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EMAIL – ORIGINAL AND ENCLOSURE TO FOLLOW

Competition Bureau
50 Victoria Street
Gatineau, QC
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Attention: Ms. Melanie Aitken, Interim Commissioner of Competition

Dear Melanie:

Re: Draft Abuse of Dominance Guidelines

We are writing on behalf of members of the Competition Policy Group, a group of major companies with a longstanding interest in the development of sound competition law in Canada¹ to provide comments on the “*Draft Abuse of Dominance Guidelines*”² published in January 2009. The introduction in Bill C-10 of administrative monetary penalties (“AMPs”) for abuse of dominance increases the risk that the abuse of dominance provisions may chill aggressive conduct by businesses in Canada which is pro-competitive and efficiency-enhancing. Thus, clear guidance from the Bureau on its approach to enforcing the abuse of dominance provisions is more important than ever in order to minimise potential chilling effects.

In general, the Group believes that the approach to predatory pricing in the *Draft Abuse of Dominance Guidelines* strikes an appropriate balance between the Bureau’s legitimate interest in effective enforcement and a recognition that low prices are usually beneficial to the Canadian economy. However, a similar balance has not been achieved in the sections of the *Draft Guidelines* that address exclusionary conduct including exclusive dealing, tying and bundled rebates. The Group encourages the Bureau to amend the *Draft Guidelines* to articulate a similarly balanced approach that reduces the risks of chilling beneficial activity in these areas. It

¹ The current members of the Group are: BP Canada Energy Company, Ford Motor Company of Canada, Limited, General Electric Canada Inc., General Motors of Canada Limited, IBM Canada Limited, Imperial Oil Limited, Intel Corporation and Petro Canada.

² Competition Bureau of Canada, *Updated Enforcement Guidelines — the Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act)*, Draft for Public Consultation, January 2009. [“*Draft Guidelines*”]

also believes that the prior guidance on the need for something more than conscious parallelism (“conscious parallelism plus”) to constitute joint abuse of dominance should be restored.

1. Predatory Conduct is Dealt with Appropriately

The Group believes that the *Draft Abuse of Dominance Guidelines*, which follow the approach set out in the updated *Predatory Pricing Enforcement Guidelines* released by the Bureau in 2008,³ reflect an appropriate recognition that low prices are usually beneficial to customers and the Canadian economy as a whole. The avoidable cost and recoupment tests are consistent with contemporary economic thinking. The appropriateness of this approach is reconfirmed by the repeal of the criminal predatory pricing offence by Bill C-10. Thus the Group encourages the Bureau to maintain its sensitivity to avoiding “chilling aggressive price competition.”⁴

2. The Discussion of Exclusionary Conduct Gives Inadequate Weight to Chilling Effects

As with predatory conduct, the *Draft Abuse of Dominance Guidelines* correctly recognise that there are certain situations in which the unilateral actions of a dominant firm can have exclusionary effects on customers and overall economic welfare. However, the experience with abuse of dominance (and other reviewable practices in Part VIII of the *Competition Act*) over the past three decades indicates clearly that such situations are extremely rare.⁵

The Group believes that the overall content and tone of the *Draft Abuse of Dominance Guidelines* give the impression that a wide range of contractual and other ordinary commercial activity is exclusionary and anti-competitive. This impression is compounded by the absence of a recognition of the risks of chilling pro-competitive activity comparable to the approach set out for predatory pricing in section 4.3. The Group therefore believes that it would be helpful and appropriate to add a paragraph along the following lines near the beginning of section 4.2 (which would benefit from being retitled as “Exclusionary Conduct”, with “Raising Rivals’ Costs” being reconfigured as a sub-heading):

“It is often difficult to distinguish exclusionary conduct from aggressive but beneficial competitive conduct. However, exclusionary conduct involves the ability to raise long-term prices once rivals have been impeded or eliminated, which may result in a substantial lessening of prevention of competition. As a general

³ Competition Bureau, *Predatory Pricing Enforcement Guidelines* (July 2008) available online at: <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02713.html>>.

⁴ *Ibid* at p. 3.

