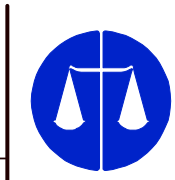

THE CANADIAN BAR ASSOCIATION
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Abuse of Dominance in Telecommunications

NATIONAL COMPETITION LAW SECTION
CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Competition Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Competition Law Section of the Canadian Bar Association.

Abuse of Dominance in Telecommunications

I. INTRODUCTION

The National Competition Law Section of the Canadian Bar Association (the CBA Section) is pleased to have the opportunity to comment on the draft Information Bulletin on the Abuse of Dominance Provisions as Applied to the Telecommunications Industry (the Draft Bulletin) released for public comment by the Competition Bureau on September 26, 2006. The CBA Section strongly supports the Bureau's public education program, including guidelines, bulletins and other interpretive aids made widely available to the business community in Canada.

The CBA Section agrees with many of the positions outlined in the Draft Bulletin. In this submission, we focus on those aspects of the Draft Bulletin which we believe could be clarified or improved and comment on the most appropriate means by which the Bureau may provide guidance in respect of the telecommunications sector at this time. As a result, the focus of these comments will necessarily be on suggested changes to the Draft Bulletin, but that fact should not obscure the overall support of the CBA Section, as noted here.

The CBA Section's comments on the Draft Bulletin fall into three thematic categories.

First, while recognizing and welcoming the significant benefits of industry-specific guidance, the CBA Section believes that both the Bureau and the telecommunications industry would be better served by enforcement guidance in less formal and comprehensive means than the Draft Bulletin. As discussed in Part II of this submission, it is the CBA Section's view that more frequent and less comprehensive industry-specific guidance in the form of speeches, backgrounders and other similar statements, rather than comprehensive formal guidance like the Draft Bulletin, allows for a more timely, transparent and flexible means of informing the public about the Bureau's evolving enforcement experience and

views in a particular industry, without committing the Bureau to a comprehensive enforcement position that might be more difficult to reverse.

Second, the CBA Section has several preliminary observations on the Draft Bulletin. These observations, in Part III of this submission, include general comments regarding:

- The relative lack of detailed telecommunications-specific analysis or examples in the Draft Bulletin to illustrate the Bureau's position on how section 79 will apply to this sector. The CBA Section recommends that the Bureau develop and draw to a greater degree upon its previous (extensive) submissions on telecommunications matters and its past enforcement experience in this industry.

- The CBA Section's concerns that finalizing the Draft Bulletin may be premature given recent and rapidly evolving legislative developments relevant to the telecommunications sector, including the Government's recent announcement of a proposal to revise the analytical framework for deregulating local telephone services.

- The CBA Section's view that the Draft Bulletin appears in several respects to address issues not specific to the telecommunications industry and to offer guidance that may depart from, or add to, the Bureau's existing enforcement position described in the August 2001 general Enforcement Guidelines on the Abuse of Dominance Provisions (the General Abuse Guidelines). The CBA Section believes that it is preferable for the Bureau to address such issues in the context of broader public consultations on potential revisions to the General Abuse Guidelines.

- The need for a separate and detailed discussion regarding the Bureau's jurisdictional interface with telecommunications-specific regulation. In the CBA Section's view, this jurisdictional interface will continue to raise important threshold questions about the possible application of the regulated conduct defence in a wide variety of enforcement scenarios.

- The CBA Section's view that telecommunications-specific guidance from the Bureau should include a discussion of the Bureau's enforcement approach to sections 75 and 77 of the *Competition Act* (and possibly other provisions as well) given the access and tying claims that have arisen in the telecommunications industry and their potential overlap with section 79. The CBA Section recommends that the Bureau consider broadening the discussion in its telecommunications-specific guidance to include other relevant sections of the *Competition Act*.

Lastly, in Part IV of the submission, the CBA Section provides more detailed comments on some specific aspects of the Draft Bulletin. These are arranged in sequential order by reference to particular sections of the Draft Bulletin. Of particular concern to the CBA Section is the Bureau's new discussion regarding the application of an "essential facilities" doctrine. The CBA Section believes that the existence, nature and appropriateness of such a doctrine in the context of section 79 are better canvassed in the context of wider public consultations regarding possible revisions to the General Abuse Guidelines.

II. INDUSTRY-SPECIFIC GUIDANCE

In its submission on the Draft Guidelines on Abuse of Dominance in the Retail Grocery Industry,[1] the CBA Section welcomed industry-specific guidance, but raised concerns and made suggestions in relation to such industry-specific guidelines. In our view, these remain appropriate. Industry-specific guidance in the form of comprehensive guidelines on the application of a particular provision of the *Competition Act* (whether called "guidelines" or a "bulletin") risks creating a false perception that the rules, or their application, are different in some industries than others. Comprehensive industry-specific guidelines may also create a false impression that the relevant industry has been the subject of exceptional Bureau scrutiny or investigation, and may raise expectations that the Bureau is going to take an aggressive stance on abuse of dominance in an industry, and thus encourage unwarranted complaints to the Bureau.

Also, in the CBA Section's view, comprehensive guidelines canvassing all or virtually all of the elements of a relevant provision (in this case, section 79) tend to suggest a significant degree of formality and a firmer, more final position from the Bureau than may be necessary or appropriate, particularly in an industry in transition, such as telecommunications. This concern applies whether the document is referred to as "guidelines" or a "bulletin". It is the substance of the document, rather than its title, which creates such perceptions.

