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Competitor Collaboration Guidelines

Canada

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Preface

The Competition Bureau (the "Bureau") is an independent law enforcement agency responsible for, among other things, the administration and enforcement of the *Competition Act* (the "Act"). The Bureau contributes to the prosperity of Canadians by protecting and promoting competitive markets and enabling informed consumer choice. These Guidelines describe the Bureau's approach to assessing collaborations between competitors, updating the guidelines published on December 23, 2009.

Canadian firms face increasing pressure to adopt flexible business strategies to remain competitive in an economy that is continually changing due to globalization, technological innovation and advancements in production processes. Strategic alliances can permit Canadian firms to capture the benefits of rapid technological changes and dynamic competitive conditions. They can permit firms to combine capabilities and resources so as to lower the costs of production, enhance product quality, and reduce the time required to bring new products (as defined in the Act) to market. Such pro-competitive collaborations, even when they involve competitors, can often benefit Canadians by allowing firms to make more efficient use of resources and accelerate the pace of innovation. At the same time, certain competitor collaborations may result in significant harm to competition.

The 2009 amendments to the Act were intended to create a more targeted criminal enforcement regime for the most egregious forms of cartel agreements, while at the same time removing the threat of criminal sanctions for legitimate collaborations to avoid discouraging firms from engaging in potentially beneficial alliances. As explained in greater detail in these Guidelines, the amended criminal prohibition is reserved for agreements between competitors to fix prices, allocate markets or restrict output that constitute "naked restraints"[1] on competition. Other forms of competitor collaborations, such as joint ventures and strategic alliances, may be subject to review under a provision that prohibits agreements only where they prevent or lessen, or are likely to prevent or lessen, competition substantially.

The Bureau recognizes the need for transparency and predictability regarding its assessment of competitor collaborations. Accordingly, these updated Guidelines are intended, with the benefit of nearly ten years' experience of administering and enforcing

[1] Naked restraints are restraints that are not implemented in furtherance of a legitimate collaboration, strategic alliance or joint venture and are commonly recognized as the most egregious forms of anti-competitive conduct. See, for example, the OECD's *Recommendation of the Council concerning Effective Action against Hard Core Cartels* (1998), which condemned hard core cartels as the "most egregious violations of competition law."

the 2009 amendments, to assist firms in assessing the likelihood that a competitor collaboration will raise concerns under the criminal or reviewable matters (civil) provisions of the Act and, if so, whether the Commissioner would commence an inquiry in respect of the collaboration.

Interpretation

These Guidelines describe the general approach of the Bureau in applying sections 45 and 90.1 of the Act to collaborations between competitors.[2] These Guidelines supersede all previous statements of the Commissioner of Competition (the "Commissioner") or other officials of the Bureau regarding the administration and enforcement of sections 45 and 90.1 of the Act.

The nature and scope of competitor collaborations vary greatly. As a result, these Guidelines cannot provide a comprehensive review of all competition issues that may arise from a given collaboration, nor do they replace the advice of legal counsel. Firms contemplating collaborations with competitors are encouraged to seek advice regarding specific issues that may arise. Guidance regarding the applicability of provisions of the Act to future business conduct can be obtained by requesting a binding written opinion from the Commissioner under section 124.1 of the Act.

These Guidelines are not intended to restate the law or to constitute a binding statement of how the Commissioner or the Director of Public Prosecutions[3] (the "DPP") will exercise discretion in a particular situation. The respective enforcement and prosecutorial decisions of the Commissioner and the DPP, and the ultimate resolution of issues, will depend on the particular circumstances of the matter in question. Final interpretation of the law is the responsibility of the Competition Tribunal (the "Tribunal") and the courts.

The Bureau may revisit certain aspects of these Guidelines in the future in light of experience, changing circumstances and decisions of the Tribunal and the courts.

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[2] The interpretation and conclusions drawn in these Guidelines do not bind the Public Prosecution Service of Canada (the "PPSC") in decisions to prosecute.

[3] On December 12, 2006, the Office of the DPP was created as part of the *Federal Accountability Act*. This statute gives the DPP jurisdiction to conduct prosecutions for offences under federal jurisdiction. This office is independent of the Commissioner and the Department of Justice and assumed the duties of the former Federal Prosecution Service.

Organization of these guidelines

These Guidelines are organized into five sections:

- Section 1 provides an overview of the analytical framework applied by the Bureau in assessing existing and proposed collaborations between competitors, including how the Bureau will determine whether the collaboration should be assessed under the conspiracy provision in section 45, the civil agreements provision in section 90.1 or other provisions of the Act.
- Section 2 explains how the Bureau will assess competitor collaborations under the criminal conspiracy provision in section 45 of the Act.
- Section 3 explains how the Bureau will assess competitor collaborations under the civil agreements provision in section 90.1 of the Act.
- Section 4 provides a number of hypothetical examples illustrating the Bureau's approach to the application of sections 45 and 90.1 of the Act.
- Section 5 contains the text of the relevant provisions of the Act.

1. Analytical framework

1.1 Overview

This section of the Guidelines outlines the Bureau's approach to determining whether to assess an agreement or collaboration between competitors under the criminal conspiracy provision, civil agreements provision or other provisions of the Act. As described below, the criminal prohibition in section 45 is reserved for agreements between competitors to fix prices, allocate markets or restrict output that constitute "naked restraints" on competition. Other forms of competitor collaborations, such as joint ventures and strategic alliances, may be subject to review under the reviewable matters provisions in Part VIII of the Act.

1.2 Distinguishing between civil agreements / conspiracy provisions or other provisions of the Act

As an initial step, the Bureau will seek to determine whether to assess the collaboration between competitors under the conspiracy provision found in section 45, or whether the collaboration should be assessed under the reviewable matters provisions in Part VIII of the Act, such as sections 79, 90.1 or 92. In some cases, investigation under multiple provisions of the Act may initially be required until adequate facts are uncovered to determine which provision of the Act is most appropriate. The Bureau applies the following principles in making this determination:

a) **Mergers**: A proposed or completed acquisition of control over, or significant interest in, the whole or part of a business through the purchase or lease of shares or assets, by amalgamation or combination, will generally be assessed under the merger provisions in section 92 and following of the Act, and not the civil agreements provision in section 90.1 or the conspiracy provision in section 45 of the Act. Where parties enter into any agreement(s) that goes beyond the acquisition, amalgamation or combination agreement, whether within or outside said agreement, the Bureau will consider under which provision(s) of the Act any investigation or inquiry should be pursued. The Bureau may utilize its formal powers under sections 11 and/or 15 of the Act to obtain information and/or records relevant to this determination. Parties who are uncertain as to whether a proposed agreement will be assessed as a merger, a competitor collaboration or otherwise are encouraged to contact the Bureau at the earliest opportunity to discuss how the Bureau will assess such an agreement. In such cases, additional information may be required for the Bureau to make such an assessment.

b) **Agreements Between Federal Financial Institutions**: Where the agreement is between federal financial institutions and is described in subsection 49(1) of the Act, the agreement will be assessed under section 49 and not section 45.[4] Agreements that fall within the ambit of subsection 49(1), but are exempted by subsection 49(2), will not be assessed under section 45, but may be subject to review under the reviewable matters provisions in Part VIII of the Act where such agreements are likely to substantially lessen competition. Agreements between federal financial institutions that are not described in subsection 49(1) may be assessed under section 45; similarly, such agreements between federal financial institutions that are likely to substantially lessen competition may be subject to review under the civil agreements provision in section 90.1 of the Act, subject to applicable exceptions, such as subsection 90.1(9), which creates an exception for agreements in respect of which the Minister of Finance has issued a certification for reasons of financial policy.

c) **Vertical Agreements Between Suppliers and Customers**: Purely vertical agreements between suppliers and customers will be assessed under the reviewable matters provisions found in Part VIII of the Act, and not under the conspiracy provision in section 45. However, vertical arrangements that include an agreement between competitors to fix the price, allocate markets or limit the supply of a product in a market will generally be assessed under section 45 of the Act.

d) **Bid-rigging**: Where the agreement between competitors is limited to "bid-rigging", as defined in section 47 of the Act, the agreement will generally be assessed under section 47 or section 90.1, and not section 45. For greater certainty, the Bureau will not assess under section 45 agreements among persons to submit or withdraw a bid that are made known to the person who called for or requested the bids or tenders, at or before the time of submission or withdrawal. The Bureau recognizes that bidders may wish to form bid consortia to effectively bid for certain projects. However, even where such a consortium is made known to the person who called for or requested the bids or tenders, the consortium agreement may still result in a substantial lessening or prevention of competition among bidders and, therefore, may be assessed under section 90.1 of the Act. Where an agreement includes other restraints on competition or if the bid-rigging is part of a broader agreement it may be assessed under either or both of sections 45 and 47.

[4] See paragraph 45(6)(b) of the Act.

e) **Abuse of Dominance**: While agreements between competitors that are not conspiracies under section 45 or mergers within the meaning of section 91 will generally be examined by the Bureau under section 90.1, such agreements may also be examined pursuant to the abuse of dominance provision found in section 79 of the Act in certain circumstances. For example, the Bureau may seek a remedy under section 79 with respect to an agreement between competitors where the competitors are jointly dominant and the agreement has or facilitates conduct that has a negative effect on a competitor that is exclusionary, predatory or disciplinary such that it has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market.[5]

1.3 Criminal or civil track

Where the Bureau has determined that an agreement should be assessed under either section 45 or 90.1, as distinct from other provisions of the Act, the Bureau will then determine, based on evidence in its possession or to be gathered, whether the criminal provision in section 45 or the civil agreements provision in section 90.1 is applicable to the agreement. As described in Section 2 below, only certain types of agreements or arrangements may be subject to criminal prosecution under section 45 of the Act. This provision is reserved for agreements between competitors to fix prices, allocate markets or restrict output that constitute "naked restraints" on competition; these types of agreements are often referred to as “hard core” cartels. Other forms of competitor collaborations, such as joint ventures and strategic alliances, may be subject to review under the Act’s civil agreements, merger or (joint) abuse of dominance provisions but only where they are likely to substantially lessen or prevent competition. Once the Bureau communicates to the parties that the agreement will be reviewed solely under the civil agreements provision, the Bureau will not refer the agreement to the DPP for prosecution on the basis of the same or substantially the same facts. The Bureau will make every effort to arrive at a timely decision on the appropriate section to be applied in evaluating an agreement, but may seek to obtain additional information and/or records in order to do so (which will necessarily affect the timeliness of any such decision).

Where the agreement falls within one of the categories prohibited by subsection 45(1), the Bureau will then consider whether the ancillary restraints defence, or another defence set out in subsection 45(5) through 45(7), may apply. As described in section 2 of these

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[5] Further details on the Bureau’s enforcement policy in respect of abuse of dominance can be found in the Bureau’s *Abuse of Dominance Enforcement Guidelines*.

Guidelines, agreements that are directly related to, and reasonably necessary for, giving effect to a broader agreement may be subject to an ancillary restraints defence.

Where the Bureau determines that there is sufficient evidence to establish that an agreement is an ancillary restraint for the purpose of subsection 45(4), or that some other defence applies, the Commissioner will not refer the matter to the DPP with a recommendation to commence a prosecution under section 45, but may seek a remedy in respect of the agreement under the reviewable matters provisions in Part VIII of the Act.

In carrying out its responsibilities to administer and enforce the Act, the Bureau is guided by its *Competition and Compliance Framework*, which describes the principles applied by the Bureau in determining the appropriate method to address a possible violation of the Act. Where the Commissioner has not referred a matter to the DPP or filed an application before the Tribunal, the Bureau may determine that it is appropriate to resolve a matter by way of an alternative case resolution.

Parties may approach the Bureau at any time with respect to a criminal matter prior to its referral of the matter to the DPP for prosecution. However, in the criminal context, the DPP has the sole authority to engage in plea and sentencing discussions with counsel for an accused. When a criminal matter is referred to the DPP, the Commissioner typically provides sentencing recommendations and Bureau officers will be consulted by the DPP with respect to sentencing discussions.

While the Bureau may initially elect to evaluate the agreement under the criminal conspiracy provision, the Bureau may subsequently decide that circumstances warrant pursuing a remedy under the civil agreements provision (or another provision in Part VIII of the Act) at any time prior to referral of the matter to the DPP for prosecution. In cases where the matter is referred but the DPP elects not to pursue a prosecution, the Bureau may choose to reevaluate whether the agreement should be subject to a remedy under the reviewable matters provisions in Part VIII of the Act. At no time will the Bureau use the threat of criminal prosecution to induce settlement in cases proceeding by way of the civil track.

1.4 Duplicate proceedings

The Act contains a number of sections that prevent the Commissioner and the DPP from simultaneously pursuing duplicate proceedings under multiple provisions of the Act. Specifically, section 45.1 states as follows:

- **45.1** No proceedings may be commenced under subsection 45(1) against a person on the basis of facts that are the same or substantially the same as the facts on the basis of which an order against that person is sought by the Commissioner under section 76, 79, 90.1 or 92.

Similarly, subsection 90.1(10) provides as follows:

- **90.1** (10) No application may be made under this section against a person on the basis of facts that are the same or substantially the same as the facts on the basis of which
    - **a)** proceedings have been commenced against that person under section 45 or 49; or
    - **b)** an order against that person is sought by the Commissioner under section 76, 79 or 92.

Accordingly, when the Commissioner has sought an order against a person in respect of conduct under section 76, 79, 90.1 or 92 of the Act, the Commissioner will not subsequently refer to the DPP a request for prosecution under section 45 against that same person on the basis of the same or substantially the same facts.

The Bureau considers that an order has been sought before the Tribunal once an application has been filed with the Tribunal by the Commissioner under sections 76, 79, 90.1 or 92 of the Act in respect of the conduct.

Similarly, where, after a referral to the DPP, the Commissioner commences proceedings against a person under section 45[6], the Commissioner will not 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. For the purpose of subsection 90.1(10), the Bureau considers that proceedings have been commenced under section 45 upon the laying of charges or the filing of an information pursuant to section 34(2) of the Act.

The same principles outlined above will apply to the duplicate proceedings provisions applicable to sections 45 and 90.1 found elsewhere in the Act.[7]

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[6] Or when the DPP has commenced proceedings under a direct indictment or subsection 34(2) of the Act.

[7] See, for example, sections 45.1 and 98 and subsection 49(4) of the Act.

