CANADIAN COMPETITION LAW AND POLICY DEVELOPMENTS

UPDATE NOTE REGARDING IMMUNITY PROGRAM

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On September 21, 2000, the first day of the Canadian Bar Association's Annual Fall Conference on Competition Law, the Competition Bureau released its final "Immunity Program under the *Competition Act*". The Bureau's bulletin explains the policies and procedures involved in obtaining a grant of immunity from prosecution for criminal offences under the *Competition Act*. The Immunity Program is substantially the same as the draft policy and procedures which the Bureau released in February of this year.[1] The Immunity Program was developed by the Bureau to provide an incentive for the early disclosure of competition offences by offering immunity from criminal prosecution to the first person who discloses potential criminal activity.

The Immunity Program differs from the draft program only in a few respects. First, the Bureau has eliminated the requirement that a person seeking immunity will normally be required to consent to an order of prohibition of fixed duration under subsection 34(2) of the *Competition Act*. Second, the Bureau has clarified that past directors, officers and employees of a corporation that is seeking immunity may also qualify for immunity under the program, but that determination will be made on a case by case basis. Finally, the Bureau reworked its policy statement on confidentiality, so that the new policy on confidentiality is a clear statement that the Bureau "treats as confidential the identity of a party requesting immunity and any information obtained from that party". The Immunity Program then lists four exceptions to the general rule of confidentiality:

(a) where there has been public disclosure by the party;

(b) where the party has agreed and when disclosure is for the purpose of the administration and enforcement of the *Competition Act*;

(c) when disclosure is required by law; and

(d) when disclosure is necessary to prevent the commission of a serious criminal offence.

In explaining the need for the Immunity Program, the Commissioner of Competition stated:

> In the past few years, the Bureau has experienced an increase in the number of requests for immunity. As a result of this increase, the Bureau thought it necessary to draft and publish this document in order to provide more clarity and certainty regarding the conditions and requirements to obtain immunity.

Notes

[1] The draft policy was described in a previous article in the *Record*: Hainey and Himel, "Criminal Immunity under the *Competition Act*" (2000) 20:1 Can. Comp. Rec. 3.

THE COMPETITION BUREAU'S CONFORMITY CONTINUUM: A MENU OF INSTRUMENTS TO ENHANCE MARKETPLACE COMPLIANCE WITH THE *COMPETITION ACT*

By: Gavin Murphy[1]

In its role of assisting the Commissioner of Competition in the administration and enforcement of the *Competition Act*, the Competition Bureau strives to create and protect a competitive marketplace where all Canadians can enjoy the benefits of lower prices, product choices, innovation and the delivery of quality goods and services. Nobody can seriously dispute that a vibrant and competitive marketplace is healthy for both business and consumers.

To ensure these objectives are realised, there are a variety of instruments available to the Bureau.[2] First and foremost, it is a law enforcement agency. It can use the full force of the law to achieve conformity with the *Competition Act*. Nevertheless, the overriding philosophy at the Bureau is that a combination of proactive, education-based strategies, coupled with vigorous law enforcement, is the most effective means of protecting competition.

The Bureau essentially starts from the premise that most people want to comply with the law. This can best be achieved by explaining the Act's provisions to them in a clear and timely way, and by ensuring that business has a good understanding of how the Bureau functions. Costly and time consuming investigations and litigation are the least favoured enforcement options, and the Bureau will only resort to the adversarial process when it is left with no other alternative.

To help understand the Commissioner's approach to ensuring compliance with the Act, the *Conformity Continuum Information Bulletin* was issued on June 16, 2000.[3] While the bulletin highlights alternative enforcement options, the Commissioner has made it clear that he will take strong enforcement action when necessary.

> Where there is evidence of serious violations of the criminal provisions of the *Competition Act*, cases will be referred to the Attorney General of Canada for prosecution. It [the Bureau] will continue to use the full force of the law. This can result in heavy fines and prison terms. In civil matters, where solutions cannot be worked out by negotiation, consent orders or other means, the Bureau will not hesitate to go before the Competition Tribunal.[4]

The Conformity Continuum

The *Conformity Continuum Information Bulletin* explains the Bureau's approach to the administration of the four statutes it enforces,[5] as well as examines the rationale for the selection and use of each instrument that constitutes the continuum.

The bulletin underpins the Bureau's five governing principles: transparency, fairness, timeliness, predictability and confidentiality. Transparency means that the Bureau will be as open as the law and confidentiality permit. Fairness refers to striking the right balance between voluntary compliance and enforcement. Timeliness requires that decisions be made promptly to avoid costly delays. Predictability means providing appropriate background material on Bureau positions and important issues to assist business in complying with the law. Confidentiality requires that the Bureau use all available appropriate means to protect confidentiality and sensitive business information provided to it.

The continuum, expressing a balanced, comprehensive and integrated approach to achieving conformity with

the law, includes a variety of education, compliance and enforcement instruments. With this integrated approach, the Bureau is able to choose the appropriate instrument or combination of instruments to address the issues raised by any specific situation. It is best understood as a system of compliance and enforcement tools designed to complement one another and work interdependently toward achieving conformity with the law. No one part is more important than the other and the continuum consists of instruments of both general and specific application.

General Application

General application instruments are geared toward educating the public to ensure conformity on an on-going basis. The instruments that make up this subsection of the continuum fall into two broad categories: conformity through education and facilitating conformity.

For many years the Bureau has been a strong advocate of conformity through education. Its publication program features press releases, the Commissioner's Annual Report to the Industry Minister, Information Bulletins, enforcement guidelines, discussion papers and a popular pamphlet series which provides general information about the Bureau and the key provisions of the Act.

