

**COMMENTS OF THE AMERICAN BAR ASSOCIATION
SECTIONS OF ANTITRUST AND INTERNATIONAL LAW
ON THE ABUSE OF DOMINANCE ENFORCEMENT GUIDELINES
FOR THE CANADIAN COMPETITION BUREAU**

May 14, 2018

The views stated in these Comments are presented on behalf of the American Bar Association Sections of Antitrust Law and International Law. 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.

Introduction

The Sections of Antitrust and International Law (“the Sections”) of the American Bar Association respectfully submit these comments on the proposed updated *Abuse of Dominance Enforcement Guidelines* (the “2018 Draft Guidelines”)¹ released by the Canadian Competition Bureau (the “Bureau”). The Sections appreciate the careful thought that went into the *2018 Draft Guidelines* and the Bureau’s objective of ensuring that its guidance documents reflect current enforcement practices. The Sections are available to provide additional comments or to participate in consultations as the Bureau may deem appropriate.

Executive Summary

Based on their collective experience in multiple jurisdictions, including the United States, Canada, and the European Union, the Sections offer suggestions to assist the Bureau in further refining the *2018 Draft Guidelines*, focusing on seven subjects: (1) Joint Dominance; (2) Non-Competitor in a Relevant Market; (3) Apparent Conflict Between Sections 1.44 and 3.6; (4) Barriers to Entry (Timing of Entry); (5) Predatory Conduct; (6) Zero-Monetary Price Services; and (7) Safe Harbours.

1. *Joint Dominance.* The Sections appreciate the guidance provided by the *2018 Draft Guidelines*. The Sections also encourage the Bureau to provide further guidance on the definition of joint dominance and a delineation between joint dominance under section 79 of the Competition Act and competitor collaboration under section 90.1 of the Act. Such clarifications could also be further reflected in the Illustrative Examples included in the *2018 Draft Guidelines*.

2. *Non-Competitor in a Relevant Market.* The Sections commend the Bureau for addressing the issue of whether and how an entity outside of a relevant market may be involved in an abuse of a dominant position. However, the Sections respectfully urge the Bureau to further clarify the treatment of non-competitors in a relevant market. The *2018 Draft Guidelines*

¹ Competition Bureau Canada, *Abuse of Dominance, Enforcement Guidelines (Consultation Draft)* (2018), available at [www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-draft-AbuseOfDominance-EnforcementGuidelines-eng.pdf/\\$FILE/cb-draft-AbuseOfDominance-EnforcementGuidelines-eng.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-draft-AbuseOfDominance-EnforcementGuidelines-eng.pdf/$FILE/cb-draft-AbuseOfDominance-EnforcementGuidelines-eng.pdf) (hereinafter *2018 Draft Guidelines*).

would also benefit from further clarification regarding the economic standard that the Bureau would use to measure the harm to downstream competition.

3. *Apparent Conflict Between Sections 1.44 and 3.6.* The Sections observe that there appears to be a conflict between sections 1.44 and 3.6 of the *2018 Draft Guidelines*, and respectfully recommend the Bureau to harmonize the test for substantiality throughout the *2018 Draft Guidelines*.

4. *Barriers to Entry (Timing of Entry).* The Sections welcome the clarifications that the Bureau has added to this topic in its guidelines. However, the Sections encourage further guidance with respect to what would be considered “timely” entry sufficient to mitigate market power concerns. While this is a fact intensive analysis, outlining the factors that the Bureau would consider on the question of timeliness will help practitioners and companies evaluate whether a company has market power.

5. *Predatory Conduct.* The Sections applaud the Bureau’s efforts to clarify the definition of “predatory conduct.” The Sections encourage further elaboration of the circumstances under which predatory pricing will be considered anticompetitive, as doing so will provide greater guidance to enterprises, consistent with the objectives of sound competition policy and without discouraging low pricing practices that generally are beneficial to consumers.

6. *Zero-Monetary Price Services.* The Sections welcome the discussion in the *2018 Draft Guidelines* of multi-sided platforms and zero-monetary price services. The Sections encourage the Bureau to provide additional guidance on how the Bureau will apply qualitative indicators of substitutability in the context of zero-monetary price services.

7. *Safe Harbours.* The Sections applaud the elimination in the *2018 Draft Guidelines* of the thirty-five percent market share safe harbour threshold contained in the 2012 Guidelines, expanding the zone within which a firm is presumed not to have a dominant position (depending on circumstances) to any share below fifty percent. Any additional clarity the Bureau could provide regarding a finding of market power when a firm’s market share is below fifty percent would further minimize uncertainty.

