JOINT COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW ON THE CANADIAN COMPETITION BUREAU'S DRAFT UPDATED ENFORCEMENT GUIDELINES ON THE ABUSE OF DOMINANCE PROVISIONS (SECTIONS 78 AND 79 OF THE COMPETITION ACT)

April 15, 2009

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

The Section of Antitrust Law and the Section of International Law (the Sections) of the American Bar Association (ABA) appreciate the opportunity to respond to the request for comments by the Canadian Competition Bureau (the Bureau) in respect of the Bureau's *Draft Updated Enforcement Guidelines on the Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act)* (the Draft Guidelines). The views expressed herein are presented on behalf of the Sections only. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association, and accordingly, should not be construed as representing the policy of the ABA.

EXECUTIVE SUMMARY

The Sections commend the significant efforts that have been made in the Draft Guidelines to clarify the Bureau's approach in a number of areas, including the assessment of legitimate business justifications; addressing specific forms of conduct; the increased emphasis on the fact that abuse, but not the fact of dominance, is the focus of the provisions; the increased willingness to consider supply substitution in market definition; and the application of the regulated conduct defence in this area. We also welcome the statement that "[t]here must also be an effective remedy available before the Commissioner will consider an application to the Tribunal."

The adoption of the hypothetical monopolist approach to market definition in the section 79 context may provide a clear basis upon which to conduct the market definition exercise, but it nevertheless controversial in the monopolization context, where the prevailing price may not be a competitive price.

The Sections invite the Bureau to provide additional guidance with respect to what conduct may implicate the "joint" abuse provisions; the approach to market definition in circumstances where it is difficult to apply the hypothetical monopolist framework; the degree of market power necessary to achieve a dominant market position; and to elaborate further on how legitimate business justifications will be assessed. We also invite the Bureau to provide additional guidance with respect to the application of the new Administrative Monetary Penalty provisions that were enacted after the Draft Guidelines were issued for comment.

COMMENTS

Introduction

The Sections welcome the Bureau's willingness to provide guidance in this very important and challenging area of competition law, and commend the Bureau for updating its existing guidance in this area in light of recent jurisprudence and the Bureau's Information Bulletin on the Abuse of Dominance provisions as applied to the Telecommunications Industry.[1] The Sections have previously commented on the draft Telecommunication Bulletin.[2]

Given the absence of significant Canadian jurisprudence on the issue of how to distinguish between "competition-on-the-merits" and "abuse" of dominance, as well as guidance recently provided by other enforcement agencies around the world, the Sections commend the Bureau for releasing the Draft Guidelines for comment.

Our comments address specific proposals of the Draft Guidelines under the following topics: (i) The Purpose of Abuse of Dominance Laws; (ii) Establishing Dominance; (iii) The Conduct Necessary to Find Joint Dominance; (iv) What Constitutes a "Substantial Prevention or Lessening of Competition"; (v) Supply Substitution Analysis; (vi) Anti-Competitive Acts and

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[1] Competition Bureau (Canada), *Information Bulletin on the Abuse of Dominance Provisions as Applied to the Telecommunications Industry* (Ottawa: Industry Canada, June 6, 2008); available online at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02690.html ["*Telecommunications Bulletin*"]

[2] American Bar Association, *Joint Comments Of The ABA Section Of Antitrust Law And Section Of International Law In Response To The Canadian Competition Bureau's Request For Public Comment On Abuse Of Dominance Provisions As Applied To The Telecommunications Industry* (December 2006); available online at http://www.abanet.org/antitrust/at-comments/2006/12-06/telecom-industry.shtml ["*Telecommunications Comments*"]

Legitimate Business Justifications; (vii) Regulated Conduct; (viii) Denial of Access to a Facility or Service; and (ix) Administrative Monetary Penalties.

I. The Purpose of Abuse of Dominance Laws

The Sections welcome the Draft Guidelines' reiteration that the objective of the abuse provision is to "promote effective competition and not the interests of any one competitor or group of competitors", the explicit acknowledgement that Section 79 is not intended to prohibit dominance itself or the mere presence of market power, the recognition that the ability to raise prices or maintain high prices does not in itself raise issues under the *Competition Act*, and the statement that the Bureau's role is not to function as a price regulator.

