

OSLER COMMENTS ON THE COMPETITION BUREAU'S DRAFT ABUSE OF DOMINANCE GUIDELINES

A. Introduction

Osler, Hoskin & Harcourt LLP welcomes the opportunity to provide comments on the draft Abuse of Dominance Enforcement Guidelines – Sections 78 and 79 of the Competition Act issued for consultation on March 14, 2018 (the “**Draft Guidelines**”). We strongly support the continuing efforts of the Competition Bureau (the “**Bureau**”) to clarify its enforcement policies by publishing enforcement guidelines, information bulletins, speeches, press releases and other interpretative aids. We commend the Bureau in consulting broadly on the Draft Guidelines, as the Bureau’s guidance on its approach to enforcement of the abuse of dominance provisions affects the market strategies and market choices of businesses in Canada, which in turn may have important implications for the competitiveness of our economy.

We applaud the significant efforts made in the Draft Guidelines to provide greater certainty and clarity to businesses by expanding the discussion of legitimate business justifications, briefly addressing potential approaches to market definition in the context of multi-sided platforms, providing insight on the Bureau’s approach to remedies, and including (as was the practice in past versions of the guidelines) greater detail in its guidance, as well as helpful market examples.

However, in respect of three main areas in particular, we have concerns with the changes proposed in the Draft Guidelines and/or believe further clarification would be helpful:

- *The removal of the 35% safe harbour threshold.* This proposed change is without meaningful explanation of the rationale or economic or legal basis for such removal. It materially and unnecessarily increases uncertainty and decreases predictability for businesses with relatively low market shares, particularly when read together with the proposed open-ended approach to identifying joint dominance;
- *The expanded application of joint dominance.* The approach to joint dominance continues to leave open and further reinforces the suggestion that simple parallel conduct in any reasonably concentrated market may be used by the Bureau to ground a finding of joint dominance. Such an approach is not supported by the language of the relevant statutory provisions or jurisprudence, nor is it consistent with the underlying principles of

the Competition Act (the “**Act**”). Given the potential implications of such a broad approach to a wide range of businesses in Canada regardless of size or market position, we strongly urge the Bureau to reconsider and clarify this section of the Draft Guidelines.

- ***The section 79 analysis post-TREB.*** The Draft Guidelines make reference in several places to circumstances in which a respondent can abuse its dominant position without competing in the market that it dominates or in which anti-competitive effects are alleged to arise. We submit that these concepts require further consideration and clarification (including by way of examples) consistent with jurisprudence, including the Competition Tribunal’s (the “**Tribunal**”) decision in *TREB*.¹

B. The Removal of the 35% Safe Harbour Threshold

In the Draft Guidelines, the Bureau has replaced its longstanding guidance that market shares of less than 35% will generally not prompt further examination under section 79, with a general statement that market shares below 50% may prompt further investigation in certain circumstances. We strongly urge the Bureau to reconsider deletion of the 35% market share safe harbour threshold, below which a market participant would not generally be considered to possess market power. This change creates significant uncertainty for no plausible benefit, and is at odds with Commissioner Pecman’s oft-stated objective of enhancing transparency and predictability.

It is unclear what gap in its analytical approach or its enforcement efforts the Bureau is seeking to fill with this change. The Draft Guidelines do not offer a rationale or explanation, not even on par with the limited circumstances mentioned in the Bureau’s white papers on big data² and fintech³. As illustrated by these very specific examples, firms with low market shares only rarely can effect a substantial lessening of competition. Outside of such unique circumstances, firms should not be exposed to undue scrutiny and risk. The proposed change introduces a potentially significant

¹ The Commissioner of Competition v The Toronto Real Estate Board, 2016 Comp. Trib. 7, [TREB].

² Competition Bureau, “Big data and innovation: key themes for competition policy in Canada” (February, 2018). The paper notes that “a firm with very low share but with access to a resource that is scarce and valuable (e.g., scarce and valuable data) may be found to possess market power”.