1. Joint Dominance

The Sections commend the Bureau on its efforts to offer some guidance in respect of joint dominance. At the same time, the Sections reiterate concerns they have previously expressed with respect to the absence of sufficient guidance on the Bureau’s approach to joint dominance. The Sections note that many of the concerns expressed on this issue with respect to the 2012 Draft Guidelines have not been addressed in the *2018 Draft Guidelines*. In the United States, there is a basic distinction between unilateral and concerted action that may be found to contravene the antitrust laws.² A joint dominance standard that could render actionable conduct by multiple firms where those firms would not face liability individually, and absent agreement that would otherwise

² *Monsanto Co. v. Spray-Rite Svc. Corp.*, 465 U.S. 752 (1984); *Copperweld v. Indep. Tube Corp.*, 467 U.S. 752 (1984).

render the firms liable collectively, risks blurring the boundaries of acceptable conduct and such resultant uncertainty could unnecessarily chill pro-competitive (or competitively neutral) commercial activities. As such, the Sections consider that the Bureau's Guidelines could benefit from greater clarity and guidance with respect to: (i) the definition of joint dominance, and (ii) the delineation between joint dominance under section 79 of the Competition Act and competitor collaboration under section 90.1 of the Act. Finally, the Sections believe it would be helpful to see such further guidance reflected in the Illustrative Examples provided in the *2018 Draft Guidelines*.

Definition of Joint Dominance: The Sections recognize that section 79 expressly contemplates potential liability for joint dominance. Nevertheless, the skepticism with which antitrust authorities and commentators have approached theories of joint dominance underscores the desirability of providing greater clarity with respect to the Bureau's approach to joint dominance and should inform the Bureau's careful delineation of the (presumably limited) circumstances in which joint dominance is likely to be pursued. Accordingly, the Sections believe that the *2018 Draft Guidelines* would benefit from greater discussion and guidance regarding the level of joint activity required to make two or more firms “jointly” dominant. Such guidance is important because individual firms that may not enjoy significant market power, and that consider themselves unlikely to be subject to section 79, may find themselves under investigation as being jointly dominant. This lack of clarity may impede non-dominant individual firms from structuring their activities to comply with the Competition Act. It is exacerbated in industries where market participants may not know the respective market shares of competitors, such that it becomes difficult for a firm to know in advance whether it could be found to be part of a group that enjoys a dominant position.

The *2018 Draft Guidelines* repeat the statement from the previous iteration of Guidelines that “[s]imilar or parallel conduct by firms is insufficient, on its own, for the Bureau to consider those firms to hold a jointly dominant position.”³ In addition, the *2018 Draft Guidelines* repeat that the mere fact that a group of firms collectively holds significant market power is not sufficient to establish abuse of dominance; rather “it is still necessary to establish that these firms’ conduct constitutes a practice of anti-competitive acts that is preventing or lessening competition substantially.”⁴ The Sections endorse this cautious approach.

However, the Sections respectfully submit that the *2018 Draft Guidelines* do not clearly define the degree of “joint” activity that would engage the joint dominance provisions of the Act. The uncertainty is exacerbated by the fact that the Bureau has not expressly identified a safe harbour threshold for joint dominance. While the *2018 Draft Guidelines* state that “a combined market share equal to or exceeding 65 percent will generally prompt further examination,”⁵ they fail to make the opposite point (which they make at section 1.35 with respect to individual market shares), namely that a combined market share below 65 percent will generally not prompt further

³ *Id.* at section 1.47.

⁴ *Id.* at section 1.48.

⁵ *Id.* at section 1.35.

examination (or will only prompt further examination if other evidence indicates the firms possess market power).

The Bureau should guard against over-enforcement of alleged joint dominance cases, because parallel conduct in an industry is often pro-competitive or competitively neutral. As described further below, it can be pro-competitive for non-dominant firms to follow the competitive practices of the market leader. Matching the prices or other competitive practices of the market leader allows non-dominant firms to compete aggressively against the market leader. U.S. antitrust law has rejected the analogous concept of shared monopoly.⁶ One principal reason for this approach is the difficulty in determining what joint action or “concerted action” will result in independent firms being found jointly dominant.⁷ Firms may act in parallel fashion simply because economic logic dictates doing so given the marketplace circumstances or the enterprises’ own experience. Without criteria such as cross-ownership or express agreements, the Sections believe that individual firms that are not independently dominant in the relevant market may have no reasonable basis for determining that they are part of a “jointly dominant” group (especially in the absence of express safe harbours, or in the absence of reliable public information as to the relative size of the competitors and the market). In turn, such firms would have no reason to know that their conduct, which would generally not be prohibited for an individual, non-dominant firm, may still be subject to challenge under section 79.

