

PRICE DISCRIMINATION

Section 50(1)(a) of the Competition Act

DISCUSSION PAPER

Director of Investigation and Research

***Bureau of Competition
Policy***

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DISCUSSION PAPER*

Foreword

The Director of Investigation and Research is responsible for the administration and enforcement of the *Competition Act*, legislation which is designed to maintain and encourage competition in Canada. This document provides information on how the Director proposes to deal with allegations of price discrimination.

While this document is intended to provide guidance on the Director's proposed enforcement policy regarding section 50(1)(a) of the Act, it is not intended to be a binding statement of the Director's position in any particular matter nor does it bind the Attorney General of Canada in prosecutions under that section. Enforcement decisions are based upon the particular circumstances of each case.

To obtain copies of this document or additional information on the subjects discussed in it, readers may contact the Compliance and Coordination Branch of the Bureau of Competition Policy, Consumer and Corporate Affairs Canada, Ottawa, Ontario, K1A 0C9, telephone (819) 994-0798. Alternatively readers may contact one of the offices listed at the end of this document.

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*Ce document est aussi disponible en français, s.v.p. voir la dernière page.

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EXECUTIVE SUMMARY

This document provides guidelines intended to advise the business and legal communities of the approach proposed by the Director of Investigation and Research to alleged practices of price discrimination prohibited by section 50(1)(a) of the *Competition Act*.

The document is being widely circulated for comment. Following consultation, this paper will form the basis of an information bulletin.

Price discrimination, as described by section 50(1)(a), is an indictable offence punishable by a maximum of two years imprisonment. Since 1984, three companies have been convicted under this section, all pursuant to guilty pleas, with fines ranging from \$15,000 to \$50,000. No individuals have been convicted under this section to date. However, the Bureau receives many complaints and information requests concerning this section.

The primary responsibility of the Director and his staff in enforcing this section is to examine matters brought to their attention with a view to determining whether there is reason to believe that an offence has been committed. The Director believes, however, that compliance with the Act will be enhanced if business persons understand how it applies to their business affairs. In this light, a primary objective of the Director is to ensure that businesses can proceed with as much certainty as possible regarding the application of this section.

This is particularly important in view of the fact that section 50(1)(a) is criminal legislation and that there is essentially no jurisprudence to assist the business and legal communities in interpreting the legislation. Businesses should not come into conflict with the law, nor should they be prevented from pursuing pro-competitive marketing policies, due to a misunderstanding of the law.

The price discrimination provision basically prohibits suppliers from making a practice of discriminating by granting a price concession or other advantage to one purchaser of articles that is not available to competing purchasers of like quality and quantity. The Bureau has historically taken the position that differences in price could only be justified by differences in the quality and quantity of the goods purchased. In contrast, it is now felt that, so long as the advantage is available to competing purchasers of like quality and quantity, there should not be reason to believe that an offence has been committed under the section.

The distinction between past practice and this proposal is important as the proposed interpretation would normally permit suppliers to offer price concessions for the provision of services, exclusive dealing, increases in purchases over prior periods and purchases made internationally, that were previously considered illegal. To the extent that such concessions may be anti-competitive, they will be examined under other sections of the Act, such as section 77 related to exclusive dealing or section 79 related to the abuse of a dominant position, where the competitive impact of the practice can be fully reviewed.

The Director believes that a change in approach is justified in light of present economic views concerning the effects of price discrimination. Systematic price discrimination that eliminates or severely disadvantages an efficient seller or purchaser is clearly harmful. On the other hand, price differences may simply be the result of the difference in costs of serving different customers.

Price discrimination may increase output and improve efficiency. The practice may be necessary in industries where no single price would allow producers to recover their costs. In some cases, price discrimination may even help to reduce the opportunities for collusion.

The Director's enforcement policy respecting the price discrimination section must take these considerations into account, especially given that

the purpose of the Act as described in section 1.1 is to maintain and encourage competition in order to promote efficiency and adaptability and in order to provide consumers with competitive prices and product choices.

The policy should also ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy. However, it need not protect such businesses from more efficient competitors nor should it prevent them from bargaining more aggressively than their competitors or from devising more efficient ways to purchase and sell their products. Consumers are best served by a policy providing scope for innovative pricing strategies where there is no specific threat to competition.

This document first explains the rationale for the section and its traditional interpretation through a brief review of its history. The effects of price discrimination are then discussed. The document then outlines the Director's approach to each element of the offence. Other sections having a bearing on price discrimination issues are also discussed. The Director's approach to some specific examples of practical problems raised by businesses and their counsel provide further illustration of the proposed policy's application. A comparison with the United States law on price discrimination is provided in view of the numerous requests for advice from members of the business and legal communities familiar with that law. The concluding section summarizes the principal policy changes presented in the document.

PRICE DISCRIMINATION

(Discussion Paper)

1. History of Price Discrimination

1.1 Price discrimination was first prohibited by Canadian competition law during the period of the Depression when confidence in the ability of the market to ensure favourable prices and product choices for consumers had deteriorated. Weak and failing businesses demanded protection against the buying power advantages enjoyed by growing retail chains.

1.2 The Royal Commission on Price Spreads reported in 1934 that discounts not related to economic efficiencies were unfair and should be prohibited. The criminal provision enacted one year later, however, prohibited suppliers from selling articles at different prices to one purchaser unless the same concessions were available to competing purchasers of like quality and quantity. This provision appears today, in virtually the same terms as enacted in 1935, as section 50(1)(a) of the *Competition Act*. The provision makes no reference to fairness or efficiencies, nor does it address the concern that mass buyers are able to extract excessive volume discounts. In fact, the statute does not clearly impose liability on buyers who extract discriminatory concessions. The law permits purchasers of larger volumes to receive larger price concessions and it does not oblige suppliers or purchasers to justify the difference in terms of costs saved.

1.3 In 1952, the legislation was amended to provide that the prohibition of price discrimination only applied to a "practice" of price discrimination. This amendment was enacted in response to the recommendation of a committee appointed by the Minister of Justice which expressed concern that, without this amendment, the provision might prevent suppliers from meeting spot competition or that it could be directed against a single transaction. The practice defence appears today as subsection 50(2) of the *Competition Act*.

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1.4 During the 1960s, in a series of public addresses, the Bureau adopted the position that the only price differences permitted by the statute were those based on the quality and quantity of articles purchased. According to this interpretation, price concessions granted conditional on the purchaser performing a service, purchasing more product in one financial period than in a previous period, or agreeing to deal exclusively in the supplier's products, were subject to the criminal prohibition of the price discrimination provision regardless of the availability of these concessions to competitors of the purchaser.