³ Competition Bureau, “Technology-led innovation in the Canadian financial services sector” (December, 2017). The paper states that “When a market is composed of a necessary good with very low price-elasticity (i.e. the rate at which demand decreases when prices increase), even firms with small market share can wield power”.

chilling effect on single firm conduct, as every firm must now face the prospect that its activities will attract enforcement action under the Act's abuse of dominance provisions, even if it has a relatively modest market share. Moreover, this concern would be exacerbated in the event that (as has been suggested by some commentators) section 79 were to be amended such that private enforcement action becomes available under section 79. The removal of this safe harbour could well encourage unmeritorious third party applications.

In the event the Bureau ultimately decides to eliminate the 35% safe harbour threshold (which, as noted, we do not believe is appropriate or warranted), at a minimum the Bureau should incorporate detailed guidance into the Draft Guidelines to elaborate upon the "other evidence" that may lead a firm with low market share to be considered dominant. The Draft Guidelines should also provide specific examples of the market circumstances that could result in such a finding or the nature of allegations the Bureau would consider sufficient to warrant further investigation despite the fact that the firm has a low market share. Firms are entitled to clarity on the type of conduct and market circumstances that would cause the Bureau to view them as a dominant player (i.e., possessing market power), as most firms would not view themselves as possessing market power where they have less than 35% market share.

Since the Draft Guidelines suggest that the Bureau no longer views market shares as a reliable primary indicator of market power, market participants would also benefit from an expanded description of how the Bureau plans to make use of market shares in its section 79 analysis going forward (i.e., to what extent are market shares more than just "an initial screening mechanism") and on what factors the Bureau intends to rely to replace the previous emphasis on market share analysis.

C. Joint Dominance

The Draft Guidelines increase rather than alleviate the significant uncertainty regarding the Bureau's assessment of joint dominance that has now persisted for several years. In its 2001 Guidelines, the Bureau took a cautious view of joint dominance, stating that "something more than mere conscious parallelism must exist" for it to establish joint dominance.⁴ In the 2009 Draft

⁴ Competition Bureau, "Enforcement Guidelines: Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act)" (July 2001) [2001 Guidelines] at 17.

Guidelines, the Bureau took a more aggressive position, stating that “[w]here these firms are each engaging in similar practices alleged to be anti-competitive...the Bureau will consider these firms to hold a jointly dominant position.”⁵ In the 2012 Guidelines, the Bureau took a somewhat more measured (though still unclear) approach by stating that “parallel conduct by firms is not sufficient, on its own” and that it will consider factors such as the combined market shares of the firms, barriers to entry, and the extent of competition between firms in its determination of joint dominance.⁶

While the Draft Guidelines maintain the position that parallel conduct alone is not sufficient to constitute joint dominance, the proposed new language suggests that the Bureau may depart from this position simply where a market is not characterized by active pro-competitive pricing. Further, the proposed language highlighted below appears to broaden the acts that could be found to facilitate joint dominance to include entirely unilateral conduct. In particular, paragraph 1.48 states:

“As with single-firm dominance, the ability to exercise market power on a collective basis is not sufficient to raise an issue under the abuse provisions of the Act. While a group of firms may collectively hold market power, it is still necessary to establish that these firms’ conduct constitutes a practice of anti-competitive acts that is preventing or lessening competition substantially. It may, however, be the case that a practice of anti-competitive acts facilitates joint dominance.”

The intent of paragraph 1.48 is unclear, particularly when read in conjunction with the reference in paragraph 1.47 to pro-competitive parallel conduct. Is the Bureau suggesting that firms operating in markets not characterized by a high degree of price competition are presumed to be acting jointly without there being any indicia of joint behaviour, such that the Bureau could threaten to file an application to force them to price more competitively? Are firms operating in concentrated markets presumed to act jointly simply due to the structure of the market?

⁵ Competition Bureau, “Enforcement Guidelines: Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act)”, Draft (January 2009) [2009 Draft Guidelines] at 15.

⁶ Competition Bureau, “Enforcement Guidelines: Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act)” (September 2012) [2012 Guidelines] at 9.

