THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Cartel Enforcement Guidelines

CANADIAN BAR ASSOCIATION
COMPETITION LAW SECTION

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66 Slater St., Suite 1200, Ottawa, ON, Canada K1P 5H1
tel/tél. 613 237-2925 • **tf/sans frais** 1-800 267-8860 • **fax/téléc**. 613 237-0185 • cba.org • info@cba.org

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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Cartel Enforcement Guidelines

I. INTRODUCTION

The Competition Law Section of the Canadian Bar Association (CBA Section) welcomes the opportunity to comment on the draft Cartel Enforcement Guidelines issued July 15, 2026 (the "CEGs").

The CBA Section supports the Bureau's issuance of a separate set of enforcement guidelines for the criminal cartel provisions of the Act. The Bureau's prior guidance was included as part of the Competitor Collaboration Guidelines that were issued in 2009 and updated in 2021. Since that time, there have been significant amendments to the *Competition Act*. In 2022, Parliament added provisions relating to wage-fixing and no-poaching agreements to the Act. The $25 million maximum fine for section 45 offences has also been removed, leaving fines in the discretion of the court. The Bureau has also consulted on separate *Anti-competitive Conduct and Agreements Enforcement Guidelines* that provide guidance relating to the Bureau's approach to enforcement of sections 75 through 79 and 90.1 of the Act (the "ACCA Guidelines").

The CBA Section supports the issuance of separate guidelines that clearly delineate between criminal and non-criminal conduct under the Act; in our view, this furthers the Bureau's objective of promoting compliance with the Act. The CBA Section's key comments on the CEGs are as follows:

- The CBA Section encourages the Bureau to avoid adding qualifications to or otherwise diluting prior enforcement positions. These qualifications and dilutions would harm predictability and the ultimate value of the CEGs.
- The CBA Section encourages the Bureau to recognize a number of recent decisions from the Federal Court confirming that the criminal provisions of the Act are limited to unambiguously harmful conduct and hard core cartel conduct, and do not apply to good faith and transparent competitor collaborations, which are subject to review on a civil basis under section 90.1 of the Act.
- The CBA Section is concerned about the new guidance relating to the bid-rigging provisions of the Act and to hub-and-spoke arrangements, which is not grounded in jurisprudence.

The CBA Section has set out its comments based on specific sections of the CEGs under the headings below. These comments are focused on providing clarity regarding enforcement of the criminal provisions of the Act, particularly for businesses that are focused on compliance and want to understand the boundaries for competitor collaboration.

II. COMMENTS

A. Section 1: Investigations under the Cartel Provisions

The CBA Section appreciates the Bureau's enforcement guidance on its approach to assessing the interaction of the criminal cartel provisions and the civil ACCA provisions, including its helpful discussion of the Bureau's internal process for assessing the application of the criminal cartel and civil ACCA provisions. However, the CBA Section is concerned that the Bureau is not providing further clarity to the business community on the bright lines between the operation of these provisions. In recent cases, the Federal Court has concluded that the criminal cartel provisions are limited to unambiguously harmful agreements and hard core cartel conduct. As the Federal Court found in *Difederico v. Amazon.com, Inc*., 2023 FC 1156, at paras. 88, 100 and 108:

> [88] The significant increases in the potential penalties for contravening subsection 45(1) that were made in 2010, together with the removal of the limit on potential fines altogether in 2022, suggests that this provision was intended to apply to agreements that require high degrees of deterrence and denunciation. It is reasonable to infer that such agreements are those that are generally unambiguously harmful to competition and that merit the full force of the criminal law. Another way of describing such agreements are those that represent "the very antithesis of the *Competition Act*'s objective": *Pioneer Corp. v. Godfrey*, 2019 SCC 42, [2019] 3 S.C.R. 295 (Godfrey), at paragraph 65, quoting *Shah*, at paragraph 38.
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> [100] In summary, the jurisprudence discussed above supports the conclusions of the interpretative analysis provided at paragraphs 84–91 of these reasons. That is to say, the jurisprudence supports the view that Parliament intended section 45 to apply only to conspiracies, agreements and arrangements that have unambiguously harmful effects on competition. Such agreements are also known as "hard-core" or "naked" cartel agreements. This unambiguously harmful conduct must be objectively intended, in the sense that a reasonable business person who is familiar with the business in question would or should know that the impugned agreement had as its object or purpose one of the prohibited types of conduct prescribed in paragraphs 45(1)(a), (b) or (c). Other types of conduct that are only potentially anti-competitive were intended to be assessed under section 90.1 of the Act, in order to remove the threat of criminal sanctions for potentially legitimate collaborations.
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> [108] The legislative history discussed above helps to inform the Court's interpretation of section 45. As with the scheme and purposes of the Act, as well as

> the jurisprudence, it strongly suggests that the application of section 45, as currently worded, was intended to be limited to conspiracies, agreements and arrangements that are unambiguously harmful to competition. Such agreements are also known as "hard-core" or "naked" cartel agreements. Other agreements between competitors were intended to be reviewed under the non-criminal provision in section 90.1 of the Act, in part to provide clearer standards to the business community.

