THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Competitor Collaboration Guidelines

CANADIAN BAR ASSOCIATION
COMPETITION LAW SECTION

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PREFACE

The Canadian Bar Association is a national association representing 36,000 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 CBA Competition Law Section, with assistance from the Advocacy Department at the CBA office. The submission has been reviewed by the Law Reform Subcommittee and approved as a public statement of the CBA Competition Law Section.

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I. INTRODUCTION

The Competition Law Section of the Canadian Bar Association (CBA Section) welcomes the opportunity to comment on the draft revised Competitor Collaboration Guidelines, issued July 29, 2020 (Draft Revised Guidelines).

Over a decade has passed since the Competitor Collaboration Guidelines (CCGs) were issued by the Competition Bureau. The CBA Section supports the Bureau's desire to ensure the CCGs reflect relevant enforcement experience and decisions of the Competition Tribunal and courts since 2009 to give more current and informative guidance to businesses. We agree that the "modest updates should not substantially change the Bureau's approach to enforcing the Competition Act".[1]

Since 2009, the CCGs represent some of the most significant guidance issued by the Bureau. The CCGs offer much needed clarity to businesses seeking to understand the boundaries between criminal and non-criminal conduct under the Act. In so doing, the CCGs promote compliance with the law.

Given the CCGs' role in drawing bright lines between criminal and non-criminal conduct and promoting compliance, the CBA Section encourages the Bureau to avoid adding qualifications to or otherwise diluting prior enforcement positions. Such qualifications and dilutions would harm predictability and the ultimate value of the CCGs. Moreover, some of the proposed qualifications to the CCGs have limited utility; the Bureau's concerns can be addressed by clarifying that agreements will be assessed on their substance and that *sham* agreements, designed to appear legitimate but whose actual purpose is to engage in cartel conduct, cannot benefit from the enforcement guidance in the CCGs.

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1 Competition Bureau, News Release, "Competition Bureau invites feedback on updated Competitor Collaboration Guidelines" (June 29, 2020), online.

II. COMMENTS

A. Section 1.1: Maintain focus in the analytical framework on sections 45 and 90.1

The analytical framework currently in section 1.1 of the CCGs indicates that the Bureau will first determine whether to assess an agreement between competitors under the two provisions dedicated to agreements between competitors – sections 45 and 90.1 – or under the other provisions of the Act.

After completing that step, the Bureau will then decide if section 45 or 90.1 is more appropriate, based on a determination of whether the agreement amounts to a "naked restraint" on competition. This two-step analysis separates out agreements that should be primarily analyzed as competitor collaborations and then applies a choice between section 90.1 and section 45, reserving section 45 for "naked restraints" on competition.

The Draft Revised Guidelines present a different dichotomy – instead of a two-step analysis ending with a 45/90.1 dichotomy, they indicate that the relevant dichotomy lies between section 45 and all "civil provisions in Part VIII of the Act".

Sections 45 and 90.1, which limit their application to agreements between competitors, reflect Parliament's intent to use these provisions as the primary legal framework for agreements between competitors. The Bureau's enforcement guidance should maintain sections 45 and 90.1 as the primary provisions for enforcement action to address collaboration between competitors that takes the form of an agreement.

While the CBA Section understands the Bureau may not want to foreclose reliance on other civil remedies (in addition to section 90.1), we anticipate that the Bureau would review horizontal agreements under the other provisions of Part VIII only in highly exceptional circumstances.

The presentation in the Draft Revised Guidelines of a high level dichotomy that includes all civil reviewable conduct provisions (including section 90.1) in contrast to section 45 may introduce unwanted uncertainty, especially when abuse of dominance under section 79 provides for very significant administrative monetary penalties (AMPs), whose quantum can be similar to criminal fines. This again underscores the appropriateness of ensuring section 90.1 is the primary civil enforcement provision for agreements between competitors.

Further, as it concerns the potential application of section 79 to competitor collaborations, the essential elements of abuse of dominance include "a practice of anti-competitive acts" that must generally be intended to be exclusionary, disciplinary, predatory or otherwise targeted at competitors pursuant to paragraph 79(1)(b).[2] In that context, it would be useful for the Bureau to confirm that the concept of "joint abuse of dominance" in practice will be reserved for collaboration between competitors that has such an exclusionary or other targeted purpose against one or more competitors.

In section 1.3 of the Draft Revised Guidelines, the Bureau reverts to the original 45/90.1 dichotomy. This also calls into question whether the broader section 45/Part VIII dichotomy is warranted.

