THE CANADIAN BAR ASSOCIATION

L'ASSOCIATION DU BARREAU CANADIEN

Competition Bureau's Draft Price Maintenance Guidelines

NATIONAL COMPETITION LAW SECTION
CANADIAN BAR ASSOCIATION

June 2014

500-865 Carling Avenue, Ottawa, ON, Canada K1S 5S8
tel/tél : 613.237.2925 | **toll free/sans frais** : 1.800.267.8860 | **fax/téléc :** 613.237.0185 | info@cba.org | **www.cba.org**

PREFACE

The Canadian Bar Association is a national association representing 37,500 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.

Copyright © 2014 Canadian Bar Association

TABLE OF CONTENTS

Competition Bureau's
Draft Price Maintenance Guidelines

Competition Bureau's
Draft Price Maintenance Guidelines

I. INTRODUCTION

The Competition Law Section of the Canadian Bar Association (the CBA Section) appreciates the opportunity to comment on the Competition Bureau's draft *Price Maintenance Guidelines* (the Draft Guidelines). Understanding of the competitive effects of price maintenance has evolved considerably over the past 15 years and the CBA Section believes it is important to ensure that the Bureau's guidance remains in-step with current legal, economic and policy views. In the CBA Section's view, the Draft Guidelines, with a few notable exceptions discussed below, generally reflect the current state of the law on price maintenance in Canada.

The CBA Section commends the Bureau for producing the Draft Guidelines and the significant effort undertaken by the Bureau, including the public consultation process, with respect to this important and timely topic.

This submission is organized in three main parts:

- issues about the general application of section 76 of the *Competition Act*
- the treatment of the language in paragraph 76(1)(a); and
- the treatment of the language in paragraph76(1)(b).

II. APPLICATION OF SECTION 76

Application of Section 76 to More Than One Person

The Draft Guidelines set out the Bureau's view that, depending on the circumstances, section 76 may apply to more than one person. For example, where several competing suppliers each engage in conduct within the scope of paragraph 76(1)(a) of the Act, the Bureau may consider "enforcement action" to address any adverse effects on competition in a market.

While the CBA Section does not have an issue in principle with bringing a case under section 76 against multiple firms in the context of a single proceeding, we are firmly of the view that each

element of section 76 would nonetheless need to be established for each participant, independently of any other participants, to satisfy the requirement of an adverse effect on competition. Section 76 does not include language similar to section 79 (which explicitly contemplates control by "one or more persons") or section 77 (which refers to behaviour that is "widespread in a market"). The distinction in the statutory language in these sections reflects a different legislative intent with respect to price maintenance. The CBA Section believes that the distinct language of section 76 should be noted explicitly in the Draft Guidelines.

The Draft Guidelines do not explicitly address how (or whether) there could be a competition issue where a number of firms — each without (sufficient) market power — independently engage in conduct to which section 76 applies. Specifically, it is not clear from the Draft Guidelines how this could be problematic under section 76. This, in turn, raises uncertainty given that price maintenance can be, and often is, pro-competitive. Firms wishing to engage in efficiency-enhancing price maintenance may have to confront a "first mover" problem (i.e., where firm A engages in the conduct, but is then followed by firms B, C and D, what is firm A's susceptibility to a section 76 violation?). A failure to clearly articulate the Bureau's approach to enforcement in these situations is one specific area where the Draft Guidelines are lacking.

Agency Exception

The Draft Guidelines state that the Bureau will consider "relevant legal principles" and the nature of an agency relationship to determine whether a supplier and retailer can appropriately be characterized as principal and agent for purposes of subsection 76(4) of the Act.

The CBA Section does not believe that a basis exists under the Act for the Bureau to challenge the legitimacy of a principal-agent relationship. If a principal-agent relationship exists, the motivation for the formation of the relationship should be irrelevant for purposes of subsection 76(4). The only question is whether the relationship exists. Stated differently, the exception in subsection 76(4) is not subject to an "anti-avoidance" provision.

