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) (THE DRAFT GUIDELINES)

May 22, 2012

The views stated in this submission are presented jointly on behalf of the Section of Antitrust Law and the Section of International Law (the 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.

EXECUTIVE SUMMARY

The Sections welcome the Competition Bureau’s willingness to provide guidance in this very important and challenging area of competition law. Guidance is particularly important because unilateral conduct is inherently ambiguous as to its welfare effects, poses serious challenges with respect to devising appropriate remedies, and because, despite recent enforcement efforts, there remains relatively little jurisprudence on sections 78 and 79 of the Competition Act (the Act). In addition, the Act has been recently amended to provide for large Administrative Monetary Penalties (AMPs) which may be imposed against those who abuse a dominant market position. This amendment has increased the risk for potentially dominant firms, so additional guidance is of particular value.

The Sections also specifically commend the Bureau for the approach to predatory pricing set out in the Draft Guidelines, although they note that there was considerable additional guidance available in the Predatory Pricing Guidelines which are to be replaced; and commend the Bureau for developing appropriate safe harbours in the determination of dominance.

The Sections’ main concern is what is absent from the Draft Guidelines. As outlined in these Comments, the Draft Guidelines replace a large number of significant documents previously issued by the Bureau relating to abuse of dominance, in addition to the 2009 Draft Guidelines

1 The Sections commented on the Bureau’s previous draft guidelines in this area, released for comment in January 2009 (the 2009 Draft Guidelines), available online at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03057.html. [“Comments on the 2009 Draft Guidelines”]

The Sections also commented on the Bureau’s 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”]; see 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”]

2 See notes 1, above, and 3-6, below.
and the current Abuse of Dominance Guidelines which were issued in 2001,\(^3\) which contain considerably more detail by way of analysis and examples than do the current Draft Guidelines. In the view of the Sections, this is a substantial loss of guidance to the business community seeking to operate in compliance with the law.

In addition to the issue of lost guidance, the Sections believe it would be valuable for the Draft Guidelines to contain some information as to the Bureau’s approach to seeking AMPs.

The Sections are concerned about two changes, which appear to represent a considerable potential broadening of the abuse of dominance provisions: the statement in the Draft Guidelines indicating that the Bureau does not regard intent aimed at injuring or excluding a competitor as a necessary element of abuse of dominant market position; and the removal of the statement, found in the 2001 Guidelines, that mere conscious parallelism, alone, does not constitute the necessary “jointness” for joint abuse of dominance.

These Comments address other aspects of the Draft Guidelines as well: the hypothetical monopolist model; the degree of market power and the time period in which such market power must be exercised for control to exist; whether future market power is an appropriate test for dominance; business justifications; the application of these provisions to regulated conduct; and the double jeopardy provisions related to joint dominance and competitor agreements.

**SPECIFIC COMMENTS**

**I. Purpose of Abuse of Dominance Laws**

The Sections welcome the Draft Guidelines' reiteration that the abuse of dominance provisions are not aimed at the mere existence or exploitation of market power by dominant firms, but rather target only anti-competitive conduct by such firms. Specifically, the Sections welcome the Draft Guidelines’ statements that: (1) the law does not seek to establish equality among competitors; (2) the fact that a firm holds market power is not, in of itself, sufficient to result in a finding of abuse; and (3) charging high prices or offering lower bids will not by itself amount to the abuse of dominant market power.