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[1] Submission on Draft Guidelines on Abuse of Dominance in the Retail Grocery Industry, National Competition Law Section, Canadian Bar Association, March 2002. http://www.cba.org/CBA/submissions/pdf/02-19-eng.pdf

In addition, to the extent that the Draft Bulletin breaks new ground beyond the General Abuse Guidelines that are not particular to the telecommunications industry, the CBA Section believes it would be more appropriate for the Bureau to propose amendments to the General Abuse Guidelines and conduct public consultations on those proposals, making it clear from the outset that the Bureau is considering general changes to its enforcement policy, and not just industry-specific aspects of it. Stakeholders in other industries who would invest time to comment on proposed revisions to the General Abuse Guidelines might not review a document purporting to relate specifically to the telecommunications industry. Public consultation on changes to the Bureau's general enforcement policy would assist the Bureau in obtaining more thoughtful and considered comments.

We are not suggesting that the Bureau should avoid providing industry-specific guidance. In fact, we would welcome more frequent industry-specific guidance in other formats – for example, speeches to industry groups, information bulletins with a more limited focus, "backgrounders", or other statements. This would be consistent with past practice in which Bureau representatives have spoken to industry associations on industry-specific issues recently confronted by the Bureau.[2] Posting these speeches and statements on the Bureau's website makes them immediately and widely available.

These formats also allow the Bureau to provide more timely and less formal advice to an industry (such as the telecommunications industry), to communicate issues that the Bureau is encountering in the industry, and to advise on positions that the Bureau has been taking. The Bureau can also identify areas of uncertainty where it has not yet reached a view and is seeking submissions. A more frequent, less comprehensive approach to industry-specific guidance increases transparency and fairness for all industry participants, without locking the Bureau into a position that will be difficult to reverse. Such an approach raises

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[2] See, for example, in the context of the telecommunications industry: *The Competition Act and The Canadian Telecommunications Industry*, address by George N. Addy, Director of Investigation and Research, Bureau of Competition Policy, to Institute for International Research Telecommunications Conference, Toronto (March 29, 1994); *The Regulated Conduct Defence and the Telecommunications Industry*, by Don Mercer, Deputy Director of Investigation and Research (Criminal Matters), Bureau of Competition Policy (September 28, 1995); and *Competition Law and the Canadian Telecommunications Industry – New Directions*, notes for an address by Gilles Menard, Deputy Director of Investigation and Research, Civil Matters, Competition Bureau, to the Canadian Institute 1997 Canadian Resale/IXC Industry Congress, Toronto (February 17, 1997). See also the examples cited at note 1 of the Section's submission on the Draft Guidelines on Abuse of Dominance in the Retail Grocery Industry, *supra*, note 1.

awareness of the Bureau's activities in that sector and allows the Bureau more flexibility to adapt its position to particular circumstances,[3] with less risk of creating the perception that a particular industry is being singled out for greater scrutiny.

III. PRELIMINARY OBSERVATIONS ON DRAFT BULLETIN

Telecommunications is an industry in transition.[4] For instance, the Canadian Radio-television and Telecommunications Commission (CRTC) has recently set standards for forbearance from price regulation in local telephone markets, and the federal Cabinet has ordered the CRTC to forbear from regulating Voice over Internet Protocol (VoIP) products offered by incumbent local exchange carriers (ILEC). On December 18, 2006, the Government issued a policy direction to the CRTC to take a more market-based approach to implementing the *Telecommunications Act*.

The Draft Bulletin appears to be a response to calls for guidance on the application of the *Competition Act* to the telecommunications industry. Specifically, in its March 2006 Final Report, the Telecommunications Policy Review (TPR) Panel recommended that "a somewhat modified set of rules and guidelines should be established to assist in distinguishing anti-competitive conduct from vigorous competitive rivalry", drawing on competition law principles as expressed in section 79 of the *Competition Act* and on detailed knowledge of the telecommunications industry.[5] The TPR Panel also recommended that work on this issue should begin "as soon as possible after the government's response to this report",[6] without waiting for amendments to the *Telecommunications Act*, by a working group of CRTC and Bureau staff. We interpret the TPR Panel's statement on timing to mean that background work on the matters outlined in Recommendation 3-15 can begin prior to there being actual amendments to the *Telecommunications Act*. However, it seems clear

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3 See William Blumenthal, "Clear Agency Guidelines: Lessons from 1982", 68 *Antitrust Law Journal* 5 (2000) at 16-17 and 24-25 for a discussion of the role and effectiveness of guidelines, as opposed to policy statements, interpretations, speeches, testimony, press releases, advisory opinions and other forms of communication by a government agency.

4 See the Section's Submission to the Telecommunications Policy Review Panel, August 2005, http://www.cba.org/CBA/submissions/pdf/05-35-eng.pdf.

5 Telecommunications Policy Review Panel, *Final Report*, March 2006, Recommendation 3-15, available at www.telecomreview.ca, at p. 3-25.

6 *Ibid*.

from the wording emphasized above that it is premature for the Bureau or the CRTC to issue any affirmative guidance prior to a response by the Government to the TPR Panel's recommendations, including Recommendation 3-15. In any event, in the CBA Section's view, Recommendation 3-15 is not inconsistent with the Bureau proceeding by way of a general revision to the General Abuse Guidelines combined with one or more other forms of telecommunications-specific guidance which address specific issues or provide examples of the application of section 79 in the telecommunications sector.

However, the Draft Bulletin does not seem to us to go as far as it usefully could in providing concrete, telecommunications-specific examples of the application of section 79 or the issues that arise under it.

A. More Industry Specific Analysis Would Be Helpful

Much of the Draft Bulletin is taken up with a generic (that is, not industry-specific) discussion about the abuse of dominance provisions. It would be more helpful to offer the industry more specific guidance on particular aspects of the Bureau's enforcement approach, and to offer generic guidance by way of amendment to the General Abuse Guidelines.