This ruling and other cases set out the narrow scope of section 45 and offer clarity to the business community.[1] The CBA Section strongly encourages the Bureau to incorporate this guidance into the CEGs, which do not refer to the standard of "unambiguously harmful" conduct and do not cite these decisions. While the CBA Section appreciates that certain appeals are pending, the CBA Section submits that the CEGs should explain how and when the Bureau will proceed under the criminal provisions in light of the current state of the law.

The CBA Section is also concerned about the Bureau's references to "mergers and strategic alliances" in its triage process (para. 4) and its expressed need for time and potential legal process to arrive at a decision whether to pursue an investigation on a civil or criminal track (para. 5). Given the clear standard set by the Federal Court and the need for businesses to know whether they are under criminal investigation, the CBA Section encourages the Bureau to provide clearer guidance.

The CBA Section appreciates the Bureau's guidance regarding duplicative proceedings (section 1.2). The CBA Section welcomes the Bureau's acknowledgement that the Act precludes the pursuit of parallel proceedings under section 45 or 49 and section 76, 79 and 90.1 or 92 on the basis of the same or substantially the same facts (para. 13). However, paragraph 13 contains a drafting error insofar as it states that the Commissioner can commence criminal proceedings under sections 45 or 49. Paragraph 13 of the CEGs states,

> "Similarly, where, after a referral to the DPP, **the Commissioner commences** proceedings against a person under section 45 or 49, or where the DPP has commenced proceedings under a direct indictment or under subsection 34(2), the Commissioner cannot subsequently initiate proceedings against that same person under section 76, 79, 90.1 or 92 on the basis of the same or substantially the same facts"[2]

This is not technically correct. While the Commissioner investigates conduct under section 45 and 49, the authority to commence proceedings under these sections rests with the Attorney

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1 See, e.g. *Mohr v National Hockey League*, 2021 FC 488 at paras 33 and 57, aff'd 2022 FCA 145, leave to appeal to SCC refused, 40426 (20 April 2023); *Sunderland v Toronto Regional Real Estate Board*, 2023 FC 1293 at paras 97-98; *Jensen v Samsung Electronics Co Ltd*., 2021 FC 1185 at para 90.

2 Emphasis added.

General of Canada, as set out by section 73(1) of the *Competition Act.*[3] The law is correctly stated in the Interpretation section of the CEGs, which highlights the role of the Commissioner compared to the Director of Public Prosecutions (DPP). Similarly, paragraph 175 of the CEGs, which correctly reproduces section 23 of the *Competition Act*, reflects the fact that only the Attorney General of Canada may institute and conduct prosecutions under the Act. The CBA Section recommends that paragraph 13 adopt the language from section 73(1) of the *Act* which provides that, "the Attorney General of Canada may institute and conduct any prosecution or other proceedings under … any of sections 45 to 49".

Additionally, the CBA Section is concerned by the ambiguity resulting from the Bureau's position that it may switch criminal and civil tracks based on a "substantial change of facts" (para. 15). Given the guidance from the Federal Court and the engagement of constitutional rights in the criminal process, the Bureau's guidance should be amended to make it clear that it will select one track at the outset of any investigation.

B. Section 2: Definition of Agreements

The CBA Section appreciates the Bureau's enforcement guidance on the meaning of an "agreement" for the purposes of sections 45 through to 49. The CBA Section agrees with the Bureau's guidance that "there must be a meeting of the minds to fix the price of a good or service" to trigger a review under the criminal provisions of the Act (para. 18). But the CBA Section is concerned that the description goes beyond what is necessary to describe a "meeting of the minds" and veers into an incorrect description of the subject matter of the agreement. Paragraph 18 defines "meeting of the minds" in the agreement context stating,

> "In determining whether an agreement exists, we consider whether the parties to the alleged agreement reached a "meeting of the minds". A meeting of the minds occurs when two or more businesses or individuals reach a consensus regarding their intentions. **In some respect, they** agree **to act predictably for a certain purpose**. For example, under paragraph 45(1)(a), there must be a meeting of the minds to fix the price of a good or service ("product"). However, a meeting of the minds can be reached even if the agreement is never implemented by the parties"[4] *(emphasis added)*

The statement that, "in some respect, they agree to act predictably for a certain purpose" is not relevant to whether there has been a "meeting of the minds". A "meeting of the minds" is a consensus, as described in the CEGs. Whether that "meeting of the minds" is a violation of

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3 *Competition Act,* RSC 1985, c C-34 at s 73(1).