⁵ See, e.g., the occasional competition Tribunal cases summarized in Appendix V of the *Draft Guidelines*; the enforcement statistics in most sophisticated competition law regimes published by *Global Competition Review*; and the analysis in N. Campbell and J.W. Rowley, “The Internationalization of Unilateral Conduct Laws – Conflict, Comity, Cooperation and/or Convergence”, 75 *Antitrust Law Journal* 267 (2008) (copy enclosed for reference).

principle, the Bureau takes a careful stance in its enforcement actions related to exclusionary conduct in an attempt to avoid false positives and chilling legitimate competition”.

3. Raising Rivals’ Costs and Reducing Rivals’ Revenues are Controversial Theories

The *Draft Guidelines* present “raising rivals’ costs” and “reducing rivals’ revenues” as if they were relatively straightforward and commonplace matters. They do not convey the degree to which the economic literature has recognised the assumptions and limitations related to such theories.

Instead, the *Draft Guidelines* give the impression that many types of ordinary commercial conduct will be viewed as falling into these categories including price squeezes, refusals to supply competitors, exclusive dealings, requirements contracts, most-favoured-nation (“MFN”) clauses, meet-or-release (“MOR”) clauses, tying and bundling, contract termination penalties and loyalty rebates. In fact, customers often request some of these actions and most of them are pro-competitive most of the time. While Appendices II, III and IV contain brief discussions of some of the non-anticompetitive rationales for exclusive dealing, tied selling, bundling and refusals to sell to competitors, it would be desirable to include a more comprehensive discussion of the pro-competitive and efficiency-enhancing scenarios relating to each of the categories of conduct that are highlighted in the rivals’ costs / revenues sections. Otherwise, the *Draft Guidelines* will almost certainly chill conduct that is not anti-competitive.

This issue is particularly important because the *Draft Guidelines* do not articulate clear standards for exclusionary activity. The Group recognises that this is a difficult area and that a single, clear standard may be difficult to establish. However, the Group believes it would be useful and appropriate to add explanations which indicate that the exclusion standard is substantial in magnitude and duration. Loose references in the rivals’ costs / revenues sections to actions that “weaken” competitors or make them “less effective” fall far short of a meaningful exclusion standard. At a minimum, the Group encourages the Bureau to indicate in the final version of the Guidelines that the extent and degree of exclusion must involve substantial foreclosure of effective competition.

4. Price Discounts Should Normally Be Assessed Using a Predation Standard

Section 4.1 of the *Draft Guidelines* recognises that a predation and / or an exclusion methodology could be applied to various conduct which involves price reductions. The *Draft Guidelines* indicate that the predation standard (which includes avoidable cost and recoupment tests) will be applied to margin squeezing implemented by retail price reductions and to tying / bundling situations in which a grouping of products is collectively regarded as a single relevant product market. However, they suggest — without supporting rationale — that other types of price reductions will be analysed using the more interventionist approach applicable to exclusionary conduct. Moreover, Section 4.2.1 negatively and inappropriately

characterizes rebates offered by a supplier as “penalties” when a competitor seeks to compete for the business of such a customer.⁶

The Group believes that all forms of price reductions, including loyalty rebates and discounts on one or many products within a bundle, are presumptively beneficial to customers unless the predation tests of selling below avoidable costs and recoupment are satisfied.⁷ The Group therefore encourages the Bureau to state in the final version of the Guidelines that price reductions of all types will normally be analysed using a predation standard in order to avoid chilling behaviour which is almost always pro-competitive.

5. Superior Competitive Performance is an Important Aspect of the Regime

The Group commends the clear affirmative statement in Section 5.3.2 of the *Draft Guidelines* that:

“Having lower costs, better distribution or production techniques, or a broader array of product offerings can put a firm at a competitive advantage that, when exploited, will lessen competition by leading to the elimination or restriction of inferior competitors. This is the sort of competitive dynamic that the Act is designed to preserve and, where possible, enhance, as it ultimately leads to a more efficient allocation of resources.”

