

**COMMENTS ON THE COMPETITION BUREAU'S
DRAFT UPDATED ABUSE OF DOMINANCE GUIDELINES**

April 20, 2009

A. General Comments and Overview

Osler, Hoskin & Harcourt LLP is pleased to have the opportunity to provide these comments on the draft Updated Enforcement Guidelines entitled *The Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act)* (the “Draft Guidelines”). We applaud the Bureau for consulting broadly on the Draft Guidelines, as they represent an important policy initiative. We also commend the significant efforts that have been made in the Draft Guidelines to clarify the Bureau’s approach to the assessment of legitimate business justifications and to address specific forms of conduct, both in the main text and in new appendices. In addition, we welcome the statement (at the top of p. 4) that “[t]here must also be an effective remedy available before the Commissioner will consider an application to the Tribunal.” The adoption of the hypothetical monopolist approach to market definition in the section 79 context is also a welcome change, as it provides a more objective basis upon which to conduct the market definition exercise.

In broad terms, the Draft Guidelines are consistent with the jurisprudence and appropriately update the 2001 *Enforcement Guidelines on the Abuse of Dominance Provisions* (the “2001 Guidelines”) to reflect the Federal Court of Appeal’s ruling in *Canada Pipe*.¹ However, there remain important areas in respect of which the jurisprudence is still unclear, is in need of further elaboration or is silent. These include:

- the appropriate approach to market definition when it is difficult to apply the hypothetical monopolist framework, i.e., due to an inability to establish the price that would likely prevail in the absence of the impugned conduct;
- the degree of market power required to achieve “substantial or complete control” within the meaning of paragraph 79(1)(a) of the *Competition Act* (the “Act”);
- how to establish joint dominance;
- the types of practices by jointly dominant firms that may be found to be anti-competitive within the meaning of paragraph 79(1)(b) of the Act;
- the manner in which a business justification must be “attributable to” the dominant firm and the nature of the required “link” between such justifications and the dominant firm, given that self-interest is not considered to constitute a valid business justification;
- how the Bureau will conduct its assessment of whether one or more business justifications “counterbalance or neutralize other evidence of an anti-competitive purpose, prior to making a determination under 79(1)(b)”;

¹ *Commissioner of Competition v. Canada Pipe Co.*, [2006] F.C.A. 233.

- the appropriate safe harbours or screens to apply in exclusive dealing, tying/bundling and conditional discounts cases;
- the extent to which facilities must be “essential” or difficult to duplicate before the owner of such facilities may be compelled to provide access to the facilities; and
- what constitutes a substantial lessening or prevention of competition.

It would be helpful if these areas could be addressed in the final Guidelines. In addition, it would be helpful if the final Guidelines could address the circumstances in which the Bureau may seek an administrative monetary penalty under the recently amended provisions in section 79(3.1) of the Act and how it will approach the assessment of the factors listed in section 79(3.2) of the Act.

Related to the issue of the degree of market power contemplated by paragraph 79(1)(a) is the issue of the appropriate safe harbour. For the reasons discussed in section C below, we submit that the requisite degree of market power should be “substantial” market power, and that safe harbours of 50% and 75% for single firm dominance and joint dominance, respectively, would be appropriate for such a standard.

Regarding the issue of what constitutes an anti-competitive practice contemplated by paragraph 79(1)(b), the single biggest area of uncertainty for the legal and business communities is how to distinguish between “competition-on-the-merits” and anti-competitive conduct. These communities will find helpful the statement, at page 18 of the Draft Guidelines, that “where it is clear that the firm’s objective in engaging in [conduct with a valid business rationale] was for reasons other than the exclusion, discipline, or predation of a competitor, then the Bureau will likely elect not to pursue further investigation.” However, the nature of the critical balancing exercise described by the Federal Court of Appeal² remains highly uncertain and therefore warrants significant clarification and elaboration in the final Guidelines.

In addition, it would be helpful if Part 4 of the final Guidelines could be restructured to address specific types of potentially anti-competitive practices, such as exclusive dealing, tied selling &

² *Id.* at § 88 (“a business justification is properly employed to counterbalance or neutralize other evidence of an anti-competitive purpose, prior to making a determination under 79(1)(b)”).

bundling, conditional discounts, predatory pricing³ and denial of access to a facility. These practices are specifically addressed in the recent *Guidance* issued by the European Commission regarding its enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (the “Article 82 Guidance”).⁴ They are also specifically addressed in the recent report issued by the United States Department of Justice (“DOJ”) entitled *Single-Firm Conduct Under Section 2 of the Sherman Act* (the “Section 2 Report”).⁵ The final Guidelines would be much more user-friendly and familiar to international readers if they were structured in a similar fashion, rather than relegating the discussion of some of these practices to the appendices, while largely ignoring conditional discounts.