Additionally, crafting appropriate and effective remedies for groups of firms that are jointly dominant may prove to be difficult. For example, if firms are found to have behaved in a jointly dominant fashion, but in fact were merely responding rationally to marketplace developments without any agreement or coordination between them, a behavioural remedy prohibiting such conduct may require firms to act contrary to economically efficient behaviour.

For these reasons the Sections believe that the concept of joint dominance among firms that do not have express economic or contractual links represents a significant practical difficulty. Although the Competition Act specifically contemplates the possibility of joint dominance in section 79, the Sections respectfully submit that the Bureau should expressly accept that joint dominance will apply only where some links exist between the parties that are alleged to be jointly dominant. To that end, the Bureau could draw on the European Union’s experience under article

⁶ See, e.g., *Flash Elecs. v. Universal Music Dist.*, 312 F. Supp. 2d 379, 396 (E.D.N.Y. 2004) (“The idea of ‘shared monopoly’ giving rise to Section 2 liability repeatedly has been received with skepticism by courts who have squarely addressed the issue.”); *Sun Dun, Inc. of Washington v. Coca-Cola Co.*, 740 F. Supp. 381, 391 (D. Md. 1990) (“An examination of the history of the Sherman Act reveals that Congress’ concept of ‘monopoly’ did not include ‘shared monopolies’ or ‘oligopolies’ at all, but rather the complete domination of a market by a *single* economic entity.”).

⁷ See, e.g., *Brooke Grp. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993) (“Tacit collusion, sometimes called oligopolistic price coordination or conscious parallelism [is] . . . not in itself unlawful.”); *RxUSA Wholesale v. Alcon Labs.*, 661 F. Supp. 2d 218, 228 (E.D.N.Y. 2009) (holding that collectively dominant defendant manufacturers’ refusal to deal with plaintiff not in direct competition with defendants did not constitute anticompetitive conduct under Section 2); *Harkins Amusement Enters. v. Gen. Cinema*, 850 F.2d 477, 490 (9th Cir. 1988) (rejecting plaintiff’s shared monopoly theory under Section 2 of the Sherman Act where motion picture distributors and exhibitors allegedly adopted concerted preferences including bid-rigging, circuit-wide deals, illusory guarantees, and blind bidding).

102 of the Treaty on the Functioning of the European Union,⁸ where a finding of collective dominance requires of firms that “from an economic point of view they present themselves or act together on a particular market as a collective entity,” generally due to the existence of structural links between them.⁹ The Sections encourage the Bureau to adopt guidelines that similarly tailor the application of the joint dominance provision to activity that displays some form of link between the jointly dominant firms. This would help to minimize the concerns and uncertainty raised above.

Interaction with Section 90.1: The Sections respectfully submit that the *2018 Draft Guidelines* could offer additional guidance on distinguishing between joint activity that would be dealt with under section 79 of the Act, as opposed to under section 90.1 of the Act. For example, the Bureau’s *Competitor Collaboration Guidelines* provide guidance on the principles the Bureau will apply in determining whether to proceed under sections 45 (the criminal offence of conspiracy) and 90.1 (the reviewable practice applicable to competitor agreements), or under another provision of the Act.¹⁰ The *Competitor Collaboration Guidelines* also provide guidance on the Bureau’s approach to whether a particular agreement should be evaluated under section 45 or section 90.1.¹¹ Similar guidance in respect of abuse of dominance would be useful in the *2018 Draft Guidelines*. If the Bureau’s position is that conduct covered by section 90.1 could also be pursued under the abuse of dominance provisions, the *2018 Draft Guidelines* should make this clear, and set out the circumstances (ideally with an illustrative example) where this would be the case.

The Sections also note that the brief paragraph in the *Competitor Collaboration Guidelines* addressing abuse of dominance under section 79 does not fill this identified gap, because it does not address the factors the Bureau considers relevant to a determination of whether to proceed under section 79 or section 90.1. The paragraph states only that “such agreements may also be examined pursuant to the abuse of dominance provision found in section 79 of the Act in certain circumstances.”¹² Therefore, at present, the business community and legal advisors do not have meaningful guidance on the Bureau’s approach to distinguishing between section 79 and section 90.1 in the context of joint activity that may have a negative effect on competition.