2. The criminal prohibition

2.1 Overview

Section 45 describes categories of agreements that are so likely to harm competition and to have no pro-competitive benefits that they are deserving of prosecution without a detailed inquiry into their actual competitive effects. These are agreements between competitors to fix prices, allocate markets or restrict output that constitute "naked restraints" on competition. The categories of agreements described in subsection 45(1) are *per se*[8] unlawful and are subject to significant criminal sanctions. Other forms of competitor collaborations, such as joint ventures and strategic alliances, may be subject to review under Part VIII of the Act, which prohibits conduct only where it is likely to substantially lessen or prevent competition.

Subsection 45(1) states:

- **45.** (1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges

  a) to fix, maintain, increase or control the price for the supply of the product;

  b) to allocate sales, territories, customers or markets for the production or supply of the product; or

  c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.

This section describes the Bureau's approach in evaluating each of the elements of section 45 of the Act, including a consideration of whether any defences and exceptions may apply. The Bureau is cognizant that parties may attempt to structure or design agreements or collaborations to avoid scrutiny under section 45. Regardless of formality or enforceability, where the Bureau has evidence that a collaboration or agreement is a sham it will consider the arrangement under the most appropriate section of the Act.

[8] That is, the behaviour is deemed to be illegal without requiring proof of anti-competitive effects.

2.2 What constitutes a conspiracy, agreement or arrangement

Subsection 45(1) applies to agreements, arrangements or conspiracies between or among competitors or potential competitors in respect of a product[9] to fix prices, allocate markets or restrict output for that product.

In determining whether an agreement[10] exists, the Bureau will consider whether the parties to the alleged agreement or arrangement reached a "meeting of the minds", either explicitly or tacitly, to engage in the conduct described in subsection 45(1). This subsection will apply to all forms of agreements between competitors, regardless of the degree of formality or enforceability and regardless of whether it has been implemented. Indeed, agreements between competitors to fix prices, allocate markets or reduce output are often concealed and not reduced to writing. The simple fact that an agreement is overt, rather than covert, does not shield it from the application of section 45.

An agreement may be established through direct evidence that the accused entered into an agreement, or it may be inferred from a course of conduct or other evidence. In this regard, subsection 45(3) of the Act specifically provides that, in a prosecution under subsection 45(1), the court may infer the existence of a conspiracy, agreement or arrangement from circumstantial evidence, with or without direct evidence of communication between or among the alleged parties to the agreement. In any event, the existence of an agreement must be proved beyond a reasonable doubt.

Becoming a party to an agreement described in subsection 45(1) is sufficient to establish the offence. Further, in order to constitute the offence of conspiracy, there is no need to establish that the object of the conspiracy was, in fact, carried out or that any acts were taken in furtherance of the conspiracy. The offence is established at the time of the agreement between competitors to engage in the conduct described in subsection 45(1) and is a continuing offence for the period of the conspiracy.[11] Similarly, there is no requirement to prove that each party took active steps during the period of the conspiracy; rather, it need only be established that the individual or firm was a party to the conspiracy at any time during the relevant period.

[9] For the purpose of the Act, a product includes an article and a service.

[10] For greater certainty, the term "agreement" is understood to include arrangements and conspiracies.

[11] See, for example, *Atlantic Sugar Refineries Co Ltd et al v Attorney General of Canada*, [1980] 2 SCR 644.

The Bureau does not consider that the mere act of independently adopting a course of conduct with awareness of the likely response of competitors or in response to the conduct of competitors, commonly referred to as "conscious parallelism", is sufficient to establish an agreement for the purpose of subsection 45(1). However, 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.

2.3 Who is a competitor

2.3.1 Generally

Section 45 prohibits certain agreements between parties who compete or are potential competitors with respect to the products that are the subject of the agreement. Therefore, where parties compete, or are likely to compete, only in respect of products that are not subject to the agreement, this is not sufficient to establish that the parties are competitors for the purpose of section 45. Rather, to be considered competitors for the purpose of section 45, the parties must compete, or be likely to compete, with respect to the products that are the subject of the agreement alleged to contravene section 45. Equally, section 45 does not apply to agreements that are entered into only between companies that are affiliated. For greater certainty, unless otherwise specified in these Guidelines, the term "competitors" is understood to include potential competitors.

Further, "competitors" includes directors, officers, employees, and agents of competing companies so that, for example, an agreement that is reached between an officer of a corporation and a director of a competing company is considered to be an agreement between competitors for the purpose of section 45. In this circumstance, the individual employees who entered into the agreement may be subject to prosecution under section 45 of the Act. Further, corporations may be subject to prosecution as a result of an agreement between their respective employees if they are acting as senior officers.[12]

Where an agreement involves competing and non-competing parties, the fact that some parties are not competitors does not insulate the competing parties from prosecution under section 45. Parties that are not competitors may also be prosecuted under section 45 through the aiding and abetting provisions in section 21 or the counselling provisions in

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[12] See sections 22.1 and 22.2 of the *Criminal Code* ("Code"). See also *R.* v. *Global Fuels Inc.*, 2012 QCCQ 5749, which provides that "[t]he liability of a corporation, formerly based on the fault of one of its directing minds, is now based on the fault of one of its 'senior officers'. And the criminal liability of that 'senior officer' could be attributed to the 'organization'. " at para 76 (unofficial translation).

section 22 of the Code in circumstances where the conditions of those sections are met.[13] For example, a wholesaler who facilitates a price-fixing conspiracy among its retail clients may be a party to the conspiracy even if it does not compete in the retail market.

Agreements between members of a trade or other industry association may also constitute agreements between competitors for the purpose of section 45. Rules, policies, by-laws or other initiatives enacted and enforced by an association with the approval of members who are competitors, are considered by the Bureau to be agreements between competitors for the purpose of section 45. In the event that such an agreement contravenes section 45, the trade association may be subject to prosecution if its liability can be established pursuant to section 21 or section 22 of the Code.

In determining whether parties to an agreement are competitors for the purpose of section 45, the Bureau is of the view that it is not required to engage in a detailed market analysis, in the sense of having to plead and prove the full nature and extent of the market and the participants within it. However, the Bureau may nonetheless seek to gather information relating to the market to more fully understand, among other things, the context of the agreement. 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, the Bureau will generally conclude that the parties are in competition with one another for the supply of such products.

Where the parties to the agreement sell homogeneous products this assessment is likely to be straightforward. In cases involving differentiated products, however, additional information may be required in order to determine whether the parties to the agreement are competitors. In assessing this issue, the Bureau will consider any evidence indicating whether the firms actually compete, including business and strategic plans prepared in the course of business, marketing and communications with potential customers, and evidence of actual competition for similar customers in neighbouring regions or in respect of similar products. The Bureau will also consider the extent to which the parties view each other as competitors. This may involve considering records prepared in the course of business that consider who the parties perceive to be their competitors and the extent to which the parties monitor and/or respond to the competitive behaviour of each other.

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[13] Under section 21 of the Code, a person who does something or omits to do something that aids in the commission of an offence may be liable as a party to the offence. Section 22 of the Criminal Code provides that one who counsels another to commit an offence, which is then committed, is a party to that offence. As a party to the offence, the person would be subject to the same penalties (including a fine and/or term of imprisonment) as the person who commits the offence.

2.3.2 Potential competitors

As noted above, section 45 applies to agreements between parties that are potential competitors. Accordingly, the fact that parties were not in competition when the agreement was concluded or during the term of the agreement is not in and of itself sufficient to avoid liability under section 45. In this regard, a competitor is defined by subsection 45(8) to include firms that are likely to compete with respect to a product in the absence of the impugned agreement.

As with actual competitors, the Bureau is of the view that a determination of whether parties are likely to compete does not require a detailed market analysis. Rather, to determine whether parties are potential competitors, the Bureau will consider evidence regarding whether the parties to the agreement were contemplating an offer, were likely to offer, or had previously offered the same or otherwise competing products in the same or otherwise competing regions. In evaluating this issue, the Bureau will have regard to any evidence indicating whether firms were likely to compete or had competed, including business and strategic plans prepared in the course of business, marketing and communications materials, and evidence of actual competition for similar customers in neighbouring regions or in respect of similar products. The Bureau will consider this issue with respect to the periods both prior to and following the implementation of the agreement.

2.3.3 Dual-distribution and franchise arrangements

The Bureau does not consider a supplier of a customer to be a competitor of a customer in respect of the product being supplied. For example, the Bureau will not assess under section 45 an agreement whereby a supplier and customer agree upon the price at which the customer will purchase the product from the supplier.

The Bureau recognizes that in some circumstances, however, a supplier may, in fact, compete with a customer in respect of the product that is being supplied. For example, a supplier may sell products to a distributor for resale in the market while also electing to sell these products directly into the market. Such supplier-distributor arrangements may also take the form of agreements between principal and agent.

It may be difficult to distinguish between a horizontal and vertical restraint in a dual-distribution context where the supplier competes for sales with its unaffiliated distributors. Given that such agreements can be pro-competitive, they are not deserving of condemnation without an inquiry into their actual competitive effects. Indeed, the distributor's status as a competitor to the supplier may only arise as a result of the dual-distribution arrangement. Accordingly, the Bureau will assess agreements between suppliers and distributors in a dual-distribution arrangement under the reviewable matters provisions found in Part VIII of the Act, and not under the criminal conspiracy provision in section 45 of the Act. However, the mere existence of a dual-distribution arrangement between two parties does not foreclose the possibility that agreements between these parties to fix prices, allocate markets or restrict output may be subject to section 45. Further, the Bureau may apply section 45 where the agreement is, in fact, an agreement between suppliers or an agreement between distributors in their capacity as competitors, such as by allocating markets or fixing prices.

The Bureau will apply these same principles to its evaluation of franchise agreements. Specifically, the Bureau will examine agreements between franchisors and franchisees that allocate markets or customers for the operations of the franchisee – such as where the franchise agreement provides franchisees with an authorized sales territory – under Part VIII of the Act and not under the criminal conspiracy provision in section 45 of the Act. The Bureau does not consider such vertical arrangements to be agreements between competitors for the purpose of section 45. Again, the foregoing is subject to the exceptions outlined above, such as where the agreement is, in fact, an agreement among the franchisees to restrain competition among themselves.[14]

2.4 Types of prohibited agreements

Broadly speaking, section 45 prohibits agreements between competitors or potential competitors to fix prices, allocate markets or reduce output that constitute "naked restraints" on competition. The Bureau's approach to evaluating whether an agreement falls into each of these categories is outlined below.

[14] For consideration of the application of section 45 to franchise agreements, see *Fairview Donut Inc v The TDL Group Corp*, 2012 ONSC 1252; affirmed 2012 ONCA 867; leave to appeal to Supreme Court of Canada refused 2013 CanLII 26760.

2.4.1 Price-fixing agreements

Paragraph 45(1)(*a*) of the Act prohibits agreements between competitors in respect of a product "to fix, maintain, increase or control the price for the supply of the product". Further, subsection 45(8) defines the term "price" to include "any discount, rebate, allowance, price concession or other advantage in relation to the supply of a product". Taken together, these provisions prohibit agreements between competitors to fix or control the price, or any component of the price, to be charged by such competitors. In the Bureau's view, this includes agreements to fix prices at a predetermined level, to eliminate or reduce discounts, to increase prices, to reduce the rate or amount by which prices are lowered, to eliminate or reduce promotional allowances and to eliminate or reduce price concessions or other price-related advantages provided to customers. For paragraph 45(1)(*a*) to apply, the agreement need not establish an actual price for the relevant product; rather, this section also prohibits agreements between competitors on methods of establishing prices or other indirect forms of agreements to fix or increase the price paid by customers. Such price-fixing agreements could include agreements between competitors to use a common pricing algorithm[15] or price list in their negotiations with customers, agreements to apply specific price differentials between grades of products, agreements to apply a pricing formula or scale and agreements not to sell products below cost. In addition, the Bureau interprets paragraph 45(1)(*a*) as applying to agreements between competitors on a component of a price, such as a surcharge or credit terms.

The Bureau does not interpret paragraph 45(1)(a) to prohibit agreements solely on the basis that they have the effect of increasing prices charged by competitors. For example, an agreement among competitors to implement a new industry standard may increase the costs of producing a product and ultimately result in an increase in price. However, the Bureau does not consider such an arrangement alone to be an agreement to fix or increase prices. Even if such an arrangement is considered to be an agreement to fix or increase prices, such an agreement could be subject to the ancillary restraints defence discussed below.

[15] Canada's cartel provisions are *per se* and prohibit agreements between competitors and potential competitors to, among other things, fix or control prices - the use of algorithms (Artificial Intelligence or "AI") could form the basis of a cartel offence, however, the existence of an agreement – actual or tacit - to fix or control prices is necessary, and conduct that amounts to conscious parallelism is not sufficient.

The prohibition in paragraph 45(1)(a) applies to the price for the supply of a product, and not to the price for the **purchase** of a product. Accordingly, joint purchasing agreements – even those between firms that compete in respect of the purchase of products – are not in and of themselves prohibited by paragraph 45(1)(a) (or paragraphs 45(1)(b) or (c)) and will only be subject to review under the reviewable matters provisions in Part VIII of the Act. As such, purchasing agreements, including employee non-poaching and wage-fixing agreements, may be subject to review under the reviewable matters provisions in Part VIII of the Act.[16]

In contrast, certain joint **selling** agreements may violate paragraph 45(1)(a) of the Act. Specifically, joint selling agreements that are, in substance, simply agreements between competitors to fix prices will be assessed by the Bureau under paragraph 45(1)(a). A joint selling agreement that restricts the supply of competing products to certain territories or customers could also violate the prohibitions in paragraphs 45(1)(b) and (c) relating respectively to market allocation and output restriction. Similarly, certain other forms of commercialization agreements between competitors may also violate subsection 45(1) of the Act. For a further discussion of the Bureau's approach to evaluating commercialization agreements and joint selling agreements, please see section 3.7.1 of these Guidelines.

2.4.2 Market allocation agreements

Paragraph 45(1)(*b*) of the Act prohibits agreements between competitors in respect of a product "to allocate sales, territories, customers or markets for the production or supply of the product". This provision prohibits all forms of agreements between competitors that allocate markets by any means, including but not limited to agreements between competitors to not compete with respect to specific customers, groups or types of customer, in certain regions or market segments, or in respect of certain types of transactions or products. The prohibition in paragraph 45(1)(*b*) applies to agreements to not compete with respect to direct sales to distributors, resellers or customers, as well as agreements entered into by suppliers to not compete in respect of indirect sales that are made through distributors or resellers. This provision prohibits market allocation agreements between actual and potential competitors.