As discussed in section D(iii) below, we encourage the Bureau to consider adopting safe harbours of (a) 30% of the existing market for exclusive dealing; (b) prices above average total costs for an entire bundle of products, where bundle-to-bundle competition exists or is reasonably possible; (c) prices above average total cost for one or more competitive products in a bundle, after allocation of all of the discounts to such product(s); and (d) prices above average total costs for conditional discounts, after applying the total discount on all sales to the sales in the contestable portion of the market. We also urge the Bureau to add a fourth condition to the list of necessary conditions that must be present before concerns may be raised regarding the denial of access to a facility or service. This condition should require that the facility in question be difficult to effectively or practically duplicate.

With respect to the degree of prevention or lessening of competition contemplated by paragraph 79(1)(c), the Draft Guidelines depart in some places from the Bureau’s longstanding policy (e.g., as expressed in the *Merger Enforcement Guidelines* (“MEGs”) and in the *Predatory Pricing Enforcement Guidelines* (“PPEGs”)) of assessing “substantiality” in terms of price and non-price proxies (e.g., quality, service, variety, innovation) for the intensity of rivalry. For example, the Executive Summary of the Draft Guidelines states: “A substantial lessening or prevention of

³ With the recent repeal of section 50, the Bureau may wish to consider dealing with predatory pricing in an expanded treatment of the discussion that now appears in section 4.3 of the Draft Guidelines, rather than in separate guidelines.

⁴ European Commission, *Guidance on the Commission’s Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*, available at <http://ec.europa.eu/competition/antitrust/art82/guidance.pdf>.

⁵ Available at <http://www.usdoj.gov/atr/public/reports/236681.htm>.

competition is an effect that creates, preserves, or enhances *barriers to entry and expansion and, by extension* market power” (emphasis added). We strongly encourage the Bureau to stick to its longstanding policy of defining “substantiality” in terms objectively measurable price and non-price proxies for the intensity of rivalry, and to explain how it will approach the balancing of anti-competitive effects against any pro-competitive effects that may have resulted, or be likely to result, from the practice in question.⁶

Finally, we are concerned that the deletion of passages that appeared in the 2001 Guidelines and discussed alternative means of resolving cases may suggest that the Bureau is less open to resolving cases by such means. Indeed, this appears to be the plain meaning of the statement in the third paragraph of the Executive Summary that the “Bureau’s enforcement policy is to vigorously pursue cases that meet the elements of section 79”. If this statement and the removal of the above-noted passages are intended to mark a shift in the Bureau’s policy away from being prepared, in some situations, to resolve cases without the need for litigation or a consent agreement, this should be justified and made more explicit. We would seriously question such a shift from the Bureau’s longstanding policy of being prepared, in some situations, to resolve matters in alternative ways, consistent with the policy set forth in the Bureau’s *Conformity Continuum Information Bulletin*.

B. Market Definition

This section of the Draft Guidelines represents a significant improvement over the 2001 Guidelines. In particular, we heartily welcome the adoption of the hypothetical monopolist approach in the abuse of dominance context. We suggest that the Bureau consider reproducing, or at least cross referencing, in this section of the Draft Guidelines the general definition of a relevant market that is set forth in the second paragraph of section 3.1 of the MEGs.

The one principal area of this section of the Draft Guidelines that could benefit from further clarification is the Bureau’s approach to determining the “but for” price to be used in the assessment, i.e., the price that likely would have prevailed in the absence of the impugned acts. We suggest that consideration be given to (i) explicitly recognizing in the main text on page 7 that it is sometimes very difficult to establish what this counterfactual benchmark would be; and

⁶ *Canada Pipe*, *supra* note 1, at § 79 (“the [beneficial] effect of an act on consumers ... is more appropriately considered under paragraph 79(1)(c)”).

(ii) stating that in such cases the Bureau will assess the extent to which there would be close substitutes for the dominant firm's products at a range of prices, taking into account the various indicia that are discussed at pages 9 (product market criteria), 10 and 11 (geographic market criteria).