For example, the Commissioner has provided significantly greater detail about her positions on competition issues relevant to market power and dominance in the telecommunications industry in other documents, which are not referred to in the Draft Bulletin:

- In her August 15, 2005 submission to the TPR Panel, the Commissioner indicated that two competing networks (e.g., a new entrant cable company and an ILEC) in the telecommunications market may provide sufficient competition where (1) the new entrant is capable of providing lower cost access to the public switched telephone network; (2) both networks have similar features and quality of access; and (3) there are no concerns about a coordinated exercise of market power.[7] A reference to this position and comment about how these observations would apply in the context of section 79 would be helpful.

[7] *Comments of the Commissioner of Competition to the Telecommunications Policy Review Panel*, August 15, 2005 at p. 12.

- In her June 22, 2005 submission to the CRTC in response to Telecom Public Notice CRTC 2005-2, *Forbearance from Regulation of Local Exchange Services* (the "Local Forbearance Case"), the Commissioner provided a very detailed review of the principles underlying predation, regulatory predation and price squeezes, all in the specific context of the telecommunications industry.[8]

- In the same submission on the Local Forbearance Case, the Commissioner also provided a two page list of information, including a number of data points specific to the telecommunications industry, which she describes as "the kinds of information that the Bureau typically seeks to define local services markets and assess existing competition and entry in these markets". Appendix B to the Submission contains a draft list of questions for industry participants and large customers.[9]

The Bureau has had significant enforcement experience in this sector, including with respect to mergers and trade practice investigations.[10] We would expect that this experience could be drawn upon by the Bureau to provide additional specific guidance.

The CBA Section believes that this type of guidance is very helpful and that the Draft Bulletin should contain a greater level of industry-specific detail and examples than it does at present. The level of detail provided in the Commissioner's submissions to the TPR Panel and in the Local Forbearance case is helpful and appropriate for industry-specific guidance. Content that is generic in nature or that repeats the Bureau's General Abuse Guidelines is more appropriately included in the General Abuse Guidelines.[11]

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8 Telecom Public Notice CRTC 2005-2, *Forbearance from Regulation of Local Exchange Services*, Evidence of the Commissioner of Competition at paras 236-245 and 266-272.

9 *Ibid*. at para 246 and Appendix B.

10 See, e.g., Competition Bureau Technical Backgrounder, "Acquisition of Microcell Telecommunications Inc. by Rogers Wireless Communications Inc." (April 12, 2005) and Competition Bureau News Release & Backgrounder, "Director Announces Results of Competition Act Review of Stentor" (February 22, 1996). The Bureau has also considered predatory pricing complaints against telecommunications carriers under sections 50(1)(c) and 79 of the Act regarding retail cellular phone sales and high-speed residential Internet access. See Director of Investigation and Research, "Annual Report for the Year Ended March 31, 1996" at 46 and Commissioner of Competition, "Annual Report for the Year Ended March 31, 1999" at 33.

11 We would recommend that the Bureau hyperlink references to the specific sections of the General Abuse Guidelines that are referred to in the Draft Bulletin or other forms of industry-specific guidance.

B. Timing of the Draft Bulletin

Since the release of the report of the TPR Panel, and since the release of the Draft Bulletin, the Government has made some significant announcements, including:

- On December 7, 2006, it proposed amendments to the *Competition Act* to allow the Competition Tribunal to order telecommunications service providers to pay an administrative monetary penalty (AMP) of up to $15 million in cases of abuse of dominant position; and

- on December 11, 2006, it proposed to change a CRTC decision establishing a revised analytical framework for the accelerated deregulation of retail telephone prices charged by the former monopoly telephone companies. The Government is proposing to (1) replace the CRTC's market share test with a test that emphasizes the presence of competitive infrastructure, (2) use smaller geographic areas, (3) streamline deregulation conditions that require the former monopoly telephone companies to meet standards for services they provide to competitors, and (4) end certain marketing restrictions.

The CBA Section believes it may be premature for the Bureau to finalize industry-specific guidance for the telecommunications industry at this time. Additional time for consideration and public consultation on the implications of these developments may be warranted. For example, the imposition of significant AMPs might warrant relatively less aggressive enforcement of section 79 to avoid a chilling effect on desirable aggressive competition, should this legislative proposal be enacted and be held to be constitutionally valid. The Government's specific proposals with regard to forbearance and geographic market definition, for example, may also warrant reconsideration of the Bureau's enforcement policy regarding section 79 in this sector. The CBA Section has not had adequate time to consider or consult with its members on these issues.

Once again, the CBA Section suggests that a speech or other less formal means of expressing the Bureau's current thoughts with respect to some of the points addressed in the Bulletin would be welcome and helpful. If the Bureau does finalize the Draft Bulletin, the CBA Section suggests that it reopen consultations into, and be willing to revise, the Bulletin once the new regulatory regime for telecommunications is known.

C. Consistency with General Abuse Guidelines

Much of the Draft Bulletin consists of a general discussion of particular aspects of the abuse of dominance provisions. In some cases, this discussion is new or inconsistent with the General Abuse Guidelines. To the extent that the Bureau is changing or adding to its position on the abuse provisions generally, it would be preferable to seek public input in the context of proposed revisions to the General Abuse Guidelines. It is confusing and inefficient to have competing and conflicting sets of comprehensive guidelines from the Bureau on the same subject matter.

The following are some examples of discussions in the Draft Bulletin that, in the CBA Section's view, would be better considered and included in proposed draft revisions to the Bureau's General Abuse Guidelines:

- the intention-based analysis of anti-competitive acts (section 4.1);
- essential facilities;
- retrospective versus prospective analysis in abuse of dominance cases, in contrast to merger cases;
- the cellophane fallacy;
- the non-price aspects of competition in the context of market definition;
- barriers to entry; and
- margin squeezing.

