Discussion Points

Presented by the Business and Industry Advisory Committee (BIAC) to the
OECD Competition Committee
Working Party No. 3 on Cooperation and Enforcement

“How to Provide Effective Guidance to Business on Monopolisation/Abuse of Dominance”*

June 5, 2007

I. Introduction

1. The Business and Advisory Committee (BIAC) to the OECD appreciates the opportunity to submit these comments to the OECD Working Party No. 3 (WP3) for its roundtable on “How to Provide Effective Guidance to Business on Monopolisation/Abuse of Dominance.”

2. BIAC is particularly grateful that the Working Party has elected to focus on providing guidance to businesses with respect to abuse of dominance. This is an area of law that, at the fringes, is fairly unsettled and fraught with risk for businesses. Agency efforts to describe the parameters of their enforcement intentions, therefore, will allow businesses to compete more effectively in the marketplace and enhance overall consumer welfare.

3. The private sector relies on various sources of information in evaluating government enforcement policy. The most obvious source of influence is an examination of the actual enforcement actions brought by agencies and an analysis of the outcome of those cases. These actions, however, form only a small part of the overall assessment by businesses attempting to adapt their practices to comply with the law. Thus, the use of informal guidance to businesses is an extremely influential means of increasing transparency of enforcement policy. Such measures are welcomed by the business community and can be an efficient means of encouraging compliance while also conserving agency resources. These “transparency initiatives” are particularly important where there are relatively few cases decided on a particular statutory provision or a particular issue,1 or when legal precedents in private enforcement provide conflicting direction to businesses.2

4. Transparency initiatives can also facilitate more timely and efficient adherence to competition laws and should be desirable from the standpoint of competition authorities. Most competition laws define the general nature of an offence, but are appropriately circumspect in describing the bounds and limits of acceptable behaviour under various circumstances. In other words, the legislature defines the offence, without providing analysis of what constitutes an offense, which businesses ultimately require. For example, the Section 2 of U.S. Sherman

---

* Paper prepared by James Rill and John Taladay of Howrey LLP, Paul Lugard of Philips, Kei Amemiya of Morrison Foerester, Christine Wilson and Kevin Yingling of O’Melveny & Myers LLP, and Crystal Witterick of Blake, Cassels & Graydon LLP, with substantial contribution from BIAC Competition Committee members.

1 This is the prevalent situation in many jurisdictions regarding abuse of dominance.

2 Such as occurs in some aspects of monopolisation law in the federal courts of appeals in the United States.
Act is a mere ninety-two words long, the majority of which are dedicated to discussing the penalties associated with a violation. A century’s worth of interpretive jurisprudence in the U.S. has added a great deal of flesh to the bone, but still leaves certain gaps in the actual analysis, for example, in relation to new markets. By providing additional guidance to businesses outside the context of legal enforcement initiatives, a great deal of efficiency can be gained by generating adherence to the law without resort to expensive agency challenges on a case-by-case basis.

5. Transparency initiatives are desirable because they increase business certainty. Certainty is critical to business planning; uncertainty can have a serious chilling effect on potentially pro-competitive business activity. The possible economic consequences of uncertainty in enforcement policy may include:
   a) a reduction in the level of discounts offered to consumers;
   b) a slowing of innovation;
   c) the retardation of potential efficiency gains;
   d) distortions in international investment;
   e) a failure to create or establish common standards that can reduce barriers to entry;
   f) the inhibition of technology transfers; and
   g) distortions of efficient structures used to carry on business.

6. By undertaking transparency initiatives, agencies can ensure consistent exercise of their prosecutorial discretion according to sound underlying principles, while still maintaining a flexible system that facilitates negotiated solutions to potential competition law problems.

7. BIAC encourages the use of a variety of transparency initiatives, each of which has benefits in terms of providing guidance to businesses and, ultimately, benefits to consumers. The most useful mechanisms for providing transparency include, among other options:

   a) Guidelines: Formal guidelines, which outline the analytical framework within which the agency will evaluate potential violations of the law (or the application of a law), are frequently the most useful transparency initiative in that they frequently provide the greatest degree of certainty. Typically, such guidelines are developed over a period of several years and build from the practical experience of the agency based on a broad array of enforcement initiatives. Guidelines, however, have certain drawbacks that may limit their utility in certain instances. They can be time-consuming to prepare, may not have a sufficient practical basis on which to draw, and – if they are not properly calibrated based on sound theoretical and practical experience – can be difficult to “fine tune” quickly. Thus, guidelines may not be well suited for areas of law and policy with disputed effects in which more experience is needed.

