



THE CANADIAN CHAMBER OF COMMERCE
LA CHAMBRE DE COMMERCE DU CANADA

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Submission to the Competition Bureau

COMMENTS ON THE DRAFT COMPETITOR COLLABORATION GUIDELINES

August 2009



CANADIAN CHAMBER SUBMISSION ON THE DRAFT COMPETITOR COLLABORATION GUIDELINES

The Canadian Chamber of Commerce ("Canadian Chamber") welcomes the opportunity to provide comments on the Draft Competitor Collaboration Guidelines (the "Guidelines").

The Canadian Chamber is Canada's largest and most representative business association. Through a unique two-way consultative process, the Chamber represents approximately 175,000 members through our network of over 325 local chambers of commerce and boards of trade located in every province, territory, and federal electoral constituency.

The Canadian Chamber commends the Bureau for providing a clear and detailed statement of the Bureau's position with respect to enforcement of the recently amended Competition Act (the "Act") provisions dealing with competitor collaborations. While the amendments, in part, signal a stricter approach to the most egregious forms of cartel conduct, the Guidelines properly recognize that competitor collaborations can represent pro-competitive, efficiency enhancing business arrangements that should continue to be permitted under Canada's competition laws. Indeed, the vast majority of businesses in Canada are committed to compliance with the law and clear guidance that sets out the range of prohibited conduct while not deterring constructive commercial arrangements is welcomed by the business community.

Overall, the Canadian Chamber considers the Guidelines to be informative and balanced. The Canadian Chamber particularly welcomes the Guidelines' clarification of the Bureau's approach to the application of the amended provisions to dual distribution arrangements, franchises and agreements with respect to the purchase, as opposed to the sale, of products. The Canadian Chamber's principal concern with Guidelines is the proposed delineation between conduct that will attract criminal or civil treatment and the application of the ancillary restraint defence, which is the key focus of this submission, following which some additional points are addressed briefly.

Criminal vs. Civil Treatment and the Ancillary Restraint Defence

The Guidelines suggest that the criminal offence set out in Section 45, as amended, is intended to apply to "the most egregious forms of cartel agreements, while at the same time removing the threat of criminal sanctions for legitimate collaborations to avoid discouraging firms from engaging in potentially beneficial alliances". The Guidelines further provide that, "The amended criminal prohibition is reserved for agreements that constitute naked restraints on competition (restraints that are not implemented in furtherance of a legitimate collaboration, strategic alliance or joint venture). Other forms of competitor collaborations, such as joint ventures and strategic alliances, may be subject to review under a civil provision that prohibits agreements only where they are likely to substantially lessen or prevent competition".



Taken together, these statements suggest that *bona fide* competitor collaborations that are not naked restraints would be outside the reach of the criminal prohibition and would be challenged, if at all, only under the civil provision (Section 90.1). Remedies would only be required where such collaborations would result in a substantial lessening of competition. The Canadian Chamber welcomes this approach insofar as it appears to provide a reasonable and practical delineation of conduct that warrants possible criminal treatment from that which does not. It is difficult, however, to reconcile this approach with the Guidelines' analysis of the application of the ancillary restraint defence. In that context the Guidelines indicate that parties to an otherwise *bona fide* competitor collaboration (for example, a joint venture) may be subject to criminal prosecution and penalties where they fail to demonstrate that the ancillary restraint is not reasonably necessary to achieve the objectives of the separate or broader agreement to which the restraint in issue is ancillary.

The Canadian Chamber appreciates the Bureau's assertion that it will not "second guess" the parties with reference "to some other restraint that may have been less restrictive in some insignificant way". Nevertheless, concepts such as "less restrictive in some insignificant way" and "significantly less restrictive restraints" introduce a degree of subjectivity and uncertainty that the Canadian Chamber views as unhelpful.

The Canadian Chamber notes that in the context of dual distribution arrangements the Guidelines conclude that, "Given that such agreements can be pro-competitive, they are not deserving of condemnation without a detailed inquiry into their actual competitive effects". The Canadian Chamber questions why the same approach is not applied to ancillary restraints, provided that the arrangement is not a sham. The difficulty with the Guidelines' approach to the ancillary restraint defence is that an inquiry into actual or likely competitive effects is never mandated. This leads to the prospect that parties who, for a *bona fide* purpose, enter into a collaboration that could not by any measure result in a material effect on competition, could nevertheless be subject to criminal liability if they fail to meet an amorphous "reasonably necessary" standard, even though the collaboration could not be successfully challenged under the civil provision (Section 90.1), because there would be no substantial lessening of competition.