These statements are broadly consistent with those found in the 2001 Guidelines, but the revised Draft Guidelines go somewhat further and express clearly the distinction, although not necessarily the means to distinguish, between market power legitimately acquired and exercised and that which may be challengeable as abuse.

II. Establishing Dominance

A. Hypothetical Monopolist Model

The Sections note the adoption of the hypothetical monopolist approach to market definition in the abuse of dominance context. This is highly controversial in the United States, with many commentators suggesting that this methodology works for mergers but not cases involving prior conduct.[3] The Sections note that the Draft Guidelines refer to the "cellophane fallacy" in footnote 14, but suggest that greater emphasis on the issue may be appropriate in the context of abuse of dominant market position.

If the hypothetical monopolists paradigm is retained, one critical section of the Draft Guidelines that could benefit from further clarification is the Bureau's approach to determining the price that likely would have prevailed in the absence of the impugned acts. In this regard, the

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[3] *Compare, e.g.,* Dennis W. Carlton, Market Definition: Use and Abuse, 3 COMPETITION POLICY INT'L 3 (2007); Lawrence J. White, Market Definition in Monopolization Cases, in ISSUES IN COMPETITION LAW AND POLICY (ABA 2008) *with* Jonathan Baker, *Market Definition: An Analytical Overview*, 74 ANTITRUST L.J. 129, 159-60, 170 (2007); Gregory Werden, *Market Delineation under the Merger Guidelines: Monopoly Cases and Alternative Approaches*, 16 REV. OF INDUS. ORG. 211, 215 (2000)

Sections suggest that consideration be given to explicitly recognizing in the main text on page 7 (and footnote 16) that it is sometimes very difficult to establish what this counterfactual benchmark would be, and articulate how that benchmark will be determined. As well, in cases in which use of the hypothetical monopolist model is impractical, the Sections suggest that the Draft Guidelines outline what methodology will be employed.

B. Degree of Market Power

With respect to the degree of market power required to trigger the potential application of section 79, the Sections understand that the jurisprudence in Canada has been largely silent. That is to say, the words "substantially or completely control" have been characterized as being synonymous with market power, which, in turn, "is generally accepted to mean an ability to set prices above competitive levels for a considerable period."[4]

The Sections suggest that the Bureau give consideration to clarifying that a *substantial* degree of market power is required before a firm may be found to "substantially or completely control" a market, within the meaning of paragraph 79(1)(a). This is the threshold that is generally considered to be required to trigger the potential application of Article 82 of the Treaty of Rome, Section 2 of the Sherman Act, and the Chapter 2 Prohibition under the U.K.'s Competition Act.[5]

The requirement that firms have a *substantial* degree of market power before they may be exposed to enforcement action under abuse of dominance or monopolization provisions reflects a recognition that the intervention threshold for single firm conduct should be higher than the intervention threshold for mergers and agreements among competitors, to avoid chilling pro-competitive single firm behaviour (particularly given the difficulty involved in distinguishing between competition on the merits and anti-competitive conduct). This chilling

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[4] Canada *(Director of Investigation and Research) v. Nutrasweet Co.* (1990), 32 C.P.R. (3d) 1, 28 (Comp. Trib.). These words have been repeated essentially verbatim in all subsequent cases, as well as in the 2001 Guidelines.

[5] Commission of the European Communities, *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings* (February 9, 2009) at para. 10, available online at http://ec.europa.eu/competition/antitrust/art82/index.html ["*EC Guidance*"]; U.S. Dep't of Justice, *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act* (2008) at page 1; available online at www.usdoj.gov/atr/public/reports/236681.htm ["*DOJ Report*"] at Chapter 2; Office of Fair Trading (United Kingdom), *Abuse of Dominant Position: Understanding Competition Law* (December 2004); available at http://www.oft.gov.uk/shared_oft/business_leaflets/ca98_guidelines/oft402.pdf, at para 4.11

effect is potentially significant for firms with a market share in excess of the Bureau's safe-harbour and some degree of market power, no matter how small. It will become even more significant with the introduction of administrative monetary penalties, as discussed in more detail below.