   b) Policy statements: Policy statements can have similar benefits to guidelines in providing guidance to businesses. They typically are more “executive” in nature, reflecting the enforcement intentions of the existing agency administration. Policy statements are often less sweeping than guidelines – i.e., they frequently do not attempt to address all potential offences under a particular law – but can be very useful.
in clarifying individual issues of concern. They are also easier to adjust as additional practical experience is gathered. Thus, what policy statements may lack in terms of permanence and breadth, they often make up in terms of timeliness and focus.

c) **Hearings and Reports:** The gathering together of leading experts in the field of law – much like the assembly of the Working Party itself – can help to expand the knowledge base upon which the agency acts while, at the same time, disseminate important agency views on enforcement to the business and legal community. The reports generated from public hearings are typically rich with policy analysis, theoretical insight and historical perspective. Involvement of the private bar and business leaders, as well as government enforcers, academic economists and consumer advocates, should all be sought in order to gain the broadest input and greatest dissemination of information. Hearings and the reports they generate, in BIAC’s view, are an important and highly advisable precursor to the preparation of formal guidelines.

d) **Roundtables:** Like hearings, roundtables provide the opportunity to gather and disseminate information from a broad range of interested parties, but on a less formal basis. Roundtables encourage the expression of new ideas, debate on the benefit of past enforcement initiatives, and a closer public-private interaction, which can assist in the future workings of the agency. They are often useful to agencies and businesses when controversial topics have arisen.

e) **Speeches:** The delivery of public addresses by senior members of the agency can help to clarify topics and reduce chilling effects. Often times, and frequently because of absence of knowledge of the full background in a particular case, businesses misconstrue the agency’s reasons behind an enforcement initiative or the decision taken by an enforcement agency in the course of an investigation. Similarly, businesses may misjudge the ramifications of an enforcement action and how that action may inform future enforcement intentions. Agencies can use speeches to indicate, for example, that it viewed a particular case as an extreme example that required action or – contrarily – that it will not hesitate to enforce on lesser grounds in the future. Each of these messages can guide businesses to better judgments about the legality of their conduct.

f) **News releases:** Agencies can issue news releases as an effective means of informing parties about the results of an investigation, including the key facts that led the agency to act (or to refrain from acting) in a particular case. News releases also provide timely updates on the status of an investigation, the procedural posture of the case, the filing of briefs or other advocacy pieces, and announcements and promotion of other transparency initiatives. BIAC notes that most WP3 participant agencies have public websites that include news releases and encourages the further development and refinement of these sites, which businesses value as a key source of timely information.

g) **Reasoned decisions:** In those jurisdictions, such as the EU, where the enforcement agencies act as the primary enforcer of the competition laws then the decisions of such agencies should be as fully reasoned and transparent as possible together with sufficient explanation of the underlying facts (subject to confidentiality restrictions) to enable third parties to adequately understand the basis of the decision and the potential implications for them in other situations.
8. The balance of this paper discusses the application of the law of monopolisation/abuse of dominance in various jurisdictions and opportunities for transparency initiatives that would be welcome by the business community.

II. Practice Across Jurisdictions

A. European Commission

9. In the European Union (EU), the use of guidelines that seek to clarify the European Commission’s (EC) methodology of analysis with regard to specific types of business transactions or specific sectors, or, to a lesser extent, to explain its enforcement priorities, has over the past few years become a well-established practice. In fact, the EC has issued several sets of guidelines that cover a number of important areas of European competition and merger control law. These include inter alia guidelines on the application of Article 81(3), the definition of relevant markets, technology transfer agreements, vertical agreements, and horizontal mergers. The EC has also announced that it intends to issue guidelines on the treatment of non-horizontal mergers and is currently undertaking a review of its policy under Article 82 EC that may culminate in policy guidelines in the area of abusive conduct under that provision. As a general matter, the EC seeks to supplement its policy as laid down in policy guidelines by publications, speeches by the Commissioner and DG COMP officials, press releases and other informal methods. These “informal” methods of supplementation are also useful, but may not have yet achieved a status of significant authoritative force in the EC. A pattern of continued and consistent reliance by the Commission on such informal guidance, embodied in its actual enforcement practices, may render them more useful as a means of communicating policy. Such appears to be the case, for example, with the informal guidance embodied in speeches delivered by the Department of Justice in the area of criminal cartel enforcement.