**II. Status of Prior Guidelines and Bulletins**

The current Draft Guidelines are described in the Bureau's media release to be a “concise overview” of the Bureau's enforcement approach to the abuse of dominance provisions. In addition to being much less detailed than the 2009 Draft Guidelines which they replace, the current Draft Guidelines appear to replace five other guidelines:

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\(^3\) Competition Bureau (Canada), *Enforcement Guidelines on the Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act)* (Ottawa: Industry Canada, July 2001); available online at http://wwwcompetitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01251.html. [“2001 Guidelines”]
• Draft Enforcement Guidelines on Abuse of Dominance in the Airline Industry4 – February 2001;
• Enforcement Guidelines on the Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act) – July 2001;
• Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act) as Applied to the Grocery Sector5 – November 2002;
• Information Bulletin on the Abuse of Dominance provisions as Applied to the Telecommunications Industry – June 2008; and

The Sections say “appear to”, as the Draft Guidelines state that they “supersede all previous guidelines and statements of the Commissioner of Competition or other Bureau officials regarding the administration and enforcement of section 79.” Insofar as the Draft Guidelines are not intended to render no longer applicable the above noted Guidelines and Bulletins, or aspects of them, the Sections urge that the above statement be amended to make it clear that some or all such guidance continues to be current.

By way only of illustration as to the types of guidance which would be lost should these prior documents no longer apply, but by no means representing a complete list, we set out below a number of areas in which firms will no longer have the benefit of the Bureau’s published thinking on important aspects of its approach to enforcing the abuse of dominance provisions:

• product bundling and market definition (Telecommunications Bulletin);
• geographic market definition and market power analysis in network industries (Telecommunications Bulletin);
• the role of technological innovation and change in assessing market power (Telecommunications Bulletin);
• the Bureau's approach to regulated conduct in the context of section 79 (2009 Draft Guidelines) and particularly the intersection of competition law and telecommunications regulation (Telecommunications Bulletin);
• the Bureau's approach to particular types of anti-competitive practices such as margin squeezes, denials of access to facilities, bundling, and rebates (2009 Draft Guidelines);
• the Bureau's approach to investigating abuse of dominance complaints in regard to practices in the grocery sector like slotting allowances, listing fees, category management, and tied selling through franchise contracts (Grocery Guidelines);

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4 Competition Bureau (Canada), Draft Enforcement Guidelines on Abuse of Dominance in the Airline Industry (Ottawa: Industry Canada, February 2001); available online at http://www.competitionbureau.gc.ca/etic/site/cb-bc.nsf/eng/01642.html. [“Airline Guidelines”] With respect to the Airline Guidelines, the Sections note that while they remained in draft, and addressed in part provisions of the Act which have since been repealed, they nevertheless contained useful guidance.

5 Competition Bureau (Canada), The Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act) as Applied to the Grocery Sector (Ottawa: Industry Canada, November 2002); available online at http://www.competitionbureau.gc.ca/etic/site/cb-bc.nsf/eng/01642.html. [“Grocery Guidelines”]

• the Bureau's approach to subsection 79(4), which requires the Competition Tribunal (the Tribunal) to consider whether any substantial lessening of competition is attributable to the superior competitive performance of the dominant firm or firms (2009 Draft Guidelines);

• the application of the abuse of dominance provisions to the airline industry – an industry which has seen a number of abuse of dominance and monopolization cases, both in Canada and elsewhere (Airline Guidelines); and

• the Bureau’s detailed view of the appropriate approach to predatory pricing, including detailed analysis of the appropriate price/cost comparison (Predatory Pricing Guidelines).

As noted, this list is illustrative only as to key aspects of guidance which would be lost should the Draft Guidelines render no longer applicable all of the above noted guidance. The Sections invite the Bureau to revisit its decision to significantly reduce written guidance in this area given the Bureau's recent enhanced enforcement activity and the recent introduction of significant AMPs for abuse of dominance. Each of these factors suggests that more rather than less guidance can and should appropriately be provided to firms and their advisers.

In the alternative, given the wholesale replacement of numerous detailed guidelines with a single Guideline that is itself significantly scaled back from the prior 2009 draft version, and that does not address the Bureau's approach to particular types of practices, some prefatory comment by the Bureau would be welcome in order to explain the significance of this change in direction. At present, firms and their advisers cannot be sure how to interpret this apparent shift in emphasis away from written enforcement guidance. It is also uncertain what if any value firms should continue to attach to prior detailed enforcement guidance in this very important area.

