JOINT COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW ON THE CANADIAN COMPETITION BUREAU'S DRAFT COMPETITOR COLLABORATION GUIDELINES

AUGUST 2009

The views stated in this submission are presented jointly on behalf of these Sections only. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore may not be construed as representing the policy of the American Bar Association.

INTRODUCTION

The Section of Antitrust Law and the Section of International Law of the American Bar Association (the "Sections") appreciate the opportunity to present their views on the Competition Bureau's public consultation draft Competitor Collaboration Guidelines (the "Guidelines").

In light of the complex analysis required for competitor collaborations, the Sections wholeheartedly agree with the Bureau's recognition of the "need for transparency and predictability regarding its assessment of competitor collaborations." (Guidelines, at i.) Many competitor collaborations are procompetitive. As the Guidelines observe, competitor collaborations often provide strategic opportunities for firms to adjust to rapidly-evolving competitive conditions and technological changes (*id.*); they "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 to market." (*Id.*) Clear guidance and predictability are therefore imperative to avoid discouraging procompetitive investments and collaborations.

This need for clarity and predictability is only heightened by the increased risks associated with engaging in conduct that could be construed as falling within the scope of the new per se provisions in Section 45 of the Act, the contravention of which is now subject to much higher maximum fines and prison terms. The United States has long held certain anticompetitive conduct to be per se illegal and to warrant criminal sanctions. Indeed, the U.S. Department of Justice's Antitrust Division ("U.S. DOJ") has ardently promoted the criminal prosecution of such conduct to other jurisdictions. But, for decades, the Antitrust Division also has scrupulously confined its criminal prosecutions to hard-core cartel conduct, not only because such conduct is universally regarded as the most pernicious form of anticompetitive behavior, but also to ensure

that the line between what is subject to criminal prosecution and what is not is as clear as possible.

The Guidelines make a substantial contribution toward the goal of providing guidance and predictability, reflecting careful thought and applying practical judgment against a backdrop of significant legislative change. The Sections respectfully submit these comments to help the Bureau to explain and clarify its enforcement policies further and thereby to guide the bar, aid in the counseling of clients, and foster improved compliance with Canada's Competition Act—the benefits of which will redound not only to companies subject to the Act, but also, and most importantly, to consumers.

EXECUTIVE SUMMARY

The Sections' comments are organized in four general sections concerning: (A) the process by which the Bureau will decide whether to prosecute a competitor collaboration (or an agreement between or among competitors) under Section 45 or Section 90.1 of the Act; (B) common issues arising under the criminal and civil provisions of the Guidelines; (C) issues arising under the Criminal Provision in the Guidelines (Part 2), and (D) issues arising under the Civil Provision in the Guidelines (Part 3).

The Sections respectfully submit the following suggestions:

- Clarify the procedures the Bureau will use to decide on which track (civil or criminal) parties' conduct will be evaluated, the timeframes in which that decision will be made, and the circumstances under which that decision might change.
- Clarify the types of circumstantial evidence that will be used (and how that evidence will be used) to prove agreements subject to Sections 45 and 90.1 of the Act, as well as the standard the Bureau will apply to distinguish between unilateral and concerted conduct.
- Clarify the standard the Bureau will apply to distinguish between "affiliated" companies that are not subject to Sections 45 and 90.1 of the Act and those companies that are.
- Clarify when and how the Bureau will determine whether companies are potential competitors.

- Clarify the types and nature of output restraints that may be subject to prosecution under Sections 45 and 90.1 of the Act.
- Emphasize that only "hard-core" cartel conduct will be subject to criminal prosecution under Section 45 of the Act, and clarify the role of the ancillary restraints defense.
- Clarify when and under what circumstances concealed bid-rigging may be subject to criminal prosecution under Section 45 of the Act.
- Reconsider the Bureau's apparent presumption that parties can normally achieve the benefits of a joint production arrangement without imposing restraints on competition in the downstream market.
- Clarify the burden parties must carry to establish efficiencies supporting collaborations and the standards by which efficiencies may (or may not) be deemed to be cognizable.
- Consider the adoption of express safe harbor provisions for information exchanges.