Prior to 2009, the Act applied to the introduction of consignment selling *for the purpose of controlling price*; the current statutory language contains no such reference, which indicates a parliamentary intent that section 76 should only consider whether there is a principal-agent relationship. In any event, the Draft Guidelines do not provide any meaningful guidance concerning the legal principles that are relevant to the Bureau's consideration of whether a

supplier and retailer are "appropriately characterized" as being in a principal-agent relationship.

Application of Section 76 and Other Competition Act Provisions

The Executive Summary of the Draft Guidelines notes that, where the Bureau believes that conduct satisfies the elements of both section 76 and another provision of the Act, the Bureau will generally base its choice of enforcement provision on the particular facts of a case, the market situation and any other relevant circumstances, including the nature of the remedy available under each section of the Act.

The CBA Section is of the view that the statement to the effect that the Bureau will consider "the nature of the remedy available under each section of the Act" requires further elaboration. For example, it should be made clear that the Bureau will not pursue under a different provision of the Act a matter that otherwise properly falls within the price maintenance provision, simply because an Administrative Monetary Penalty is available under the other provision (and not under section 76). At the very least, the Draft Guidelines should specify the basic principles that will govern the Bureau's decision-making regarding the provision of the Act that will be enforced where more than one provision could apply.

III. PARAGRAPH 76(1)(A)

"Agreement, Threat, Promise or Any Like Means"

The Draft Guidelines do not contain much discussion on the meaning of the requirement that the influencing of a price be "by agreement, threat, promise or any like means". The Draft Guidelines simply outline a very expansive interpretation of this phrase.

Since these words were subject to considerable interpretation by the courts in the context of enforcement actions under the former criminal price maintenance provision, the Draft Guidelines' failure to reference previous jurisprudence on this phrase may suggest that the Bureau is seeking to distance itself from prior interpretation of the language. The CBA Section is of the view that the Draft Guidelines should address, or at least reference, this prior jurisprudence.

In particular, the discussion in Section 2.1.2 of the Draft Guidelines on how this element of section 76 is satisfied would benefit from a reference to prior decisions on this issue, including cases such as *Shell Canada, Sunoco, George Lanthier, Campbell* and *Moffats*. These cases provide

considerable guidance on the types of conduct that fall within the phrase "an agreement, threat, promise or any like means". The statement in the Draft Guidelines that section 76 could include "*any* conduct by which a supplier *implicitly or explicitly* purports to …" confer a benefit or impose a penalty on a retailer could inject considerable uncertainty into the test for determining whether conduct falls within the scope of the provision. For example, it will be difficult for suppliers to determine when a legitimate discussion with a retailer concerning selling prices crosses the line into an illegitimate attempt to influence prices. The broad interpretation proposed by the Draft Guidelines is inconsistent with prior jurisprudence that has found that discussion, persuasion, suggestions or advice on the retail price may fall outside the scope of the price maintenance provision.

Meaning of "Influence Upward"

The CBA Section has three principal concerns with the interpretation of the "influence upward" requirement in section 76, as set out in Section 2.13 of the Draft Guidelines.

1. The Draft Guidelines correctly note that the mere increase in the wholesale price of a product does not satisfy the requirement that the supplier influenced upward the selling or advertised prices of the downstream product.[1] The same rationale should also be extended to upstream prices for a component used downstream. In both cases, the requirement of an "influence upward" is not satisfied.

2. The paragraph in the Draft Guidelines beginning with "The Tribunal considers that …", does not reflect an attempt to apply any actual meaning to the words "influence upward", let alone explain how these words are to be interpreted in the price maintenance context. Rather, the Draft Guidelines appear to apply a type of "but for" test for determining whether downstream prices have been influenced upward, which is overly broad. A "but for" test – i.e., whether the retailer would have charged a lower price absent the conduct at issue – could encompass conduct that goes well beyond that which is properly considered to have "influenced upward or discouraged the reduction" of the downstream price.