Parenthetically, we also encourage the Bureau to avoid, to the extent possible, references (such as those in footnote 16) to the "competitive level" of prices, which typically is exceptionally difficult to determine.

C. Market Dominance (s. 79(1)(a))

(i) *Degree of Market Power Required*

Neither the Bureau nor the Tribunal have ever provided any particularly helpful guidance regarding the *degree* of market power that is required to meet the "substantially or completely control" test set forth in paragraph 79(1)(a). The public has simply been repeatedly told that the words "substantially or completely control" are synonymous with market power, which, in turn, "is generally accepted to mean an ability to set prices above competitive levels for a considerable period."⁷ The time has surely come for the Bureau to take a position on this critical threshold issue.

There are several reasons why it would make good sense for the Bureau to adopt the position that paragraph 79(1)(a) contemplates a *substantial* degree of market power.⁸ First, the view that this paragraph simply contemplates that a firm have *some* market power essentially renders this provision redundant since the Tribunal has held that an ability to exercise *some* market power must be established to satisfy the requirement in paragraph 79(1)(c) that the practice of anti-competitive acts contemplated by paragraph 79(1)(b) "has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market."⁹

⁷ *Director of Investigation and Research v. Nutrasweet Co.* (1990), 32 C.P.R. (3d) 1, 28 (Comp. Trib.). These words have been repeated essentially verbatim in all subsequent cases, as well as in the 2001 Guidelines.

⁸ The following reasons are discussed in detail in P. Crampton, "Abuse of Dominance in Canada: Building on the International Experience", 73 *Antitrust Law Journal* 803 at 808-816 (2006).

⁹ In *Nutrasweet*, *supra* note 7, at 47 the Tribunal stated, with respect to Section 79(1)(c): "In essence, the question to be decided is whether the anti-competitive acts engaged in by [Nutrasweet] preserve or add to [Nutrasweet's] market power." This position was followed in *Director of Investigation and Research v. D & B Companies of*

Second, in *PANS*, the Supreme Court of Canada observed in *dicta* that the level of market power required to trigger the potential application of the abuse of dominance provisions is greater than what is required under the conspiracy provisions in what is now paragraph 45(1)(c) of the Act. The court stated that only a “moderate” degree of market power is required for the purposes of the latter provisions. It defined this degree of market power as being “an ability to behave relatively independently of the market, in a passive way.”¹⁰ The court contrasted this with “the capacity to influence the market.”¹¹ The court seemed to infer that *an ability to influence the market* is what is contemplated by paragraph 79(1)(c). It then observed that “[t]he required degree of market power under [section 79] ... comprises ‘control’, and not simply the ability to behave independently of the market.”¹² So, it seems clear that the Supreme Court of Canada believes that more than merely *some* market power is required to come within the scope of the paragraph 79(1)(a). It would appear that there must be an ability to *influence* the market.

Third, the Supreme Court’s observation makes good sense since, with the exception of firms in perfectly competitive markets, most firms have at least *some* degree of market power. It would defy common sense and would create a potentially very severe chilling effect on single firm conduct in general if all such firms in the economy, or at least those with a market share in excess of the Bureau’s safe harbour, had to be concerned about the possibility that their conduct might attract enforcement action under the abuse of dominance provisions of the Act.

To avoid chilling single firm competitive initiative, the level of market power required to constitute “dominance” in the United States, Europe and elsewhere has been set at much higher level, approximating a substantial degree of market power, than what is reflected in the 2001 Guidelines and in the Draft Guidelines. This reflects a recognition that the intervention threshold for single firm conduct should be higher than the intervention threshold for mergers and

Canada Ltd. (1995), 64 C.P.R. (3d) 216 at 266-267 (Comp. Trib.) (hereinafter “*Nielsen*”). Cf. *Director of Investigation and Research v. Tele-Direct (Publications) Inc.* (1990), 73 C.P.R. (3d) 1 at 216 and 247-248 (Comp. Trib.).

¹⁰ *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, 654 (hereinafter “*PANS*”). See generally Paul Crampton and Joel Kissack, “Recent Developments in Conspiracy Law and Enforcement: New Risks and Opportunities,” 38 *McGill L.J.* 569 at 588 et seq. (1993), where the implications of this aspect of the Supreme Court’s ruling are discussed.