III. Regulated Conduct

The Sections note that the 2009 Draft Guidelines contained the statement, with regard to regulated conduct, 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.”7 The Statement is not in the current Draft Guidelines. The Sections commended the Bureau for this addition in the 2009 Draft Guidelines and urge the Bureau to restore it to the current Draft Guidelines.

IV. Interplay Between Sections 79 and 90.1

The issue of the intersection between section 79 and other provisions of the Act is no longer covered in the new Draft Guidelines. Especially given the recent enactment of section 90.1 governing the review of non-criminal arrangements between competitors, the Sections believe that the Draft Guidelines should elaborate on the Bureau's approach to deciding when it will proceed under section 79 or alternative sections of the Act given the protection against double jeopardy in subsection 79(7). In particular, given the discussion of joint abuse of dominance in the Draft Guidelines (discussed further below), it would be helpful if the Bureau could clarify

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7 2009 Draft Guidelines, supra note 1 at s. 5.3.6.
how it will determine whether it will review a non-criminal collaboration between competitors as an agreement between competitors under section 90.1, or conversely as a joint abuse of dominance under section 79.

V. Administrative Monetary Penalties

The Sections reaffirm their suggestion, made in their Comments on the 2009 Draft Guidelines, that the Bureau offer guidance on practical aspects of the use of AMPs, including when and why AMP remedies will be sought by the Bureau, the scale of AMPs likely to be sought, and what type of conduct will typically be in issue when AMPs are sought.

VI. Settlements

The Sections note the Bureau's statement, at page 3 of the Draft Guidelines, that “[f]irms proposing voluntary revisions to existing business practices should be aware that, while such proposals will be given due consideration by the Bureau, any approved proposal will generally be embodied in a consent agreement and registered with the Tribunal pursuant to section 105 of the Act.” The Sections question the basis for this general preference for consent agreements and propose that the Bureau state a more flexible, case-by-case approach (a phrase used in the 2009 Draft Guidelines). The new Draft Guidelines also depart from the 2009 Draft Guidelines in omitting reference to the Bureau's Conformity Continuum Information Bulletin, which contains a wider range of compliance and enforcement options.

The costs and rigidities associated with consent agreements, together with the consequences flowing from a registered consent agreement (including the potential for AMPs and the risk that breach of the agreement could constitute a criminal act) may be disproportionate to the concerns raised in any particular case. Requiring a consent agreement might also impede the otherwise speedy modification of behaviour to address the Commissioner's concerns.

VII. Anti-Competitive Intent and Legitimate Business Justifications

Anti-Competitive Acts

The Draft Guidelines depart from the 2009 Draft Guidelines and what the Sections understand to be well-established Canadian jurisprudence on the issue of the necessary anti-competitive purpose associated with anti-competitive acts. Specifically, the Draft Guidelines assert that “certain acts not specifically directed at competitors” may be considered by the Bureau to have an anti-competitive purpose within the meaning of paragraph 79(1)(b) of the Act.

The 2009 Draft Guidelines endorsed the long-standing approach to paragraph 79(1)(b) established by the Tribunal, and more recently upheld by the Federal Court of Appeal in its 2006 decision in Canada Pipe. The Bureau previously articulated that approach when it stated

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8 40 C.P.R. (4th) 453 (Comp. Trib.).
9 2006 FCA 233. [Canada Pipe] The Court's unanimous decision was written by Desjardins J.A.
that: “[…] what the acts in section 78, along with other potential anti-competitive acts, all have in common is that they must be performed for an anti-competitive purpose, namely an intended negative effect on a competitor that is predatory, exclusionary, or disciplinary.”