As noted above, the Bureau does not consider parties that are only suppliers to a customer to be competitors of that customer in respect of the product that is being supplied. For

[16] The Bureau recognizes that small- and medium-sized firms often enter into joint purchasing agreements to achieve discounts similar to those obtained by larger competitors. Such agreements can be pro-competitive and are not deserving of condemnation without a detailed inquiry into their actual competitive effects.

example, as discussed in section 2.3.3 of these Guidelines, the Bureau will not normally apply paragraph 45(1)(*b*) to agreements that allocate markets for the resale of products supplied by a supplier to a customer, even where the supplier also competes with the customer in respect of the sale of that product. Rather, such dual-distribution arrangements will be assessed by the Bureau under the reviewable matters provisions found in Part VIII of the Act.

2.4.3 Output restriction agreements

Paragraph 45(1)(*c*) of the Act prohibits agreements between competitors in respect of a product "to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product". This provision prohibits all forms of agreements between competitors to fix or control production by any means, including but not limited to agreements between competitors to limit the quantity or quality of products supplied, reduce the quantity or quality of products supplied to specific customers or groups of customers, limit increases in the quantity of products supplied by a set amount or discontinue supplying products to specific customers or groups of customers. The prohibition in paragraph 45(1)(*c*) applies to agreements to restrict the supply or production of a product. Accordingly, agreements between competitors to impose production quotas, permanently or temporarily close manufacturing facilities, reduce the quality of components used in a product, or other agreements to reduce the quantity or quality of products that are produced can violate paragraph 45(1)(*c*).

2.5 Ancillary restraints defence

Subsection 45(4) provides a defence for ancillary restraints. The Bureau recognizes that some desirable business transactions or collaborations require explicit restraints on competition to make them efficient, or even possible. 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. Although such ancillary restraints may fall within the type of conduct described in subsection 45(1), they are more appropriately subject to review under the reviewable matters provisions in Part VIII of the Act, including the civil agreements provision in section 90.1 of the Act. As explained elsewhere in these Guidelines, the criminal prohibition in section 45 is reserved for agreements between competitors to fix prices, allocate markets or restrict output that constitute "naked restraints" on competition.

For the purpose of subsection 45(4), an ancillary restraint is an agreement or term of an agreement that contravenes the prohibitions in subsection 45(1), but which is directly related to, and reasonably necessary for giving effect to, a broader and lawful agreement.

For example, the Bureau will generally not assess the following types of ancillary restraints under the criminal provision in section 45 of the Act, although (as noted above) these restraints may be subject to review under the reviewable matters provisions in Part VIII of the Act:

- **a)** A non-compete clause found in an agreement for the sale of assets or shares between parties;
- **b)** An agreement among competitors to charge a common price in a blanket license agreement for artistic works;
- **c)** An agreement to abstain from making material changes to a business pending the consummation of a merger; and
- **d)** A non-compete obligation between the parent undertakings and a joint venture where such obligations correspond only to the products, services and territories covered by the joint venture agreement.

The ancillary restraints defence is available when:

- **a)** The restraint is ancillary to a broader or separate agreement that includes the same parties;
- **b)** The restraint is directly related to, and reasonably necessary for giving effect to, the objective of the broader or separate agreement referred to in (a) above; and
- **c)** The broader or separate agreement referred to in (a) above, when considered in the absence of the restraint, does not contravene subsection 45(1).

Each element of the ancillary restraints defence is discussed in turn below.

2.5.1 Onus

The Crown bears the onus of establishing beyond a reasonable doubt that the restraint(s) in issue contravenes the prohibitions in subsection 45(1) (i.e., the restraint is an agreement or term of an agreement between competitors to fix prices, allocate markets or reduce output). The parties to the agreement must establish on a balance of probabilities the first and second elements of the defence: that the challenged restraint is ancillary to a broader or separate agreement, and that the restraint is directly related to, and reasonably necessary for giving effect to, the objective of the broader or separate agreement.

2.5.2 Ancillary to a broader or separate agreement

To be eligible for the defence in subsection 45(4), the challenged restraint must be "ancillary" to a broader or separate agreement that includes the same parties. The Bureau interprets "ancillary" to mean that the restraint is a part of an agreement or is a separate agreement that is functionally incidental or subordinate to the objective of some broader agreement. The Bureau distinguishes between ancillary restraints (those that are truly subordinate and collateral to a broader agreement) and "naked restraints". In making this determination, the Bureau will examine the terms of the agreement, the form of the agreement), the functional relationship or lack thereof between the restraint and the principal agreement, and how the restraint makes the main agreement more effective in accomplishing its purpose. In short, to invoke the defence, the parties to the agreement must establish that the challenged restraint does not represent the object of their cooperation, but rather constitutes a matter functionally incidental and subordinate to the purpose or end of their collaboration.

As noted above, the ancillary restraint may be a term in a broader agreement. For example, the ancillary restraint could be a non-compete clause between the parties that is contained in one section of a broader agreement. The ancillary restraint may also be contained in a separate agreement that is ancillary to a broader agreement. For example, instead of including a non-compete clause in an agreement, the parties may enter into a separate non-compete agreement. Both types of ancillary restraints qualify for the defence under subsection 45(4), provided the remaining conditions are satisfied.

The defence in subsection 45(4) does not require that the parties to the challenged restraint and the broader or separate agreement be identical. However, the broader or separate agreement must include all of the parties to the agreement containing the ancillary restraint. For example, the defence is still available where the parties to a non-compete agreement are a subset of the parties to a separate joint venture or commercialization agreement.

2.5.3 Directly related and reasonably necessary for giving effect to broader objective

The challenged restraint must be directly related to the objective of the broader agreement. For a restraint to be directly related, it is not adequate to merely assert that the participants would not enter into the broader agreement in the absence of the challenged restraint. Nor is it adequate to demonstrate that the ancillary restraint was entered into between the parties in the same context and at the same time as the broader agreement. Rather, the parties must demonstrate that the restraint was directed at the promotion or facilitation of an objective of the broader agreement.

There is no requirement under subsection 45(4) of the Act that the challenged restraint be the **least** restrictive alternative. Accordingly, in determining whether a challenged restraint is reasonably necessary, the Bureau will not "second guess" the parties with reference to some other restraint that may have been less restrictive in some insignificant way. The Bureau will not examine theoretically less restrictive alternatives that are not practical given the business circumstances. Nonetheless, the ancillary restraints provision requires that restrictions be "directly related and reasonably necessary" to give effect to the objective of the broader agreement. Where there are significantly less restrictive alternatives available to the parties, the parties must demonstrate that the other alternatives were inadequate or impractical, or that such 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 when the agreement was entered into, then the Bureau will conclude that the restraint was not reasonably necessary. In assessing this issue, the Bureau will also consider the duration of the ancillary restraint, the subject matter of the restraint (e.g., whether it applies to products outside of the collaboration) and the geographic scope of the restraint to determine whether it is reasonably necessary to give effect to the objective of the broader agreement as required under the ancillary restraints defence.[17]

For example, the Bureau will consider whether, in the absence of the restraint, the collaboration would likely be implemented. To this end, the Bureau will consider whether, in the absence of the restraint, the agreement could only be implemented under considerably more uncertain conditions, at substantially higher cost or over a significantly longer period. On this issue, the Bureau will examine, among other things, the submissions of the parties to the Bureau, evidence created during the evaluation and negotiation of the agreement that demonstrates the objectives of the agreement, and any evidence of alternative options considered by the parties at the time the agreement was negotiated.

[17] For an application of this defence by a court, see *Dow Chemical Canada ULC v NOVA Chemicals Corporation*, 2018 ABQB 482, at paras 1414-1416 (CanLII).

2.5.4 Lawfulness of principal agreement

To qualify for the defence, the broader or separate agreement to which the restraint is ancillary must not contravene section 45 of the Act. In other words, if the alleged ancillary restraint is merely part of a broader price-fixing, market allocation or output restriction cartel, the defence is unavailable.

2.6 Other defences

In addition to the ancillary restraints defence, a number of other defences or exceptions are found in the Act and other legislation. The exceptions found in section 45 are described below.

2.6.1 Agreements between affiliates

Paragraph 45(6)(*a*) provides an exception for agreements that are entered into only between companies that are affiliated. The definition of affiliated companies is set out in subsection 2(2) of the Act and is reproduced in Section 5 of these Guidelines. For the exception to apply, all of the parties to the agreement must be affiliated; accordingly, an agreement between affiliated and unaffiliated entities or individuals may be prosecuted under subsection 45(1).

2.6.2 Export agreements

Subsection 45(5) of the Act contains a qualified or limited exception for agreements between competitors that relate only to the export of products from Canada. As with the predecessor provisions found in subsection 45(5) prior to the 2009 amendments and similar provisions existing in other jurisdictions, the defence for export agreements is designed to enhance export trade by facilitating export agreements between competing firms. For the export defence to apply, the agreement must relate only to the export of products from Canada and not, for example, the supply of products to Canadian markets. In addition, pursuant to subsection 45(5), the export defence will not apply where the agreement:

- **a)** has resulted in or is likely to result in a reduction or limitation of the real value of exports of a product;
- **b)** has restricted or is likely to restrict any person from entering into or expanding the business of exporting products from Canada; or
- **c)** relates only to the supply of services that facilitate the export of products from Canada.

It should be noted that an export agreement that benefits from the defence in subsection 45(5) may be subject to prosecution or other proceedings in the jurisdictions to which products are exported under the agreement. Further, where the export agreement is likely to prevent or lessen competition in Canada, the Commissioner may seek a remedy in respect of the agreement under section 90.1 of the Act. Please see section 3.5.3 of these Guidelines regarding the application of an export defence in proceedings under section 90.1.

2.6.3 Regulated conduct

As described in the Bureau's *Bulletin on "Regulated" Conduct*, the Bureau recognizes that the regulated conduct doctrine may apply to the enforcement of the Act, including the conspiracy provision in section 45, with respect to conduct that is regulated by another federal, provincial or municipal law or legislative regime. The regulated conduct doctrine can operate so as to exempt an agreement from the application of the Act. Subsection 45(7) provides that the regulated conduct doctrine as it applied to section 45 prior to the 2009 amendments will continue to apply to the amended section 45;[18] as a result, the Bureau will continue to apply the approach to the regulated conduct doctrine articulated in the *Bulletin on "Regulated" Conduct* in the assessment of matters under the amended section 45 of the Act.

2.6.4 Specialization agreements

Pursuant to section 90 of the Act, sections 45 and 90.1 of the Act do not apply in respect of registered specialization agreements as defined in section 85 of the Act.

[18] Following the decision of the Supreme Court of Canada in *Garland v Consumers Gas Co*, 2004 SCC 25, some commentators expressed concern that the removal of the term "unduly" from section 45 would prevent the regulated conduct doctrine ("RCD") from being applied in prosecutions under section 45. Subsection 45(7) clarifies that the removal of the term "unduly" from section 45 of the Act and other changes implemented through the 2009 amendments do not impact the availability of the regulated conduct doctrine under section 45.

2.7 Remedies

A range of potential remedies is available to address violations of the conspiracy provision. If the Commissioner concludes that an offence has been committed, evidence may be referred to the DPP with a recommendation that criminal charges be brought. The DPP will then decide whether a prosecution is in the public interest in accordance with the criteria set out in the *Public Prosecution Service of Canada Deskbook*.

A person found guilty of an offence under subsection 45(1) may be imprisoned for a maximum term of 14 years or subjected to a fine not exceeding $25 million, or to both. Where there is a finding of guilt, in addition to a fine and/or imprisonment, the Bureau will typically recommend that the DPP consider applying to a court under subsection 34(1) of the Act for a prohibition order to prohibit any behaviour that constitutes, or is directed toward, the commission of an offence. Such prohibition orders can last for up to 10 years and may include prescriptive terms requiring positive steps or acts to ensure compliance with the law. Business organizations and individuals may be subject to a prohibition order under subsection 34(1).

The Bureau will consider the merits of an alternative case resolution, such as issuing a warning letter, only in cases where a recommendation for prosecution would be inappropriate. For example, in certain instances when a conspiracy has not been implemented.

In appropriate circumstances as described in Chapter 5.2 of the PPSC Deskbook, the PPSC may proceed under subsection 34(2) of the Act, requesting the court issue a prohibition order without a finding of guilt where the court finds that a person has done, is about to do or is likely to do any act or thing constituting or directed toward the commission of an offence. Business organizations and individuals may be subject to a prohibition order under subsection 34(2).

In urgent circumstances, the DPP may apply for an interim injunction under section 33 to temporarily halt behaviour that constitutes, or is directed toward, the commission of an offence pending a prosecution or the completion of proceedings under subsection 34(2).

Section 36 of the Act provides a right of private action for the recovery of damages. This remedy is available if there has been a violation of the criminal provisions of the Act, or a failure to comply with an order of the Tribunal or a prohibition order issued by a court. Recovery in proceedings under this provision can be equal to the loss or damage suffered by the plaintiff.

2.8 Immunity and Leniency

Businesses or individuals involved in activities that may violate the criminal provisions of the Act can, in certain circumstances, approach the Bureau and request immunity from prosecution in return for cooperating with the Bureau's investigation and any ensuing prosecutions. Under the Bureau's Immunity Program, the Commissioner will recommend that the DPP grant immunity to the first party that comes forward and satisfies the identified criteria. However, the DPP has ultimate discretion to accept or reject the Commissioner's recommendation.

Immunity from prosecution is only available to the party involved in the offence that is first-in to make an application. Subsequent parties to come forward are able to request other types of lenient treatment granted by the DPP, such as recommendations to the court for reduced fines in return for co-operation with the Bureau and the DPP. For more information on the degree of lenient treatment and the timing of a request for that treatment, see the Bureau's Immunity and Leniency Programs.

3. The civil agreements provision

3.1 Overview

Section 90.1 permits the Tribunal to issue certain remedies in respect of existing or proposed agreements between competitors or potential competitors that are likely to substantially lessen or prevent competition in any relevant market.[19] Subsection 90.1(1) states:

- **90.1** (1) If, on application by the Commissioner, the Tribunal finds that an agreement or arrangement – whether existing or proposed – between persons two or more of whom are competitors prevents or lessens, or is likely to prevent or lessen competition substantially in a market, the Tribunal may make an order

  a) prohibiting any person – whether or not a party to the agreement or arrangement – from doing anything under the agreement or arrangement; or

  b) requiring any person – whether or not a party to the agreement or arrangement – with the consent of that person and the Commissioner, to take any other action.