Under the communication heading, Bureau officials are often featured speakers and participants in seminars with business, legal, academic and consumer audiences. Copies of speeches and papers are generally made available to the public. The Bureau has produced videos to assist in public education, particularly on the subject of deceptive telemarketing. The Bureau also has a well-designed and easy to navigate website[6] where its publications are made available on a regular and timely basis.

In the area of advocacy work, Bureau staff carry out extensive research which adds to the body of materials available on industrial organization and competition policy. Through the Commissioner, the Bureau can appear as of right before federal regulatory boards and tribunals or before provincial boards with leave.[7] The Bureau also enters into partnership agreements with other government departments and agencies to facilitate the sharing of information and expertise.

On the international front, the Bureau has assisted in the development of co-operation agreements between the Canadian government and the United States and the European Communities regarding the application of their competition laws.[8] It actively supports Canadian representation at the Organization for Economic Co-Operation and Development, the World Trade Organization and other fora such as the International Marketing Supervision Network.

The Bureau monitors marketplace activities through the operation of the Information Centre, often the first point of contact the public has with the Bureau, which responds to initial complaints and information requests. Conformity is facilitated with mergers through the prenotification provisions of the Act.[9] These provisions require that parties to certain proposed mergers notify the Commissioner and provide specified information before the transaction is completed. This allows the Bureau to assess the competitive impact of the merger on the marketplace and to consider options if it is deemed that the transaction is likely to substantially prevent or lessen competition.

The Bureau also maintains regular contact with industry representatives, as well as with consumers and the legal community, to help in the collection and analysis of market data. It supports a wide consultation process for legislative amendments to the Act and enforcement practices that are under review. For

example, guidelines and Information Bulletins are only released to the public in final form after extensive consultation with interested stakeholders in the business, legal and academic communities.

Specific Application

To encourage voluntary compliance with the Act in a specific set of circumstances, advisory opinions are provided by the Bureau. An advisory opinion can be requested on whether or not a proposed business plan or practice would come into conflict with the Act. Advisory opinions, only given on prospective plans, take into account existing jurisprudence, previous opinions and the stated policies of the Bureau. The advisory opinion will indicate whether or not the proposal would raise concerns under the Act.

An advisory opinion is only based on the facts provided to the Bureau and no outside contacts are made before arriving at a decision. A Fees and Service Standards Policy was adopted in 1997, which provides for specific fees[10] and commits to service standards for the preparation of advisory opinions.

Parties to a proposed merger can apply for an advance ruling certificate ("ARC") instead of filing a notice with the Commissioner.[11] An ARC application allows the parties to a merger to seek assurance that it will not be challenged by the Commissioner. An ARC binds the Commissioner if the transaction is substantially completed within one year and if there is no substantial change in the information on the basis of which the certificate was issued. The issuance of an ARC, which is only available in cases where the transaction is unlikely to raise competition concerns, eliminates the need for a prenotification filing.

The Bureau supports the adoption of both corporate compliance programs and voluntary codes. The Bureau's 1997 Information Bulletin entitled *Corporate Compliance Programs* provides guidance on measures business can take to avoid problems arising under the Act. Voluntary codes are another effective tool to assist in complying with the law. They are essentially arrangements established by business to influence, shape, control or set benchmarks for behaviour in the marketplace.

Specific Responses to Non-Conformity

Specific responses to non-conformity are grouped into three categories: suasion, consent and adversarial instruments. Information contacts are a common feature under the suasion heading. Compliance may often be achieved by contacting the party in question and simply explaining the law. Persons are not obligated to discuss the matter or justify their conduct, but may wish to do so for clarification. This instrument is most appropriate where the Bureau is of the opinion that the breach of the Act is unintentional. Information letters and warning letters, which identify, respectively, specific requirements of the legislation and specific situations of potential conflict, are other suasion methods used to help achieve compliance.

Where the actions at issue represent less serious contraventions of the law, matters may be resolved on a consensual basis through negotiated undertakings. Undertakings would typically be accepted in matters involving infrequent or inadvertent infractions by parties willing to offset the damage to the marketplace. Nevertheless, breach of an undertaking could result in the reopening of the investigation and further enforcement considerations.

In criminal cases, both consent and adversarial proceedings are conducted by the Attorney General after referral by the Commissioner. The Attorney General will consider leniency to a co-operating party at any stage of the investigation upon the Commissioner's recommendation. Leniency may

include full immunity from criminal prosecution and the Commissioner released a draft *Immunity Information Bulletin* in February 2000, offering guidance on the conditions under which immunity may be granted.[12]

A prohibition order can be part of any penalty imposed by the court in contested or consent proceedings upon conviction, or it can be made without a finding of guilt if it appears to the court that a party has committed acts or done things toward the commission of an offence. Prohibition orders are enforceable and failure to comply with the terms could result in criminal proceedings.[13]

For civil matters under the Act, the process parallel to court proceedings is application by the Commissioner to the Competition Tribunal.[14] Applications can be made on either a contested or consent basis.

There can also be application to the courts or the Tribunal for an interim injunction or temporary order in urgent cases involving serious harm in the marketplace.

Finally, the Commissioner always has the option to refer a matter to the Attorney General for prosecution, or apply to the Tribunal for a remedial order. As noted above, the Commissioner is prepared to take this step in appropriate circumstances. For example, it would likely be considered in serious cases of deceptive telemarketing or price fixing, or for a repeat offender, or against a party who has acted in contravention of an order, previous undertaking or other consent instrument.