III. Conduct Necessary to Find Joint Dominance

The Sections note that Section 79 of the *Competition Act* specifically contemplates applications against "one or more persons", and that it is therefore necessary to determine how that section applies in the case of multiple actors. That is, it is essential to determine what constitutes the necessary "jointness" for a joint dominance case, because firms need to understand whether their conduct, which may be similar, even inadvertently, to conduct engaged in by their competitors, may result in challenge. Firms which on their own do not enjoy significant market share or market power, may consider themselves unlikely to be subject to the Abuse of Dominance provisions, yet may find themselves subject to challenge as jointly dominant.

It is not clear from the current Draft Guidelines what conduct may result in the Bureau viewing firms as jointly dominant. Moreover, it appears from the proposed change from the previous Guidelines that conscious parallelism alone — or even conduct by two firms which may result in similar effects, whether or not either of the firms knew of the other's conduct — may, in the view of the Bureau, be sufficient to constitute jointly dominant activity, and yet there is no discussion in the Draft Guidelines of that issue or of any jurisprudence or economic thinking leading to that conclusion. It would also be useful to discuss the distinction between anticompetitive jointly dominant behavior based on conscious parallelism and pro-competitive horizontal conduct involving, for example, "matching" behavior or "meet competition" pricing. Such a distinction would be helpful to avoid the chilling of pro-competitive conduct by businesses seeking to comply with the Guidelines, once finalized.

There is considerable uncertainty and variability in the legal and business communities regarding how the Bureau and its foreign counterparts would assess joint dominance or monopolization. Apart from the conspiracy to monopolize offense, U.S. law does not recognize monopolization claims premised on theories of joint dominance. Indeed, lower court decisions

have held that "shared monopoly" or "joint monopolization" claims are not cognizable as monopolization or attempts to monopolize under Section 2 because those Section 2 offenses require that a single firm possess or dangerously threaten to achieve monopoly power.[6] As well, U.S. Supreme Court jurisprudence holds that parallel conduct in concentrated or oligopolistic industries is not sufficient, in the absence of circumstantial evidence of an agreement, to show a Section 1 violation.[7]

In the EC, the law governing "joint" or "collective dominance" is still developing. Article 82 of the EC Treaty prohibits "[a]ny abuse by one *or more* undertakings of a dominant position within the common market or in a substantial part of it" if the firms' conduct "may affect trade between Member States," and lists types of conduct that exemplify abusive conduct. Although the EC has recognized that Article 82 encompasses a collective dominance theory, the EC has not provided significant guidance as to when such collective dominance actually exists.[8] Moreover, although the 2005 DG Competition Discussion Paper that supplied the initial basis for the EC's recent Article 82 Guidance included a discussion on the concept of "collective

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[6] *Midwest Gas Servs. v. Indiana Gas Co.*, 317 F.3d 703 (7th Cir. 2003) (holding that under *Sherman Act*, § 2 only one firm can be a monopolist); *Harkins Amusement Enters. v. General Cinema Corp.*, 850 F.2d 477, 490 (9th Cir. 1988) (observing that no court has held that *Sherman Act* § 2 applies to shared monopoly or oligopolistic interdependence); *see also Flash Elecs. v. Universal Music & Video Distrib. Corp.*, 312 F. Supp. 2d 379, 396-97 (E.D.N.Y. 2004) (same); *Carpet Group Int'l v. Oriental Rug Imps. Ass'n*, 256 F. Supp. 2d 249, 285 (D.N.J. 2003) *Kramer v. Pollock-Krasner Found.*, 890 F. Supp. 250, 256-57 (S.D.N.Y. 1995) (same); *Phoenix Elec. Co. v. Nat'l Elec. Contractors Ass'n*, 861 F. Supp. 1498, 1514 (D. Or. 1994) (same); *Sun Dun, Inc. v. Coca-Cola Co.*, 740 F. Supp. 381, 390 (D. Md. 1990) (same); *Consolidated Terminal Sys. v. ITT World Communs.*, 535 F. Supp. 225, 228-29 (S.D.N.Y. 1982) (same); *but see American Tobacco Co. v. United States*, 328 U.S. 781 (1946); *JTC Petroleum Co. v. Piasa Motor Fuels*, 190 F.3d 775, 780 (7th Cir. 1999) (observing that multiple firms may be liable under *Sherman Act* § 2 where there is proof of an agreement).

