

INTERNATIONAL BAR ASSOCIATION

ANTITRUST COMMITTEE WORKING GROUP ON THE DRAFT CANADIAN COMPETITOR COLLABORATION GUIDELINES

1. This submission is made to the Canadian Competition Bureau (the “Bureau”) on behalf of the Working Group of the Antitrust Committee of the International Bar Association (the “Working Group”) that has been formed in response to the Bureau’s public consultation on draft Competitor Collaboration Guidelines (the “Guidelines”). The Working Group appreciates this opportunity to provide our comments to the Bureau.

2. The IBA’s Antitrust Committee brings together antitrust practitioners and experts among the IBA’s 20,000 individual members from across the world, with a unique blend of jurisdictional background and professional experience. The Working Group’s comments and recommendations draw on the members’ experience with antitrust law and the treatment of competitor collaborations in Canada, the US and the EU. The members of the Working Group are set out in Annex A.

3. We commend the Bureau for taking the step of preparing Guidelines at this crucial juncture in the development of Canadian competition law. In March 2010, amendments to the *Competition Act* will come into force that will significantly change the treatment of anticompetitive agreements among competitors. Businesses and their representatives will have very limited ability to draw on the understandings derived from past jurisprudence which has been based on a soon-to-be-superseded legislative approach. Moreover, if history is a guide, Canadian jurisprudence on the new provisions will likely develop quite slowly. Hence, for many years to come, the Guidelines will serve as the single most important interpretive tool in understanding the new amendments and the proper approach to dealing with agreements and arrangements among competitors.

4. As an introductory comment, we believe that the Guidelines do a generally good job of explaining the law on competitor collaborations, the Bureau’s enforcement approach, and the treatment of a number of difficult situations that can be anticipated. That said, as we examined

the Guidelines, we observed a number of issues where some clarification or other improvement would be useful. Accordingly, in the following pages, we discuss and offer our recommendations on the treatment of dual distribution and similar inherently vertical arrangements, the ancillary restraints defence, the affiliated companies exception, the safe harbour rules, the treatment of joint purchasing arrangements, and intellectual property issues.

A. Treatment of Vertical Arrangements

5. The general statement found in section 1.1 of the Guidelines that the “amended criminal prohibition is reserved for agreements between competitors to fix prices, allocate markets or restrict output that constitute naked restraints on competition” is an important delineation of when section 45 should apply.¹ The impact of criminal sanction to a company and its employees can be devastating. Quite apart from fines and potential imprisonment, they also face reputation loss and potential civil litigation. While the Guidelines can not immunize parties from civil litigation under section 36 of the Act, the Guidelines will nonetheless have significant impact on the risk of litigation. Any lack of clarity as to the application of section 45 will materially increase the risk of litigation and negatively impact contractual certainty.

6. The adoption of a *per se* approach to “naked restraints on competition” marks a significant change from the approach the Supreme Court of Canada called a “partial rule of reason” analysis² which required that the restraint “unduly lessen competition” before it could be found to constitute a criminal offense. The Working Group supports the position that the types of anticompetitive agreements that should be prosecuted as *per se* criminal offenses should be restricted to naked restraints on competition.

7. Vertical agreements and concerted practices are typically not subject to *per se* condemnation because they are not agreements among competitors and, perhaps more importantly, because they are agreements that “can improve economic efficiency within a chain of production or distribution by better coordination between the participating undertakings; in particular, they can lead to a reduction in the transaction and distribution costs of the parties”.³

¹ Guidelines, section 1.1

² *R. v. Nova Scotia Pharmaceutical Society* (1992), 43 C.P.R. (3d) 1

³ Commission Regulation (EC) No 2790/1999

Consistent with this view the Guidelines note generally that “vertical agreements between suppliers and customers will be assessed under the reviewable matters provisions found in Part VIII of the Act, such as section 76 (price maintenance) and section 79 (abuse of dominance), and not under the conspiracy provision in section 45.”⁴

8. In many cases vertical agreements or arrangements such as distribution agreements or franchise arrangements will not be caught by section 45 because they are not agreements or arrangements among competitors. That said, section 45 is potentially applicable to distribution agreements and franchise arrangements where the supplier or franchisor is also a competitor of its distributors or franchisees – a not uncommon occurrence. Many suppliers today have so-called dual distribution models which include direct sales to customers. These have become commonplace over the past decade with the advent of online sales or web stores. Similarly, many franchise models involve corporate franchisees owned by the franchisor, which compete directly with the other franchisees. In these circumstances, the supplier or franchisor is also a competitor with the distributor or franchisee. Moreover, under the extended definition in section 45, a supplier and a distributor, or a franchisor and a franchisee, can also be defined to be “competitors” if they would be reasonably likely to compete in the absence of the agreement or arrangement. Therefore these substantively vertical agreements or arrangements may well be vulnerable to the potential application of section 45.

