



Enforcement Guidelines



Price Maintenance (Section 76 of the *Competition Act*)

DRAFT FOR CONSULTATION



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PREFACE

The Competition Bureau (the "Bureau"), as an independent law enforcement agency, ensures that Canadian businesses and consumers prosper in a competitive and innovative marketplace. The Bureau investigates anti-competitive practices and promotes compliance with the laws under its jurisdiction, namely the *Competition Act* (the "Act"),¹ the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act* and the *Precious Metals Marking Act*.

In 2009, important amendments modernized the Act to enhance the predictability, efficiency and effectiveness of its enforcement and administration and to better protect Canadians from the harm caused by anti-competitive conduct. Among other things, these amendments decriminalized price maintenance conduct under the Act, repealing the former criminal offence in section 61 and introducing a new non-criminal provision in section 76. Under the new non-criminal provision, it is necessary to demonstrate that price maintenance conduct has had, is having or is likely to have an adverse effect on competition in a market.

The *Enforcement Guidelines – Price Maintenance (Section 76 of the Competition Act)* (the "Guidelines") describe the Bureau's general approach to enforcing section 76 of the Act, including with respect to common business practices such as minimum resale pricing, manufacturer-suggested resale pricing ("MSRP") and minimum advertised pricing ("MAP"). Issuance of these Guidelines is in furtherance of the Bureau's Action Plan on Transparency, which aims to promote the development of a more cost-effective, efficient and responsive agency, while providing Canadians with more opportunities to learn about the Bureau's work.

These Guidelines supersede all previous statements made by the Commissioner of Competition (the "Commissioner") or other Bureau officials regarding the Bureau's approach to the administration and enforcement of section 76 of the Act. These Guidelines do not replace the advice of legal counsel and are not intended to restate the law or to constitute a binding statement of how the Commissioner will exercise discretion in a particular situation. The enforcement decisions of the Commissioner and the ultimate resolution of issues will depend on the particular circumstances of the matter in question. Final interpretation of the law is the responsibility of the Competition Tribunal (the "Tribunal") and the courts.

The Bureau may revisit certain aspects of these Guidelines in light of experience and changing circumstances.

¹ R.S.C. 1985, c. C-34, as amended.



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1. EXECUTIVE SUMMARY

Price maintenance under the Act occurs when a person influences upward or discourages the reduction of another person's selling or advertised prices by means of a threat, promise or agreement, or when a person refuses to supply another person or otherwise discriminates against them because of their low pricing policy, in each case with the result that competition in a market is likely to be adversely affected.

More specifically, section 76 of the Act permits the Tribunal to make a remedial order in respect of three types of price maintenance conduct where the conduct has had, is having or is likely to have an adverse effect on competition in a market:

- (i) First, subparagraph 76(1)(a)(i) applies where a person, by agreement, threat, promise or any like means, influences upward or discourages the reduction of the price at which the person's customer or any other person to whom the product comes for resale supplies or offers to supply or advertises a product within Canada. This can include minimum resale price, MSRP and MAP policies, and the Act sets out the circumstances in which such practices will be deemed to influence prices.
- (ii) Second, subparagraph 76(1)(a)(ii) applies when a person refuses to supply a product or otherwise discriminates against a person or class of persons engaged in business in Canada because of the low pricing policy of that person or class of persons. However, the Act provides exceptions where the person refused supply was engaged in certain conduct in respect of the products, namely loss leadering, bait-and-switch selling, misleading advertising or not providing the level of service that purchasers might reasonably expect.
- (iii) Third, subsection 76(8) applies when a person, by agreement, threat, promise or any like means, induces a supplier, as a condition of doing business with the supplier, to refuse to supply a product to a person or class of persons because of the low pricing policy of that person or class of persons.

Price maintenance practices are common in many markets, and can be pro-competitive in many circumstances. For example, price maintenance conduct can enhance non-price dimensions of intra-brand competition, such as service and inventory levels, among competing retailers of the same brand of product, and can correct "free-riding" among retailers. Price maintenance conduct can

also stimulate inter-brand competition among competing brands of products, such as by facilitating the entry or expansion of competitors by encouraging retailers to stock and promote the supplier's products, or by encouraging retailers to engage in marketing efforts for a particular product.²

An important requirement under section 76 is that price maintenance conduct has had, is having or is likely to have an adverse effect on competition in a market, which is only likely to occur in some circumstances. This may occur, for example, if price maintenance conduct resulted in the exclusion of rivals or new entrant competitors to the supplier or the exclusion of discount or more efficient retail competitors. It may also occur if price maintenance conduct was being used to inhibit competition among suppliers or retailers.

When examining whether price maintenance conduct is likely to adversely affect competition in a market, market power is a key factor in the Bureau's analysis. In a general sense, market power is the ability of a firm (or group of firms) to profitably maintain prices above the competitive level, or other elements of competition, such as quality, choice, service or innovation, below the competitive level, for a significant period of time. Where price maintenance conduct is unlikely to create, preserve or enhance market power, the conduct is unlikely to have an adverse effect on competition in a market.

Upon finding that price maintenance conduct is likely to adversely affect competition in a market, the Tribunal may make a remedial order prohibiting the conduct. Alternatively, the Tribunal may make an order requiring a supplier or a retailer, as the case may be, to do business with another person on usual trade terms. The Act provides that no order may be issued in respect of conduct that falls under paragraph 76(1)(a) if the supplier and retailer are principal and agent, affiliated corporations, or representatives of the same entity or of affiliated entities.

In considering enforcement action under section 76 of the Act, the Bureau evaluates allegations of price maintenance on a case-by-case basis, in the context of structural and other market-specific characteristics. In the course of an examination or inquiry, the Commissioner will generally afford parties the opportunity to respond to the Bureau's concerns regarding alleged contraventions of section 76 and to propose an appropriate resolution to address them. Where the Bureau believes that price maintenance conduct satisfies the elements of both section 76 and another provision of the Act, the Bureau will generally base its choice of enforcement provision on the particular facts of each

² The terms "supplier" and "retailer" are used in these Guidelines for convenience, to differentiate persons operating at different levels of the distribution chain with respect to a product (who may also or alternatively be competitors of each other). Use of the term "retailer" should not be taken to suggest that the person necessarily supplies a product to consumers or end-users; in some circumstances a "retailer" could be a "supplier" to persons other than end-users of the product.

case, the market situation and any other relevant circumstances, including the nature of the remedy available under each section of the Act.

Pursuant to section 103.1 of the Act, private parties may seek leave of the Tribunal to bring an application under section 76 if they are directly affected by conduct that falls within the price maintenance provision.

2. INFLUENCING UPWARD OR DISCOURAGING THE REDUCTION OF SELLING OR ADVERTISED PRICES OF A PRODUCT (s. 76(1)(a)(i))

2.1 The Statutory Elements

Subparagraph 76(1)(a)(i) of the Act applies where a person, by agreement, threat, promise or any like means, influences upward or discourages the reduction of the price at which the person's customer or any other person to whom the product comes for resale supplies or offers to supply or advertises a product within Canada.

Four elements must be established before subparagraph 76(1)(a)(i) can apply:

- (i) a type of person specified in subsection 76(3) of the Act;
- (ii) by agreement, threat, promise or any like means;
- (iii) directly or indirectly influences upward or discourages the reduction of selling or advertised prices of a product in Canada;
- (iv) of the person's customer or any other person to whom the person's product comes for resale.