10. BIAC appreciates that the “formal” guidelines issued by the EC are generally highly authoritative and are frequently relied on in proceedings with the EC, national competition agencies in the EU, as well as in national court proceedings. We believe, as a matter of

---

7 Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations Between Undertakings, 2004 O.J. (C 31) 3.
9 See, Staff Discussion Paper and replies to the public consultation, available at http://ec.europa.eu/comm/competition/antitrust/art82/index.html. The EC Commission’s guidelines either supplement its policy laid down in block exemptions, such as in the case of vertical and horizontal agreements, as well as technology transfer agreements, or seek to provide guidance in a more general manner, like the Notice on the application of Article 81(3).
10 See, e.g., the EC’s Competition Policy Newsletter, published three times per year, available at http://ec.europa.eu/comm/competition/publications/cpn/.
principle, that such guidelines can perform a valuable function in providing insights into the EC’s analysis and treatment of specific business transactions. Obviously, in order to meet that objective, guidelines must be clear, concise and comprehensible, especially when dealing with complex subjects, such as exclusionary conduct by dominant firms. BIAC supports the consultative approach that the EC has recently followed and invites the EC, as well as other agencies, to explore ways in which the use of consultation mechanisms can be made even more effective in the development of formal policy statements.

11. The use of policy guidelines by the EC displays, in BIAC’s view, a number of special features that distinguish the use of this type of policy instrument in the EU from other jurisdictions.

12. First, in contrast to, for example the United States, where the enforcement policy of the antitrust agencies is more directly scrutinized by the courts in large measure because private enforcement is a major driver of the enforcement of antitrust law, the EC in the EU plays a more prominent role as the dominant enforcer of antitrust law. In light of the nature of the EU Courts’ judicial review, this position provides the Commission with relatively broad discretion to lay out its enforcement views in policy guidelines. It is therefore crucially important that the EC adopt a balanced approach when adopting guidelines in order to minimize the chilling effect that such guidelines may have.

13. Second, the need to exercise a self-restraining approach is underscored by the fact that the EC’s guidelines not only serve as policy guidelines for the EC itself, but also have a profound influence on the application of EC competition law, and often national competition law, by national agencies and courts within the EU, as well as in the regimes of candidate EU member states. Perhaps paradoxically, detailed “prescriptions” in this respect may actually hamper the application of EC competition law by national agencies and courts.

14. Third, in an attempt to strike a balance between the need to conduct a detailed economic analysis and the desire to issue rules that are relatively easy to administer and apply, on occasion the EC has tended to resort to the use of structural assumptions and proxies, such as the somewhat vague notion of “anticompetitive foreclosure” and “the likelihood that prices will rise,” rather than an actual substantiation and quantification of consumer harm. While BIAC appreciates that the use of these types of “shortcuts” may in some cases be appropriate, it generally believes that the proper administration, and optimal consumer welfare, is not served by such a formulaic approach.

15. Fourth, perhaps in contrast to some other agencies, the EC is generally reluctant to provide “qualitative” guidance and to indicate which theories of harm it believes are “more” or “less” likely to occur in practice. BIAC believes that such guidance would be helpful, in particular in the area of abuse of dominance.

16. The EC, as is appropriate, generally seeks to ensure that its policy guidelines are consistent with judicial precedent and past practice in individual cases. As economic learning advances, however, BIAC believes that the EC, as well as other agencies, should not be reluctant to restate the direction of its policies, even if new policy guidelines would perhaps be difficult to reconcile with past practices and even court decisions purporting to respect EC precedents. This would include the need to re-evaluate and adjust, on a regular basis, policy guidelines and supplemental guidance.
B. United States

17. The United States has made a very position contribution to transparency through the issuance of guidelines covering a range of antitrust issues; including horizontal mergers, intellectual property licensing, health care and competitor collaboration, for example. The U.S. agencies also recently issued a joint report on intellectual property, “Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition,” following an extended series of hearings that assembled many of the leading legal and economic experts in the U.S and beyond.11 The business community has welcomed the report as helping to clarify enforcement policy and reducing uncertainty.