In the Draft Guidelines, the Bureau repeats the traditional test for paragraph 79(1)(b) and states that “an anti-competitive act is defined by reference to its purpose, and the requisite anti-competitive purpose is an intended negative effect on a competitor that is predatory, exclusionary, or disciplinary.” However, the Draft Guidelines go on to note that the Tribunal and the Federal Court of Appeal have each acknowledged that paragraph 78(1)(f), which does not explicitly refer to a purpose vis-à-vis a competitor, is “one” exception to the standard test for anti-competitive acts, and the Bureau considers that other non-enumerated acts not specifically directed at competitors could amount to anti-competitive acts that engage section 79.

The Draft Guidelines do not cite to relevant case law or other authority in support of the position that paragraph 78(1)(f) is not the only exception to the established requirement that an anti-competitive act have an intended negative effect on a competitor. Further, the Sections submit that the Federal Court of Appeal’s decision in Canada Pipe does not lend itself to the above interpretation. That decision indicates that paragraph 78(1)(f) is the only exception to the mandated test, which draws its constituent elements from the essential characteristics shared by all other acts listed in section 78.

The suggestion that there is an open-ended category of anti-competitive acts that do not require an intended negative effect on a competitor appears to significantly broaden the scope of the Act’s abuse of dominance provisions, creating uncertainty as to the line between permissible and impermissible conduct. It is also at odds with the Federal Court of Appeal’s holding that each limb of section 79 must involve a distinct legal test, and that paragraph 79(1)(b)’s focus on competitors is what keeps it distinct from paragraph 79(1)(c), which focuses on competition more generally. The Tribunal’s approach in Canada Pipe was criticized by the Federal Court of Appeal for conflating those paragraphs by referring to anti-competitive purpose in relation to competition in general. The Sections urge the Bureau to reconsider this approach.

**Business Justifications**

In their Comments on the 2009 Draft Guidelines, the Sections commended the Bureau for attempting to clarify its position in regard to business justifications and their role in evaluating the requisite anti-competitive purpose under paragraph 79(1)(b). However, the Sections invited further guidance on the Bureau’s understanding of difficult phrases in the Federal Court of Appeal’s decision in Canada Pipe, including those describing the requirement that a pro-
competitive rationale be “attributable to the respondent” and the analysis required to determine how and when a legitimate business reason “counterbalances the anti-competitive effects and/or subjective intent” of an impugned practice. The Sections also suggested further guidance regarding (i) the requirements of a credible efficiency rationale and (ii) the relevance of a firm’s self-interest.

The Sections have already made the general observation that the current Draft Guidelines are significantly less detailed than the 2009 Draft Guidelines. This is particularly the case in regard to the discussion of legitimate business justifications, which has been reduced from nearly two pages to a single paragraph in the present draft. Given the importance of the purpose enquiry under paragraph 79(1)(b) as a screen for anti-competitive conduct, and the widely documented interpretive difficulties associated with the Federal Court of Appeal’s discussion of legitimate business justifications, the Sections emphasize that elaboration by the Bureau on this point would be most welcome.

The Sections also note that the limited discussion in the Draft Guidelines regarding the applicable standard for an appropriate business justification appears to include a relatively narrow interpretation of the Federal Court of Appeal's approach to this issue. Specifically, the Draft Guidelines cite the Federal Court of Appeal's decision in Canada Pipe for the proposition that the “firm bears the burden of proving that the overriding purpose of the conduct was in furtherance of a credible efficiency or pro-competitive rationale.” However, this assertion appears to de-emphasize the weighing exercise called for by the Federal Court of Appeal—in particular, at paragraph 73 where the court stated that “in appropriate circumstances, proof of a valid business justification for the conduct in question can overcome the deemed intention arising from the actual or foreseeable effects of the conduct, by showing that such anti-competitive effects are not in fact the overriding purpose of the conduct in question.”