2.1.1 A Person Specified in Subsection 76(3) of the Act

Pursuant to subsection 76(3) of the Act, paragraph 76(1)(a) applies only to a person that falls within one or more of the following three categories:

- (i) persons engaged in the business of producing or supplying a product;
- (ii) persons who extend credit by way of credit cards or otherwise engage in a business relating to credit cards; or
- (iii) persons who have the exclusive rights and privileges conferred by a patent, trade-mark, copyright, registered industrial design or registered circuit topography.

The Bureau's view is that, depending on the circumstances, section 76 may apply to more than one person. For example, where several competing suppliers each engage in price maintenance conduct within the scope of paragraph 76(1)(a) of the Act, the Bureau may consider enforcement action against more than one of those suppliers to address any adverse effect on competition in a market. Where such conduct is the result of an agreement between competitors or potential competitors, it could also raise issues under section 45 of the Act, the criminal conspiracy provision, or section 90.1 of the Act, the civil competitor collaboration provision, depending on the circumstances.

Notwithstanding that a person may fall under subsection 76(3) of the Act, subsection 76(4) provides that the Tribunal cannot issue a remedial order in respect of conduct that falls under paragraph 76(1)(a) if the supplier and retailer are principal and agent, affiliated corporations, or representatives of the same entity or of affiliated entities. Section 2 of the Act sets out the rules by which affiliation is to be determined. In determining whether a supplier and retailer can appropriately be characterized as principal and agent for the purposes of subsection 76(4), the Bureau will consider relevant legal principles and the nature of the claimed agency relationship, including whether the relationship was established for the purpose of avoiding scrutiny of the parties' conduct under section 76 of the Act.

2.1.2 By Agreement, Threat, Promise or any Like Means

Subparagraph 76(1)(a)(i) of the Act applies to price maintenance conduct that arises by way of an "agreement, threat, promise or any like means". The Bureau considers this element to include any conduct by which a supplier implicitly or explicitly purports to either confer a benefit on a retailer who adheres to the supplier's influence on the retailer's selling or advertised prices, or to impose a penalty on a retailer if the retailer disregards the supplier's influence on its prices.

2.1.3 Directly or Indirectly Influences Upward or Discourages the Reduction of Selling or Advertised Prices of a Product

Under subparagraph 76(1)(a)(i), it must be shown that the supplier's price maintenance conduct has directly or indirectly influenced another person's selling or advertised prices upward or discouraged their reduction. An increase by a supplier in the wholesale price of a product may lead to an increase in the price of a retailer's product. However, the Bureau will not consider a supplier's increase of a wholesale price, in and of itself, to have satisfied the requirement that the supplier influenced upward or discouraged the reduction of selling or advertised prices of a product.

The Bureau's approach in this respect is consistent with the Tribunal's decision in *Visa/MasterCard*, where the Tribunal concluded that an increase in prices in the market in which a retailer sells or advertises a product as a consequence of the mere exercise of market power by a supplier is not determinative.³ In other words, a price increase in a downstream market is insufficient, in and of itself, to establish that a particular supplier has directly or indirectly influenced upward or discouraged the reduction of a retailer's prices.

The Tribunal considers that a supplier's influence on a retailer's selling or advertised prices could represent something more than the mere exercise of market power when, for example, the supplier's conduct results in a retailer setting the price of its product at a level higher than it would otherwise sell the product.⁴ Indications that the retailer has set the price above this level could include, for example, evidence that the retailer's price was lower prior to implementation of the price maintenance conduct, or internal documentary evidence prepared in the ordinary course of business that shows the retailer would have charged a lower price absent the supplier's price maintenance conduct.

Subparagraph 76(1)(a)(i) of the Act provides that a supplier's influence on selling or advertised prices may occur "directly or indirectly". In the Bureau's view, a "direct" influence on prices will typically occur where a supplier specifies a particular price to the retailer at or above which the retailer is to sell or advertise a product.

In contrast, an "indirect" influence on prices may occur where a supplier does not specify a particular price, but nevertheless influences the level of prices through non-price-based conduct, such as the terms and conditions on which the supplier provides a product to a retailer. For example, and as the Tribunal recognized in *Visa/MasterCard*, a supplier's terms and conditions of sale may reduce or eliminate competitive forces that would otherwise discipline the supplier's pricing, such that the supplier's price for the product supplied, and by extension the price of the retailer's product, is higher than would be the case absent the price maintenance conduct.⁵ Similarly, a supplier's use of parity agreements may also indirectly influence a retailer's prices upwards, for example, to the extent the agreement may prevent a retailer in a lower-cost sales channel from setting prices at a level less than retailers in a higher-cost sales channel.⁶

³ *The Commissioner of Competition v. Visa Canada Corporation and MasterCard International Incorporated*, 2013 Comp. Trib. 10 at para. 162 [*Visa/MasterCard*].

⁴ *Ibid.* at paras. 162 and 269.

⁵ *Ibid.* at para. 321-322.

⁶ For the purposes of these Guidelines, the Bureau considers a "parity agreement", broadly speaking, to be a type of agreement pursuant to which a supplier's customer is required to set the selling or advertised price of a product not at a particular (absolute) level, but rather in reference to the selling or advertised price of the product of another of the supplier's customers or types of customers.

2.1.4 Of the Person's Customer or Any Other Person to Whom the Supplier's Product Comes for Resale

Subparagraph 76(1)(a)(i) provides that price maintenance conduct must influence upward or discourage the reduction of “the price at which the person's customer or any other person to whom the product comes for resale supplies or offers to supply or advertises a product within Canada”. While subparagraph 76(1)(a)(i), and section 76 more generally, refers to “products”, both physical articles and services fall within the scope of the provision.⁷

The Tribunal has interpreted this element of subparagraph 76(1)(a)(i) to mean that a supplier's customer, or any other person who obtains the supplier's product, must resell a product to another person, and that the product resold “should be identical or substantially similar on the important characteristics of the product” supplied.⁸ This could be the case, for example, when a manufacturer distributes its products to end-users through a network of distributors or retailers.

That said, the Tribunal has not concluded that the product that a retailer resells must be identical to the product supplied to it by the supplier, or that it must be in the same product market as the product supplied.⁹ For example, circumstances where the product resold is repackaged, reapportioned, processed or transformed from the product supplied, or is bundled with products other than the product supplied but in a manner in which the product supplied is a significant component of the product resold, could satisfy the Tribunal's interpretation.

2.2 Minimum Resale Price, MSRP and MAP Policies

In some circumstances, the Act deems a supplier's use of minimum resale prices, MSRP or MAP to satisfy the “influencing” requirement of subparagraph 76(1)(a)(i) of the Act.

With respect to MSRP and minimum resale pricing practices, subsection 76(5) of the Act stipulates that a supplier's suggestion to a retailer of a resale price or a minimum resale price for the product supplied is proof that the retailer has been “influenced” in its pricing. The presumption does not apply, however, where the supplier establishes that, in suggesting a price, it made clear to the retailer that

⁷ Subsection 2(1) of the Act defines a “product” to include an “article” and a “service”. The term “article” is in turn defined broadly to mean real and personal property of every description, including energy, tickets, money and deeds and instruments relating to property or an interest in a corporation or its assets. A “service” is also defined broadly to mean a service of any description, whether industrial, trade, professional or otherwise.

⁸ *Visa/MasterCard*, *supra* note 3 at paras. 115 and 134.

⁹ *Ibid.* at para. 134.

the person is under no obligation to accept the suggestion and will in no way suffer in its business relations with the supplier or with any other person if it fails to accept the suggestion.