9. The Guidelines state that “subject to certain exceptions, the Bureau does not consider such vertical arrangements to be agreements between competitors” and therefore will exercise its discretion not to review such agreements under section 45. The exceptions referred to are identified in the Guidelines by examples found in subsection 2.3(c) and examples 4 and 5 at page 41 of the Guidelines. These exceptions relate to dual-distribution agreements and franchise arrangements where the supplier or franchisor is a competitor to its distributors or franchisees, as the case may be.

10. The Guidelines state that section 45 may have application to these agreements or arrangements in circumstances where:

⁴ Guidelines, subsection 1.2(c)

- “a supplier imposes a restraint on distributors not because the supplier was of the view that such restraint was necessary, but because the distributors acting in concert coerced or requested the supplier to impose the restraint”: or
- “the franchisor imposes a restraint on franchisees not because the franchisor was of the view that such restraint was necessary, but because the franchisees, acting in concert, coerced or requested the franchisor to impose the restraint”.

11. These exceptions are based on a subjective analysis of the motive or objectives of some or all of the parties for entering into the restraint. If the franchisor believes that a territorial restriction is important and introduces the requirement, the arrangement will escape criminal *per se* condemnation. But where the same restraint is requested by two or more franchisees, it would be potentially prosecuted under section 45 (even though the requesting franchisees may not be competitors if they operate in different local markets). As a result two identical franchise agreements would be differentiated solely by whether the restraint was inserted at the behest of the franchisees or franchisor. Similarly a restraint on price dictated by the terms of a distribution agreement will be treated under the Act according to whether that restraint was requested by the distributors or was inserted at the behest of the supplier.

12. The Working Group is concerned that this distinction may be difficult to apply to the facts and circumstances of many specific agreements or arrangements, including those that have been in place for many years. In addition, distinguishing the legality of a restraint based on the subjective intent or objectives of the parties is not only difficult to apply, but it potentially subjects some parties to the agreement to significant risk if they are unaware of how the restraint in question came to be introduced into the agreement in the first place. Further, the fact that a restraint was motivated by the interests of the supplier versus distributors, or the franchisor versus franchisees, does not change the competitive impact of the restraint or change it from a vertical restraint to a naked horizontal restraint on competition which is the intended focus of *per se* condemnation in section 45.

13. The European rules explicitly recognize that vertical arrangements may be legitimately entered into by competitors. The EU block exemption on vertical agreements and concerted practices applies to franchise arrangements⁵ and dual-distribution agreements⁶ (subject to some

⁵ Commission Regulation (EC) No 2790/1999, Article 2(3)

⁶ Commission Regulation (EC) No 2790/1999, Article 2(4)

market share limitations). The block exemption is specifically made inapplicable to certain types of “hard core” vertical restraints such as minimum pricing requirements or certain market restriction provisions.⁷ This categorical approach provides a much greater certainty and transparency with respect to vertical agreements or arrangements that may be scrutinized under Article 81(1). In fact, the EU rules do not automatically prohibit even dual distribution or franchising agreements that cannot benefit from the block exemption, for example, because of high market shares, or the presence of hard core restrictive provisions. Even where such an agreement is shown to have an anti-competitive object or effect and so to infringe Article 81(1), it is always possible in principle for it to be exempted under Article 81(3) on the basis that it creates efficiencies.⁸ In practice the type of dual distribution or franchising agreement most likely to raise concerns is one which is in reality a supplier or a distributor cartel, which would need to be proved by showing a “concurrence of wills” between all parties concerned.⁹

14. Recent decisions of the United States Supreme Court also support the position that vertical restraints should not be judged under the *per se* standard.¹⁰ Price restraints, the last bastion of a *per se* treatment for vertical agreements, have now been found, at least under federal laws, to be properly subject to a rule of reason approach. As a result all vertical restraints, including pricing, territorial restrictions, tying or exclusivity arrangements fall under rule of reason analysis. The divergence in the approach outlined in the Guidelines from that taken in both the EU and the US undermines the convergence which is cited as one of the key rationales for the amendment of section 45.