RECOMMENDATION

1. **The CBA Section recommends that the CCGs retain the original dichotomy between sections 45 and 90.1, instead of the broader dichotomy between section 45 and Part VIII. Further, reliance on Part VIII other than section 90.1 for horizontal agreements should only occur in exceptional circumstances. Given the risk of substantial AMPs emanating from section 79, we recommend that the Bureau indicate in what circumstances a review or challenge under section 79 would apply. We recommend that joint abuse of dominance be considered only in circumstances where a competitor collaboration is exclusionary, disciplinary, predatory or otherwise targeted at a competitor or competitors.**

B. Section 1.2: Addition of qualifications

At several points in section 1 of the Draft Revised Guidelines, the Bureau adds qualifying language to its prior positions on when it will apply section 45 to certain conduct:

- In section 1.2(a), the draft revisions state that "mergers" as defined pursuant to section 91 of the Act will "generally" be assessed under the substantive merger review provision in section 92 of the Act.
- In section 1.2(c), the draft revisions add the conflicting concepts of "purely vertical" agreements being "generally" assessed under Part VIII of the Act. Purely vertical agreements are not capable, by definition, of violating section 45.

[2] *Canada (Commissioner of Competition) v. Canada Pipe Co.,* 2006 FCA 233 at paras. 66-68.

- In section 1.2(d), the draft revisions indicate that where the agreement is limited to conduct described by section 47, it will "generally" be assessed under sections 47 or 90.1 and not section 45.[3]

We understand that the Bureau would like to account for its decade-long enforcement experience under the new section 45 and give guidance accordingly. However, we caution the Bureau against adding qualifications to the clear, intuitive and internally consistent guidance now in the CCGs.

The addition of this qualifying language adversely affects businesses' ability to understand the Bureau's enforcement position and, by extension, the value of the CGGs. Moreover, the qualifying language is unnecessary as the Bureau has previously indicated that where a seemingly legitimate agreement, such as a merger or vertical arrangement, constitutes a sham or fig leaf for the competing parties' underlying and overriding purpose to fix prices, allocate markets, or restrict output, the relevant conduct could still qualify as a "naked restraint", which the Bureau would investigate under section 45.

In 2010, the former Commissioner indicated the Bureau's intent to create clear bright lines around criminal conduct, while preserving the ability to look beyond sham agreements. The clarity of this guidance is as relevant and desirable for the Canadian business community now as then, and there have been no developments that warrant a change in approach:

> [W]e have explicitly removed whole categories of agreements from the scope of criminal enforcement action, such as dual distribution agreements, franchise agreements and non–competes, unless, of course, the agreement is just a sham. We are doing our best to put a fence around the conduct we would consider investigating as criminal, and to paint that fence in bright, bold colours."[4]

In lieu of qualifying the principled advice in the CCGs, the CBA Section recommends adding a clearer general provision to the CCGs, indicating that the Bureau's analysis does not apply to sham arrangements, whose underlying and overriding purpose is to fix prices, allocate markets, or restrict output among competitors. This is consistent with the Bureau's existing framework, to determine whether the agreement is undertaken to further a legitimate collaboration,

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3 The CBA Section acknowledges that inserting a qualification when differentiating between two criminal provisions may not be as significant as when differentiating between the criminal and civil provisions. Sections 45 and 47 are fundamentally different – for example, each has unique statutory defences. Therefore, clarity on when the Bureau will employ each should remain unqualified.

4 Melanie Aitken, Remarks to the Economic Club of Canada (May 4, 2010), online.

strategic alliance or joint venture or whether the agreement is a "naked restraint" on competition.

RECOMMENDATION

2. **The CBA Section recommends that the CCGs avoid qualifying language when describing various legitimate collaborations (for example, mergers, vertical arrangements, etc.). Instead, we encourage the Bureau to indicate clearly in the CCGs that its analytical framework does not apply to sham arrangements intended to disguise "naked restraints" on competition that violate section 45.**

C. Section 2.1: Jurisdictional issues in footnote 6

In footnote 6 of the Draft Revised Guidelines, a brief discussion "of the application of the Act to agreements that were formed or entered into outside of Canada, not simply limited to agreements being considered under section 45" is added. The footnote confusingly cites jurisprudence unrelated to section 45 and that is not determinative of the territorial scope of section 45.