¹¹ *Id.*

¹² *Id.*

agreements among competitors, to avoid chilling pro-competitive single firm behaviour (particularly given the absence of clear standards or principles regarding how to distinguish between competition on the merits and anti-competitive conduct).¹³

For all of the foregoing reasons, we submit that it would make good sense for the Bureau to embrace for its enforcement policy purposes this same “substantial degree of market power” threshold, as defined in terms of “an ability to behave to an appreciable extent (but not completely) independently of one’s competitors,” in the sense of having “an appreciable influence” on the market.

This position would be consistent with the heading in the Act just before sections 78 and 79, and with the margin notes besides section 79 which use the term “dominant position.” It also would be directionally consistent with Parliament’s intent that the words “substantially or completely control” be interpreted in a way that contemplates more than the mere exercise of *some* market power.¹⁴

(ii) *Safe Harbours*

The foregoing considerations weigh heavily in favour of higher safe harbours than what are reflected in the Draft Guidelines. We submit that a single firm safe harbour of 50% would be much more helpful to the public and reflective of actual enforcement policy, particularly given that (i) the cases that the Bureau has brought to the Tribunal under section 79 have all involved firms with market shares in excess of approximately 80%, (ii) it is highly unlikely that the Bureau would ever bring a case against a firm with a market share below 50%, and (iii) there is broad international recognition that the “dominance” threshold (which we submit is contemplated by paragraph 79(1)(a)) is higher than the “substantial prevention or lessening of competition” threshold, in respect of which the MEGS and PPEGs adopt a 35% single firm threshold. The statement towards the end of the Executive Summary in the Draft Guidelines, which makes it clear that the Bureau retains its flexibility to depart from the Guidelines in

¹³ See, e.g., John Vickers, “How Does the Prohibition of Abuse of Dominance Fit With The Rest of Competition Policy?” Paper for the Eighth Annual EU Competition Law and Policy Workshop at the European University Institute, pp. 3-4 (2003) available at <http://www.ofc.gov.uk/NR/rdonlyres/660C15CB-6F9E-41F5-A370-61F6EE022CB3/0/spe0303.pdf>.

¹⁴ See Consumer and Corporate Affairs Canada, *Competition Law Amendments – A Guide*, at 22 (December 1985).

particular situations, together with the explicit recognition on page 13 that the Tribunal's comments in *Tele-Direct*¹⁵ do not imply that dominance could never be found below 50%, will provide the Bureau with all the leeway it requires to bring an exceptional case against a firm with a market share below 50%.

For similar reasons, we submit that the safe harbour threshold for joint dominance needs to be higher than the CR4 65% threshold that is used in the MEGs. We submit that this joint dominance safe harbour needs to be set at no less than 75%.

(iii) *Joint Dominance*

There is much uncertainty in the legal and business communities regarding how the Bureau assesses whether firms are jointly dominant. Unfortunately, the relatively cursory (three paragraph) treatment of joint dominance that is provided in the Draft Guidelines does not help very much to reduce this uncertainty. Indeed, the deletion of the statement in the 2001 Guidelines that something more than mere conscious parallelism is required before conduct may be pursued under section 79 has raised additional uncertainty.

The first of the aforementioned three paragraphs in the Draft Guidelines addresses the sources of competition that can defeat the profitability of a price increase. The second of those paragraphs is largely devoted to the approach described immediately below, and the third makes the basic points that the mere exercise of market power is not sufficient and that it is necessary to establish a practice of anti-competitive acts. We encourage the Bureau to describe in the final Guidelines how it will assess whether two or more firms are jointly dominant and the factors it is likely to consider in determining whether to pursue an arrangement between competitors under section 79 versus under the new civil conspiracy section (section 90.1). It is important that the Bureau clarify its position in this regard.

The Draft Guidelines suggest that the Bureau will begin its assessment of joint dominance by determining which firms in the relevant market “would need to be engaging in potentially anti-competitive behaviour such that together they have market power.” We suggest that it would make more sense to begin by assessing whether the firms alleged to be engaging in the impugned conduct have substantial market power. If not, the assessment could be terminated on that basis

¹⁵ *Tele-Direct*, *supra* note 9.

alone, without the need to assess other firms in the market and the extent to which they may or may not need to be part of any larger group in order for joint dominance to be found to exist.