4 Emphasis added.

section 45 depends on what it relates to. Acting predictably for a certain purpose does not violate section 45. Businesses may agree to act "predictably" in a variety of ways. Their conduct only violates section 45 if the "meeting of the minds" relates to the conduct specifically enumerated in paragraphs (a) to (c). The CBA Section suggests this section be removed entirely as irrelevant and incorrect.

The CBA Section also appreciates the Bureau's express endorsement that conscious parallelism is not subject to criminal enforcement, given that "there is no meeting of the minds" (para. 20). However, there remains ambiguity in the description of conscious parallelism. At paragraph 20, the CEGs state,

> "…Conscious parallelism by itself is not considered an agreement since each business is acting alone, making its own decisions independently, even if its decision is based on anticipating, copying or reacting to an action taken by a competitor. For example, there is no agreement between competitors simply because one business in a market raises the price of its product expecting that its competitor would do the same. Nor is there an agreement simply because a business reacts to a competitor's price increase by raising its own prices."

Footnote 11 relates to the last sentence in that paragraph and provides,

> "While each market and case is unique, **at some point** a **predictable and robust** call and response pattern between two or more competitors **could** be evidence of an agreement and give rise to an enforcement concern."[5]

Respectfully, footnote 11 injects enormous uncertainty into the enforcement approach under section 45. At what point will the parties' conduct violate section 45? What will qualify as a "predictable" or a "robust" pattern? Even more fundamentally, what will qualify as a "pattern" in the first place? By its nature, conscious parallelism may produce outcomes that could have been – but were not – the product of an agreement and were instead the outcome of independent decision making. Consistently reacting to a competitor's price changes is an example of entirely independent conduct that could fall afoul of the "pattern" approach suggested by footnote 11. Similarly, in labour markets, where employment terms may be published in job postings, communicated by recruiters, reported in industry surveys, and disclosed by candidates during hiring negotiations, employers may observably follow one another on compensation without any agreement. The CBA Section recommends that footnote

5 Emphasis added.

11 be removed. If not removed, more guidance is required to describe in greater detail when a business's pattern of conduct could conceivably cross the line.

The CBA Section is further concerned about the Bureau's general references to (i) the use of shared algorithms and platforms or other "tools" by businesses that might be subject to criminal enforcement (para. 22), (ii) "sharing commercially sensitive information in the course of collaboration activities", and (iii) "the sharing of employment terms" (para. 22). As described above, the Federal Court has ruled that section 45 is limited to unambiguously harmful conduct that involves hard core cartel activity. The transparent collaboration among competitors using these tools falls outside section 45 and may have pro-competitive benefits.

In the CBA Section's view, businesses need clearer guidance that the use of such algorithms, platforms and tools will not trigger a criminal investigation. The Bureau's proposed guidance in the CEGs will discourage the use of such tools, which are widely used in other jurisdictions. The CBA Section encourages the Bureau to distinguish more clearly between conduct that will be assessed under section 45 and conduct that will be assessed under the ACCA provisions of the Act.

The CBA Section is also concerned that the Bureau has omitted any guidance on the territorial application of section 45. In its prior CCGs, the Bureau included the following guidance in footnote 19:

> For greater certainty, agreements between competitors that fall outside of the prohibitions of subsection 45(1) or that satisfy the elements of the ancillary restraints defence can be reviewed under section 90.1. For a discussion of the application of section 90.1 of the Act to agreements that were formed or entered into outside of Canada, see The Commissioner of Competition v Harper Collins Publishers LLC et al, 2017 Comp Trib 10, at paras 66-174. See also Rakuten Kobo Inc v Canada (Commissioner of Competition), 2018 FC 64, at paras 81-141. For a general discussion of conduct that may be subject to the jurisdiction of Canadian courts, please see R v Libman, [1985] 2 SCR 178.

The draft CEGs remove this guidance, replacing it with the shorter footnote 49:

> See the Supreme Court of Canada decision at: Libman v. the Queen, 1985 CanLII 51 (SCC) for more information on the scope of Canadian law enforcement jurisdiction.

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.[6]

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

The CBA Section encourages the Bureau to provide more clarity on its views relating to the application of section 45 to agreements that are entered into outside Canada. In other words: how does the Bureau **apply** the Libman principles to conduct that may violate section 45?

