INTERNATIONAL BAR ASSOCIATION
ANTITRUST SECTION MERGERS WORKING GROUP

IBA COMMENTS ON THE COMPETITION BUREAU'S DRAFT ANTI-COMPETITIVE CONDUCT AND AGREEMENTS ENFORCEMENT GUIDELINES

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I. INTRODUCTION

The International Bar Association's ("**IBA**") Antitrust Section ("**Section**" or "**we**") would like to thank Canada's Competition Bureau (the "**Bureau**") for the opportunity to provide comments on the draft Anti-Competitive Conduct and Agreements Enforcement Guidelines (the "**Guidelines**"). This inclusive process will ensure a robust and workable framework that benefits all.

II. ABOUT THE IBA

The IBA is the world's leading international organization of legal practitioners, bar associations, and law societies. As the "global voice of the legal profession", the IBA contributes to the development of international law reform and shapes the future of the legal profession throughout the world. It has a membership of more than 80,000 individual lawyers from over 170 countries, including Canada, and considerable expertise in assisting the global legal community.

The Section includes competition law practitioners with a wide range of jurisdictional backgrounds and professional experience, including with international cartel matters and leniency regimes. Such varied experience places it in a unique position to provide a comparative analysis for the development of competition laws, including through submissions developed by its working groups on various aspects of competition law and policy.

III. OVERVIEW

We appreciate the Bureau's efforts in drafting the Guidelines and welcome the opportunity for continued dialogue as a part of this modernization effort. Our overarching concern is that the Guidelines prioritize flexibility over predictability, leaving businesses without sufficient clarity as to how the Bureau intends to enforce the ACCA provisions.

Indeed, the essence of the Section's submission is that we believe the Bureau needs to express clearer, firmer positions throughout the Guidelines. While we understand the Bureau's inclination to preserve enforcement latitude, the practical value of the Guidelines hinges on its ability to provide meaningful, actionable insight into how the Bureau will approach real-world enforcement decisions and the legal basis for doing so. Absent more disciplined guidance – ideally distilled into a more accessible document and supported by substantive references to case law – businesses and their counsel will face continued uncertainty in assessing compliance risk. This is likely to have two adverse effects. First, it could chill pro-competitive or competitively benign conduct,

because the identification of a wide range of potential issues may lead businesses to take unnecessarily conservative approaches to their behaviour. Second, it could result in the Guidelines effectively being ignored by businesses and their counsel on the basis they do not provide actionable guidance.

Accordingly, the Section encourages the Bureau to adopt a more transparent and decisive approach throughout the Guidelines. A more streamlined, instructive document would enhance both compliance and enforcement effectiveness, ultimately supporting the objectives of the Act.

In the below submission, we note instances where the Bureau could issue more forthright, useful guidance, as well as highlighting other substantive concerns and areas where we appreciate the Bureau's helpful analysis.

IV. ANALYSIS

1. Part 2 – Market Power

Part 2 positions market power as the foundation of the ACCA analysis but adopts an expansive and elastic conception that leaves significant uncertainty as to when market power is sufficient to trigger liability. The repeated use of qualitative thresholds such as a "meaningful" amount of market power, outside the abuse of dominance context, affords the Bureau broad discretion while offering limited guidance to firms, particularly in consolidated markets.

1.1 What is market power?

The Guidelines appropriately distinguish possession from exercise of market power and recognize that market power may arise from lawful competitive success. It also correctly distinguishes between market power and single firm dominance, which requires a "substantial" degree of market power enabling the firm to substantially or completely control the market. However, the analysis does not clearly delineate when the exercise of market power becomes legally relevant, particularly in markets where firms inevitably behave interdependently. The discussion of multiple firms having market power gestures toward joint dominance but does not articulate a clear analytical framework for distinguishing joint market power from lawful rivalry in consolidated markets with large players.

