

**FCPC COMMENTS**  
**ON DRAFT UPDATED ENFORCEMENT GUIDELINES: “THE ABUSE OF DOMINANCE**  
**PROVISIONS (SECTIONS 78 AND 79 OF THE COMPETITION ACT)”**  
**(JANUARY, 2009)**

**I. Introduction**

Food & Consumer Products of Canada (“FCPC”) is the national industry association in Canada representing the food, beverage and consumer products industry. FCPC’s members range from small, independent and privately owned companies to large, global multinationals. The food and consumer products industry is the largest manufacturing employer in Canada, generating billions of dollars in annual GDP and purchasing a substantial proportion of Canadian agricultural output. The industry has invested heavily in Canada, not only in respect of its businesses but in respect of Canada’s labelling, health and wellness and environmental objectives. FCPC and its members are committed to compliance with all laws regulating the industry, including the *Competition Act*, as well as to assisting law enforcement officials with enforcing those laws and providing guidance as to how the laws will be interpreted and enforced. Consequently, FCPC welcomes the opportunity to comment upon the Competition Bureau’s draft Updated Enforcement Guidelines entitled “The Abuse of Dominance Provisions (Sections 78 and 79 of the *Competition Act*” (“Draft Guidelines”) released for public consultation in January of 2009.

FCPC’s comments, herein, seek amendments to the Draft Guidelines that would encourage parties to pursue the enforcement of the abuse of dominance provisions by the Competition Bureau and to expressly address anticompetitive acts by a dominant party (or parties) which are directed against that party’s (or parties’) suppliers (“upstream conduct”). It is FCPC’s view that the requested amendments will not only serve the objectives of the Draft Guidelines by helping business better understand the Bureau’s approach but will recognize, importantly, that buyer power issues are, in a number of sectors of the Canadian economy, an area of concern for Canadian competition authorities.

**II. Draft Abuse Guidelines Must Be Amended**

**(A) Observations on Discussion of Inquiries**

The stated purpose of the Draft Guidelines is “to ensure a transparent and predictable enforcement policy” by providing an “outline of the Bureau’s approach to enforcing the abuse of dominance provisions” (p. 1) that will “help the general public [and] business people ... to better understand ... the Bureau’s general approach to enforcing these provisions” (p. 1). In FCPC’s view, to achieve this objective, the Draft Guidelines must not only address the Bureau’s interpretation of the relevant provisions of the law but must also provide its readers with a more detailed understanding of how the Bureau’s investigations and/or inquiries (hereafter

“inquiries”) are conducted, whether and how participants’ identity and/or confidential information is protected from public disclosure, and whether and how parties who initiate, or cooperate, in a Bureau inquiry are protected from ‘retaliation’ by those whom the Bureau’s inquiry targets. Part 2.2 of the Draft Guidelines, titled “the Examination/Inquiry Process”, provides limited such information, indeed, virtually no information on the issue of the protection of confidential information from disclosure (only a reference to the requirement that all inquiries be conducted in private) and no information on the protections afforded those who initiate, or participate in, a Bureau inquiry under sections 78-79 of the *Act*. Moreover, the Draft Guidelines do not speak to various means by which those affected by anticompetitive conduct may bring forward a complaint, e.g. individually or through, for example, an ad hoc coalition or a trade association (or group thereof). In the FCPC’s view, these omissions may deter parties from approaching the Bureau with information relevant to the Bureau’s enforcement of sections 78-79 of the *Act*, rather than, as FCPC believes the Draft Guidelines should, encourage parties to approach the Bureau with such information. In the FCPC’s view, it is in the Bureau’s, and the public’s, interest that the Draft Guidelines indicate that the Bureau will do its utmost to establish an investigation process which not only encourages parties to pursue enforcement of competition laws but recognizes – and addresses to the extent possible – the risks to parties who choose to do so.

**(B) Observations on Discussion of Anticompetitive Acts**

Part 3.2.2 of the Draft Guidelines discusses the second element of section 79 of the *Act*, the question of whether the dominant party, or parties, have “engaged in or are engaging in a practice of anticompetitive acts”, correctly citing the existing jurisprudence for the requirement that the act have an anticompetitive purpose. This discussion, however, does not address the various means by which an anticompetitive purpose may be manifest. For example, Part 3.2.2(b) contains no indication that the act(s) need not be specifically directed at a competitor, named or otherwise, nor that an act(s) directed upstream as well as downstream of a dominant party may be found to constitute an anticompetitive act. Indeed, Appendix II, which addresses exclusivity, contains only one reference to upstream conduct (an acknowledgment that exclusivity may be required by the customer not the supplier) and one sentence on vertical foreclosure (p. 94).