Conclusion

The Conformity Continuum is a positive and helpful contribution by the Commissioner to outlining the framework in which the Bureau operates. It provides a better understanding of the Bureau's governing principles and puts this information into a concise and lucid document. By providing the *Conformity Continuum Information Bulletin* to the public, it is hoped increased conformity with the Act will be achieved, thereby ensuring a competitive marketplace for the benefit of all Canadians.

Notes

[1] Of the Competition Bureau, who is currently on secondment to Justice Canada's International Cooperation Group. Any views expressed in this paper are strictly those of the author and in no way reflect the policies or opinions of the Competition Bureau. This paper was completed in August 2000.

[2] The Commissioner is also responsible for the administration and enforcement of the *Consumer Packaging and Labelling Act*, the *Precious Metals Marking Act* and the *Textile Labelling Act*.

[3] This document can be found on the Bureau website at: http://competition.ic.gc.ca

[4] *Annual Report of the Commissioner of Competition* (Ottawa: Industry Canada, 1999), p. 2.

[5] Only the *Competition Act* will be considered for the purposes of this paper.

[6] http://competition.ic.gc.ca

[7] See sections 125 and 126 of the Act.

[8] The agreement with the United States also includes provisions regarding deceptive marketing practices.

[9] See Part IX of the Act.

[10] For example, there is a $500 fee for an advisory opinion concerning the application of section 74.06 to a proposed promotional contest.

[11] See section 102 of the Act.

[12] See in this regard Gavin Murphy, "Canadian Draft Immunity Information Bulletin Released in February", [2000] E.C.L.R. 326, www.dur.ac.uk/Law/deli/publications.html

[13] See section 34(6) of the Act.

[14] Civil reviewable matters under the Part VII.1 Deceptive Marketing Practices provisions of the Act can also be brought before the Federal Court of Canada–Trial Division or the superior court of a province.

THE COMMISSIONER'S DRAFT ABUSE OF DOMINANCE ENFORCEMENT GUIDELINES: A BRIEF COMMENTARY

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Introduction

In mid May this year the Competition Bureau released draft *Abuse of Dominance Enforcement Guidelines* (the "ADEGs") for public comment.[1] The ADEGs are the latest in a series of guidelines produced by the Bureau aimed at providing the business and legal communities with a better understanding of the Bureau's enforcement approach. The ADEGs are also motivated in part by the Bureau's hope of reducing frivolous complaints alleging abuse of dominance. The draft guidelines note that some complainants have misconstrued the purpose of the abuse of dominance provisions in an attempt "to seek protection from the impacts of otherwise legitimate market competition or . . . to assure their firm a profitable position in the market".[2] The ADEGs make it clear that the purpose of the abuse provisions is to "preserve competition within markets rather than to provide an umbrella of protection for individual competitors".[3]

According to the ADEGs, the abuse of dominance provisions, together with the merger review and criminal conspiracy provisions, form the "cornerstone" of Canadian competition policy legislation. While this may be true from the Bureau's perspective, most practitioners of competition law are called upon to advise clients in respect of mergers, actual or potential conspiracies or the pricing-related provisions of the *Competition Act* much more frequently than the abuse of dominance provisions. This may be because Canadian companies rarely regard themselves as "dominant" (although it is not uncommon to see documents, especially those prepared by investment bankers, where the term is used). However, as one commentator has noted, "it would be a mistake to assume that antitrust issues only arise in respect of the Microsofts of the world"[4] — abuse cases can be brought against smaller companies who are dominant in niche product or geographic markets. Even when there is a recognition of dominance, Canadian firms tend to show less concern than their U.S. counterparts which are potentially subject to much more severe consequences under the *Sherman Act* (which makes monopolization a criminal offence) as well as civil treble-damage actions.

The ADEGs are unlikely to be controversial as they essentially provide a sound restatement of the law. They are also very long (75 pages including appendices) and highly technical in nature. For these reasons, the draft guidelines are unlikely to result in a flood of concerned comments from business people. There is no doubt, however, that the ADEGs will be read with interest by some, especially participants in Canada's airline industry, given Air Canada's recent merger with Canadian Airlines to form a single national air carrier. In fact, specific legislation has already been enacted to cover the airline industry – the Bureau announced in late August the introduction of a new set of regulations to the Act in response to concerns that Air Canada might "act in an anti-competitive manner to preserve its dominant market position."[5] The new regulations contain eight additional anti-competitive acts and provide guidelines as to when facilities will be considered essential to the operation of an air service.[6]

The abuse provisions are found in sections 78 and 79 of the Act. For the Competition Tribunal to make a prohibition order, section 79 requires a finding that:

(a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,

(b) the person(s) involved have engaged in or are engaging in a practice of anti-competitive acts, and

(c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market.

Section 78 sets out a non-exhaustive list of examples of anti-competitive acts.

In contrast to some of its other guidelines, in the case of abuse of dominance the Bureau had the benefit of the caselaw arising from the six cases heard by the Competition Tribunal since the 1986 enactment of the provisions.[7] The ADEGs thus contain a mixture of the guidance provided by Competition Tribunal decisions, and the Bureau's own interpretation of how the provisions should be enforced.

When is a Firm "Dominant"?