As a criminal offence, section 45 is subject to territorial limitation pursuant to subsection 6(2) of the *Criminal Code*:

> Subject to this Act or any other Act of Parliament, no person shall be convicted or discharged under section 730 of an offence committed outside Canada.[5]

Additionally, section 46 of the Act renders it a criminal offence to implement foreign directives regarding a conspiracy entered into outside of Canada, which provides a powerful criminal remedy to address foreign conspiracies that affect Canada. Moreover, section 46 (which criminalizes implementation of foreign directives in Canada to give effect to a conspiracy "entered into outside Canada that, if entered into in Canada, would have been in contravention of section 45")[6] suggests that section 45 does not apply to agreements entered into outside of

5 *Criminal Code*, R.S.C. 1985, c. C-46, s. 6(2).

6 Emphasis added.

Canada. As noted in the Tribunal case cited by the Bureau in footnote 6, it is currently an unresolved question whether section 45 can apply to agreements formed outside of Canada.[7]

The CBA Section does not consider it helpful for the Bureau to intimate that a criminal provision may have extraterritorial application in the absence of a clear statutory provision or judicial interpretation. The CCGs are useful because the Bureau takes a pragmatic approach to the law, and not an aggressively expansive one.

Notwithstanding the Bureau's view on the unresolved question of the territorial scope of section 45, a related, but potentially useful issue on which we would welcome guidance in footnote 6 would be an explanation of the Bureau's enforcement position on when it would rely on section 46, as opposed to section 45.

RECOMMENDATION

3. **The CBA Section recommends that in lieu of the general reference to case law in footnote 6, the Bureau explain in which circumstances it would rely on sections 46 and 45 respectively.**

D. Section 2.3.1: Clarifying relevant provisions applicable to non-competitors

Text is added to this section to explain how a non-competitor wholesaler can facilitate a conspiracy. We believe it would be useful for the Bureau to clarify that the non-competitor wholesaler would be investigated in these circumstances under sections 21 and 22 of the *Criminal Code*, if appropriate, and in any event not section 45.

RECOMMENDATION

4. **The CBA Section recommends the following change to section 2.3.1 of the Draft Revised Guidelines:**

> **For example, a wholesaler who facilitates a price-fixing conspiracy among its retail clients may be a party to the conspiracy <u>pursuant to sections 21 and/or 22 of the *Criminal Code*</u> even if it does not compete in the retail market.**

[7] The Commissioner of Competition v. Harper Collins Publishers LLC, 2017 Comp. Trib. 10 at paras. 85, 91-93.

E. Section 2.4.1: Upstream and environmental coordination

Section 45 is limited to agreements between competitors to fix prices, allocate markets or restrict output on the supply – and not demand – side of a market. Therefore, it is incapable of application to a joint buying group or an agreement amongst competing employers not to compete in respect of employees (so-called "no-poach" agreements) or for wages ("wage fixing agreements").

Nevertheless, the revisions to section 2.4.1 of the CCGs indicate that such agreements can be pursued under section 45 if the purpose of the agreement was to fix prices, allocate markets, or restrict output downstream.

It is important that the Bureau clarify its enforcement position on buyer-side agreements, especially when enforcement agencies in other jurisdictions are pursuing "no poach" agreements on a criminal basis.[8]

The Bureau should state that it will not consider buyer-side agreements, including "no poach" and wage-fixing agreements, under section 45. Instead – unlike other jurisdictions and reflecting the Canadian statute – it would consider such agreements under section 90.1 based on anti-competitive effects. It is only agreements among competing suppliers of products that relate to price-fixing, market allocation or output restriction (of products being sold to customers) that would potentially be considered under section 45.

Additionally, section 2.4.1 of the CCGs contains an (unchanged) discussion on an agreement between competitors intended to protect the environment that results in a price increase. The Bureau indicates that it would not consider the agreement as paragraph 45(1)(a) price fixing, but is silent on paragraph 45(1)(b) market allocation and paragraph 45(1)(c) output restriction, which we believe is an oversight. For example, if competing manufacturers of a consumer product agree to stop selling products in plastic packaging out of legitimate environmental concerns, they should not face criminal prosecution for output restriction.