VIII. Establishing Dominance

Hypothetical Monopolist Model

In their Comments on the 2009 Draft Guidelines, the Sections noted some of the potential concerns and difficulties associated with employing the hypothetical monopolist approach to market definition in connection with abuse of dominance. The Sections do not repeat those concerns in detail here, but believe that, should this approach be maintained, it would be helpful for the Bureau to offer additional guidance how it plans to determine the price that likely would have prevailed in the absence of the impugned acts. In this regard, the Sections suggest that

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consideration be given to explicitly recognizing that it is sometimes very difficult to establish what this counterfactual benchmark would be, and to articulate how the Bureau will attempt to determine that benchmark. The Sections note the reference, in footnote 10 of the Draft Guidelines, to the price which prevailed prior to the introduction of the conduct in issue, or in other geographic markets, but these are often difficult or inappropriate proxies, and guidance as to what other tools may be employed would be helpful. 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.

**Future Market Power**

The Sections note the statement at page 7 of the Draft Guidelines that “[i]f a firm does not have market power, or is not expected to obtain market power through the alleged anti-competitive conduct within a reasonable period of time, the Bureau will generally not pursue allegations of abuse of dominance related to that conduct.” This statement, which is new to the Draft Guidelines, suggests that section 79 may be triggered by the conduct of firms that have not yet obtained market power (that is, the ability to profitably maintain prices above competitive levels for a significant period).

The impression that enforcement action under section 79 may be taken in respect of non-dominant firms is reinforced by the further statements contained in the market share discussion of the Draft Guidelines at page 9. Footnote 21 to that section states that in cases where a firm's market share is below 50%, the Bureau “is concerned with allegations of abuse of dominance that appear likely to create market power within a reasonable period of time.” The Draft Guidelines provide as an example the situation of a firm with an initially low market share allegedly pricing in a predatory way that has a high likelihood of creating market power within a reasonable time period.

The Sections believe that further consideration of these statements is necessary, given the requirement in paragraph 79(1)(a) that “one or more persons substantially or completely control […] a class or species of business.” The plain meaning of the statutory language, which is stated in the present tense, appears to require proof of actual market power as a constituent element of a section 79 application. While the Sections agree that market power derived from a practice of anti-competitive acts should count toward the overall analysis under paragraph 79(1)(a), it is not clear how the anticipated acquisition of market power at some time in the future could form the basis for enforcement action under section 79.

**Degree of Market Power**

The Draft Guidelines quote the Competition Tribunal, in the NutraSweet case,¹⁴ that substantial or complete control is synonymous with market power. In the Comments on the 2009 Draft Guidelines, the Sections suggested that the Bureau give consideration to clarifying that a

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¹⁴ [*Canada (Director of Investigation and Research) v. NutraSweet Co.* (1990), 32 C.P.R. (3d) 1, 28 (Comp. Trib.).] ("NutraSweet")
“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 102 of the Treaty of Rome, Section 2 of the Sherman Act, and the Chapter 2 Prohibition under the U.K.’s Competition Act. The Sections renew that suggestion here.

**Market Share and Market Power**

The Sections welcome the discussion of market share in Section 2.3.1, which generally reflects a broadly held view of the relative weight to be given to market share in relation to establishment of the existence of market power. Specifically, the Draft Guidelines acknowledge a core principle concerning the relationship between market share and market power – that although high market share is “one of the most important determinants” of market power, alone it is insufficient to establish market power. Rather, high market share is a necessary condition to establish market power when it is combined with other indicia of control. The Sections therefore are of the opinion that the Draft Guidelines commendably abandon the more restrictive position articulated in the 2001 Guidelines that “greatest emphasis” would be placed on market share and barriers to entry in evaluating the presence of market power.

Consistent with this more robust analytical approach to the assessment of market power, the Draft Guidelines appropriately place greater emphasis on an assessment of high market share in the context of other market factors that could result in effective discipline of an attempted exercise of market power, including: (a) the share of the market held by competitors to whom customers can switch in the face of a price increase; (b) the likelihood of timely “supply responses” by firms that would begin to sell product in response to a small but significant and non-transitory price increase; and (c) the presence or absence of entry barriers and their impact more generally.