It may also be advisable to defer the finalization of new comprehensive abuse of dominance guidelines until after the outcome of the current proceedings in the *Canada Pipe* case. Given that significant commentary on the abuse of dominance provisions seems likely in the near future from either the Supreme Court of Canada or the Competition Tribunal (on a redetermination), and the relatively limited jurisprudence under section 79, comprehensive abuse of dominance guidelines would likely benefit from further revision after the final determination of those proceedings. This would not be a concern in the case of less formal guidance, such as a speech or a backgrounder providing more discrete and focussed insight

into the Bureau's current views or approach on particular issues in the telecommunications sector.

D. Guidance to the Telecommunications Sector Should Address Other Reviewable Matters Provisions

The CBA Section believes that enforcement guidance to the telecommunications sector would be more useful if it also addressed the provisions of the Act dealing with unilateral conduct, rather than only the abuse of dominance provisions. Given the history of claims for access to infrastructure in the telecommunications industry and the overlap or potential overlap between section 79 and certain other reviewable practices, the CBA Section believes that it would be helpful for the Bureau to provide some telecommunications-specific guidance on its enforcement approach to section 75 (refusal to deal). Given issues that have arisen with respect to bundling in this sector, it would also be helpful for such guidance to address section 77 (tied selling/exclusive dealing). As a practical matter, industry participants will assess conduct or proposed conduct in light of the entire Act, not just section 79.

E. Competition Bureau Jurisdiction Where CRTC Forbearance is Conditional

One issue that would benefit from a separate discussion and additional detail is the potential application of the regulated conduct defence, particularly where the CRTC forbears conditionally. The Bureau's *"Technical" Bulletin on Regulated Conduct* states only that "where… a regulator has forborne conditionally, the Bureau will apply the Act to all conduct conditionally forborne from regulation". This is relatively generic advice. More specific advice in the telecommunications context would be quite useful given that – under the present law – forbearance by the CRTC is almost invariably conditional. Some specific comment on the implications of the Government's deregulation initiative announced on December 11, 2006 may also be warranted.

Typically, the CRTC forbears from rate regulation but retains its powers under section 27(2) of the *Telecommunications Act* to address situations where a telecommunications carrier unjustly discriminates or gives an undue or unreasonable preference toward any person,

including itself, or subjects any person to an undue or unreasonable disadvantage. Where the CRTC retains these powers, both the CRTC and the Bureau may have jurisdiction to investigate the same alleged anti-competitive conduct. It would be helpful for industry participants to have further guidance on how the Bureau and the CRTC would allocate jurisdiction in these circumstances. More generally, given the CRTC's regulatory role in the telecommunications sector, in light of the regulated conduct defence, there would seem to be very circumscribed opportunities for the Bureau to apply section 79 in this sector.

IV. SPECIFIC COMMENTS ON THE DRAFT BULLETIN

A. Market Definition

(i) Approach to Market Definition

Initially, we note that the Draft Bulletin's discussion of product and geographic market definition appears to focus on residential telephone services and is, to some extent, anchored in the ILEC/CLEC[12] structure that has characterized the telecommunications industry over the last decade. We recommend broadening the discussion to include other telecommunications services, such as business and data services. In addition, the Bureau may wish to consider acknowledging that technological developments may be widening some relevant product markets beyond traditional telecommunications services. For example, the ICN Working Group on Telecommunications Services commented in a report earlier this year that: "Technological developments show that mobile, alternative fixed-line (i.e. cable), broadband access services, and IP technologies are evolving to become sources of competition to incumbent telecommunications providers."[13]

Generally speaking, the CBA Section agrees with the approach to market definition in the Draft Bulletin. In particular, we agree that geographic market definition should be based on overlapping areas of competing networks, in cases involving networks or network-based applications. From the perspective of enforcing the Act, this approach is preferable to

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12 A "CLEC" is a competitive local exchange carrier, as opposed to an incumbent.

13 Report of the International Competition Network Working Group on Telecommunications Services, presented at the 5th Annual Conference, Cape Town, South Africa, 3-5 May, 2006, at page 1. See also pages 5-7.

defining geographic markets on the basis of Statistics Canada census metropolitan areas ("CMAs").[14]

To the extent that the Bureau is in a position to do so, it would be helpful to provide views or initial thoughts on the implications of significant changes in the telecommunications industry that will likely raise difficult product market definition issues. For example, it may be helpful for the Bureau to advise on its current thinking on whether VoIP services should be considered to be in the same product market as an ILEC's residential telephone service.

(ii) Retrospective vs. Prospective Analysis

The Draft Bulletin states, in section 2.1, that the way market definition principles are applied may be different in abuse cases than in merger and forbearance cases. The Draft Bulletin explains that abuse cases are typically retrospective in nature, while merger and forbearance analyses are typically prospective. While the link is not explicitly made, this distinction leads to the discussion of the cellophane fallacy in section 2.2. The concern in abuse cases is to avoid assuming that products that apparently compete with one another are in the same product market.

This general distinction between abuse and merger proceedings may hold for many cases. However, it may be helpful to note that abuse cases can involve a prospective analysis, particularly if the concern is that a new practice by a dominant firm will lead to a substantial prevention of competition.

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[14] See the CRTC's decision in the Local Forbearance Case, Telecom Decision CRTC 2006-15, ¶141ff. The Bureau had advocated the overlapping network approach to the CRTC. The CRTC cited the test in the Bureau's *Merger Enforcement Guidelines*, but instead defined geographic markets based on CMAs for economic, social and practical reasons. On December 11, 2006, the Government announced, and on December 16 published in the Canada Gazette, its proposed Cabinet Order to vary the CRTC Telecom Decision 2006-15 (April 6, 2006) *Forbearance from the regulation of retail local exchange services*. The proposed Cabinet Order is intended to ensure that the market power test adopted by the CRTC more accurately reflects market power principles and in this regard would replace the CRTC's market share test with a test that emphasizes the presence of competitive infrastructure and uses smaller geographic areas.