With respect to advertised prices, subsection 76(6) of the Act stipulates that the publication of an advertisement by a supplier, other than a retailer, that mentions a resale price for the product is proof that the supplier is “influencing upward” the selling price of any person to whom the product comes for resale. The presumption does not apply, however, where the price is expressed in the advertisement in a way that makes it clear to any person who may view the advertisement that the product may be sold at a lower price. In the Bureau’s view, a supplier may establish this latter exception where the advertisement clearly indicates, in plain language, that a retailer may sell the product for less than the advertised price.

Pursuant to subsection 76(7) of the Act, subsection 76(5) and subsection 76(6) do not apply to a price that is affixed or applied to a product or its package or container.

Where a supplier establishes that an exception applies to the application of subsection 76(5) or subsection 76(6) of the Act, such that the supplier’s minimum resale pricing, MSRP or MAP pricing practices are not deemed to satisfy the “influencing” requirement, this is not a complete defence to subparagraph 76(1)(a)(i) of the Act. Rather, the Bureau may still establish, based on the available evidence, that the supplier’s minimum resale pricing, MSRP or MAP pricing practices have in fact influenced a retailer’s pricing.

3. REFUSING TO SUPPLY DUE TO A LOW PRICING POLICY (s. 76(1)(a)(ii))

3.1 The Statutory Elements

Subject to the applicability of an exception in subsection 76(9) of the Act, subparagraph 76(1)(a)(ii) applies where a person refuses to supply a product or otherwise discriminates against any person or class of persons engaged in business in Canada because of the low pricing policy of that other person or class of persons.

Four elements must be established before subparagraph 76(1)(a)(ii) can apply:

- (i) refusal to supply a product or discrimination in the supply of a product;
- (ii) to or against a person or class of persons engaged in business in Canada;

- (iii) due to that person's or class of persons' low pricing policy;
- (iv) by a type of person specified in subsection 76(3) of the Act.¹⁰

The refusal to supply provision in subparagraph 76(1)(a)(ii) of the Act shares similarities with the general refusal to deal provision in section 75 of the Act. Where evidence suggests that a refusal to supply has occurred due to a person's low pricing policy, the Bureau will typically examine such conduct under subparagraph 76(1)(a)(ii), rather than under section 75.

3.1.1 Refusal to Supply a Product or Discrimination in the Supply of a Product

Subparagraph 76(1)(a)(ii) of the Act encompasses two types of conduct: refusals to supply a product and discrimination in the supply of a product. As is discussed in Section 3.1.3 of these Guidelines, in each case the occurrence of the conduct must be due to the low pricing policy of the person who is refused supply or discriminated against for subparagraph 76(1)(a)(ii) to apply.

A refusal to supply can be either express or constructive. In the Bureau's experience, most alleged refusals to supply under section 76 are express, whereby a supplier simply withholds supply of a product from a customer. However, owing to the fact that an available remedy for refusals to supply under section 76 is an order requiring a person to do business with a customer (or supplier, as the case may be) "on usual trade terms", the Bureau will also consider whether a supplier has constructively refused to supply a customer. Such constructive refusals could involve price or non-price conduct by the supplier. With respect to the former, for example, a wholesale price for the product supplied that is patently in excess of any price that could reasonably be expected to be obtained for the product in a downstream market could constitute a constructive refusal to supply. Non-price constructive refusals to supply could include, for example, delays in filling orders or filling orders in an incomplete manner.

In the Bureau's view, discrimination in the supply of a product based on another person's low pricing policy will typically occur when a supplier provides a product to a customer at a price that is less favourable than the price at which the supplier provides the same product to another customer that does not engage in a low pricing policy. Thus, the Bureau considers that a supplier's discriminatory pricing to customers that have a low pricing policy will generally fall within the scope of subparagraph 76(1)(a)(ii) of the Act. Discrimination may also take the form of non-price conduct, such as supplying a product on less favourable terms or conditions than are provided to other customers, or withholding certain benefits from customers that have a low pricing policy, such as marketing or advertising support in respect of the product supplied.

¹⁰ Section 2.1.1 of these Guidelines discusses the Bureau's approach to subsection 76(3).

For the purposes of subparagraph 76(1)(a)(ii) of the Act, a single incidence of a refusal to supply or discrimination is sufficient to engage the provision. In other words, there is no requirement that the conduct constitute a “practice” or that a supplier engage in the conduct on multiple occasions or over a period of time. That said, where the supplier’s conduct is isolated in time or in scope, it may be more difficult to establish that the price maintenance conduct is likely to result in an adverse effect on competition in a market.

3.1.2 To or Against a Person or Class of Persons Engaged in Business in Canada

Subparagraph 76(1)(a)(ii) applies only in respect of refusals to supply, or discrimination against, a person or class of persons engaged in business in Canada. The Bureau considers a “class of persons” to be a group of firms that share common distinguishing attributes or characteristics. The Bureau interprets the provision’s reference to a “class of persons” to mean that it may apply when firms that do not have a low pricing policy are refused supply or otherwise discriminated against because they fall within a class of persons that, as a group, generally employs a low pricing policy.

In determining whether a person or class of persons is “engaged in business in Canada”, the Bureau will have regard to the definition of “business” in subsection 2(1) of the Act and previous Bureau guidance with respect to the location of a business. In this latter respect, the Bureau’s *Pre-Merger Notification Interpretation Guideline Number 1* notes that a business with a physical location or office in Canada will be considered to be “in Canada”, as may a business that is partly or predominantly in another jurisdiction if it has some component or presence in Canada.¹¹ The Bureau will consider all relevant factors in determining whether a person has a sufficient link to Canada so as to be considered to be engaged in business in Canada, including the location of its tangible, intangible and financial assets, and the nature of any revenues generated from sales to customers in Canada.¹²

3.1.3 Due to that Person’s or Class of Persons’ Low Pricing Policy

The Bureau considers that a refusal to supply or discrimination in the supply of a product will have occurred “because of the low pricing policy” of a person or class of persons where the low pricing policy is the proximate cause of the supplier’s

¹¹ Competition Bureau, *Pre-Merger Notification Interpretation Guideline Number 1: Definition of “operating business” (Section 108 of the Act)*, 20 June 2011, p. 2.

¹² See Competition Bureau, *Pre-Merger Notification Interpretation Guideline Number 15: Assets in Canada and Gross Revenues From Sale in, from or into Canada (Sections 109 and 110 of the Act)*, Draft for Public Consultation, 11 April 2012, p. 2 ff.

refusal or discrimination. To be clear, a person's low pricing policy need not be the only or even the primary reason for the refusal or discrimination, but rather a factor informing the supplier's decision.

The Bureau will consider any available evidence in assessing whether a refusal to supply or discrimination in the supply of a product is due to another person's low pricing policy. For example, the Bureau will consider any statements by a supplier, be they internal to the supplier or in external communications, that suggest a reason for the refusal or discrimination is the other person's low pricing policy. The Bureau will also consider whether it is reasonable to infer from the other person's low pricing policy that such policy is in fact the proximate cause of the refusal to supply or discrimination.

In this regard, a "low pricing policy" consists of two elements: "low pricing" and a "policy". Several factors may be relevant in assessing "low pricing", including whether the retailer's price is below a supplier's MSRP, MAP or other pricing suggestions, and whether the retailer's price is less than the price the retailer charges for similar products or the price that other retailers typically charge for the same or similar products. Because subparagraph 76(1)(a)(ii) (and subsection 76(8)) refer to a "policy" rather than a "practice", the Bureau considers that a retailer's stated intent with respect to a future course of low pricing conduct may constitute a low pricing policy, even where the retailer has not yet engaged in the conduct. Conversely, a retailer that has engaged in low pricing conduct to a limited or isolated extent could be considered not to have a "policy" of low pricing, depending on the circumstances.