If the Bureau's enforcement position is that a section 79 application premised on joint dominance could be successful in circumstances where firms act independently of each other but where the market is viewed to be insufficiently competitive, this should be clearly stated. Moreover, the Bureau should justify its view. We respectfully submit that such a position is not supported by the statutory language or jurisprudence. Importantly, such a position would represent a departure from the clear principle underlying the Act that simply being in a favourable market position is insufficient to constitute anti-competitive activity. Indeed, the Draft Guidelines clearly state this principle in the context of single firm dominance, noting in the Executive Summary that "charging higher prices to customers or offering lower levels of service and choice than would be expected in a more competitive market does not constitute an abuse of dominance".⁷ If the Bureau recognizes this principle in the context of unilateral conduct, it is unclear why firms with lower market shares that each unilaterally and independently determined that aggressive price competition was not sustainable should be held to a different standard.

It should be recognized that parallel but independently determined pricing and other similar behaviors are consistent with competitive oligopolistic markets (particularly where undifferentiated products are involved) and should not be discouraged, let alone challenged.

D. *TREB* – Elaboration Required

Drawing on the *TREB* decision, the Draft Guidelines introduce proposed new guidance with respect to dominance itself and the ability to exclude, in particular the extent to which a firm participates or otherwise has an interest in the market where the anti-competitive conduct occurs or the effects materialize.

Paragraph 1.4 of the Draft Guidelines states that a person may be dominant in a market that is different from the market in which the alleged anti-competitive acts take place. While this statement is consistent with the Tribunal's decision in *TREB*,⁸ without an explanation of the circumstances in which such a finding may be made (outside of the industry association context in which *TREB* was decided), this statement of principle does not provide an appropriate or helpful

⁷ Draft Guidelines at 5.

⁸ *Supra* note 1.

level of guidance to businesses and organizations about the circumstances in which the Bureau would consider applying the principle set out in *TREB*.

We further recommend that the Bureau explain its enforcement position in the context of the Tribunal's statement in *TREB* that: "[b]efore a practice engaged in by a respondent who does not compete in the relevant market can be found to be anti-competitive, the Commissioner will be required to satisfy the Tribunal that the respondent has a plausible competitive interest in the market."⁹ As the Tribunal stated, "[i]f a respondent, who is a dominant supplier to, or customer of, participants in the relevant market, is found to have no plausible competitive interest in adversely impacting competition in the relevant market, its practices generally will not be found to fall within the purview of paragraph 79(1)(b). This is so regardless of whether that entity's conduct might incidentally adversely impact upon competition."¹⁰ Considering that this is a potentially significant limitation on the ability to enforce section 79 against a firm that is not a participant in the market affected by the anti-competitive practice, the concept of "plausible competitive interest" requires further elaboration. While demonstrating plausible competitive interest may be straightforward in the case of a trade association, in light of the *TREB* precedent that a trade association may have a plausible interest in protecting some or all of its members from new entrants or from smaller disruptive competitors in the market. However, it is unclear how this principle would be applied in other circumstances. For example, in the case of a business that is upstream or downstream from the relevant market further clarity is needed on what, if anything, would constitute a plausible competitive interest that could result in an abuse of dominance concern. Among other things, it will be important to ensure that ordinary course refusals to supply or other vertical conduct that has no link to a plausible competitive interest by the respondent in the relevant market will not be mistaken for the type of anti-competitive conduct that is contemplated by paragraph 79(1)(b).

In footnote 5 of the Draft Guidelines, the Bureau indicates that it may conclude the abuse of dominance provisions are engaged where there is a link between a market in which a firm is dominant, which is "wholly unrelated to the market in which competitive effects materialize." It is not immediately clear what the Bureau means by this and it would be helpful for the Bureau to

⁹ Supra note 1 at 279.

¹⁰ Supra note 1 at 282.

clarify and provide examples of how such circumstances might arise. For example, does footnote 5 allude to bundling or tied selling? If so, the Bureau should set out what factors they would consider, prior to taking action, in order to determine that a sufficient link exists between markets that appear otherwise unrelated.

E. Conclusion

The Bureau's efforts to provide further guidance and examples in the Draft Guidelines is notable and greatly appreciated. However, in our view the Draft Guidelines would benefit from a reconsideration of the foregoing issues. We would be pleased to further discuss our comments with the Bureau if that would be helpful.