1.5 The amendments in 1986 resulting in the present *Competition Act* did not alter the price discrimination provision. This practice remains a criminal offence prohibited by section 50(1)(a) of the Act. However, these amendments incorporated a purpose clause which must now be considered in any interpretation of the statute. This clause stresses that the purpose of the Act is to maintain and encourage competition with a view to promoting efficiency and related objectives. It is therefore appropriate to consider the competitive effect of price discrimination before proposing an enforcement policy provision.

2. The Competitive Effects of Price Discrimination

2.1 In layman's terms, price discrimination may be defined as the charging of different prices to individual customers or classes of customers purchasing similar quantities of a good or service. Economic analysis suggests that price discrimination may or may not be harmful to consumers depending on the facts of each case.

2.2 Systematic price discrimination that results in a misallocation of resources is socially wasteful and reduces consumer welfare. If a price concession is, on a continuous and sustained basis, not available to a more efficient purchaser, consumers may be left with a choice between less efficient

firms should the efficient firm be forced to leave the market. This practice is particularly harmful when a seller or buyer, in control of the market, engages in discriminatory selling tactics or uses its power to extract concessions in order to limit entry or increase monopoly rents at the consumer's expense.

2.3 In most cases, however, suppliers realize that it is adverse to their long-run interests to employ price discounts to enhance the market power of a particular downstream firm. To the extent that competing customers are disadvantaged by price discrimination, demand for the supplier's products could be lessened. In addition, the supplier could become dependent on a smaller number of buyers, forcing the supplier into a disadvantageous bargaining position.

2.4 In many instances, price differences merely reflect the difference in transaction costs of different classes of customers. If the supplier's price is not flexible enough to recognize the cost advantage provided, for example, by a purchaser's choosing a location closer to the supplier's plant, then there will be no incentive to make this choice and a more costly location may be selected. In this instance, a strict prohibition of price differentiation impedes efficiency.

2.5 In certain instances, price discrimination is necessary to the existence of an industry. In these industries, no single price will allow the suppliers to cover their long-run costs. In this circumstance, unless price discrimination is permitted, the industry will cease to exist and the product will not be offered for sale.

2.6 Price concessions are sometimes offered in conjunction with other vertically restrictive practices. For example, the supplier may offer a price advantage if the purchaser agrees to deal exclusively in the supplier's product or agrees to purchase other products from the supplier in addition to the product line that the purchaser requires. It is generally recognized that these exclusive dealing and tied selling practices can have efficiency benefits and

should be prohibited only if they substantially lessen competition. In such situations, there is no compelling reason to treat the practice of price discrimination more strictly than the associated vertical market restraints.

2.7 In other cases, price discrimination may undermine collusive price setting. Price cuts to selected customers hamper the ability of suppliers to maintain collusive prices. Price cuts have a tendency to spread because other sellers, once they learn that a competitor has undercut the collusive price, will be tempted to reduce their price as well. Once they become aware of the price changes, other buyers will similarly demand lower prices.

2.8 In sum, price discrimination may have adverse effects on consumers in particular cases. There is, however, no support for a presumption that price discrimination is harmful in most cases. On the contrary, consumers are likely to be best served by a policy which provides scope for innovative pricing strategies where there is no specific threat to competition.

3. The Director's Approach to the Enforcement of Section 50(1)(a)

A. Interpretation and Enforcement Generally

3.1 Section 50 of the *Competition Act* provides that price discrimination, as described by the section, is an indictable offence punishable by a maximum of two years imprisonment. Since the provision became law, three corporate convictions have been registered, all pursuant to guilty pleas, with fines ranging from \$15,000 to \$50,000. These three convictions all occurred during the last six years. Two other companies were subjected to prohibition orders in cases where no conviction was registered. No individuals have been convicted under this section to date.

3.2 The primary responsibility of the Director and his staff in enforcing section 50(1)(a) is to examine matters brought to their attention, most often by competitors or disadvantaged customers of the person alleged to be discriminating. Should the Director have reason to believe that an offence has been committed, the Act requires that he commence an inquiry. The Director or his authorized representative may then apply to a judge of the appropriate court for the exercise of search or subpoena powers authorized by the statute. The Director may, at any stage of an inquiry, communicate records or evidence to the Attorney General of Canada with a recommendation for prosecution. The Director may also discontinue any inquiry if, in his opinion, further inquiry is not justified.

3.3 The price discrimination provision leads to more requests for interpretation and advice than any other section of the Act. This is a strong indication that the business community wishes to comply with the law but needs to be better informed about the Director's interpretation and enforcement policy relating to this section, especially since virtually no jurisprudence exists to shed light on the provision's application.

3.4 The Director's interpretation and enforcement of this provision should not discourage sellers from introducing pro-competitive marketing strategies nor should it prevent buyers from bargaining for better prices that can be passed on to their consumers. On the contrary, the provision should be enforced in a manner that is consistent with the purpose of the Competition Act as expressed in section 1.1: to maintain and encourage competition in order to promote efficiency and adaptability, to ensure that small and medium-sized enterprises have an equitable opportunity to participate, and in order to provide consumers with competitive prices and product choices.

3.5 In deciding which matters justify the exercise of formal powers of investigation and, ultimately, referral to the Attorney General, the Director is guided in part by the objectives of the legislation set out by Parliament in the

purpose clause. Matters which have a limited effect on competition or which do not affect competition adversely will necessarily be allocated less resources than those having a greater impact or causing significant harm to competition in Canada. In practical terms, price discrimination matters, in many if not most cases, will warrant resolution by information or investigative visit, undertaking or consent order rather than by criminal prosecution.

B. The Substantive Provisions

3.6 Section 50 of the *Competition Act* reads as follows in relation to price discrimination:

50(1) Every one engaged in a business who (a) is a party or privy to, or assists in, any sale that discriminates to his knowledge, directly or indirectly, against competitors of a purchaser of articles from him in that any discount, rebate, allowance, price concession or other advantage is granted to the purchaser over and above any discount, rebate, allowance, price concession or other advantage that, at the time the articles are sold to the purchaser, is available to the competitors in respect of a sale of articles of like quality and quantity, ...is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

(2) It is not an offence under paragraph (1)(a) to be a party or privy to, or assist in, any sale mentioned therein unless the discount, rebate, allowance, price concession or other advantage was granted as part of a practice of discriminating as described in that paragraph.

(3) Paragraph (1)(a) shall not be construed to prohibit a cooperative association, credit union, caisse populaire or cooperative credit society from returning to its members, suppliers or customers the whole or any part of the net surplus made in its operations in proportion to the acquisition or supply of articles from or to its members, suppliers or customers. R.S., c. C-23, s. 34 1974-75-76, c. 76, s. 16.

3.7 Section 50(1)(a) can be conveniently divided into six requirements:

1. There is a sale of articles by a seller who is engaged in a business.
2. There is a discount, rebate, allowance, price concession or other advantage granted to one purchaser over and above the advantage available to another at the time the articles are sold to the first purchaser.
3. Discrimination occurs, directly or indirectly, between purchasers who are in competition with one another.
4. The articles sold are of like quality and quantity.
5. The supplier has knowledge that there is discrimination.
6. There is a practice of discriminating.