The Sections further commend the indications in the Draft Guidelines that the Bureau will take account of a number of other market factors that facilitate a comprehensive assessment of the relationship between high market share and the likelihood that market power may be abused. In particular, the Bureau has helpfully clarified that high market share will be evaluated in light of the distribution of the remaining market among competitors in order to take account of disparity between a firm’s individual market share and those of its competitors. The Sections understand this discussion to indicate that the Bureau will be open to exploring a broader range of factual circumstances that drive competitive dynamics in a given market. The Sections suggest it would be helpful to include examples of the kinds of circumstances and evidence the Bureau would consider relevant to a market power inquiry.

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15 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).

Similarly, the Draft Guidelines indicate that the Bureau will examine the durability of market shares in a particular market in order to observe and understand market share fluctuations over time. This discussion indicates that the Bureau will give consideration to share fluctuations attributable, for example, to the introduction of “leapfrog” technologies. The Sections support the consideration of the durability of market shares and believe that it is appropriate to provide explicit acknowledgment that technological innovation is an important dimension of competition that informs the market power analysis. In addition, the Sections suggest the Bureau also take explicit account of the competitive effects of a range of non-technological but nevertheless pro-competitive innovations or changes including improvements in product quality, product differentiation or segmentation and/or marketing and distribution efficiencies, all of which could affect the durability of market share levels that otherwise might facilitate the ability to exercise market power.

**Market Share Thresholds for Section 79 Enforcement**

The Sections welcome the introduction of greater specificity in the Draft Guidelines’ discussion of how the Bureau will approach market share thresholds for enforcement actions. The Bureau’s described approach promises, with additional clarification, to offer helpful insight into the market share levels (and related factual circumstances) that are likely to prompt further investigation of alleged anti-competitive conduct under Section 79. Greater clarity with respect to such enforcement thresholds will enhance certainty for business and improve the ability of private counselors to guide affected clients.

The Draft Guidelines indicate that in a zone between 35% and 50% market share, a firm would not be presumed to have obtained dominance, depending on circumstances. The potential value of this “non-presumption” zone to private counseling and compliance efforts is significant because it could mitigate the potential chilling effect of legal uncertainty on the part of firms with market shares within the zone. To realize the full value of such a non-presumption zone, the Sections suggest that the Bureau provide examples of the market circumstances or the nature of allegations the Bureau would consider sufficient to overcome the non-presumption and therefore warrant further investigation. Such examples might include discussion of the weight to be afforded evidence related to market share disparities, market share durability, and/or the likelihood of timely supply responses in the Bureau’s determination as to the merits of continuing an investigation. In addition, it would be useful for the Bureau to indicate the weight it would give to business justifications of firms whose market share levels fall within the 35% to 50% range.

In order to clarify the Bureau’s enforcement policy with respect to the “non-presumption” zone, it will also be important to provide greater transparency with respect to the question of future market power by firms with market shares below 50 percent, an issue that is raised in Footnote 21. Footnote 21 indicates there may be a separate standard applicable to firms that appear capable of acquiring “future market power.” The Sections’ views on this issue are addressed at page 9 of these comments. For the reasons expressed at page 9, the Sections urge the Bureau to consider eliminating Footnote 21 so that it does not undermine the utility of the non-presumption zone.
The Draft Guidelines raise the joint dominance market share safe harbour threshold from 60% to 65%. The Sections believe that this increase of the combined market share threshold for a determination of joint dominance is appropriate because it brings the Bureau’s approach to abuse of dominance in line with its approach to mergers (65% is the coordinated effects safe harbour under the Commissioner’s Merger Enforcement Guidelines16), and because 65% still falls well below the market share levels at which the Tribunal has been willing to find dominance in the contested cases (all of which involved single firm dominance and market shares above 80%). The Sections also suggest that it would be useful to clarify how the 65% joint dominance threshold may be viewed with respect to firms that may collectively be subject to investigation with respect to future market power.