15. In light of the foregoing, the Working Group encourages the Bureau to reconsider its approach in the Guidelines to dual distribution and other inherently vertical arrangements. A more logical enforcement approach, and one that is more consistent with the US and EU, would be to handle such agreements among competitors under Part VIII of the Act (which now also includes a specific price maintenance provision), and not under the *per se* approach of section 45. As indicated in the preface to the Guidelines, the *per se* approach to criminal sanctions

⁷ Commission Regulation (EC) No 2790/1999, Article 4

⁸ The EU rules are currently under review and proposals published by the European Commission on 28 July 2009 would introduce increased emphasis on the possibility of such hard core restrictions being exempted.

⁹ Cases C-2/01P and C-3/01P, Bayer [2004] ECR I-23.

¹⁰ *State Oil Co. v. Kahn*, 522 U.S. 3 (1997); *Leegin Creative Leather Products, Inc., v. PSKS, Inc.*, 551 US 877(2007)

should be reserved for the most egregious anticompetitive conduct involving naked horizontal restraints on competition – a category that does not include *bona fide* dual distribution or franchise agreements.

B. Section 2.5 – Ancillary Restraints Defence

16. Subsection 45(4) of the Act provides a defense for ancillary restraints, that is, an agreement that contravenes the anticompetitive prohibitions in subsection 45(1) but which is ancillary to a broader and otherwise lawful agreement, and that is directly related to or reasonably necessary for giving effect to the objective of that broader agreement. The ancillary restraints defence is a key component of the March 2010 amendments, as it allows certain joint ventures and other non-cartel activities to escape the broadly worded criminal prohibitions in subsection 45(1) of the Act.

17. In subsection 2.5(c), the Guidelines provide the Bureau's interpretation of the concept of the restraint being directly related to, and reasonably necessary for giving effect to, the objective of the broader agreement. The discussion in subsection 2.5(c) of the Guidelines is troubling as discussed below, and we encourage the Bureau to consider refining its approach.

18. As a starting point, we note the obvious point that the ancillary restraints defence in subsection 45(4) of the Act is a defence against criminal prosecution with very serious penalties. Where the parties to a competitor collaboration invoke the ancillary restraints defence, it does not mean that the collaboration cannot be challenged. The collaboration can still be examined for anticompetitive effect and possible remedial action under the civil track in section 90.1 of the Act. Indeed, we would expect that in cases where the parties point to a plausible joint venture agreement or other such broader or separate agreement in which the price, output or market sharing agreement is ancillary, the Bureau would normally pursue the civil rather than the criminal track. The Guidelines would benefit from some elaboration of this point in section 1.9 of the Guidelines where there is a discussion of the decision to pursue either the criminal or civil track when faced with a potential violation of subsection 45(1) of the Act.

19. We note in this regard that US antitrust guidelines explicitly provide for the analysis of joint ventures under a civil rule of reason analysis rather than as a criminal matter.¹¹ Where the parties to an agreement can point to the agreement on prices, output or markets being part of a joint venture, the matter is invariably not considered for *per se* criminal treatment, which is the treatment accorded to blatant and irredeemable cartel conduct. Instead it is handled under a civil rule of reason analysis. That is, where a plausible and non-pretextual joint venture between the parties is asserted, criminal treatment is not appropriate.

20. Recognizing that joint ventures will not usually be handled under the criminal track, subsection 2.5(c) of the Guidelines should indicate a substantial tolerance for a range of possible pricing and output agreements that can appropriately fall within the scope of the ancillary restraints defence. Failure to make such a clarification will risk deterring competitors from engaging in commercial activities that do not amount to hard-core cartel conduct and that indeed may constitute pro-competitive collaborative conduct.

21. Our concerns on this score are heightened when we examine the second paragraph of subsection 2.5(c) of the Guidelines, where the phrase “reasonably necessary” is discussed. The commentary starts out appropriately where the Guidelines state that the Bureau will not “second guess” the parties as to whether some other putative restraint might have been less restrictive than the one chosen. But the Guidelines then impose a stricter standard by stating that “where there are significantly less restrictive alternatives available to the parties, the parties must demonstrate why such alternatives were infeasible or inadequate”, failing which the restraint cannot be considered as reasonably necessary to give effect to the objectives of the broader agreement.