Each of these requirements will be considered below.

Requirement 1: Parties to the offence and requirement of a sale of articles

(i) parties to the offence

"Everyone engaged in a business who is a party or privy to or assists in any sale that discriminates against a purchaser of articles from him ..."

3.8 It is evident that consumers and other sellers and purchasers not engaged in a business cannot be parties to the offence of price discrimination.

3.9 The words "party, or privy to, or assists in any sale" imply that persons in addition to the actual seller of articles may be liable under the section. For example, the agents of the seller, such as brokers who assist in negotiating and executing the sales transaction, may be persons who assist in a discriminatory sale.

3.10 These words are also broad enough to encompass individuals acting either as officers or agents of the enterprise engaged in a discriminatory sale provided that they are engaged in "business" as defined by section 2 of the *Competition Act*.

3.11 Buyers may also be liable. Where inquiry reveals that the buyer's purpose is to gain an illegal advantage over a competitor, consideration will be given to recommending charges against the buyer under the aiding and abetting or counselling provisions of the *Criminal Code*, sections 21(1), 22 and 464 respectively.

(ii) requirement of a sale of articles

"Every one engaged in a business who is party, or privy to, or assists in, any sale that discriminates ...against competitors of a purchaser of articles...."

3.12 Most of the substantive provisions of the *Competition Act* refer to "supply" rather than "sale". The requirement of a "sale" in paragraph 50(1)(a) limits the application of the price discrimination provision to a sale, as opposed to other forms of supply such as renting or leasing.

3.13 The price discrimination provision requires only one sale to have occurred for an offence to have been committed if that sale was part of a practice of discriminating among competing purchasers. The transfer of legal title will generally be the most important consideration in determining whether a sale has actually occurred. For example, certain consignment arrangements

in the petroleum industry, where the article remains the property of the original seller until the dealer disposes of it to the ultimate customer, do not give rise to a "sale" of articles for the purposes of this provision. It should be noted, however, that the Competition Tribunal may order that a supplier discontinue the practice of consignment selling under section 76 of the *Competition Act* where it finds that the practice has been introduced for the purpose of price discriminating.

3.14 Unlike other sections of the Act, the price discrimination section provides no specific exemption for transactions between corporations and their affiliates. It is very likely that transactions between affiliates that involve mere transfers are not sales for the purposes of section 50(1)(a), if the parties do not deal at arm's length. Where such transactions are engaged in by a person with a strong market position and their effect is to substantially lessen competition, however, they may amount to the anti-competitive practice of squeezing the profit margins available to non-integrated customers subject to review under section 79 of the Act.

3.15 Most of the substantive provisions of the Act also refer to "products" rather than to "articles". Section 2 of the *Competition Act* defines "product" to include an article and a service. Section 2 of the Act also defines "article" to mean "real and personal property of every description". The definition of "article" in section 2 includes money, deeds and instruments relating to the title or right to property, to recover or receive property, or to an interest in a corporation and its assets, tickets for attendance and transportation, and energy.

3.16 Despite the breadth of the definition "personal property of every description" it is the Director's view that section 50(1)(a) does not apply to the sale of advertising services or professional services. Further, it is not illegal to make separate arrangements for services of value to the supplier such as

delivery, installation, servicing or maintenance which are ancillary to the sale of an article.

Requirement 2: A discount, rebate, allowance, price concession or other advantage is granted to one purchaser over and above the advantage available to competing purchasers at the time the articles are sold to the first purchaser

(i) the requirement of a discount, rebate, allowance, price concession or other advantage

"... discriminates ... in that any discount, rebate, allowance, price concession or other advantage is granted ... over and above any discount, rebate, allowance, price concession or other advantage that, ... is available ... in respect of a sale ..."

3.17 Although the terms "discount", "rebate", "allowance" and "price concession" refer to monetary transactions, the Director is of the view that the words "other advantage" are broad enough to encompass non-monetary advantages such as free equipment, in-store demonstrations and displays, and other advantages that a seller may bestow on purchasers.

3.18 Favourable credit terms or special terms for prompt payment will, when they form part of the bargaining process, generally be regarded as a discount, price concession or other advantage within the meaning of the section. Terms such as "2%, 30 days" should be made available to all competing purchasers of like quality and quantity.

3.19 Credit terms may not be part of the bargaining process, however, when the seller needs protection against poor credit risks. In these circumstances, no question would arise if a supplier sold to certain purchasers on a cash basis, or pursuant to some other arrangement, so long as any

discount for prompt payment was made available to these purchasers. The seller may also rely on the practice requirement of section 50(2) discussed below in certain situations where credit terms are in issue. The issue in most of these situations will generally be whether there is a true problem of collection or an intentional practice of discrimination.

(ii) the "over and above" requirement

*"... discriminates ... in that any discount, rebate, allowance, price concession or other advantage is granted to the purchaser **over and above** any discount, rebate, allowance, price concession or other advantage that ... is available to the competitors ..."*

3.20 Section 50(1)(a) does not prevent suppliers from selling at one price to all customers. The section only applies where the seller grants, as a matter of a practice, a price concession or other advantage that exceeds the concession or advantage available to competing purchasers of like quality and quantity.

(iii) the availability requirement

*"...over and above any discount, rebate, allowance, price concession or other advantage that, ... is **available** to the competitors in respect of a sale of articles of like quality and quantity, ..."*

3.21 The Director will take no enforcement action if the supplier has made an advantage available to competing purchasers of like quality or quantity. An advantage will be considered to be available even if the seller has imposed one or more conditions on it provided the condition is one which customers can reasonably meet and is not designed to deprive them of the advantage granted to their competitors. For example, an offer to grant an allowance on condition that the purchaser remain or become an exclusive dealer is not prohibited by section 50(1)(a) in the Director's view, even if some

purchasers qualify and are granted the allowance while competing purchasers of like quality and quantity do not qualify and are therefore not granted the concession. In this situation, any difference in treatment between competitors would arise not because the advantage was unavailable but because of the purchaser's own decision not to qualify. Similar permissible conditions might include the provision of services, increases in purchases over prior periods (growth or incentive bonuses) and pricing below maximum levels. Conditions that are not objective or verifiable, or which are not applied uniformly, will have more difficulty in passing this test.

3.22 In the Director's view, an advantage is available when the supplier has conveyed enough information to those purchasers the supplier reasonably believes may qualify for the advantage to allow them to make sound business judgments as to the measures they must take to satisfy the condition. Failure to announce a quantity discount to the trade generally, for example, would not likely give rise to an inquiry if the seller makes the discount available to those reasonably capable of purchasing in the quantities necessary to qualify.