COMMENTS

A. Determination to Proceed on Criminal or Civil Track

The Sections welcome the Bureau's efforts to explain how and when it will decide to pursue a matter on the criminal or civil track.[1] With respect to the timing of the choice of track, Section 1.3 of the Guidelines provides that the Bureau will make every effort to arrive at a timely decision on the choice of track on the basis of available evidence. The Sections appreciate that in many cases there may be practical difficulties, particularly at the early stages of an investigation, in making an election. It is nevertheless critical that subjects of an investigation be made aware at the earliest opportunity that their conduct is being examined under the criminal rather than civil provisions for a number of reasons, ranging from securities law related disclosure requirements to possible resort to the Bureau's Immunity or Leniency Programs. The Bureau may, therefore, wish to consider a target timeframe within which a determination would be made in most cases. It also would be helpful if the Guidelines provided more information about the

[1] The Sections understand that the Bureau's choice of track procedures is subject to constitutional safeguards that require the Bureau to afford *Charter* protections to individuals in cases in which the predominant purpose of an inquiry is the determination of penal liability. *See R. v. Jarvis*, [2002] 3 S.C.R. 757; *see also Kligman v. M.N.R.,* [2003] 3 F.C. 569 (C.A.). The Sections also understand that these safeguards may limit the ability of the Bureau to "change" tracks in an investigation or at least to change from the civil track to the criminal track after a certain point in an investigation without risking the exclusion of evidence obtained in violation of an individual's *Charter* rights.

nature of the evidence the Bureau will consider at this stage—for example, will the Bureau consider evidence supporting affirmative defenses (e.g., the ancillary restraints doctrine).

The Guidelines also identify two situations in which the Bureau may depart from the general choice of track principles laid out in Section 1.3. The first situation is where the Bureau determines that a criminal prosecution "is not in the public interest" and declines to refer the matter to the DPP. Clarification of how that determination will be made would be useful. The "public interest" determination appears to be similar to that contained in Chapter 15.3.2 of the Federal Prosecution Service Deskbook, and the Sections encourage the Bureau to apply similar principles in determining when a criminal prosecution is not in the public interest.

The second situation is where the Bureau decides to shift an investigation from the criminal to the civil track before a referral to the DPP has been made. Here, again, such flexibility is welcomed, but the Sections urge the Bureau to describe as clearly as possible the circumstances in which such a change might occur.

Finally, Section 1.4 of the Guidelines notes that, with respect to duplicate proceedings, the Bureau will not refer an agreement to the DPP for criminal prosecution where proceedings have been initiated before the Tribunal and there has been no "material change in circumstances." This qualification is not supported by the plain language of Section 45.1 of the Act, which appears to permit such a prosecution only where the facts are not the same or substantially the same as the facts that provided the basis for an application to the Tribunal.

B. Common Issues Arising Under the Civil and Criminal Provisions of the Guidelines[2]

1. Use of Circumstantial Evidence to Prove Agreements [Guidelines §§ 2.2, 3.2]

The Sections commend the Bureau for the Guidelines' general approach to parallel conduct in Sections 2.2 and 3.2. The Guidelines generally embrace the long-recognized competition law

[2] The Sections wish to observe that Sections 2.6(c) and 3.5(c) of the Guidelines reflect the exemptions for export cartels established under §§ 45(5) and 90.1(8) of the Act, and to note their opposition to such exemptions except in narrow circumstances. *See, e.g.*, ABA Section of Antitrust Law, Comments on the Railroad Antitrust Enforcement Act (Dec. 2008), www.abanet.org/antitrust/at-comments/2008/12-08/HR1650_S772.pdf. The Sections believe these and like exemptions, adopted by jurisdictions around the world (including the United States), sacrifice consumer welfare and therefore should be, in the words of the U.S. Antitrust Modernization Committee's 2007 report, "granted rarely" and "only where, and for so long as . . . is necessary to satisfy a specific societal goal that trumps the benefit of a free market to consumers . . . and the U.S. economy in general." AMC, *Report & Recommendations*, at 335, Recommendation 57 (April 2007) (endorsing views submitted by ABA Antitrust Section), govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

principle that "conscious parallelism" alone is insufficient to prove an agreement—a principle adopted not only by Canada but also by the United States, the EU, and other jurisdictions.[3] The Sections, however, respectfully submit a few suggestions to improve upon the solid foundation already laid in the Guidelines.