Additionally, section 46 of the Act criminalizes the implementation of a foreign directive regarding a conspiracy entered into outside of Canada. This provides a powerful criminal remedy to address foreign conspiracies that affect Canada. As noted in the Tribunal's *Harper Collins* decision, whether section 45 can apply to agreements formed outside of Canada remains unresolved.[7] There is also a pending appeal before the Supreme Court of Canada on these very issues.[8]

It is not helpful for the CEGs to imply that a criminal provision may have extraterritorial application in the absence of a clear statutory provision or judicial interpretation. The Bureau should address its enforcement approach regarding the application of the criminal provisions of the Act in clear terms.

As a final note on the Agreements section, the CBA Section flags some inconsistencies with the stated effect of writing agreements down. Paragraph 24 states,

> "Finally, cartel agreements are often hidden and not written down. Placing them into a written contract or making them public through an announcement **does not make them legal**. Regardless of form, formality or enforceability, we investigate agreements under the most appropriate section of the Act"[9] *(emphasis added)*

The CBA Section recognizes this is intended as a summary comment and perhaps intended to apply only to section 45. However, as drafted it appears to apply to section 47, and, in that case is inconsistent with the made known defence under that section. The very essence of the made known defence is that agreements that would otherwise violate section 47 are legal if disclosed in writing or otherwise to the person calling for bids or tenders.

Further, the blanket statement in paragraph 24 is inconsistent with how paragraph 148 of the CEGs describes the interaction of the made known defence even outside of section 47. Paragraph 148 states,

> "We recognize that bidders may wish to form bid consortia to effectively bid for certain projects. Even when a business has available productive capacity to bid independently, collaborations with others can lead to lower prices or higher quality

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7 *The Commissioner of Competition v. Harper Collins Publishers LLC*, 2017 Comp. Trib. 10 at paras. 85, 91-93.
8 *NHK Spring Co., Ltd., et al. v. Tony Cheung, et al.*, 2025 SCC 41451(Leave to Appeal).
9 Emphasis added.

> products. However, potential bidders should appreciate that there is no ancillary restraints defence to a bid-rigging offence. Making the agreement known to the person calling for bids, as described in paragraphs 163 to 169, is a legal mechanism provided by the Act to ensure that an agreement does not violate section 47. **When a bid consortium is made known, it ordinarily will not be assessed under section 45** but may be reviewed under the ACCA provisions." *(emphasis added)*

Here, the CEGs imply the opposite of what paragraph 24 states: disclosing the agreement does make it legal, both under section 47 and "ordinarily" under section 45.

This apparent conflict between paragraphs 24 and 148 is not the only issue. Paragraph 148 indicates that bidders could make known their joint bidding agreement and so avoid prosecution under section 47, but somehow still offend section 45, although this will not "ordinarily" be so. In our view, it is difficult to imagine a scenario in which bidders could immunize themselves from scrutiny under section 47 but violate section 45.

The CBA Section recognizes that members of a bid consortium who also agree on matters beyond the bid that has been made known may engage section 45 in respect of that other conduct. If the CEGs contemplate that scenario, they should do so expressly. But where the agreement made known is the bid consortium itself, and the conduct in question is the joint bid, conduct that is expressly insulated under section 47 through the made known defence should not be caught under section 45.

The CBA Section suggests the removal of "ordinarily" from paragraph 148. If the conduct is expressly insulated under section 47, through the made known defence, that conduct should not be caught under section 45.

C. Section 4.2.1: Competitors: defined

The CBA Section commends the Competition Bureau for highlighting the importance of defining competitors for the enforcement of the cartel provisions. How competitors will be defined is critically important because section 45 only applies to agreements or arrangements between competitors. With the possibility of serious criminal penalties under section 45, market participants need to understand who their competitors are to comply with the Act.

The CBA Section acknowledges that the CEGs attempt to provide a clear explanation of how competitors will be defined; that said, in our view, greater detail regarding how the Competition Bureau identifies competitors for the purpose of section 45 would improve the CEGs.

In defining "competitors" and "potential competitors", the CEGs contain an example at paragraph 43, which states,

> "For example, where two businesses compete in the supply of electronic automobile widgets and decide to start a joint venture selling hydraulic avionic gadgets, we likely will determine that the businesses are not competitors in the avionics industry. On that basis, we would not be able to establish an offence under subsection 45(1), even if the joint venture agreement sets the price that the joint venture will charge for the new avionic product. However, we could review it under the ACCA provisions."

