

INTERNATIONAL BAR ASSOCIATION
CARTELS WORKING GROUP

PUBLIC COMMENT FOR THE CANADIAN COMPETITION BUREAU ON THE DRAFT CARTEL ENFORCEMENT GUIDELINES

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1. INTRODUCTION

1.1. The Cartels Working Group ("Working Group") of the International Bar Association (the "IBA") welcomes the opportunity to submit this comment in response to the Competition Bureau's public consultation on the Cartel Enforcement Guidelines ("Guidelines"). This submission addresses key issues raised in the Guidelines and offers a comparative analysis of international approaches to cartel enforcement.

2. ABOUT THE IBA

2.1. The IBA is the world's leading international organization of legal practitioners, bar associations, and law societies. As the "global voice of the legal profession", the IBA contributes to the development of international law reform and shapes the future of the legal profession throughout the world. It has a membership of more than 80,000 individual lawyers from over 170 countries, including Canada, and considerable expertise in assisting the global legal community.

2.2. The Working Group includes competition law practitioners with a wide range of jurisdictional backgrounds and professional experience, including with international cartel matters and leniency regimes. Such varied experience places it in a unique position to provide a comparative analysis for the development of competition laws, including through submissions developed by its working groups on various aspects of competition law and policy.

3. SUMMARY OF COMMENTS

3.1. The Working Group commends the Competition Bureau for what are in large measure clear and coherent Guidelines. The Working Group believes that the Guidelines will meaningfully assist market participants and practitioners to navigate the *Competition Act's* cartel provisions.

3.2. The Working Group also acknowledges that the Guidelines discuss an enforcement approach informed by the language of the *Competition Act* and Canadian jurisprudence, not international laws or jurisprudence. Accordingly, the Working Group has focused its comments on those topics where it believes international perspectives could inform and improve the Guidelines.

4. MARKET DEFINITION AND COMPETITOR IDENTIFICATION

4.1. The Guidelines describe how the Competition Bureau will analyze competitors and market definition for the purposes of the cartel offence in section 45. Because section 45 applies only to agreements or arrangements between competitors, the analysis of who qualifies as a competitor is critically important. Market participants need clarity to be able to comply with section 45 and avoid its serious criminal penalties.

4.2. The Working Group acknowledges that the Guidelines attempt to provide such clarity but submits that they could be improved to describe in more detail the theoretical

framework that the Competition Bureau applies to determine that parties to an agreement are competitors for the purposes of section 45.

4.3. The Guidelines discuss this topic at paragraph 48, which states, "In determining whether parties to an agreement are competitors for the purpose of subsection 45(1), **we will not engage in a detailed market analysis**, in the sense of having to prove the full nature and extent of the market and the participants within it. As long as the parties are offering, or, in the absence of the agreement, would likely offer, the same or otherwise competing products in the same or otherwise competing regions, we will generally conclude that the parties are in competition with one another for the supply of such products." [Emphasis added]. Paragraph 49 then lists evidence the Bureau may consider when determining whether the parties are competitors.

4.4. While paragraphs 48 and 49 of the Guidelines state the Competition Bureau's view that section 45 does not require a detailed market analysis, they do not provide an analytical framework to determine whether parties to an agreement are competitors. Instead, they indicate that the Competition Bureau will identify competitors who sell "the same or otherwise competing" products or sell "similar" products to "similar" customers. Such descriptions raise the question: what is a "similar product" or an "otherwise competing product"? More fundamentally the statement that a detailed market analysis is not required could imply that the parties do not need to be in the same relevant market – which leads one to ask how they could be competitors at all.