The Sections agree that competitors' parallel behavior coupled with other circumstantial evidence—so-called "facilitating practices"—may provide a sufficient basis from which to infer an agreement in some cases. But, defining facilitating practices to include "*conduct otherwise consistent with an agreement*," as Section 2.2 appears to do, would seem to allow an agreement to be inferred from parallel conduct alone. The U.S. Supreme Court by contrast has long held that "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy"[4] The Sections, therefore, recommend modifying the last sentence of Section 2.2 to read as follows (new text in bold italics):

> However, parallel conduct coupled with ***conduct that is more probative of agreement than with independent conduct*** ~~facilitating practices~~, such as sharing competitively sensitive information~~,~~ ***or*** activities that assist competitors in monitoring each other'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 similar reasons, the Sections also encourage the Bureau to clarify what it has in mind when it refers to "tacit" agreements or understandings in Section 2.2. The Sections are concerned that the reference to competitors reaching a meeting of the minds "tacitly" could cause confusion. The notion of "tacit" agreements has occasionally found its way into the U.S. case law and has not been well-defined.

The Sections also suggest that the Bureau provide a single definition of "agreement" by consolidating the definitions that appear separately in Sections 2.2 and 3.2 of the Guidelines. Consolidating those sections would improve the readability of the Guidelines and, most

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[3] *See, e.g.*, OECD Global Forum on Competition, Prosecuting Cartels Without Direct Evidence, 18 (2006) ("Consistent with economic theory, a long line of case law has recognized that evidence of parallel conduct, such as simultaneous price increases by rivals, alone is not sufficient proof a cartel agreement."); *R v. Atl. Sugar Ref.,* [1980] 2 S.C.R. 644, 656 (conduct "did not constitute a conspiracy . . . but merely "conscious parallelism"); *Theatre Enters. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 541 (1954) (the Court has "never held that proof of parallel business behavior conclusively establishes [an] agreement").

[4] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) (citing *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984)).

importantly, reduce the possibility that the two sections might be read incorrectly to define the pre-requisite of an agreement differently for criminal and civil offenses.

2. Defining "Affiliated Companies" [Guidelines §§ 2.6(a), 3.5(e)]

The Sections encourage the Bureau to expand upon and clarify the meaning of the terms "affiliated" and "affiliated companies" as used in Sections 2.6(a) and 3.5(e) of the Guidelines. Sections 2.6(a) and 3.5(e) address the statutory exemption of agreements between or among "affiliated companies" from criminal or civil prosecution that is specified in Sections 45(6) and 90.1(7) of the Act, respectively. Section 2(2) of the Act defines "affiliated companies" as follows:

> For the purposes of this Act,
>
> (a) one corporation is affiliated with another corporation *if* one of them is the subsidiary of the other *or* both are subsidiaries of the same corporation *or* each of them is controlled by the same person;
>
> (b) if two corporations are affiliated with the same corporation at the same time, they are deemed to be affiliated with one another; and
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> (c) a partnership or sole proprietorship is affiliated with another partnership, sole proprietorship or a company if both are controlled by the same person.[5]

This definition is not clear. More specifically, Section 2(2)(a) does not specify the nature or extent of the interest a parent must have in a subsidiary—or a common parent must have in two subsidiaries—before those firms would be deemed to be "affiliated" and exempt from Sections 45 and 90.1 of the Act.[6] It is critical that companies have as much guidance as possible concerning the extent to which the exemption may (or may not) apply to their transactions.

The Sections recognize the Bureau's ability to define these terms categorically may be limited since they likely will be subject to judicial interpretation. Yet the Bureau still could provide useful guidance by further explaining how it will construe these terms in exercising its prosecutorial discretion. The Sections concede this issue has proven to be challenging in the United States as well. The U.S. Supreme Court has ruled that, for purposes of applying Section 1

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[5] Competition Act § 2(a) (emphasis added).

[6] Section 2(2)(a) appears to distinguish between companies that are subsidiaries of one another and companies that control one another or are subject to common control. Section 2(4)(a) of the Act defines "control" as ownership of shares conferring a majority of the votes which may be cast to elect directors, provided such votes, if exercised, are sufficient to elect a majority of the corporation's directors. Similarly, Section 2(4)(c) states that a person controls a partnership if the person holds any interest which entitles the person to receive more than 50 percent of its profits or of its assets upon dissolution.

of the Sherman Act, parents and their wholly-owned subsidiaries are to be regarded as "single economic entities" and therefore incapable of conspiring as a matter of law.[7] But, beyond that particular case, U.S. courts have established no uniform rule defining the extent to which "agreements" between corporate affiliates are subject to Section 1.