The CBA Section encourages the Bureau to state that a bona fide agreement between competitors that addresses environmental issues will not result in the application of any of paragraphs 45(1)(a), (b) or (c). This important clarification would be consistent with the

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8 See, for example, US Department of Justice, Antitrust Division, "Antitrust Guidance for Human Resource Professionals" (October 2016), p. 3, online.

emerging attention given by other jurisdictions to ensuring that competition laws do not inappropriately discourage sustainability or other environmental initiatives.[9]

RECOMMENDATION

5. **The CBA Section recommends that the Bureau indicate clearly in Section 2.4.1 of the CCGs that "no poach" and wage-fixing agreements (and other buyer-side agreements among competing purchasers) cannot be considered under section 45 unless they were a sham agreement, undertaken to fix prices, allocate markets, or restrict output for the downstream supply of products. Instead, such agreements can only be reviewed under section 90.1 based on anti-competitive effects.**

6. **The CBA Section recommends that the Bureau state that a *bona fide* agreement to address environmental issues will be reviewed under the section 90.1 rather than any of the criminal provisions in paragraphs 45(1)(a), (b) or (c).**

F. Section 2.5: Ancillary restraints defence

The Draft Revised Guidelines eliminate two generic examples of ancillary restraints in section 2.5:

> For example, one or more parties to a joint venture or licensing arrangement may refuse to participate in such arrangements without some explicit restraint on competition. Similarly, parties may not wish to invest in the joint development of a product where one party is able to independently compete with the joint venture.

In our view, these examples give easily understandable and useful illustrations of ancillary restraints. Removing examples not only reduces guidance, but may create uncertainty on whether the Bureau has changed its enforcement policies on the deleted items.

RECOMMENDATION

7. **The CBA Section recommends that the Bureau retain the examples of ancillary restraints in section 2.5 of the CCGs.**

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9 See, for example, the Netherlands's Authority for Consumers and Markets, "Draft guidelines 'Sustainability Agreements'" (July 9, 2020), online.

G. Section 2.6.1: Affiliation and "almost affiliated"

Section 2.6.1 of the CCGs offer a straightforward explanation of paragraph 45(6)(a) of the Act, which exempts affiliates as defined in subsection 2(2) of the Act from the application of section 45.

The CBA Section would welcome the Bureau clarifying its enforcement approach to circumstances where parties are sufficiently close (or "almost affiliated") so the Bureau would generally not consider the application of section 45.

Notably, a private equity firm might manage (but have no or little equity ownership stake in) several investment funds, each of which owns operating businesses. In this scenario, the private equity manager would not be affiliated with any of the operating companies – and operating companies held by one fund would not be affiliated with operating companies held through a different fund, even though they were subject to control in fact by the same private equity management team. Had this been structured through a holding company structure, management of the holding company and all the subsidiaries and operating businesses would be affiliated. Given the substantive similarity between affiliate structures and such "almost affiliate" structures, the Bureau should give itself discretion to consider the actual relationships between the parties when determining whether entities under common control in fact would be considered "competitors" for the purpose of section 45 and whether investigation under section 45 and possible referral for prosecution is appropriate.

RECOMMENDATION

8. **The CBA Section recommends that the Bureau indicate in section 2.6.1 of the CCGs that it will generally exercise its discretion to forgo investigation under section 45 for related entities and other persons whose legitimate relationship put them under common control in fact, even though they are legally unaffiliated.**

H. Section 2.6.2: Federal financial institutions

Section 49 does not appear to be an enforcement priority for the Bureau. However, the per se nature of section 49 offence makes it at least theoretically applicable to a wide range of commercial arrangements between federal financial institutions. Subsections 49(4) and 90.1(10) contain double jeopardy cross-references which confirm that Parliament recognized the possibility of overlap between these provisions.

In our view, the failure to repeal section 49 in 2009 was a legislative oversight and it is not reasonable to apply a different and higher standard to federal financial institutions than to other businesses. It would be reasonable and appropriate to interpret section 49 as narrowly as reasonably possible.

The CBA Section would welcome additional guidance on how the Bureau may exercise its enforcement discretion for criminal investigations under section 49 and reviewable practice proceedings under section 90.1.

RECOMMENDATION

9. The CBA Section recommends that the Bureau indicate in section 2.6.2 how it may exercise its enforcement discretion on the overlap between sections 49 and 90.1.

I. Section 2.7: Remedies

Over the past few years, prohibition orders pursuant to subsection 34(2) of the Act have been used in several criminal cases. In our view, prohibition orders offer an important tool for the Bureau and the PPSC to achieve judicial redress on criminal conduct that avoids the requirement of a guilty plea.