The Draft Guidelines’ omission of upstream conduct is, effectively, continued in the more detailed discussion of the economics of anticompetitive acts at Parts 4.1-4.3. There is virtually no discussion, in these Parts, of conduct which dominant buyers may engage in to exclude or hinder rivals or, more generally, to remove (or flatten) elements of competition, to the detriment of innovation, choice, quality and/or price competition. Examples of such conduct could include prohibiting suppliers from making available a version of a product, or a packaging configuration of a product, exclusively for a specific customer or channel of trade or requiring that products made available by a supplier in packages of multiple units also be made available in single units at the same, per unit, price. It would seem arguable, at the least, that conduct of this nature may be intended to prevent (new) competitors from differentiating their offerings and/or offering a better value in the eyes of consumers, ultimately hampering the efforts of those (new) competitors to increase their competitive presence and limiting the bases of competition downstream. Indeed, for suppliers who also compete downstream with the products of their customers, conduct by dominant customers may deter innovation in terms of

products or packaging, limit the elements of competition and reduce the number of products/companies competing to a level where competition is less dynamic, e.g. requirements that a supplier provide confidential information regarding a product that customer also sells at retail in competition with that supplier. Thus, it is FCPC's view that the Draft Guidelines should expressly recognize that conduct by a dominant party *vis a vis* its suppliers is subject to the abuse of dominance provisions of the *Act* and provide an explanation as to how the Bureau will assess such conduct.

### **(C) Existing Caselaw Does Not Preclude Discussion of Upstream Conduct**

Existing caselaw, such as the *Canada Pipe* decision of the Federal Court of Appeal, does not, in any way, preclude the Bureau from pursuing anticompetitive acts by dominant parties directed against their suppliers. Neither the Competition Tribunal nor the Federal Court of Appeal addressed such conduct, either expressly or by implication, in *Canada Pipe*. Moreover, the statements by the Federal Court of Appeal with respect to the elements of section 79 of the *Act* establish a framework within which the Bureau may find that a dominant party's upstream conduct can be exclusionary, disciplinary or predatory *vis a vis* its supplier(s) *qua* competitor(s) (where the dominant party also sells the product being supplied downstream) or *vis a vis* the dominant party's competitor(s) downstream. The Federal Court of Appeal's discussion of the "but for" test under section 79(1)(c) is readily applicable to both upstream and downstream conduct by dominant parties, as is its discussion of anticompetitive acts under section 79(1)(b) which recognizes that an act is "anticompetitive" if it is designed to "make current and/or potential rivals less effective" (p. 20, Draft Guidelines) or to remove them from the marketplace and that, provided the act(s) is so designed, the act can take any form.

A good starting point for the development of the requested discussion of upstream conduct by dominant parties is the Bureau's submissions to the OECD's Round Table on Monopsony and Buyer Power (October 21-23, 2008) ("OECD Submissions"), particularly paragraphs 23-26 thereof. The OECD Submissions expressly recognize competition authorities' concern that conduct by a 'monopsonist' (or 'oligopsonists') may, ultimately, reduce the price of an input (product supplied) below the competitive level such that it results in a decrease in the "overall" quantity or quality of the product being supplied or a "corresponding diminishment of any other dimension of competition" (para. 2). While we acknowledge the Bureau's statement in the OECD Submission that "[i]t is unlikely that lower input prices would, in isolation, meet the requirement of a practice of anticompetitive acts", we would suggest that this statement warrants elaboration in the Draft Guidelines, for example, by addressing the types of conduct identified above (and below). As noted in the OECD Submission, "[u]nder Canadian law, there need not be harm by way of a price or output effect in the downstream market in order for an exercise of monopsony power to be considered harmful" (para. 23).

### **III. Bureau's Grocery Bulletin Is Not A Substitute for Amended Draft Guidelines**

FCPC recognizes that the Bureau's 2002 "Interpretation Bulletin: The Abuse of Dominance Provisions (Sections 78 and 79 of the *Competition Act* as Applied to the Canadian Grocery Sector" ("Grocery Bulletin") addresses the application of the abuse of dominance provisions to one sector of concern to FCPC. FCPC particularly appreciates the Grocery Bulletin's indication that the abuse of dominance provisions "are meant to make it possible for businesses of all sizes to have an equitable opportunity to participate in the market. In this way,