Although this example illustrates a situation in which businesses would not be competitors, it implies that joint ventures may be reviewed under section 45, despite such agreements typically only attracting scrutiny under the civil ACCA provisions. In the CBA Section's view, paragraph 43 should employ an alternative example that does not pertain to a joint venture.

The CEGs discuss competitors in greater detail at paragraph 48, which states,

> "In determining whether parties to an agreement are competitors for the purpose of subsection 45(1), **we will not engage in a detailed market analysis**, in the sense of having to prove the full nature and extent of the market and the participants within it. As long as the parties are offering, or, in the absence of the agreement, would likely offer, the same or otherwise competing products in the same or otherwise competing regions, we will generally conclude that the parties are in competition with one another for the supply of such products."[10] *(emphasis added)*

The Bureau further provides evidence at paragraph 49 that it may consider when determining whether the parties are competitors.

Paragraphs 48 and 49 of the CEGs do not provide any tangible framework for market participants to understand how competitors will be defined. While it is clear on reading these paragraphs that the Competition Bureau will not necessarily conduct a full market analysis, it is not clear what the Competition Bureau will look to in absence of that framework. The CEGs broadly indicate that the Competition Bureau will identify competitors who sell "the same or otherwise competing" products or sell "similar" products to "similar" customers, but does not provide guidance on what a "similar product" or an "otherwise competing product" is.

If a full market analysis is not required, the CEGs imply that the parties may not need to be in the same relevant market at all.

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10 Emphasis added.

The CEGs should clarify that the Competition Bureau will still look for evidence that the parties are **in the same relevant market in the sense that they supply substitutable products or services**, even though a full relevant market analysis is not required. The CEGs could connect this to the Competition Tribunal's jurisprudence, which discusses product substitution and rivalry more generally.

For example, in *TREB*, the Tribunal described how it has approached relevant market analysis and substitution by asking whether "buyers are willing to switch from one product to another in response to a relative change in price".[11] It acknowledged the role of the hypothetical monopolist test in that analysis, but cautioned that test may not always be applicable. Thus, it identified other, indirect indicia of substitutability:

> [130] […] it should be recognized that market definition in section 79 proceedings will largely involve assessing indirect evidence of substitutability, including factors such as functional interchangeability in end-use; switching costs; the views, strategies, behaviour and identity of buyers; trade views, strategies and behaviours; physical and technical characteristics; and price relationships and relative price levels (*Canada Pipe FCA Cross Appeal* at paras 15-16; *Tele-Direct* at pp. 36-82). In assessing such indirect evidence, functional interchangeability in end-use is a necessary but not sufficient condition for products to be included in the same relevant market (*Tele-Direct* at p. 38).

The CBA Section acknowledges that the types of evidence the Bureau lists in paragraph 49 of the CEGs fit into one or more of these categories of "indirect evidence of substitutability". From the perspective of the CBA Section, the issue is not that the Bureau proposes to rely on inadequate evidence, but that the CEGs could better explain what it means for persons to compete "with respect to a product" in view of the jurisprudence and economic theory.

In addition to these concerns regarding the identification of competitors, additional clarity is required in the description of potential competitors. Paragraph 42 of the CEGs states,

> "Subsection 45(1) prohibits certain agreements between businesses that compete or are likely to compete ("potential competitors"). […] Under subsection 45(1), parties will be found to be competitors when they compete, **or it is reasonable to believe they would be likely to compete**, on the products that are subject to the agreement." *(emphasis added)*

The description in paragraph 42 is oversimplified and should be corrected. The key metric when analyzing potential competitors under the Act is the potential for competition between

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11 *The Commissioner of Competition v The Toronto Real Estate Board*, 2016 CACT 7 at para. 118 citing *Canada (Commissioner of Competition) v Canada Pipe*, 2006 FCA 236.

them **in the absence of the illegal agreement**.[12] Here, the CEGs suggest the description is broader, including situations where parties are likely to compete. Yet, there are many conceivable situations where businesses could compete with each other in theory, but without the caveat of "in the absence of the illegal agreement", these situations do not fall into the definition of potential competitors. The CEGs correctly state the law in paragraph 50, but paragraph 42 should be corrected to ensure clarity and accuracy.

D. Section 4.2.2.2: Hub and Spoke Cartels

The CBA Section appreciates the introduction of guidance on hub-and-spoke arrangements, which did not appear in the CCGs. As discussed above in Section B, however, additional guidance is needed, particularly with respect to how the Bureau intends to distinguish pro-competitive use of a shared platform from the type of arrangements described in paragraph 59 of the CEGs; this is important because businesses in many sectors now rely on third party platforms and algorithmic tools for purposes such as improving efficiency or lowering transaction costs.