[7] *Theatre Enterprises v. Paramount Film Distributing Corp.*, 346 U.S. 537, 541 (1954); *Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 237 (1993).

[8] In *Societá Italiano Vetro and Others v. Commission* ("*Italian Flat Glass*"), Cases T-68, 77 and 78/69,1993 ECR II -1403, the CFI held that claims of "collective dominance" are cognizable under Article 82 where two or more entities are "united by such economic links that, by virtue of that fact, together they hold a dominant position vis-à-vis the other operators on the same market." The court did not, however, elaborate on what "economic links" Article 82 requires because it found that the Commission failed to carry its burden to show abuse of a dominant position. In subsequent decisions, the ECJ has provided only limited clarity to the types of "economic links" that would supply a basis for a finding of collective dominance under Article 82. *See Municipality of Almelo and Others* v *Energiebedrijf Ijsselmij*, Case C-393/92, 1994 ECR I-1477**,** ("[F]or collective dominance to exist, the undertakings in the group must be linked in such a way that they adopt the same conduct on the market" […] It is for the national court to decide whether there exist between the regional electricity distributors links which are sufficiently strong for there to be a collective dominant position in a substantial part of the common market."); *Compagnie Maritime Belge Transports and Others* v. *Commission,* Cases C-395 and 396/96P, 2000 ECR I-165 ("[T]o establish . . . a collective entity . . . it must be ascertained whether economic links exist between the undertakings concerned which enable them to act together independently of their competitors, customers and consumers."). *See generally* Richard Whish, *Competition Law* (6th ed. 2008) (noting that clarification regarding the terms of abuse of collective dominance under Article 82 is lacking in European case law).

dominance" —including standards for liability under Article 82[9] — the EC did not include that material in the Article 82 Guidance.[10]

The Sections understand that the concept of joint dominance under section 79 of the *Competition Act* has never been litigated in Canada,[11] and therefore it would be very useful if the Draft Guidelines were able to provide additional information as to what level of joint activity is necessary to lead to a finding of joint dominance. The closest the Draft Guidelines now come to addressing this question is as follows:

> "[W]here these firms are each engaging in similar practice alleged to be anti-competitive, and they appear to together hold market power based on their collective share of the market, barriers to entry or expansion…the Bureau will consider these firms to hold a jointly dominant position."

The previous 2001 Guidelines had a more extensive discussion of this issue, noting explicitly that the Bureau had adopted a position (similar to that found under the conspiracy provision of the *Act*) that conscious parallelism alone was insufficient to make a finding of joint dominance.[12] That discussion has been eliminated from the current Draft Guidelines, without any indication that jurisprudential, statutory or economic changes have occurred, and indeed without discussion. The Sections encourage the Bureau to elaborate upon how it will assess, in the context of an actual case, whether two or more firms may be jointly dominant, and in particular that it provide specifics as to what type of joint activity it believes may constitute a practice of anti-competitive acts by jointly dominant firms, and what has caused a change from the previous Guidelines in this regard.

IV. What Constitutes a "Substantial Lessening or Prevention of Competition"?

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[9] European Commission, *DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses* at paras. 43-50, *available at* http://europa.eu.int/comm/competition/antitrust/others/discpaper2005.pdf

[10] EC Guidance, *supra* note 5 ("Article 82 applies to undertakings which hold a dominant position on one or more relevant markets . . . . *This document only relates to abuses committed by undertakings holding single dominance*.") (emphasis added).

[11] But see *R. v. Canadian General Electric Co*. (1976), 29 C.P.R (2d) 1 (H.C.J.) for a discussion of the issue under the prior, criminal provision.

[12] *Atlantic Sugar Refineries Co. Ltd. et al. v. Attorney General of Canada*, [1980] 2 S.C.R. 644.