The flexibility associated with prohibition orders can allow outcomes where a cooperating party (in addition to competition in the relevant market) does not suffer undue prejudice – for example, by being prohibited from bidding on federal, provincial or municipal contracts under local debarment regimes.

In addition to the text now in section 2.7 of the CCGs, the CBA Section would welcome the Bureau explaining when it considers prohibition orders to be an appropriate remedy for criminal conduct. This could usefully include cross-referencing the relevant sections of the PPSC Deskbook that explain when prohibition orders under subsection 34(2) of the Act are considered appropriate (below):

1. any history of anti-competitive or other relevant behaviour by the respondent company, its principals or any associated company;
2. the seriousness of the conduct, including:
    i. whether a prior order or undertaking has been contravened;
    ii. the apparent effect of the conduct on consumers, competitors, etc.;

iii. whether the conduct violates corporate policy (and, if so, how effectively that policy is policed, and how quickly the conduct was terminated when senior officials became aware of it);

3. any remedial steps by the respondent; and
4. compliance policies of the Competition Bureau.[10]

RECOMMENDATION

10. The CBA Section recommends that section 2.7 of the CCGs include an explanation of the circumstances when it would consider a prohibition order under subsection 34(2) to be an appropriate remedy for criminal conduct, including the circumstances in the PPSC Deskbook.

J. Section 3.2: What constitutes an agreement under section 90.1?

The CCGs state that the Bureau does not consider that "conscious parallelism" is sufficient to establish an agreement for the purposes of section 90.1, which is a well-established principle in the jurisprudence under section 45.

The Draft Revised Guidelines add a statement that, "Parallel conduct coupled with facilitating practices, such as sharing competitively sensitive information or activities that assist competitors in monitoring one another's prices, may be sufficient to prove that an agreement was concluded between the parties."

The CBA Section appreciates the Bureau's desire to clarify the factors distinguishing mere parallel conduct from activities that would be viewed as contravening section 90.1. The Bureau could give better guidance by explaining that parallel conduct with facilitating practices may be sufficient to prove such an agreement, but only in circumstances where those actual facts permit the existence of an agreement to be inferred (on the balance of probabilities standard applicable to section 90.1).

RECOMMENDATION

11. The CBA Section recommends that the CCGs include additional guidance on the circumstances where parallel conduct along with facilitating practices would lead the Bureau to infer that an agreement or arrangement within the meaning of section 90.1 exists.

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10 Public Prosecution Service of Canada, *Public Prosecution Service of Canada Deskbook* (March 1, 2014), s. 5.2, 7.1.

K. Section 3.3: Who is a competitor under section 90.1?

The CCGs state that it may be necessary for parties to collaborate to develop a product by combining complementary technologies, and note that the parties may become potential competitors in supply of the developed product. The CCGs add that the Bureau will not consider parties to be competitors, "where they compete only in respect of products that are not subject to the agreement," and further that, "for the purposes of section 90.1, the Bureau will not consider parties to an agreement to be competitors in respect of the activity covered by the collaboration in circumstances where the parties are unable to independently develop the product, complete the project, or carry out the activity covered by the collaboration." All these statements have been deleted in the Draft Revised Guidelines.

We understand that these statements were intended to encourage pro-competitive and innovative collaborations between companies with complementary products or technologies by clarifying that such collaborations would not be subject to scrutiny under section 90.1.

We are concerned that the Draft Revised Guidelines do not contain these important assurances and only indicate that parties can become potential competitors (and therefore, it is implied, subject to scrutiny under section 90.1) by virtue of their collaboration.

In our view, if the parties would not be competitors but for the collaboration, either because the product would not exist or because the commercialization rights would be held by one party or the other, section 90.1 should not and would not apply to the collaboration.

It seems there is little risk that encouraging such collaboration would discourage other types of innovation which cannot be achieved independently. The new suggestion that collaboration in such circumstances may result in scrutiny under section 90.1 may have a chilling effect on pro-competitive collaboration.

The CBA Section understands that the Bureau wishes to preserve its flexibility to challenge all types of agreements that may result in harm to competition, even types of agreements that would rarely (but could hypothetically) result in a substantial lessening or prevention of competition (SLPC). The general caveat that the CCGs are guidelines gives this flexibility.

If the Bureau no longer believes that a blanket exception for collaborative products that could not be developed independently is appropriate, it should offer replacement guidance on the (presumably narrow) circumstances where this collaboration would raise concerns under

section 90.1, so as not to inadvertently chill desirable and pro-competitive collaborations due to concerns about competition law risks.

