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No March Break for Competition, as Bureau Releases New Abuse of Dominance and Intellectual Property Enforcement Guidelines

March 2019 has been a busy month for the Competition Bureau. On March 7, the Bureau released its updated Abuse of Dominance Enforcement Guidelines. Then, on March 13, the Bureau released its updated Intellectual Property Enforcement Guidelines ("IPEGs"). While neither new enforcement guideline reflects a fundamental shift in the Bureau's approach to these issues, they provide new guidance and reflect important nuances in the Bureau's consideration of these issues, particularly regarding abuse of dominance.

The Updated Abuse of Dominance Enforcement Guidelines

The Bureau released draft updated Abuse of Dominance Enforcement Guidelines in March 2018, and a consultation period followed between March and May 2018. The new Abuse of Dominance Enforcement Guidelines were formally issued on March 7, 2019. Those guidelines had not been updated since the previous guidelines issued in September 2012. In the interim, the law on abuse of dominance had evolved, most notably as a result of the litigation by the Commissioner of Competition against the Toronto Real Estate Board ("TREB"). The new guidelines substantially expanded the Bureau's guidance on various issues and also provided some changes. Some of the key changes in those guidelines are summarized here.

First, the Bureau provided new guidance as to how it will approach market definition in abuse of dominance cases. Among other things, the Bureau noted that it may define markets with respect to particular types of purchasers, such as where sellers engage in price discrimination. In addition, the Bureau may analyze several different product markets together in certain circumstances. The Bureau also provided new guidance as to how it would approach the market in cases of multi-sided platforms:

> Special considerations arise when applying the hypothetical monopolist test to "multi-sided" platforms. For

> a multi-sided platform, demand for one “side” depends on use of another; one example would be an advertising service that matches buyers and sellers of a product, where greater buyer use increases the attractiveness to sellers, and greater seller use increases the attractiveness to buyers. Depending on the facts of a case, the Bureau may define a product market as one side of a multi-sided platform (i.e. consider the effects of a price increase on one side of the platform). However, when considering if a hypothetical monopolist would find it profit maximizing to impose that price increase, it may be necessary to account for the interdependence of demand, feedback effects, and changes in profit on all sides of the platform. In other cases, the Bureau may view it appropriate to define a market to include multiple sides of the platform.

These changes show a greater sensitivity by the Bureau to complicated issues of market definition that are becoming increasingly prevalent as technology advances.

Second, and consistent with the Bureau’s greater sensitivity to platforms and new technologies, the new guidelines show increased concern about network effects as a factor that can affect market power. The guidelines contain a new passage that describes network effects as follows:

> Network effects occur when demand for a product depends on use of that product by others, and can be direct or indirect. Direct network effects, access occur when the demand for a product or service directly increases with more users, such as how the value of a communications network for an individual may increase with the number of other users of the network. In contrast, indirect network effects occur where greater use of a product or service by members of one group creates value for members of another group, potentially causing feedback effects. For example, in the case of a website that matches buyers and sellers of various products, the website becomes more valuable to buyers the more sellers use the website, and vice versa. All else equal a buyer may be indifferent to the number of other buyers that use the website, but if additional buyers attract additional sellers, a buyer indirectly benefits from greater use of the website by other buyers. Network effects may provide significant advantages to incumbent firms, making entry or expansion more difficult…

Third, the guidelines now explicitly set out that “[a] firm that does not compete in a market may nonetheless substantially or completely control that market”. This statement reflects the

Federal Court of Appeal's first decision in the TREB case. This language confirms that the Bureau will look to enforce the abuse of dominance provisions against trade associations and others who play a significant role in markets without competing in them. However, in such cases, the Bureau will need to show that the organization has a plausible competitive interest in adversely impacting competition in that market.

Fourth, the Bureau provided additional guidance as to when particular exclusionary conduct will fall offside s. 79 of the Act. The new guidelines provide extensive discussion of the circumstances in which the Bureau will consider exclusive dealing, tying and bundling, and refusals to deal to be anticompetitive. While those forms of conduct are also subject to separate specific provisions under the *Competition Act*, the new Abuse of Dominance Enforcement Guidelines suggest that the Bureau may instead approach the question of whether such acts are anticompetitive under the more general abuse of dominance provision in s. 79.

Finally, the guidelines provide an expanded explanation as to when business justifications will negate the inference that an act was undertaken for an anti-competitive purpose. The guidelines reinforce that the respondent bears the burden to show a reasonable business justification for its conduct. As the Federal Court of Appeal held in its first decision in *Canada Pipe*, that "business justification must be a credible efficiency or pro-competitive rationale for the conduct in question, attributable to the respondent, which relates to and counterbalances the anti-competitive effects and/or subjective intent of the acts". The Bureau will also consider "whether the claimed efficiency or pro-competitive benefits could have been achieved by credible alternate means that would have had a lesser impact on competitors".