The absence of clear delineation is significant because of the penalties to which a firm may be subject under section 79. A finding of joint abuse of dominance under section 79 could result in administrative monetary penalties of up to C\$10 million. In contrast, under section 90.1, the remedy is limited to a prohibition order.

Illustrative Examples: The Illustrative Example in the *2018 Draft Guidelines* on joint dominance (Example 4) fails to provide further clarity or guidance on the degree of joint activity

⁸ Joined cases C-395/96 P and C-396/96 P *Compagnie maritime belge transports SA & Compagnie maritime belge SA and Dafa-Lines A/S v. Comm’n*, 2000 E.C.R. I-1365, at ¶ 36 (Eur. Ct. Justice).

⁹ *Id.*

¹⁰ Competition Bureau, *Competitor Collaboration Guidelines*, § 1.2 (Dec. 23, 2009), available at [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf/\\$FILE/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf/$FILE/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf).

¹¹ *Id.* at section 1.3.

¹² *Id.* at section 1.2(e).

required to establish joint dominance. The only suggestion of “joint” activity in the example is that neither firm appears to attempt to solicit the customers of the other firm, and that both firms employ long-term contracts with automatic renewals and liquidated damages clauses. The Sections’ view is that two firms, acting totally independently, but offering similar contractual terms (which may reflect an efficient and competitive outcome), should not suffice to constitute joint dominance. Rather, some form of linkage should be required to be established. *See E.I. Du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 140 (2d Cir. 1984).

Further, in the *2018 Draft Guidelines*, mere market power is recognized to be insufficient to establish joint dominance. However, in Example 4, the two firms comprise one hundred percent of the relevant market. The Sections respectfully submit that this Illustrative Example does not provide meaningful clarity on the Bureau’s approach to joint dominance. The Sections urge the Bureau to identify how it would deal with the issue if the combined market shares of the allegedly dominant firms were lower (*e.g.*, sixty percent) and there were other competitors in the market.

Finally, the Sections suggest that the inclusion of a case study that exemplifies the Bureau’s approach to the delineation of joint dominance and competitor collaboration would greatly benefit the business community. Example 4 does not address competitor collaboration, nor does it offer guidance on how the Bureau would approach its decision to pursue this factual scenario as joint dominance rather than competitor collaboration. Such a discussion would assist the business community in understanding the difference in potential application of these two provisions of the Act.

2. Non-Competitor in Relevant Market

Sections 1.41-1.42 of the *2018 Draft Guidelines* address a situation in which market power exists in one market, yet the abuse occurs in another market. At the outset, the Sections question the premise that an entity outside of a relevant market may be involved in an abuse of a dominant position and the Sections respectfully urge the Bureau to further clarify the treatment of non-competitors in a relevant market.

Section 1.42 is not clear but appears to assert that a dominant firm can have market power in a market in which it does not compete, and also appears to create a unique test for dominance or control. The Sections submit that this section is likely to confuse firms and practitioners. In the section’s first sentence, the draft does not explain why the Bureau might find it unnecessary to define and establish dominance in the input market, when the firm does participate in that input market. It would seem that an ordinary market definition test and effects test should apply for such an analysis, and if this is not the case, the Bureau should explain the reasons for departing from this standard practice. In the third sentence, Section 1.42 seems to introduce the concept of “market power” in a market for which the firm does not participate at all. The Sections believe that this section may be making an erroneous or non-traditional use of terminology. When a firm is a dominant supplier, its actions may impact a downstream market in which it does not participate; however, the traditional method of describing such impacts is to call them “effects,” “harms,” or “benefits.” The terms “market power,” “control,” and “dominance,” in contrast, are generally reserved for description of the firm’s behavior in a market in which it does participate. The Sections suggest that the Bureau make a conforming change to its text, to promote clarity.

The *2018 Draft Guidelines* would also benefit from further clarification regarding the economic standard that the Bureau would use to measure the harm to downstream competition. Additionally, it would likely be helpful for parties to understand how the Bureau will weigh harm to downstream competition against the potential efficiencies achieved by specific conduct.