D. Practice of Anti-competitive Acts (s. 79(1)(b))

(i) *Distinguishing between “Competition-on-the-Merits” and “Anti-Competitive” Conduct*

It would be helpful if the final Guidelines could provide more guidance regarding the difficult issue of how to distinguish between “competition-on-the-merits” and “anti-competitive” conduct, particularly in respect of targeted (and other) responses by incumbent firms to entry or expansion initiatives by smaller firms. As the Tribunal has recognized, competitive responses that are targeted at new entrants are not necessarily anti-competitive.¹⁶ In this regard, the Tribunal has observed: “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.”¹⁷

The clear inference to be taken from these statements is that it cannot be assumed that a response to an entry or expansion initiative constitutes conduct that is designed to have an exclusionary, predatory or disciplinary effect on an actual or potential competitor. Something more is required. The Bureau’s guidance on this important question would be very welcome.

(ii) *Legitimate Business Justifications*

The Draft Guidelines state:

If, in the opinion of the Bureau, the firm in question has engaged in conduct with a valid business rationale, where it is clear that the firm’s objective in engaging in that conduct was for reasons other than the exclusion, discipline, or predation of a competitor, then the Bureau will likely elect not to pursue further investigation. However, where there is evidence that suggests a potentially anti-competitive purpose, the Bureau will continue to investigate the matter.

¹⁶ *Id.* at 193-205. See also *Commissioner of Competition v. Canada Pipe* (1990), 40 C.P.R. (4th), 453 at §§ 181-183 and 191 (Comp. Trib.).

¹⁷ *Tele-Direct, id.* at 194.

The first of these sentences is a very helpful guideline. However, we submit that the second sentence, dealing with mixed-motive situations, requires elaboration, particularly with respect to how the Bureau will conduct the difficult process of balancing legitimate business justifications against evidence of potentially anti-competitive purpose, as contemplated by the Federal Court of Appeal.¹⁸

The Draft Guidelines also state that the Bureau will not consider a claimed business justification to be valid “if the cost savings can be achieved in an equally effective manner other than through the conduct alleged to be anti-competitive.” This is inconsistent with the MEGs, which suggest that cost savings (and other claimed efficiencies) will not be excluded unless they “could reasonably be expected to be achieved through non-merger alternatives” (MEGs, at note 105). The 1991 MEGs elaborated by stating: “In general, efficiencies will not be excluded from consideration on the basis that they theoretically *could* be attained through internal growth, a joint venture, a specialization agreement, or a licensing, lease or other contractual arrangement” (1991 MEGs, at § 5.2). Rather an assessment is undertaken of the *likelihood* that claimed efficiencies will be achieved in an alternative way, taking account of common industry practice and other business realities (MEGs, at § 8.7). We submit that a similar approach should be taken to the assessment of legitimate business justifications identified in the section 79 context.

The Draft Guidelines provide helpful elaboration on the Federal Court of Appeal’s requirement that a legitimate business justification provide a “credible efficiency or pro-competitive explanation” for the conduct. In this regard, the Draft Guidelines note that such justifications “will often comprise activities that minimize costs of production or operation, independent of the elimination or discipline of a rival; or activities that improve a firm’s product, service, or some other aspect of the firm’s business.” It would be helpful if the final Guidelines address other types of justifications, including those that have been recognized by the Tribunal.¹⁹

¹⁸ *Canada Pipe*, *supra* note 1 at §§ 87-88.

¹⁹ These are discussed in *Crampton*, *supra* note 8, at 839.

(iii) *Specific Types of Anti-competitive Practices*

(a) Exclusive Dealing

We submit that it would be helpful and appropriate for the Bureau to articulate an objective safe harbour, such as the 30% safe harbour articulated by the DOJ in its recent Section 2 Report.²⁰

(b) Tying and Bundling

Appendix III of the Draft Guidelines states: “Where it appears that a firm is selling a bundle of products primarily as a means of offering discounts to buyers, the Bureau may choose to examine such conduct under a predatory standard, in order to avoid chilling legitimate price competition.” It is not clear what is meant by this. We submit that the final Guidelines should articulate the same type of approach that is set forth in the DOJ’s Section 2 Report, which clearly distinguishes between situations where bundle-to-bundle competition is reasonably possible and situations where such competition is not reasonably possible. We further submit that the Bureau adopt clear cost-based safe harbours, which were supported by “the vast majority of amicus briefs“ submitted in the *PeaceHealth* case.²¹ In this regard, we encourage the Bureau to adopt essentially the same types of safe harbours that were adopted in the DOJ’s Section 2 Report, namely, (a) a predation-based safe harbour, determined by reference to an appropriate measure of total costs, where bundle-to-bundle competition exists or is reasonably possible, and (b) a discount allocation safe harbour (allocation of the entire discount to the competitive product) where bundle-to-bundle competition is not reasonably possible. In both cases we submit that the appropriate measure of costs that is used for the safe harbour should be average total costs.