18. Moreover, the U.S. agencies recently concluded public hearings as part of a major initiative to examine abuse of dominance. These hearings are expected to lead to another report in order to better guide businesses and, presumably, help the agencies to clarify their own enforcement priorities. Even in advance of the report, the discussion and debate from the hearings has added helpful information and convergence on the application of Section 2. In late 2005, the DOJ and FTC announced the joint hearings on single firm conduct, the specific goal of which is to “examine whether and when specific types of single firm conduct are pro-competitive or benign, and when they may harm consumers.” Assistant Attorney General Barnett, at the time of announcement of the hearings identified the chief benefit of the single firm conduct initiative: “Having clear standards help businesses comply with the antitrust laws and works to the advantage of consumers.”12 BIAC is hopeful that the hearings will result in the issuance of, at a minimum, a comprehensive report of the agencies’ views on single firm conduct and, potentially, the development of guidelines to this effect. Timeliness is also an important factor in providing clarification to businesses. BIAC therefore hopes that the results of the single firm conduct hearings can be issued without undue delay.

19. BIAC believes the public hearings to review the existing economic and legal knowledge on the subject of monopolisation are a valuable method of determining the proper approach to enforcement and recommends this approach for consideration to other jurisdictions. As Chairman Majoras noted in connection with the hearings, "Over-enforcement of the monopolization laws leads to high false positives that chills pro-competitive behaviour that benefits consumers. Under-enforcement, however, may result in false negatives in which firms continue to engage in exclusionary conduct that harms consumers."13 Striking the proper pitch in this delicate balance can best be achieved by obtaining a broad range of input that joins sound theoretical foundation and extensive practical experience.

20. In the U.S., clarification particularly is required in the important area of multi-product bundled discounts in order to ensure that consumers enjoy all of the benefits of price reductions and competition that can be derived from the economy. In BIAC’s view, firms with large market shares – even monopolies – should be free to discount goods and services to consumers, regardless of whether competitors are injured by such discounts, as long as a competition is not injured in the process. The U.S. Supreme Court has ruled that even a monopolist may

---


13 Id.
charge low prices unless the prices are below (variable) cost and there is a dangerous probability that the monopolist later will be able to recoup revenues lost due to below-cost sales. It is especially important that monopolies not be deterred from offering discounts since, by definition, full market pressure for them to lower prices is lacking and many buyers therefore stand to benefit from their offering of a price cut.

21. Lower courts, however, have caused substantial confusion in interpreting Supreme Court precedent. A confounding decision by the Third Circuit in the LePages v. 3M case, for example, found that liability could extend to multi-product bundled discounts even in the absence of an objective standard of behaviour by the alleged monopolist. As a result of the confusion created at the circuit court level, numerous businesses, including BIAC members, have refrained from offering economically-rational multi-product discounts that would have ensured immediate and measurable benefits to consumers. The uncertainty and subjectivity of analysis to be applied and the sizable damage awards that accompany adverse antitrust judgments in the U.S., however, deterred such pro-competitive, consumer welfare-enhancing bundled discounts.

22. Agency guidelines in the U.S. can directly influence private litigation and positively impact the risk assessment conducted by firms in developing business strategies. For example, the market definition test established by the agencies in the Horizontal Merger Guidelines has gained traction both in judicial review of merger cases, as well as non-merger litigation. In this instance, an affirmative view expressed by the agencies that an objective, cost-based standard is appropriate in the analysis of bundled discounts would, in BIAC’s view, encourage pro-competitive discounting by influencing businesses and federal courts on the proper standard to be applied. This, in turn, would reduce the risk and uncertainty that has caused many businesses to forego such discounts to their customers’ detriment. Such an approach would be even more welcome in those jurisdictions, such as the EU, where the enforcement agencies act as the primary enforcer of the competition laws.

23. An excellent example of the capability of agency guidelines to positively influence judicial outcomes regarding single firm conduct is the Supreme Court’s decision in Illinois Tool. There, the Court was deciding whether a presumption of market power should apply to a patent holder. Citing the joint FTC/DOJ Antitrust Guidelines for the Licensing of Intellectual Property as a persuasive influence, the Court held that the proper analysis of a tying claim did not allow for a presumption of market power in the tying product based on the presence of a patent. The Guidelines state that “the Agencies will not presume that a patent, copyright, or trade secret necessarily confers market power upon its owner. Although the intellectual property right confers the power to exclude with respect to the specific product, process, or

---

17 See, e.g., United States v. Visa U.S.A., Inc., 163 F. Supp. 2d 322, 336 (S.D.N.Y. 2001) (court applied the 1992 Merger Guidelines' "critical loss analysis" to find that a 5% price increase by a hypothetical monopolist of "general purpose" credit cards would be profitable and that such cards therefore constitute a relevant product market).
work in question, there will often be sufficient actual or potential close substitutes for such product, process, or work to prevent the exercise of market power.”