4.5. The Working Group submits that the Guidelines could clarify that while a detailed market analysis is not required in the sense that precise boundaries or participants are unnecessary for the purposes of section 45, the Competition Bureau will nevertheless look for evidence that the parties to the agreement **are in the same relevant market in the sense that they supply substitutable products or services**. That appears to be the implication of phrases such as selling "the same or otherwise competing products in the same or otherwise competing regions" but the implication could be explicit. The Guidelines could then draw on the Competition Tribunal's jurisprudence in which it has discussed product substitution and rivalry more generally to describe what it means for products to be substitutes.

4.6. The Working Group's suggestion aligns with international approaches. Most major international cartel regimes do not require a full relevant market analysis to prove a cartel violation – but they do look for evidence of rivalry and substitution.

4.7. Examples from Europe are instructive. European antitrust law differentiates violations between those that are "by object" and those "by effect". Cartels are typically a "by object" violation. Although European courts acknowledge that a "by object" infringement does not typically require a full relevant market analysis, one may still be necessary depending on the facts. For example, the court has held that a full market analysis is necessary where without it, it would be impossible to determine whether the

behaviour has as its object or effect the prevention, restriction, or distortion of competition within the internal market.[1]

4.8. Similarly, Dutch case law recognizes that the relevant market analysis should be flexible and responsive to the individual case: "[…] the determination of the relevant market is an instrument for identifying and delineating the boundaries of competition between undertakings. The primary purpose of market definition is to identify in a systematic way the competitive constraints facing the undertakings concerned. The definition of the relevant market is not an end in itself, but an instrument for the analysis required for the application of the competition rules. The degree of detail required depends on what is necessary for the assessment of the conduct that is the subject of the investigation**. The requirements that the definition of the relevant market must satisfy thus vary according to the circumstances of the individual case.**" [Emphasis added].[2]

4.9. Other European countries in cartel cases follow a similar approach insofar as they do not require a full relevant market analysis, but instead focus on product substitution as the key indicator of competition. In Austria, the Austrian Competition Authority and the Cartel Court do not conduct a full SSNIP-based market definition analysis but focus on whether the parties **actually or potentially supply substitutable products or services**.[3] Croatia applies a similar analysis and looks at whether the parties actually or potentially supply substitutable products or services.[4]

4.10. Non-European countries have adopted a similar approach. In New Zealand, the High Court in *Commerce Commission v Air New Zealand* (2011) confirmed that "competition" in the cartel context is used in a "descriptive or relational" sense focusing on "rivalrous behaviour", and that "market definition is not required where the word 'competition' is used in this sense". In the U.S., Section 1 of the Sherman Act broadly prohibits conduct in restraint of trade or commerce. It is established that Cartel conduct, such as bid-rigging, tying agreements, and horizontal market agreements, are largely considered per se offences under the Sherman Act, where further inquiry into their effects on the market is not required.[5] This Section does not require the agreement to have been made between competitors, obviating the need for a full market analysis.

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[1] See Judgment of 6 July 2000, Volkswagen v Commission, T-62/98, EU:T:2000:180, paragraph 230 & Judgment of 8 July 2004, Mannesmannröhren-Werke v Commission, T-44/00, EU:T:2004:218, paragraph 132.

[2] Judgment of the Dutch Trade and Industry Appeals Tribunal of 28 April 2020, ECLI:NL:CBB:2020:307 (Cold-storage firms), at para 3.3.2; See also Judgement of the Court (Third Chamber) of 11 July 2013, C-439/11P, ECLI:EU:C:2013:513 at paras 71-72.

[3] KartG 2005 (BGBl I 2005/61) at section 23; See also 16 Ok 1/18k, 16 Ok 3/22k and 16 Ok 6/12.

[4] Decision of Croatian Competition Agency, 18 December 2024, Class: UP/I 034-03/15-01/020, Reg.No.: 580-09/132-24-389.

[5] *U.S. v Socony-Vacuum Oil Co.*, 310 U.S 150 (1940); Most recently upheld in *Honey Bum, LLC v Fashion Nova Inc,* 22-55150 9th Cir. 2023, at p 7.