Section 76 of the Act does not require that a person's "low pricing policy" be in respect of a product previously supplied by the particular supplier who now refuses to supply or discriminates in the supply of a product. In other words, the section applies to circumstances where, for example, a person has a low pricing policy generally, such as a discount retailer, and, on that basis, is refused supply of a product that it has never previously purchased or resold. Thus, there is no requirement that a person be an existing or previous customer of a supplier for the "refusal to supply" provisions of section 76 to apply.

3.2 Exceptions to the Applicability of Subparagraph 76(1)(a)(ii)

An exception to the applicability of subparagraph 76(1)(a)(ii) of the Act is available to a supplier whose product has previously been resold by a person or class of persons that engaged in certain conduct in respect of the product. In particular, pursuant to subsection 76(9) of the Act, the Tribunal cannot make a remedial order in respect of a supplier's refusal to supply or discrimination in the supply of a product where the retailer was engaged in any of the following practices in respect of the product:

- loss leadering, or more specifically, selling the product at a low price for the purpose of advertising, rather than for the purpose of making a profit;
- bait-and-switch selling, or more specifically, using the product not for the purpose of selling it at a profit, but for the purpose of attracting customers in the hope of selling them other products;
- misleading advertising; or
- not providing the level of service that purchasers of the products might reasonably expect.

During the course of an investigation, the Bureau will consider any available evidence that may suggest one or more of the above exceptions may apply. However, in the Bureau's view, a supplier that purports to rely on an exception in subsection 76(9) of the Act bears the burden of proving the applicability of the exception. In this regard, the supplier must demonstrate that it had sufficient information to reasonably believe that the retailer had in fact engaged in conduct within the scope of an exception.

For any of the exceptions in subsection 76(9) to apply, the conduct in question must have constituted a "practice" by the retailer. As the Bureau indicates in its Abuse of Dominance Guidelines, a "practice" normally involves more than one isolated act, but may also constitute a single act that is sustained and systemic or that has had or is having a lasting impact in a market.¹³ With respect to the "misleading advertising" exception in paragraph 76(9)(c) of the Act, in determining whether an advertisement is misleading, the Bureau will consider the factors relevant to an assessment of allegedly false or misleading representations under sections 52 and 74.01 of the Act, including the literal meaning of the advertisement and the general impression it conveys.

4. INDUCING A SUPPLIER TO REFUSE TO SUPPLY A PERSON OR CLASS OF PERSONS DUE TO THAT PERSON'S OR CLASS OF PERSONS' LOW PRICING POLICY (s. 76(8))

4.1 The Statutory Elements

¹³ Competition Bureau, *Enforcement Guidelines: The Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act)*, 20 September 2012, Section 3.1 [Abuse of Dominance Guidelines].

Subsection 76(8) of the Act applies when a person, by agreement, threat, promise or any like means, induces a supplier, as a condition of doing business with the supplier, to refuse to supply a product to a person or class of persons because of the low pricing policy of that person or class of persons, with the result that competition in a market has been, is or is likely to be adversely affected.

Five elements must be established before subsection 76(8) can apply:

- (i) a person, as a condition of doing business with a supplier;
- (ii) induces the supplier by agreement, threat, promise or any like means;
- (iii) to refuse to supply a product to a particular person or class of persons;
- (iv) because of that person's or class of persons' low pricing policy;
- (v) with the result that the inducement has had, is having or is likely to have an adverse effect on competition in a market.

Sections 3.1.1 and 3.1.3 of these Guidelines discuss the Bureau's approach under section 76 of the Act to refusals to supply attributable to another person's or class of persons' low pricing policy, while Section 5 discusses the Bureau's approach to the competitive effects test. The two remaining elements of subsection 76(8) are discussed below.

4.1.1 A Person, as a Condition of Doing Business with a Supplier

In the Bureau's view, subsection 76(8) applies both to a person that is currently doing business with a supplier, as well as to a person that has not previously done business with a supplier but who engages with the supplier with a view to doing business. In other words, depending on the circumstances, the provision may apply where a supplier refuses to supply a retailer in anticipation or expectation of securing the business of another person who induces the refusal as a condition of doing business with the supplier.

Pursuant to subsection 76(8) of the Act, a supplier's refusal to supply a person must occur as a condition of another person doing business with the supplier. Put differently, the provision will not be engaged where a person induces a supplier to refuse supply to another person if the person would have done business with the supplier regardless of the success of the inducement.

4.1.2 Induces the Supplier by Agreement, Threat, Promise or Any Like Means

Section 2.1.2 of these Guidelines discusses the Bureau's approach to the "agreement, threat, promise or any like means" requirement of subparagraph

76(1)(a)(i) of the Act, which approach the Bureau will similarly apply to subsection 76(8).

In the Bureau's view, the requirement that a person "has induced" a supplier to refuse to supply requires that any agreement, threat, promise or any like means which a person brings to bear against a supplier actually results in a refusal to supply by the supplier. Thus, the Bureau considers that this element of subsection 76(8) will generally not be met where, for example, a supplier agrees with a person to refuse supply to another person but does not actually implement the agreement.

Where an actual refusal to supply has occurred, the Bureau will consider whether the refusal was "induced" by another person. In this regard, if it can be shown that a supplier would have refused to supply a particular person regardless of any agreement, threat, promise or any like means with or by another person, the Bureau will not generally consider that other person to have "induced" the supplier's refusal to supply.

5. ADVERSE EFFECT ON COMPETITION IN A MARKET

Price maintenance conduct that falls under subparagraph 76(1)(a)(i), subparagraph 76(1)(a)(ii) or subsection 76(8) of the Act can be made subject to a remedial order by the Tribunal only where the conduct "has had, is having or is likely to have an adverse effect on competition in a market". The Tribunal has held that, based on its plain meaning, "adverse effect" is "a lower threshold" than "substantial lessening or prevention of competition", which is the standard for effects under sections 77, 79, 90.1 and 92 of the Act.¹⁴

The Tribunal has said that "without market power there can be no adverse effect in a market".¹⁵ In *Visa/MasterCard*, the Tribunal confirmed its approach in earlier cases that for conduct to have an "adverse effect" on competition, the remaining market participants must be placed in a position, as a result of the conduct, of created, enhanced or preserved market power.¹⁶ As a result, the Bureau will be concerned with price maintenance conduct under section 76 of the Act only where it is likely to create, preserve or enhance market power.

¹⁴ *B.-Filer v. The Bank of Nova Scotia*, 2006 Comp. Trib. 42 at para. 211 [*B.-Filer*].

¹⁵ *Nadeau Poultry Farm Limited v. Groupe Westco Inc.*, 2009 Comp. Trib. 6 at para. 369 [*Nadeau*].

¹⁶ *Visa/MasterCard*, *supra* note 3 at para. 350. See also *B-Filer*, *supra* note 14, and *Nadeau*, *ibid.*

The Bureau discusses its approach to assessing market power and competitive effects in its Abuse of Dominance Guidelines, Merger Enforcement Guidelines and Competitor Collaboration Guidelines.¹⁷ When assessing adverse effects on competition in this context, the exercise is a relative one; the Bureau will compare the level of competitiveness in the market in the presence of the particular price maintenance conduct with that which would exist in its absence to determine whether the effect of the conduct, in the past, present or future, creates, preserves or enhances market power. In this regard, the Bureau will consider whether the price maintenance conduct facilitates or is a result of coordination between suppliers or retailers that inhibits their competitive vigour, or whether the conduct excludes actual or potential competition at the supplier or retailer level, such that in either case the market would be more competitive in the absence of the price maintenance conduct.