24. The U.S. agencies have also utilised press releases effectively to explain their position with respect to enforcement policy. For example, the agencies have effectively used press releases to explain their rationale for closing investigations, particularly in the merger area. The FTC’s statement in the Cruise Lines case and the DOJ’s statements relating to Whirlpool/Maytag and Verizon/MCI are exemplary. BIAC believes that there is further scope for the effective use of press releases to explain enforcement decisions, including mergers, monopolisation cases and the imposition of remedies.

25. The U.S. agencies have for many years delivered and published speeches and participated on panels to illuminate the thrust of enforcement initiatives. For example, AAG Barnett’s address at last fall’s George Mason program illuminated the agency’s views on the intersection between antitrust and intellectual property. FTC Chairman Deborah Majoras recently spoke about her views of the Commission's enforcement intentions with respect to pharmaceuticals.

26. The agencies have also exacted a significant influence on the direction of antitrust law through their participating as amici in private action. This role is particularly important in light of the extent to which private actions have been an important element of legal development in the U.S. This function should be pursued more aggressively. Many businesses believe the DOJ and FTC missed an important opportunity to provide clarity in the monopolisation area by failing to recommend Supreme Court review of the LePage’s bundled pricing case.

C. Japan

27. The case of Nipro Corporation is a typical exclusionary conduct case in Japan, relating to the private monopolization of glass pipe for small medicine bottles and a case from which observations concerning guidance can be made. The Japan Fair Trade Commission (JFTC) declared the conduct of a wholesaler illegal, because it pressured the bottle manufacturer, which was a regular customer of the wholesaler, not to import alternative glass pipes. The

---


JFTC concluded the wholesaler’s conduct to be illegal as private monopolization in violation of the Japanese competition law.\textsuperscript{24}

28. This JFTC ruling is frequently criticised by academics because the standard of violation is unclear. The Japanese Anti-Monopoly Act (AMA) identifies “exclusion of business” as an element of private monopolisation. However, the JFTC ruling did not clearly find that the bottle manufacturing business of the bottle maker (the alleged victim of the pressure) was excluded, but rather that there was a possibility that the bottle maker's business might be excluded. Evidence in fact reflected that the business of bottle maker was not materially damaged. Also, whether the foreign pipe manufacturers' business – i.e., the real victim of the alleged violation in the relevant market – was excluded was not clearly mentioned in the ruling. Furthermore, it appears from the context that the relevant market is pipe supply, but there is no market definition identified in the ruling.

29. In short, this case and its ability to positively influence the behaviour of other businesses in Japan would benefit from additional transparency designed to better describe the nature of the exclusion, the effect of the exclusion and the relevant market that was impacted by the exclusion. More discussion of the rationale of a decision and description of critical facts in JFTC decisions would greatly aid business in understanding and complying with the AMA.

30. In an effort to provide transparency, the JFTC recently issued draft guidelines for the use of intellectual property. These Guidelines are a revision of the Patent and Know-how Licensing Guidelines. They provide a welcome degree of clarification on a number of fundamental points, but are also confusing in several aspects. For example, although they establish a market share based safe harbour, the level of the safe harbour is unreasonably low (20%) and is not universally applied. Moreover, the Guidelines do not adequately clarify the situations in which the 20% market share safer harbour is available, and fail to describe “influential technologies” which assertedly could be a basis for market power. Because they are still draft form and were published for public comment recently, BIAC is optimistic that the JFTC will openly receive and evaluate comments and use these as a basis for improvement.

\textbf{D. Korea}

31. The Korean Fair Trade Commission (KFTC) was founded more than a quarter of a century ago to enforce the Monopoly Regulation and Fair Trade Act (MRFTA). The MRFTA proscribes “a market-dominating enterpriser”\textsuperscript{25} from engaging in several specific types of conduct, including determining, maintaining, or changing unreasonably the price of commodities or services; unreasonably controlling the sale of commodities or provision of services; unreasonably interfering with the business activities of other enterprisers; unreasonably impeding the participation of new competitors; unfairly excluding competitive enterprisers; and other acts that might considerably harm the interests of consumers.\textsuperscript{26} An Enforcement Decree, which elaborates on the MRFTA, identifies certain types of conduct as an abuse of market dominance and provides examples. For instance, the Enforcement Decree

\textsuperscript{24} The JFTC did not issue a cease and desist order because of the long period of time taken for the hearing procedures.

\textsuperscript{25} The MRFTA defines a “mark-dominating enterpriser” as either: “1. Market share of one enterpriser is 50/100 or more; or 2. The total market share of not less than three enterprisers is 75/100 or more; provided that those whose market share is less than 10/100 shall be excluded.” MRFTA Article 4.