Section 2.41 uses the expression “alleged to control”, which the Sections, respectfully, find problematic. First, this wording suggests that the Bureau can establish abuse and dominance in a downstream market without even properly establishing dominance in the upstream market. Second, the use of the term “control” is unclear. Does “control” imply dominance in the upstream primary market? Can a firm “control” an input without being dominant in the product market? Third, the wording seems to suggest that an allegation of control is enough to establish dominance and abuse in the downstream market. The Sections suggest that should the Bureau choose to keep this section, it should be made clear that dominance in the upstream market must be properly established, as well as a strong correlation to an abuse of power which carries into the downstream market.

Section 1.42 proposes that in an economic assessment of the downstream market: “the Bureau will consider the extent to which substitutes exist to the input provided by the allegedly dominant firm, as well as the extent to which that input is necessary to compete.” The Sections respectfully submit that this contradicts the “alleges to control” test described in the previous paragraph. Furthermore, it would be helpful to further explain how this test differs from a market definition test generally, and why this separate definition is necessary. For example, typically when a firm is a dominant supplier, it may have some degree of power over a market in which it does not necessarily participate. Such situations are not automatically problematic. Further clarification regarding the conduct of a dominant supplier would be helpful.

The following sentence in section 1.42 seems to introduce an essential facility doctrine similar to the one adopted by the Tenth Circuit in *Aspen Skiing*¹³: “In the absence of acceptable substitutes, and if competitors in the relevant market are unable to effectively compete without access to the input, the Bureau will conclude the allegedly dominant firm has market power in the relevant market.” The Sections observe that the concept and tests that these sections bring forth could be clarified, including whether they introduce a test of refusal to supply and what other types of conduct they may cover. The Sections respectfully submit that a refusal to supply in markets the monopolist is not competing in does not violate the U.S. antitrust laws.¹⁴ For example, they

¹³ 738 F.2d 1509, 1520-21 (10th Cir. 1984), which was later neither rejected nor adopted by the supreme court in the appeal: *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

¹⁴ As was determined in *Official Airline Guides, Inc. (OAG) v. FTC*, 630 F.2d 920 (2d Cir. 1980), where the refusal to supply affected a market in which the alleged monopoly did not compete. In this case, the FTC claimed a Section 5 violation against OAG’s owner, which may have been a monopolist in publishing airline schedules, for arbitrarily refusing to supply a schedule to commuter airlines, thereby hindering competition between them. The court rejected this application of Section 5, ruling there is no Section 5 violation if the refusal to supply occurred in a separate market, where the monopoly is not a competitor.

theoretically might be interpreted as prohibiting excessive prices in a downstream market, and it is not clear whether that would constitute an abuse of a dominant position.¹⁵

The Sections respectfully submit that more clarity needs to be brought to this concept, potentially by replacing it with a direct reference to refusal to supply as a type of abuse of dominance, and explaining when the Bureau would pursue such an enforcement path instead of using the other refusal to supply provisions in sections 75 and 76 of the Act. An open-ended definition, such as the current one, may lead to over-enforcement of the abuse of dominance provisions and/or chilling effects if a wide range of ordinary commercial actions by a dominant firm may be interpreted as actionable whenever they impact an adjacent market.

3. Apparent Conflict Between Sections 1.44 and 3.6

The Sections respectfully observe that there appears to be a conflict between sections 1.44 and 3.6 of the *2018 Draft Guidelines*. According to section 79(1)(c) of the Competition Act, a practice by a dominant party may be found abusive if it “has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market.” The legal test is that of substantiality, and finds an echo in section 1.44 (“the threshold necessary to qualify as ‘substantial’”).

Chapter 3 of the *2018 Draft Guidelines* explains the notion of substantiality further. However, section 3.6 states that “[t]here is no definitive threshold past which a given lessening or prevention qualifies as substantial.” This appears to contradict section 1.44, and undermines the clarity that the *2018 Draft Guidelines* are intended to bring.

In addition, according to section 1.44, evidence of a substantial lessening of competition is accepted as evidence of market power: “Where an allegedly dominant firm is able to lessen or prevent competition significantly in excess of the threshold necessary to qualify as ‘substantial’ under paragraph 79(1)(c), *this may be evidence that the firm possesses substantial market power.*”¹⁶ However, section 3.6 states that “substantiality is assessed based on market specific factors, including the market power of the allegedly dominant firm.” This creates a circular analysis whereby market power is evidenced by substantiality, and substantiality is evidenced by market power.

