NEW ABUSE OF DOMINANCE ENFORCEMENT GUIDELINES

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On September 20, 2012, the Canadian Competition Bureau released its revised Enforcement Guidelines on the Abuse of Dominance Provisions of the Competition Act (the "*New Guidelines*").[1]

The New Guidelines provide a summary of the Bureau's approach to the enforcement of the Canadian abuse of dominant market position regime. Changes from the existing guidelines which were issued in 2001 (the "*2001 Guidelines*") and earlier draft guidelines (the "*2009 Draft Guidelines*"), which were never finalized, provide insight into the Bureau's evolving thinking. Key aspects of the New Guidelines and differences from previous guidelines are summarized below.

1. **Less Detail:** The *New Guidelines* offer much less guidance, by way of examples and analyses of types of anti-competitive conduct, than did the *2009 Draft Guidelines* or the *2001 Guidelines*. This development is unfortunate, since guidelines are most useful in articulating enforcement approaches where jurisprudence is not available.
2. **Necessary Intent:** The most important development in the *New Guidelines* is the Bureau's changed interpretation of the intent necessary to find that conduct constitutes an anti-competitive act, and can therefore be the basis for a finding of abuse of dominant market position. The jurisprudence has been unanimous that, to constitute an anti-competitive act, conduct must be undertaken with the goal of having a negative effect on a competitor which is predatory, exclusionary or disciplinary. However, the New Guidelines state that "while many types of anti-competitive conduct may be intended to harm competitors, the Bureau considers that certain acts not specifically directed at competitors could still be considered to have an anti-competitive purpose". This approach greatly expands the scope for finding that conduct constitutes an abuse of dominance. For example, a Bureau official has noted that it could cover "facilitating practices."
3. **Joint Abuse of Dominance and Conscious Parallelism:** The *2001 Guidelines* expressly stated that mere conscious parallelism would not constitute an abuse of dominance, but the *2009 Draft Guidelines* removed that provision. The *New Guidelines* state that "Similar or parallel conduct by firms is insufficient, on its own, for the Bureau to consider those firms to hold a jointly dominant position." The question remains as to what degree of joint action will be necessary to find joint dominance. The Competition Tribunal has not yet had occasion to consider this important point (many firms which would not consider

themselves to be dominant may be subject to challenge as jointly dominant, depending upon the test employed).

4. **Market Share Thresholds:** The New Guidelines maintain the historic 35% market share "safe harbour". They also indicate that a firm with a market share of between 35% and 50% will generally only be examined by the Bureau if the firm is likely to increase its market power through the alleged anti-competitive behaviour within a reasonable period of time. This change suggests that the Bureau is now less likely to focus on firms with market shares below 50%. If a firm holds a market share in excess of 50%, the *New Guidelines* provide that it will likely be subject to further examination.
5. **Substantial Lessening of Competition and Sufficient Remaining Competition:** The *New Guidelines* indicate that the focus in deciding whether there has been a "substantial lessening or prevention of competition" as a result of anti-competitive conduct requires an assessment of the relative decrease in competition in the market as a result of the conduct, not a consideration of the overall competitiveness of the market, or whether the absolute level of competition in the market is substantial or sufficient. As a result, it is at least theoretically possible for conduct that results in a "substantial" lessening of competition to be challenged, even when the market in issue continues to be characterized by a "substantial" or "significant" level of competition in absolute terms. This is an odd result.
6. **Administrative Monetary Penalties:** Historically, a finding of abuse of dominant market position did not give rise to fines or civil damages. In March 2009, administrative monetary penalties (a maximum of $10 million, or $15 million for repeat conduct) were introduced. There is not yet any jurisprudence regarding the imposition of such penalties. It would have been helpful to have guidance on when and what level of administrative monetary penalties would be sought by the Bureau in certain circumstances, but the New Guidelines are silent on this important issue.

The *New Guidelines* arrive on the heels of significantly enhanced enforcement efforts by the Competition Bureau. Between 2000-2008, only a single abuse of dominance case was filed. Since mid-2009, the Bureau has filed a Consent Agreement settling a matter involving joint abuse of dominance in the waste business; brought an abuse of dominance case against the Canadian Real Estate Association which was subsequently settled; and is pursuing an abuse case against the Toronto Real Estate Board. The Bureau is also litigating a case against Visa and MasterCard under the price maintenance provisions of the Act that is similar in many respects to an abuse of dominance case. Thus, the issues addressed in the New Guidelines are of significant practical, as well as policy, importance.

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1 The new Guidelines are available on the Competition Bureau's website at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03497.html.

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A Cautionary Note

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