The first requirement of section 79 is that one or more persons "control" a class or species of business. The ADEGs equate "control" with market power, which is defined as "the ability to profitably maintain prices above competitive levels (or similarly restrict the non-price dimensions of competition) for a significant period of time, normally one year."[8] The ADEGs make it clear, however, that charging prices above the competitive level is not sufficient as the abuse of dominance provisions are "not intended to regulate prices, but rather to ensure that anti-competitive conduct is properly addressed".[9]

"Control of a Class or Species of Business" – Defining Product and Geographic Markets

While section 79 uses the term "class or species of business" and not "market", following the decision of the Tribunal in *NutraSweet*, the draft guidelines equate the process of defining a "class or species of business" with product market definition. As is the case with other areas of antitrust, defining markets in abuse cases is of critical importance. Following the "hypothetical monopolist" approach to product market definition in the *Merger Enforcement Guidelines*[10] ("MEGs"), the approach to product market definition in the current draft is essentially as follows:

> The analysis begins by examining the product market(s) within which the alleged abuse of dominance has occurred or is occurring. As in other areas of competition law, the examination then turns to determining whether competition from other product sources limits the ability of the firm(s) in question from exercising market power. The analysis focuses on whether there are close substitutes for the product(s) in question, such that buyers would turn to these substitutes in the event that the product price was raised above competitive levels by a significant amount for a non-transitory period of time. In general, a 5% real price increase above competitive levels lasting one year is considered a significant and non-transitory amount. (emphasis added)[11]

The underlined portion of the above passage seems somewhat contradictory (or at least is inadequately explained) for two reasons. First, it is prospective, rather than retrospective, the latter approach presumably being the correct one for abuse of dominance cases. Second, in abuse cases the prevailing price level may well already be above competitive levels, a fact which is recognized by the ADEGs themselves in their subsequent discussion of the "Cellophane Fallacy". The Cellophane Fallacy occurs if competing products are included in a product market but are only substitutes of the product in question at the higher-than-competitive price levels which often

prevail in cases where dominance exists. This flows from economic theory which holds that elasticity of demand for a particular product varies with its price. At low prices, demand is inelastic, meaning that consumers are less inclined to switch to a competing product in response to a given price change. At higher prices, demand is more elastic, meaning that any further price increases will result in a significant substitution.[12]

According to the ADEGs, the Bureau works on the assumption that dominance exists and that prevailing prices reflect this fact. Based on higher than competitive price levels the ADEGs conclude that:

> it is reasonable to assume that there may be products in the market that would not be there at price levels commensurate with a competitive market. To include these products in a market definition would effectively overstate the product market from an anti-trust perspective. This is because these products do not discipline the market but rather enter the market only at price levels which are higher than normally competitive levels.[13]

Similarly, the ADEGs take the view that geographic markets will be overstated if defined in terms of price levels reflecting a dominant player because they will include areas which would not be included in the relevant market if competitive prices were in place.

To overcome these problems, the Bureau's approach will be to estimate what the approximate price level for the product would be if market power did not exist. While this approach is not without logic, it will inevitably result in an increase in the market share of the allegedly dominant firm by removing competing products from the market. As well, it presents practical problems for businesses and counsel who are attempting to determine whether a firm is dominant because there is no reliable way to determine in advance which products will be removed from the market. This approach also ignores the fact that in cases where the alleged abuse of dominance involves exclusionary practices, many potential competitors may not be in the market due to such practices.

In defining markets, the ADEGs also consider qualitative factors (which are identical to those used in the MEGs) such as the views, strategies and behaviour of buyers and the trade, product end use, physical and technical characteristics, switching costs, price relationships and relative price levels.

Measuring Market Power and Safe-Harbours

To measure market power, the Bureau will rely on a number of indicia including market share, barriers to entry, the extent of technological change, recent entry or exit, whether excess capacity exists and any countervailing power of customers or suppliers. Not surprisingly, market share is one of the most important factors, although the Bureau's view is that high market share is a necessary, but not sufficient, condition to establish market power.[14]

The ADEGs also provide some safe-harbours which are similar to those found in the MEGs. In particular, a firm with less than 35% of a relevant market will not normally be considered dominant, a share of over 35% will prompt further investigation, and a market share of over 50% by a single firm (joint dominance is discussed separately below) will *prima facie* be considered dominant.[15] The use of a 50% threshold for a *prima facie* finding of dominance is questionable – the market shares in the six abuse of dominance cases heard by the Tribunal have been well in excess of that number, ranging from 87 to 100%. To date, the Bureau's track record in abuse cases is unblemished – its batting average is 1000. Given its limited resources and its success rate to date, it remains to be seen

whether it would (or should) ever vigorously pursue a case against a firm with only a 50% market share in a relevant market.

The ADEGs do provide that a high market share – even a share of 100% – is not sufficient to prove the existence of market power without an examination of barriers to entry. Without such barriers, attempts by the dominant firm to exercise market power are likely to be met with entry or expansion by existing firms to make a price increase by the dominant firm unprofitable. Other relevant factors in examining barriers to entry include cost differences between the incumbent firm and new entrants, whether investments made by new entrants are recoverable if the entry is unsuccessful (referred to as sunk costs) and whether the new entrant will be a viable competitor.

Joint Dominance

The ADEGs assert that joint dominance – the possession of market power by a group of unaffiliated firms – is "clearly contemplated" by the Act.[16] However, the discussion of joint abuse of dominance is limited by the fact that to-date, only two cases before the Tribunal involved a joint abuse of dominance,[17] and in each case, joint dominance was taken as a given and supported by the existence of an agreement between the parties.

The draft guidelines take the position that coordinated actions by a group of firms can be addressed under the abuse provisions even where no explicit agreement exists.[18] However, for "joint" behaviour to come into play, the Bureau will require something more than "mere conscious parallelism" to exist before concluding that firms are engaged in some form of coordinated activities.

