable in determining whether *per se* treatment should apply to common pricing that was a "core activity" of the joint venture.[4] The court considered the joint venture to be an integrated "single entity" so its internal pricing decisions were not *per se* unlawful. In that regard, the Bureau should more clearly articulate when parties to an alliance or joint venture will be considered to have formed a single entity and the Bureau will review the matter only as a "merger" under section 92, not as an agreement under section 45. Again, the CBA Section recommends including a hypothetical example illustrating when a competitor collaboration will be treated as a merger and not subject to section 45. The first hypothetical example in the U.S. *Antitrust Guidelines for Collaborations Among Competitors* is a collaboration that would likely be analyzed as a merger.

b. Directly Related and Reasonably Necessary

Assuming restraints that would contravene section 45(1) qualify as ancillary, there still remains potential uncertainty (and chilling effect) on whether the restraints are "directly related to, and reasonably necessary for giving effect to" the objective of the broader or separate agreement that does not contravene section 45(1).

Legitimate alliances and joint ventures may involve coordination at many levels, from research and development, through production to distribution, marketing and sales. The Draft Guidelines are helpful in indicating that, in the context of section 45, the Bureau is generally unlikely to second guess the parties on their view of which restraints are necessary. In particular, the Draft Guidelines state that "unless there are significantly less restrictive alternatives to give effect to the objective of the broader agreement, the Bureau is likely to conclude that the restraint is reasonably necessary".

However, the Draft Guidelines also state that "[i]f the parties could have achieved an equivalent or comparable arrangement through practical, less restrictive means that were reasonably available to the parties at the time when the agreement was entered into, then the Bureau will conclude that the restraint was not reasonably necessary". This raises uncertainty regarding whether particular restraints are reasonably necessary, even where the

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4 *Texaco Inc. v. Dagher,* 547 U.S. 1 (2006).

collaboration poses no harm to competition or consumers. Concepts such as "significantly less restrictive alternatives" and "practical less restrictive means" are inherently difficult to apply in practice.

For example, consider a joint venture where the parties with a combined market share of less than 5% in the relevant market plan to combine research and development, production, distribution, marketing and sales/pricing functions. What if the parties view pricing coordination as potentially useful as simplifying the joint venture, but otherwise arguably not necessary to the main purpose of the venture? The CBA Section believes this is a line of inquiry is not reasonably necessary. Instead, the Bureau's enforcement policy on legitimate collaborations should rely on the availability of section 90.1 (or section 92) to assess whether there is any harm to competition, rather than engage in unnecessary scrutiny regarding whether individual aspects of the collaboration are "reasonably necessary" for the purposes of a possible criminal prosecution under section 45.

c. Summary

To avoid potential chilling effects associated with words such as "ancillary" and "reasonably necessary" in section 45(4), the CBA Section recommends that the Draft Guidelines specify that unless the collaboration is either a "naked restraint" or a sham (i.e., where the only plausible object and effect of the collaboration is to harm competition), it will be reviewed only under section 90.1 (or section 92) and not under section 45. In addition, we recommend that the Draft Guidelines include a hypothetical example illustrating this principle.

The approach suggested above would limit potential criminal liability to naked restraints. The approach in the Draft Guidelines risks extending criminal treatment beyond the most egregious conduct to good faith commercial conduct that may actually be pro-competitive where the parties cannot demonstrate that a restraint is both "ancillary" and "reasonably necessary".

Section 2.6 – Other Defences

a. Affiliates

Sections 45(6) and 90.1(7) contain a defence for agreements between affiliates. However, the definition of "affiliate" in the Act is very narrow, and could lead to situations where agreements among entities commonly controlled or held within the same corporate group (i.e., entities that form part of a single economic unit) are considered illegal. The CBA Section has previously proposed a more expansive definition of the term "affiliate" in the Act[5] (and hopes this expanded definition will ultimately be adopted). The CBA Section is encouraged that the Bureau will consider the nature of any common control or corporate relationship in determining whether to refer a matter for prosecution. Sections 45 and 90.1 were not designed to apply to agreements between commonly controlled entities and it would not be in the public interest to prosecute a case involving commonly controlled parties, regardless of the type of entity at issue (trusts, partnerships, etc).