As the Draft Guidelines note, the Federal Court of Appeal recently established, in part after considering U.S. jurisprudence, a "but for" test to determine whether or not there has been or is likely to be a substantial prevention or lessening of competition. That is: "would the relevant markets — in the past, present or future — be substantially more competitive but for the impugned practice of anti-competitive acts?"[13] Clarification on the threshold for "substantially more competitive," and its relationship to the degree of market power required to possess dominance, would be helpful. For example, in an exclusion case, when dominance is found even when un-excluded rivals pose a threat to the dominant firm's position, how does the "but for" test operate?

The Sections also observe that the Federal Court of Appeal noted that the "but for" test is not necessarily the only correct approach to determining a substantial lessening of competition.[14] The Draft Guidelines acknowledge this, but do not provide additional comment or advice as to other possible tests which will be applicable, or when the Bureau will urge the Tribunal to apply a test other than the "but for" test. Guidance on this point would be very valuable.

V. Supply Substitution Analysis

The Sections commend the Bureau for the addition, in the current Draft Guidelines, of reference to supply responses as a relevant consideration in determining market share and therefore market power. In the view of the Sections this is a useful, informative addition to the Guidelines and is consistent with the Merger Enforcement Guidelines.[15]

VI. Anti-Competitive Acts and Legitimate Business Justifications

The Sections commend the Bureau for adopting the following clear guideline: "If, in the opinion of the Bureau, the firm in question has engaged in conduct with a valid business rationale, where it is clear that the firm's objective in engaging in that conduct was for reasons

[13] *Commissioner of Competition v. Canada Pipe Company Ltd./Tuyauteries Canada Ltée,* 2006 FCA 233 at para 38 ["*Canada Pipe*"].

[14] *Ibid* at para 44.
[15] Competition Bureau (Canada), *Merger Enforcement Guidelines* (Ottawa: Industry Canada, 2004); available online at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01245.html, at Part 4. *["MEGs"]*

other than the exclusion, discipline, or predation of a competitor, then the Bureau will likely elect not to pursue further investigation."

The Sections note that the Draft Guidelines cite the Federal Court of Appeal statement in *Canada Pipe*, to the effect that "a business justification must be a credible efficiency or pro-competitive rationale for the conduct in question, attributable to the respondent, which relates to and counter-balances the anti-competitive effects and/or subjective intent of the acts". The Draft Guidelines offer some helpful insight into the Bureau's interpretation of this statement, but there remain difficult aspects of the language, particularly the phrases "attributable to the respondent" and "counter-balances the anti-competitive effects." Additional guidance as to the Bureau's understanding of these phrases — that is, what the Bureau will understand to be a pro-competitive rationale "attributable to the respondent," what type of activity "counter-balances the anti-competitive effects," and how the trade-off analysis would be undertaken — would be very welcome.

The Sections note the statement: "the Bureau will also examine the necessity of the conduct in question for achieving those efficiencies; if the cost savings can be achieved in an equally effective manner other than through the conduct alleged to be anti-competitive, the Bureau will not consider the conduct as having a valid business justification." This inquiry appears to go beyond an examination of whether the conduct is reasonably necessary, and may suggest an inquiry into whether or not there is any possible less anti-competitive alternative. The difficulty with such inquiries is that, *ex post facto*, it is almost always possible to advance a theory which posits a less anti-competitive alternative to conduct, but operations in real time and in the real world do not allow for the alternatives to be canvassed in such detail and leisure. Moreover, if the comparative analysis is based on activity "alleged" (rather than conduct "concluded by the Bureau") to be anticompetitive, this risks enforcement against conduct that is competitively neutral or pro-competitive merely because there is a more effective manner of gaining the efficiency.