In many respects, agreements that fall within the scope of section 90.1 are examined in a manner consistent with the approach outlined in the Bureau's 2011 *Merger Enforcement Guidelines* (the "MEGs"). This section of the Guidelines describes the Bureau's approach to evaluating each of the elements of section 90.1 of the Act, including a consideration of whether any defences and exceptions may apply. In addition, this section describes the Bureau's approach to assessing six common forms of agreements between competitors; namely: commercialization agreements, information sharing agreements, research and development agreements, joint production agreements, joint purchasing agreements and non-compete agreements.

[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.

3.2 What constitutes an agreement or arrangement

In determining whether an agreement exists[20], the Bureau will consider whether the parties to the alleged agreement or arrangement reached a consensus, either explicitly or tacitly. The Bureau does not consider that the mere act of adopting a common course of conduct with awareness of the likely response of competitors, commonly referred to as "conscious parallelism", is sufficient to establish an agreement for the purpose of section 90.1. As with subsection 45(1), the civil agreements provision can apply to all forms of agreements and arrangements[21] between competitors, regardless of the degree of formality. 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 existence of a written document setting out the terms of the agreement between the parties may assist the Bureau in understanding the terms of the agreement and the objectives underlying the agreement.

3.3 Who is a competitor

Section 90.1 is applicable to agreements between parties two or more of whom are competitors or potential competitors with respect to a product(s).[22] In many, but not all, cases, the Bureau's primary focus will be on whether two or more of the parties to the agreement are actual or potential competitors in respect of a product(s) subject to the agreement.[23] The Bureau will assess whether parties to an agreement are competitors by considering the types of evidence identified in the last two paragraphs of section 2.3.1, above.

Agreements between members of a trade or industry association may also constitute agreements between competitors for the purpose of section 90.1. The Bureau considers

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[20] See *The Commissioner of Competition v HarperCollins Publishers LLC et al*, 2017 Comp Trib 10, at paras 181-185.

[21] For greater certainty, the term "agreement" is understood to include arrangements.

[22] A party that does not compete with any of the other parties to an agreement could still be considered a party to an agreement under section 90.1 if at least two of the other parties to the agreement are actual or potential competitors. See, for instance, the consent agreement negotiated in *The Commissioner of Competition v Apple Inc et al*, CT-2017-005.

[23] Agreements may also raise concern under section 90.1 where two or more of the parties to the agreement are not actual or potential competitors in respect of a product(s) subject to the agreement, but are competitors in respect of some other product, and where the agreement is likely to prevent or lessen competition substantially in a relevant market. This may result, for instance, where ongoing collaboration between parties in respect of the development of product A (a product for which they are not actual or potential competitors) dampens their incentive to compete vigorously in respect of product B (a product for which they are actual or potential competitors).

that rules, policies, by-laws or other initiatives that prevent or lessen competition substantially, and that are enacted and enforced by an association with the approval of members who are competitors, constitute agreements between competitors for the purpose of section 90.1.[24]

As described above, section 90.1 also applies to agreements between parties that are potential competitors. Subsection 90.1(11) defines competitors to include not just actual competitors, but also "a person who it is reasonable to believe would be likely to compete" with respect to the relevant product "in the absence of the agreement or arrangement". Accordingly, the fact that parties did not compete when the agreement was concluded or during the term of the agreement is not alone sufficient to avoid review under section 90.1.

In some instances, parties can become potential competitors as a result of their collaboration. For example, it may be necessary for parties to collaborate in order to develop a product by combining complementary technologies. Owing to their collaboration, the parties may become potential competitors in respect of the supply of the developed product.

3.4 Anti-competitive threshold

3.4.1 Overview

As set out in subsection 90.1(1), the Tribunal may make an order where it finds that an existing or proposed agreement between competitors "prevents or lessens, or is likely to prevent or lessen, competition substantially in a market". When assessing competitive effects under section 90.1, the Bureau will consider whether the agreement is likely to prevent or lessen competition substantially in <u>any</u> relevant market, including but not limited to the relevant market(s) that contains the product(s) subject to the agreement.

A substantial lessening or prevention of competition results from agreements that are likely to create, maintain or enhance the ability of the parties to the agreement to exercise market power. For example, an agreement can lessen competition where parties to the agreement are able to sustain higher prices than would exist in the absence of the agreement by diminishing existing competition. An agreement can also prevent competition by hindering the development of future competition. Where applicable, the Bureau will consider whether an agreement is likely to substantially lessen or prevent competition in the relevant market in which products are supplied by the parties (the

[24] The Competition Tribunal's decision in *The Commissioner of Competition v The Toronto Real Estate Board*, 2013 Comp Trib 9, at para 26, is consistent with the Bureau's position on this issue.

"downstream market") and in the relevant market in which inputs are purchased by the parties (the "upstream market").

The Bureau's approach to determining whether an agreement is likely to substantially lessen or prevent competition (including issues such as substantiality, defining the relevant market, anti-competitive effects and the efficiency exception) is consistent with the assessment conducted in respect of mergers as set out in the MEGs. Readers are encouraged to consult the relevant portions of the MEGs for further information regarding the Bureau's approach to examining agreements under section 90.1.

3.4.2 Market shares

Consistent with the MEGs, as a general rule, the Commissioner will not challenge an agreement under section 90.1 on the basis of:

i. 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; or

ii. a concern related to a coordinated exercise of market power by firms in the relevant market 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.

The Bureau will consider the share of the relevant market held by the parties at the time the agreement is concluded and also, to the extent possible, the share of the market that will be held by the parties during the term of the agreement. Parties wishing to determine whether ongoing agreements are likely to be subject to challenge under section 90.1 must evaluate whether, as a result of changes to the market structure that occur during the term of an agreement, the agreement is likely to substantially lessen or prevent competition.

Subsection 90.1(3) of the Act provides that evidence as to the market shares held by the parties to the agreement or the level of concentration in the relevant market cannot constitute the sole basis upon which an agreement may be subject to a remedy by the Tribunal. The fact that parties collectively hold a large share of the relevant market or that the market is concentrated are highly relevant considerations, but are not alone sufficient to warrant a remedy under section 90.1 of the Act.

3.4.3 Entry or expansion

In examining the competitive effects of a transaction, the Bureau will also consider whether timely entry by potential competitors would likely occur on a scale and magnitude to sufficiently constrain the ability of the parties to an agreement to exercise market power in the relevant market. As a general rule, in the absence of impediments to entry, the parties' attempt to exercise market power is likely to be thwarted by entry of firms that: are already in the relevant market and can expand production or sales; are not in the relevant market but operate in other product or geographic markets and can switch production or sales into the relevant market; or can begin production or sales into the relevant market *de novo*. For further discussion of the Bureau's approach regarding the likelihood of entry and barriers to entry, please see Part 7 of the MEGs.

3.4.4 Additional factors

Subsection 90.1(2) contains a non-exhaustive list of factors to which the Tribunal may have regard in determining whether an agreement is likely to prevent or lessen competition substantially. The factors listed in subsection 90.1(2) are similar to those enumerated in section 93 of the Act in respect of the assessment of mergers, such as the extent of foreign competition, barriers to entry into the market, and the nature and extent of change and innovation in any relevant market. The Bureau may consider each of the factors set out in subsection 90.1(2) and, where applicable, any other factor relevant to competition in the market that is or would likely be affected by the agreement.

3.5 Defences and exceptions

3.5.1 Efficiency exception

There are a number of different types of efficiency gains that may be realized through competitor collaborations, such as the introduction of new products; reductions in fixed and variable costs; improved utilization of distribution and warehousing; increased specialization in distribution, sales and marketing functions; more intensive use of a network infrastructure; and improvements to product quality. Subsections 90.1(4) to (6) create a framework where efficiency gains likely to be brought about by an agreement are considered against the anti-competitive effects that are likely to result from the agreement.

The analysis conducted by the Bureau in respect of the efficiency exception in subsection 90.1(4) is consistent with the analysis undertaken by the Bureau in respect of the efficiency exception applicable to mergers in section 96 of the Act. In both cases, the burden is on the parties to the agreement to demonstrate, through credible, substantiated claims of efficiency gains, that the cost savings and other benefits brought about by such efficiency gains are greater than and offset any anti-competitive effects that are likely to result from the agreement (including any anti-competitive effects resulting from cost saving initiatives, such as the reduction of product quality).

To facilitate its review of efficiency claims, the Bureau requires detailed and comprehensive information that substantiates alleged efficiency gains. The information should also address the likelihood that such gains will be achieved and why those gains are not likely to be achieved if potential Tribunal orders, such as an order prohibiting the agreement, are made. Efficiency claims must be supported by documentation prepared in the ordinary course of business in addition to probative evidence on the magnitude, likelihood and impact of any efficiencies.[25]

The discussion regarding the nature of the Bureau's analysis, types of efficiencies generally included and excluded, and the assessment of anti-competitive effects of the agreement found in Part 12 of the MEGs may also be instructive to parties in preparing efficiency claims for the purpose of section 90.1.

3.5.2 Federal financial institutions

Subject to the exception found in subsection 90.1(9) for agreements in respect of which the Minister of Finance has issued a certification, agreements between federal financial institutions that are likely to substantially lessen competition may be subject to review under section 90.1 of the Act.

3.5.3 Export agreements

Subsection 90.1(8) of the Act contains a qualified or limited exception for agreements between competitors that relate only to the export of products from Canada. As with the exception found in subsection 45(5) of the Act, the exception for export agreements is designed to enhance Canada's export trade by facilitating export agreements between competing firms.

[25] For additional guidance on the types of information that may be relevant to an assessment of efficiencies under section 90.1 of the Act, parties are encouraged to review the Bureau's Model Timing Agreement for Merger Reviews involving Efficiencies, with particular emphasis on section 2 ("The efficiency exception"), section 3 ("Information requirements to test efficiencies") and Appendix II ("Efficiencies information requirements").

In order for the export defence to apply, the agreement must relate only to the supply of products outside of Canada and not, for example, to the supply of products in Canada. In addition, pursuant to subsection 90.1(8), the export defence will not apply in the following circumstances:

- **a)** Where the agreement has resulted in or is likely to result in a reduction or limitation of the real value of exports of a product;
- **b)** Where the agreement has restricted or is likely to restrict any person from entering into or expanding the business of exporting products from Canada; or
- **c)** Where the agreement has prevented or lessened or is likely to prevent or lessen competition substantially in the supply of services that facilitate the export of products from Canada.

Factors considered by the Bureau in assessing whether the export defence is applicable are generally consistent with those examined in determining the applicability of the export defence in subsection 45(5) to competitor agreements under the criminal provision (as described in section 2.6.2 of these Guidelines). However, pursuant to paragraph 90.1(8)(*c*) of the Act, the defence is not applicable where the agreement is likely to prevent or lessen competition in the supply of services that facilitate the export of products from Canada. In considering this issue, the Bureau will assess whether the agreement has had, is having or is likely to have the effect of substantially lessening or preventing competition in the supply of services that facilitate exports, such as customs brokerage, transportation and warehousing.

3.5.4 Specialization agreement

Pursuant to section 90, the Tribunal cannot issue a remedy under section 90.1 of the Act in respect of specialization agreements that are registered under section 86 of the Act.

3.5.5 Agreements between affiliates

Section 90.1 does not apply to agreements entered into only by parties that are affiliates. The definition of affiliated parties is set out in subsection 2(2) of the Act and is reproduced in section 5 of these Guidelines.

3.6 Remedies

The Bureau considers potential remedies early in any investigation or inquiry under section 90.1 in order to determine the nature, scope, and the means by which a remedy may be implemented. Where the Bureau is satisfied that the evidence supports a conclusion that section 90.1 is engaged, it can seek to remedy the conduct through a consensual resolution with the parties or by seeking an order from the Tribunal.

3.6.1 Consensual resolutions

Generally speaking, in using the range of enforcement tools available, the Bureau encourages and facilitates voluntary compliance and will often attempt to achieve a negotiated settlement in response to a breach of section 90.1.[26]

Where the Bureau has concluded section 90.1 is engaged, in most circumstances the Bureau will require that any proposed remedy agreed upon be formalized in a consent agreement and registered with the Tribunal pursuant to section 105 of the Act.[27] Consent agreements entered into by the Bureau and a respondent must be based on terms that could be the subject of an order of the Tribunal. Upon registration, consent agreements have the same force and effect as orders of the Tribunal.

3.6.2 Orders of the Competition Tribunal

Where the Bureau is satisfied that the evidence supports an application to the Tribunal under section 90.1 and the Bureau cannot resolve the case on a consensual basis, or where a consensual remedy is not considered appropriate in the circumstances, the Bureau may make an application to the Tribunal for a remedial order.[28]

Where the Tribunal finds that the elements of section 90.1 are met, the Act grants the Tribunal discretion to issue both prohibition orders and prescriptive orders. The power to issue prohibition orders is set out in paragraph 90.1(1)(a), which provides the Tribunal with the ability to prohibit any person – including persons that are not a party to the agreement or arrangement – from doing anything under the agreement or arrangement.

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[26] See also the Bureau's *Competition and Compliance Framework*.

[27] In some cases, the Bureau may seek compensation for investigative costs as part of a consent agreement.

[28] The Commissioner is the only party that may make applications to the Tribunal under section 90.1. See paragraph 90.1(1) of the Act.

The power to issue prescriptive orders, which is set out in paragraph 90.1(1)(b), is more qualified. The Tribunal can only issue an order requiring a person to take certain corrective action if both that person and the Commissioner consent.

Unlike under section 79, the Tribunal does not have the discretion to order a party to pay an administrative monetary penalty under section 90.1.

3.7 Types of agreements reviewable under Section 90.1

The sections that follow describe how the Bureau will generally review six common forms of competitor collaborations, namely: commercialization agreements, information sharing agreements, research and development agreements, joint production agreements, joint purchasing agreements and non-compete agreements.