The following factors will be considered in determining whether an inference of joint dominance can be made:

- whether the group of firms collectively account for a large share of the relevant market;
- evidence that the alleged coordinated behaviour is to increase price or engage in some form of anti-competitive act;
- evidence of barriers to entry into the group as well as barriers to new entrants into the relevant market;
- evidence based on the particular facts of the case that actions have been taken by members of the group to inhibit intra-group rivalry; and
- evidence that a significant number of customers cannot exercise countervailing power to offset the attempted abuse.

Illogically, the Bureau's "safe-harbour" for joint dominance is a combined share lower than 60-65%.[19] No attempt is made to rationalize the difference from the 50% presumption of single firm dominance. The prescription for this fault is to raise the single firm dominance safe-harbour to this level.

It is also disappointing that the ADEGs do not provide a more detailed analytical base on which the Bureau would seek to build a case for joint dominance, given the rising importance of interdependency as a factor in Canadian antitrust analysis. No guidance is offered as to what constitutes coordinated behaviour or the degree of coordinated behaviour required to exceed "mere conscious parallelism". This uncertainty will be especially troublesome for firms engaging in joint ventures in oligopolistic industries where the participants' combined market shares may be over the 60-65% safe-harbour.[20]

A Practice of Anti-Competitive Acts

The possession of market power by one or more firms by itself does not give rise to concern. A firm must be shown to have abused its dominant position by engaging in a "practice of anti-competitive acts".

What Constitutes a "Practice"

In *NutraSweet*, the Tribunal took a broad view of the term "practice", finding that different individual anti-competitive acts taken together could constitute a practice. Under the draft guidelines, while "a practice is normally more than an isolated act, it may also constitute one occurrence that is sustained and systemic or that has had a lasting impact on the state of competition".[21] The ADEGs discuss the example of a long-term contract which may prevent or lessen competition, even though the contract itself constitutes only one anti-competitive act.

Anti-Competitive Acts in General

Section 78 provides nine examples of anti-competitive acts, all of which, according to the ADEGs, will lessen competition when engaged in by a dominant firm for an anti-competitive purpose. However, section 78 is not exhaustive and numerous other acts may be sufficiently anti-competitive to warrant a finding of abuse of dominance. In fact, in the abuse cases to reach the Tribunal, non-enumerated acts have been more prevalent than the enumerated ones.[22] The ADEGs therefore provide a detailed description of the Bureau's approach to identifying non-enumerated anti-competitive acts.

While the Tribunal's view has been that anti-competitive acts involve actions which are predatory, exclusionary or disciplinary in nature, the Bureau's approach (which is asserted to be consistent with that of the Tribunal) is to determine whether the activities in question fall into one or more of the following three categories:

- acts that raise rivals' costs (or reduce rivals' revenues) or foreclose existing or potential rivals from key inputs or facilities;
- predatory conduct; and
- acts intended to facilitate co-ordinated behaviour among firms (referred to as "facilitating practices").

Raising Rivals' Costs and Market Foreclosure

The draft guidelines suggest that dominant firms may wish to increase the costs of a rival firm in order to induce the rival to raise its prices, allowing the dominant firm to raise its own prices. Dominant firms may also undertake strategies that have the effect of eliminating existing competitors from the market or deterring entry by excluding rivals from inputs necessary to compete. The ADEGs note how five of section 78's listed anti-competitive acts have the potential to raise a rivals' costs or exclude a rival from scarce facilities.[23]

Two further examples of this category of anti-competitive acts are given. First, certain contractual provisions such as "meet-or-release clauses" can discourage potential suppliers from seeking to sell to a buyer because the potential supplier anticipates that the current suppliers will match its price. Second, a most-favoured-nation or "MFN" clause[24] can also result in exclusivity by keeping the dominant firm informed about attempted entry or other actions of rival firms.

The ADEGs also describe situations when a dominant firm's actions limit the ability of its rivals to attract customers, thereby reducing the revenues of the rival firms. The primary means are the implementation by

dominant firms of technology, contracts, or other practices which make it costly for customers to switch to alternative suppliers, thereby foreclosing entry or limiting the expansion of competitors. Specific examples include:

- adopting product specifications which are incompatible with the products of a rival (section 78(g));
- adopting long-term contracts with automatic renewal provisions;
- setting up exclusive buying arrangements;
- the acquisition of a customer by a supplier (section 78(b)) which can exclude a potential competitor from sufficient customers to make entry profitable; and
- abuse of judicial process.[25]

Predatory Conduct

Predatory pricing is described by the draft guidelines as "selling at a price below some measure of cost in order to harm a competitor".[26] Predatory pricing can be profitable to the dominant firm if it results in an ability to maintain or enhance market power, thereby recouping the losses from the predatory pricing campaign by, for example, eliminating a rival (if sufficient entry barriers are present) or deterring potential competitors from entering the market for fear of a repeated predatory episode. The ADEGs argue that dominant firms also engage in predation in order to discipline competitors who are challenging their market power with a goal of convincing them to cease some action, rather than forcing them to exit the market.

The ADEGs acknowledge that it is difficult to distinguish between predatory pricing and competitive pricing in that both involve, at least initially, lower prices. However, since predatory pricing involves the ability to raise prices once rivals have exited the market, the key consideration is whether the market is characterized by high barriers to entry. Without barriers to entry, a subsequent price increase by the dominant firm would attract new entrants so that the dominant firm would not be able to recoup the costs of predation.

The draft ADEGs set out a two stage approach to the analysis of an allegation of predatory pricing. First, the Bureau considers whether the dominant firm would eventually be able to recoup its losses from predatory pricing either from a subsequent, non-transitory, significant price increase or by maintaining high prices in other markets. If the Bureau determines that recoupment is likely, it will then consider whether the dominant firm is pricing below some measure of its costs – defining costs to include all costs that are "avoidable" (ie. costs that could have been avoided by not offering the relevant product or service in the relevant time frame).