IX. Joint Dominance

Section 79 of the Act specifically contemplates applications against “one or more persons” and therefore allows the Tribunal to make an order against jointly dominant firms. The Draft Guidelines provide only minimal guidance on the level of joint activity or “jointness” that is necessary in order for the Commissioner to bring a joint dominance case. Such guidance is important because firms that on their own do not enjoy significant market share or market power, and that therefore consider themselves unlikely to be subject to the abuse of dominance provisions, may find themselves subject to challenge as jointly dominant. In the Sections’ view, the Draft Guidelines would benefit from greater discussion and guidance regarding the level of joint activity required to make two or more firms “jointly” dominant.

The 2001 Guidelines contained an extensive but cautious discussion of the issue of joint dominance, stating that “something more than mere conscious parallelism must exist before the Bureau can reach a conclusion that firms are participating in some form of coordinated activities.”17 This position was reiterated by the Bureau in 2006, when the Commissioner noted that “[i]n order for the Bureau to conclude that there has been a potential joint abuse of dominance there must be evidence to show coordinated behaviour albeit short of “conspiracy” covered by our criminal cartel provisions.”18 The Sections endorse this cautious (and pragmatic) approach and note that U.S. Supreme Court jurisprudence has held that parallel conduct in concentrated or oligopolistic industries is not sufficient, in the absence of circumstantial evidence of an agreement, to show a violation of section 1 of the Sherman Act.19

The 2009 Draft Guidelines were decidedly more aggressive than the 2001 Guidelines on joint dominance, stating that “[w]here these firms are each engaging in similar practices alleged to be anti-competitive, and they appear to together hold market power based on their collective share

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18 Commissioner of Competition, Speaking Notes, “Abuse of Dominance under the Competition Act” (Submission to the Federal Trade Commission/Department of Justice Hearings on Single Firm Conduct, Washington, D.C., September 12, 2006).
19 See e.g. the discussion in the Comments on the 2009 Draft Guidelines of additional information on the U.S. law, and for information on the E.U. approach to collective dominance.
of the market, barriers to entry or expansion…the Bureau will consider these firms to hold a jointly dominant position.” However, the 2009 Draft Guidelines failed to address the threshold question of the “linkage” required to determine when firms are acting “jointly” as opposed to individually. In their prior comments on the 2009 Draft Guidelines, the Sections raised concerns about the need for additional guidance on this issue, particularly since there is no jurisprudence directly on point.  

The Sections are pleased that the Draft Guidelines take a somewhat more measured approach to joint dominance than did the 2009 Draft Guidelines by stating that “[s]imilar or parallel conduct by firms is not sufficient, on its own, for the Bureau to consider them to hold a jointly dominant position”, and by moving to a 65%, rather than a 60%, joint dominance safe harbour. However, the Sections remain concerned that the Draft Guidelines continue to suffer from a similar deficiency as the 2009 Draft Guidelines, in that they fail to provide sufficient guidance on the issue of what constitutes “joint” activity. The closest the Draft Guidelines now come to addressing this question is as follows:

“Similar or parallel conduct by firms is not sufficient, on its own, for the Bureau to consider them to hold a jointly dominant position: firms may engage in similar practices that are pro-competitive, such as matching price reductions or making similar competitive offers to customers. However, the Bureau will examine whether these firms appear to hold market power as a group based on: (i) their collective share of the market; (ii) barriers to entry or expansion; (iii) evidence of a lack of inter-firm competition; and (iv) any other relevant factors.

The Bureau considers evidence of coordinated behaviour between firms to be potentially probative, although not strictly necessary, to establishing these firms hold a jointly dominant position.”