For example, relevant considerations may include whether users agreed with one another to adopt the tool or to adhere to its outputs; whether the tool was designed or configured at the users' direction to produce a coordinated result; whether users supplied confidential, current or forward-looking information in circumstances where it was accessible, directly or in reconstructable form, to competitors; and whether users gave assurances, conveyed through a supplier, that they would not deviate from its recommendations. Conversely, the CEGs should confirm that the use of a tool operating on aggregated or historical inputs, from whose recommendations users remain free to depart, and which is adopted independently, does not engage section 45.

Absent such guidance, the CEGs may discourage the adoption of technology that carries real efficiency benefits, without any corresponding enforcement gain. Such an outcome would be inconsistent with the guidance of the Federal Court discussed in Section A above, which confines section 45 to unambiguously harmful conduct.

Finally, the CEGs should expressly state that, consistent with paragraph 18, subsection 45(1) applies to a hub-and-spoke arrangement only where the spokes have reached a meeting of the

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12 *Competition Act* s. 45(8): competitor includes a person who it is reasonable to believe would be likely to compete with respect to a product in the absence of a conspiracy, agreement or arrangement to do anything referred to in paragraphs (1)(a) to (c).

minds with one another, and that evidence that each spoke reached an agreement with the hub is not, without more, sufficient.

E. Section 4.3: Agreements between Employers

The CBA Section commends the Bureau for its comments on the specific cartel considerations between employers. As is well known, paragraph 45(1.1)(b) of the Act prohibits agreements between unaffiliated employers not to hire each other's employees.[13] Paragraph 82 of the CEGs explains when paragraph 45(1.1)(b) will apply, however the explanatory footnote is unclear.

Paragraph 82 states,

> "As mentioned, the paragraph [45(1.1(b)] applies only to agreements to not solicit or hire "each other's" employees. When a restraint contained in an agreement only applies to one employer, we will view it as "one-way" and not applicable to "each other's" employees. However, when there are separate agreements between two or more employers that result in reciprocating promises to not poach each other's employees, then we may take enforcement action."

The associated footnote 44 states,

> "When the parties' respective no-poaching restraints are not in force at the same time or the agreements apply to unrelated employees, such as employees in different regions or lines of business, **we will prioritize our enforcement on those agreements that appear to be designed to evade the application of paragraph 45(1.1)(b)**."[14]

It is unclear to the CBA Section what footnote 44 describes. Are these examples of reciprocal agreements that violate the Act? Are they non-reciprocal, at least on their face, so they only raise concerns if they are actually reciprocal in practice but were designed to avoid the application of the Act? Given the ubiquity of lawful non-solicit clauses, further clarity is required to allow employers to comply with the Act's no-poaching restraints.

The CBA Section also notes that footnote 39 states that the Bureau prioritizes enforcement on wage-fixing and no-poaching agreements between employers that would otherwise compete in the purchase of labour. Because subsection 45(1.1), unlike subsection 45(1), contains no competitor requirement, that statement is the principal limit on the Bureau's enforcement of the provision. The CBA Section recommends that it be moved from the footnote into the text of paragraph 75.

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13 *Competition Act,* RSC 1985, c C-34 at s 45(1.1)(b).

14 Emphasis added.

F. Section 4.4: Statutory Defences

The CBA Section acknowledges the helpful clarification on the section 45 statutory defences in the CEGs. For the most part, this section provides useful instructions to market participants on what will be required to qualify for the various defences. The CBA Section notes however that there remains some ambiguity on the enforcement approach to the ancillary restraints defence.

Paragraph 94 provides helpful guidance on the ancillary restraints defence. The paragraph states,

> "There is no requirement under subsection 45(4) that the challenged restraint be the least restrictive alternative. In determining whether a challenged restraint is reasonably necessary, we will not "second guess" the parties with reference to some other restraint that may have been less restrictive in some insignificant way. Further, we will not examine theoretically less restrictive alternatives that are not practical given the business circumstances. However, when there were **significantly less restrictive alternatives available** to the parties, the parties must demonstrate that those alternatives were inadequate or impractical, or that those alternatives would not allow the parties to achieve the objective of the agreement. If the parties could have achieved an equivalent or comparable arrangement through practical, **significantly less restrictive means** that were reasonably available to the parties at the time the agreement was entered into, then we will conclude that the restraint was not reasonably necessary."[15]

While directionally helpful, this paragraph does not provide insight into what may qualify as "significantly less restrictive" means or alternatives. For market participants to comply with the Act and qualify for this defence, the CBA Section encourages further guidance regarding the threshold for "significantly less restrictive alternatives".