22. According to the Guidelines, parties to a joint venture will not only have to consider alternatives to the restraint that they prefer from a business point of view, but they must also determine if their preferred choice is significantly more restrictive than alternatives. If the answer is yes, the parties must then ask themselves if the alternatives are infeasible or inadequate. Such a level of investigation, with the need to apply vague standards such as “significantly more restrictive” or “infeasible or inadequate alternative restraints”, can only chill businesses from

¹¹ Federal Trade Commission and US Department of Justice, *Antitrust Guidelines for Collaboration Among*

legitimate and pro-competitive joint ventures, recognizing that there are severe criminal penalties for making a mistake.

23. The key problem is that Guidelines set a very high bar for the phrase “reasonably necessary”. The Act does not require that the restraint chosen by the parties be measured against possible alternatives. Instead, the Act only requires that the restraint be reasonably necessary. As noted above, there are good policy reasons to suggest quite wide latitude for the ancillary restraints defence. There is nothing in the language of the Act to suggest that such an interpretative approach is flawed. Indeed, the Bureau’s overall objective of using the Guidelines to limit criminal prosecutions to hard-core cartel activity would be better served by giving the ancillary restraints defence a more generous interpretation.

24. Indeed, recognizing that ancillary restraints defence is part of criminal law, we would expect that the “reasonably necessary” test could be satisfied by even a minimal degree of “necessary-ness” as between the restraint in question and the giving of effect to the objectives of the broader agreement. This is not to say that any link, however implausible, should be adequate. Where the link between the ancillary restraint and the giving of effect to the objectives of the agreement is but a pretext for what is at its core an anticompetitive agreement contrary to subsection 45(1) of the Act, the ancillary restraint defence should properly fail.

25. Another concern with the “reasonably necessary” discussion in subsection 2.5(c) of the Guidelines is the puzzling suggestion as to the party who bears the onus of proof in a “reasonably necessary” examination. In a criminal prosecution, the onus is on the Crown to show the agreement is contrary to subsection 45(1) of the Act. The onus then shifts to the parties to the agreement to show that, on a balance of probabilities, that the restraint is ancillary, directly related to and reasonably necessary.¹² If the parties to the agreement establish a plausible “reasonably necessary” link as part of that defence, the onus is then discharged. In the course of that examination, it is of course open to the Crown to show that the offered explanation is a sham, that is, a pretext for an anticompetitive agreement that should be condemned. But the onus should not be on the parties to the agreement to justify their choice of restraint in comparison to possible alternatives. Yet this is what the Guidelines appear to call for.

Competitors, April 2000, section 3.2.

26. In the US, the antitrust agencies' collaboration guidelines refer to a reasonably necessary test, but in the context of an examination of efficiencies of a collaboration which, in turn is part of a rule of reason examination that balances anticompetitive harm against cognizable efficiencies.¹³ The commentary in the US guidelines notes that the ancillary restraint may not be considered reasonably necessary if the efficiencies could be achieved by practical and significantly less restrictive means, and this can lead to an examination of alternatives that the parties could have considered.

27. The context, however, of the US examination of alternatives is that the competitor collaboration is being examined for efficiencies under a civil standard, not a criminal standard. Of course, in Canada a section 45 action is very much a criminal proceeding where neither efficiencies nor competitive effects are at issue, and the "reasonably necessary" test is part of a defence to very serious criminal allegations. It would, therefore, be dangerous to uncritically transfer the thinking on possible alternatives under the US approach, to the Canadian context.

28. Similarly, in EU law, which is purely civil and not criminal, there is a concept of "ancillary restraints", defined as applying to "any alleged restriction of competition which is directly related and necessary to the implementation of a main non-restrictive transaction and proportionate to it".¹⁴ The relevant guidelines say that the "necessary and proportionate" requirement is satisfied if "on the basis of objective factors it can be concluded that without the restriction the main non-restrictive transaction would be difficult or impossible to implement".¹⁵ This is interpreted as requiring the least restrictive option to be chosen. However, in the EU the effect of classification of a restriction as "ancillary" is to exempt it from the application of competition law altogether, and a significantly lower standard than this is appropriate where such classification simply makes the restriction subject to civil rather than criminal proceedings.

29. Turning from the "reasonably necessary" discussion, we note that the Guidelines offer virtually no discussion of the concept of the restraint being "directly related" to the objective of

¹² See the discussion at subsection 2.5(a) of the Guidelines.