(iv) the timing requirement

"... discriminates ... in that any discount, rebate, allowance, price concession or other advantage is granted to the purchaser over and above any discount, rebate, allowance, price concession or other advantage that, at the time the articles are sold to such purchaser, is available to the competitors ..."

3.23 This provision allows sellers to alter terms and conditions of sale with the passage of time. For example, rebates granted to purchasers in one year should not generally be compared to those granted in later years. If a commodity is sold on the basis of quotations which vary from hour to hour, then sellers may legitimately offer successive purchasers different prices for articles of the same quality and quantity. Similarly, changing market conditions may require that suppliers bid different prices in response to

successive calls for tenders without giving rise to an inquiry. These situations should be distinguished from situations in industries where articles are normally sold pursuant to price lists which, under normal trade conditions, are expected to remain in effect for standard periods of time.

Requirement 3: Discrimination occurs, directly or indirectly, between purchasers who are in competition with one another

(i) direct or indirect discrimination

*"any sale that discriminates ..., **directly or indirectly**, against competitors ..."*

3.24 The use of the word "indirectly" means that section 50(1)(a) cannot be avoided by transactions that lack a *bona fide* business purpose. For enforcement purposes, the corporate veil will be lifted where either the seller or purchaser employs a sham corporation whose only purpose is to serve as a conduit for price concessions to which those who benefit from the sham would otherwise not be entitled.

(ii) the "purchaser" requirement – buying groups

*"... discriminates ... against competitors of **a purchaser** of articles ... in that any discount, allowance, price concession or other advantage is granted to the **purchaser** ..."*

3.25 The issue raised by the term "purchaser" is whether the recipient of the price concession or other advantage is a legitimate "purchaser" for the purposes of the price discrimination provision. The paragraphs that follow review the competitive effects of buying groups and the considerations that apply to their formation.

3.26 The term "buying group" as used in this document refers to any association of independent businesses which combines the volumes of their purchases for the purpose of calculating rebates. This definition includes a wide variety of different organizations offering a range of services to their members.

3.27 Franchises and co-operatives engaged in distribution will generally offer members and suppliers many services including warehousing, delivery, marketing, and information and data processing. These services often produce economies which result in real resource savings due to the efficiencies of organizing as a group rather than as independents. These types of organizations will rarely give rise to questions under the *Competition Act* as to whether the group or the member is the true purchaser.

3.28 Other groups are organized so as to provide fewer services, some serving as little more than collection offices. These collection office buying groups ordinarily negotiate volume rebates, account for purchases made by members purchasing as agents for the group, receive rebate cheques for these purchases and distribute the surplus (after administrative expenses have been deducted) to their members. These groups are often established primarily to benefit from price concessions on volume purchases made available by suppliers.

3.29 Even though the collection office group generally offers suppliers and members fewer economies and services than franchises and co-operatives, it may still be beneficial to competition in several ways. The independent business joins a buying group to reduce purchase costs so as to better compete in resale and to obtain more information about price concessions available. In addition the group may offer programs to members such as private label products. The supplier becomes more efficient by selling to buying groups which reduce the supplier's credit risk, minimize its marketing costs and assist it in reliably forecasting volume purchases for planning purposes. Consumers

benefit from these groups to the extent that reduced purchasing costs (reductions resulting not only from price concessions, but improved efficiencies) are passed through to them in the form of lower retail prices.

3.30 Recognizing that buying groups in Canada are often pro-competitive, the Director believes that such groups should be allowed to constitute themselves and to conduct their affairs with a minimum of Bureau intervention. The Director no longer insists that a buying group maintain records designed to show that it sold the property interests in articles acquired to its members; it is sufficient to deem that such sales have occurred. However, it is the Director's position that, in order to be considered "the purchaser" for the purposes of section 50(1)(a), buying groups should continue to respect the fundamental obligation of the purchaser in the sale transaction, that of assuming liability for the purchase of articles.

3.31 In determining whether a buying group is a true purchaser and not simply a sham, three characteristics especially would appear to be important indicators in determining whether the organization is a true purchaser: 1) the group should be a legal entity capable of acquiring property in the articles purchased; 2) the group should in fact acquire a property interest in the articles, though it need not take possession; and 3) the group should be liable and assume responsibility for payment of the goods purchased.

3.32 In respect of the second characteristic, a buying group need not document a second transaction in which it conveys the articles to its members if this transaction can be deemed from the circumstances or by agreement with the members. The Director does not wish to impose any obligation on such businesses that is not required by law or that is inconsistent with their operational needs. Nor does the supplier have to concern itself with the agreement between the group and its members so long as it is satisfied that the group has acquired the goods.

3.33 In respect of the third characteristic, the group should be in a position to satisfy suppliers that it has the ability to meet any debts incurred in its name, either by retaining revenues from administration or membership fees and undistributed rebate payments, by agreement with its members to collect a surcharge in the event of shortfall, or by some other means. The amount of assets required to satisfy the supplier in respect of the group's liability should be determined by industry norms.

3.34 Groups which fail to meet these guidelines may simply be a sham established to allow otherwise separate buyers to enjoy larger rebates than those to which they are legally entitled. For example, assume a supplier grants a price concession to a buying group based on combined purchases of various members in situations where the supplier can only take legal recourse against the individual members and not the buying group if purchase obligations are not met. In this context, the Director would examine closely whether the supplier gave a concession to the buying group knowing that it was not "a purchaser" for the purpose of section 50(1)(a). Similarly, if a seller of an article were to take recourse against the buying group and the group then refused or was unable to honour its purchase obligations, doubt would be cast on its status as a true purchaser.

3.35 If the buying group is a true purchaser for the purposes of section 50(1)(a), the issue then arises as to who are the competitors of this purchaser given that the group does not directly compete in the resale of the articles that it purchases. Generally, a buying group should be considered the competitor of any business seeking to serve the same ultimate customers such that gains in sales for the buying group and its members are made at the expense of these businesses. This interpretation is consistent with the requirement that discrimination may occur "directly or indirectly".

(iii) the "competitors" requirement

"... any sale that discriminates ... against competitors of a purchaser of articles from him ..."

3.36 The primary concern motivating enactment of price discrimination legislation was the adverse effect that price disadvantages might have on competition among purchasers in the resale of the articles affected. Accordingly, it is not competition in the purchase but competition in the downstream market which is the focus of interest. In approaching this issue, the relevant market in which the purchasers compete - in terms of geography and in terms of the nature of the product and its distribution - must be defined.