While the full analysis is not required, parties still must show the rough contours of the relevant market.[6]

4.11. A constant theme running through these international approaches is the rivalry occasioned by the ability of buyers to substitute between the products of the alleged cartelists. The Guidelines hint at that theoretical framework, but do not describe it explicitly. The Working Group recommends that they do so by explaining that section 45 requires that the parties supply competing products or services – meaning products or services in the same relevant market – but that the precise boundaries of that relevant market may not need to be determined so long as there is sufficient evidence of rivalrous behaviour caused by the ability of buyers to substitute between the products or services of the alleged cartelists.

4.12. In addition to clarification regarding how the Competition Bureau will identify competitors, the Guidelines would benefit from additional clarity regarding the description of **potential** competitors. Specifically, paragraph 42 of the Guidelines states, "Subsection 45(1) prohibits certain agreements between businesses that compete or are likely to compete ("potential competitors"). […] Under subsection 45(1), parties will be found to be competitors when they compete, **or it is reasonable to believe they would be likely to compete**, on the products that are subject to the agreement."

4.13. This statement in paragraph 42 is incomplete and should be corrected. Potential competitors are not defined with reference to the possibility of competition between them, but by the potential for competition between them **in the absence of the illegal agreement**.[7] This is a critical distinction. Many businesses could compete with one another in theory if they hired the right people, opened the right offices, invested in the right technology, etc. But these businesses are not potential competitors as defined in the *Competition Act*. The Guidelines correctly state the law in paragraph 50, but paragraph 42 should be corrected to ensure clarity and accuracy.

5. BID RIGGING

5.1. The Working Group commends the Competition Bureau for this expanded guidance on its enforcement approach to bid-rigging under section 47 of the *Competition Act*. It offers its comments on one topic concerning the applicability of section 47 to buy and sell-side bidding processes.

5.2. The Guidelines state that section 47 applies to buy and sell-side bidding processes. Specifically, paragraph 128 of the Guidelines states, "Parties should note that the definitions provided in section 47(1) are exhaustive and can be applied to a call for bids to purchase (i.e. auctions) or supply a product (e.g. procurement of business supplies)."

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6 *Republic Tobacco Co.,* v *North Atlantic Trading Company Inc et al.,* 381 F.3d 717.

7 *Competition Act* , RSC 1985 c C-34, s. 45(8): competitor includes a person who it is reasonable to believe would be likely to compete with respect to a product in the absence of a conspiracy, agreement or arrangement to do anything referred to in paragraphs (1)(a) to (c).

5.3. This interpretation of section 47 is in notable contrast to Parliament's decision to limit the cartel provision in section 45 to sell-side agreements, and specifically "hardcore cartel agreements" that fix prices, allocate markets or restrict output.[8] Buy-side agreements were reserved for non-criminal analysis under s. 90.1 because they are not always anti-competitive – in fact, they are often procompetitive.[9] Given Parliament's recognition that buy-side agreements can be procompetitive and should not be subject to criminal sanction, it is strange that section 47 would criminalize buy-side agreements. Doing so would seem to produce an absurd result in which process rather than substance would determine the criminality of the conduct. For example, an agreement among competitors to jointly purchase inputs is not captured by section 45 and, thus, not a criminal offence. But if that same joint purchase occurred through joint bidding at an auction, the Guidelines state that the conduct would be criminal. The same conduct – a joint purchase – has produced two entirely different outcomes based solely on the process through which the joint purchase occurred.

5.4. International examples do not draw the same statutory distinction between cartel conduct and bid-rigging as does the *Competition Act*. But they do demonstrate that there is a consistency of approach to buy-side and sell-side agreements that is lacking in the Guidelines.