The overall approach appears to be at odds with the approach in the Bureau's Merger Enforcement Guidelines, which state that cost savings (and other claimed efficiencies) will not be excluded unless they "would likely be attained by alternative means if the order being sought,

or that would likely be sought, were made."[16] The MEGs elaborate by stating: "The market realities of the industry in question will be considered in determining whether particular efficiencies could reasonably be expected to be achieved through non-merger alternatives."[17] The Joint FTC/DOJ Merger Guidelines address this issue by recognizing that "[o]nly alternatives that are practical in the business situation faced by the merging firms will be considered in making [the merger-specificity] determination; the Agency will not insist upon a less restrictive alternative that is merely theoretical."[18] The Sections suggest that consideration be given to adopting a similar approach in the assessment of legitimate business justifications identified in the section 79 context.

The Sections also note the statement by the Bureau in this section of the Draft Guidelines that "any demand-enhancing business justifications must also be …beyond mere self interest". The Sections do not understand what this is intended to mean. Presumably any firm investing to improve technology, production processes or product quality(to take three examples generally viewed to be unambiguously pro-competitive) is doing so purely and expressly out of self interest — to make a better product, or the same product more cheaply, and thereby make more money. [19] Thus, conduct that had the effect of excluding competitors as well as offering consumer or economic efficiency benefits, should not be subject to challenge under the Abuse of Dominance provisions of the *Act* merely because it is also motivated by self-interest.

VII. Regulated Conduct

The Sections note the addition, in these Draft Guidelines, of the statement that "the Bureau will also consider whether the alleged anti-competitive conduct is mandated or authorized by another federal, provincial or municipal law or legislative regime." The Sections commend the Bureau for this addition and encourage the Bureau to elaborate upon the role that the regulated conduct defense may have in cases arising under section 79 of the Act.

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[16] *MEGs*, *supra* note 15 at § 8.7.
[17] *MEGs*, *supra* note 15 at footnote 105.
[18] *See* U.S. Dep't Of Justice & Federal Trade Comm'n, Commentary On The Horizontal Merger Guidelines §4 (Mar. 2006), *available at* http://www.usdoj.gov/atr/public/guidelines/215247.htm
[19] If the concept the Bureau is referring to is the use of demand-enhancing activities to enhance a dominant position, such as the abuse of industry standard setting as alleged by the FTC against memory-chip manufacturer Rambus, then perhaps the text could be reworded to focus on the anticompetitive nature of the conduct itself rather than the intent of the party. *See Rambus Inc. v. FTC*, No. 07-1086 (D.C. Cir. Apr. 22, 2008).

VIII. Denial of Access to a Facility or Service

As an initial matter, the Sections applaud the Bureau for recognizing that denial of access is a "common practice that will raise issues under the Act only in limited circumstances." The Sections most recently addressed the issue of denial of access in their comments to the Bureau on the draft Telecommunications Bulletin.[20] There, the Bureau adopted a 3-part test, identical to that proposed in the revised[21] Draft Guidelines:

i. A vertically integrated firm that has market power in the downstream (or retail) market for which the facility is an input in the time period following the denial.

ii. A denial of access to the facility that has occurred for the purpose of excluding competitors from entering or expanding in the downstream market or otherwise negatively affecting their ability to compete.

iii. The denial has had, is having or is likely to have the effect of substantially lessening or preventing competition in the downstream market.[22]

In addition to the above three points, the Sections submit that a fundamental issue is that the facility must be difficult or impossible to replicate. This point is noted in the following paragraph of the Draft Guidelines, but in the view of the Sections, is sufficiently important to list with the above noted three points.

The Draft Guidelines focus on downstream market power but not upstream market power, even though the putative mechanism of competitive harm is the denial to a rival of a facility or input that is a *sine qua non* for effective competition. The Sections suggest that, where an input is the most economical or advantageous but not *essential*, the doctrine should not apply.[23]

[20] Telecommunications Comments, *supra* note 2, at 6–8.

[21] The Bureau's 2001 Dominance Guidelines discussed (briefly) paragraph 78(1)(e) of the Competition Act, which prohibits the preemption of scarce facilities or resources required by a competitor, but the Guidelines did not explicitly set forth the Bureau's test for evaluating denial of access. Competition Bureau of Canada, Enforcement Guidelines on the Abuse of Dominance Provisions (July 2001), at 21.

[22] Telecommunications Bulletin, *supra* note 1 at Part 4.2.2.