(iii) Conflating Market Definition, Dominance and Anti-competitive Effects

In discussing the cellophane fallacy, the Draft Bulletin suggests that if a competitive price can be accurately determined, the "answer is immediately apparent without resorting to the market definition step".[15] The suggestion appears to be that knowledge about the competitive price establishes both market definition and competitive effects: "the analysis is, in effect, defining the market and assessing competitive effects simultaneously". This position is problematic.

For section 79 to be engaged at all, there must be a dominant firm. Since dominance is equated to market power, and market power refers to the ability to raise prices above the competitive level, it is possible, if not likely, that prices will be above competitive levels even without a practice of anti-competitive acts.

A test that equates the competitive price with the effects on competition is unable to distinguish any increase in price attributable to the fact of dominance from any further increase caused by the practice of anti-competitive acts.[16] However, the provision does not make dominance actionable, only its abuse. It is necessary to isolate the effects that are attributable to the practice of anti-competitive acts from those attributable to the fact of dominance. In such a case, relying solely on the difference between the prevailing price and the notional competitive price to establish a substantial lessening or prevention of competition may be tantamount to using section 79 to challenge dominance itself, rather than the abuse of dominance, which is contrary to the structure of section 79.

(iv) Non-price Aspects of Market Definition

The Draft Bulletin notes that identifying relevant markets means identifying competitors that are likely to constrain the ability of a firm to profitably increase price. Then, in a footnote, it

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15 Draft Bulletin, p. 5, note 17. (Page references are to the pdf version on the Bureau's website.)

16 There may, of course, be cases where the two are the same. For example, if one could predict that, but for the anti-competitive acts, the dominant firm would face entry and competition that would drive prices towards competitive levels, then the difference between the prevailing price and the likely future competitive price would be the measure of the effect on competition. Such a case would typically involve a practice of anti-competitive acts that is directed at maintaining dominance and thus the prevailing anti-competitive pricing.

defines all references to "price" to mean "price, output, quality, variety, service, advertising, innovation and other dimensions of competition".[17]

Including advertising as an aspect of "price" requires additional explanation. Advertising is a means of competition, but it does not inhere in a product or define a characteristic of the product or the terms of trade in a way analogous to price.[18] The ability of a firm to reduce advertising without a corresponding loss of market share to competitors is not likely to be a reliable indicator that these competitors are not in the same market. There may be many other reasons why the reduction in advertising has little effect. Similarly, it is not clear why a reduction in advertising by a dominant firm would have any adverse effect on the willingness of consumers to switch to substitutes that are not advertised as much.

That said, advertising may be informative about market delineation. For instance, if mobile telephony providers run advertisements comparing themselves to other mobile telephony providers (for instance, on quality of network), but do not generally target landline telephony providers, that may be some evidence that mobile telephony and landline telephony are not (yet) in the same product market.

As well, the inclusion of innovation in references to "price" also requires explanation in this context. Products currently on the market embody past innovation, but not future innovation. Future innovation leads to enhancements to existing products (or ways of making products) and often new products. It is hard to characterize the lack of future enhancements or new products as being analogous to an increase in the price of existing products.

The CBA Section does, however, recognize that reduction in innovation by a firm may be a sign of market power. More broadly, reduction in innovation may be one of the more pernicious effects of monopolies.

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17 Draft Bulletin, page 4, note 13.

18 An exception might be online services that force customers to watch advertisements in lieu of paying a fee for no-advertisement access. If that is what is intended, then it should be explicitly explained.

More fundamentally, this comment on non-price aspects of market definition in the Draft Bulletin raises issues that are not particular to the telecommunications industry and would be better considered in the context of revisions to the General Abuse Guidelines.

B. Market Power Assessment

i. Section 3.2 – Market Share

The Draft Bulletin refers to several potential measures of market share (sales, demand units, capacity), but does not indicate a preference until section 3.5, where it appears that capacity, particularly in the sense of network coverage, is the Bureau's preferred measure of market share in that context. We agree that network coverage is an important indicator of capacity. However, bandwidth may also be an important factor, and other measures may also be appropriate. We also agree that capacity (including coverage and bandwidth) may be the appropriate measure for determining the market share of competing networks. However, capacity may not be the appropriate measure for participants in other segments of the telecommunications industry (application and content). For instance, it is not clear how the Bureau would measure capacity for a VoIP service. More discussion of how the Bureau would measure market share in other aspects of the telecommunications sector would be helpful.

As the Draft Bulletin suggests, using network coverage as the measure for market share yields a market share for all participants of 1/n, regardless of the number of customers served by each participant. Previously, the Commissioner has discussed in some detail circumstances in which two competing networks provide sufficient competition to warrant forbearance from CRTC regulation.[19] It would seem hard to argue that, where two networks are each determined to have a 50% market share on the basis of capacity, one of them, but not the other, is dominant. Moreover, as the Bureau correctly notes, market shares in past abuse cases have been very high. In the result, it is likely that, where there are two or more

[19] See Comments of the Commissioner of Competition to the Telecommunications Policy Review Panel, August 15, 2005, at pars. 27-30.

networks in a relevant market, single firm dominance cannot be satisfied. If that is the Bureau's understanding of the implication of its position, it would be helpful to express it more clearly. If not, further explanation would be helpful.

The Bureau should also consider in its assessment of dominance whether the allegedly dominant firm's market share is declining, and, if so, how rapidly. This analysis may be particularly relevant in the telecommunications industry, given the changes that are occurring due to deregulation and the introduction of new competitors and technologies.

