



THE CANADIAN CHAMBER OF COMMERCE
LA CHAMBRE DE COMMERCE DU CANADA

June 19, 2002

Competition Bureau
Industry Canada
50 Victoria Street
Hull Quebec
K1A 0C9

Attention: Mr. Michael Sullivan
Acting-Assistant Deputy Commissioner of Competition
Criminal Matters Branch

Dear Mr. Sullivan,

Subject: Draft Enforcement Guidelines for Illegal Trade Practices: Unreasonably Low Pricing Policies under Paragraph 50(1)(b) and 50(1)(c) of the *Competition Act* (the "Draft Guidelines")

The Canadian Chamber of Commerce, Canada's largest and most representative business association, is pleased to provide comments on the Draft Guidelines.

At the outset, we commend the Bureau for preparation of the Draft Guidelines and circulation of them for comment. Enforcement Guidelines are an important tool for ensuring transparency of enforcement practices, particularly in areas such as Paragraphs 50(1)(b) and 50(1)(c) of the *Competition Act* which involve a considerable degree of enforcement discretion and interpretation. Timely issuance of guidelines that reflect a change in enforcement practice is important too (and the Draft Guidelines do reflect a significant change). It is also valuable to seek wide-ranging input on enforcement guidelines prior to the guidelines being finally issued by the Bureau.

The Canadian Chamber of Commerce's comments on the Draft Guidelines follow:

501-350, rue Sparks St.

Ottawa, Ontario

K1R 7S8

(613) 238-4000

(613) 238-7643

www.chamber.ca

info@chamber.ca

General Tone

The Canadian Chamber prefers the more measured tone and cautious approach of the Bureau's 1992 Predatory Pricing Enforcement Guidelines which are, we think, more consistent with the idea (which we believe is widely accepted by economists) that instances of true predatory pricing are relatively rare. This is important to emphasize because low pricing activity is more frequently pro-competitive and is one of the objectives of the competitive process. To suggest otherwise or to imply that there may be more frequent challenges of aggressive (albeit not offensive) low pricing conduct could well serve to impart a chill to and deter such activity.

Also, the Draft Guidelines contain several references to "low pricing" and "strategic pricing" which are not linked either to the prospect of recoupment, the exercise of



- 2 -

market power or even below-cost pricing. These references might lead readers to conclude that such pricing activities may be anti-competitive in and of themselves, when in fact they are more likely to be pro-competitive in the absence of these other factors. There is even a suggestion that low pricing activity may be evidence of the possession of market power. (Page 10, last paragraph) This strikes us as quite circular reasoning. In the same vein, there are suggestions that the cultivation by a party of a reputation as a low pricer may be predatory which, again, in the absence of below-cost pricing, market power and the prospect of recoupment, would not constitute actionable predation.

By way of further example, on page 15, it is stated that: "Strategic-pricing behaviour that deters entry also constitutes a form of competitor elimination, and the Bureau considers such behaviour as meeting this element of the offence." This statement is over-broad. Clearly, any low pricing will impact the willingness of a potential competitor to enter a new market and may deter or delay that entry. A low pricing policy should be said to "eliminate" a potential competitor for the purposes of Section 50 (1) only if the price is unreasonably low and the conduct is engaged in order to deter entry by specific, known potential competitors.

The section on "reputational barriers" (page 13) also is over-broad and risks creating a chill against low pricing activity. The fact that a market participant has a reputation for low pricing should rarely be a "barrier" to entry that is of competitive concern. Rather, "reputation" should only be relevant if the firm has a reputation of pricing unreasonably low with the intent or object of removing a competitor or deterring new entry.

Discussion About "Competitive Effects"

The Canadian Chamber believes that the Guidelines would be more instructive if they contained more discussion about the types of competitive effects the Bureau is concerned about when assessing whether a low pricing policy has resulted in a substantial lessening of competition, and less discussion about market characteristics.