3.7.1 Commercialization and joint selling agreements

Commercialization agreements typically define the actions to be undertaken by participants in order to develop new products or enter new markets. Certain forms of commercialization arrangements can generate cost savings and other efficiencies for participants, including reduced distribution costs by sharing a common warehouse, distribution facility or sales agent. However, these agreements can also impair competition between participants, such as where the agreement substantially restricts competition in product choice, service or other significant competitive variables.

The Bureau will consider a number of factors when assessing commercialization agreements, including the following: whether the agreement is between competitors; whether the parties to the agreement hold market power; whether the agreement deals with competitively significant terms of trade, such as price; whether the parties are able to commercialize products outside the scope of the agreement or otherwise retain the ability to compete independently; whether the commercialization agreement requires or provides opportunities for the disclosure of competitively sensitive information between the participants; and whether any anti-competitive effects are offset and outweighed by the efficiencies generated through the commercialization agreement. Each of these factors is discussed in turn below, with the exception of market power and efficiencies, which are discussed above in sections 3.4 and 3.5.1 of these Guidelines, respectively.

Joint selling agreements involve agreements between participants with respect to certain aspects of their sales activities, such as, for example, using a common sales agent. Where joint selling agreements are, in substance, simply agreements to restrain competition between the parties (including, for example, price-fixing agreements), the Bureau will generally assess these agreements under the criminal provision in section 45 of the Act. Joint selling agreements that address other aspects of the relationship between the participants will generally be assessed in a manner similar to commercialization agreements, as discussed in greater detail below.

(a) Agreement between competitors

Section 90.1 is confined to agreements where two or more of the parties to the agreement are competitors or potential competitors. As such, the Bureau will not review a commercialization or joint selling agreement under section 90.1 unless at least two of the parties subject to the agreement are actual or potential competitors in respect of a product(s), including but not limited to the products that are subject to the agreement. In some cases, a commercialization or joint selling agreement may also be reviewed under other provisions of the Act. For example, if a commercialization agreement contains vertical restraints, such as restrictions on prices or requirements that products be distributed only within certain markets, then the agreement may be subject to review under sections 76 (price maintenance), 77 (market restriction) or other reviewable provisions found in Part VIII of the Act.

(b) Competitively significant terms

Commercialization and joint selling arrangements may cover a broad range of sales, distribution and marketing activities, or may be confined to a single aspect, such as advertising. The Bureau will consider the terms of the commercialization agreement and/or joint selling agreement in determining whether the agreement is likely to prevent or lessen competition substantially. Concerns are most likely to arise where the commercialization agreement and/or joint selling agreement restricts competition on key aspects of competitive rivalry between the participants.

Identification of the key aspects of competitive rivalry will depend upon the circumstances relevant to each agreement. For example, commercialization agreements that prevent participants from competing on price are more likely to raise concerns than arrangements that are limited to sharing a common warehouse or distribution network. Where rivalry between the parties is focused on non-price aspects, such as level of service or delivery terms, a commercialization agreement that restricts competition on these aspects may still raise concerns under the Act. The Bureau will also consider other terms of the commercialization agreement and/or joint selling agreement, such as the duration of the collaboration. In general, the shorter the duration of the collaboration, the less likely it is that the collaboration will raise issues under the Act.

The Bureau will consider the impact that the agreement has had or is likely to have on competition. For example, where a proposed agreement requires that sales of a product be made through a common sales agent, the Bureau will consider whether the arrangement is likely to: significantly reduce price competition; reduce competition on other terms of trade; impair the incentive or ability of the parties to engage in aggressive marketing strategies; lead to the apportioning of markets or customers; and result in other potential anti-competitive effects.

(c) Ability to sell outside of agreement and independent competition

The Bureau will also consider whether the agreement restricts the ability of the parties to exercise independent discretion in respect of the key conditions of competitive rivalry – for example, whether competitors who agree to supply products through a common distribution network or sales agent will continue to independently determine prices and other terms of trade, or whether the agreement requires or induces these competitors to adopt common prices and terms of trade.

Similarly, the Bureau will consider whether the parties to the agreement are permitted to engage in the supply of products outside of the agreement. For example, when examining a joint selling or distribution agreement, the Bureau will consider whether the agreement allows the parties to sell all or some of the relevant product independently or whether the agreement requires the parties to supply the relevant product only through common distribution or a common sales agent.

The Bureau will also examine whether the collaboration is organized and governed in a manner that permits the collaboration to compete independently from its participants. For example, the Bureau will consider whether the collaboration has the ability and incentive to act as an independent decision-maker or whether the participants retain control over the collaboration's decisions regarding price, marketing strategies or other competitively significant terms. Factors that are relevant to this determination include whether the collaboration is separately incorporated, whether participants are entitled to appoint representatives to the board of directors of the collaboration, whether the collaboration has independent senior management, whether competitively significant decisions of the collaboration are subject to approval of the participants, and whether participants are otherwise able to exert significant control over the operations of the collaboration. A collaboration is not considered to be anti-competitive merely because it does not have the ability or incentive to compete independently of its participants. Rather, this is one factor in the overall assessment of the collaboration.

(d) Disclosure of competitively sensitive information

The Bureau will consider whether a commercialization agreement and/or joint selling agreement provides an opportunity for the disclosure or exchange of competitively sensitive information, such as information regarding costs, prices to be charged and marketing strategies. The Bureau will consider opportunities for the sharing of information directly between participants, as well as opportunities for indirect exchanges, such as through a common agent. Parties are encouraged to include in the terms of the agreement appropriate safeguards against the disclosure of competitively sensitive information. For further discussion of these issues, please see section 3.7.2 of these Guidelines regarding information sharing between competitors.

3.7.2 Information sharing agreements

Collaborations can involve a considerable degree of information exchange between competitors. Similarly, trade associations may gather information from industry participants to further the objectives of the association, perform benchmarking exercises or otherwise benefit members. For the most part, such exchanges do not raise concerns under the Act because competitors generally avoid sharing information that is competitively sensitive in order to preserve their competitive advantage. In certain cases, an agreement that involves a unilateral disclosure or exchange of information between competitors can impair competition by reducing uncertainties regarding competitors' strategies and diminishing each firm's commercial independence.

Cartel agreements often involve the exchange of competitively sensitive information between competitors. Indeed, activities that assist competitors in monitoring one another's prices or conduct otherwise consistent with the existence of an agreement may be sufficient to prove that an agreement was concluded between the parties for the purpose of subsection 45(1) of the Act.[29] Accordingly, information sharing agreements between competitors should be structured carefully to ensure that they do not raise concerns under the criminal prohibitions in subsection 45(1) of the Act.

In assessing information sharing agreements between competitors under section 90.1, the Bureau will consider the following factors, among others: the nature of the information exchanged (i.e., whether the information is competitively sensitive); the timing of the information exchange (e.g., whether the information relates to historical, current or future activities); whether the parties participating in the information exchange have market power or will likely have market power; the manner in which the information is collected

[29] Please refer to the discussion above in section 2 of these Guidelines.

and disseminated (e.g., whether the information is shared directly between competitors or aggregated by a third party); and whether any anti-competitive effects are offset and outweighed by the efficiencies generated through the information sharing agreement. Each of these factors is discussed in turn below, with the exception of efficiencies, which is discussed above in section 3.5.1 of these Guidelines.

(a) Competitively sensitive information

An agreement to disclose or exchange information that is important to competitive rivalry between the parties can result in a substantial lessening or prevention of competition. For example, exchanging pricing information, costs, trading terms, strategic plans, marketing strategies or other significant competitive variables can raise concerns under the Act. Where competitors agree to share competitively sensitive information, it can become easier for these firms to act in concert, thereby reducing or even eliminating competitive rivalry.

In general, the Bureau does not consider publicly available information to be competitively sensitive. However, the Bureau may be concerned with an agreement between competitors to publicly disclose competitively sensitive information. For example, an agreement to publicly disclose future pricing information can raise concerns under the Act where such disclosure is not in furtherance of some legitimate objective and/or where it is likely to have the effect of substantially lessening or preventing competition.

(b) Timing of information

The exchange of information relating to current or future activities is more likely to affect competition adversely and, as such, raises greater concerns than the exchange of information relating to historical activities. For example, disclosure of information relating to future pricing, future marketing activities or the disclosure of other competitively sensitive information is more likely to raise concerns than disclosure of information regarding activities that took place in the past, such as historical costs or sales. However, it should be noted that an agreement to disclose historical information could raise concerns where such information provides a meaningful indication of future intended pricing or other competitively significant factors.

(c) Market power

As noted above, an agreement is likely to substantially lessen or prevent competition in a relevant market where the agreement is likely to create, maintain or enhance the ability of the parties to the agreement to exercise market power. As a result, the Bureau will not challenge under section 90.1 an agreement to share information unless the parties to the agreement have or are likely to have market power or the relevant market is concentrated such that firms are able to engage in a coordinated exercise of market power. Agreements to share information between participants who collectively hold market power have the potential to substantially lessen competition in the relevant market.

(d) Manner of collection and dissemination

Information exchanged directly between competitors is more likely to raise concerns than information that is supplied to an independent third party. In addition, information that is aggregated so as not to disclose information specific to any given firm is less likely to raise concerns than information that is shared in a disaggregated form. For example, firms wishing to determine costs relative to industry averages or industry trends may agree to supply current sales information to a third party for disclosure in an aggregated form that does not reveal the sales information of any specific firm, as distinct from sharing that information directly.

In evaluating an agreement to exchange information, the Bureau will also consider the safeguards established through the organization and governance of the collaboration that are directed at preventing or minimizing the disclosure of competitively sensitive information. For example, participants in the collaboration can limit disclosure of information to personnel who are not engaged in sales or marketing activities, or can prevent sales and marketing personnel from participating in a research and development joint venture.

3.7.3 Research and development agreements

Cooperation in respect of research and development ("R&D") activities may result in significant benefits. For example, R&D collaborations can allow firms to combine complementary technologies and resources, leading to the development of new and improved products. R&D collaborations can also allow firms to lower the costs of research, accelerate the pace of innovation, and reduce the time required to bring new products to market.

In certain circumstances, R&D agreements can substantially lessen or prevent competition, such as where restrictions are imposed on the exploitation of products developed through the collaboration.

The central issue that will be considered by the Bureau is whether the R&D agreement substantially lessens or prevents competition, either in respect of a product or innovation. For example, the Bureau may have concerns where the R&D agreement reduces the level of innovation that would prevail in the absence of the agreement (such as where consumers will have fewer product choices), or where the time required to bring products to market is greater. Restrictions on competition can also reduce the number of independent competitors for the products that are the subject of R&D agreements or otherwise lessen competition.

In assessing R&D agreements, the Bureau generally considers the following factors: whether the agreement is between competitors; whether the agreement is limited to R&D or also contains provisions regarding the joint exploitation of products; whether the parties hold market power in the relevant market; whether the restrictions on competition are reasonably necessary for achieving the objective of the R&D agreement; and whether any anti-competitive effects are offset and outweighed by the efficiencies generated through the R&D agreement. Each of these factors is discussed in turn below, with the exception of efficiencies, which is discussed above in section 3.5.1 of these Guidelines.

(a) Agreement between competitors

Section 90.1 only applies to R&D agreements between parties at least two of whom are competitors or potential competitors.

When assessing an R&D agreement, the Bureau's primary focus will be on whether the parties are able to develop the product(s) subject to the R&D agreement independent from the collaboration (though the Bureau may also consider whether, absent the R&D agreement, the parties would be actual or potential competitors in respect of other product(s)). Where the parties are able to develop the product independently, albeit at a higher cost or during a longer period of time than through a collaborative effort, this does not necessarily mean that the agreement will be challenged, but that further consideration of other factors, such as those listed below, is necessary to determine whether concerns exist under section 90.1.

(b) Whether agreement deals with joint exploitation

The Bureau will consider whether the agreement includes provisions relating to the joint exploitation of the results of the R&D. Agreements that relate only to R&D and do not include provisions regarding the joint exploitation of the possible results generally raise concerns under the Act in the following circumstances:

i. where the agreement involves the disclosure of competitively sensitive information that is not necessary for the purpose of carrying out the R&D activities;

ii. where the agreement imposes unnecessary restrictions on innovation that would likely be carried out in the absence of the agreement; or

iii. where the agreement would substantially lessen competition because the parties would otherwise be likely to independently develop competing products.

For example, issues may arise in respect of an agreement regarding R&D where the agreement restricts participants from engaging in R&D in respect of unrelated products. Where the agreement includes provisions regarding joint exploitation or meets the conditions in one or more of (i), (ii) or (iii) above, the Bureau will undertake additional analysis in accordance with the discussion that follows below. This does not mean that the collaboration will necessarily be challenged, but only that further review is required to determine if the collaboration raises concerns under section 90.1 of the Act.

(c) Market power

Where the research and development agreement includes provisions relating to the joint exploitation of products, the Bureau then examines whether the parties to the agreement hold or are likely to hold market power. The parties to a research and development agreement will not have the ability to substantially lessen or prevent competition in any relevant market unless they hold or are likely to hold market power.

The determination of whether the parties to an R&D agreement hold market power may be straightforward or complex, depending upon the nature of the products and the stage of development. For example, where the R&D agreement relates only to improvements on existing products, then the relevant market will likely consist of the existing products and products that are competitive substitutes. However, it may be more challenging to determine whether participants in an R&D agreement hold market power in circumstances where the collaboration concerns the development of entirely new products. Where possible, in determining whether the parties are likely to hold market power in respect of a product under development, the Bureau will account for competitive substitutes that exist in the market and those that are under development by the participants and third parties.

(d) Whether restrictions are reasonably necessary

In exercising its enforcement discretion under section 90.1 of the Act, the Bureau will also consider whether any restraints on competition in the R&D agreement are reasonably necessary to attain its objectives. Although the Bureau will consider each agreement in the particular circumstances, the Bureau does not generally consider that restrictions on the level of output or restraints that restrict the ability or incentive of the participants to conduct R&D in respect of products or fields that are outside of the R&D agreement are reasonably necessary. The Bureau will also examine whether any restraints on competition are imposed for a period of time that extends beyond that which is reasonably necessary to achieve the objectives of the R&D agreement.

3.7.4 Joint production agreements

Joint production agreements take numerous different forms, including: specialization agreements where parties unilaterally or reciprocally agree to discontinue production of a product and instead purchase that product from another party; agreements where parties produce products through common production facilities or a jointly controlled company; and subcontracting arrangements where one party retains another to produce products on its behalf.

