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Canadian
Council of
Grocery
Distributors

Conseil
canadien des
distributeurs en
alimentation

CANADIAN COUNCIL OF GROCERY DISTRIBUTORS

SUBMISSION TO

**SHARPENING CANADA'S COMPETITIVE EDGE
COMPETITION POLICY REVIEW PANEL**

FOR FURTHER INFORMATION PLEASE CONTACT

DAVID WILKES

SENIOR VICE PRESIDENT, TRADE AND BUSINESS DEVELOPMENT

416-922-6228 EXT 324

DWILKES@CCGD.CA

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INTRODUCTION

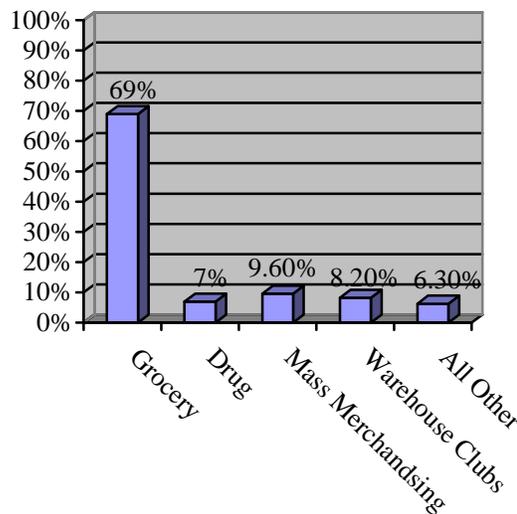
The Canadian Council of Grocery Distributors ("CCGD") is the national trade association representing grocery retailers and foodservice companies across Canada. Our members sell over 95% of food and consumer products sold in Canada and operate in every province of the country. The food distribution industry is Canada's second largest commercial sector. Member sales represent \$71.8 billion in retail and \$12 billion in foodservice. Members employ over 428,100 Canadians, and represent over 85% of all grocery (i.e. food, non-food, non-alcoholic beverages) distribution sales in Canada.

CCGD has been extensively involved in prior consultations on possible amendments to the *Competition Act*, as well as other matters relating to the enforcement and administration of Canadian competition law and policy. CCGD appreciates the opportunity to now participate in the Panel's consultation process and to provide the retail grocery industry's perspective on the impact of Canadian competition policy on the competitiveness of our economy, both domestic and international.

GROCERY RETAILING IN CANADA: A HIGHLY COMPETITIVE INDUSTRY

By way of background, the Canadian retail grocery industry is intensely competitive, with consumers enjoying competitive prices and quality products. Most significantly, the retail channel is no longer occupied solely by traditional grocers. There has been an exponential growth in competition from mass merchandisers, drug chains and warehouse/club stores, among others. These non-traditional sources have substantially expanded the food and grocery products they sell, resulting in significant channel growth as illustrated by the following chart:

GROCERY SHARE BY CHANNEL – OCTOBER 2007



Source: The Nielsen Company

In addition to the growth of non traditional sources within the grocery channel, independent and smaller grocers have positioned themselves to serve smaller market niches such as the new immigrant population base and core urban and rural shoppers.

Canadian consumers have benefited greatly from this competition in the form of enhanced product and service selection, increased choice and highly competitive pricing. Indeed average price change in the US ranged from a low of 0.4% in the San Francisco market to a high of 11% for the 52 week period ended October 27, 2007 compared against a national average of 1.7% in Canada.¹

Looking closer at market activity it is clear that competitive activity has continued to increase in the Canadian market with a decrease in cost of the CPI grocery basket by 2.0% in October versus a year ago and 1.5% in November 2007.²

The competitiveness of the Canadian retail grocery industry has also served as the catalyst for Canadian grocers to become world leaders in employing innovative solutions to improve productivity, such as the ECCnet industry registry. This registry has been developed by the industry and is managed by the not for profit standards organization GS1 Canada. The registry facilitates data synchronization by allowing access to information that supports inventory management, purchasing, order fulfillment and logistics. The registry currently has information on 400,000 products and is used by some 2,400 suppliers and distributors.

INSIGHTS AND RECOMMENDATIONS

Based on the experience of the Canadian retail grocery industry, CCGD offers the following observations on the key principles that Canadian competition law and policy should incorporate to ensure that Canadian businesses are able to achieve world class status and deliver value to Canadian consumers:

1. The Role of Competition Law is to Promote the Competitive Process Not Protect Individual Competitors

The goal of Canadian competition policy should continue to be to promote the integrity of the competitive process rather than to protect individual businesses – or categories of businesses – from the impact of competition. Under this approach, it is reasonable – and indeed desirable – to expect that vigorous marketplace activity will affect different parties differently and lead to either growth or failure on an individual basis. In other words, it is the role of competition policy to protect equality of opportunity, not equality of result.

CCGD submits that the following statement from the Competition Bureau's Interpretation Bulletin on the Abuse of Dominance Provisions as Applied to the Canadian Grocery Sector – although delivered in a specific context – aptly sets out the fundamental principle that ought to apply in all circumstances:

¹ The Nielsen Company

² The Nielsen Company

"Since market participants vary in terms of size and resources, it is important to note that the abuse of dominance provisions are not intended to provide protection from legitimate market competition, nor are they designed to ensure that all firms continue to prosper in the market. Rather, they are meant to make it possible for businesses of all sizes to have an equitable opportunity to participate in the market. In this way, the market can provide consumers with competitive prices and product choices."³

For the same reason, CCGD submits that the *Competition Act* should not target specific industries. The *Competition Act* is a statute of general application and should not be used to micro-manage the competitive environment affecting particular industries or particular classes of business.