Three of section 78's listed practices are described as predatory conduct:

- selling articles at a price lower than their acquisition cost for the purpose of eliminating or disciplining a competitor (section 78(i));
- freight equalization (section 78(c)); and
- introducing "fighting brands" (section 78(d)).

Facilitating Practices

Facilitating practices are described as practices employed to enhance the ability of firms to coordinate their behaviour in order to increase or maintain prices. Such practices might assist firms in monitoring each other to ensure that no firm deviates from their arrangement and to allow the firms more effectively to punish such deviations. Examples include: pre-announced price increases, public price lists and

delivered pricing[27] (or, alternatively, the adoption by different firms of the same basing points from which transportation costs are added). The ADEGs argue that contractual arrangements can also be used to enhance transparency and allow for more effective punishments. Meet or release clauses can alert a firm to price cutting by other firms and thereby facilitate the detection of deviations. MFN clauses, which were discussed above as an example of an activity which can result in market foreclosure, are also mentioned by the ADEGs as an example of a facilitating practice in that they can commit a firm to "punishing itself" for offering a selective price cut to a particular customer, since that price cut would have to be offered to all customers with MFN clauses. Thus, MFN clauses are seen as potentially deterring selective price cuts and stabilizing interdependence among oligopolists.[28]

Substantial Lessening of Competition

At the end of the day, anti-competitive acts undertaken by a dominant firm must be proven to lessen competition substantially before an abuse of dominance may be found. The difficulty is that certain so-called anti-competitive acts can actually have pro-competitive effects. For example, the ADEGs recognize that vertical acquisitions (section 78(b)) can result in an integrated firm which is a more efficient and effective competitor.

The draft guidelines contend that the meaning of "lessening competition substantially" was established in *NutraSweet*, where the Tribunal held that the question of whether a substantial lessening of competition had occurred turned on whether the anti-competitive acts engaged in by *NutraSweet* preserved or added to its market power. As one commentator has remarked, it would be useful if the Commissioner of Competition and/or the Tribunal would go further and articulate the injury to the economy that must be caused by the anti-competitive acts.[29] In particular, must there be a reduction of consumer welfare or total welfare?[30] The draft guidelines leave these questions unanswered.

The ADEGs prescribe a sliding scale test in terms of whether competition has been lessened "substantially". A practice of anti-competitive acts engaged in by a dominant firm or group of firms not subject to significant effective competition at the time of such acts will need only to have had an "incremental" negative impact on competition for it to be considered substantial, compared to a market which exhibits greater competition or lower entry barriers, where presumably the negative impact on competition need not be as great.

If the anti-competitive acts involve the creation or enhancement of barriers to entry or to expansion, thereby inhibiting potential competitors from challenging the market power of the dominant firm, a different approach is taken. In such cases, the Bureau will focus its analysis on the state of competition in the market in the absence of these acts and will conclude that the acts in question did constitute a substantial lessening or prevention of competition if it is satisfied that but for the anti-competitive acts, an effective competitor or group of competitors would emerge within a reasonable time frame – set by the ADEGs at two years – to challenge the dominance of the firm(s).

One issue not addressed in the draft guidelines is whether a firm's anti-competitive acts must lessen competition in the same market in which it is dominant. The *Van Duzer Report* takes the position that there is no such requirement.[31] The issue is not insignificant, and should be addressed in the next draft.

Superior Competitive Performance — A Defence?

Section 79(4) requires the Tribunal, in determining whether a practice has lessened competition substantially in a market, to consider "whether the practice is a result of superior competitive performance" According to the ADEGs,

> [section 79(4)] does not call upon the Tribunal to balance superior competitive performance against the effects of the anti-competitive acts. Superior competitive performance is only a factor to be considered in determining the cause of the lessening of competition and not as a justifiable goal for engaging in the anti-competitive act. Having lower costs, better distribution or production techniques or a broader array of product offerings can put a firm at a competitive advantage which when exploited will lessen competition by leading to the elimination or restriction of inferior competitors. This is the sort of competitive dynamic that the *Competition Act* is designed to preserve and, where possible, enhance as it ultimately leads to a more efficient allocation of resources.[32]

The ADEGs therefore appear to reject the possibility, as argued by McFetridge, that a practice of anti-competitive acts, even if undertaken with an anti-competitive purpose, may not result in a finding of an abuse of dominance if it is efficient.[33]

Remedies for Abuse of Dominance

Section 79 provides the Tribunal with broad remedial powers where abuse is established. The basic, first stage remedy is a prohibition order. However, in cases where it can be shown that such an order is not likely to restore competition, the Tribunal may, in addition to or in lieu of the prohibition order, order such other actions, including the divestment of assets or shares, as are reasonable and necessary to overcome the effects of the practice of anti-competitive acts.