b. Regulated Conduct

The CBA Section is encouraged that the Bureau will give effect to Parliament's apparent intent to ensure that the regulated conduct defence (RCD) continues to be available under section 45. The CBA Section has expressed concerns about the wording of section 45(7) in light of the *Garland*[6] case, in the spirit of ensuring that Parliament's intent is recognized and realized in judicial decisions under this provision. The CBA Section is also encouraged by the Bureau's comments at the Toronto roundtable consultations that the RCD, as articulated in the *Technical Bulletin on Regulated Conduct*, will continue to be available in cases under section 90.1 and other civil and criminal provisions of the Act.

c. Joint Petitioning/Lobbying

The CBA Section believes that the Bureau should endorse the existence of a joint petitioning or lobbying defence similar to the U.S. Noerr-Pennington doctrine. There is arguably

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5 See May 19, 2005 letter from the Canadian Bar Association National Competition Law Section to the Assistant Deputy Commissioner of Competition for Legislative Affairs, proposing various "technical amendments" to the *Competition Act.*

6 *Garland v. Consumers' Gas Co.,* [1998] 3 S.C.R. 112.

common law support for this defence (by virtue of free speech and other rights protected under the *Charter* and under the RCD jurisprudence, where any anti-competitive effect is the result of regulatory action, not the petitioning). Express reference to this defence in the Draft Guidelines would help to avoid any chilling effect on legitimate representations to government.

d. Statutory Exemptions

In the interests of full transparency, particularly for business, the Draft Guidelines should cross-reference existing statutory exemptions from competition law that exist in certain other legislation; for example the *Shipping Conferences Exemption Act* and the *Copyright Act*.

Another Issue to Address: Settlement Agreements for IP Rights

The Draft Guidelines are silent on the issue of settlement agreements for IP rights. IP rights may be formed under a statute (such as patents), recognized through registration under a statute (e.g., trade-marks and copyright) or otherwise exist by operation of common law (including unregistered trade-marks, copyright and trade secrets). However created, the existence, enforceability and scope of an IP right may be the subject of litigation. Even where the IP right carries a presumption of validity (as in patents or registration of trade-marks and copyright), a court may in certain circumstances declare that the purported right was invalid *ab initio*.

Most IP cases are resolved by settlement, and the resulting settlement agreements typically involve restraints on future competition between persons who are actual or potential competitors. The Bureau should provide guidance as to its approach to these agreements under sections 45 and 90.1 where the foundation for the agreement, the IP right, carries a degree of uncertainty. In particular, the Draft Guidelines should address:

- The extent to which section 45 or 90.1 could apply to settlement agreements that fix prices, markets or production where there is little or no doubt that those restrictions fall within the scope of an IP right and such IP right is valid and enforceable.

- Whether the Bureau will examine or consider the merits of an actual or possible infringement action when evaluating the settlement of a dispute involving IP rights, including whether and how that approach might change if a court subsequently determines the IP right is invalid or would be not have been infringed by the settling defendant.

- If the Bureau will respect the goal of settlement and the parties' subjective assessment of the validity or scope of the IP right as reflected by the settlement, having regard to what is permitted by sections 45 and 90.1; the settlement may represent an honest attempt to follow the IP right as closely as possible. On the other hand, the settlement may represent an attempt by the IP right holder to reduce competition beyond the rights actually conferred by using the threat and costs of litigation to deter legitimate competition outside the true scope of the IP right.[7]

- Whether any latitude will be given to settling parties to impose naked restraints on competition that do not precisely align with the IP right as defined but where it is convenient for the parties to use rules or language that differ from the scope of the IP right in order to achieve clarity. To illustrate, consider a patent infringement dispute. A defendant (the alleged infringer) may properly defend on the basis that the patent is invalid (and thus unenforceable) and that the defendant's product does not infringe because it does not fall within the scope of the claims of the patent. Since litigation is expensive, the parties may decide to resolve their differences by agreeing on what the defendant may and may not do in view of (or in spite of) the patent. That agreement, involving compromises, may in fact include a restraint that goes beyond what is actually justified by the patent had its true scope and effect been determined by a court. If the patent were invalid, for example, it would afford no lawful basis for the parties to agree to restrain the defendant from making or selling its product. Further guidance is required with respect to whether, in these circumstances, the naked restraint would be contrary to section 45(1) (or would engage section 90.1) and whether any defences, such as the ancillary restraint defence, would apply.