3. The discussion of an "indirect" influence on prices set out in the Draft Guidelines is also overly broad and inconsistent with the *Visa/MasterCard* decision. The Draft Guidelines suggest that the "influence upward" element could be satisfied if a "supplier's terms and

[1] It is not clear why the Draft Guidelines use the phrase "in and of itself" in making this point. These words suggest that the focus of the price maintenance provision could, under other circumstances, be on the wholesale price level, but that is not a proper interpretation of section 76.

conditions of sale may *reduce or eliminate competitive forces* that would otherwise discipline the *supplier's pricing* such that the supplier's price for the product supplied, and by extension the price of the retailer's product, is higher …". This is precisely the interpretation that was rejected in *Visa/MasterCard* because it conflates the "influence upward" element in paragraph 76(1)(a) with the "adverse effect on competition" element in paragraph 76(1)(b).[2] (See *Commissioner of Competition v. Visa Canada Corporation and MasterCard International Incorporated*, 2013 Comp. Trib. 10 at para. 163). Moreover, in a price maintenance case, terms and conditions that may influence the *supplier's pricing* are not at issue. What is at issue is the influence of the conduct on the retailer's discretion to price. The phrase in the Draft Guidelines quoted above starting with "such that the supplier's price for the product supplied, and by extension the price of the retailer's product …" is thus at odds with the statement earlier in the Draft Guidelines, to the effect that an increase by a supplier to the wholesale price of a product which then leads to a price increase downstream is not caught by section 76.

Resale Requirement

Section 2.1.4 of the Draft Guidelines sets out the Bureau's proposed interpretation of the words "the price at which the person's customer or any other person to whom the product comes for resale …" The Bureau notes that the Competition Tribunal interpreted this language to mean that a resale is required and that the resold product be "identical or substantially similar on the important characteristics of the product" supplied. The Draft Guidelines acknowledge, but do not explicitly adopt, the Tribunal's interpretation. The CBA Section suggests that, for clarity, the Tribunal's view that a resale is required under section 76 should be explicitly adopted in the Draft Guidelines.

The Draft Guidelines also state that, where a product is repackaged, processed or bundled but sold in a manner where the product supplied upstream is a "significant component" of the product "resold", the Tribunal's interpretation could be satisfied. In the CBA Section's view, without further guidance from the Bureau, the introduction of the concept of a "significant component" may reduce, rather than add, certainty with respect to this aspect of the price maintenance provision.

---

[2] The citations to the *Visa/MasterCard* case in this Section of the Draft Guidelines are to portions of the decision that discussed the alternative analysis which the Competition Tribunal rejected, and should therefore be disregarded for these purposes.

Finally, in footnote 7 of the Draft Guidelines, the Bureau refers to the fact that a "product" includes both an article and a service. The CBA Section believes that further elaboration is necessary regarding how subparagraph 76(1)(a)(i) could apply to a service; in particular, how a service could be considered to be "resold" by a downstream producer in a manner that would differentiate it from the upstream service.

Low Pricing Policy

The CBA Section offers two comments on the Draft Guidelines' treatment of subparagraph 76(1)(a)(ii), dealing with refusing to supply due to a low pricing policy.

1. Paragraph 3.1 of the Draft Guidelines states that a person's low pricing policy "need not be the only or even the primary reason for the refusal or discrimination, but rather a factor informing the supplier's decision" for section 76 to be engaged. The CBA Section recognizes that there may be some limited authority for the proposition that the price maintenance provision is applicable even where the low pricing policy is not the primary reason for a refusal (e.g., *Royal LePage*). Nevertheless, the formulation of the required causal relationship between the refusal and the low pricing policy as expressed in the Draft Guidelines creates uncertainty. Practically speaking, under the paragraph 3.1 interpretation, a supplier will be susceptible to the possibility of an investigation under section 76 in virtually any case in which it discontinues the supply of products to a retailer engaged in discounting, even if a number of other factors contributing to the refusal are present.