In short, the Canadian Chamber recommends that as a matter of policy the Bureau's approach should be that, absent a sham, competitor collaborations for a legitimate commercial purpose that include an ancillary restraint should be examined, if at all, under Section 90.1, rather than Section 45. In other words, such restraints will be deemed to be "reasonably necessary", unless they are a sham, with the proviso that such arrangements may still be subject to challenge in appropriate cases under Section 90.1. The Canadian Chamber believes that this approach is consistent with the Guidelines' stated premise of reserving criminal treatment for the most egregious conduct involving naked restraints. It must be remembered that *per se* treatment is not premised on the idea that competitive effects are irrelevant, but rather, on the idea that some forms of conduct are so clearly egregious that the competitive effects are presumed and a detailed inquiry into such effects is therefore unnecessary, the Guidelines' approach to ancillary restraints leaves



open the possibility that criminal processes will be applied not only to conduct that does not fall into the “most egregious” category, but which may actually be competitively benign or even pro-competitive.

Common Control

The Guidelines (in para. 2.6(a)) provide some indication that the Bureau may look beyond the strict requirements of the express affiliate exemption in determining its enforcement approach in particular cases. The Guidelines state, “...the Bureau will consider the nature of any common control or corporate relationship between the parties when determining whether referral of an agreement for prosecution is appropriate”. The Canadian Chamber considers that it would be helpful if the Guidelines were more explicit in this area. Is it the Bureau’s position that it is unlikely to prosecute 50/50 joint ventures, even though the affiliate defence would not technically be available. The Guidelines suggest that the only option the Bureau would consider in these circumstances is whether or not to prosecute. It would be helpful if the Guidelines indicated whether and to what extent consideration might be given to proceeding under Section 90.1 rather than Section 45 in these circumstances; it would seem reasonable, for example, for the Bureau to conclude that in the case of common control, consideration would be given first to proceeding under Section 90.1 with an enumeration of the specific factors that might lead the Bureau, if at all, to proceed under Section 45. Further, it would be helpful to have a more fulsome statement of the Bureau’s position with respect to circumstances short of common control (e.g. where a party has a substantial interest, say up to 49%), or where a party exercises control in fact.

IP Rights

The Guidelines say very little with respect to the important area of agreements dealing with IP rights. For example, the Guidelines do not comment on the Bureau’s approach to agreements to settle patent disputes. Are there circumstances where such agreements might lead to prosecution under Section 45? If so, it would be helpful if the Guidelines set out the factors that might lead the Bureau to make such a determination. Alternatively, if the Bureau’s position is that such arrangements would only be challenged, if at all, under section 90.1, that should be expressly stated in the Guidelines.

The Civil Provision-Changing Market Conditions

The Guidelines indicate that in assessing conduct under Section 90.1, “The Bureau will consider the share of the relevant market held by the parties at the time the agreement is entered into and also, to the extent possible, the share of the market that will be held by the parties during the term of the agreement”. It is unclear whether this entails that any possible changes in the structure of the market will be assessed by the Bureau “to the extent possible” at the time the agreement is entered into and factored into the Bureau’s analysis at that time, or whether the parties may be subject to challenge at a later time if the market changes in a way that was unknown, or could have not have been predicted. Although this should be clarified, the Canadian Chamber’s view is that the latter



approach ought not to be adopted. Parties may be reluctant to make substantial investments in commercial arrangements that might be overturned on the basis of the occurrence of unknown or unanticipated circumstances. Even if the former interpretation is what is intended, it should be made clear that only anticipated future occurrences with a very high probability of actually occurring will be taken into account in the Bureau's assessment. Not only is the latter approach commercially reasonable, it accords with the approach taken by the Bureau with respect to merger review, on which the analytical framework underlying Section 90.1 is based.

The Canadian Chamber appreciates the opportunity to submit these comments. We would be pleased to discuss with them with you in greater detail.