\textsuperscript{26} MRFTA Article 3-2.
explains that a dominant firm may unreasonably hinder the entry of a new competitor by “[e]ntering into, without justifiable reason, an exclusive contract with a transaction partner.”

32. The KFTC has recognized, however, that these existing materials provide insufficient guidance to businesses. Thus, the KFTC created the MFRTA Working Group, led by director level officials consulting with outside experts, to assess possible changes to the current legal framework. In 2006, the Working Group analyzed procedural and substantive issues, including abuse of dominance issues. The KFTC plans to use the Working Group’s findings to revise and update the competition laws and regulations in 2007. In addition, the KFTC maintains websites in Korean and English with information on statutes, regulations, speeches, reports, press releases, and other materials. These initiatives, and further explication of the KFTC policies, have been useful to businesses, which welcome the progress to date and, at the same time, hope that additional clarification can be provided.

E. New Zealand

33. The Commerce Commission (Commission) of New Zealand enforces the Commerce Act, which was enacted in 1986. Section 36 of the Commerce Act prohibits a “person that has a substantial degree of power in a market” from restricting the entry of a person into that or any other market; preventing or deterring a person from engaging in competitive conduct in that or any other market; or eliminating a person from that or any other market.” In 2002, the Commission published a guide to Part II of the Commerce Act, which covers restrictive trade practices including use of a dominant market position, with the express purpose of promoting greater understanding. This twenty page guide provides an overview of Part II, and contains descriptions and examples of prohibited trade practices. At the time of its publication, however, there were no New Zealand court precedents that reflected a 2001 change from “dominance” to “substantial degree of market power” in Section 36. Thus, one of the three examples was based upon an Australian case, in which a similar standard was employed, and two examples were drawn from cases decided using the pre-2001 New Zealand standard. In addition to the guide, the Commission maintains a website with useful materials.

F. Australia

34. Enacted in 1974, Section 46 of the Trade Practices Act (TPA) deals with anticompetitive conduct by a “corporation that has a substantial degree of power in a market.” The TPA and other useful materials are available on the Australian Competition and Consumer Commission’s (ACCC) website.

---

27 Enforcement Decree of the MRFTA Article 5(4).
29 Commerce Act 1986 Section 36.
30 NEW ZEALAND COMMERCE COMMISSION, THE COMMERCE ACT: ANTI-COMPETITIVE PRACTICES UNDER PART II OF THE COMMERCE ACT, at 1 (“The purpose of this publication is to promote understanding of the anti-competitive practices (or restrictive trade practices) prohibited under Part II of the Commerce Act . . . .”).
32 TPA Section 46.
35. There have been two recent reviews of the TPA. The Dawson Committee review concluded that no amendments to Section 46 were necessary and that the courts were providing sufficient guidance in its application. One month after the Dawson Committee reported to the Australian government, the High Court of Australia issued its decision in *Boral Besser Masonry Pty Ltd. v. ACCC*, which found that the defendant, charged with predatory pricing, had not violated the TPA. After that decision, the Chairman of the Dawson Committee reaffirmed the report, despite potential issues raised by Boral.

36. In 2004, though, the Senate Economics References Committee concluded in its report that changes were needed to clarify Section 46. The Senate Committee made several recommendations for refining the law, including amending the TPA to indicate that the threshold of “a substantial degree of power in a market” is lower than the former threshold of “substantial control”; to identify factors to consider when determining whether a company possesses “a substantial degree of power in a market”; and to clarify that a company may be considered to have obtained a substantial degree of market power by virtue of its ability to act in concert (either explicitly or tacitly) with another company. Although the Australian government accepted several of the committee’s recommendations, however, Section 46 remains unchanged.

### G. Canada

37. There has been limited case law on the abuse of dominant position provisions in section 79 of the Competition Act over the last 20 years, with only five contested cases. Further, there is no right of private action for abuse of dominance – only the Commissioner of Competition can apply to the Competition Tribunal for remedial relief. Accordingly, guidelines, speeches, annual reports and other communications, including submissions to OECD roundtables and the Global Forum that set forth the Competition Bureau’s analytical and enforcement approach to applying the abuse of dominance provisions are welcome initiatives.