The Sections respectfully urge the Bureau to harmonize the test for substantiality throughout the *2018 Draft Guidelines*. Additionally, sections 3.6 and 1.44 should be revised so that they avoid the circular tie between market power and competitive effects.

4. Barriers to Entry (Timing of Entry)

The Sections welcome the clarifications that the Bureau has added to this topic in its guidelines. However, the Sections encourage further guidance with respect to what would be

¹⁵ When the monopolist is also competing in the downstream market, this conduct seems to fall under section 78 (for example, margin squeeze, at section 78(1)(a)). The Sections presume this guidance was not intended to address cases of this kind.

¹⁶ *2018 Draft Guidelines*, *supra* note **Error! Bookmark not defined.**, § 1.44 (emphasis added).

considered “timely” entry sufficient to mitigate market power concerns. While this is a fact-intensive analysis, outlining the factors that the Bureau would consider on the question of timeliness will help practitioners and companies evaluate whether a company has market power.

For example, the International Competition Network (“ICN”) recommends that entry must be quick enough to have “an appreciable effect on the incumbent’s conduct.”¹⁷ Similarly in the United States, the *Horizontal Merger Guidelines* address the timeliness of entry by considering whether entry would undermine the overall profitability of an exercise of market power over the longer-term: “[E]ntry must be rapid enough to make unprofitable overall the actions causing those effects and thus leading to entry, even though those actions would be profitable until entry takes effect.”¹⁸ In other words, entry can have a meaningful impact on market power for competition law purposes without occurring so quickly as to be a complete deterrent to anti-competitive conduct. This would be harmonious with the recognition in the *2018 Draft Guidelines* that, in some circumstances, anticipated future entry may place a competitive constraint on firms already in the market, and the Bureau may consider any evidence of this as well.¹⁹

5. Predatory Conduct

Sections 2.12-2.14 address “predatory conduct,” defining it as behavior involving deliberate below-cost pricing for a period of time sufficient to eliminate, discipline, or deter entry or expansion of a competitor and in the expectation that the firm will thereafter recoup its losses by charging higher prices. These sections also address the average avoidable cost test and the various “screens” used by the Bureau prior to conducting an in-depth avoidable cost analysis.

The Sections encourage further elaboration of the circumstances under which predatory pricing will be considered anticompetitive, as doing so will provide greater guidance to enterprises, consistent with the objectives of sound competition policy and without discouraging low pricing practices that generally are beneficial to consumers. Although U.S. law may consider low pricing anticompetitive in certain circumstances, it has approached this conduct carefully. This is because competition on price remains “the very essence of competition,” and so “[e]ven if the ultimate effect of the [price] cut is to induce or reestablish supracompetitive pricing, discouraging a price cut and forcing firms to maintain supracompetitive prices, thus depriving consumers of the benefits of lower prices in the interim, does not constitute sound antitrust policy.”²⁰ Low prices are

¹⁷ INT’L COMPETITION NETWORK, DOMINANCE/SUBSTANTIAL MARKET POWER ANALYSIS PURSUANT TO UNILATERAL CONDUCT LAWS RECOMMENDED PRACTICES § II.7, Comment 4 (2008), available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc317.pdf>.

¹⁸ U.S. Dep’t of Justice & Fed. Trade Comm’n, Horizontal Merger Guidelines § 9.1 (2010), available at <https://www.justice.gov/atr/public/guidelines/hmg-2010.pdf>.

¹⁹ *2018 Draft Guidelines*, *supra* note 1, section 1.32; see also Horizontal Merger Guidelines § 9.1 (“The Agencies will not presume that an entrant can have a significant impact on prices before that entrant is ready to provide the relevant product to customers unless there is reliable evidence that anticipated future entry would have such an effect on prices.”).

²⁰ *Brooke Grp. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224, 226 (1993); see also INT’L COMP. NETWORK UNILATERAL CONDUCT WORKING GROUP, PREDATORY PRICING ANALYSIS PURSUANT TO UNILATERAL CONDUCT LAWS – RECOMMENDED PRACTICES ¶ 1 (2014), available at

generally beneficial to consumers, even when they result in losses by another individual competitor, and, without more, do not harm the competitive process or consumers.²¹