Overall, the new guidelines provide substantial additional guidance as to the Bureau's approach to abuse of dominance issues, particularly as those provisions apply in the new economy characterized by rapid innovation, platforms and network effects, and competition for the market rather than within it.

The Revised IPEGs

The Bureau's previous IPEGs were issued in 2016. In November 2018, the Bureau invited feedback on draft updated IPEGs, and the consultation period concluded on December 31, 2018. Only three submissions are listed publicly on the Bureau's website as having been received: from ACT – the App Association, Fraunhofer-Gesellschaft, and the Canadian Generic Pharmaceutical Association. The Bureau then issued

the new IPEGs on March 13, 2019.

The new IPEGs do not reflect any significant changes from the Bureau's approach set out in the 2016 IPEGs. In fact, there are only two substantive changes from the 2016 IPEGs to the present IPEGs.

First, the IPEGs were updated to reflect the various decisions in the TREB case, and in particular the second decision of the Federal Court of Appeal. The new IPEGs include a paragraph specifically devoted to the Court of Appeal's decision:

> TREB was upheld in a decision by the Federal Court of Appeal ("FCA"). The FCA noted that subsection 79(5) does not state that any assertion of intellectual property right shields what would otherwise be an anti-competitive act. The FCA also noted that Parliament intended to insulate intellectual property rights from allegations of anti-competitive conduct where the IP right is the sole purpose of exercise or use. Finally, the Court held that because the conditions TREB imposed on its copyright licenses were anti-competitive, it could not rely on copyright as a defence pursuant to subsection 79(5).

This summary of the TREB decision confirms the Bureau's general approach in the IPEGs that the existence or purported exercise of intellectual property rights will not automatically shield a party from proceedings under the *Competition Act*, and in particular from proceedings under the abuse of dominance provision. While the TREB decision provides additional guidance in a number of respects, this aspect of the decision is not a fundamental change from the Bureau's previous approach.

Second, the IPEGs were updated to reflect changes to Canada's *Patented Medicine (Notice of Compliance) Regulations*. Under the *PM(NOC) Regulations* in place prior to 2017, the validity of a patent was not determined in the context of a *PM(NOC)* application. Practically, that meant that a generic pharmaceutical manufacturer could succeed in defending against claims that their product infringed a valid patent and obtain regulatory approval for their product, yet still face subsequent patent infringement litigation on that very same patent. 2017 amendments to the *PM(NOC) Regulations* mean that the validity of a patent can now be determined in the context of a *PM(NOC)* proceeding. Because this change impacted the IP landscape and the cost-benefit calculus for both innovators and generics in such litigation, the Bureau appropriately updated its guidelines dealing with settlement of *PM(NOC)* proceedings to reflect this change.

While it is a positive development that the Bureau was sensitive to changes to the *PM(NOC) Regulations* in updating the IPEGs, further changes to the IPEGs in this regard would be welcome. While the IPEGs apply an approach that is reflective of US antitrust law to settlements of patent litigation involving new drugs, there are significant differences between the scheme for new drug approvals in Canada and the United States that are salient to competition. Most notably, as the IPEGs recognize, section 8 of the *PM(NOC) Regulations* allows a generic who was successful in a *PM(NOC)* proceeding to sue an innovator for lost profits for the period they were excluded from the market by the innovator's patent during the regulatory approval process; there is no comparable provision in the United States.

In this regard, the updated IPEGs were not specifically changed to reflect other significant amendments that were made to the *PM(NOC) Regulations* in 2017. For example, prior to 2017, the generic's right to recover lost profits in s. 8 litigation was limited to lost profits during the period between the date the generic would have otherwise been given regulatory approval and the date the *PM(NOC)* application was dismissed, withdrawn, or discontinued. The implication of this was that claims for diminished sales after the relevant period, permanent loss of market share, or loss of business value were not available under s. 8. However, amendments to the *PM(NOC) Regulations* that came into force in September 2017 removed that limitation, allowing claims for lost profits in respect of the period after the application was dismissed, withdrawn, or discontinued. This substantially increases the financial risk to innovators from *PM(NOC)* litigation and provides additional disincentives for parties to agree to anticompetitive "pay for delay" settlement agreements. This change in the *PM(NOC) Regulations* is not explicitly reflected in the IPEGs.