3.37 In delineating markets geographically, the Bureau begins generally by seeking to determine the effect of a price change instituted by one of the parties. If the price change caused customers to switch some or all of their purchases to another firm, then that firm would be considered to be a competitor. For example, assume a supplier of gasoline wishes to grant a different discount to gasoline station A, which A will then pass on to consumers in the form of a price reduction, than it offers to stations B and C. A, B and C are all purchasers of like quality and quantity located in the same vicinity. If the sales of A increase in response to the price reduction while the sales of B, which does not reduce its price, decrease (perhaps because A and B are located in the same traffic flow), then the Director will consider that A and B are competing purchasers of gasoline from this supplier. On the other hand, A and C do not compete if A's price reduction has no effect on the sales of C.

3.38 In delineating product markets for the purpose of section 50(1)(a), the Bureau considers whether the purchasers compete in the business of reselling the goods that they purchase or whether they compete in the business of selling products which require the articles purchased as raw materials or

significant inputs. For example, purchasers of cellophane who buy the article for manufacturing Christmas tree ornaments would not ordinarily compete with purchasers of cellophane for manufacturing potato chip bags. Different price concessions granted in selling energy to a dairy and a lumberyard would likely not be contrary to the provision because dairies and lumberyards generally do not compete in the sale of similar articles.

3.39 Given that ordinary consumers are not in the business of reselling or processing the articles they buy, sales to consumers are not affected by the price discrimination provision. For the same reason, sales to federal, provincial and municipal governments are ordinarily not subject to the provision. The same reasoning may not apply, however, concerning sales to Crown corporations or public utilities engaged in actual or potential competition with other enterprises.

3.40 Functionally, the level of trade or trade classification assigned to the purchaser by the manufacturer is not a sound test for differentiating between purchasers and may well mislead. Chain stores may compete with independent retailers. Grocery "wholesalers" that sell to associated retail stores may compete with other grocery "retailers" that purchase in like quantities and perform the same distribution functions as the wholesalers.

3.41 This interpretation of the section does not prevent sellers and purchasers from determining which party to a sales transaction can most efficiently provide services such as delivery, installation and maintenance. Though a wholesaler may purchase in the same quantity as a retailer, the seller may wish to recognize the additional services provided by the wholesaler by accounting separately for these services. In this event, an issue will only arise if the payment bears little relation to the service provided.

Requirement 4: The articles sold are of like quality and quantity

(i) the "like quality requirement"

"... in respect of a sale of articles of like quality"

3.42 Only sales of articles of like quality are subject to the prohibition of price discrimination in section 50(1)(a). Articles which are not of like quality may be sold at different prices without risk of liability. The word "like" in this context is interpreted not as "identical" but as "similar"; the French translation of the term, "similaire", is apposite. In determining whether articles are of "like quality", several attributes are considered. The physical or chemical composition of the product, its functional or performance characteristics, its costs and its physical appearance will be taken into account.

3.43 The question has often been raised whether a trademark or label alone is sufficient to distinguish one article from another for the purposes of the section. The same question could be raised concerning the other attributes listed above. The answer lies in whether the attribute affects commercial acceptance of the article: would purchasers ordinarily pay a different price for a good with a particular attribute?

3.44 Two examples will illustrate how this test applies. Assume first that a supplier manufactures identical articles that it sells to retailers under a label of the supplier's choice and a brand of the retailer's choice. Assume further that the supplier engages in heavy local and national advertising to promote its own label, successfully cultivating a consumer preference for this brand to the extent that the retailer and his customers are prepared to pay a significantly higher price for it than they pay for the retailer's brand. In this situation, the brand will generally be sufficient to distinguish the quality of the articles.

3.45 In the second example, consider a supplier who sells articles to well-informed commercial enterprises for their own consumption. If different labels were to be affixed to the containers, it would not matter to these customers who are well aware that the articles are identical. In this case, labelling the articles differently would not qualify for exemption from the provision given that the purchasers do not indicate a preference between the brands.

(ii) the "like quantity" requirement

"... in respect of a sale of articles of like ... quantity,..."

3.46 In the Director's view, it is clearly lawful to discriminate in price on the basis of quantities purchased, although the supplier is not obliged to grant price concessions when quantities differ. The term "like" should be interpreted not as "identical" or "exactly equal" but as "similar". Production, distribution and other costs associated with volume sales may influence the determination of whether one quantity is "like" another. "Quantity" may be measured either by physical volume or dollar value. It is permissible to aggregate sales of different products for the purpose of calculating volume discounts and rebates provided that the products grouped are reasonably similar in nature.

3.47 Many suppliers in Canada establish scales of quantity discounts and rebates according to which net prices decrease as the quantities purchased increase. The quantity required to qualify for such a concession need not be confined to a single transaction as in the case of a discount on an individual shipment, or to a narrowly defined article when several articles are normally sold and purchased jointly. Price concessions in the form of a rebate payment based upon total purchases over a period such as a year or a quarter of a year are well established in Canadian business and do not give rise to the Director's enforcement action under section 50(1)(a).

3.48 Suppliers risk liability under the price discrimination provision, however, where volume requirements are not clearly delineated and where no definite period of time is specified within which the qualifying volume must be achieved. In other words, suppliers may prepay the discount, allowance or rebate based on estimated purchases but should adjust the payments if the actual purchases do not conform to the original estimates.

Requirement 5: The supplier has knowledge that there is discrimination

(i) "...sale that discriminates to his knowledge ..."

3.49 The words "to his knowledge" leave no doubt that criminal intent (also called "mens rea") is required in respect of each element to establish the offence of price discrimination. However, it is not necessary to prove knowledge by direct evidence if it can be inferred from the circumstances.

3.50 The knowledge requirement may also be met by willful blindness. The doctrine of willful blindness applies to situations where the consequences of one's actions, though not intended, are substantially certain to occur if a particular course of action is adopted or pursued. An example of a situation where the doctrine of willful blindness applies may occur when a seller arbitrarily categorizes its purchasers into broad classifications and grants rebates based upon forecast purchase volumes without adjusting for actual volumes purchased. It is not suggested that mere negligence merit enforcement action. However, such action would be considered in those circumstances where the accused is aware of the danger that conduct could bring about a result prohibited by criminal law, but deliberately persists in omitting to make the necessary inquiries.

Requirement 6: There is a practice of discriminating

50(2) It is not an offence under paragraph (1)(a) to be a party or privy to, or assist in, any sale mentioned therein unless the discount, rebate, allowance, price concession or other advantage was granted as part of a practice of discriminating as described in that paragraph.

3.51 The requirement of a practice of price discrimination recognizes some of the benefits to competition that discriminatory pricing offers. Price cutting to win customers, or to keep from losing customers to competitors offering better prices, is fundamental to competition. Secretive discriminatory price cuts may cause a deterioration of oligopoly pricing structures leading to general downward price changes.

3.52 The practice requirement in subsection 50(2) was enacted following the 1952 Report of the Committee to Study Combines Legislation. The Committee concluded that the price discrimination provision should not prevent a seller from matching the price of its competitor in order to gain a potential customer but should rather be directed against a prolonged course of action. The Committee accordingly recommended amendment to the price discrimination provision to direct it against a practice and not against a single transaction.