The Sections suggest that the Bureau consider adopting a construction of Sections 2(2) of the Act that would apply the exemption to companies: (1) holding more than 50 percent of the outstanding voting securities of a corporation; or (2) having the contractual power to designate more than 50 percent of the directors of a corporation, or, in the case of unincorporated entities, of individuals exercising similar functions. This proposed definition focuses on the economic reality of control and, in that regard is consistent with the definition of "control" specified in Section 2(4)(a) of the Act and the spirit of Section 45(6)(a) of the Act. It would, moreover, provide increased predictability to parties by drawing bright lines as to when entities will be deemed to be affiliated based on common ownership.

3. Determining Whether Parties to an Agreement Are "Competitors" [Guidelines §§ 2.3, 3.3]

Sections 2.3 and 3.3 of the Guidelines raise questions concerning how the Bureau will evaluate the nature of potentially competitive relationships between parties to an agreement that may be subject to Section 45 or Section 90.1 of the Act.

Section 2.3(a) (last sentence) states that "the Bureau will generally conclude that the parties are in competition with each other for the supply of such goods or services" where the parties are merely "contemplating the offer of the same or otherwise competing goods or services in the same or otherwise competing regions." This standard appears to be lower than the "likely to compete in the absence of agreement" test set forth in Section 45(8).

Section 2.3(b) (last sentence) states that the Bureau will "consider" whether parties to an agreement are potential competitors for purposes of applying Section 45 "with respect to the periods both prior to and following the implementation of the agreement." If this statement is intended to mean only that the Bureau will evaluate whether "it is reasonable to believe [the parties] would be likely competitors" *at the time they implemented their agreement* but for their agreement, it is uncontroversial and consistent with the immediately preceding sentence which

[7] *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

identifies the types of evidence the Bureau will consider in determining whether parties are potential competitors. But the statement appears to go farther.

The statement could also be read to say that in deciding whether an agreement may be subject to criminal prosecution, the Bureau will evaluate the nature of any competitive relationships between parties as of the time the Bureau is examining their agreements. This interpretation would cover a scenario in which the nature of parties' competitive relationships has changed since their agreement was implemented—perhaps even as a result of their agreement or collaboration, a possibility explicitly acknowledged in Section 3.3.[8]

The Sections have concerns about the extent to which agreements that may have been procompetitive or competitively neutral when adopted, due to either the absence of a competitive relationship or the existence of a valid ancillary restraints defense, may later be investigated—and, indeed, exposed to criminal prosecution—as a result of changed circumstances that may not be clearly evident to the parties. The extent to which parties' competitive relationships and, more broadly, the legality of their collaborations should be evaluated after their agreements are implemented has proven to be one of the more controversial issues in the analysis of competitor collaborations in the United States and likely will be in Canada, too. The Section of Antitrust Law highlighted this issue in its 2000 comments on the then-draft *Antitrust Guidelines for Collaborations Among Competitors* proposed by the U.S. Department of Justice and the Federal Trade Commission.[9]

As the Antitrust Section acknowledged in those comments, how to evaluate competitor collaborations after their formation—and whether to prosecute them—are questions of enforcement policy. Here, as in prior comments, the Sections offer no specific recommendation on what the Bureau's policy should be, except to urge the Bureau to provide clear guidance on what its enforcement policy will be and, in formulating that policy, to carefully balance, on one

[8] *See* Guidelines § 3.3 ("In some instances, parties can become potential competitors as a result of their collaboration."). Section 3.4(b) may raise the same issue to the extent it suggests the Bureau may examine the parties' post-formation market shares in a relevant market in evaluating the competitive effects of an agreement under Section 90.1 of the Act. *See* Guidelines § 3.4(b) ("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.").

[9] *See* ABA Section of Antitrust Law, *Comments on the Antitrust Guidelines for Collaborations Among Competitors*, at 7-9 (Feb. 18, 2000), www.abanet.org/antitrust/at-comments/2000/02-00/competitorcollab comments.pdf.

hand, the need to protect consumers and, on the other hand, the risk of discouraging investments in procompetitive collaborations by creating concerns that successful competitor collaborations might be penalized for their very success.