Joint production agreements may generate cost savings through various means, such as economies of scale or scope, sharing a better production process, and combining complementary technologies and know-how. Accordingly, joint production agreements can be pro-competitive and, in some cases, may provide a means for launching a new product, entering a new market or carrying out a specific project. However, joint production agreements can also have anti-competitive effects, such as where the agreement leads to a significant reduction or elimination of competition in respect of the supply of a product, where the agreement results in a significant reduction of output of a product or where the agreement lowers the price of an input below competitive levels. As noted above, section 90.1 of the Act does not apply in respect of specialization agreements that are registered under section 86 of the Act.

In assessing a joint production agreement, the Bureau considers a number of factors, including: whether the joint production agreement is between parties that are actual or potential competitors; whether the joint production agreement contains provisions that limit output of a relevant product, fix prices or otherwise restrict competition on competitively significant matters; whether the joint production agreement otherwise reduces the incentive or ability of the parties to compete independently; whether the parties to the agreement have market power or will likely have market power (either in the upstream or downstream markets); and whether any anti-competitive effects are offset and outweighed by the efficiencies generated through the joint production agreement. Each of these factors is discussed in turn below, with the exception of efficiencies, which is discussed above in section 3.5.1 of these Guidelines.

(a) Agreement between competitors

The primary concern with a joint production agreement is that the agreement can result in the elimination or reduction of rivalry between suppliers who are actual or potential competitors. In considering this issue, the Bureau will examine competition in both the relevant market for the products that are produced through the joint production agreement (the "downstream market") as well as the relevant market for the purchase of inputs into the joint production process (the "upstream market"). Joint production agreements may substantially lessen competition and fall within the scope of section 90.1 where the parties are competitors or potential competitors in respect of at least one product in a downstream market (such as where the parties compete with respect to the product that is being jointly produced) or upstream market (such as where the parties compete with respect to the purchase of an input).

(b) Restraints on competition

The Bureau will consider whether the joint production arrangement imposes restraints on competition in a downstream market. The Bureau may have concerns where an agreement includes restraints in the nature of, for example, restrictions on the quantities of products that may be produced or supplied into a market, agreement on the price to be charged for products, allocation of customers, elimination of promotional strategies or agreement on other competitively significant aspects of the parties’ respective operations. Overall, the Bureau’s analysis focuses on whether the joint production agreement will reduce the ability or incentive of the parties to compete independently and, as discussed below, whether this will result in a substantial lessening or prevention of competition in a relevant market.

(c) Reduced incentive or ability to compete independently

The Bureau will consider whether a joint production agreement is likely to reduce the incentive or ability of the participants to compete independently in respect of the supply of products. For example, the Bureau will consider whether the joint production agreement will result in a substantial degree of commonality of costs between the participants such that the scope for price competition between the parties is substantially restricted. For such a concern to arise, among other things, the joint production process governed by the agreement must represent a substantial portion of the total production costs of the relevant product. Similar concerns may arise where the joint production agreement relates to the use of key production facilities of the parties, thereby reducing the individual participants' capacity or control over assets necessary to compete independently.

(d) Market power

The parties to a joint production agreement will not have the ability to substantially lessen or prevent competition in any relevant market unless they hold or will hold market power. To determine whether the parties collectively hold market power, the Bureau will examine competition in the relevant market in which the parties are actual or potential competitors, which would include assessing competition in both:

i. the relevant market for the products that are the subject of the joint production agreement (the "downstream market"); and

ii. the relevant market for the purchase of inputs into the joint production process (the "upstream market").

Where the joint production agreement relates to an intermediate good, which is an input into the final product supplied by the parties (such as where competing automobile manufacturers enter into a joint production agreement for the manufacture of transmissions for use in their automobiles), the Bureau may consider whether the joint production agreement is likely to substantially lessen or prevent competition in respect of the intermediate product and/or the final product.

Through a joint production agreement, participants can combine their acquisition of input products and substantially lessen or prevent competition in respect of the purchase of the input. The Bureau's approach to examining joint purchasing arrangements is described below in section 3.7.5 of these Guidelines.

3.7.5 Joint purchasing agreements and buying groups

A joint purchasing arrangement is an agreement between firms to purchase all or some of their requirements for a product from one or more suppliers. Such arrangements are often pro-competitive, as they permit firms to combine their purchases to achieve greater discounts from suppliers, and share delivery and distribution costs. However, joint purchasing agreements are agreements between parties that may be competitors, including in respect of the purchase of the products subject to the agreement. Accordingly, joint purchasing arrangements can substantially lessen or prevent competition where, for example, purchasers agree to fix the price at which products will be purchased as an exercise of monopsony power.

Joint purchasing arrangements can take several forms, including agreements to purchase products through a jointly controlled company, contractual arrangements between a group of firms and a supplier and buying groups. As noted earlier in these Guidelines, the existence of a written agreement between the parties clearly defining the terms of the joint purchasing arrangement may assist the Bureau in understanding the terms of the agreement and the objectives underlying the agreement.

In considering whether a joint purchasing agreement is likely to substantially lessen or prevent competition, the Bureau's primary focus will be on the likely impact of the agreement on competition in the relevant purchasing market (the "upstream" market). The Bureau's approach to the assessment of the potential competitive effects of joint purchasing agreements in the upstream market is discussed below.

(a) Defining relevant purchasing or upstream market

The assessment of whether a joint purchasing agreement will likely substantially lessen or prevent competition in a relevant upstream market depends upon whether the agreement will create, preserve or enhance the monopsony or oligopsony power of the participants. For the purpose of section 90.1, the Bureau considers a single buyer to have "monopsony power" where the buyer holds market power in the relevant purchasing market such that it has the ability to decrease the price of a relevant product below competitive levels with a corresponding reduction in the overall quantity of the input produced or supplied in a relevant market, or a corresponding diminishment in any other dimension of competition.[30] Oligopsony power occurs where market power in the relevant purchasing market is exercised by a coordinated group of buyers. For greater clarity, in these Guidelines, the Bureau uses the term monopsony power to include oligopsony power.

The Bureau considers whether monopsony power exists in the context of a relevant purchasing market. The process for defining the relevant purchasing market follows the same general approach for defining a relevant market, with the exception that the concept of substitutability is defined from the perspective of the supplier and is not based on

[30] Cases where the supply curve is perfectly inelastic such that a price decrease below competitive levels does not result in a decrease in output but only a wealth transfer may also give rise to concerns. This scenario should be understood to be generally included in the category of upstream market power.

demand by the buyer. The Bureau applies a hypothetical monopsonist test under which a relevant market is defined as the smallest group of products and the smallest geographic areas in which a sole, profit- maximizing buyer (the "hypothetical monopsonist") would impose and sustain a significant and non-transitory price decrease below levels that would exist in the absence of the joint purchasing agreement. Therefore, the question applicable to defining the relevant market is whether the suppliers of an input, in response to a decrease in the price of the input, would be able to profitably switch to alternative buyers or modify an input they sell in sufficient quantity to render the input price decrease unprofitable to the buyer.

For example, if corn suppliers could discipline a price decrease for corn by switching to canola production, this would imply that, for the purpose of assessing the likelihood of monopsony power, corn and canola are in the same product market. In determining this issue, the Bureau will consider whether, given the time and money required by sellers to switch to the production of other products, such alternatives provide an effective, sufficient and timely discipline on a price decrease of the relevant input.

(b) Monopsony power

Once the relevant market is defined, the Bureau will consider whether the participants in the joint purchasing agreement have, or are likely to have, monopsony power with respect to a relevant product that is subject to the agreement. In general, for concerns to arise with respect to the likely competitive impact of a joint purchasing agreement on the upstream market, the parties must hold market power in the market for the purchase of the relevant input and the joint purchasing agreement must be likely to reduce prices below the competitive level such that there is a corresponding reduction in the input supplied or a corresponding diminishment in any other dimension of competition.

Buyers currently buying the input in question will generally be considered participants in the relevant market. Buyers not currently buying the input may be considered participants in the relevant market provided that, in the event of a small but significant input price decrease, the buyer would buy the input and the seller would sell it. It should also be noted that buyers that do not participate in the same downstream market in which the parties to the joint purchasing agreement participate might still be considered to be buyers in the relevant purchasing market. For example, a grocery store likely participates in a local market for the sale of groceries, but it may purchase a food input, such as corn, from a producer that may have regional, national and even international buyers for the sale of its product, including not only grocery stores, but also industrial purchasers.

Once the buyers are identified, the size of the purchases of the relevant input product by the participants to the joint purchasing agreement are compared with the total sales of the input in the relevant market. If the parties to the agreement represent only a small percentage of the suppliers' sales of the input product in the relevant market, these suppliers are generally considered to be well-placed to forego sales to the parties in favour of other buyers when faced with an attempt to lower input prices. As a general rule, the Bureau will not challenge joint purchasing agreements under section 90.1 on the basis of a concern related to the exercise of monopsony power by the parties where the share of the relevant upstream market held by the parties to the agreement is less than 35%. Further, the Bureau will generally not challenge an agreement on the basis of oligopsony power where:

i. the share of the four largest firms in the relevant upstream market is less than 65%; or

ii. the share of the parties to the agreement is less than 10% of the relevant upstream market.

Where the parties to the joint purchasing agreement account for a significant portion of the input purchases, the Bureau will consider whether barriers to entry into buying the relevant input are high. Where the participants in a joint purchasing agreement represent a significant portion of the input purchases and barriers to entry into the purchasing market are high, the Bureau will likely conclude that the participants hold buying power (the ability to depress prices), and the Bureau will engage in further analysis to determine whether the participants are likely to exercise monopsony power.

(c) Likelihood of exercise of monopsony power

Where it is established that the parties to the agreement hold monopsony power, the Bureau will examine a number of factors in determining whether the participants are likely to exercise monopsony power, including:

i. whether supply is highly elastic;

ii. whether the upstream supply of the input is characterized by a large number of sellers and low barriers to entry such that the normal selling price of a supplier is likely competitive; and

iii. whether it seems likely that certain suppliers will exit the market in response to the anticipated price decrease or will scale back production.

The Bureau will also consider whether the exercise of monopsony power will jeopardize a long-run source of supply and the possible costs to the parties of decreased output in the downstream market that may follow decreased input purchases. As 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, as discussed above.

3.7.6 Non-compete clauses

Non-compete clauses are common in a number of different types of agreements and can serve legitimate purposes, such as ensuring that a purchaser realizes the full value of a purchased business by not being required to compete against the vendor for customer loyalty. Non-compete clauses that are entered into in connection with a merger (as that term is defined in section 91) are generally examined as part of the assessment of the transaction under section 92 of the Act. However, in rare instances they may be considered under section 45 of the Act, for example where the non-compete may amount to a market allocation agreement, or under section 90.1 of the Act, for example where the effect of a non-compete agreement is uncertain at the time when the merger is reviewable under section 92 of the Act.

When examining a non-compete clause or agreement under section 90.1 of the Act, the Bureau will consider whether, as a result of the non-compete, the agreement substantially lessens or prevents competition in any relevant market. In the context of this determination, the Bureau will have regard to the geographic scope of the non-compete, the duration of the non-compete, the parties subject to the non-compete and the products subject to the non-compete.

4. Hypothetical illustrative examples

The following examples are designed to illustrate the analytical framework that would be applied by the Bureau in conducting its review of a particular agreement. Not all of the agreements listed below raise issues that warrant review by the Bureau.

Example 1: Price-fixing agreement

X,Y and Z are firms that compete in respect of the retail sale of gadgets in Canada. They are all supplied gadgets by Company A, a mid-stream distributor, and have traditionally been aggressive competitors who never spoke to one another. Company A advised X that it wanted to increase the price of gadgets and that it had already received the consent of Y who agreed to raise prices by 5% if X raised its prices by 5% too. X agreed with its supplier to increase its price by 5%.

Analysis

This agreement would likely raise concerns under section 45 of the Act. Subsection 45(1) of the Act provides that it is illegal for two or more competitors to agree to fix, maintain, increase or control the price for the supply of a product. It is unnecessary for parties to communicate directly. In this instance, the intermediary's assurances that Y would be increasing its prices if X did too facilitated the parties' "meeting of the minds", as required under subsection 45(1). Further, if Company A then proceeded to have a similar conversation with Z and Z was unaware of X's participation in the conspiracy but was aware of Y's participation, Z could be found guilty of conspiring with X and Y, even if it was unaware that company X was party to the conspiracy. Further, Company A may also be guilty of an offence under section 45 for aiding and abetting the conspiracy as described in sections 21 and 22 of the Code, even though Company A does not compete with any of X, Y or Z in the retail market.

Example 2: Market allocation agreement between potential competitors

X is an established supplier of widgets throughout Western Canada. X has enjoyed significant profits in recent years after recognizing that the widget market in Western Canada was under- supplied and moving quickly to meet demand with its product. X is now interested in building upon its recent successes by supplying widgets into Eastern Canada, where Y is the largest widget supplier. Y supplies widgets only in Eastern Canada, but is considering expanding its operations into Western Canada. X and Y meet to discuss trends in the widget industry and, at this meeting, learn of each other's expansion plans. In order to maintain the profitability of their respective operations, X and Y agree that X will confine its sales of widgets to Western Canada and Y will confine its sales of widgets to Eastern Canada. When questioned about the agreement, the Parties argue, among other things, that the restriction is an ancillary restraint.

Analysis

Subsection 45(8) of the Act defines a "competitor" to include a person who it is reasonable to believe would be likely to compete with respect to a product[31] in the absence of an agreement. Although X and Y were not competitors at the time of the agreement, the Bureau would consider whether either or both of X and Y would be likely to compete in respect of the supply of widgets in the other's sales territory in the absence of the agreement. In particular, given evidence as to each firm's plans and ability to expand across the country, the Bureau would conclude that X and Y are potential competitors, and this agreement would likely raise concerns under subsection 45(1) of the Act because it is an agreement between potential competitors to allocate sales, territories, customers or markets for the supply of a product.

While this restraint may contravene subsection 45(1) of the Act, the Bureau would consider the parties' argument that it is, in fact, an ancillary restraint. In considering the defence under subsection 45(4) of the Act, the Bureau will examine whether:

i. the restraint is ancillary to a broader or separate agreement that includes the same parties;
ii. the restraint is directly related to, and reasonably necessary for giving effect to, the objective of the broader or separate agreement; and
iii. the broader or separate agreement, when considered in the absence of the restraint, does not contravene subsection 45(1).