For example, section 3.7.3(a) of the Draft Revised Guidelines states that the Bureau will not consider R&D agreements to raise a section 90.1 concern if the parties are not able to develop the product(s) independently of the collaboration. If the Bureau's intent is to indicate that other types of agreements in respect of collaborative products that could not be developed independently could raise concerns under section 90.1, the Draft Revised Guidelines should state what types of collaborations are potentially problematic. Otherwise, the guidance now in the CCGs should be restored.

Finally, the revised CCGs do not contemplate these types of collaborative agreements in the discussion of potential competitors under section 45 (in section 2.3.2 of the Draft Revised Guidelines). These agreements should not be considered under section 45, and should only be considered under section 90.1 in the narrow circumstances described above. The Bureau may wish to consider making an explicit statement to this effect in the Draft Revised Guidelines.

RECOMMENDATION

12. The CBA Section recommends retaining the language in section 3.3 of the CCGs, indicating that the Bureau will typically not consider parties to an agreement to be competitors in respect of the activity covered by the collaboration in circumstances where the parties are unable to independently develop the product, complete the project, or carry out the activity covered by the collaboration.

In the alternative, the Bureau should give specific further guidance on the narrow circumstances where it would consider that a collaboration could raise concerns under section 90.1. The Bureau should confirm in the CCGs that these agreements will not be considered under section 45.

L. Section 3.5.1: Efficiency exception

The Draft Revised Guidelines delete a helpful example demonstrating how efficiencies claims would be reviewed by the Bureau under subsection 90.1(4). While similar points are made in detail in the Bureau's Merger Enforcement Guidelines and other guidance on efficiencies, the example is helpful in giving a concise overview of the boundaries of the defence, without requiring reference to another guidance document. If the Bureau concludes this example should

be omitted to streamline its guidance, it would help to include clear cross-linking to the other guidance documents so that they can be easily accessed by readers of the CCGs.

RECOMMENDATION

13. The CBA Section recommends that the efficiency defence example in section 3.5.1 be maintained. In the alternative, the CCGs should include clear cross-references to other Bureau guidance on efficiencies.

M. Section 3.6: Remedies

The Draft Revised Guidelines add a section on remedies that may be sought by the Bureau under section 90.1. Section 3.6.1 of the Draft Revised Guidelines state that, "in most circumstances the Bureau will require that any proposed remedy agreed upon be formalized in a consent agreement and registered with the Tribunal." As this leaves open the possibility of a consensual resolution not memorialized in a registered consent agreement, we believe the Bureau should indicate the circumstances when it would not require a consent agreement.

Section 3.6.2 of the Draft Revised Guidelines offers an overview of the remedies available by application to the Competition Tribunal, set out in paragraphs 90.1(1)(a) and 90.1(1)(b) of the Act.

In the CBA Section's view, the Bureau should give a more thorough explanation of the "prescriptive orders" the Bureau may seek under paragraph 90.1(1)(b). While applications under paragraph 90.1(1)(b) would be fact-specific, this subsection encompasses a broad range of potential orders and it would promote compliance to know the Bureau's perspective on the types of remedies it might seek under this subsection.

RECOMMENDATION

14. The CBA Section recommends additional information on the types of remedies the Bureau may seek under subsection 90.1(1)(b) of the Act and the circumstances where it may agree to remedies that would not be formalized in a consent agreement.

N. Section 3.7.4: Joint production agreements

The CCGs indicate that, "[t]he Bureau generally will not have concerns with a joint production agreement relating to an intermediate product where the intermediate product does not

represent a significant proportion of the total costs of the final product or where the parties do not have market power or are not likely to have market power in the downstream market for the final product."

The Draft Revised Guidelines indicate simply that the Bureau may consider whether the joint production agreement is likely to substantially lessen or prevent competition in respect of the intermediate or final product. The CBA Section does not understand the rationale for the change in treatment of intermediate products.

While we recognize that there may be circumstances where a joint production agreement could cause an SLPC in respect of an intermediate product, it is unlikely that an SLPC would arise in the circumstance described in the deleted text.

The deleted text offers helpful guidance that promotes compliance with the Act, and the CBA Section believes it should be retained (even if in addition to the revised text). While it is understood that the Bureau does not want to fetter its discretion to challenge anti-competitive agreements, a better approach would be to give additional guidance on the circumstances where a joint production agreement could be expected to result in a SLPC under section 90.1, rather than deleting the current general guidance on intermediate products.

