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Our File No. *32031*
Date *August 14, 2009*

Via Email; Original to Follow

Ms. Melanie Aitken
Commissioner of Competition
Competition Bureau
Place du Portage, Phase 1
50 Victoria Street
Gatineau, QC
K1A 0C9

Dear Commissioner:

Re: Draft Competitor Collaboration Guidelines

We are writing on behalf of members of the Competition Policy Group, a group of major companies with a longstanding interest in the development of sound competition law in Canada,[1] to provide comments on the "*Draft Competitor Collaboration Guidelines*"[2] published in May 2009. The Group welcomes the Bureau's guidance on its approach to enforcing the new competitor agreements regime and believes that these guidelines will contribute significantly to the predictability and transparency of the Bureau's approach to enforcement.

In particular, given the broad literal scope of the amended conspiracy offence and the very heavy potential criminal penalties associated with it, the Bureau's clear indications that it will reserve section 45 for hard-core cartel conduct provide important certainty for businesses entering into commercial arrangements. However, two aspects of the Draft Guidelines are inconsistent with this constructive approach: the unnecessarily restrictive interpretation of the ancillary restraints defence and the consideration of franchisee-initiated or distributor-initiated vertical restraints under the criminal track. The Group believes that greater reliance on the civil rather than criminal track in these areas would be appropriate and would not compromise the Bureau's legitimate enforcement objectives under the criminal provision. The Group also believes that certain revisions to the "safe harbour" and "evidence of agreement" sections of the

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[1] The current members of the Group are: BP Canada Energy Company, Ford Motor Company of Canada, Limited, General Electric Canada Inc., General Motors of Canada Limited, IBM Canada Limited, Imperial Oil Limited, Intel Corporation and Petro Canada.

[2] Competition Bureau of Canada, *Competitor Collaboration Guidelines – Draft for Public Consultation*, May 8, 2009 ["*Draft Guidelines*"].

Guidelines would increase business certainty, while focusing Bureau enforcement resources on genuinely anti-competitive activities.

Ancillary Restraints Defence

The ancillary restraints defence is an important mechanism for protecting *bona fide* commercial relationships from criminal prosecution under section 45, and ensuring that any potential competition concerns which may arise are evaluated under the competitive effects test and factors applicable to the new section 90.1 civil track. The Group is concerned that the interpretation of the ancillary restraints defence set out in section 2.5 of the Draft Guidelines is more restrictive than is necessary in the context of the criminal track.

The Draft Guidelines set out the general principle that section 45 will only be applied to hard-core cartel conduct. The suggestion in the Draft Guidelines, that parties raising the ancillary restraints defence will need to demonstrate why less restrictive alternatives were infeasible or inadequate, goes beyond ensuring that the defence is not used as a sham to protect hard-core cartel conduct. This approach will be difficult for parties to apply in practice, and suggests that parties may not be able to assert this defence in connection with some commercial relationships that should be subject to review under the civil provision.

The Group respectfully suggests that the test for whether a restraint is reasonably necessary to achieve the objectives of a broader and separate agreement should not include a requirement for the parties to show that alternative approaches were infeasible or inadequate. Any directly related restriction which has a plausible (non-sham) link to enabling the objectives of one or more parties to the broader agreement should be sufficient.

Vertical Agreements Subject to Criminal Track

Section 2.3(c) of the Draft Guidelines states that dual distribution, franchise and other types of vertical arrangements will normally be dealt with under the civil rather than the criminal track. This is entirely appropriate because such arrangements do not constitute hard-core cartel conduct (and indeed are seldom anti-competitive).

Unfortunately, this clear statement of principle is undermined by references to an exception where two or more distributors / franchisees have coerced or induced the supplier / franchisor to participate in an agreement that may include price, territorial or output restrictions. There are many distribution systems in which distributors and their supplier, or franchisees and their franchisor, collaborate on issues related to the distribution of the supplier's products and how they compete against other brands. Depending on the scope of geographic markets and distributor / franchisee territories, some of the distributors and franchisees may be actual or potential "competitors" of each other and the supplier / franchisor, while others may not. However, this overall form of collaboration is predominantly a type of "vertical" activity related to the organization of a system of distribution, with any "horizontal" aspects being secondary.

In the Group's respectful opinion, any price, territorial, output or other competitive restriction arising in these settings should be dealt with under the civil track because actual competitive effects need to be assessed on a case-by-case basis. The Group therefore

believes that the exception which contemplates use of the criminal track in such situations should be removed. Similarly, Example 5(b) on page 41 of the Draft Guidelines (relating to franchisee-initiated minimum prices) should be revised to focus on the civil track.

Safe Harbours

Section 3.4(b) of the Draft Guidelines incorporates the same market share "safe harbours" used in the *Merger Enforcement Guidelines* into the analytical framework for competitor agreements being reviewed on the civil track. This includes a two-part safe harbour in respect of coordinated behaviour involving the parties to a competitor agreement plus other involved competitors in a concentrated market: where the top four firms have a combined share of less than 65%; or where the parties to the agreement have a combined share of less than 10%.

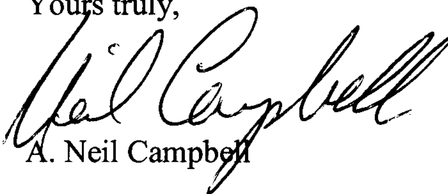
In practice, it is difficult to imagine how an agreement between parties with a combined share of 10% could be expected to result in a substantial lessening or prevention of competition, even if the top four firms in the market account for more than 65% of total sales. The Group notes that the US guidelines on competitor collaboration use 20% as a safe harbour. The Group encourages the Bureau to increase the 10% threshold in section 3.4(b) to at least 20%.

Evidence of an Agreement

Section 2.2 of the Draft Guidelines indicates that an agreement "may be inferred from a course of conduct *or* other evidence". Also in section 2.2 of the Draft Guidelines, the Bureau indicates that it does not consider that "conscious parallelism" is sufficient to establish an agreement for the purpose of subsection 45(1). The recognition that conscious parallelism does not constitute an illegal competitor agreement is appropriate (and consistent with other major jurisdictions such as the US and EU). On this basis, the Group suggests that the Bureau clarify that an agreement "may be inferred from a course of conduct *and* other evidence", rather than from a course of conduct alone.

The Group appreciates the opportunity to provide comments on the Bureau's *Draft Competitor Collaboration Guidelines*. We would be pleased to discuss any aspect of these comments with you or your staff if that would be useful as the Bureau completes its work on these *Guidelines*.

Yours truly,



A. Neil Campbell

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Copy: Members of the Competition Policy Group
J. William Rowley QC
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