5.5. Many jurisdictions do not have a separate prohibition on bid-rigging, as this conduct is captured by the more general cartel provision. For example, the EU and the United States do not have standalone provisions for bid-rigging but instead use their general cartel prohibitions which apply to both buy and sell-side agreements. Other examples include Austria and New Zealand:

5.5.1. In Austria, under the general cartel prohibitions, all agreements that have as their object or effect the restriction of competition are prohibited. Bid-rigging is treated as a prohibition by object and is prohibited regardless of whether it occurs on the buy or sell-side.

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[8] See *Sunderland v Toronto Regional Real Estate Board,* 2023 FC 1293 at paras 97-98; *Mohr v National Hockey League,* 2021 FC 488 at paras 33 & 57; *Jensen v Samsung Electronics Co Ltd.,* 2021 FC 1185 at para 90; *Commissioner of Competition v HarperCollins Publishers L.L.C and HarperCollins Canada Limited,* 2017 CACT 10 at para 59; *Difederico v Amazon.com Inc.,* 2023 FC 1156 at paras 95 & 100.

[9] See Competition Bureau Canada, *Competition Bureau statement on the application of the Competition Act to no-poaching, wage-fixing and other buy-side agreements,* (Gatineau, 2020) online: https://www.canada.ca/en/competition-bureau/news/2020/11/competition-bureau-statement-on-the-application-of-the-competition-act-to-no-poaching-wage-fixing-and-other-buy-side-agreements.html; *Mohr v National Hockey League,* 2021 FC 488 at para 60; Canada, Innovation, Science and Economic Development Canada, *The Future of Competition Policy in Canada,* (Ottawa, 2025) at s VI 3 online:https://ised-isde.canada.ca/site/strategic-policy-sector/en/marketplace-framework-policy/competition-policy/future-competition-policy-canada; Competition Bureau Canada, *Competitor Collaboration Guidelines* (Ottawa, 2021), online: https://competition-bureau.canada.ca/en/how-we-foster-competition/education-and-outreach/competitor-collaboration-guidelines at 3.7.5.

5.5.2. New Zealand is similar and both buy and sell-side agreements are captured under the general cartel provisions. There is no separate provision for bid-rigging, and the Commission confirmed in *Commerce Commission v Ronovation* in 2019 that bid-rigging is captured by the cartel provisions stating, "[a]greements not to compete at auctions or on tenders are also commonly known as bid rigging" and that bid rigging "is a form of cartel conduct and is prohibited by both the former and current s 30 of the Commerce Act."[10]

5.6. Because these jurisdictions do not have separate provisions specific to bid-rigging, the approach applied to cartels generally also applies to bid-rigging: if the cartel provision can apply to buy and sell-side agreements it can also apply to buy or sell-side bid-rigging conduct.

5.7. The Guidelines propose a different outcome for Canada. Buy-side conduct is not captured by Canada's general cartel provision (section 45) but is captured and criminalized by its bid-rigging provision (section 47).

5.8. Ultimately, the scope of section 47 of the *Competition Act* is a question of domestic Canadian law that will be determined by Canadian courts. However, to the extent that the Cartel Enforcement Guidelines take the position that section 47 can apply to buy-side conduct the Working Group wished to provide the Competition Bureau with information about the international approaches to this issue as described herein. It also recommends that the Guidelines provide more clarity on the circumstances in which the Competition Bureau would be likely to enforce section 47 in the context of buy-side conduct. Given the focus of the jurisprudence and the Guidelines on sell-side conduct, parties are left with very little idea about how and when the Competition Bureau might enforce a very serious criminal section against buy-side conduct. For example, it could be useful to clarify that the Competition Bureau will only enforce section 47 in the context of buy-side conduct where there is clear evidence of harm (given the overall recognition that buy-side conduct can be procompetitive).

6. CONCLUSION

6.1. Thank you for the opportunity to comment as part of this important review of the Cartel Enforcement Guidelines. The Working Group would welcome the opportunity to engage further with the Competition Bureau as it continues to develop the Guidelines.

[10] *Commerce Commission v Ronovation*, [2019] NZHC 2303.