RECOMMENDATION

15. The CBA Section recommends that the Bureau retain the current guidance on intermediate products and give additional guidance on the circumstances where a joint production agreement may result in a substantial lessening or prevention of competition in respect of an intermediate product.

III. CONCLUSION

We appreciate the opportunity to comment on the Draft Revised Guidelines.

The revisions will play an important role in ensuring that guidance to market participants and their advisors, as well as Bureau staff, is transparent and reflects current enforcement policies and practices. We would be pleased to discuss these comments in more detail.

IV. SUMMARY OF RECOMMENDATIONS

The CBA Section recommends:

1. **CCGs retain the original dichotomy between sections 45 and 90.1, instead of the broader dichotomy between section 45 and Part VIII. Further, reliance on Part VIII other than section 90.1 for horizontal agreements should only occur in exceptional circumstances. Given the risk of substantial AMPs emanating from section 79, we recommend that the Bureau indicate in what circumstances a review or challenge under section 79 would apply.**

   We recommend that joint abuse of dominance be considered only in circumstances where a competitor collaboration is exclusionary, disciplinary, predatory or otherwise targeted at a competitor or competitors.

2. **CCGs avoid qualifying language when describing various legitimate collaborations (for example, mergers, vertical arrangements, etc.). Instead, the CBA Section encourages the Bureau to indicate clearly in the CCGs that its analytical framework does not apply to "sham" arrangements intended to disguise "naked restraints" on competition that violate section 45.**

3. **In lieu of the general reference to case law in footnote 6, the Bureau explain the circumstances where it would rely on sections 46 and 45 respectively.**

4. **Changing section 2.3.1 of the Draft Revised Guidelines as follows:**

   For example, a wholesaler who facilitates a price-fixing conspiracy among its retail clients may be a party to the conspiracy pursuant to sections 21 and/or 22 of the *Criminal Code* even if it does not compete in the retail market.

5. **Section 2.4.1 of the CCGs clearly indicate that "no poach" and wage-fixing agreements (and other buyer-side agreements among competing purchasers) cannot be considered under section 45 unless they were a sham agreement, undertaken to fix prices, allocate markets, or restrict output for the downstream supply of products. Instead, such agreements can only be reviewed under section 90.1 based on anti-competitive effects.**

6. **The Bureau should state that a bona fide agreement to address environmental issues will be reviewed under the section 90.1 rather than any of the criminal provisions in paragraphs 45(1)(a), (b) or (c).**

7. **Retaining the examples of ancillary restraints in section 2.5 of the CCGs.**

8. **The Bureau indicate in section 2.6.1 of the CCGs that it will generally exercise its discretion to forgo investigation under section 45 for related entities and other persons whose legitimate relationship put them under common control in fact, even though they are legally unaffiliated.**

9. **The Bureau indicate in section 2.6.2 how it may exercise its enforcement discretion in relation to the overlap between sections 49 and 90.1.**

10. **Section 2.7 of the CCGs include an explanation of the circumstances when it would consider a prohibition order under subsection 34(2) to be an appropriate remedy for criminal conduct, including the circumstances set out in the PPSC Deskbook.**

11. **CCGs include additional guidance on the circumstances where parallel conduct along with facilitating practices would lead the Bureau to infer that an agreement or arrangement within the meaning of section 90.1 exists.**

12. **Retaining the language in section 3.3 of the CCGs, indicating that the Bureau will typically not consider parties to an agreement to be competitors in respect of the activity covered by the collaboration in circumstances where the parties are unable to independently develop the product, complete the project, or carry out the activity covered by the collaboration.**

    In the alternative, the Bureau should give specific further guidance on to the narrow circumstances where it would consider that a collaboration could raise concerns under section 90.1. The Bureau should confirm in the CCGs that these agreements will not be considered under section 45.

13. **Preserving the efficiency defence example in section 3.5.1. In the alternative, the CCGs should include clear cross-references to other Bureau guidance on efficiencies.**

14. **Giving additional information on the types of remedies the Bureau may seek under subsection 90.1(1)(b) of the Act and the circumstances where it may agree to remedies that would not be formalized in a consent agreement.**

15. **Retaining the current guidance on intermediate products and giving additional guidance on the circumstances where a joint production agreement may result in a substantial lessening or prevention of competition for an intermediate product.**