¹³ Federal Trade Commission and US Department of Justice, *Antitrust Guidelines for Collaboration Among Competitors*, April 2000, sections 3.2, 3.36(b)

¹⁴ European Commission, *Guidelines on the Application of Article 81(3) of the Treaty*, 2004 OJ C101/97, para.29. Similar principles, applicable to mergers, acquisitions and certain types of joint ventures, are set out in its Notice on restrictions directly related and necessary to concentrations, 2005 OJ C56/24.

¹⁵ *Ibid*, para. 31

the broader agreement. The first paragraph of subsection 2.5(c) of the Guidelines does suggest what is not encompassed by the phrase “directly related”, but the comments are of very limited assistance. The only discussion of what is encompassed by the phrase “directly related” comes in the last sentence. And there, the Guidelines explain, in effect, that “directly related” means the same as “reasonably necessary”. This explanation cannot be correct, because subsection 45(4) of the Act already requires the restraint to be reasonably necessary, so “directly related” must mean something different.

30. Accordingly, we encourage the Bureau to provide more guidance on its interpretation of the phrase “directly related”. In this regard, the Guidelines should recognize that the term “related” is a term of wide application, and that any plausible direct link between the restraint and the objectives of the broader agreement should, absent unusual circumstances, be sufficient to meet the “directly related” standard. If it is thought that the phrase requires a more strict relationship between the objectives of the enterprise and how it is achieved, then this should be reflected in the Guidelines. If what is intended is something akin to “reasonably related”, as under the US *Antitrust Guidelines for Collaborations Among Competitors*,¹⁶ or the EU standard of “subordinate to the implementation of [the main] transaction” and “inseparably linked to it”,¹⁷ the guidance should reflect that. However, as already stated, these standards relate to civil liability, and in the case of the EU, the placing of a restriction outside the reach of competition law completely, so it is not our view that such demanding standards should apply in the criminal context.

31. To sum up,, we encourage the Bureau to revise subsection 2.5(c) of the Guidelines to restate the interpretation of “reasonably necessary” in a manner that does not compel parties to conduct unwarranted examinations of alternative business scenarios in order to satisfy the legal test for a legally defensible ancillary restraint, and does not allude to an unwarranted onus of proof on those parties. It should also provide guidance on the interpretation of “directly related”.

C. “Affiliated Companies” Exception

¹⁶ See section 3.2.

¹⁷ European Commission, *Guidelines on the Application of Article 81(3) of the Treaty*, 2004 OJ C101/97, para.29

32. Subsections 2.6(a) and 3.5(e) of the Guidelines refer to the “affiliated companies” exception or defence contained in subsections 45(6) and 90.1(7) of the *Competition Act*. The Guidelines state as follows in subsection 2.6(a):

“Parties should note that this [affiliated companies] exception “applies only to companies, and not partnerships, trusts or other corporate entities or individuals, although the Bureau will consider the nature of any common control or corporate relationship between the parties when determining whether referral of an agreement for prosecution is appropriate. Finally, for the exception to apply, all of the parties to the agreement must be affiliated corporations.”

33. Given the ambiguities that exist in the statutory language regarding affiliation in the *Competition Act*, the Bureau should be commended for its attempt to provide clarification and guidance with respect to the “affiliated companies” exception. That said, the above cited passage is internally inconsistent, which could very well be as a result of a typographical error. The above passage appears to equate “companies” with “corporations” for purposes of the “affiliated companies” exception, and yet it also states that it does not apply to “partnerships, trust or other corporate entities”. If it is the Bureau’s intention to equate “companies” with “corporation” for purposes of the “affiliated companies” exception, the reference to “other corporate entities” should read “other non-corporate entities”.

34. In addition, the Working Group encourages the Bureau to consider providing further guidance through the use of examples to illustrate circumstances where the “nature of any common control or corporate relationship between the parties” would lead to the Bureau’s exercise of its discretion not to refer an agreement for prosecution. For instance, under the *Competition Act*’s affiliation rules and/or the Bureau’s interpretation that the “affiliated companies” exception only applies to agreements among affiliated corporations, the following agreements among competitors would not benefit from such an exception:

- An agreement between Company A and Partnership B even where Company A owns interests in Partnership B so as to entitle Company A to more than 50% of the profits, or assets upon dissolution, of Partnership B.
- An agreement between Partnership C and Partnership D even where Company E owns, directly and indirectly, all of the interests in both partnerships