1.2 Indicators of market power

The Guidelines reliance on a flexible set of direct and indirect indicators reflects established practice, but the absence of a structured methodology for weighing conflicting evidence of absence or reduction of market power undermines predictability. This concern is heightened in joint dominance cases, where individual firms may not appear dominant on standard indicators, yet collective market power is inferred without clear evidentiary thresholds.

1.2.1 Market structure

Market structure plays a central role in the assessment, with particular emphasis on market shares and concentration. While the Guidelines caution that structural indicators are imperfect, they nevertheless remain the primary basis for inferring both unilateral and joint market power. In the context of joint dominance, the Guidelines do not clearly explain how concentration metrics translate into collective market power absent other factors such as structural links and coordination, creating a risk that structure alone substitutes for evidence of joint conduct or mutual constraint.

a) **Market definition**

The Guidelines' flexible approach to market definition, including the willingness to proceed without a precise market definition, increases analytical discretion but reduces transparency. For example, the European Union ("**EU**") Market Definition Notice acknowledges that market definition is necessary for the assessment of market power, and is indispensable for establishing dominance, as well as assessing the effects analysis and the applicability of safe harbours under the EU Merger Regulation and the vertical block exemption regulations (paras. 9-10 of the Market Definition Notice). This is especially problematic for joint dominance analysis, where outcomes are highly sensitive to market boundaries. Small changes in product or geographic scope can materially alter concentration measures and, by extension, the inference of collective market power.

b) **Market shares and concentration measures**

The Guidelines suggest that higher market shares and concentration indices may signal market power, including in joint dominance settings, but fail to provide clear thresholds or guidance for interpreting stability in such power over time. This approach risks conflating mere size with actual market influence, especially in dynamic markets where new technologies, shifting consumer preferences, or potential entry may limit a firm's ability to exercise power. Moreover, the Guidelines do not clarify how to reconcile conflicting signals from different share measures, such as revenues, units sold, or capacity, which may diverge in differentiated or partially constrained markets.

We are particularly troubled by the introduction of a 30 percent threshold, above which a firm is more likely to have market power. We understand that this threshold is being adopted to harmonize with the provisions concerning mergers and acquisitions. However, it represents an important departure from past practice, and it is not clear to us why a merger-specific standard set out in legislation should be adopted as an across-the-board standard in the absence of legislation. If Parliament wanted to implement a concentration threshold for market power generally, it could have amended the Act. It did not. Regardless, this issue merits explanation and justification in the Guidelines. As a practical matter, this is also another example of the Guidelines not providing practical guidance. Suggesting that there could be market power at a 30 percent share level, whereas that is almost certainly not likely to ever be the case, risks misleading businesses on real risk.

1.2.2 Entry or expansion

The Guidelines emphasize timely, likely, and sufficient entry as a constraint on market power, but the standards for these criteria are demanding and often difficult to apply in practice. It remains unclear whether entry must constrain all incumbents collectively, or if partial entry suffices to limit market power. The treatment of barriers is comprehensive but qualitative, leaving firms with uncertainty about how factors like sunk costs, network effects, or access to data will be weighed in practice. While historical evidence of successful entry is considered, the Guidelines do not provide a structured approach for evaluating potential entry in novel or rapidly evolving markets.

1.2.3 Negotiating leverage

Negotiating leverage is treated as an indicator of market power, yet the Guidelines do not distinguish clearly between leverage stemming from true market dominance versus standard bargaining dynamics in concentrated markets. Without such differentiation, there is a risk of overstating the significance of leverage as evidence of market power, particularly where buyer or supplier dependence reflects normal commercial arrangements rather than coordinated market influence.

1.2.4 Supra-competitive prices or profits

Supra-competitive prices or profits are acknowledged as potential evidence of market power, but the Guidelines note significant challenges in establishing competitive benchmarks. Difficulties in measuring costs, adjusting for quality, or defining a competitive price may limit the evidentiary weight of this factor. The Guidelines provide no clear methodology for integrating price or profit evidence with structural indicators, which may lead to inconsistent assessments across cases.