Unlike the Draft Bulletin, the General Abuse Guidelines do not discuss different ways of measuring market share. It would be helpful to revise the General Abuse Guidelines to incorporate such a discussion.

(ii) Section 3.3 – Barriers to Entry

The Draft Bulletin expands on the General Abuse Guidelines in its discussion of barriers to entry. The Draft Bulletin states that entry must be timely, likely and sufficient, and adds that the beneficial effects of entry must normally occur within a two-year period. The Draft Bulletin also comments on "market maturity" as a form of barrier to entry. These points are not made in General Abuse Guidelines,[20] and it would be helpful to consider these points in the context of proposed revisions to those Guidelines.

(iii) Section 3.4 – Other Market Characteristics

Section 3.4 of the Draft Bulletin comments that technological change and innovation is particularly important to the assessment of telecommunications markets, without providing significant amplification. This is an area that would benefit from elaboration or concrete examples in relation to the telecommunications industry.

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[20] The General Abuse Guidelines do, however, make a footnote reference to the two-year period for effective entry mentioned in the Bureau's 1991 Merger Enforcement Guidelines.

C. Anti-competitive Acts

(i) Section 4.1 – Anti-Competitive Acts in the Telecommunications Industry

Section 4.1 includes a quote from the Federal Court of Appeal decision in *Canada Pipe* to the effect that "an anti-competitive act is one whose purpose is an intended negative effect on a competitor that is predatory, exclusionary or disciplinary". The implications of the Federal Court of Appeal decision for the definition of an anti-competitive act may be an example of a point of broader consequence beyond the telecommunications industry that may usefully be the subject of a wider consultation on the General Abuse Guidelines at the appropriate time. In addition, there may be greater concern with regard to reliance on intent in a context where significant AMPs may be imposed, as the Government has recently proposed for the telecommunications sector.

(ii) Section 4.2.2 – Denial of Access to a Facility

The Draft Bulletin's discussion of denial of access to a facility as an anti-competitive act raises a number of issues.

First, the CRTC currently regulates facilities in the telecommunications sector that it deems to be essential or "near-essential". It seems likely that the CRTC will continue to do so. By virtue of the regulated conduct defence (RCD), the Bureau likely has no jurisdiction to act in this area while the CRTC regulates. The TPR Panel recommended that the CRTC retain jurisdiction over access to essential facilities[21] and that the proposed CRTC/Bureau working group develop recommendations to the CRTC on the definition of essential facilities and its application to today's telecommunications networks.[22] The CRTC is currently seeking input on which services should be deemed to be "essential" and therefore continue to be regulated by the CRTC, as well as on the definition of "essential facility".[23]

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21 *TPR Report*, Recommendation 3-19.

22 *Ibid*, Recommendation 3-21.

23 Telecom Public Notice CRTC 2006-14 – *Review of Regulatory Framework for Wholesale Services and Definition of Essential Services.*

To the extent that the Bureau adopts an approach to "essential facilities" consistent with that of the CRTC, the CRTC, and not the Bureau, will have jurisdiction over access to essential facilities. Thus, to provide greater context to the discussion in section 4.2.2 of the Draft Bulletin in light of the regulatory environment for telecommunications, additional discussion of the interaction between the CRTC and the Bureau in this regard would be helpful, such as an acknowledgement that the RCD may apply to a CRTC-regulated essential facility.

Second, this is the first time the Bureau has expressly adopted the essential facilities doctrine in relation to the abuse of dominance provisions (apart from the airline-specific essential facilities provisions). If the Bureau considers that a denial of access to an essential telecommunications facility may be an anti-competitive act, then it presumably considers that denials of access to essential facilities in other industries can also constitute anti-competitive acts. In our view, such a major change to, or at least new expression of, the Bureau's approach to abuse of dominance should not be made through industry specific guidance. If the Bureau intends to adopt an essential facilities doctrine, it would be preferable to do so after public consultations on revisions to the General Abuse Guidelines.

Third, it would be helpful for the Draft Bulletin to acknowledge that the Tribunal has yet to rule on either (1) whether denial of access to an essential facility constitutes an anti-competitive act for the purposes of section 79, or (2) the criteria that must be established to demonstrate that a facility is "essential". As a result, both the existence and scope of an essential facilities doctrine in Canada are uncertain and open to debate. As well, it would be helpful for the Bureau to articulate the legal theory that would support recognizing denial of access to an essential facility as an anti-competitive act for the purposes of section 79.

While the CBA Section has not fully canvassed its members on this issue, there appear to be arguments both for and against the application of an essential facilities doctrine to section 79. For example, it is questionable whether section 79 encompasses as an anti-competitive act the unilateral refusal by a single firm to grant access to a facility that it owns and does not offer to anyone. It is difficult to see how a mere refusal to grant access to private property could constitute an anti-competitive act. The case may be different, however, where the owner of the facility discriminates against competitors in granting access to the

facility, or where the owner cuts off a competitor that previously had access, or where firms jointly control a facility but deny it to others.[24] However, such cases, particularly in the latter two categories, might be addressed under the refusal to deal provisions in section 75 of the Act. Indeed, the existence of section 75 may support an argument that essential facilities are not intended to be captured by section 79.

As well, recognition of an essential facilities doctrine could conflict with the approach taken by the Bureau and the courts to the interface between the Act and intellectual property rights. The Bureau has stated that intellectual property should be treated like any other property, and a mere refusal to license intellectual property is immune from scrutiny (except under section 32).[25] If a refusal to provide access to other kinds of property can be an anti-competitive act, then the symmetry between intellectual property and other kinds of property is lost.