Moreover, the CBA Section notes that subparagraph 45(4)(a)(i) refers to a restraint that is ancillary to a "broader or separate agreement *or arrangement* that includes the same parties"[16] whereas the CEGs refer throughout only to a broader or separate "agreement". The CBA Section recommends the CEGs adopt the statutory language of an "agreement or arrangement" to more clearly confirm that structures organized as a series of bilateral agreements with a common counterparty, such as franchise systems in which no two franchisees have contracted with each other, may also constitute a broader or separate arrangement for the purposes of subsection 45(4).

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15 Emphasis added.

16 Emphasis added.

G. Section 4.7: Bid-Rigging

The CBA Section commends the Competition Bureau for this guidance on its enforcement approach to bid-rigging under section 47 of the Act. There remain concerns however regarding the stated applicability of section 47 to buy-side bidding processes and the interplay between buy-side agreements and the made known defence.

The CEGs state that section 47 applies to buy and sell-side bidding processes. Specifically, paragraph 128 of the CEGs states,

> "Parties should note that the definitions provided in section 47(1) are exhaustive and can be applied to a call for bids to purchase (i.e. auctions) or supply a product (e.g. procurement of business supplies)."

To the knowledge of the CBA Section, this is the first time that the Bureau has stated that section 47 applies to buy-side bidding processes. The CBA Section is not aware of any prior case involving buy-side allegations under section 47; certainly, there have been no such convictions under section 47. Indeed, the bid-rigging cases to date have been sell-side cases that have narrowly interpreted 'bid and tender' to mean very specific practices in formal sell-side tendering processes.

For example, in the instructions to the jury in *R. v. Durward*, Justice Warkentin described the applicable law as follows:

> There is no difference between the words bid and tender which are often used interchangeably.
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> A call for bids or tenders may generally be described as an invitation by the person making the call for bids or tenders, for offers from vendors or contractors, to enter into a subsequent contract on the terms specified in the invitation, to undertake the services for a price specified by the contractor. The person calling for bids or tenders will put out a call to the public or to a group of vendors or contractors asking them to submit bids that are compliant with terms set out in the call. Those who respond to the call must submit a bid that is compliant with the terms of the call, and also set out the terms on which they would be willing to undertake the services sought.
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> While there is only one physical exchange in a call or request for tenders, at law the call for and the submission of a bid results in two separate contracts - Contract A and Contract B.
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> In order for the procurement process to be a call for bids or tenders, there must be a Contract A and the intention to enter into a Contract B.[17]

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17 *R. v. Durward* (2015), 09-300-68, Warkentin J. at 44 (Ont. S.C.J.). See also *R. c. Rousseau*, 2018 QCCS 640 (Que. S.C.).

While the facts of *R. v. Durward* or similar cases did not raise the issue of whether section 47 applied to buy-side conduct, their interpretation of the statutory phrase "a call for bids or tenders" describes a specifically sell-side process.

In addition, the application of section 47, and criminal sanctions, to buy-side conduct appears to be inconsistent with Parliament's approach to buy-side conduct overall. In 2010, Parliament expressly limited section 45 to sell-side agreements, and specifically "hardcore cartel agreements" that fix prices, allocate markets or restrict output.[18] Because buy-side agreements can be procompetitive, Parliament and the Federal Court have acknowledged that section 90.1, which engages a non-criminal analysis, is more appropriate for buy-side agreements.[19] In this context, it is not obvious that section 47 applies to buy-side agreements.

Applying section 47 to buy-side conduct also produces an outcome in which the form rather than the substance of the conduct determines criminality. Joint purchase through an auction is criminal; joint purchase through any other process is not.

The CEGs' application of section 47 to buy-side conduct is even more troubling given the strict requirement the CEGs describe for the made known defence. Paragraph 165 of the CEGs places the onus on the joint bidders to provide notice of any agreement stating,

> "…Bidders cannot presume that the person calling for bids will infer or assume that a joint bid or joint venture is in place in the absence of clear notice. Rather, a person submitting a bid which contravenes paragraphs 47(1)(a) or (b) must give actual notice of the agreement to the person calling for or requesting the bids at or before the time when the bid is submitted or withdrawn in order to take advantage of the made known allowance in subsection 47(1). Parties must make the agreement known to the person calling for bids for each call for bids to which it applies. Incomplete or misleading information that fails to disclose an agreement or the parties to the agreement is likely insufficient. The obligation is to proactively notify the person calling for bids so that they become aware of the agreement, and not expect that they figure it out on their own on the basis of the bids submitted or otherwise".