3.53 The word "practice" is not defined in the *Competition Act* although it is found in other sections of the Act: sections 48, 49, 52, 61 and 79. For the purposes of section 50(2), it is the Director's view that a "practice" refers to a systematic pattern of behaviour as distinct from isolated acts or reactions to market changes. "Practice" contemplates more than the adoption of a temporary expedient designed to win a new account, enter a new market or match a competitor's effort to acquire an existing customer. The number of

repeated incidents, or the length of time required to become a practice, may vary depending on the nature of the product and the market concerned.

3.54 In reaching the determination of whether there is a discriminatory practice for the purposes of this section, the Director will consider not only the frequency but also the duration, consistency and intent of the practice. Temporary allowances to subsidize retailers in meeting competitors' prices during a price war will generally not constitute a practice of discriminating. Occasional discriminatory discounts such as for store opening, clearance or anniversary sales or similar one-time offers would not of themselves, unless they are undertaken on a basis that is unreasonably repetitious, give rise to an inquiry. Similarly, advancing credit of 18 to 24 months to attract a new account or to enable a new enterprise to pay for articles purchased would not normally constitute a practice.

3.55 Bargaining for individual orders in the form of tendering for contracts may also be considered as one-time offers. Depending on the facts of the case, it may be important that the price differentiation lasts for only one contract period rather than for two or more. An even more important consideration will be whether the low bid is made to test the market or for some other pro-competitive purpose as opposed to a bid made with reasonable expectations of disciplining or eliminating a competitor. Evidence of this intention may raise not only questions of price discrimination but also issues of predatory pricing and abuse of dominance.

The Co-operative Exception

50(3) Paragraph (1)(a) shall not be construed to prohibit a cooperative association, credit union, caisse populaire or cooperative credit society from returning to its members, suppliers or customers the whole or any part of the net surplus made in its operations in

proportion to the acquisition or supply of articles from or to its members, suppliers or customers.

3.56 In the view of the Director, the exception provided by subsection 50(3) is quite limited being restricted to the associations listed in the subsection. It should be noted that the subsection refers to "members" rather than to shareholders and to "associations" rather than corporations. It is evident that the subsection does not exempt all conduct engaged in by these associations from the price discrimination provision.

3.57 Buying groups engage in conduct very similar to the conduct described in the subsection 50(3): groups often distribute surplus remaining from rebates received, after the group's expenses have been paid, *pro rata* on the basis of the amounts purchased by each member. Distributions of surplus in this manner, whether by a buying group or by an association referred to in subsection 50(3), will not ordinarily raise an issue under the *Competition Act*.

4. Other Sections

4.1 Other sections of the *Competition Act* may be relevant to fact situations raising issues of price discrimination.

- (a) Section 45 (conspiracy) may apply to the conduct of buying groups. If a buying group is used to facilitate agreements to lessen competition unduly in the sale or purchase of a product -- for example, to fix resale prices, maintain market shares, eliminate existing competitors or prevent the entry of potential competitors -- the Director will consider enforcement action under section 45.
- (b) Section 50(1)(b) (regional price predation) prohibits the policy of selling products in any area of Canada at prices lower than those charged elsewhere in Canada with the effect, tendency or design of

substantially lessening competition or eliminating a competitor. Such price differences do not raise issues under section 50(1)(a), however, unless the purchasers compete in the same market.

- (c) Section 50(1)(c) (predatory pricing) prohibits persons engaged in a business from engaging in a policy of selling products at prices unreasonably low, having the effect or tendency of substantially lessening competition or eliminating a competitor, or designed to have that effect. Price concessions or other advantages that reduce the selling price below the supplier's cost may give rise to concerns under this provision in certain circumstances. The Director's Predatory Pricing Bulletin provides information on how allegations of predatory pricing are examined by the Director.
- (d) Section 51 (disproportionate promotional allowances) applies to certain price concessions offered or granted for advertising or display purposes. Such an allowance must also be collateral to a sale or sale of articles. Allowances applied directly to the selling price, for example in the form of reductions appearing on the face of the invoice, are excluded from the definition in subsection 51(1). Section 51 establishes rules of proportionality that are quite different from the provisions of section 50.

The Director will first examine price concessions relating to advertising and display pursuant to section 51, not 50, given that this provision was first enacted in 1960 to cure a perceived deficiency in the price discrimination provision. However, allowances that do not meet the definition provided for advertising and display allowances in section 51 may be reviewed pursuant to section 50(1)(a).

- (e) Section 61(1)(b) prohibits discrimination in the context of price maintenance. For example, questions would be raised if a supplier does not directly refuse supply to a discounting distributor, but instead charges the distributor a discriminatory price designed to discourage the discounter from ordering products.
- (f) In the Director's view, consignment arrangements do not give rise to a "sale" under section 50(1)(a). However consignment sales may be subject to review by the Competition Tribunal. Section 76 provides that the Tribunal may order the supplier who ordinarily sells the product for resale to cease carrying on the practice of consignment selling where it is found that the practice has been introduced by the supplier for the purpose of discriminating between consigners or dealers and consignees, or for the purpose of controlling resale prices.
- (g) Section 77 concerning exclusive dealing, tied selling and market restriction applies to price discrimination in that the definitions of those practices include offers of price concessions. Under those definitions, the section applies to practices of offering price concessions or extracting penalties on the condition that the purchaser buy products only from the supplier or his nominee, that the purchaser buy more than one product from the supplier or that the purchaser deal only in restricted areas or in other ways as defined by section 77. In these cases, questions are raised only if the practice is likely to have exclusionary effects in the market such that competition is or is likely to be lessened substantially.
- (h) Section 79 (abuse of dominant position) applies to a practice of price discrimination that is engaged in by a dominant supplier and has the effect of substantially lessening competition in a market. If a supplier in a dominant position engages in price discrimination

for the purpose of impeding or preventing the entry of a competitor or potential competitor, with the effect that competition is or is likely to be substantially lessened, then the Director will review this practice under section 79 as well as section 50(1)(a). The Director would also consider proceeding under section 79 in situations where a buying group substantially or completely controls a class of business, uses this position to coerce discriminatory price concessions from suppliers, with the result that competition is or is likely to be lessened substantially.

4.2 Section 36 of the *Competition Act* provides for private actions. The Supreme Court of Canada has recently upheld the constitutional validity of this provision. Individuals or corporations may wish to explore this avenue of redress if they are of the view that damage has been suffered as a result of conduct contrary to the criminal provisions of the Act including section 50(1)(a). The Bureau would like to be informed of any such actions.

5. Illustrations of the Application of the Policy

Example 1 - Exclusive Dealing Discount

5.1 In order to stimulate sales of its products, a manufacturer invites all distributors to participate in a new marketing plan. The supplier offers to supply products to distributors on the same terms and conditions as are currently in place, but it will extend an additional discount to those distributors who agree to deal only in products supplied by the manufacturer and to refrain from dealing in products of other manufacturers.