35. It is difficult to see a policy rationale for pursuing prosecution of the above agreements among competitors while exempting the similar agreements entered into by parties that happen to all be corporations, as opposed to some non-corporate entities. As such, to the extent that the Bureau interprets “affiliated companies” exception to be limited to “affiliated corporations”, we encourage the Bureau to clarify in the Guidelines such that, as a matter of enforcement discretion, the Bureau will not seek to challenge agreements between or involving non-corporate entities in circumstances where the “affiliated companies” exception would otherwise apply but for the non-corporate form of the parties to the agreement. At a minimum, recognizing that a section 45 prosecution is intended to address the most serious anticompetitive activity, the Guidelines should indicate that where non-corporate parties are affiliated with corporate or non-corporate parties, whether under section 2 of the Act or as commonly understood, any action by the Bureau to challenge their conduct will usually be taken under section 90.1 rather than under section 45.

36. Last, the Guidelines’ requirement that all “parties” to the agreement must be affiliated may have unintended consequences. For example, it would render the affiliated companies exception inapplicable to a pricing agreement among Companies A and B who are affiliated competitors and Company C, a non-affiliated distributor which is not a competitor to either Companies A or B. Given that Company C is not a competitor, any agreement between it and Companies A and/or B would be outside the scope of subsections 45(6) and 90.1(7) in any event. As such, from a policy perspective, having Company C party to the agreement with Companies A and B should not preclude Companies A and B from invoking the affiliated companies exception. Accordingly, the Working Group suggests that the reference to all “parties” to the agreement being affiliated be amended to all “competitors” that are parties to the agreement being affiliated.

D. Subsection 3.4(b) – Safe Harbour Rules

37. Subsection 3.4(b) of the Guidelines outlines the “safe harbours” within which the Bureau will not challenge a competitor collaboration under section 90.1 of the Act. *Per se* unlawful agreements subject to section 45 are not subject to such a safe harbour. Although this is an

obvious point — both by logic and by virtue of the organization of the Guidelines — the Bureau may want to emphasize this point with a simple declarative sentence to that effect.

38. Relying explicitly on the Bureau’s Merger Enforcement Guidelines (“MEGs”), subsection 3.4(b) categorically removes from scrutiny those collaborations that implicate “a concern related to the exercise of market power by the parties to the agreement where the market share held by the parties represents less than 35% of the relevant market.” This approach — taken directly from the MEGs’ unilateral effects analysis — appears to be reasonable and will likely prove to be sensible in practice.¹⁸

39. Relying on the coordinated-effects portions of the MEGs, however, subsection 3.4(b) seemingly sets forth an inconsistent and questionable limitation on the 35% safe harbour. This arises where the Guidelines state that the safe harbour will only provide protection “where the share of the four largest firms in the relevant market is less than 65%, or the share of the parties to the agreement is less than 10% of the relevant market.” In the context of competitor collaborations, as distinct from mergers, it is not apparent why there should be a 10% standard even in an arguably concentrated market; nor do the Guidelines articulate any reason why only a 10% safe harbour should apply in those circumstances.

40. Stating a safe harbour at 10% may imply that competitor collaborations with 11% market share could be challenged in concentrated markets. However, based on the Bureau’s practice with mergers, it is difficult to recall any circumstance where a market share concentration of 11% has ever attracted Bureau interest, much less enforcement activity. At a minimum, the Guidelines should contemplate raising the 10% threshold to at least 20%. The “Safety Zone” for competitor collaborations applicable in the United States is a combined market share of 20%.¹⁹ This safe harbour threshold draws no distinction between concentrated or unconcentrated markets, and practitioners frequently find that this threshold is in practice already too low for even concentrated markets. Although the Working Group believes 20% is too low of a safe harbour, raising the coordinated-effects market share threshold for parties to the agreement from

¹⁸ MEGs, section 4.12

¹⁹ Federal Trade Commission and US Department of Justice, *Antitrust Guidelines for Collaboration Among Competitors*, April 2000, section 4.2

10% to 20% would at least provide consistency between the Guidelines and the “Safety Zone” for competitor collaborations applicable in the United States.