On the facts, there is no evidence to suggest that the restraint is ancillary to a broader agreement between the two parties. Accordingly, it is unlikely that the ancillary restraints defence would be applicable to the parties' agreement.

[31] The term "product" should be understood to include the plural, as well as differentiated products that compete.

Example 3: Output restriction agreement

X and Y compete with one another in the production of gizmos. Each company operates four plants in various locations across Canada. As a result of declining demand, there is now significant excess capacity for the production of gizmos. X and Y meet and agree to reduce production capacity in the industry, so as to stabilize prices. Soon after the meeting, each company shuts down a plant.

Analysis

Agreements are not subject to exceptions from the provisions of the Act simply as a result of depressed economic conditions. In this example, the agreement would likely raise concerns under subsection 45(1) of the Act because it is an agreement between competitors to fix, lessen or eliminate the production of a product.

Example 4: Dual-distribution agreement

X is a Canadian widget manufacturer that sells widgets to distributors and to retailers. Y, an independent distributor, approaches X to inquire about the possibility of distributing X's widgets. Y has no manufacturing facilities and is otherwise unable to manufacture widgets on its own. X enters into a distribution agreement with Y whereby they agree on the price at which X will supply widgets to Y. The agreement also requires that Y distribute only X's widgets and only to retailers in Ontario. X will continue to sell its widgets to distributors and retailers in Ontario and throughout the rest of Canada.

Analysis

As indicated in section 2.3.3 of these Guidelines, the Bureau will assess dual-distribution agreements between suppliers and distributors under the reviewable matters provisions found in Part VIII of the Act, and not under the criminal provision in subsection 45(1) of the Act. As such, in the event that the Bureau assesses this arrangement, it would examine the arrangement under, for example, section 77 of the Act. Notably, the agreement between X and Y to establish the price at which X supplies widgets to Y is not considered by the Bureau to be an agreement to fix prices.

Example 5: Agreements involving franchises

(a) Non-Criminal

A franchisor's agreements with each of its franchisees provide that the franchisees will not supply products to customers outside of their respective assigned territories. The parties to these agreements assert that these restraints are necessary so as to ensure that each franchisee is provided with a sufficient sales territory to support the overall viability of the franchise and to effectively promote their products.

Analysis

As described in section 2.3.3 of these Guidelines, the Bureau does not consider a restriction in a franchise agreement that requires franchisees to supply products only in a defined territory to be an agreement among competitors. Accordingly, the agreement would not be examined under subsection 45(1), but it may be assessed under the reviewable matters provisions found in Part VIII of the Act, such as section 77 (market restriction).

(b) Criminal

Franchisor X has entered into agreements to grant franchises to three franchisees, B, C and D, all of which supply products in the same region and share the same customer base. The franchisees are concerned about price competition between themselves. Franchisees B, C, and D enter into an agreement to fix prices for their products.

Analysis

As discussed in section 2.3.3 of these Guidelines, the Bureau will generally assess agreements between franchisors and franchisees that allocate markets or customers for the operations of the franchisee – such as where the franchise agreement provides franchisees with an authorized sales territory – under the reviewable matters provisions found in Part VIII of the Act, and not under the criminal conspiracy provision in subsection 45(1) of the Act. However, the mere existence of a franchisor- franchisee relationship between two parties does not foreclose the possibility that agreements between these parties to fix prices, allocate markets or restrict output with respect to products that are outside of the franchise arrangement may be subject to section 45.

In addition, agreements between franchisees to allocate markets, fix prices or restrict supply will be reviewed under subsection 45(1) of the Act. In the present example, the agreement between B, C and D would likely raise concerns under subsection 45(1), as it constitutes an agreement between competitors to fix prices for the supply of products in respect of which they compete.

Example 6: Joint selling agreement

(a) Non-Criminal

X and Y compete with one another in the supply of widgets. Currently, each of X and Y use their own distributors and warehouses to supply widgets to retailers, sending shipments by separate trucks from separate warehouses on a weekly basis. X and Y enter into an agreement whereby they will employ a common distributor, a common warehouse and common distribution facilities, allowing the parties to deliver widgets to retailers in joint shipments each week. X and Y continue to independently determine prices for their products and remain free to supply products through other distributors. X and Y also agree that the common distributor will not disclose to a party any pricing, marketing or other competitively sensitive information supplied by the other party. The joint venture does not involve the acquisition by X or Y of a significant interest in the other party's business so as to be considered a merger under the Act.

Analysis

The agreement in this example is clearly an agreement between competitors. However, it would be examined under section 90.1 of the Act, and not subsection 45(1), as it does not constitute an agreement between competitors to fix prices, allocate markets or reduce output.

In assessing the agreement under section 90.1, the Bureau would consider a number of factors, including whether the parties to the agreement hold market power; whether the agreement deals with competitively significant terms of trade; whether the parties are able to supply products outside the scope of the agreement or otherwise retain the ability to compete independently; whether the agreement requires or provides opportunities for the disclosure of competitively sensitive information between the participants; and whether any anti-competitive effects are offset and outweighed by the efficiencies generated through the agreement.

In the present example, the Bureau would be unlikely to challenge the agreement on the basis that the agreement does not deal with competitively significant terms of trade or restrict the ability of the parties to supply products outside of the agreement, and the agreement incorporates measures directed at preventing the disclosure of competitively sensitive information. To the extent that the Bureau determined that the agreement was likely to result in a substantial lessening or prevention of competition, the Bureau would also consider all available evidence as to whether any anti-competitive effects would be offset and outweighed by efficiency gains that would be likely to result from the agreement, before determining whether to challenge the agreement under section 90.1 of the Act.

(b) Criminal

X and Y compete with one another in the supply of widgets, but they also are interested in developing an unrelated product called a gizmo. X and Y enter into a joint venture agreement with respect to the development of gizmos. The agreement also specifies that the parties will set a common price for the supply of widgets, which the parties argue is directly related to and reasonably necessary for giving effect to the joint venture. The joint venture does not involve the acquisition by X or Y of a significant interest in the other party’s business so as to be considered a merger under the Act.

Analysis

The joint venture agreement includes a restraint that fixes the prices of widgets supplied by the parties. While this restraint may contravene subsection 45(1) of the Act, the Bureau would nonetheless consider the applicability of the ancillary restraints defence.

In considering this defence under subsection 45(4) of the Act, the Bureau will examine whether:

i. the restraint is ancillary to a broader or separate agreement that includes the same parties;
ii. the restraint is directly related to, and reasonably necessary for giving effect to, the objective of the broader or separate agreement; and
iii. the broader or separate agreement, when considered in the absence of the restraint, does not contravene subsection 45(1).

Of particular relevance is whether the restraint on competition agreed to by the parties is directly related to and reasonably necessary for giving effect to the joint venture agreement. On the facts, there is no evidence to establish that fixing a price for the supply of widgets is either directly related to or reasonably necessary for giving effect to the broader joint venture agreement, which is focused on the development of gizmos. Further, as noted in section 2.5.3 of the Guidelines, for a restraint to be directly related, it is not adequate merely to establish that the participants would not enter into the broader agreement in the absence of the challenged restraint.

Accordingly, it is unlikely that the ancillary restraints defence would apply to the parties' price- fixing agreement, and the agreement would likely raise concerns under subsection 45(1) of the Act.

Example 7: Information sharing

The Canadian Widget Association (CWA) is a trade association that seeks to promote the interests of Canadian producers of widgets. The CWA's member roster includes twenty-five widget producers, five of which are the largest widget producers in Canada. Collectively, CWA members account for 70% of the market for the supply of widgets in Canada, although no single member holds more than 10% of the market. A number of members recently commenced supplying widgets. At an annual meeting of the CWA, its members unanimously agree to appoint an independent third party to collect certain information from each member for purposes of identifying industry trends and benchmarking. In particular, members agree to submit data to the third party with respect to sales volumes by customer type and region, as well as certain historical cost information. The third party will supply data in an aggregated form to members, such that the sales information from any single member cannot be identified.

Analysis

In this example, CWA members are not agreeing to fix prices, allocate markets or reduce output. Accordingly, the Bureau would examine the agreement under section 90.1 of the Act, and not under subsection 45(1).

In assessing the agreement under section 90.1, the Bureau would consider a number of factors, including the nature of the information exchanged (i.e., whether the information is competitively sensitive); the timing of the information exchange (e.g., whether the information relates to historical, current or future activities); whether the parties participating in the information exchange have market power or will likely have market power; the manner in which the information is collected and disseminated (e.g., whether the information is shared directly between competitors or aggregated by a third party); whether parties were coerced to participate in the information exchange; and whether any anti-competitive effects are offset and outweighed by the efficiencies generated through the information sharing agreement.

In the present example, CWA members collectively represent a significant portion of the supply of widgets in the relevant market and, depending upon barriers to entry and other factors, may collectively possess market power. The Bureau recognizes that the exchange of information between competitors can impair competition by reducing uncertainties regarding competitors' strategies and diminishing each firm's commercial independence. However, the information in the present example will only be shared in an aggregated manner through an independent third party that does not reveal individual sales or cost data. Accordingly, the information being supplied to members is not competitively sensitive and the agreement would be unlikely to lead to a substantial lessening or prevention of competition in the market for the supply of widgets. On this basis, the Bureau would not be likely to challenge the agreement under section 90.1 of the Act.

Example 8: Joint research and development

X and Y enter into a research and development (R&D) joint venture to develop a new product called a "gizmo". There is considerable commercial risk associated with the collaboration. The joint venture agreement specifies that each of the parties must provide substantial funding to the joint venture, and that the parties will not conduct R&D in respect of gizmos outside of the joint venture, such that competing gizmos will not be developed by the parties in parallel with the gizmo being developed by the joint venture. Once the gizmo is developed, X and Y are to each produce and sell the product independently from one another. The joint venture does not involve the acquisition by X or Y of a significant interest in the other party's business so as to be considered a merger under the Act.

Analysis

In the present example, the Bureau would first consider whether X and Y are competitors or potential competitors. To address this issue, the Bureau's review will primarily focus on whether X and Y are able to develop the product independently from the R&D agreement.

If the Bureau determines the parties to be competitors, the Bureau will next assess the nature of the restraint on competition agreed to by the parties. In this example, as there is no evidence to suggest that the agreement is a naked restraint on competition, the Bureau would initially examine the agreement under section 90.1 of the Act. Only where the Bureau determines that the agreement is, in substance, an agreement to allocate sales or markets for the production or supply of a product, or to prevent, lessen or eliminate the production or supply of a product, would the Bureau examine the agreement under subsection 45(1).

In assessing R&D agreements under section 90.1, the Bureau will consider a number of factors, including whether the agreement is limited to R&D or also contains provisions regarding the joint exploitation of products; whether the parties are likely to hold market power in a relevant market; whether the restrictions on competition are reasonably necessary for achieving the objective of the R&D agreement; and whether any anti-competitive effects are offset and outweighed by the efficiencies generated through the R&D agreement.

To the extent that the Bureau determines that the agreement is likely to result in a substantial lessening or prevention of competition, the Bureau would also consider all available evidence as to whether any anti-competitive effects are offset and outweighed by efficiency gains that are likely to result from the agreement, before determining whether to challenge the agreement under section 90.1 of the Act.

Although the agreement in this example would be assessed under section 90.1, for the purposes of these Guidelines, this example will also be used to illustrate how the Bureau's analysis would proceed in respect of the ancillary restraints defence in the event that the agreement was assessed under section 45. In considering the defence under subsection 45(4) of the Act, the Bureau will examine whether:

i. the restraint is ancillary to a broader or separate agreement that includes the same parties;

ii. the restraint is directly related to, and reasonably necessary for giving effect to, the objective of the broader or separate agreement; and

iii. the broader or separate agreement, when considered in the absence of the restraint, does not contravene subsection 45(1).

Of particular relevance is whether the restraint on competition agreed to by the parties is directly related to and reasonably necessary for giving effect to the joint venture agreement. In this regard, the Bureau will assess, among other things, the duration of the ancillary restraint, the subject matter of the restraint (e.g., whether it applies to products outside of the collaboration between the competitors) and the scope of the restraint to determine whether it is reasonably necessary to give effect to the objective of the broader agreement, as required under the ancillary restraints defence.

The Bureau will also consider whether there are significantly less restrictive alternatives available to the parties, and whether the parties could have achieved an equivalent or comparable arrangement through practical, less restrictive means that were reasonably available to the parties at the time that they entered into the agreement. Among the facts relevant to that determination by the Bureau are the presence of a broader joint venture agreement, the significant investment required by X and Y, and the commercial risk associated with the joint venture. The Bureau will also assess evidence pertaining to whether the parties would invest in the collaboration if one party was able to independently compete with the joint venture.

In the present example, the Bureau would likely conclude that the ancillary restraints defence is applicable, and would accordingly proceed to examine the agreement under section 90.1 of the Act, and not subsection 45(1).

Example 9: Buying groups

Numerous firms compete with one another in the supply of gizmos in Canada. Widgets are key inputs to the production of gizmos. Widgets are supplied in Canada by two large firms, X and Y, which offer volume discounts for sizeable widget purchases. Volume discounts are easily obtained by large buyers, but smaller firms are often incapable of meeting these volume requirements, and face higher costs as a result. Ten gizmo manufacturers representing approximately 10% of the total purchases of widgets from X and Y agree to form a buying group to purchase widgets. The buying group negotiates a common price with X and Y for the supply of widgets to its members. Also, to ensure that the buying group is able to obtain desired volume discounts, the buying group imposes a minimum purchase volume on its members (members wishing to purchase less must buy outside the group).

Analysis

The agreement in this example would be examined under section 90.1 of the Act, and not subsection 45(1), as it does not constitute an agreement between competitors to fix prices, allocate markets or reduce output in respect of the supply of a product. Rather, this agreement relates to the purchase of products by competitors.

Given that the buying group's share of the relevant upstream market is only 10%, the buying group is unlikely to hold monopsony power with respect to the purchase of widgets. Accordingly, the Bureau would not be likely to challenge the agreement under section 90.1.

Example 10: Output exchange agreement

X and Y, competitors located in different regions of Canada, are producers of a homogeneous commodity product. The commodity product is processed at regional centres and shipped to distributors who store the commodity and then deliver it to customers. As they each have a number of national accounts, X and Y have been selling the commodity to distributors in one another's regions for many years. Recently, X and Y entered into an agreement whereby they would each buy a fixed tonnage of the processed commodity from one another's production facilities. The agreement allows X and Y to cut the costs of shipping to their respective distributors in one another's regions. The agreement does not contain any provisions dealing with selling prices or non-price aspects of competition.