Section 2.3(b) also suggests that the Bureau may "consider" companies' internal documents to help determine whether, in the words of Section 45(8) of the Act, "it is reasonable to believe [the parties] would be likely competitors." Because it is not uncommon for businesspeople to engage in "blue sky" exercises about potential new areas of business without any realistic prospect of them coming to fruition, the Sections urge the Bureau to consider such evidence carefully in evaluating the nature of parties' competitive relationships in order to avoid giving particular documents undue weight.

4. Defining Output Restrictions [Guidelines §§ 2.4(c), 3.8]

The Bureau's approach, set out in Section 3(d) of the Guidelines, to evaluating whether an output restraint is an agreement between competitors in respect of a product "to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product" prohibited by section 45(1)(c) of the Act, refers only to limiting or reducing the *quantity* of product supplied or produced or discontinuing the supply or production of a product. Output restraints may also include agreements between competitors with respect to product attributes (e.g., product quality). The Sections believe that clarification is warranted as to the application of the per se standard in the context of output restraints relating to product attributes. For example, how would the Bureau evaluate an agreement between competitors to make gizmos out of metal A rather than the more expensive metal B?

Similarly, in assessing R&D agreements, Section 3.8(d) of the Guidelines provides that the Bureau does not generally consider output restrictions to be reasonably necessary to achieve the objective of R&D agreements. The Sections encourage the Bureau to expand on how restraints on product attributes would be considered by the Bureau in the context of R&D agreements.

C. Part 2: The Criminal Prohibition

1. Characterization of Criminal Agreements

Section 1.3 of the Guidelines states that only "agreements between competitors to fix prices, reduce output or allocate markets that constitute naked restraints on competition (restraints that are not implemented in furtherance of a legitimate collaboration, strategic alliance or joint

venture)" will be subject to criminal prosecution under Section 45. This new per se approach marks a significant departure from prior Canadian law, which previously required proof that an agreement unduly lessen competition" (a test the Canadian Supreme Court called a "partial rule of reason" analysis[10]) before it could be found to constitute a criminal offense. The Sections agree the proposed definition includes the types of anticompetitive agreements that should be prosecuted as per se criminal offenses,[11] and commend the Bureau for proposing to apply the criminal provision only to naked restraints on competition.

The imposition of criminal sanctions is a serious matter that can have devastating consequences for a company and its employees, including enormous fines, loss of personal liberty, stigma associated with having been convicted of (or even charged with) a crime, reputational damage that can result in substantial business losses, and follow-on civil litigation that can expose the company to large damage awards. It is precisely for this reason that the U.S. DOJ focuses its criminal antitrust prosecutions narrowly on hard-core violations—price fixing, bid-rigging, and market allocations.[12] By contrast, the U.S. DOJ does not treat cases in which the legality of the challenged conduct may be open to good faith debate, or a defendant has acted in good faith and without awareness that its actions arguably violate the law, as criminal matters. Over time, this approach has established clear, predictable boundaries for businesses.

Canada, of course, does not have a comparable historical record of enforcement under its new per se regime at this stage. So, in order to provide clear and predictable standards for businesses and individuals, it is critical that the Guidelines identify the specific types of conduct that will be subject to criminal prosecution as clearly as possible. The Guidelines substantially achieve this goal by drawing a bright line in Section 2.4 around price-fixing, market allocation, and output restriction agreements—agreements traditionally regarded as hard-core offenses by the U.S. DOJ and the U.S. courts.

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[10] *R. v. Nova Scotia Pharm. Soc'y* (1992), 43 C.P.R. (3d) 1.

[11] *Compare* U.S. Dep't of Justice & Federal Trade Comm'n, *Guidelines for Collaborations Among Competitors*, § 1.2 (April 2000) ("Agreements of a type that always or almost always tends to raise price or to reduce output are per se illegal. . . . Types of agreements that have been held per se illegal include agreements among competitors to fix prices or output, rig bids, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce."), www.ftc.gov/os/2000/04/ftcdojguidelines.pdf.