The discussion contained under the heading "Competitive Impact", particularly with regard to lessening of competition, is somewhat convoluted and unfocused. Factors such as market concentration and barriers to entry are important determinants of market power and constraints on the ability to exercise market power. However, Sections 50(1)(b) and 50(1)(c) require an analysis of whether the low pricing policy has had the effect or tendency of substantially lessening competition. We are of the view that the Draft Guidelines contained too much discussion about barriers to entry and market concentration (pp. 10-14) that have little relevance to the low pricing policy and too little discussion about the types of results the Bureau is concerned about when it considers whether the low pricing policy has resulted in a lessening of competition that is substantial. For example: Is the Bureau concerned about prices increasing after a competitor has been eliminated? Is the Bureau concerned about increased barriers to entry that result from the low pricing policy? It is difficult to envision how a low pricing policy can have any impact on structural barriers to entry notwithstanding the detailed discussion about such barriers in the Draft Guidelines.



-3 -

Recoupment

The most troubling aspect of the Draft Guidelines to the Canadian Chamber is its omission of a recoupment requirement as a sine qua non of enforcement action being taken.

Up to now, the Bureau has stated that unreasonably low pricing would only be problematic under Section 50(1)(c) if the low pricer was able to "recoup" its losses - i.e. the low pricing resulted in the elimination of competitors, such that following removal of the competitors the low pricer was able to raise its prices and recoup its losses. The Bureau's move away from this requirement (page 14) is a significant change in enforcement policy for which there is no apparent justification in law or policy.

Requiring the possibility of recoupment is important for several reasons:

- a) it evidences that the low pricer has market power
- b) it satisfies the requirement for a substantial lessening of competition because (i) the competitor exit is not counter-balanced by new entry and (ii) the low pricing policy ultimately leads to higher prices.

We are at a loss to understand, if there is no reasonable prospect of a party engaging in below-cost pricing recouping its losses in the future, how such activity may be considered to be anti-competitive. Indeed, as was stated by the U.S. Supreme Court in *Brooke Group v. Brown & Hilleman Tobacco Corp.*, "unsuccessful predation is in general a boon to consumers". Moreover, the requirement of demonstrating that the alleged predator has the ability to recoup foregone profits serves to confirm that the predator in fact possesses market power and has the capacity to exercise market power, which by anybody's definition is a requirement for predation. We also note that the recoupment concept is relevant in other contexts such as in the discussion of predatory pricing in the Bureau's Abuse of Dominance Enforcement Guidelines. More on this subject follows below.

"Avoidable Costs"

While the avoidable cost standard may indeed be a better articulated and more flexible cost standard to use to delineate predatory pricing than variable cost, average variable cost or average total cost, surprisingly (since it represents one of the most prominent changes proposed by the Draft Guidelines) there is relatively little discussion in the Guidelines which describes the avoidable cost standard, how it is applied in various circumstances and why it is preferred to these other cost measures. The Draft Guidelines would benefit from more discussion on this topic and hypothetical fact scenarios that illustrate how "available costs" are determined in specific circumstances. We note that the avoidable cost concept, which is also used in the Abuse of Dominance in the Airline Industry Guidelines is actually more extensively explained there.



- 4 -

Geographic Price Discrimination

In regard to geographic price discrimination or predation, it would usefully advance our understanding of paragraph 50(1)(b) of the Act if the Draft Guidelines clarified that the separate areas in respect of which the pricing differences covered by this provision are relevant separate antitrust geographic markets and not merely different areas.

Consistency with other Enforcement Guidelines

A more useful and comprehensive guideline on predatory pricing would incorporate in the Draft Guidelines the commentary which is included on "Predatory Conduct" in Section 4.3 of the Abuse of Dominance Enforcement Guidelines, which deals with the same subject but from the civil perspective.

Timing Issue

A timing issue relates to the fact that the Industry Committee of the House of Commons has, in its recently released report entitled A Plan to Modernize Canada's Competition Regime, recommended, at page 72 of its Report, decriminalizing predatory pricing and dealing with it solely as an aspect of abuse of dominance, in line with the earlier recommendation of Messrs. Van Duzer and Paquet in the so-called Van Duzer Report. In light of these quite substantive suggestions to reform the law by eliminating the existing criminal provisions, the revamping of the guidelines at this stage would appear to be an attempt to pre-empt serious discussion of such suggestions.

We trust that the above comments will be useful to you in your deliberation.

Yours truly,

Michael N. Murphy
Senior Vice-President, Policy