- Whether any latitude would be afforded to a settlement agreement where the agreement from the outset likely or clearly restrains one party beyond the scope of the IP right. For example, suppose a patent covers airplane engines that have certain characteristics, but the defendant agrees in settlement to limit production of airplane engines of any sort to a fixed number per year. In that situation, even if there may be uncertainty of whether the defendant's engine infringes the patent, there would be little, if any, uncertainty that the restraint went beyond the scope of the patent.

VI. PART 3 – THE CIVIL PROVISION

The general framework in sections 3.1 to 3.5 of the Draft Guidelines is very helpful.

However, some considerations identified as relevant to a section 90.1 assessment should be

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[7] Both the Federal Trade Commission and the Antitrust Division of the U.S Department of Justice have questioned the legality under section 1 of the *Sherman Act* of so-called "reverse payment" settlements of patent disputes in the pharmaceutical sector where a generic firm drops a challenge to the validity of a patent in exchange for payments from the patent holder. The Bureau should provide its perspective on this issue in light of the recent amendments to the Act

eliminated as they are prerequisites to the application of section 90.1, rather than "considerations". For example, in the discussion of commercialization and joint selling agreements, research and development agreements and joint production agreements, one of the stated considerations is whether an agreement is between competitors. This is not a consideration but rather a pre-condition to being in section 90.1. Similarly, impact on competition is identified as something the Bureau will consider, when in fact it is a (critical) substantive element of the provision.

Section 3.3 – Who Is a Competitor

In the discussion of potential competitors, it is not clear whether the Draft Guidelines intend to suggest that section 90.1 will apply unless both parties are unable to independently carry out the activity covered by the collaboration.

Section 3.4 – Anti-Competitive Threshold

a. Section 3.4(b) – Market Shares

The safe harbour market share thresholds identified in the Draft Guidelines are very low and well below shares in cases where the Tribunal or Bureau have typically intervened or required a remedy in merger or abuse of dominance cases. The CBA Section recommends that the safe harbour thresholds be increased accordingly.

The Draft Guidelines suggest that subsequent changes in market structure may affect the susceptibility of an agreement to challenge under section 90.1. This creates inherent uncertainty for businesses. The CBA Section recommends that the Draft Guidelines provide guidance on the Bureau’s view with respect to:

- How frequently are parties expected to review existing agreements for compliance with section 90.1? Does the same principle apply in the context of section 45? (i.e., do parties continually have to assess the basis for relying on the ancillary defence, e.g., where an "obvious" alternative means become available after the original agreement is signed?)
- What is the legal basis for asserting that an agreement that is legal at the time it is entered into can be declared illegal based on subsequent market developments?

Parties to a joint venture faced with the potential illegality of their agreement due to circumstances which may or may not arise at some point in the future, may be deterred from entering the joint venture in the first place. They will also have to consider the possibility of eventual illegality in negotiating the terms of their agreement – for example to determine whether one party will be required to compensate another for non-performance in the event of illegality. The implications of such ongoing legal risk for joint ventures are therefore very far-reaching and not sensitive to business realities. By contrast, if two competitors merge, the merger is assessed at the time of the merger (the Bureau cannot challenge a merger on the basis of subsequent market developments extraneous to the parties and perhaps extraneous to the merger itself). The CBA Section questions why an agreement between two competitors should be treated differently than mergers in this regard. If the treatment is not consistent, parties will have an incentive to merge rather than have a more limited form of contractual cooperation. There is also a risk of deterring pro-competitive ventures altogether.

Section 3.5 – Defences and Exceptions

a. Section 3.5(a) – Efficiency Exception

The Draft Guidelines suggest that in preparing efficiency claims for the purpose of section 90.1, parties should refer to the MEGs. The Draft Guidelines should also refer parties to the Bulletin on Efficiencies in Merger Review.