[12] *See* Thomas O. Barnett, Asst. Att'y General, Antitrust Div., U.S. Dep't of Justice, *Criminal Enforcement of Antitrust Laws: The U.S. Model*, at 2, Fordham Competition Law Inst. Annual Conference on Int'l Antitrust Law & Policy (Sept. 14, 2006), www.usdoj.gov/atr/public/speeches/218336.pdf.

2. Ancillary Restraints Defense [Guidelines § 2.5]

The Sections commend the Bureau's approach to the ancillary restraints defense against criminal prosecution provided under Section 45(4) of the Act. The Bureau's articulation of the necessary conditions for the defense to apply to a particular restraint—namely, that the restraint be (1) "ancillary to a broader or separate agreement" and (2) "directly related and reasonably necessary for giving effect to broader objective"—appears generally to be consistent with the ancillary restraints doctrine under U.S. law and the articulation of that doctrine in the U.S. FTC/DOJ Competitor Collaboration Guidelines:

> If . . . participants in an efficiency-enhancing integration of economic activity enter into an agreement that is reasonably related to the integration and reasonably necessary to achieve its procompetitive benefits, the Agencies analyze the agreement under the rule of reason, even if it is of a type that might otherwise be considered per se illegal.[13]

By acknowledging that ancillary agreements, by statute, are specifically excluded from criminal prosecution, the Guidelines reduce the risk that procompetitive collaborations might be discouraged by the threat of per se condemnation and the imposition of criminal sanctions. In this regard, the Sections also commend the Bureau's statement in Section 2.5(c) that in determining whether a restraint is "reasonably necessary," it will not "second guess" the parties' choice of agreements "with reference to some other restraint that may have been less restrictive in some insignificant way" or "examine theoretically less restrictive alternatives that are not practical given the business circumstances." Such second guessing could lead to the punishment of good faith business judgments and discourage legitimate commercial arrangements. This policy judgment is likewise shared by the U.S. antitrust enforcement agencies and reflected in their Competitor Collaboration Guidelines:

> An agreement may be "reasonably necessary" without being essential. However, if the participants could achieve an equivalent or comparable efficiency-enhancing integration through practical, significantly less restrictive means, then the Agencies conclude that the agreement is not reasonably necessary. In making this assessment, except in unusual circumstances, the Agencies consider whether practical, significantly less restrictive means were reasonably available when the

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[13] *See* U.S. DOJ/FTC *Antitrust Guidelines for Collaborations Among Competitors*, § 3.2 (citing *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 339 n.7, 356-57 (1982)).

> agreement was entered into, but do not search for a theoretically less restrictive alternative that was not practical given the business realities.[14]

The Sections would like to point out one potentially important difference between Canadian and U.S. law in terms of the availability and application of the ancillary restraints defense. In the United States today, the ancillary restraints defense typically is raised only in defense to civil challenges to agreements between or among competitors under Section 1 of the Sherman Act.[15] In such cases, the challenged restraint ultimately may be held to be per se illegal if it is found not to be "reasonably related" or "reasonably necessary" to the collaboration. But, even if a restraint is condemned as per se illegal, that finding rarely leads to the imposition of criminal sanctions unless the parties' assertion that the restraint is ancillary is merely a cover for an otherwise unlawful "hard core" violation.

By contrast, the ancillary restraints defense in Canada is statutory and provides an affirmative defense specifically against criminal prosecution. The Sections have concerns about the extent to which restraints that ultimately may not satisfy the formal requirements of the ancillary restraints defense, but the "ancillary" nature of which is not spurious (or merely a sham), may be prosecuted as per se criminal violations under Section 45 of the Act. Such prosecutions would appear to be at odds with the Bureau's stated position that criminal liability should be reserved only for naked restraints. Moreover, they could lead to the criminal prosecution of parties to an otherwise legitimate joint venture, even where they possessed little or no market power and the challenged restraint posed no realistic threat of injury to competition. As the Sections noted above, these cases most likely would be prosecuted in the United States on a civil, not a criminal, basis even if the per se rule applied. Given the risk that some parties might be discouraged from entering into potentially procompetitive collaborations for fear of exposure to criminal prosecution, the Sections suggest that, as a matter of policy, the Bureau should, absent a sham, review a continuing and legitimate joint venture that may have an ancillary restraint under Section 90.1 of the Act, rather than Section 45.