The Sections agree that the two “screens” specified in section 2.14 to be used prior to conducting an avoidable cost analysis are useful indicators that a dominant firm’s behavior is not likely to be anticompetitive. The Sections also suggest further consideration of additional cost-based tests that may help enterprises internally determine whether their conduct is likely to be considered an abuse of dominance. One useful set of thresholds suggested by various U.S. courts would allow for a relatively straightforward screening using the seller’s average total costs (“ATC”) and average variable costs (“AVC”), which are well-understood accounting concepts in most businesses: (1) prices at or above ATC fall clearly outside the domain of problematic “below-cost pricing,”²² (2) prices at or above AVC but below ATC are usually legitimate, and (3) prices below AVC are candidates for more detailed analysis.²³

The Sections also encourage further clarification that the costs in the avoidable cost analysis should be the *seller’s* own costs, rather than the average cost of all companies in the market or some other measure of cost. Regulating pricing below general average market cost, or below some other measure different from a seller’s own costs, would make it extremely difficult for businesses to determine the boundaries of lawful prices because businesses often cannot confidently measure costs other than their own, and could penalize businesses for being more efficient than their competitors. This clarification would help enterprises avoid conflating the Bureau’s examination of competitors’ costs (one of the “screens” used prior to conducting an avoidable cost analysis) with the avoidable cost analysis itself. The Sections understand from the body of the *2018 Draft Guidelines* and most of the commentary in Example 5 that the costs in the avoidable cost analysis should be the seller’s own costs, rather than the average cost of all

<http://www.internationalcompetitionnetwork.org/uploads/library/doc966.pdf> (“Vigorous price competition is generally beneficial to consumers.”).

²¹ *Brooke Grp.*, 509 U.S. at 224 (“That below-cost pricing may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured: It is axiomatic that the antitrust laws were passed for ‘the protection of competition, not competitors.’”) (citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)); *see also* *Atl. Richfield Co. v. USA Petroleum*, 495 U.S. 328, 338 (1990) (“[C]utting prices in order to increase business often is the very essence of competition.”); PHILLIP E. AREEDA & HERBERT HOVENKAMP, *FUNDAMENTALS OF ANTITRUST LAW* § 7.04 (4th ed. 2017); RICHARD WHISH, *COMPETITION LAW* 556 (6th ed. 2010).

²² *See, e.g.*, *United States v. AMR Corp.*, 335 F.3d 1109, 1117 (10th Cir. 2003) (pricing above total costs has been “implicitly ruled out” by the Supreme Court as a basis for predatory pricing liability); *McGahee v. N. Propane Gas*, 858 F.2d 1487 (11th Cir. 1988) (recognizing “average total cost as the cost above which no inference of predatory intent can be made”); *Henry v. Chloride, Inc.*, 809 F.2d 1334, 1346 (8th Cir. 1987) (“[A]t some point, competitors should know for certain they are pricing legally, and . . . this point should be average total cost.”); *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 729 F.2d 1050, 1056 (6th Cir. 1984) (“Pricing below marginal or average variable cost presumed predatory while pricing above marginal or average cost conclusively presumed legal.”).

²³ *See, e.g.*, *Tri-State Rubbish v. Waste Mgmt.*, 998 F.2d 1073, 1080 (1st Cir. 1993) (observing that pricing below variable cost is the “normal test of predation”); *Kelco Disposal v. Browning Ferris Indus.*, 845 F.2d 404, 407 (2d Cir. 1988), *aff’d*, 492 U.S. 257 (1989) (noting that prices below “reasonably anticipated average variable cost are presumed predatory”); *Henry*, 809 F.2d at 1346 (holding AVC “to be a marker of rebuttable presumptions”); *William Inglis & Sons Baking v. ITT Cont’l Baking*, 668 F.2d 1014, 1035-36 (9th Cir. 1981) (holding that the plaintiff bears the burden of showing that prices above AVC but below ATC are “predatory,” and that the plaintiff establishes a prima facie case of predatory pricing by proving that the defendant’s prices were below AVC).

companies in the market or some other measure of cost. The Sections support this approach, and therefore recommend the deletion of the following sentence in Example 5, which may create a confusing and misleading impression: “Information on the extent to which certain costs are avoidable could also be obtained from DOMAINE, other ice wine producers and/or industry experts.”

6. Zero-Monetary Price Services

The Sections welcome the discussion in the *2018 Draft Guidelines* of multi-sided platforms and zero-monetary price services, particularly when read in light of the Bureau’s comments on the same topic in its Big Data and Innovation white paper.²⁴ The prevalence of digital companies and the increasing importance of data within traditional sectors of the economy suggest that guidance in this regard is increasingly important.