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18 See *Sunderland v Toronto Regional Real Estate Board,* 2023 FC 1293 at paras 97-98; *Mohr v National Hockey League,* 2021 FC 488 at paras 33 & 57; *Jensen v Samsung Electronics Co Ltd.,* 2021 FC 1185 at para 90; *Commissioner of Competition v HarperCollins Publishers L.L.C and HarperCollins Canada Limited,* 2017 CACT 10 at para 59; *Difederico v Amazon.com Inc.,* 2023 FC 1156 at paras 95 & 100.

19 See Competition Bureau Canada, *Competition Bureau statement on the application of the Competition Act to no-poaching, wage-fixing and other buy-side agreements,* (Gatineau, 2020) online. *Mohr v National Hockey League,* 2021 FC 488 at para 60; Canada, Innovation, Science and Economic Development Canada, *The Future of Competition Policy in Canada,* (Ottawa, 2022) at s VI 3 online. Competition Bureau Canada, *Competitor Collaboration Guidelines* (Ottawa, 2021), online.

The CBA Section agrees with the Bureau that clear guidance about the application of the made known defence is essential so that bidders can comply with the Act. It agrees that bidders should be cautioned about the risks of assuming knowledge on the part of the person calling for bids. The notice described in the CEGs is certainly best practice, and the CBA Section encourages the Bureau to provide more examples of acceptable notice, in addition to the conference call example in Example 12.

However, the strictness of the made known defence reinforces that section 47 is ill-equipped to apply to buy-side agreements. On the CEGs' reading, two farmers who intend to share a second-hand combine, or two siblings who intend to share a cottage, could face criminal exposure because only one participates in the farm-equipment auction (or bids on the cottage). There are countless everyday examples of processes where Canadians jointly bid to purchase items, but would never expect that formal disclosure of the joint nature of the bid is needed to avoid criminal sanction.

Given the lack of case law supporting the application of section 47 to buy-side conduct, and the other considerations described in these comments, the CBA Section strongly encourages the Bureau to revise the CEGs to focus on the application of section 47 to sell-side conduct.

H. Section 4.8: Remedies

Section 4.8 addresses the process by which a matter proceeds to prosecution and the ancillary orders that may follow a finding of guilt, but says little about the principal sanction. Paragraph 177 notes that a person found guilty under subsection 45(1), 45(1.1) or 47(2) may be imprisoned for up to 14 years or fined in the discretion of the court. Before the 2022 amendments, subsection 45(2) fixed a maximum fine of $25 million which, while not a guide to the fine a court would impose, established the outer limit of exposure against which businesses and their counsel assessed risk. The CEGs describe the removal of that maximum at item (iv) of the Introduction as ensuring that penalties for section 45 offences serve as an effective deterrent. Deterrence, however, depends on those subject to a sanction being able to anticipate it, and the removal of the statutory maximum has made that materially more difficult.

The CBA Section recommends that the CEGs describe the methodology the Bureau applies in formulating sentencing recommendations to the DPP, including whether it continues to use an estimate of the volume of affected commerce as a starting point, the aggravating and mitigating factors it considers, and whether it regards sentencing decisions rendered before the 2022 amendments as continuing to inform its recommendations.

I. Section 4.9: Section 48 relating to Professional Sports

The CBA Section makes no comment on the Bureau's decision not to enforce section 48. It notes, however, that the CEGs describe section 48 without distinguishing among its subsections, and that the statement at paragraph 185 is expressed as applying to "this section" as a whole. Section 48 is not a single rule; subsection 48(3) provides that section 45 does not apply to agreements among teams or clubs in the same league relating exclusively to matters described in subsection 48(1) or to the granting and operation of league franchises, and that section 45 applies to all other agreements between them. Subsection 48(3) thus sets out a rule allocating conduct between two provisions and does not contain the terms the Bureau has identified as presenting enforcement challenges.

The CBA Section recommends that the Bureau address subsection 48(3) expressly, as it does for the comparable allocation rule in section 49 at paragraph 190, and that the CEGs reflect the confirmation of the Federal Court that the purview of subsection 48(1) is limited to the intra-league agreements described in subsection 48(3) and does not apply between leagues.[20]

J. Conclusion

The CBA Section thanks the Bureau for this opportunity to comment on the draft CEGs. It is available to discuss any of these comments in more detail or to answer any questions should that prove helpful.

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20 *Mohr v National Hockey League*, 2021 FC 488 at paras 85, 140, aff'd 2022 FCA 145, leave to appeal to SCC refused, 40426 (20 April 2023).