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[14] *See id.* § 3.2 (citing *Maricopa*, 457 U.S. at 352-53, and *Broad. Music, Inc. v. Columbia Broad. Sys.*, 441 U.S. 1, 20-21 (1979)).

[15] *See, e.g.*, *Rothery Storage & Van Co. v. Atlas Van Lines*, 792 F.2d 210 (D.C. Cir. 1986); *Polk Bros. v. Forest City Enters.*, 776 F.2d 185 (7th Cir. 1985).

3. Bid-Rigging [Guidelines § 1.2]

Section 1.2(d) of the Guidelines affirms that big-rigging agreements generally will be assessed under Sections 47 or 90.1 of the Act—not as a per se offense under Section 45. Thus, the operative bid-rigging provision on the criminal side is Section 47, which is meant to "occupy the field" with respect to this type of activity; this is to be distinguished from the prior regime in which bid-rigging conduct that might not offend Section 47 (for example, because the agreement between bidders was made known to the caller of the bids), could nevertheless expose participants to conspiracy allegations under Section 45. The Sections view the Guidelines as intending to clarify that criminal exposure falls under Section 47 only, and commend the Bureau for this clarification.

At the same time, Section 1.2(d) of the Guidelines refers to activities involving bid-rigging that may still be assessed under Section 45 of the Act. That Section states that "where an agreement includes other restraints on competition apart from bid-rigging that may contravene the conspiracy provision in Section 45 (such as where competitors agree to rig bids *and* allocate markets) or if the bid-rigging is part of a broader conspiracy to lessen competition, the agreement may be assessed under either or both of Sections 45 or 47." The Sections suggest that the Bureau provide further clarification and concrete examples of the kinds of bid-rigging agreements that may remain subject to criminal prosecution under Section 45. Again, given the severity of the penalties for Section 45 offenses, it is important that the Guidelines are both clear and predictable in this regard.

The Sections commend the Bureau for clarifying that bidding consortia are not subject to criminal prosecution in situations where the submission or withdrawal of bids are made known to the person who called for said bids. This exemption recognizes the commercial reality that bidders may need to form bid consortia to effectively bid for certain projects, and that once the caller of bids is made aware of the agreement between bidders, the activity is not criminal. The Sections suggest, however, that the Bureau provide further clarification with respect to the manner in which it will determine that a bid-rigging agreement substantially lessens competition, and thus should be assessed under Section 90.1 of the Act.

Section 1.2(d) provides:

> Where the agreement between competitors is limited to "bid-rigging", as defined in section 47 of the Act, the agreement will be assessed under section 47 or section 90.1, and not section 45. In particular, the Bureau will not assess under section 45 agreements among bidders to submit or withdraw a bid that are made known to the person who called or requested the bids or tenders.

The Sections note that Section 47 of the Act defines "bid-rigging" as an agreement not to bid "where the agreement or arrangement is not made known to the person calling for or requesting the bids." Accordingly, by definition, Section 47 would not apply to disclosed bidding arrangements. The Sections recommend that the Bureau consider deleting the language indicating that concealed bid-rigging would be assessed under Section 90.1, so that the definition of "bid-rigging" in Section 47 of the Act is applied consistently.

D. Part 3: The Civil Provision

1. Joint Production Agreements [Guidelines § 3.9(b)-(c)]

Sections 3.9(b) and (c) of the Guidelines address the extent to which joint production agreements might restrain competition or discourage companies from competing independently. Section 3.6(b), specifically, appears to adopt a presumption that "parties can normally achieve the benefits of a joint production arrangement without imposing restraints on competition in the downstream market." The Sections encourage the Bureau to consider whether that presumption (assuming it is one) is warranted and whether an alternative approach, focusing on the "reasonable necessity" of any restraints on downstream competition adopted as part of a joint production collaboration, might be a preferable approach**.**

The U.S. DOJ/FTC Competitor Collaboration Guidelines adopt that approach.[16] While those guidelines also recognize the potential for downstream restraints to adversely affect downstream competition under particular circumstances,[17] they acknowledge the business reality that such restraints might be reasonably related, and reasonably necessary, to encourage parties to invest in new or expanded production capacity or to share production technology—the procompetitive benefits of which may offset any possible anticompetitive effects of the downstream restraints.

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[16] *See* U.S. DOJ/FTC *Antitrust Guidelines for Collaborations Among Competitors*, § 3.36(b).
[17] *Id.* § 3.31(a).