38. In that regard, the Competition Bureau has issued detailed general and sector-specific enforcement guidelines: *Enforcement Guidelines: The Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act);* and *The Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act) as Applied to the Canadian Grocery Sector.* The Commissioner of Competition has also clarified the Bureau’s approach to applying the abuse of dominance provisions in the airline industry in a very concise communication that specifies the type of conduct that will raise issues and clarifies the application of the avoidable cost test. The *Intellectual Property Enforcement Guidelines* also discuss abuse of dominance as applied to IP rights.

39. The Competition Bureau also issued on September 26, 2006 a draft Bulletin for public comment that describes its approach in reviewing abuse of dominance complaints in

---

37 Id.
39 These guidelines are all available at [http://www.competitionbureau.gc.ca](http://www.competitionbureau.gc.ca).
deregulated telecommunications markets. This consultative process followed on a report of Canada’s Telecommunications Policy Review Panel that found competition has progressed in most telecommunications markets to the point where market forces can be relied upon to achieve many of Canada’s telecommunications policy objectives. The Bureau developed the Bulletin “with a view to being more transparent and predictable”. In drafting the Bulletin, the Bureau consulted with the Canadian Radio-Television Commission (“CRTC”), the sector specific regulator, to benefit from their expertise in the telecommunications sector. BIAC supports this approach, which is one that can be applied in other aspects of competition law to improve transparency and enforcement clarity to private sector stakeholders where there is sector specific regulation and overlapping jurisdiction between the sector specific regulator and the competition authority. For example, to provide greater clarity on the interface between the Competition Act, the Broadcasting Act and the Telecommunications Act, the Bureau and the CRTC developed an “interface agreement” describing their respective authority. The stated objective of that document was to provide “industry stakeholders, including the general public, with greater clarity and certainty about the overall regulatory and legal framework governing the telecommunications and broadcasting sectors which were undergoing rapid change and transition from detailed regulation to greater reliance on market forces.”

40. The Competition Bureau’s approach to abuse of dominance cases has also been explained and updated in speeches and other Bureau communications. Recently, Sheridan Scott, Commissioner of Competition, noted that the spirit of section 79 – err on the side of non-intervention – leads the Bureau to take a limited number of cases.

41. The Canadian abuse guidelines offer a useful template for other jurisdictions. However, there are areas for improvement. For example, the mere expression that the policy towards abusive conduct “should be governed by the economic effects” may be a useful starting point, but is, upon inspection, insufficient. Instead, the agency should preferably articulate how these economic effects are measured, have a clear view on how (dynamic) efficiencies enter into the analysis and express a more detailed analysis on diverse matters as the exclusion of “as efficient” competitors and barriers to entry.

42. In addition, BIAC notes that there seems to be a disconnect between the case law and the Bureaus’ guidelines, which provide that: “If a firm has a 35 percent or higher market share, the Bureau will normally continue its investigation.” The abuse provisions in the Competition Act do not specify a market share threshold, requiring instead that the alleged dominant entity substantially control a class of business. The Competition Tribunal has held that “control” is synonymous with market power equating substantial or complete control of a business with market power in the economic sense, being the power to maintain prices above the competitive level without losing so many sales that the higher price is not profitable. In the contested abuse of dominance cases heard to date by the Competition Tribunal, the market shares of the dominant firms has been well over 50%. While the Competition Tribunal has not clearly articulated a threshold level of dominance, it has provided the following framework for analyzing whether the alleged dominant entity has the requisite control:

   a) examine whether an entity has the ability to maintain prices above competitive levels for a considerable period; and

   b) determine the entity’s market share – under 25% - unlikely to find dominance, but consider any evidence of an increasing trend; under 50% - no prima facie finding of
dominance; or 100% - prima facie finding of dominance absent evidence that there are no barriers to entry.

Accordingly, given that the Competition Tribunal seems to look for a much a higher share, the meaningfulness of this particular guideline is uncertain.

43. The Competition Bureau also faces some significant enforcement issues which could be expanded upon in transparency initiatives. These include the use of presumptions of dominance, the standards under which such presumptions may apply,\(^{40}\) and determining the least interventionist remedy. It has been suggested that behavioural remedies directed toward eliminating barriers to restore competition are clearly preferable to structural remedies,\(^{41}\) an approach which the Competition Tribunal and the Bureau have historically taken. There is also an ongoing debate in Canada about the merits of introducing administrative monetary penalties as part of the remedial order in abuse cases.\(^{42}\)

44. The *Conformity Continuum Information Bulletin*\(^{43}\) discusses the Bureau’s efforts at promoting and facilitating conformity through education and monitoring, and its responses to non-conformity. It establishes five principles that govern the Bureau’s activities: (i) transparency; (ii) fairness; (iii) timeliness; (iv) predictability; and (v) confidentiality. Two of these principles are particularly relevant to the discussion in this submission and endorsed by BIAC given their importance to the business community: (i) transparency, which “means that the Bureau will be as open as the law and confidentiality requirements permit” and (ii) predictability, which “involves providing appropriate background material on Bureau positions and important issues to assist the business community in conducting its affairs in a manner that complies with the law.”