We also have the following specific comments on the approach to essential facilities set out in the Draft Bulletin:

First, an "essential facility" appears to be defined from the point of view of the owner of the facility, as an input that allows the owner to lessen or prevent competition in a downstream market. Although it may be correct to say that, if ownership of an upstream facility allows a firm to exercise market power in a downstream market, the facility must be essential for the downstream market, it seems odd to define an essential facility from the point of view of its owner, rather than of the competitor who seeks access to it. It would be helpful if the Bureau could elaborate on the rationale behind this definition.

Defining "essential facility" in this way creates the possibility that a firm that develops a more efficient upstream facility than another could find that facility characterized as "essential". The owner of the more efficient upstream facility would be able to undercut the

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[24] See, for example, *Director of Investigation and Research v. Bank of Montreal, et al*. (1996), 68 C.P.R. (3d) 527 (Comp. Trib.).

[25] Competition Bureau, *Intellectual Property Enforcement Guidelines*, §4.2.1; *Canada (Competition Act, Director of Investigation and Research) v. Tele-Direct (Publications) Inc.*, [1997] C.C.T.D. No. 8 at ¶66; *Canada (Director of Investigation and Research) v. Warner Music Canada Ltd*. (1997), 78 C.P.R. (3d) 321; *Molnycke AB v. Kimberly-Clark of Canada Ltd*. (1991), 32 C.P.R. (3d) 493.

downstream pricing of its rivals who depend on the less efficient upstream facility. These less efficient rivals may thus argue that, unless they are given access to the more efficient facility, they will be unable to compete and will be forced to exit the market. Such a view of essential facilities would encourage free riding and reduce incentives for innovation.

It would also be helpful for the Bureau to elaborate on the standard for determining when a facility will be considered "essential". For example, what degree of lessening or prevention of competition is required for the Bureau to consider a facility to be "essential"?

Second, the requirement of dominance in two markets (upstream and downstream) may be overly restrictive in the context of section 79, which on its face does not require that the market in which the respondent is dominant be the same as the market in which the substantial lessening or prevention of competition occurs. Thus, section 79 could apply in a monopoly leveraging case, where a dominant firm leverages its monopoly in one market to obtain a monopoly in a market that it did not previously monopolize. The Draft Bulletin's statement that "If that firm does not have market power downstream, the denial of access to the facility cannot amount to an abuse of dominance" may therefore be inconsistent with section 79. It would be helpful for the Bureau to articulate the rationale for this requirement.

Third, the Draft Bulletin could be clearer about circumstances in which an anti-competitive purpose will be inferred. The Draft Bulletin deals with this concept in the negative by stating that an anti-competitive purpose can be inferred only if it is difficult or impossible to duplicate substitute inputs, or duplicate the facility. It is not clear, however, whether the Bureau regards this factor as sufficient to lead to an inference of anti-competitive purpose. It should also be noted that, if this factor is not present, the facility cannot be characterized as essential in the first place, whatever the operator's subjective intent.

It would also be helpful to clarify the Bureau's thinking behind the following statement in the Draft Bulletin: "…for the purpose to be anti-competitive, the supplier must have the necessary capacity, or have the willingness and ability to build the necessary capacity…" As it stands, this statement might be taken to suggest that it is an anti-competitive act for a supplier to refuse to build additional capacity in order to supply a competitor. Whatever the

status of the essential facilities doctrine, it is difficult to imagine that a supplier could be expected to build capacity in order to supply a competitor. The reference to "willingness" in this statement also seems out of place. If the supplier is willing to expand capacity to supply the competitor, then by definition the supplier is willing to supply the competitor, and there would be no basis for a complaint or action by the Commissioner.

Finally, it would be helpful if the Bureau could provide some particular examples of how an essential facilities doctrine might apply to the telecommunications industry.

(iii) Section 4.3 − Predatory Pricing

Initially, we note that the Draft Bulletin uses the concept of "avoidable cost", which was incorporated in the airline-specific abuse provisions, rather than the different terminology and concepts such as average variable cost used in the Bureau's 1992 Predatory Pricing Enforcement Guidelines. It would be helpful for the Bureau to explain why it considers the "avoidable cost" standard to be appropriate for the application of predatory pricing analysis in this sector. In addition, we believe that the meaning of the term should be made more explicit. Insofar as it may capture, in addition to more traditional aspects of "cost", some notion of opportunity cost, it may not be appropriate. In other words, it would be helpful for the Bureau to explain whether and, if so, how it makes a difference to apply an avoidable cost rather than an average variable cost standard in the telecommunications sector.

As a general comment, the CBA Section welcomes the Bulletin's effects-based approach to analyzing predatory pricing claims in the telecommunications sector. By focussing on harm to competition and consumers, not competitors, the Bureau appears to have effectively provided three safe-harbour levels for pricing: (i) the "avoidable costs" (i.e., any costs that would have been avoided by not offering the product or service in the relevant time frame) of the target/complainant; (ii) the avoidable costs of the alleged predator; and (iii) the pricing

of the target/complainant (or other firms in the market).[26] This inclusion of three safe harbours constitutes the Bureau's clearest guidance to date on pricing levels that will be needed to establish predation. The CBA Section welcomes this guidance.