E. Section 3.10 – Purchasing Cartels and the Treatment of Joint Purchasing Agreements

41. Section 3.10 of the Guidelines describes the Bureau’s approach to Joint Purchasing and Buying Groups. But as a threshold matter, a discussion of this section would be incomplete without first noting that subsection 45(1)(a) of the Act does not apply to agreements among competitors that relate to the price for purchase of a product.²⁰ That is a policy choice made in the Act, and it is outside the scope of the Working Group’s comments. That distinction categorically puts secret, “naked” buyer cartels — *i.e.*, those not purporting to be publicly disclosed joint purchasing agreements — out of the realm of *per se* treatment.

42. Subsection 2.4(a) of the Guidelines, while not acknowledging the treatment of naked buyer cartels, explains the rationale for analyzing joint purchasing agreements under section 90.1 of the Act:

“The bureau recognizes that that small- and medium-sized firms often enter into joint purchasing agreements to achieve volumes and discounts similar to those obtained by larger competitors. Given that such agreements can be pro-competitive, they are not deserving of condemnation without a detailed inquiry into their actual competitive effects and therefore should only be subject to review under the civil provision in section 90.1.”

43. Subsection 3.10(b) of the Guidelines states as “a general rule” that the Bureau will not challenge joint purchasing agreements that fall within the 35% and 65%/10% safe harbours set forth in section 3.4, just discussed. The 10% provision here is subject to the same Working Group comments set forth above with respect to the 10% caveat in subsection 3.4(b).

44. Moreover, section 3.10 of the Guidelines then outlines a confusing analytical framework applicable to joint purchasing agreements, focusing on the use of “monopsony power” in the upstream purchasing market. The framework draws by analogy from merger review principles, adopting a “hypothetical monopsonist test” for determining the existence of monopsony power. The Working Group is unaware of the prior use of the “hypothetical monopsonist” test in the

²⁰ Guidelines, subsection 2.4(a)

U.S. or elsewhere. Even if not completely novel, it is at a minimum obscure, and therefore decreases the enforcement predictability that these Guidelines are intended to foster.

45. After employing this test for monopsony power, in subsection (c), the Bureau states that it will examine the potential for the exercise of monopsony power in the upstream purchasing market, and lists factors relevant to any such analysis. Section 3.10 concludes with the sentence, “[a]s a general rule, the Bureau is not concerned with joint purchasing agreements that result only in lower prices for inputs, provided that such lower prices do not constitute an exercise of monopsony power”.

46. The Guidelines’ focus on the monopsony effects on suppliers in the upstream purchasing market, rather than the effects on consumers in the downstream market for sales by the participants to the joint purchasing agreements, suggests a departure from the general competition law concern with consumer welfare effects. The Bureau’s approach ignores the potentially chilling effect on procompetitive, lower-cost purchasing initiatives that may result from this interpretation of what may constitute an anticompetitive exercise of monopsony power. Similar concerns were considered in the U.S. Supreme Court’s recent *Weyerhaeuser* decision.²¹ The Court analyzed the requirements for alleging a “predatory buying” scheme in which the defendant was alleged to have monopsonized the purchasing market for alder sawlogs by bidding the price up above the competitive level to drive out competing buyers. Recognizing that such a predatory buying scheme requires the predatory buyer of inputs to suffer a short term loss “on the chance it will reap supracompetitive profits in the future,” the Court held that to prevail on such a claim, the plaintiff had to prove “below-cost pricing of the predator’s outputs” in addition to proving that the monopsonist has a “dangerous probability” of recouping any losses incurred in bidding up the price of inputs.²² As applicable here, *Weyerhaeuser* illustrates a different approach to monopsony analysis than employed in the Guidelines, focusing on the potential effects in the downstream output market, and therefore on consumer welfare.

47. Similarly, the EU guidance on joint purchasing, after stressing the potential benefits of such arrangements, states clearly that “[t]here are two markets which may be affected by joint buying: First, the . . . relevant purchasing market(s). Secondly . . . the market(s) downstream where

²¹ *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007)

the participants of the joint purchasing arrangement are active as sellers”.²³ The guidance goes on to say that if the joint purchasers do not compete downstream, and are not realistic potential competitors, “Article 81(1) will rarely apply unless the parties have a very strong position in the buying markets...”²⁴

48. The Working Group recommends that the Bureau reconsider its hypothetical monopsonist formulation and its focus on the theoretical presence of monopsony power effects on the upstream market in favor of a simplified approach like that set forth in Statement 7 of the United States Department of Justice and Federal Trade Commission’s *Antitrust Enforcement Policy in Health Care* (the “U.S. Policy”). The principles and instructions set forth there are widely applied in the U.S. by practitioners to joint purchasing arrangements in industries outside of health care, with no suggestion of resulting monopsonistic abuses.