As the *2018 Draft Guidelines* acknowledge, the hypothetical monopolist test cannot be applied in its traditional form where a price is zero because a “small but significant and non-transitory price increase”²⁵ is meaningless in such a setting. The *2018 Draft Guidelines* suggest that the test could be adapted to consider small but significant changes in non-price elements (such as quality) but acknowledge that this may not be tractable in practice, with the result that the Bureau’s analysis may focus instead on qualitative indicators of substitutability.²⁶

The Sections encourage the Bureau to provide additional guidance on how the Bureau will apply such qualitative indicators of substitutability in the context of zero-monetary price services. The Sections similarly encourage the Bureau to provide additional guidance on how it would evaluate a reduction in one or more non-price dimensions of competition (including, for example, product quality, service, innovation and privacy protections) in assessing a “substantial lessening or prevention of competition,” particularly in the context of zero-monetary price services. The inclusion of an illustrative example would likely be helpful in this regard.

More generally, the Sections note that in an environment of increasing technological change, multi-sided or platform markets have become much more common. While market definition for zero-priced services is one issue that arises in this context, there are many other challenging issues related to the assessment of dominance/market power, the determination of whether conduct constitutes an anti-competitive act, and the application of competitive effects tests in the context of multi-sided markets. The Sections recognize that this is an area in which economic theory and international experience are continuing to evolve, but they encourage the Bureau to consider providing additional guidance regarding its likely approach where it has had experience with the relevant issues.

²⁴ Competition Bureau, *Big Data and Innovation: Implications for Competition Policy in Canada* (Draft Discussion Paper) (2017), available at [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Big-Data-e.pdf/\\$file/Big-Data-e.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Big-Data-e.pdf/$file/Big-Data-e.pdf).

²⁵ *2018 Draft Guidelines*, *supra* note **Error! Bookmark not defined.**, § 1.18.

²⁶ *Id.* § 1.16.

7. Safe Harbours

The *2018 Draft Guidelines* eliminate the thirty-five percent market share safe harbour threshold contained in the 2012 Guidelines, expanding the zone within which a firm is presumed not to have a dominant position (depending on circumstances) to any share below fifty percent. In theory, this change brings the *2018 Draft Guidelines* closer to the approach adopted in the case law in the United States; however, the impact of the change will depend on how the Bureau applies the threshold in practice. The American Bar Association's *Antitrust Law Developments* publication provides the following summary of the United States' approach to market share thresholds based on court precedents in monopolization cases:

A market share in excess of 70 percent generally establishes a prima facie case of monopoly power, at least with evidence of substantial barriers to entry and evidence that existing competitors could not expand output. In contrast, courts rarely find monopoly power when the market share is less than about 50 percent.²⁷

In the Sections' view, a finding of market power where market share is under fifty percent should be similarly rare in Canada. Assuming this to be the case, the prior threshold of thirty-five percent may have caused firms with shares above the thirty-five percent threshold but below fifty percent to consider themselves to be subject to in-depth scrutiny if a Bureau investigation were to occur.²⁸ On this basis, the Sections applaud the Bureau's efforts to revise its guidance on market share pre-requisites for a finding of market power and anticipate that the elimination of the thirty-five percent threshold will likely improve certainty for businesses and their advisors.

The *2018 Draft Guidelines* discuss circumstances in which the Bureau might pursue a further investigation when a firm's market share is below fifty percent. The guidance, including Example 3, is generally instructive; however, any additional clarity the Bureau could provide would further minimize uncertainty. For example, the Sections suggest that the Bureau consider elaborating on the findings referenced in connection with other provisions of Part VII of the Act: namely, in Footnote 30 on the circumstances that resulted in the Tribunal finding market power with a share as low as thirty-three percent in the *VISA* case, and in footnote 31 on any specific factors relevant to the findings in the *Hillsdown Holdings* case.

Conclusion

The Sections appreciate the opportunity to comment on the *2018 Draft Guidelines* and commend the Bureau for its work. The Sections remain available to clarify any of the recommendations made herein.

²⁷ 1 ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 230-31 (8th ed. 2017) (citations omitted).

²⁸ See INT'L COMPETITION NETWORK UNILATERAL CONDUCT WORKBOOK CHAPTER 2: ANALYTICAL FRAMEWORK FOR EVALUATING UNILATERAL EXCLUSIONARY CONDUCT ¶ 17 (May 2017) available at <https://icn2017.concorrenca.pt/downloads/materials/UCWG-Analytical-Framework-Chapter.pdf>.