5.1 Market Definition

Defining the relevant product and geographic markets is typically an important first step in assessing a person's ability to exercise market power. In defining relevant markets for the purposes of section 76 of the Act, the Bureau will follow the approach to market definition set out in the Abuse of Dominance Guidelines.¹⁸

In price maintenance cases, it can be particularly important to properly distinguish between a product brand and a relevant product market. A particular brand of product may not, in and of itself, constitute a separate relevant product market where consumers view other brands as substitutable products. That said, where a relevant product market is comprised of several competing brands, the Bureau will still assess the ability of any individual brand or brands to exercise market power within that market, based on the factors laid out in Section 5.2 of these Guidelines.

Of potential significance to market definition in price maintenance cases is the proliferation of e-commerce. In some instances, suppliers may employ price maintenance practices, such as MSRP and MAP policies, differentially across sales channels, such as between online and bricks-and-mortar retailers. In defining relevant markets for the purposes of section 76, the Bureau may consider whether, from a consumer perspective, different sales channels are most appropriately viewed as competitive substitutes or complements. For example, an online sales channel may supply a wider geographic market than a

¹⁷ Abuse of Dominance Guidelines, *supra* note 13; Competition Bureau, *Enforcement Guidelines: Merger Enforcement Guidelines*, 6 October 2011 [Merger Enforcement Guidelines]; and Competition Bureau, *Enforcement Guidelines: Competitor Collaboration Guidelines*, 23 December 2009 [Competitor Collaboration Guidelines].

¹⁸ Abuse of Dominance Guidelines, *ibid.* at Sections 2.1 and 2.2.

locally-based bricks-and-mortar sales channel, and markets that would traditionally be defined around the physical store locations of retailers may need to be viewed more broadly in determining whether or not an online sales channel is considered to be part of the same product market.

5.2 Market Power

In a general sense, market power is the ability of a firm (or group of firms) to profitably maintain prices above the competitive level, or other elements of competition, such as quality, choice, service or innovation, below the competitive level, for a significant period of time. In assessing market power for the purposes of section 76 of the Act, the Bureau will follow the approach set out in the Abuse of Dominance Guidelines.¹⁹

In price maintenance cases, the relevant market in which market power is to be assessed may differ, depending on the conduct at issue and the particular provision of section 76. Thus, the relevant question is whether a person(s), be it a supplier(s) or a retailer(s), is able to profitably maintain its prices above the competitive level as a result of price maintenance conduct.

The Bureau will consider both a firm's pre-existing market power (*i.e.*, any market power held by the firm notwithstanding any price maintenance conduct) and any market power derived from its price maintenance conduct. The Bureau will have regard to any direct indicators of market power, such as profitability or supra-competitive pricing, as well as qualitative and quantitative indirect indicators. In this latter regard, the Bureau will consider a variety of factors, such as, market share, including share stability and distribution, barriers to entry, including barriers created as a result of any price maintenance conduct, and other market characteristics, including the extent of technological change and retailer or supplier countervailing power.

With respect to market share, the Bureau's general approach is that a share of less than 35 percent will typically not prompt further examination of whether the firm possesses market power.²⁰ However, consistent with the Tribunal's finding in *Visa/MasterCard*, the Bureau is of the view that a firm with a market share of less than 35 percent could have some degree of unilateral market power in some instances, depending on the characteristics of the relevant market.²¹

¹⁹ *Ibid.* at Section 2.3.

²⁰ *Ibid.* at Section 2.3.1.

²¹ *Visa/MasterCard*, *supra* note 3 at para. 267.

5.3 Circumstances in Which Price Maintenance Conduct May Adversely Affect Competition

From an economic perspective, price maintenance conduct can be pro-competitive or anti-competitive, depending on the circumstances.²² In all cases, the conduct reduces intra-brand price competition downstream, since retailers cannot compete based on price in the sale of a particular branded product. At the same time, however, price maintenance conduct can be pro-competitive by enhancing the overall level of demand in a market through the stimulation of inter-brand competition and non-price dimensions of intra-brand competition. For example, price maintenance conduct may:

- eliminate inefficiency in non-price dimensions of intra-brand competition by, for example, correcting “free-riding” among downstream retailers. Absent the conduct, discounting retailers may free-ride on the investments of full-service retailers that provide product information and services to buyers, causing full-service retailers to lose sales to discounters and, as a result, to inefficiently reduce services. Price maintenance conduct may prevent discounters from undercutting the prices of full-service retailers, and may preserve incentives to offer efficient levels of service; and
- enhance inter-brand competition by providing retailers with a margin with which to, for example:
 - invest in promotional efforts, store enhancements or increased service, so as to stimulate demand for the supplier’s product in competition with rival retailers; or
 - stock and promote new or competing product brands, thereby facilitating entry or expansion.

Where price maintenance conduct is demand-enhancing in a market, the Bureau believes the conduct is unlikely to create, preserve or enhance market power, so as to have an adverse effect on competition in the market. However, in at least the following general circumstances, price maintenance conduct may be demand-restricting, adversely affecting competition in a market and serving to create, preserve or enhance market power:²³

²² See, e.g., *Visa/MasterCard*, *ibid* at para. 269.

²³ See *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007). In the Bureau’s view, there may be other circumstances in which price maintenance conduct may create, preserve or enhance market power, so as to have an adverse effect on competition in a market.

- Inhibiting competition between suppliers: Price maintenance conduct may be used by suppliers to facilitate less-vigorous price competition among them, or to help police a price-fixing arrangement;
- Inhibiting competition between retailers: One or more retailers may compel a supplier to adopt price maintenance conduct to facilitate less-vigorous price competition among them, or to help police a price-fixing arrangement;
- Supplier exclusion: An incumbent supplier may use price maintenance conduct to guarantee margins for retailers to make them unwilling to carry the products of rival or new entrant competitors to the supplier. To the extent this results in the foreclosure of downstream distribution channels to competing suppliers, it may limit or reduce the ability of such suppliers to discipline the supplier's wholesale pricing, so as to enable the supplier to charge a price that is higher than could be sustained absent the conduct; and
- Retailer exclusion: A person may compel a supplier to adopt price maintenance conduct with the objective to exclude competition to a retailer(s) from discount or more efficient retailers.

Supplier-based theories of harm are most likely to arise in the context of price maintenance conduct under paragraph 76(1)(a) of the Act, while retailer-based theories of harm are likely to be more common in respect of price maintenance conduct under subsection 76(8).²⁴ More specifically, in the Bureau's view, adverse effects on competition as a result of price maintenance conduct that falls within subparagraph 76(1)(a)(i) will typically manifest in the foreclosure of downstream distribution channels and the exclusion of suppliers that would otherwise compete with the firm engaging in the conduct. Similarly, in respect of price maintenance conduct under subsection 76(8), the Bureau will consider whether the conduct has excluded or is likely to exclude competitors of a retailer(s), such that prices in the relevant market can be profitably maintained above, or non-price dimensions of competition in the relevant market can be profitably maintained below, the level that would prevail absent the price maintenance conduct. Under either provision, the Bureau will also consider whether the price maintenance conduct facilitates or is a result of coordination at the supplier or retail level that inhibits competitive vigour in the market.