2. *Competition Policy Must be Sensitive to Changing Market Dynamics*

CCGD believes that the Competition Bureau must always remain cognizant of changing market dynamics when evaluating the impact of conduct on competition. The failure to recognize changing circumstances can lead to erroneous enforcement decisions that unnecessarily hinder economic development and progress.

The retail grocery industry offers the perfect example of a situation in which it is important to take into account evolving market conditions and changing market structure. As noted above, the retail grocery industry in Canada is characterised by a highly dynamic and competitive environment that delivers value, low prices and product choice to consumers. In particular, the arrival of new competitors has significantly broadened the choices available to Canadians in their purchases of grocery items.

Two recent U.S. court decisions demonstrate the sort of nuanced approach to dynamic market conditions that is appropriate in competition law analysis. In *Delco LLC v. Giant of Md. LLC*, the U.S. District Court for the District of New Jersey rejected the plaintiff's allegation that the defendant's proposed acquisition of a traditional supermarket violated U.S. antitrust laws. The plaintiff had argued that the relevant market for these purposes should be limited to supermarket sales. The plaintiff alleged that traditional supermarkets offer a unique "one-stop" grocery shopping opportunity that is not interchangeable with the smaller range of food offerings available at mass merchants (such as Wal-Mart) or smaller grocery stores. The Court held, however, that the plaintiff failed in its evidentiary burden. In particular, the Court noted the growing phenomenon of what it called "cross-shopping", i.e., consumers doing their grocery shopping not only at traditional supermarkets, but also at club stores, smaller grocery stores, mass merchants and other retailers.⁴

³ Interpretation Bulletin, The Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act) as Applied to the Canadian Grocery Sector (November 2002), [web site].

⁴ *Delco LLC v. Giant of Md. LLC*, 2007 U.S. Dist. LEXIS 82711 (N.J. 8 November 2007).

Similarly, in *FTC v. Whole Foods Market, Inc.*, the U.S. Federal Trade Commission sought to enjoin Whole Foods' proposed acquisition of the Wild Oats chain of stores on the grounds that it would substantially lessen competition in the narrowly defined market of "premium natural and organic supermarkets". The U.S. District Court for the District of Columbia rejected the FTC's proposed market definition and denied its motion. Among other things, the Court also noted the fact that consumers frequently engage in "cross-shopping" and buy their groceries from a variety of different sources. Of particular interest, the Court recognized that traditional supermarkets had responded to competition from retailers such as Whole Foods and Wild Oats by refocusing and repositioning their formats to offer consumers an increased selection of natural and organic foods.⁵

As the Court observed in *Whole Foods*, it is imperative that competition enforcement take account of "what's going on in the marketplace" rather than rely on static or outdated views of competition.

3. Canadian Competition Law Should Not Impose an Undue Burden on Business

While CCGD supports the view that the Competition Bureau must have access to suitable regulatory tools to carry out its statutory duties, CCGD cautions that the Bureau ought not be granted "carte blanche" when it comes to enforcing the *Competition Act*. Over-enforcement – and the imposition of an unnecessary regulatory burden – can have an obviously detrimental effect on the competitiveness of Canadian business.

CCGD is particularly concerned about this issue because of the reference in the Panel's Consultation Paper to the proposal to grant the Bureau (or another independent government agency) the power to conduct "market studies". This proposal was rejected after a prior consultation process because of the failure to garner sufficient support among stakeholders. CCGD is disappointed to see it apparently surface again.

From CCGD's perspective, this proposal remains a misplaced effort to revive a power held by the former Restrictive Trade Practices Commission ("RTPC") before that power was eliminated when the *Competition Act* was introduced in 1986. One of the reasons for eliminating the RTPC's inquiry process was the enormous cost involved. CCGD remains concerned that the "market studies" proposal would subject Canadian industry to the same type of cost burdens without any satisfactory rationale for doing so.

In CCGD's view, the Competition Bureau already has sufficient investigative powers to inquire both into specific activities within an industry and to obtain the necessary background information to provide context for such inquiries. For example, the Bureau recently published well-received studies of the generic pharmaceutical industry and certain self regulated professions.⁶ These industry studies were conducted within the Bureau's existing framework of

⁵ *FTC v. Whole Foods Market, Inc.* No. 07-1021 (PLF) (D.C. Cir. 16 August 2007).

⁶ Competition Bureau, *Self-regulated professions: Balancing competition and regulation* (December 11, 2007), [web site]; Competition Bureau, *Canadian Generic Drug Sector Study* (October 29, 2007), [web site].

investigatory powers. There is no reason to believe that the Bureau's studies would have been any more penetrating or cogent had additional intrusive market inquiry powers been available.

CCGD submits that the "market studies" issue should be considered settled. CCGD urges the Panel not to include any such proposal in its recommendations.

CONCLUSION

CCGD is grateful for the opportunity to participate in this written part of the Panel's consultation process and would be happy to elaborate upon the views set out in its submission in any upcoming in-person sessions.