Section 3.6 – Commercialization and Joint Selling Agreements

As discussed below, the Draft Guidelines should provide more complex examples to illustrate the Bureau's approach to commercialization agreements and how it will evaluate and weigh the relevant factors.

a. Section 3.6(c) – Ability to Sell Outside of Agreement and Independent Competition

Further clarification is required on the significance of the reference in the last paragraph to the Bureau's consideration of whether participants retain control over the collaboration's decisions regarding price, etc. or the operations of the collaboration. It is difficult to conceive of scenarios where this would <u>not</u> be the case.

Section 3.7 – Information Sharing Agreements

The CBA Section is encouraged that the Draft Guidelines acknowledge that, for the most part, information exchanges do not raise concerns under the Act. There are perfectly valid reasons to require information sharing as a condition to participation in many types of joint ventures. Information may need to be shared for security reasons (payment networks) or for free riding issues (e.g., persons who do not contribute information to the collaboration should not be entitled to the benefit of information contributed by others). Participants to an industry "best practices" or "benchmarking" exercise may want to limit the results of the exercise to those who contributed information to the exercise.

Section 3.8 – Research & Development Agreements

The Draft Guidelines state that "[I]n certain circumstances, R&D agreements can substantially lessen or prevent competition, such as where restrictions are imposed on the exploitation of products developed through the collaboration". However, the Draft Guidelines do not state how the Bureau will treat joint exploitation agreements. Further guidance could give market participants sufficient comfort to continue to invest in R&D as a joint venture. For example, if two pharmaceutical companies invest in the development of a product, it is not unreasonable that they would seek to protect the value of this product in the market. If these companies agreed on the price at which the joint venture will sell the product, this should not in itself be subject to attack under section 90.1. A similar question arises in connection with joint production agreements (discussed below).

a. Section 3.8(c) – Market Power

In this Section, "as a general rule" should be deleted. The same issue arises in Section 3.9(d).

Section 3.9 – Joint Production Agreements

The Draft Guidelines should clarify that a significant reduction of output raises competition concerns only where output of the jointly produced product is reduced. There is no competition concern if the output of some materials, equipment, and services required to produce the relevant product is reduced through the realization of production efficiencies.

a. Section 3.9(b) – Restraints on Competition

The CBA Section believes the statement that "[t]he Bureau is of the view that parties can normally achieve the benefits of a joint production arrangement without imposing restraints on competition in the downstream market" is overly simplistic and may not reflect market reality. For example, if one party provides all technical know-how or intellectual property to a joint production arrangement, it is reasonable to expect that party to impose some restraints on its production partner's ability to compete in the downstream market.

b. Section 3.9(c) – Reduced Incentive or Ability to Compete Independently

It is not clear why concerns would necessarily arise where a joint production agreement relates to the use of key production facilities of the parties. Further guidance is required.

c. Section 3.9(d) – Market Power

In this Section, "as a general rule" should be deleted. Also, the example of cases "where the supply curve is perfectly inelastic" (page 35, footnote 16, emphasis added) is not practically useful and could be deleted.

Section 3.10 – Joint Purchasing Agreements and Buying Groups

The CBA Section questions whether the CR4 ratio is the appropriate threshold on which to challenge a buying agreement (rather than the market share and power of the parties to the agreement itself). Similarly, we question whether it makes sense to challenge a buying agreement between two or three small competitors that collectively account for over 10% of the market when they face one or two larger competitors that together account for 65% of the market. If the Bureau insists on using a CR4 threshold in this context, the basis for using 65% as the appropriate threshold is not clear (and may not be appropriate).