the market can provide consumers with competitive prices and product choices” (p. 3). In FCPC’s view, upstream conduct by a dominant party, e.g. unilateral imposition of amended payment terms on new or emerging suppliers, may raise these very issues, yet upstream conduct is addressed in a very limited manner in the Grocery Bulletin. For example, while the Grocery Bulletin (5.2) indicates that one focus of the Bureau is whether the activities of the dominant party encourage interdependent conduct or tacit collusion amongst manufacturers, it does not address facilitating practices by buyers, such as buyer requirements related to ‘best price’ or MFN, to access to all forms of packaging, or to the advertisement or promotion of products by a competitor. Similarly, the Grocery Bulletin (5.2.1) discusses slotting allowances/listing fees but the focus is on enhancement of manufacturer market power, not buyer power, and does not consider the recent evolution of such fees, e.g. fees for warehouse space or ‘new store openings’.

Indeed, neither the Grocery Bulletin nor the Draft Guidelines cover the kinds of buyer power issues that other antitrust authorities have both recognized and acted upon. For example, in 1999-2000, the U.K. Competition Commission conducted an investigation into “groceries from ‘multiple stores’ (chains) in the United Kingdom” and concluded that a number of supply chain practices had an adverse effect on competition. The Commission established a Code of Practice that prohibited “Supermarkets” from amongst other practices:

- unreasonably requiring a supplier to make any payment towards a Supermarket's costs of consumer or market research or the opening or refurbishing of a store;
- requiring a supplier to make any lump sum payment in order to secure better positioning or an increase in the allocation of shelf space unless such payment is made in relation to a promotion; and,
- requiring a supplier to change significantly any aspect of the normal supply chain procedures unless that Supermarket either gives reasonable notice of such change in writing or fully compensates the supplier for any net resulting costs resulting from the failure to give reasonable notice.

In May of 2006, the U.K. Office of Fair Trading (“OFT”) requested that the U.K. Competition Commission conduct another investigation into the supply of groceries (food, pet food, drinks, cleaning products, toiletries and household goods) by retailers in the U.K. on the grounds that “a feature or a combination of features of the market or markets in which the ... goods are supplied, prevents, restricts or distorts competition ...”. The Commission’s April, 2008 report noted that “[a] common theme is the exercise of buyer power by grocery retailers” (p. 155) and, while the exercise of buyer power does not, generally, raise competition concerns, “...if it allows retailers to impose excessive risks and unexpected costs on suppliers, which reduces suppliers’ incentive or ability to invest and innovate, this could lead to reduced capacity, reduced product quality and fewer new product offerings, and ultimately, to a detriment to consumers” (para. 9.5, report). The U.K. Competition Commission has, as a result of this report, proposed a revised (supplemented) Code of Conduct which includes, amongst other provisions, an over arching fair dealing obligation on retail grocers, a prohibition against making retrospective adjustments to terms of supply, and a requirement that retailers provide notice of, and reasons for, de-listing suppliers or significantly reducing suppliers’ business.

It is FCPC's view that the Bureau's consideration of FCPC's comments, herein, may benefit from a review of the conduct of competition law authorities in the U.K., and elsewhere, that have considered buyer power issues.

#### **IV. FCPC Proposal for Amendments to the Draft Guidelines**

In light of the above comments, FCPC respectfully requests that the Bureau consider amending the Draft Guidelines so as to encourage stakeholders – at all trade levels – to seek the enforcement of the abuse of dominance provisions and to expressly address upstream conduct by dominant parties.

As regards the encouragement of parties to seek the enforcement of the abuse provisions, FCPC would suggest that the Draft Guidelines be amended to:

- (a) discuss the obstruction provision in section 64 of the *Act*, making it clear that this provision is in play where any person discontinues doing business with or otherwise disadvantages anyone – or threatens to do so – by reason that the person initiated or participated in any investigation, inquiry, or application under sections 78-79 of the *Act*;
- (b) discuss, in practical terms, the ability of (and efforts made by) the Bureau to protect the confidentiality of the identity, and the information of, parties who initiate or participate in a Bureau inquiry; and,
- (c) indicate the Bureau's willingness to initiate investigations on its own (e.g. based on general industry information) and pursue more detailed information from the parties involved by way of voluntary requests for information or by way of orders under section 11 of the *Act*.

As regards upstream conduct by dominant parties, FCPC would ask that the Draft Guidelines be supplemented to provide an explanation as to how the Bureau approaches such conduct generally and how it views various examples of such conduct such as those identified above. In addition, FCPC asks that the Draft Guidelines expressly address upstream conduct where the dominant party (or parties) compete with their supplier(s) downstream.

FCPC appreciates the opportunity to participate in the public consultations on the Draft Guidelines and looks forward to their publication in final form.