49. The U.S. Policy is based on the central premise that most joint purchasing arrangements “do not raise antitrust concerns,” and that “[s]uch collaborative activities typically allow the participants to achieve efficiencies that will benefit consumers.” The Policy then articulates its own safe harbours, also using a 35% market share test, under which the Department of Justice and FTC will not challenge a joint purchasing agreement “absent extraordinary circumstances.” Statement 7 then articulates a second safe harbour protecting joint purchasing agreements where “the cost of the products and services purchased jointly accounts for less than 20% of the total revenues from all products or services sold by each competing participant in the joint purchasing agreement.” This second prong does not focus on any coordinated-effects analysis as does the Guidelines’ second safe harbour prong,²⁵ but concentrates on the likelihood of collusion among parties to the joint purchasing agreement, without regard to the other participants in the purchasing market. The Working Group believes that maintaining the analytic focus on the parties to the joint purchasing agreement will simplify the overall inquiry and lead to greater transparency and predictability.

²² Ibid at 323-25

²³ European Commission, *Guidelines on the Applicability of Article 81 of the EC Treaty to Horizontal Cooperation Agreements* [2001] OJ C3/2, para.119

²⁴ Ibid, para. 123

²⁵ See supra comments on section 3.4 of the Guidelines at para. 37 and following.

50. In addition, Statement 7 of the U.S. Policy offers the clear guidance that the Bureau's Guidelines lack, by describing "several safeguards that joint purchasing agreements can adopt to mitigate concerns that might otherwise arise."²⁶ Such safeguards described in the Policy are: "if members are not required to use the arrangement for all their purchases;"; if they are using an "independent employee or agent" unaffiliated with a participant in the agreement for purchasing negotiations; and if each participant in the group keeps its communications with the purchasing entity or agent confidential. The Policy then concludes that the use of these prophylactic measures will decrease the likelihood of downstream price coordination and will "help demonstrate" that the "joint purchasing arrangement is intended to achieve economic efficiencies rather than to serve an anticompetitive purpose."

51. The Working Group recommends that the Guidelines be revised to incorporate an approach similar to that set forth in Statement 7 of the U.S. Policy. Providing such practical and concrete instructions will best advance the Bureau's goals of transparency and predictability.

F. Intellectual Property Issues

52. The Guidelines are silent about the potential application of sections 45 and 90.1 of the Act to agreements respecting intellectual property ("IP"). The Bureau's most detailed guidance to date in this area is contained in the *Intellectual Property Enforcement Guidelines* (the "IPEGs"). The IPEGs set out the Bureau's view of the application of the current conspiracy provisions to licensing arrangements, patent pools and cross licensing, R&D cooperation and transfers and assignments. This guidance, however, now requires revision to reflect the operation of the new sections 45 and 90.1. Accordingly, we believe that some clarification of these issues in the Guidelines may be useful (assuming that the Bureau is not contemplating near-term revisions to the IPEGs). In addition to the issues explicitly considered in the IPEGs, the Guidelines might also consider the application of the new competitor collaboration provisions to other aspects of the competition law/IP interface, including standard setting and settlements of patent disputes. Enforcement guidance with respect to the latter would be particularly welcome and timely, given the attention given to settlement issues in the pharmaceutical context by the U.S. Federal Trade Commission and the European Commission.

²⁶ See U.S. Policy, Statement 7, § B.

53. Though it is beyond the scope of this submission to set out the panoply of issues raised in each of these settings, as a general matter, it would be useful to have enforcement guidance regarding the situations in which particular IP arrangements/agreements may be subject to prosecution under section 45 (including the factors that may be determinative in this regard as well as the potential application of the ancillary restraints defence) or would be examined under section 90.1.

G. Concluding Comments

54. The Working Group welcomes the opportunity to contribute to the development of the Canadian Guidelines, which we see as an important advance in Canadian competition law. The clear effort to indicate that criminal prosecutions will focus on hard-core cartel conduct while other collaborations will be dealt with on the civil track is important and welcome guidance. The Working Group hopes that the foregoing comments relating to vertical arrangements, ancillary restraints defence, affiliates, safe harbours, joint purchasing and intellectual property will assist the Bureau to further improve the Guidelines.

ANNEX A

MEMBERS OF THE WORKING GROUP OF THE ANTITRUST COMMITTEE OF THE
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