As a separate matter, if the Bureau is indicating there could be a serious monopsony problem upstream without an adverse downstream effect, the CBA Section believes this should be explicitly stated in the Draft Guidelines. In this regard, we references the Bureau' position in connection with the OECD's Roundtable on Monopsony and Buyer Power in 2008: "Under

Canadian law, there need not be harm by way of a price or output effect in the downstream market in order for an exercise of monopsony power to be considered harmful."[8]

Section 3.11 – Non-Compete Clauses

The Draft Guidelines provide limited guidance on non-compete clauses. Clear guidance on the assessment of non-compete clauses would be useful. Non-compete agreements do not arise only in merger and acquisition transactions. They are also common in vertical agreements, e.g., where a customer agrees not to compete with a supplier or vice versa. Such agreements are often critical to the supplier-customer relationship, since a supplier may not wish to provide its products (and often its competitively sensitive product information) to a customer who turns around and begins to produce a competitive product. The Draft Guidelines should state that non-compete clauses between customers and suppliers do not contravene section 90.1 (or section 45) except in very exceptional circumstances such as where the supplier-customer agreement is entered into to prevent likely upstream entry by the customer or likely downstream entry by the supplier.

VII. PART 4 - HYPOTHETICAL ILLUSTRATIVE EXAMPLES

The examples in Part 4 provide concrete, practical guidance to practitioners and businesses. At the same time, more challenging or nuanced examples would better assist businesses and practitioners in understanding how the Bureau will apply the new provisions in practical situations.[9] We have attempted throughout to highlight areas where additional more nuanced examples might be helpful.[10] If there is a reluctance to provide too categorical or definite a view on specific fact patterns, the Bureau could instead describe the analytical framework it would apply to the fact pattern, indicating factors which would point the Bureau towards a particular conclusion.

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8 Available at http://www.cb-bc.gc.ca/eic/site/cb-bc.nsf/eng/02995.html.

9 See p. 20, Section 2.5 (3) Summary – a hypothetical example illustrating the principle of review under subsection 45(4) and section 90.1.

10 For example, as noted above in the context of the meaning of "ancillary", it would be helpful to include hypothetical examples illustrating the concept of "incidental" or "subordinate" restraints where pricing is a core activity of an integrative joint venture, and examples of when a joint venture might be viewed as a single entity.

Example 4: Dual-Distribution Agreement

In Example 4, it is not clear why the decision by X, a manufacturer, to supply widgets to Y, a distributor which cannot manufacture widgets on its own and does not currently sell X's widgets anywhere, may be reviewed under section 77. Prior to the agreement, Y did not sell X's widgets, but after the agreement, Y commences selling X's widgets in Ontario. There seem to be no anti-competitive element to this arrangement (indeed, it is potentially pro-competitive, compared to the pre-existing situation, which seems to be the relevant comparison). It may not be as pro-competitive as it otherwise would be if Y were permitted to sell X's widgets throughout Canada, but it cannot be the case that to avoid review under the Act, parties with no pre-existing distribution arrangement must enter the most pro-competitive arrangement possible.

Example 4 would also generate more interesting analysis if it contained a part (b), in which X, the manufacturer, provided incentives to Y, the distributor, to sell products at or above a certain price, or even required Y to sell at or above a certain price. Although this may raise issues under section 76 (a civil provision whose sanctions do not include fines or imprisonment), the Bureau should clarify whether its position is that this pricing restraint in a dual distribution context can never raise subsection 45(1) issues. The CBA Section believes that the Draft Guidelines do adopt this position, but clarification would be useful. This seems to be significant point – if a manufacturer who engages in dual distribution practices unilaterally enters into agreements with each of its distributors to sell at a fixed price (and none of these distributors is party to any other distributor's agreement with the manufacturer), the Draft Guidelines indicate, in the CBA Section's view, that such conduct will not be viewed as criminal conduct.