²⁴ Depending on the facts of a case, the Bureau may evaluate the competitive effects of specific price maintenance conduct under both paragraphs 76(1)(a) and subsection 76(8).

Price maintenance conduct that falls within subparagraph 76(1)(a)(ii) of the Act also has the potential to exclude the retailer that the supplier refuses to supply or otherwise discriminates against from the relevant market. However, because a remedial order in respect of conduct engaged in under this provision can only be issued against the supplier, the Bureau will consider the extent to which the refusal to supply has created, preserved or enhanced the supplier's market power. For example, if the product supplied occupies a significant position in the relevant market, the supplier's refusal to supply may cause the low pricing retailer to alter its business practices to obtain supply, which may have an exclusionary effect on the supplier's competitors. The Bureau will also consider whether the supplier's conduct facilitates or is a result of coordination with other suppliers that inhibits competitive vigour in the market.

In some circumstances, price maintenance conduct may occur in connection with agreements or arrangements between competing suppliers or competing retailers, which arrangements may themselves engage section 45 or 90.1 of the Act. Similarly, where price maintenance conduct is used to exclude competition, it may also give rise to issues under section 77 and/or section 79 of the Act. Section 6 of these Guidelines discusses the Bureau's enforcement approach where the Bureau believes conduct may satisfy the elements of both section 76 and another provision of the Act.

6. REMEDYING ADVERSE COMPETITIVE EFFECTS OF PRICE MAINTENANCE CONDUCT

The Tribunal may issue remedial orders upon finding that price maintenance conduct is likely to adversely affect competition in a market. In respect of conduct that falls under subparagraph 76(1)(a)(i) or 76(1)(a)(ii), the Tribunal may make an order pursuant to subsection 76(2) of the Act prohibiting a person from engaging in the conduct or requiring the person to accept another person as a customer within a specified time on usual trade terms.²⁵ In respect of conduct that falls under subsection 76(8), the Tribunal may make an order pursuant to that subsection prohibiting a person from engaging in the conduct or requiring the person to do business with another person on usual trade terms. Subsection 76(12) of the Act defines "trade terms" to mean terms in respect of payment, units of purchase and reasonable technical and servicing requirements.

²⁵ As noted in Section 2.1.2 and 3.2 of these Guidelines, the Tribunal cannot make an order under subsection 76(2) of the Act in respect of: (i) conduct that falls under paragraph 76(1)(a) of the Act where an exception in subsection 76(4) applies; or (ii) conduct that falls under subparagraph 76(1)(a)(ii) of the Act where an exception in subsection 76(9) applies.

Prior to commencing formal proceedings with the Tribunal under section 76, the Commissioner will generally afford parties the opportunity to respond to the Bureau's concerns regarding alleged contraventions of section 76 and to propose an appropriate resolution to address them. Generally, any approved resolution proposal will be embodied in a consent agreement registered with the Tribunal pursuant to section 105 of the Act. However, in some cases, and having regard to the Bureau's *Conformity Continuum*, the Bureau may determine that it is appropriate to resolve the matter by way of an alternative case resolution.²⁶ Where a consensual resolution cannot be reached, the Commissioner may file an application with the Tribunal.

As noted previously in these Guidelines, in some instances price maintenance conduct may also raise concerns under one or more other provisions of the Act. Pursuant to subsection 76(11) of the Act, the Commissioner may not commence an application under section 76 against a person on the basis of facts that are the same or substantially the same as the facts on the basis of which the Commissioner has commenced proceedings under section 45 or 49 or sought an order under section 79 or 90.1 of the Act. Where the Bureau believes that price maintenance conduct satisfies the elements of both section 76 and another provision of the Act, the Bureau will generally base its choice of enforcement provision on the particular facts of each case, the market situation and any other relevant considerations. The Bureau's decision will also be informed by the nature of the remedy under each section of the Act, and the remedy that the Bureau believes is necessary to alleviate the competitive harm in the particular case.

Section 103.1 of the Act allows private parties to seek leave of the Tribunal to bring an application under section 76. The Tribunal may grant leave if it has reason to believe that the applicant is directly affected by conduct that falls within the price maintenance provision and that could be made subject to a remedial order under section 76.

7. HYPOTHETICAL ILLUSTRATIVE EXAMPLES

The following examples are intended to illustrate the analytical framework that the Bureau will generally apply in conducting a review of alleged price maintenance conduct. As with these Guidelines generally, the Bureau's discussion of the examples below does not replace the advice of legal counsel and is not intended to restate the law or to constitute a binding statement of how the Commissioner will exercise discretion in a particular situation. The enforcement decisions of the Commissioner and the ultimate resolution of issues will depend on the particular circumstances of the matter in question.

²⁶ Competition Bureau, *Bulletin: Conformity Continuum*, 18 June 2000.

7.1 Example 1 – Co-operative Advertising Agreement

Scenario

Company X is a leading supplier of gadgets, which are sold to end-user consumers in Canada through an independent dealer network. X-branded gadgets are popular with consumers, representing more than 50% of the overall gadget market. To promote its gadgets, Company X conducts an ongoing and extensive national advertising campaign.

One year ago, Company X entered into standard-form co-operative advertising agreements with nearly all of its dealers. Pursuant to these agreements, Company X reimburses its dealers, on a quarterly basis, 50% of the dealer's cost of local audio and visual promotional expenses in respect of X-branded gadgets, up to a maximum of 2% of the value of all X-branded gadgets sold by the dealer during the quarter. To be eligible for the reimbursement, the co-operative advertising agreements stipulate that dealers must market X-branded gadgets using terminology and images pre-approved by Company X, and in addition must advertise X-branded gadgets, including on the Internet and dealer websites, at Company X's MSRP. While dealers are permitted to sell X-branded gadgets in-store for less than the advertised MSRP and still receive reimbursement under the co-operative advertising agreements, Company X prohibits dealers from noting in their advertisements that dealers may sell for less.

Company X's cooperative advertising reimbursement is a significant contributor to dealer margins, since local advertising is a crucial driver of gadget sales. In practice, nearly all dealers today sell X-branded gadgets at the advertised MSRP, and have prioritized the sales and marketing of advertising-supported X-branded gadgets over competing gadget brands.

Analysis

The Bureau would typically examine a co-operative advertising arrangement of the type described in this example under subparagraph 76(1)(a)(i) of the Act.²⁷ For the purposes of that provision, Company X: is a supplier within the meaning of subsection 76(3) of the Act; supplies X-branded gadgets to its dealers who sell a product, in this case the supplied gadgets, to consumers; and has implemented the co-operative advertising arrangement with its dealers through an express written agreement. As such, three of the four required elements for the applicability of subparagraph 76(1)(a)(i) are present in this case, leaving only the

²⁷ Where a supplier employs a dual-distribution arrangement, selling to end-users itself and through a dealer network, the Bureau may also examine a co-operative advertising agreement or arrangement under one or more other of the Act's civil provisions; see the Competitor Collaboration Guidelines, *supra* note 17 at Section 2.3.3.

fourth element, a direct or indirect influence by Company X on dealer prices, for consideration.

Although dealer advertisements pursuant to the co-operative advertising agreements omit any indication that dealers may sell X-branded gadgets for less than the advertised MSRP, subsection 76(6) of the Act would not apply so as to deem the advertisements to have influenced dealer prices upward. This is because the advertisements are published by retailers, rather than Company X, and the deeming provision in subsection 76(6) only applies to the publication of an advertisement by a supplier.