Analysis

While this is an agreement between competitors, it would be examined under section 90.1 of the Act, and not subsection 45(1), as it does not constitute an agreement to fix prices, allocate markets or reduce output.

In assessing an agreement under section 90.1, the Bureau will consider a number of factors, including whether the parties to the agreement hold market power; whether the agreement deals with competitively significant terms of trade; whether the parties are able to supply products outside the scope of the agreement or otherwise retain the ability to compete independently; and whether the agreement requires or provides opportunities for the disclosure of competitively sensitive information between the participants.

Among the facts in this example that would be relevant to the Bureau's determination is that the agreement permits both X and Y to independently compete with respect to price and other aspects in selling the commodity. While the agreement provides that X and Y will purchase a fixed tonnage of the commodity each year, it does not impose restrictions on the output of either party in any way, including by way of restricting the parties from constructing a new facility or expanding an existing production facility.

To the extent that the Bureau determined that the agreement was likely to result in a substantial lessening or prevention of competition, the Bureau would also consider all available evidence as to whether any anti-competitive effects would be offset and outweighed by efficiency gains that would be likely to result from the agreement, before determining whether to challenge the agreement under section 90.1 of the Act. On the facts in the present example, however, the Bureau would not be likely to challenge the agreement under section 90.1.

Example 11: Product exchange or swap agreement

Firms X and Y are competitors in a commodity market where they face several larger competitors. While there is a world wholesale price for the commodity, the retail price at which each firm sells the commodity depends primarily on transportation costs.

X and Y agree to enter into a product exchange or "swap" agreement, whereby X will buy the product from Y in eastern Canada, and Y will do the same with X's product in western Canada. This allows X and Y to reduce transportation costs and supply a broader range of customers.

Analysis

This type of agreement does not involve an agreement between competitors to fix prices, reduce output, or allocate markets or customers, and any competitive issues that would arise out of the agreement would be examined under section 90.1, and not subsection 45(1) of the Act.

Product exchange agreements that only serve to allow regional firms to reduce costs and supply a broader range of customers on a competitive basis are not likely to be challenged by the Bureau.

Example 12: Trade association guideline

In recent years, certain members of the gizmo industry began to report sales orders as revenues in their public accounting reports. With a downturn in the economy, most orders did not materialize. This was followed by several unfavourable reports in the media regarding accounting practices in the gizmo manufacturing industry. At a meeting of the Canadian Gizmo Manufacturers Association, several members of the industry expressed concerns about the accounting practices of certain manufacturers and the associated impact on the industry's capitalization and reputation. Shortly thereafter, the Association issued a non-binding guideline on best accounting practices for members of the industry based on advice from accounting professionals.

Analysis

While members of the Association are very likely to be considered competitors, in this example, the voluntary industry guideline would not constitute an agreement to fix prices, allocate markets or reduce output; and, therefore, it would not raise an issue under subsection 45(1). Similarly, the adoption of a voluntary industry guideline on best accounting practices is not likely to substantially lessen or prevent competition and therefore would not be challenged by the Bureau.

5. Relevant provisions of the Act

Purpose and Interpretation

Definitions

2. (1) In this Act,

article means real and personal property of every description including

- **a)** money,
- **b)** deeds and instruments relating to or evidencing the title or right to property or an interest, immediate, contingent or otherwise, in a corporation or in any assets of a corporation,
- **c)** deeds and instruments giving a right to recover or receive property,
- **d)** tickets or like evidence of right to be in attendance at a particular place at a particular time or times or of a right to transportation, and
- **e)** energy, however generated;

product includes an article and a service;

service means a service of any description whether industrial, trade, professional or otherwise;

supply means,

- **a)** in relation to an article, sell, rent, lease or otherwise dispose of an article or an interest therein or a right thereto, or offer so to dispose of an article or interest therein or a right thereto, and
- **b)** in relation to a service, sell, rent or otherwise provide a service or offer so to provide a service;

Affiliation

2. (2) For the purposes of this Act,

- **a)** one entity is affiliated with another entity if one of them is the subsidiary of the other or both are subsidiaries of the same entity or each of them is controlled by the same entity or individual;
- **b)** if two entities are affiliated with the same entity at the same time, they are deemed to be affiliated with each other; and
- **c)** an individual is affiliated with an entity if the individual controls the entity.

Control

2. (4) For the purposes of this Act,

- **a)** a corporation is controlled by an entity or an individual other than Her Majesty if
  - i. securities of the corporation to which are attached more than 50% of the votes that may be cast to elect directors of the corporation are held, directly or indirectly, whether through one or more subsidiaries or otherwise, otherwise than by way of security only, by or for the benefit of that entity or individual, and
  - ii. the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the corporation;
- **b)** a corporation is controlled by Her Majesty in right of Canada or a province if
  - i. the corporation is controlled by Her Majesty in the manner described in paragraph (a), or
  - ii. in the case of a corporation without share capital, a majority of the directors of the corporation, other than ex officio directors, are appointed by
    - A. the Governor in Council or the Lieutenant Governor in Council of the province, as the case may be, or
    - B. a Minister of the government of Canada or the province, as the case may be; and
- **c)** an entity other than a corporation is controlled by an entity or individual if the entity or individual, directly or indirectly, whether through one or more subsidiaries or otherwise, holds an interest in the entity that is not a corporation that entitles them to receive more than 50% of the profits of that entity or more than 50% of its assets on dissolution.

Conspiracies, agreements or arrangements between competitors

45. (1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges

- **a)** to fix, maintain, increase or control the price for the supply of the product;
- **b)** to allocate sales, territories, customers or markets for the production or supply of the product; or
- **c)** to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.

Penalty

(2) Every person who commits an offence under subsection (1) is guilty of an indictable offence and liable on conviction to imprisonment for a term not exceeding 14 years or to a fine not exceeding $25 million, or to both.

Evidence of conspiracy, agreement or arrangement

(3) In a prosecution under subsection (1), the court may infer the existence of a conspiracy, agreement or arrangement from circumstantial evidence, with or without direct evidence of communication between or among the alleged parties to it, but, for greater certainty, the conspiracy, agreement or arrangement must be proved beyond a reasonable doubt.

Defence

(4) No person shall be convicted of an offence under subsection (1) in respect of a conspiracy, agreement or arrangement that would otherwise contravene that subsection if

- **a)** that person establishes, on a balance of probabilities, that
    - i. it is ancillary to a broader or separate agreement or arrangement that includes the same parties, and
    - ii. it is directly related to, and reasonably necessary for giving effect to, the objective of that broader or separate agreement or arrangement; and
- **b)** the broader or separate agreement or arrangement, considered alone, does not contravene that subsection.

Defence

(5) No person shall be convicted of an offence under subsection (1) in respect of a conspiracy, agreement or arrangement that relates only to the export of products from Canada, unless the conspiracy, agreement or arrangement

- **a)** has resulted in or is likely to result in a reduction or limitation of the real value of exports of a product;
- **b)** has restricted or is likely to restrict any person from entering into or expanding the business of exporting products from Canada; or
- **c)** is in respect only of the supply of services that facilitate the export of products from Canada.

Exception

(6) Subsection (1) does not apply if the conspiracy, agreement or arrangement

- **a)** is entered into only by parties each of which is, in respect of every one of the others, an affiliate;
- **b)** is between federal financial institutions and is described in subsection 49(1); or
- **c)** is an arrangement, as defined in section 53.7 of the *Canada Transportation Act*, that has been authorized by the Minister of Transport under subsection 53.73(8) of that Act and for which the authorization has not been revoked, if the conspiracy, agreement or arrangement is directly related to, and reasonably necessary for giving effect to, the objective of the arrangement.

Common law principles — regulated conduct

(7) The rules and principles of the common law that render a requirement or authorization by or under another Act of Parliament or the legislature of a province a defence to a prosecution under subsection 45(1) of this Act, as it read immediately before the coming into force of this section, continue in force and apply in respect of a prosecution under subsection (1).

Definitions

(8) The following definitions apply in this section.

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). (*concurrent*)

price includes any discount, rebate, allowance, price concession or other advantage in relation to the supply of a product. (*prix*)

Where application made under section 76, 79, 90.1 or 92

45.1 No proceedings may be commenced under subsection 45(1) against a person on the basis of facts that are the same or substantially the same as the facts on the basis of which an order against that person is sought by the Commissioner under section 76, 79, 90.1 or 92.

Specialization Agreements

Definitions

85. For the purposes of this section and sections 86 to 90,

. . .

specialization agreement means an agreement under which each party thereto agrees to discontinue producing an article or service that he is engaged in producing at the time the agreement is entered into on the condition that each other party to the agreement agrees to discontinue producing an article or service that he is engaged in producing at the time the agreement is entered into, and includes any such agreement under which the parties also agree to buy exclusively from each other the articles or services that are the subject of the agreement. (*accord de spécialisation*)

Non-application of sections 45, 77 and 90.1

90. Section 45, section 77 as it applies to exclusive dealing, and section 90.1 do not apply in respect of a specialization agreement, or any modification of such an agreement, that is registered.

Agreements or Arrangements that Prevent or Lessen Competition Substantially

Order

90.1 (1) If, on application by the Commissioner, the Tribunal finds that an agreement or arrangement — whether existing or proposed — between persons two or more of whom are competitors prevents or lessens, or is likely to prevent or lessen, competition substantially in a market, the Tribunal may make an order

- **a)** prohibiting any person — whether or not a party to the agreement or arrangement — from doing anything under the agreement or arrangement; or
- **b)** requiring any person — whether or not a party to the agreement or arrangement — with the consent of that person and the Commissioner, to take any other action.

Factors to be considered

(2) In deciding whether to make the finding referred to in subsection (1), the Tribunal may have regard to the following factors:

- **a)** the extent to which foreign products or foreign competitors provide or are likely to provide effective competition to the businesses of the parties to the agreement or arrangement;
- **b)** the extent to which acceptable substitutes for products supplied by the parties to the agreement or arrangement are or are likely to be available;
- **c)** any barriers to entry into the market, including
  - i. tariff and non-tariff barriers to international trade,
  - ii. interprovincial barriers to trade, and
  - iii. regulatory control over entry;
- **d)** any effect of the agreement or arrangement on the barriers referred to in paragraph (c);
- **e)** the extent to which effective competition remains or would remain in the market;
- **f)** any removal of a vigorous and effective competitor that resulted from the agreement or arrangement, or any likelihood that the agreement or arrangement will or would result in the removal of such a competitor;

g) the nature and extent of change and innovation in any relevant market; and

h) any other factor that is relevant to competition in the market that is or would be affected by the agreement or arrangement.

Evidence

(3) For the purpose of subsections (1) and (2), the Tribunal shall not make the finding solely on the basis of evidence of concentration or market share.

Exception where gains in efficiency

(4) The Tribunal shall not make an order under subsection (1) if it finds that the agreement or arrangement has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the agreement or arrangement, and that the gains in efficiency would not have been attained if the order had been made or would not likely be attained if the order were made.

Restriction

(5) For the purposes of subsection (4), the Tribunal shall not find that the agreement or arrangement has brought about or is likely to bring about gains in efficiency by reason only of a redistribution of income between two or more persons.

Factors to be considered

(6) In deciding whether the agreement or arrangement is likely to bring about the gains in efficiency described in subsection (4), the Tribunal shall consider whether such gains will result in

a) a significant increase in the real value of exports; or

b) a significant substitution of domestic products for imported products.

Exception

(7) Subsection (1) does not apply if the agreement or arrangement is entered into, or would be entered into, only by parties each of which is, in respect of every one of the others, an affiliate.

Exception

(8) Subsection (1) does not apply if the agreement or arrangement relates only to the export of products from Canada, unless the agreement or arrangement

a) has resulted in or is likely to result in a reduction or limitation of the real value of exports of a product;

b) has restricted or is likely to restrict any person from entering into or expanding the business of exporting products from Canada; or

c) has prevented or lessened or is likely to prevent or lessen competition substantially in the supply of services that facilitate the export of products from Canada.

Exception

(9) The Tribunal shall not make an order under subsection (1) in respect of

a) an agreement or arrangement between federal financial institutions, as defined in subsection 49(3), in respect of which the Minister of Finance has certified to the Commissioner

i. the names of the parties to the agreement or arrangement, and

ii. the Minister of Finance's request for or approval of the agreement or arrangement for the purposes of financial policy;

b) **(b)** an agreement or arrangement that constitutes a merger or proposed merger under the *Bank Act*, the *Cooperative Credit Associations Act*, the *Insurance Companies Act* or the *Trust and Loan Companies Act* in respect of which the Minister of Finance has certified to the Commissioner

i. the names of the parties to the agreement or arrangement, and

ii. the Minister of Finance's opinion that the merger is in the public interest, or that it would be in the public interest, taking into account any terms and conditions that may be imposed under those Acts;

c) an agreement or arrangement that constitutes a merger or proposed merger approved under subsection 53.2(7) of the *Canada Transportation Act* in respect of which the Minister of Transport has certified to the Commissioner the names of the parties to the agreement or arrangement; or

d) an agreement or arrangement that constitutes an existing or proposed arrangement, as defined in section 53.7 of the *Canada Transportation Act*, that has been authorized by the Minister of Transport under subsection 53.73(8) of that Act and for which the authorization has not been revoked.

Where proceedings commenced under section 45, 49, 76, 79 or 92

(10) No application may be made under this section against a person on the basis of facts that are the same or substantially the same as the facts on the basis of which

a) proceedings have been commenced against that person under section 45 or 49; or

b) an order against that person is sought by the Commissioner under section 76, 79 or 92.

Definition of *competitor*

(11) In subsection (1), ***competitor*** includes a person who it is reasonable to believe would be likely to compete with respect to a product in the absence of the agreement or arrangement.

How to contact the Competition Bureau

Anyone wishing to obtain additional information about the *Competition Act*, the *Consumer Packaging and Labelling Act* (except as it relates to food), the *Textile Labelling Act*, the *Precious Metals Marking Act* or the program of written opinions, or to file a complaint under any of these acts should contact the Competition Bureau's Information Centre:

Web site

www.competitionbureau.gc.ca

Address

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Competition Bureau
50 Victoria Street
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Toll-free: 1-800-348-5358
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