Response

5.2 Under the past enforcement policy, such a scheme raised questions under section 50(1)(a) because it contemplates price differences not

based on differences in quality or quantity. Under the proposed policy, the plan would not raise an issue because the additional discount is made available to all distributors. A similar view would be taken towards advantages offered to encourage pricing below a maximum level or the achievement of sales growth.

5.3 Exclusive dealing arrangements can have a pro- or anti-competitive effect depending on various circumstances. This dichotomy is recognized by section 77 of the *Competition Act* which permits the Competition Tribunal to make an order prohibiting the practice of granting price concessions to induce exclusive dealing only if certain requirements are met, including the requirement that the practice is or is likely to lessen competition substantially. The Director's policy basically removes such practices from criminal prohibition while leaving them open to examination under section 77 and section 79, dealing with abuse of a dominant position, where their effect on competition can be fully reviewed.

Example 2 - Functional Rebates

5.4 A supplier wishes to transfer some of the functions it currently performs to its customers, rewarding those who take on these functions with a rebate on the price of the products they purchase. Such functions include transportation, delivery, installation and maintenance.

Response

5.5 To the extent that the opportunity is made available to all customers, the plan would not raise an issue under section 50(1)(a). A problem would only arise if the supplier intended to use this plan to discriminate between its purchasers. This intention could be indicated by the incapacity of certain customers to perform the functions required to qualify for the

concession, or the lack of correlation between the amount of the rebate and the value of the service performed.

Example 3 - International Volume Price Concessions

5.6 A supplier wishes to offer all its customers price concessions based on the calculation of worldwide purchase volumes. Sales between the supplier's Canadian subsidiary and its Canadian purchaser are transacted at a price that accounts for volumes purchased by international affiliates of the purchaser, decreasing the net price as certain volume levels are achieved.

Response

5.7 Under the past enforcement policy, these concessions raised questions under section 50(1)(a). If the Canadian customer assumed liability for the purchases, it was considered the purchaser for the purposes of the section; therefore, only the quantity that the Canadian firm purchased could be considered for the purpose of calculating the price concession. Under the proposed policy, these concessions would not raise an issue under section 50(1)(a) given that they are available to all.

5.8 International volume price concessions are permitted in virtually all other industrialized countries under statutes that require competitive disadvantage to prohibit price discrimination. There is no compelling reason to deprive Canadian purchasers and their customers of these price reductions or to oblige these buyers to purchase their needs elsewhere where they can qualify for better prices.

5.9 It is recognized that suppliers and purchasers operating solely on a national scale may be disadvantaged by concessions granted on an international basis. However, these concessions prompt suppliers to make their product offerings more competitive in other ways. Furthermore,

purchasers may be able to enter into arrangements with international buyers allowing them to benefit from such concessions. Finally, international volume price concessions that amount to anti-competitive practices in that they prejudice efficient suppliers or purchasers may be reviewed under section 79 relating to abuse of a dominant position.

Example 4 -- Buying Group I

5.10 A supplier has been asked to deal with a group of retail enterprises on the following basis. The retailers wish to form a buying group in order to take advantage of rebates offered by the supplier calculated on a sliding scale depending on the volume of purchases made during the course of a year. The retailers will continue to order, take delivery and pay for articles purchased independently but they instruct the supplier to grant a rebate to each of them at the end of the year calculated on the basis of their consolidated volume divided *pro rata* among them. The retailers propose an agreement for the supplier's signature which states that the group accepts no liability in the event that a retailer defaults on payment or becomes incapable of meeting its obligations.

Response

5.11 Under this proposal, it appears that the true purchaser for the purposes of paragraph 50(1)(a) would be the individual retailers and not the group given that the group does not meet the fundamental obligation of the purchaser in a sale transaction: to pay for the goods purchased. For this reason, an inquiry would be commenced if there was a belief on reasonable grounds that the supplier was granting rebates to the individuals retailers calculated in this manner, and assuming that the other elements of the price discrimination provision could be satisfied.

Example 5 -- Buying Group II

5.12 A supplier has been asked to deal with a group of retail enterprises on the following basis. The retailers wish to take advantage of rebates offered by the supplier calculated on a sliding scale depending on the volume of purchases made during the course of a year. The retailers undertake to act as agents for the group, a separate corporation, in ordering articles from and making payments to the supplier. Delivery will be made directly to the retailers but the group will retain title to the articles until payment is made to the supplier. The retailers instruct the supplier to grant a rebate to the group calculated on the basis of the consolidated purchase volume. The retailers propose an agreement for the supplier's signature pursuant to which the group recognizes its liability to pay for the articles purchased. In making ordinary inquiries concerning the creditworthiness of a customer, the supplier is assured that the group as a separate legal entity will be able to satisfy its obligation in an amount meeting the industry's norms by retaining revenues derived from the administration and membership fees it collects, undistributed rebates and an agreement with its member retailers to collect a surcharge in the event of a shortfall. The group has no credit history which contradicts these assurances.

Response

5.13 In the Director's view, the supplier may legally accept the group as the purchaser for the purposes of paragraph 50(1)(a) given that the group is a separate legal entity which acquires a legal interest in the articles purchased and undertakes the responsibility to pay for these goods, an obligation it appears to be capable of satisfying in the measure required by the industry under normal circumstances. Therefore, the supplier would not be risking violation of the price discrimination provision should it decide to grant a rebate to this group on the basis of the group's consolidated purchases from the supplier.

6. Comparison with the United States Law of Price Discrimination

6.1 The Bureau often receives enquiries from persons familiar with the United States law of price discrimination. This section provides a basic guide to the differences in the treatment of price discrimination between the Canadian *Competition Act* and the United States *Robinson-Patman Act*, federal legislation expressly directed at price discrimination in that country.

6.2 The *Robinson-Patman Act* has two prohibitory sections, sections 1 and 3. Section 1 amends section 2 of the *Clayton Act* and is usually referred to as section 2 of *Robinson-Patman* which is the reference adopted in this paper. It may serve as the basis for a civil action by the United States Federal Trade Commission, the Department of Justice or a private plaintiff. Section 3 is a criminal statute which can be enforced only by the Department of Justice.

6.3 Section 3 of the *Robinson-Patman Act* is worded in terms that are virtually identical to those of section 50 of the *Competition Act*. Section 3 prohibits price discrimination "in respect of a sale of goods of like grade, quality and quantity". It also prohibits geographical predation in respect of sales "in any part of the United States at prices lower than those exacted ... elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor". Finally, it prohibits predatory pricing in respect of sales "at unreasonably low prices for the purpose of destroying competition or eliminating a competitor". There have been no reported cases on section 3 since 1958. Commentators in the United States have remarked on the vagueness of the statute's prohibitions and its apparent incompatibility with other objectives of competition policy.