2. Paragraph 3.1 also suggests that there is no requirement that a person be an existing or prior customer of a supplier for section 76 to be engaged. This is potentially problematic for two reasons. First, it is questionable whether section 76 (or its predecessor) was intended to apply to parties who did not have an existing supplier-customer relationship. The CBA Section does not believe that section 76 should be interpreted in a manner that would interfere with the ability of suppliers to choose with whom they want to do business. From a competition policy perspective, this should be treated differently from circumstances where there is an existing supplier-customer relationship. It is also unclear whether, and, if so, how, the adverse effect on competition test would be met in a situation where there is no existing supply relationship. If the Bureau sees a significant possibility of harm, the Draft Guidelines should provide examples to support its analysis.

IV. PARAGRAPH 76(1)(B)

The CBA Section has a number of concerns with the discussion in the Draft Guidelines concerning paragraph 76(1)(b) and the requirement that the section 76 conduct "has had, is having or is likely to have an adverse effect on competition in a market".

Market Power

The CBA Section believes that the Draft Guidelines should be clear that a firm without market power could not be found under any circumstances to have adversely affected competition.

The Draft Guidelines suggest that price maintenance is a concern only where it is likely to "create, preserve or enhance market power." The CBA Section recognizes that this term emanates from case law on various Part VIII provisions (including *Visa/MasterCard*). However, the CBA Section also believes that further thought should be given as to whether price maintenance may result in the "creation" of market power and that additional clarity should be brought to this concept. If the Bureau believes there are circumstances in which price maintenance could create market power, it should provide examples in the Draft Guidelines.

In terms of the Bureau's assessment of market power, Section 5.2 of the Draft Guidelines usefully notes that a market share of less than 35 percent typically will not prompt further examination of whether a firm possesses market power, but that a firm with a share of less than 35% could have some degree of unilateral market power "in some instances, depending on the characteristics of the relevant market." It would be useful for the Bureau to provide some guidance with respect to circumstances in which this might be the case, particularly circumstances (if any) that the Bureau has previously encountered.

Circumstances Where Price Maintenance Conduct May Adversely Affect Competition

In Section 5.3 of the Draft Guidelines, footnote 23 suggests that there are other circumstances (beyond the four principal theories of harm listed on the next page) where price maintenance may have an adverse effect on competition, but the Draft Guidelines are silent on what these other circumstances may be. The CBA Section suggests that the Bureau expand on this point. In addition, based on the way the footnote is drafted, it is unclear whether these other unstated theories of harm must also be demand-restricting (which appears self-evident) as suggested by the language in the text preceding footnote 23.

The CBA Section is also of the view that the discussion in Section 5.3 of the Draft Guidelines on the interplay between subsections 76(1) and 76(8) is unclear. The Draft Guidelines indicate that "retailer-based theories of harm are likely to be more common in respect of price maintenance conduct under subsection 76(8)". The CBA Section believes that the draft could benefit from further explanation of this point. For example, while subsection 76(8) captures retailer conduct that is exclusionary, it does not capture conduct that would facilitate retailer collusion, which may fall under subsection 76(1). The Draft Guidelines also do not adequately address situations in which a retailer seeks to exclude discounters from the market through a request or demand for a MAP program leading to its introduction by a supplier. In this case, it is not clear what the supplier's potential liability would be under section 76. The CBA Section suggests that the Bureau consider addressing this issue more thoroughly and refining its stance regarding when retailer collusion and exclusion theories are most likely to arise. From an enforcement perspective, the CBA Section is of the view that it would be far more effective and fair to address these situations at the retailer level, rather than by going after one or more suppliers who are not the source of the behaviour. In these cases, the power to compel suppliers to engage in price maintenance may be a function of the importance of the retailer as a customer of the supplier.

Finally, the Draft Guidelines note that, in cases where an adverse competitive effect has been found, the Bureau may be convinced not to pursue enforcement action if it is satisfied with the parties' responses and proposed resolution. The CBA Section suggests that the Bureau elaborate on the types of actions that may satisfy its requirements in this regard.

V. CONCLUSION

The CBA Section appreciates the opportunity to comment on the Draft Guidelines and hopes that these comments will be of assistance. The CBA Section would be pleased to discuss its comments in more detail if that would be helpful.