Alternative Case Resolution

During any abuse of dominance examination or inquiry, the ADEGs state that the parties will be informed of any preliminary concerns and afforded an opportunity to respond. The ADEGs note that the Commissioner is open to suggestions as to alternative means of dealing with his concerns which will not necessitate an application to the Tribunal. While each matter will be dealt with on a case-by-case basis, "the Commissioner's preference would be to have any proposed remedy agreed upon by the parties to be reviewed by the Competition Tribunal pursuant to a consent order application".[34] Given the uneven history associated with consent procedures, this preference is unlikely to be shared by experienced advisors.[35]

In cases where a party changes its business practices to address the Commissioner's concerns, the Commissioner may decide not to litigate the matter and/or discontinue the examination or inquiry. The Commissioner proposes to make public the resolution of matters which have occurred without resort to litigation in order "to ensure that the process remains transparent"[36] and that all interested parties are informed of the manner in which the dispute was resolved.[37]

Conclusions and Next Steps

Given the relative absence of Canadian antitrust jurisprudence, the Bureau is to be commended for its efforts in producing guidelines which flesh out various provisions of the Act. While the ADEGs, once promulgated, are unlikely to have the same degree of influence as earlier guidelines such as the MEGs, the

present draft sets out a reasonably coherent analytical framework. However, the ADEGs suffer from "imbalance" in that they give inexplicably short shrift to potentially controversial topics such as joint abuse of dominance (covered in five paragraphs) and the fundamental threshold issue of product market definition (covered in three paragraphs plus one for the "cellophane fallacy") while the topic of vertical margin squeezing is the subject of a separate appendix of over seven pages.

Going forward, the Bureau's plan is to post all submissions received in respect of the draft ADEGs on its website. A target date for a revised version has yet to be announced.

Notes

[1] The draft ADEGs are available online at the Competition Bureau's website at http://strategis.ic.ca/SSGct01250e.html.
[2] ADEGs para. 12.
[3] ADEGs para. 6.
[4] Paul Collins, "An Overview of Abuse of Dominance Under the *Competition Act*: Lessons Learned" *Competition Law Practices for Canadian Companies* (December 2-3 1999) at 43, CD ROM: June 2000 Release #8 (Insight Press).
[5] See Regulatory Impact Analysis Statement, *Canada Gazette Part II*, Vol. 134, No. 18 (August 30, 2000) at 2163.
[6] The new regulations fleshed out subsections 78(i)(j) and (k) to the Act which had been added earlier in the summer by Bill C-26. In addition, Bill C-402 (one of the four current private member's bills amending the *Competition Act*) would create four additional examples of anti-competitive acts in relation to the retail sector.
[7] These cases are: *Canada* v. *NutraSweet* (1990), 32 C.P.R. (3d) 1 (Comp. Trib.) [hereinafter *NutraSweet*]; *Canada* v. *Laidlaw Waste Systems* (1992), 40 C.P.R. (3d) 289 (Comp. Trib.) [hereinafter *Laidlaw*]; *Canada* v. *AGT Directory Ltd. et al.* (1994), C.C.T.D. N° 24 Trib. Dec. N° CT9402/19 [hereinafter *Canyps*]; *Canada* v. *D and B. Companies* (1994) 58 C.P.R. (3d) 353 (Comp. Trib.) [hereinafter *Nielsen*]; *Director of Investigation and Research* v. *Bank of Montreal et al.* (1996), 68 C.P.R. (3d) 527 (Comp. Trib.) [hereinafter *Interac*], and *Canada* v. *Tele-Direct (Publications) Inc. et al.* (1997), 73 C.P.R. (3d) 1 (Comp. Trib.) [hereinafter *Tele-Direct*]. Appendix IV of the ADEGs provides a useful bullet point summary of these cases.
[8] ADEGs para. 21. The Bureau's attention is drawn to the split infinitive contained in this clause. It is hoped that stylistic elegance can be added in the final version of the text.
[9] ADEGs para. 21.
[10] (Ottawa: Supply and Services Canada, 1991).
[11] ADEGs para. 25.
[12] The term "cellophane fallacy" arose from a U.S. case where the Supreme Court defined the market broadly to include all flexible wrapping materials, thereby, according to some commentators, failing to recognize that other flexible wrapping products were substitutes for cellophane only because of the high prevailing price of cellophane. (*United States* v. *E.I. Dupont de Nemours & Co.*, 118 F. Supp. 41(d) Del. 1953; aff'd 351 U.S. 377 (1956)).
[13] ADEGs para. 30.
[14] ADEGs para. 34.
[15] ADEGs para. 41.
[16] ADEGs para. 45. According to the guidelines, joint dominance can arise in cases where no one firm would be dominant by itself.
[17] *Interac* and *Canyps*.
[18] ADEGs paras. 48 and 49.
[19] Note that the ADEGs are somewhat inconsistent in that they state at paragraph 39 that market shares of a dominant group in the range of 60 to 65% will result in a *prima facie* finding of joint dominance, while in the summary of the safe harbours at paragraph 41 (as well as in the executive summary), the ADEGs state that joint shares in the 60 to 65% range will "prompt further investigation".
[20] The Bureau acknowledges that the abuse of dominance provisions are among the sections of the Act which may be used by the Bureau in examining strategic alliances. See: Director of Investigation and Research, *Strategic Alliances Under the Competition Act* (Ottawa: Minister of Supply and Services Canada, 1995) at 12.
[21] ADEGs para. 53.
[22] T. Kennish, M. Lally and D. Steiner, "A Retrospective on the Canadian Competition Law Experience in Regard to Mergers and Abuse of Dominant Position" (1996) Canadian Bar Association Annual Competition Law Conference at 79.
[23] These anti-competitive acts are: vertical margin squeezing (section 78(a)); acquisition of a customer or supplier that would otherwise be available to a competitor of the customer, or the acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, for the purposes of impeding or preventing a competitor's entry or eliminating a competitor (section 78(b)); the pre-emption of scarce facilities or resources (section 78(e)); buying up a product to prevent the erosion of price levels (section 78(f)); and requiring or inducing a supplier not to supply a rival (section 78(h)). The Bureau's approach to investigating allegations of vertical margin squeezing is dealt with at length in Appendix III to the ADEGs.
[24] MFN clauses require a seller to give a buyer the best price it offers to any other customer.
[25] In *Laidlaw*, the Tribunal found Laidlaw's habit of threatening both customers and suppliers with litigation to constitute a practice of anti-competitive acts.
[26] The Bureau's *Predatory Pricing Enforcement Guidelines* describe predatory pricing as "a situation where a dominant firm charges low prices over a long enough period of time so as to drive a competitor from the market or deter others from

entering and then raises prices to recoup its losses." See Director of Investigation and Research, *Predatory Pricing Enforcement Guidelines* (Ottawa: Minister of Supply and Services Canada, 1992) at i.