Absent applicability of the deeming provision, the Bureau would consider whether the co-operative advertising agreements have in fact influenced upward or discouraged the reduction of dealer prices. In this regard, the Bureau would consider any indications that, as a result of the co-operative advertising agreements, dealers set prices of X-branded gadgets at a higher level than they would have in the absence of the advertising reimbursement by Company X. For example, the Bureau would assess whether, in the one year since Company X has implemented the co-operating advertising arrangement, dealers charge a higher (inflation-adjusted) price for X-branded gadgets than they did prior to implementation of the arrangement. The Bureau would also have regard to any documentary evidence prepared by X-branded gadget retailers in the ordinary course of business that shows the retailer would have charged a lower price for the gadgets absent the co-operative advertising arrangement.

If it could be demonstrated that the co-operative advertising agreements had influenced X-branded gadget prices upward, the Bureau would consider the competitive impact of the conduct in the relevant market. In this regard, the Bureau would assess whether X-branded gadgets and other brands of gadgets should appropriately be characterized as separate product markets or as a single product market, and whether Company X possesses market power in the relevant market.

If the relevant market was found to include all brands of gadgets and the Bureau determined that Company X possessed market power in that market, based on its apparent greater than 50% share of the gadget market and any evidence of barriers to entry, the Bureau would consider to what extent Company X's market power had been preserved or enhanced as a result of the cooperative advertising agreements. For example, the Bureau would consider whether dealers' decisions to prioritize the sales and marketing of advertising-supported X-branded gadgets over competing gadget brands had excluded the entry or expansion of competitors, the presence of which may have resulted in lower prices in the gadget market or an increase in product quality, choice, service, innovation or another non-price dimension of competition. In the presence of exclusionary effects, the Bureau may conclude that the cooperative advertising

agreements preserved or enhanced Company X's market power, so as to adversely affect competition in the gadget market.

7.2 Example 2 – Refusal to Supply a Retailer

Scenario

Company Y manufactures and supplies widgets and, in that regard, competes with four other widget suppliers, each of which (including Company Y) accounts for approximately 20% of total annual sales in the market. Widget suppliers, including Company Y, sell widgets to end-user consumers through independent dealer networks in Canada. Some dealers operate only bricks-and-mortar stores, others sell exclusively online, and still others sell online and in-store.

For most consumers, widgets are a relatively high-cost purchase, and thus consumers demand a significant level of pre-purchase and after-sale support from dealers. Some online dealers provide this support by telephone and through interactive website chat. Nevertheless, not all widget suppliers are comfortable with the level of support offered by online dealers. As such, at least two widget suppliers, including Company Y, only distribute their widgets through dealers that agree to resell them exclusively in bricks-and-mortar stores and not online.

Company A is an online and bricks-and-mortar widget dealer in Canada that has been retailing the widgets of two suppliers. Company A seeks to expand its widget line by carrying Y-branded widgets, and obtains supply from Company Y on the condition that Company A not offer Y-branded widgets for sale online. Company Y permits Company A to advertise Y-branded widgets on Company A's website, and places no restrictions on Company A's advertised or retail price of Y-branded widgets. Soon after Company A has commenced retailing Y-branded widgets, Company Y begins receiving complaints from consumers about a lack of product knowledge, service and support in Company A stores, and complaints from its other dealers about the very low prices charged by Company A for Y-branded widgets. Although Company Y attempts to work with Company A to address these service and pricing concerns, the complaints persist six months later. As such, Company Y informs Company A that, due to these ongoing complaints, it is terminating the parties' dealer agreement and will no longer supply its widgets to Company A.

Analysis

Given the absence of any indication that Company Y was induced (by agreement, threat, promise or any like means) by another of its dealers to cease supplying widgets to Company A, the Bureau would typically examine the

conduct in this example under subparagraph 76(1)(a)(ii) of the Act.²⁸ For the purposes of that provision: Company Y is a supplier within the meaning of subsection 76(3) of the Act; Company Y has refused to supply widgets to Company A; and Company A is engaged in business in Canada. As such, three of the four required elements for the applicability of subparagraph 76(1)(a)(ii) are present in this case.

With respect to the fourth required element, the evidence suggests that Company Y refused to supply widgets to Company A due, at least in part, to the latter's low pricing policy. Nevertheless, because product support and service is especially important in the widget industry, it is possible that Company Y would have continued to supply Company A if it had satisfactorily addressed customer complaints about service, even if Company Y continued to receive complaints from other dealers about Company A's low pricing. As such, the Bureau would consider any available subjective and objective evidence in assessing whether Company A's low pricing, as opposed to its service, was a proximate cause of Company Y's refusal to supply.

If Company Y's refusal to supply widgets to Company A could be attributed to the latter's low pricing policy, the Bureau would consider any available evidence that may suggest an exception in subsection 76(9) of the Act would preclude the applicability of subparagraph 76(1)(a)(ii). In this case, in particular, the Bureau would consider any evidence, including any evidence put forth by Company Y, that Company A made a practice of not providing the level of service that purchasers of Y-branded widgets might reasonably expect. Such evidence in this case could include documented consumer complaints received by Company Y.

Absent the applicability of an exception in subsection 76(9), and if the required elements of subparagraph 76(1)(a)(ii) could be established, the Bureau would consider the competitive impact in the relevant market of Company Y's refusal to supply widgets to Company A. In this regard, the Bureau would assess whether the relevant product market includes both Y-branded widgets and other widget brands, and whether bricks-and-mortar and online sales channels for widgets should appropriately be characterized as separate product markets or as a single product market. If the relevant market were to be defined as all widgets sold in bricks-and-mortar and online channels, it would be unlikely that Company Y, with a market share of 20% and without evidence of competitor exclusion, would be placed in a position of created, preserved or enhanced market power as a result of the refusal to supply, so as to adversely affect competition in the market.

²⁸ The Bureau may instead examine the conduct in this example under section 75 of the Act, the general refusal to deal provision, in those cases where there is no indication that the refusal to supply was due to the customer's low pricing policy.

7.3 Example 3 – Inducing a Supplier to Refuse to Supply Another Person

Scenario

Company Z is a supplier of gizmos, which are sold to end-user consumers in Canada through independent retailers. Owing to their nature, gizmos are sold only in bricks-and-mortar stores, and not online. Gizmos are also highly differentiated, with a multitude of brands, varieties and packaging sizes. End-user consumers generally purchase gizmos from local retailers, with many retailers in a given area stocking full lines of gizmos. Z-branded gizmos currently account for approximately 10% of overall gizmo sales nationally.

Company B is the largest retailer by revenue of Z-branded gizmos in City T and nationally, accounting for more than 50% of total citywide and national sales of Z-branded gizmos. In an overall market for gizmos, however, Company B accounts for only 20% of sales in City T and nationally. Company B operates three flagship retail stores in City T, which offer extensive customer service in well-appointed outlets located in prime retail areas.

Recently, Company C, a family-owned start-up, began retailing Z-branded and other gizmos from a re-purposed warehouse located on the outskirts of City T in a former industrial park. Due to its lower-cost location and no-frills service, Company C profitably sells gizmos at prices up to 20% lower than other retailers in City T. As a result, Company C is capturing a growing share of gizmo sales in City T, with Company B experiencing a significant decline in store visits and revenues.