6. Specific Types of Activity

The Group has focused on the provisions of the *Draft Guidelines* which it believes are most important and has not attempted to provide detailed line-by-line comments. In keeping with this approach, the Group commends the Bureau for providing specific guidance about Exclusive Dealing, Tying / Bundling and Refusals to Sell to Competitors in Appendices II, III and IV, and provides only summary comments about these components of the *Draft Guidelines*:

- *Exclusive Dealing* — The Appendix appears to have a somewhat negative orientation to exclusivity. The brief explanations regarding non-anti-competitive types of exclusive dealing do not cover many of the commonplace reasons for one- or two-directional exclusivity in a wide range of distribution situations. In addition, phrases such as “whether exclusive dealing is in fact the only method of achieving these efficiency goals” suggest an unwarranted suspicion of exclusivity provisions.

⁶ See, *Draft Guidelines* at p. 32.

⁷ See also K.L. Glazer and B.R. Henry, *Coercive vs. Incentivizing Conduct: A Way Out of the Section 2 Impasse?*, Antitrust, Fall 2003, who emphasize the opportunities available to customers to choose whether to take advantage of such offers.

- *Tying / Bundling, and Bundled Rebates* — Here again, a broader recognition of the range of non-anti-competitive uses of such pricing and distribution strategies would be useful. Also, a cross-reference to the tied selling provision in section 77 of the *Act* and an explanation of how the terminology used in these *Draft Guidelines* differs from the broad definition of “tied selling” would be helpful. Finally, the Group is concerned that the reference to price discrimination (which occurs in the context of generally helpful guidance on aftermarket issues) may send an unintended signal that the Bureau regards such conduct somewhat negatively (particularly since footnote 71 focuses on “capture of consumer surplus” without also acknowledging the output expansion which it generates). Given the repeal of the criminal offences related to price discrimination and promotional allowances by Bill C-10, the Group encourages the Bureau to develop an appendix which explains that the abuse of dominance regime would only rarely be applicable to such conduct.
- *Refusals to Sell to Competitors* — There is a fundamentally problematic perspective embedded in the title and throughout the body of Appendix IV which is reflected in the phrase “denial of access”. The normal common law concept of freedom of contract allows firms to decide who they will and won’t do business with. Firms often prefer not to do business with their competitors for many valid business reasons, as well as the competition law sensitivities related to having an ongoing business relationship with a rival. As the US Supreme Court recognized in the *Trinko* case, extreme caution should be employed before using antitrust / competition laws to impose a duty on a firm to supply facilities or services to competitors. The Group encourages the Bureau to develop a revised Appendix IV: Refusals to Sell to Competitors that contains guidance focusing on the exceptional situations in which such an extraordinary remedy might be pursued.

Joint Abuse of Dominance Should Require More Than Parallelism

The Group is concerned that the *Draft Guidelines* create uncertainty about the Bureau’s approach to joint abuse of dominance. Under the previous guidelines issued in 2001, it was clear that conscious parallelism alone was not sufficient to trigger a finding of a joint abuse of dominance.⁸ Under the new *Draft Guidelines*, it appears that conscious parallelism, and possibly even unconscious parallelism, could be sufficient to trigger a finding of a joint abuse of dominance.


As you know, reviewable practices are activities that are not inherently anti-competitive and are normally beneficial to both business and consumers, as well as to the Canadian economy. There are many industries where multiple competitors employ exclusivity, tying, bundling or other commercial practices such as MFN or meet-or-release clauses as part of the basis of competition. In the absence of some form of agreement, tacit collusion or overt facilitating practices, it would be inappropriate and counter-productive to treat parallel conduct

⁸ Competition Bureau of Canada, *Enforcement Guidelines on the Abuse of Dominance Provisions*, July 2001.

as a joint “practice of anti-competitive acts”. The uncertainty around the Bureau’s approach to joint abuse of dominance, combined with the availability of fines of up to \$10 million for an abuse of dominance, risks deterring businesses from engaging in aggressive conduct that may in fact be efficient and competitive.

The Group appreciates the opportunity to provide comments on the updating of the Bureau’s *Abuse of Dominance Enforcement Guidelines*. We would be pleased to discuss any aspect of these comments with you or your staff if that would be useful as the Bureau completes its work on these *Guidelines*.

Yours truly,



A. Neil Campbell

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Attach.

cc: Members of the Competition Policy Group
J.W. Rowley QC and Sorcha O’Carroll, McMillan LLP