[27] The ADEGs state that delivered pricing can involve uniform pricing whereby customers pay the same delivered price, regardless of actual location.

[28] ADEGs para. 85.

[29] J. Musgrove and D. Edmonston, "Abuse of Dominance and Tied Selling: Some Thoughts on the Tele-Direct Case" (1997) 18:2 Can. Comp. Rec. 29 at 34-35.

[30] The Tribunal recently held that the total surplus standard is appropriate when considering efficiencies in merger cases. See: *The Commissioner of Competition* v. *Superior Propane Inc.*, 2000 Comp. Trib. 15.

[31] J.A. Van Duzer and G. Paquet, "Anticompetitive Pricing Practices and the *Competition Act*: Theory, Law and Practice", (Unpublished) (1999) at p. 52.

[32] ADEGs para. 93. The ADEGs note the contrast between this provision and section 96 of the Act which applies to mergers and requires the Tribunal to balance any substantial lessening or prevention of competition resulting from a merger with any resulting efficiency gains.

[33] D. G. McFetridge, "The Law and Economics of Abuse of Dominant Position" (1996) Canadian Bar Association Annual Competition Law Conference at 34.

[34] ADEGs para. 87.

[35] See, for example, The *Commissioner of Competition* v. *Ultramar*, [2000] C.C.T.D. No. 4, online: QL (CCTD).

[36] ADEGs para. 88.

[37] A recent example occurred when the Bureau issued a press release announcing that The H.J . Heinz Company of Canada Ltd. had agreed to change some of its business practices regarding jarred baby food and infant cereal in Canada. The Bureau was concerned that Heinz, which is currently the sole supplier of jarred baby food in Canada, was engaging in anti-competitive practices by making large up front payments to retailers not to stock non-Heinz jarred baby food and infant cereal products and by entering into multi-year contracts for exclusive supply (including offering discounts conditional on exclusive supply). See Competition Bureau News Release, "Heinz Canada Signs Undertaking Regarding Jarred Baby Food and Infant Cereal" (August 1, 2000).

CANADIAN COMPETITION RECORD

STATEMENTS AND NEWS RELEASES ISSUED BY THE COMPETITION BUREAU DURING THE PERIOD JULY 1, 2000 TO NOVEMBER 30, 2000

The following Statements and News Releases are available on the Bureau's website at http://strategis.ic.gc.ca/SSG/ct01256e.html

July 05, 2000
INFORMATION: Charges Laid in Montreal Area Snow Removal Conspiracy

July 18, 2000
NEWS RELEASE: Foreign Corporation Fined $12.5 Million for Price Fixing

August 1, 2000
NEWS RELEASE: Heinz Canada Signs Undertaking Regarding Jarred Baby Food and Infant Cereal

August 2, 2000
INFORMATION: Montreal-based Telemarketing Company Pleads Guilty to Criminal Charges under the *Competition Act*

August 9, 2000
INFORMATION: Competition Bureau Seeks Comments on "Made in Canada" Claims Relating to Diamonds

August 24, 2000
INFORMATION: Airline Regulations Come Into Force

August 30, 2000
NEWS RELEASE: Half-million Dollar Fine for Deceptive Marketing by Mail
NEWS RELEASE: Companies Plead Guilty to Montreal Area Snow Removal Conspiracy

September 6, 2000
NEWS RELEASE: Competition Bureau Appeals Decision in Superior Propane Case

September 12, 2000
INFORMATION: Variation of Consent Order re the Interac Association Approved by the Competition Tribunal

September 13, 2000
INFORMATION: Consent Order Registered Against Gestion Professionnelle to Cease Marketing of an Anticorrosion Device

September 19, 2000
NEWS RELEASE: Fines Totalling $2.71 Million Imposed for International Conspiracy under the *Competition Act*

CANADIAN COMPETITION RECORD

September 21, 2000
INFORMATION: Competition Bureau Releases Information Bulletin on the Immunity Program Under the *Competition Act*
INFORMATION: Competition Bureau Releases Intellectual Property Enforcement Guidelines
NEWS RELEASE: Criminal Charges Laid Against Montreal-based Telemarketers

September 22, 2000
NEWS RELEASE: Director of Three Telemarketing Companies Pleads Guilty to Criminal Charges under the *Competition Act*

October 12, 2000
NEWS RELEASE: Commissioner of Competition Issues Temporary Cease and Desist Order Against Air Canada

October 24, 2000
NEWS RELEASE: $1 Million Fine Imposed in Montreal Area Snow Removal Conspiracy

October 31, 2000
NEWS RELEASE: Competition Bureau Targets Online Activities
NEWS RELEASE: Competition Bureau Extends Temporary Order

November 3, 2000
NEWS RELEASE: Competition Bureau and CanWest Resolve Concerns about ROBTv

November 10, 2000
INFORMATION: Competition Bureau Files Application for Consent Order Regarding Divestiture of TQS by Quebecor

November 30, 2000
NEWS RELEASE: Charges Laid for Unsolicited Internet Directory Services