Company B informs Company Z that, unless it ceases supplying gizmos to Company C in City T, Company B will stop purchasing from Company Z on a national basis and only stock the gizmos of Company Z's competitors. Nationally and in City T, Company B is Company Z's largest customer, and the profitability of its business would be imperilled were Company Z to lose Company B as a customer. Consequently, Company Z informs Company C that, effective immediately, it will no longer supply it with gizmos. Some customers decide to purchase a different brand of gizmos from Company C to benefit from its lower prices, while other customers return to Company B's stores to purchase Z-branded gizmos. Company C believes it can remain in business, relying on sales of other gizmos from suppliers who have not yet refused supply; however, Company C is fearful of the future should those suppliers also come under pressure from Company B.

Analysis

The Bureau would typically examine the conduct of Company B in this example under subsection 76(8) of the Act.²⁹ For the purposes of that provision: Company B is a customer of Company Z; Company B has induced Company Z to refuse to supply gizmos to Company C by threatening to cease purchasing gizmos from Company Z; Company B's inducement was due to Company C's low pricing policy in respect of Z-branded gizmos; and Company Z's refusal to supply Company C was a condition of Company B continuing to do business with Company Z. As such, five of the six required elements for the applicability of subsection 76(8) are present in this case.

With respect to the remaining element, the Bureau would consider whether Company B's conduct has created, preserved or enhanced any market power by excluding competing retailers, so as to adversely affect competition in a relevant market. In this regard, the Bureau would assess whether Z-branded gizmos and other brands of gizmos should appropriately be characterized as separate product markets or as a single product market. In considering whether consumers view different brands of gizmos as substitutable, the Bureau would assess, among other factors, the degree of consumer switching between brands, including in this case consumer switching between Company B, Company C and other retailers in City T that may stock different gizmo brands. From a geographic perspective, the Bureau would consider whether consumers consider retailers from cities other than City T to be alternative viable sources of gizmos.

If the relevant market were to be defined as all gizmo brands in City T, the Bureau would assess whether Company B possess market power in that market, and whether any market power it may have has been preserved or enhanced by its inducement of Company Z to refuse to supply gizmos to Company C. In this regard, the Bureau would consider Company B's share of gizmo sales, which is only 20%. In addition, the apparent ease of successful entry by Company C may suggest that structural barriers to entry into the retail gizmo market in City T are not significant. That said, the Bureau would also consider any strategic barriers to entry created by Company B's conduct. If it could be established that such a barrier to entry was significant and would likely serve to exclude retail competitors, such that Company B's conduct would likely confer upon it market power in the gizmo market in City T, the Bureau may determine that Company B's conduct has had an adverse effect on competition in the market.

²⁹ Depending on the circumstances (such as where one or more of the required elements of subsection 76(8) cannot be established), the Bureau may instead examine the conduct under section 79 of the Act, the abuse of dominance provision. The Bureau's approach to the enforcement of section 79 is set out in the Abuse of Dominance Guidelines, *supra* note 13.

APPENDIX: SECTION 76 OF THE ACT

Price Maintenance

Price maintenance

76. (1) On application by the Commissioner or a person granted leave under section 103.1, the Tribunal may make an order under subsection (2) if the Tribunal finds that

- (a) a person referred to in subsection (3) directly or indirectly
 - (i) by agreement, threat, promise or any like means, has influenced upward, or has discouraged the reduction of, the price at which the person's customer or any other person to whom the product comes for resale supplies or offers to supply or advertises a product within Canada, or
 - (ii) has refused to supply a product to or has otherwise discriminated against any person or class of persons engaged in business in Canada because of the low pricing policy of that other person or class of persons; and
- (b) the conduct has had, is having or is likely to have an adverse effect on competition in a market.

Order

(2) The Tribunal may make an order prohibiting the person referred to in subsection (3) from continuing to engage in the conduct referred to in paragraph (1)(a) or requiring them to accept another person as a customer within a specified time on usual trade terms.

Persons subject to order

- (3) An order may be made under subsection (2) against a person who
- (a) is engaged in the business of producing or supplying a product;
 - (b) extends credit by way of credit cards or is otherwise engaged in a business that relates to credit cards; or
 - (c) has the exclusive rights and privileges conferred by a patent, trade-mark, copyright, registered industrial design or registered integrated circuit topography.

Where no order may be made

(4) No order may be made under subsection (2) if the person referred to in subsection (3) and the customer or other person referred to in subparagraph

(1)(a)(i) or (ii) are principal and agent or mandator and mandatory, or are affiliated corporations or directors, agents, mandataries, officers or employees of

(a) the same corporation, partnership or sole proprietorship; or

(b) corporations, partnerships or sole proprietorships that are affiliated.

Suggested retail price

(5) For the purposes of this section, a suggestion by a producer or supplier of a product of a resale price or minimum resale price for the product, however arrived at, is proof that the person to whom the suggestion is made is influenced in accordance with the suggestion, in the absence of proof that the producer or supplier, in so doing, also made it clear to the person that they were under no obligation to accept the suggestion and would in no way suffer in their business relations with the producer or supplier or with any other person if they failed to accept the suggestion.

Advertised price

(6) For the purposes of this section, the publication by a producer or supplier of a product, other than a retailer, of an advertisement that mentions a resale price for the product is proof that the producer or supplier is influencing upward the selling price of any person to whom the product comes for resale, unless the price is expressed in a way that makes it clear to any person whose attention the advertisement comes to that the product may be sold at a lower price.

Exception

(7) Subsections (5) and (6) do not apply to a price that is affixed or applied to a product or its package or container.

Refusal to supply

(8) If, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that any person, by agreement, threat, promise or any like means, has induced a supplier, whether within or outside Canada, as a condition of doing business with the supplier, to refuse to supply a product to a particular person or class of persons because of the low pricing policy of that person or class of persons, and that the conduct of inducement has had, is having or is likely to have an adverse effect on competition in a market, the Tribunal may make an order prohibiting the person from continuing to engage in the conduct or requiring the person to do business with the supplier on usual trade terms.

Where no order may be made

(9) No order may be made under subsection (2) in respect of conduct referred to in subparagraph (1)(a)(ii) if the Tribunal is satisfied that the person or class of

persons referred to in that subparagraph, in respect of products supplied by the person referred to in subsection (3),

(a) was making a practice of using the products as loss leaders, that is to say, not for the purpose of making a profit on those products but for purposes of advertising;

(b) was making a practice of using the products not for the purpose of selling them at a profit but for the purpose of attracting customers in the hope of selling them other products;

(c) was making a practice of engaging in misleading advertising; or

(d) made a practice of not providing the level of servicing that purchasers of the products might reasonably expect.

Inferences

(10) In considering an application by a person granted leave under section 103.1, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by the application.

Where proceedings commenced under section 45, 49, 79 or 90.1

(11) No application may be made under this section against a person on the basis of facts that are the same or substantially the same as the facts on the basis of which

(a) proceedings have been commenced against that person under section 45 or 49; or

(b) an order against that person is sought under section 79 or 90.1.

Definition of “trade terms”

(12) For the purposes of this section, “trade terms” means terms in respect of payment, units of purchase and reasonable technical and servicing requirements.

R.S., 1985, c. C-34, s. 76; R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37; 2009, c. 2, s. 426.

HOW TO CONTACT THE COMPETITION BUREAU

Anyone wishing to obtain additional information about the *Competition Act*, the *Consumer Packaging and Labelling Act* (except as it relates to food), the *Textile Labelling Act*, the *Precious Metals Marking Act*, or the program of written opinions, or to file a complaint under any of these acts should contact the Competition Bureau's Information Centre.

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