Example 5(a): Non-Criminal Agreements Involving Franchises

In Example 5(a), the Draft Guidelines state that the Bureau "does not consider a restriction in a franchise agreement that requires franchisees to supply products only in a defined territory to be an agreement among competitors". No reasons are provided for this conclusion. In the absence of the territorial restraints, the franchisees might compete with each other (indeed, one reason the restraint may exist is to prevent them from competing with each other). If the franchisees are not competitors for the purposes of the territorial restraint, why are they competitors for other purposes (i.e., why could they not enter into the agreement contemplated in Example 5(b))? It seems that the franchisees are possibly competitors of each other but, as a matter of enforcement policy, the situation in Example 5(a) would not be pursued by the Bureau. Although the CBA Section believes the above-quoted statement represents, in many contexts, a reasonable approach to franchise agreements, the reasoning behind the statement would clarify the principles at work. Private parties have access to section 45(1) through section 36 of the Act, and as such, additional analysis of this situation, beyond a conclusory statement of the Bureau's view, would help. Finally, Example 5(a) seems to contemplate a situation where the franchisor unilaterally imposes territorial restrictions on franchisees. A more nuanced example might explore the situation where the franchisor and the franchisees collectively agree on the scope of the territorial restrictions.

Example 5(b) indicates that the conduct of franchisees acting in concert to coerce or request a franchisor to impose a restraint (such as a pricing restraint) on the franchisees would be reviewed under section 45(1). Although the CBA Section understands the rationale for the Bureau's analysis, the situation raises some interesting questions. For instance, the competitive impact would be the same in each of the following scenarios: (a) a franchisor unilaterally and without prompting from anyone else, requires each of its distributors to sell at a particular price; and (b) some subset franchisees advocate for a common price to the franchisor, and the franchisor agrees to the request. It seems that (a) is viewed as civilly reviewable (no fines, imprisonment, or even AMPs given the sanctions available under sections 90.1 and 76) but (b) is viewed as potential criminal conduct (large fines, imprisonment), despite having similar (or identical) market impact.

Other Examples

In Example 7, it may be instructive to expand on the example by exploring the kind of additional conduct by members of the trade association that are more likely to raise issues under section 90.1, or even to prompt the Bureau to examine the agreement under section 45(1). For instance, if data provided to members were not aggregated, or if recent/current prices of particular companies could be discerned, how significant would those factors be?

Even supposing that specific information were shared among competitors through a trade association, would that be sufficient for the Bureau to challenge under section 90.1, or would the Bureau first need to see evidence of a negative impact in the marketplace, and then causally connect the information sharing to the negative impact? This seems relevant because it is sometimes possible for a competitor to act on competitively sensitive information in a way that results in lower prices or enhanced output (for example, by spotting an opportunity to capture share by lowering its price). Although, this may be more of an exceptional case, it seems to illustrate the notion that, under section 90.1, the Bureau would have to connect the information sharing to actual competitive harm.

In Example 8, Joint Research and Development, given the significance of R&D activities to Canadian economic growth, and the prevalence of joint R&D activities, an example certainly merits inclusion. The Draft Guidelines state that the "Bureau will also consider whether there are significantly less restrictive alternatives available to the parties". However, it is not clear whether this statement relates only to a hypothetical analysis under section 45, or the consideration is also relevant under the section 90.1 analysis. While acknowledging that the qualifier "significantly" (as in *significantly* less restrictive) is useful, the CBA Section believes that assessing whether parties could have entered into a somewhat different R&D arrangement can be fraught with difficulties. It is entirely possible that numerous arrangements could have been reached, and second guessing the actual arrangement by comparing it to other potential arrangements, with the inevitable benefit of hindsight, may prove problematic.

In the analysis following Example 9, the Bureau should explicitly clarify the status of buying groups under section 45(1). The analysis arguably leads to the conclusion that buying groups never raise section 45(1) issues.

With respect to Example 12, the trade association's decision to issue a non-binding guideline on best accounting practices seems to be relatively uncontroversial. Expanding this example would be more useful. For instance, an analysis of the trade association imposing minimum service standards or minimum qualifications on its members would better illustrate the

Bureau's potential concerns regarding trade associations. Would the Bureau review this conduct criminally or civilly? The analysis in Example 12 also refers only to section 45(1), but it may be more appropriate in many cases to view certain trade association conduct through the lens of section 90.1.

Finally, the discussion of the efficiency clause (section 90.1(4)) in the "civil" examples seems relatively light. We recommend further analysis.

VIII. CONCLUSION

The CBA Section thanks the Bureau for the opportunity to submit these comments and hopes they are of assistance. The CBA Section would be pleased to discuss its comments further at the Bureau's convenience.