2. Efficiency Exception: Burden of Proof [Guidelines § 3.5(a)]

Section 3.5(a) of the Guidelines raises a question regarding the extent to which and how any efficiencies attributable to a competitor collaboration will be taken into account under Section 90.1 of the Act. The third paragraph of that subsection states that the Bureau will "require[] information that describes the *precise nature and magnitude* of each type of *anticipated* efficiency gain," as well as "the likelihood that such gains will be achieved and why those gains are not likely to be achieved if" the agreement is disallowed.[18] These statements could be read strictly to impose a burden of production or persuasion that no parties could realistically meet at the stage when they are only contemplating a collaboration—or the adoption of an ancillary restraint as part of a collaboration. By definition, the anticipated efficiencies will not have been realized and, therefore, any precise measurement or quantification of those efficiencies may be difficult. The Sections encourage the Bureau to further explain how "precise" the evidence supporting claimed efficiencies must be before those efficiencies will be credited, or to modify the standard to reflect the predictive nature of such efficiencies at the time of analysis.

3. Efficiency Exception: Cognizable Efficiencies [Guidelines § 3.5(a)]

The Sections also suggest that the Bureau consider modifying its statement in the fourth paragraph of Section 3.5(a) that it will not credit efficiencies that "would likely be attained in any event through alternative means." Specifically, the Sections suggest inserting "reasonable" or "practical, significantly less restrictive" before the term "alternatives." This proposed change does not reflect a substantive disagreement with what the Sections perceive to be the intended point of the statement—namely, to recognize only those efficiencies attributable to restraints that are reasonably necessary to a collaboration. Rather, the change is intended only to conform this statement with the approach the Bureau has taken elsewhere in the Guidelines and in its Bulletin on merger efficiencies, as well as that taken by the U.S. enforcement agencies.[19]

4. Information Sharing Agreements [Guidelines § 3.7]

Section 3.7 of the Guidelines establishes the conditions under which information sharing between competitors is likely to give rise to anticompetitive concerns. The Sections first applaud the Bureau for its detailed explanation of the factors that will be considered when assessing information-sharing agreements because this explanation provides parties with the tools

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[18] Guidelines § 3.5(a) (emphasis added).
[19] *See U.S. DOJ/FTC Antitrust Guidelines for Collaborations Among Competitors*, § 3.36(b).

necessary to evaluate their collaborations. To this end, the Sections recommend that the Bureau consider one additional level of security for such good-faith collaborations: a safe harbor provision similar to the U.S. DOJ/FTC Statements for Antitrust Enforcement Policy in Healthcare ("U.S. Healthcare Guidelines") on information exchanges.[20]

Under the U.S. Healthcare Guidelines—often used by analogy to counsel clients in a wide range of non-healthcare industries—there is a safe harbor for participation in surveys of prices for services and benefits for personnel if: (1) the survey is managed by a third-party; (2) the information is more than three months old; (3) at least five competitors participate in the survey, and none represents more than 25 percent (weighted) of any particular statistic; and (4) the information has been sufficiently aggregated to conceal competitors' identities.[21] The intent of the U.S. Healthcare Guidelines is to ensure that information is shared for procompetitive reasons and not used for "discussion or coordination" of prices or costs.[22] The safe harbor provision achieves this objective while minimizing the costs of compliance for both companies and government enforcement agencies.

CONCLUSION

The Guidelines mark a substantial achievement in articulating how the Bureau will analyze competitor collaborations. They generally reflect deliberative and well-informed choices in one of the most challenging areas of competition law and policy. Because uncertainty in the antitrust rules for competitor collaborations—and, in particular, the extent to which they may be subject to criminal prosecution—could discourage procompetitive investments, it is imperative that the Guidelines be as clear as possible. The Sections respectfully encourage the Bureau to consider the suggestions in these comments as a means to clarify their enforcement policies further and to provide the most guidance possible to the bar and the business community.

Respectfully submitted,

American Bar Association
Section of Antitrust Law
Section of International Law

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[20] U.S. Dep't of Justice & Fed. Trade Comm'n, *Statement 6: Enforcement Policy on Provider Participation in Exchanges of Price and Cost Information*, Statements of Antitrust Enforcement Policy in Health Care (1996).

[21] *Id.*

[22] *Id.*