6.4 Persons knowledgeable about United States law on price discrimination are usually more familiar with section 2 of *Robinson-Patman*

than with section 3. The principal differences between section 2 and section 50(1)(a) of the *Competition Act*, aside from jurisdictional ones, are the following:

- 1) No violation occurs under section 2(a) of *Robinson-Patman* unless the effect of the price discrimination in question is to "substantially ... lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them... ." Section 50(1)(a) does not provide explicitly for a competitive effects test.
- 2) Price discrimination may be defended under section 2(a) on the ground that the differential in price makes "only due allowance for differences in the cost of manufacture, sale or delivery" resulting from differing quantities or methods in sale or delivery. The *Competition Act* provides for no similar cost-justification defence.
- 3) Under section 2(b) of *Robinson-Patman*, the seller is permitted to rebut a *prima facie* case of price discrimination by showing that his price reduction was intended to meet a competitor's lower price. Subsection 50(2) of the *Competition Act* obliges the Crown to prove, as an element of the offence of price discrimination, that an advantage was granted as part of a practice of discriminating .
- 4) Section 2(c) of *Robinson-Patman* prohibits certain payments made in lieu of brokerage. Brokerage types of payments are not explicitly prohibited by section 50(1)(a) of the *Competition Act*.
- 5) Sections 2(d) and (e) of *Robinson-Patman* prohibit, respectively, the granting of allowances for services or facilities provided by the purchaser, or the furnishing of any services or facilities involved in the processing or handling of the commodity in question, unless

such concessions have been accorded "to all purchasers on proportionally equal terms". Section 51 of the *Competition Act* similarly prohibits disproportionate advertising or display allowances.

- (6) Section 2(f) of *Robinson-Patman* makes it unlawful for a buyer engaged in interstate commerce, in the course of such commerce, knowingly to induce or receive a price discrimination which would be unlawful for a seller to grant. Section 50(1)(a) of the *Competition Act* does not explicitly provide for buyer liability.

6.5 A significant procedural difference between the two statutes is that successful litigants in the United States are entitled to have their damages trebled. In contrast, section 36 of the *Competition Act* provides for compensatory damages only, equal to the loss or damage actually suffered in addition to the costs of investigation.

6.6 The *Robinson-Patman Act* has been discussed by numerous economic and legal commentators in the United States. Notably, the United States Department of Justice in 1976 reported that the Act was ineffective when evaluated both in terms of its objectives and in terms of its costs to society. Specifically, the report determined that the Act conflicted with the goals of competition law in that it promoted high prices, restricted entry and encouraged inefficiency in the distribution of goods by inducing pricing caution among suppliers and discouraging hard bargaining on the part of buyers. It is the Director's intention to interpret section 50(1)(a) of the *Competition Act* in a manner that avoids the same conflict with the goal of maintaining and encouraging competition expressed in the purpose clause of the Canadian legislation.

7. Conclusion

7.1 Section 50(1)(a) of the *Competition Act* prohibits businesses from making a practice of discriminating by granting a price concession or other advantage to one purchaser over and above the advantage available to competing purchasers of like quality and quantity at the time the articles are sold to the first purchaser. Businesses risk criminal sanctions if they engage in conduct that conflicts with this section. In economic terms, however, price discrimination can be beneficial to competition, promoting the efficiency and adaptability of the Canadian economy and providing consumers with competitive prices and product choices. In enforcing section 50(1)(a), the Director will seek to avoid unnecessary interference with price discrimination that is either competitively beneficial or neutral.

7.2 Past practice was to challenge any price difference that was not based on quality and quantity differences. The Bureau now proposes to take the position that price concessions available to competing purchasers of like quality and quantity do not provide reason to believe that an offence has been committed under the section. Price concessions in exchange for agreements to deal exclusively in the supplier's product, to provide services such as delivery or maintenance, or to increase purchases over previous financial periods, can now, therefore, be offered without the risk of an investigation with potential criminal liability for companies and individuals who choose to market their products in this fashion, provided the offer is reasonably available to competing purchasers of like quality and quantity.

7.3 This paper identifies other factors in addition to availability, representing changes, clarifications or restatements of previous policy, which can be summarized as follows:

- 1) Consumers and other sellers and purchasers not engaged in business cannot be parties to the offence.

- 2) The provision does not apply to consignment arrangements and other transactions where legal title is not transferred, nor does it apply to non-arm's length transfers between affiliates.
- 3) The provision does not apply to the sale of services such as advertising or professional services.
- 4) The provision does not prevent suppliers from selling at one price to all customers.
- 5) To make an advantage "available", the supplier is obliged to convey information about the offer only to those competing purchasers the supplier believes are reasonably capable of qualifying for the advantage.
- 6) The provision does not apply to differentiation in credit terms when necessary to protect against poor credit risks.
- 7) The provision does not apply to alterations of trade terms with the passage of time.
- 8) Purchasers may form a buying group to take advantage of volume price concessions offered by suppliers provided that the group is a true purchaser in that 1) it is a legal entity capable of acquiring property in the articles purchased, 2) it in fact acquires a property interest in the articles, and 3) it assumes responsibility for payment of the goods purchased.
- 9) The buying group need not document the sale of articles from the group to its members if this transaction can be deemed from

the circumstances or from the agreement between the group and its members.

- 10) The provision does not apply to businesses selling articles to consumers or governments.
- 11) For the purposes of this provision, articles are not of "like quality" if purchasers ordinarily pay a different price for a change in attribute such as a different trade name or a change in physical appearance or chemical composition.
- 12) For the purposes of this provision, suppliers may aggregate the sales of different but reasonably similar products and they may aggregate total volumes purchased over a period of time in order to determine like quantity.
- 13) The provision does not apply to price concessions granted to enter a market or to meet short-term competition, nor does it apply to a single transaction provided the transaction does not cover a lengthy period of time.

7.4 The Director recognizes that systematic price discrimination may be harmful to competition. Price concessions granted in exchange for exclusive dealing or increased volume, for example, may impair efficiency and result in a misallocation of resources if efficient suppliers and purchasers are disadvantaged at the expense of their less efficient competitors. Section 50(1)(a) does not distinguish between competitive and anti-competitive concessions, however, and, in fact, allows powerful buyers to benefit from larger discounts without requiring justification in terms of cost. As a general approach, the Director would prefer to challenge anti-competitive price discrimination under the sections relating to exclusive dealing and abuse of a dominant position where the competitive merits of the practice can be fully reviewed.

7.5 The Director therefore proposes an interpretation of section 50(1)(a) which he believes is consistent with the purpose of maintaining and encouraging competition. This interpretation should permit businesses to pursue pro-competitive marketing strategies without fear of criminal liability.

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