45. Further, BIAC supports the current Commissioner’s ongoing communications between the Bureau and its various stakeholders about the application and reform of the law.

**III. Conclusion**

46. BIAC advances the following principles to agencies that desire to expand transparency initiatives. As to the mechanisms for providing transparency:

a) Agency statements, regardless of the form in which they are conveyed, should be fundamentally clear and thus capable not only of inducing compliance by businesses, but also of being applied in judicial as well as agency contexts.

b) All guidance should be rooted in accepted legal and economic learning and objectives.

---

\(^{40}\) See, Discussion Points Presented by the Business and Industry Advisory Committee (BIAC) to the OECD Working Party No. 3 on Cooperation and Enforcement Roundtable Discussion on Proof of Dominance/Monopoly Power (June 7, 2006).

\(^{41}\) See, Summary of Discussion Points, Presented by the Business and Industry Advisory Committee (BIAC) to the OECD Competition Committee Roundtable Discussion on Remedies and Sanctions in Abuse of Dominance Cases (June 8, 2006).


c) The form of guidance utilised should be sufficiently flexible to accommodate advances in learning as well as industrial, technological and other factual developments.

47. With respect to providing useful guidance to businesses on the specific issue of abuse of dominance/monopolisation, BIAC notes as follows:

a) **Consultative Approach:** Given the fairly limited practical enforcement history of most agencies and the continued evolution of economic learning with respect to the potential effects of abuse of dominance, BIAC endorses a public consultation process involving all stakeholders in the development of policy and in the preparation of transparency initiatives. Hearings, roundtables, conferences and opportunities for public comment are most helpful.

b) **Consumer Welfare Focus:** The enforcement goal of transparency initiatives should be to maximise economic benefits rather than to control or contain dominant firms per se. Agency transparency initiatives and enforcement actions should make clear that the objective of enforcement will be the protection of competition rather than the protection of competitors.

c) **Application of International Best Practices:** Enforcement should be exercised in such a way as to comport with international best practices to the fullest extent practicable consistent with the requirements of national law. Enforcement action based on an alleged abuse of dominance within one jurisdiction can often have broader consequences in terms of the business practices of a firm, especially when intellectual property is at stake. Thus, over-enforcement in one regime can lead to chilling effects in another.

d) **Consistency with Current Learning:** Agencies should seek to ensure that its transparency initiatives are consistent with controlling judicial decisions and the agency’s past practice in individual cases. However, BIAC believes that agencies should not be reluctant to develop new policy directions supported by more recent economic learning, even if new policies would perhaps be difficult to reconcile with existing practices and precedents. Guidelines should be sufficiently adaptable to new economic and institutional learning so as to preserve utility without a need for constant revision.

e) **Focus on Analysis of Actual Effects:** The use of transparency initiatives – and particularly guidelines – in the recent years seems to coincide with a greater emphasis of the actual economic effects. Agency guidance should rest on a sound theoretical foundation and also reflect practical application of economics as witnessed in the marketplace.

f) **Relevancy/Regular Review:** BIAC welcomes more regular initiatives from agencies to review their existing policy statements, including guidelines, to ascertain their practical use and their consistency with judicial precedents and advancements in economic learning. BIAC welcomes more regular initiatives from agencies to review their existing policy statements, including guidelines, on *an ongoing basis or fixed review schedule* to ascertain their practical use and their consistency with judicial precedents and advancements in economic learning.
g) Focus on Exclusionary Conduct: In those jurisdictions where systems of exclusionary and exploitative abuses co-exist, such as the EU, it is essential to develop a coherent framework of analysis for both types of abuses in tandem. BIAC believes that priority must be given to a coherent and rational policy in the field of exclusionary conduct. Substantial focus on exploitative behaviour risks type one error and chilling of investment in innovation.

48. BIAC submits that transparency in the field of abusive conduct by dominant firms is of particular importance because an over-inclusive policy in this area is particularly likely to defeat efficiency-enhancing conduct. BIAC believes that, as a matter of principle, transparency initiatives regarding monopolisation and abuse of dominance, or similar other provisions could contribute to a more rational application of antitrust law in this area.