While the basic framework for analyzing predatory pricing is welcome, the CBA Section believes that the Draft Bulletin would be more useful if it provided greater guidance on how this framework will be applied to the telecommunications industry in practice. The general framework is more appropriate as part of the General Abuse Guidelines. For example, although some parts of the Draft Bulletin point to an industry characterized by non-redeployable, sunk cost investments (and therefore presumably a significant amount of unavoidable costs), it would be helpful to have a clearer articulation of which costs the Bureau views as avoidable. We note that the Bureau has previously provided more detailed discussion of the conditions needed for predation in the telecommunications industry, such as the following prior submission to the CRTC:

> It is not obvious that the conditions required for ex ante concern sufficient to restrict downward price flexibility by the ILECs are applicable where forbearance is based on entry into a well defined antitrust market by a rival network. Forbearance implies that the market structure is unlikely to facilitate predatory pricing. More fundamentally, the incentives for predation to be a concern might disappear. It seems unlikely that predation is going to induce exit in cases where the rival has invested in a sunk network that is ubiquitous and exists for other reasons, not only to supply telecommunications services. Moreover, for predation to induce such exit, prices would have to fall below both it and the incumbent's average avoidable costs. Depending on the magnitude of the fixed and sunk capital cost of the network, this could be substantially lower than long run average incremental cost.[27]

Finally, the CBA Section is pleased that the Bureau has explicitly recognized the ability to recoup sacrificed profits as a necessary element of successful predation.

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[26] Items (i) and (iii) could potentially be addressed under paragraph 79(1)(c) rather than 79(1)(b) of the Act. (For example, in the *Air Canada* predation case, the Tribunal focussed on item (ii) in regard to paragraph 79(1)(b), apparently leaving consideration of items (i) and (iii) to the analysis under paragraph 79(1)(c). That case is unique in that the anti-competitive act of predatory pricing was defined in an industry-specific regulation.) It probably does not matter in practice whether items (i) and (iii) are dealt with under paragraph 79(1)(b) or (c), although there may be merit in the Bureau's approach of dealing with all price to cost (or price) comparisons in the same part of section 79.

[27] Telecom Public Notice CRTC 2005-2, *Forbearance from Regulation of Local Exchange Services*, Evidence of the Commissioner of Competition at paragraph 266. It is also noted that telecommunications firms do not share the same opportunities as airlines to redeploy assets to other geographic markets, which was an important aspect of the Tribunal's finding in the *Air Canada* case that most costs were avoidable.

(iv) Section 4.4 − Targeted Pricing

The Draft Bulletin includes a distinct section on targeted pricing, which is largely, but not entirely, analogized to predatory pricing. The Draft Bulletin states that "should the targeted price exceed avoidable costs, the Bureau would require considerable ancillary evidence" before pursuing the matter as an anti-competitive act. The CBA Section believes that the Bureau should clearly indicate that, where pricing is not predatory, there can be no separate anti-competitive act for targeted pricing.

The CBA Section considers that "targeted pricing", where such pricing is above the relevant measure of costs, cannot be an anti-competitive act for the purposes of section 79. In *Tele-Direct,* the Tribunal rejected the Commissioner's targeting theory:

> In one obvious sense, therefore, "targeting" simply refers to focused or aimed rather than general responses. The facts show that Tele-Direct behaved differently in the competitive markets. If the Director is arguing that the actions of Tele-Direct constitute the anti-competitive act of targeting merely because its actions in markets in which broadly-scoped entry was occurring were different from those in markets where no such entry had occurred, we do not accept the argument. Targeting cannot be distinguished as an anti-competitive act merely by the fact that there is a differentiated response. Targeting, in the sense of a differentiated response to competitors, is a decidedly normal competitive reaction. An incumbent can be expected to behave differently where it faces entry than where it does not. One competes where there is competition. Similarly there may be gradations of reaction depending on the nature of the competitive threats.[28]

Moreover, targeted pricing can be viewed as a form of price discrimination, which can be pro-competitive and welfare enhancing.

(v) Section 4.5 − Bundling

As noted above, we recommend that the Draft Bulletin deal with the tied selling provisions as part of a discussion on bundling. Such a discussion should recognize and describe the Bureau's approach to market definition in bundling cases – i.e., the determination of whether the bundled package constitutes a single product (in which case there can be no tied sale), or whether the components of the package constitute two or more relevant products. Any telecommunications-specific guidance that the Bureau can provide in this area (e.g., based on previous investigations) would be helpful as well.

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[28] *Tele-Direct*, at ¶593.

D. Substantial Lessening or Prevention of Competition

Part 5 of the Draft Bulletin contains no discussion about how a substantial lessening or prevention of competition would be determined in the telecommunications industry. Rather, it appears to consist solely of an update to the Bureau's thinking on the question of substantial lessening or prevention of competition generally. Such an update would be better accomplished by way of revisions to the General Abuse Guidelines.

The Draft Bulletin defines substantial lessening or prevention of competition as preservation and enhancement of barriers to entry.[29] The Draft Bulletin then states that:

> there are a variety of other considerations in determining whether or not there has been a substantial lessening or prevention of competition, such as whether or not consumer prices might be significantly lower, or product quality, innovation or choice significantly greater, in the absence of the practice.[30]

Obviously, the factors listed in the passage cited above can constitute a substantial lessening or prevention of competition. However, to define substantial lessening or prevention of competition solely in terms of preservation or enhancement of barriers to entry, as the Draft Bulletin does, is inconsistent with the factors listed above.

E. Remedies

Part 6 of the Draft Bulletin also contains no discussion of remedies for abuse of dominance in the telecommunications industry. Rather, it appears to consist solely of an update to the Bureau's thinking on remedies for abuse of dominance generally. For the reasons discussed above, the CBA Section believes that such an update would be better and more appropriately accomplished by way of revisions to the General Abuse Guidelines.

In light of the Government's very recent proposal to introduce AMPs with regard to the application of section 79 to the telecommunications sector, the CBA Section is not at this time in a position to offer further commentary on remedies in this sector.

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29 Draft Bulletin, p. 22.

30 Draft Bulletin, p. 23.

VI. CONCLUSION

The CBA Section appreciates the opportunity to provide comments on the Draft Bulletin. We support the Bureau's efforts to educate the Canadian public and business community on the application of the Act, and we would be pleased to discuss our comments with the Bureau or participate in further consultation on either the Draft Bulletin or the General Abuse Guidelines.