[23] *Alaska Airlines v. United Airlines*, 948 F.2d 536, 544-46 (9th Cir. 1991).

The Sections also query whether the Bureau considers the doctrine applicable to regulated businesses such as natural monopolies or price-regulated monopoly utilities,[24] where the traditional market-oriented enforcement tools utilized by competition agencies may be inadequate.[25] The Bureau's Telecommunications Bulletin appears to acknowledge this limitation by focusing on potential market foreclosure that involves "denying access to facilities that are *not subject to regulation* by the CRTC."[26] The Sections recommend that a similar general clarification be included in the Draft Guidelines.[27]

Finally, the Bureau notes that "[i]n practice . . . it may be difficult to quantify [the profit-maximizing] price [term] in cases where it has not been historically supplied through voluntary exchange." The Sections therefore request clarification on how the Bureau will estimate a "but for" profit-maximizing access price absent a course of conduct providing a market price to reference, whether for purposes of finding a lessening of competition or imposing price terms in a remedial order. [28]

IX. Administrative Monetary Penalties

The Sections note that, since the release of the Draft Guidelines, Bill C-10[29] has been enacted by the Canadian Parliament. It introduces administrative monetary penalties (AMPs) of up to C$10 million for a first occurrence and C$15 million for subsequent occurrences for abuse of dominance conduct.

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[24] *See* Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* (3d ed. 2008) ¶ 771c (describing the essential facility doctrine as "harmful and unnecessary" and recommending that it be "abandoned" except possibly for the above entities).

[25] Regulatory agencies have greater experience in and (arguably) more statutory legitimacy to set "reasonable" rates in the "public interest" than do competition agencies through consent orders setting terms of trade when no course of conduct is available to use as a market price benchmark. *See* DOJ REPORT 2, at 129 (questioning the courts' ability to set prices and other terms of dealing); *see also* Frank H. Easterbrook, *When Is It Worthwhile to Use Courts to Search for Exclusionary Conduct?*, 2003 COLUM. BUS. L. REV. 345, 352 (concluding that essential facility doctrine fails to solve monopoly problem "unless court becomes a rate regulator – and few think that the isolated examples of judicial rate regulation . . . have been successful").

[26] Telecommunications Bulletin, *supra* note 1 at Part 4.2.2 (emphasis added).

[27] *See Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 411 (2004) (holding that refusal to deal should be evaluated in light of government regulations including "extensive provision for access").

[28] Antitrust Modernization Commission, Report and Recommendation (Apr. 2007) Ch. 1C.(3)(C)(2), at 103 (noting "the difficulty [for courts] of determining the proper 'non-exclusionary benchmark price'"); *available online* at http://govinfo.library.unt.edu/amc/report_recommendation/chapter1.pdf.

[29] Bill C-10, *An Act to implement certain provisions of the budget tabled in Parliament on January 27, 2009 and related fiscal measures, 2nd session*, 40th Parl., 2009.

Consequently, the Sections expect that AMPs may now become an important enforcement tool. While it is understandable that the Draft Guidelines are currently silent on this point, it is hoped that additional guidance will be forthcoming on practical aspects including when and how AMP remedies will be sought by the Bureau, and what type of conduct will typically be in issue when AMPs are sought.

CONCLUSION

The Sections commend the Bureau for taking the initiative to provide updated guidance in this difficult area. The Sections encourage the Bureau to provide additional guidance with respect to certain concepts as outlined above. Key among those are the approach to market definition in circumstances when it is difficult to apply the hypothetical monopolist framework; the degree of market power required to achieve "substantial or complete control" within the meaning of paragraph 79(1)(a) of the Act; the necessary "joint" conduct to result in a finding of how joint dominance may be established; the manner in which a business justification must be "attributable to" the dominant firm and the nature of the required link between such justifications and the dominant firm; how the Bureau will conduct its assessment of whether one or more business justifications "counterbalance or neutralize other evidence of an anti-competitive purpose"; and the application of Administrative Monetary Penalties.

We appreciate the opportunity to comment and would be pleased to respond to any questions the Bureau may have, or to provide any additional information that may be of assistance to the Bureau.