(c) Conditional Discounts

Unfortunately, the Draft Guidelines make only passing reference to conditional discounts (also known as fidelity rebates and loyalty rebates). Given the prevalence of conditional discounts in the economy and the fact that the only contested case brought in the last decade involved loyalty rebates, we strongly encourage the Bureau to elaborate upon its approach to such discounts in the final Guidelines.

²⁰ *Supra* note 5 at 141.

²¹ DOJ Section 2 Report, *supra* note 5 at 97.

In this regard, we suggest that the Bureau adopt a safe harbour similar to the one that was embraced in the recent Article 82 Guidance, namely, that where the effective price of the product in question over the relevant range remains consistently above long-run average costs, no further review of the matter would be conducted.²² An alternative approach would be to apply the total discount on all sales to the sales in the contestable portion of the market and discontinuing the investigation where the latter sales (after such adjustment) remain above long-run average costs.²³

²² *Supra* note 4 at § 42

²³ DOJ Section 2 Report, *supra* note 5 at 111.

(d) Denial of Access to a Facility

In Appendix IV of the Draft Guidelines, the Bureau identifies three necessary conditions that “must be present” before a denial of access to a facility or service will be considered to raise an issue under the Act. All three of those conditions relate to the market that is downstream from the facility. We strongly encourage the Bureau to add a fourth condition, related to the nature of the facility (or services) to which access is denied. Specifically, we encourage the Bureau to consider adopting a condition that would require something along the lines of either (i) the “inability of competitors to effectively duplicate the facility” test that is described in the Article 82 Guidance,²⁴ or (ii) the “inability of competitors to practically duplicate the facility” test that was recognized in *MCI Communications Corp. v. American Tel. & Tel. Co.*²⁵

(e) Other

Given the recent repeal of the criminal provisions relating to price discrimination and promotional allowances, it would be helpful for the Bureau to clarify that such practices are unlikely to raise serious concerns under the abuse of dominance provisions because it is unlikely that such practices would ever prevent or lessen competition substantially. Similarly, it would be helpful for the Bureau to clarify that resale price maintenance will be reviewed solely under the new section 76 and not under the abuse of dominance provisions.

E. Preventing or Lessening Competition Substantially (s. 79(1)(c))

This section of the Draft Guidelines is largely consistent with the Federal Court of Appeal’s decision in *Canada Pipe*. However, the final Guidelines would provide greater guidance, and be much more helpful and consistent with the MEGs, the PPEGs, other Bureau statements and the general approach to the assessment of adverse effects in the U.S. and other jurisdictions, if they articulated the clear statement that a “substantial” lessening or prevention of competition will only found to exist where the conduct in question has had, is likely to have, a material adverse impact on price or non-price proxies for the intensity of rivalry. We have suggested some language to this effect in our mark-up of the Draft Guidelines.

²⁴ *Supra* note 4 at § 82

²⁵ 708 F.2d 1081, at 1132-1133 (7th Cir.), *cert. denied* 464 U.S. 891 (1983).

In addition, it would be helpful if the final Guidelines described how the Bureau conducts the balancing of pro-competitive and anti-competitive effects, as contemplated by the Federal Court of Appeal.²⁶ This is not addressed in the Draft Guidelines.

F. Administrative Monetary Penalties

We encourage the Bureau to provide guidance regarding the circumstances in which it may seek an administrative monetary penalty under the recently amended provisions in section 79(3.1) of the Act and how it will approach the assessment of the factors listed in the new section 79(3.2) of the Act.

G. Conclusion

The Draft Guidelines represent a significant improvement over the 2001 Guidelines. However, they could be much more helpful, and more representative of actual practice and prevailing economic thinking, if they were revised to reflect our foregoing suggestions.

²⁶ *Canada Pipe*, *supra* note 1 at § 79.