In this passage, the Bureau enumerates four factors that it will consider in determining whether firms are jointly dominant. The third factor – evidence of a lack of inter-firm competition – appears to be directed at providing the “linkage” necessary to transform a competitive market situation into one of joint dominance. However, in the Sections’ view, it is very difficult to apply this factor in practical terms. In particular, what constitutes evidence of a lack of competition? The statement quoted above suggests that the Bureau will not infer that there is a lack of competition just because firms are engaged in leader-follower behaviour or conscious parallelism. If this is the case, it seems logical to conclude that evidence of actual communication and coordination among firms is necessary to prove joint dominance. However, the Draft Guidelines go on to state that evidence of coordinated behaviour between firms is “potentially probative, although not strictly necessary” to establish joint dominance.

The Sections believe that Draft Guidelines would benefit from additional clarity and a more detailed discussion of what types of evidence the Bureau considers to be indicative of a lack of inter-firm competition in the joint dominance context.

20 But see R. v. Canadian General Electric Co. (1976), 29 C.P.R (2d) 1 (H.C.J.) and Atlantic Sugar, supra note 17 for a discussion of the issue under the pre-1986 criminal provision.
X. Predatory Pricing Issues

The Sections believe that the Draft Guidelines appropriately highlight the tension between encouraging low pricing, one of the main benefits of competition, and prosecuting predatory pricing as an abuse of dominance. Recognition of this tension is important in guiding enforcement in this area, so that procompetitive discounting will not be chilled by overly aggressive enforcement of abuse of dominance provisions against alleged predatory pricing.

The Sections also believe that the Draft Guidelines provide a definition of competitive harm from predatory pricing that is consistent with mainstream practices and broadly accepted economic theory. In particular, the definition requires the dominant firm to incur losses for a period of time sufficient to eliminate, discipline, or deter entry of a competitor and then be able to recoup those loses. Both of these requirements are important to be able to distinguish pricing that is procompetitive and beneficial to customers from pricing that is expected to be profitable only because of its anticipated anti-competitive effects. 21

The Sections note that the Bureau has provided helpful guidance to businesses by specifying that it will use average avoidable cost (AAC) to assess whether pricing is below cost. Many competition agencies consider AAC to be the most appropriate cost measure to use in predatory pricing cases. 22

The Sections suggest, however, that the Draft Guidelines could benefit from clarification in two respects.

First, the Draft Guidelines state that the Bureau, in addition to considering whether price is below AAC, will also examine whether the dominant firm’s price can be matched by competitors without incurring losses. The Sections suggest that the Bureau clarify that this factor is not intended to furnish a separate test from the price-cost test. An inefficient company may not be able to match the prices of a dominant firm without sustaining losses because the competitor is inefficient, not because the dominant firm’s pricing is predatory. A separate liability rule of this sort could discourage aggressive pricing by dominant firms to the detriment of customers. Moreover, this rule would make difficult a dominant firm’s pricing decisions because that firm is not likely to know the cost structure of its competitors and what pricing may cause losses for particular competitors. This could further chill procompetitive discounting.

Second, the Draft Guidelines would benefit from clarification with respect to the recoupment requirement. As described in the Draft Guidelines, the Bureau will determine whether the dominant firm will be able to recoup its losses by charging higher prices in the future. This requirement is an important one because it helps to distinguish conduct that is anti-competitive from that which is simply aggressive competition. The purpose of a recoupment requirement is to determine whether a pricing strategy is a rational, anti-competitive strategy. If a company is

not likely to be able to recoup the losses, and then some, then customers will benefit from the low prices more than they are harmed by the subsequently higher prices.\textsuperscript{23}

\textbf{CONCLUSION}

The Sections commend the Bureau for taking the initiative to provide updated guidance in this difficult area. The Sections very much appreciate the opportunity to comment on the Draft Guidelines 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.

\textsuperscript{23} See, e.g. \textit{Brooke Group}, supra note 21 at page 224.