1.2.5 Effects of anti-competitive conduct

The Guidelines recognize that conduct itself can demonstrate market power if it alters competition or creates barriers to entry. However, they do not provide clear criteria for assessing the causal link between conduct and competitive effects, leaving room for interpretive variation. Reliance on observed conduct may also understate market power when firms have the ability—but not yet the incentive—to act anti-competitively.

1.2.6 Ability to exclude

The ability to exclude competitors is treated as a form of market power, particularly through control of key inputs or rule-making authority. While the Guidelines identify relevant factors, such as alternative input availability or enforcement of rules, they provide limited guidance on weighing these factors in practice. The distinction between potential exclusion and realized exclusion is not fully developed, leaving ambiguity about when the mere ability to restrict rivals constitutes evidence of market power.

Part 2 of the Guidelines rely heavily on structural indicators and flexible analytical tools without clearly articulating how collective market power will be distinguished from lawful interdepend-

ence. Greater precision on evidentiary standards, market definition discipline, and the role of coordination would materially improve predictability and analytical rigor in joint dominance cases.

2. Part 3 – The economics of anti-competitive conduct and agreements

This section of the Guidelines explains how the Bureau evaluates the ways in which conduct or agreements can harm the competitive process and thereby create, enhance, or maintain market power. The Bureau identifies three principal mechanisms through which harm may occur:

- exclusion of competitors,
- reduced incentives to compete, and
- facilitation of coordination.

While the frameworks and concepts referred to in this section are grounded in established economic theory, they are articulated at a high level of generality and provide limited guidance on how the Bureau will distinguish anti-competitive conduct from vigorous competition on the merits.

The emphasis in the Guidelines on effects rather than form may be appropriate in principle, but the Guidelines do not clearly explain how causation will be assessed where market outcomes may be attributable to multiple factors. The statement in the Guidelines that similar conduct may affect markets differently depending on the facts, while accurate, offers little practical assistance to firms seeking to assess compliance risk.

The discussion of exclusion in the Guidelines is particularly expansive. By encompassing not only full foreclosure but also partial exclusion that reduces rivals' effectiveness, the Guidelines risk capturing conduct that reflects scale-based competition, efficiencies, or legitimate commercial strategy. The Guidelines do not sufficiently explain how the Bureau will distinguish between exclusion that harms the competitive process and exclusion that results from competition on the merits.

Similarly, the treatment of conduct that reduces incentives to compete is broad and potentially over-inclusive. Without clearer limiting principles, the concept risks conflating reduced rivalry arising from normal market dynamics with conduct that improperly suppresses competition. Additional guidance on materiality and the role of pro-competitive justifications would improve clarity.

Furthermore, the discussion of facilitation of coordination raises concerns regarding the boundary between lawful conscious parallelism and actionable conduct. The Guidelines do not clearly identify the incremental conduct that would transform interdependent behaviour into interference with the competitive process, particularly in the absence of explicit information sharing.

Finally, while the Bureau's intention to assess how multiple forms of conduct may work together is understandable, the Guidelines do not explain how cumulative effects will be assessed where individual practices may be benign in isolation. More nuanced guidance on this point would enhance predictability.

3. Part 4 – Assessing the effects of anti-competitive conduct and agreements

This section of the Guidelines outlines the Bureau's framework for assessing whether conduct or agreements create, enhance, or maintain market power in violation of the ACCA provisions. The Bureau applies a "but-for" analysis, comparing market conditions with and without the conduct or agreement to determine whether competition has been lessened or prevented. The focus is on how the conduct affects the intensity of competition rather than whether there is "enough" competition in absolute terms.

While the effects-based framework described in Part 4 of the Guidelines is consistent with established competition law principles, the Guidelines provide limited practical guidance on how the Bureau will apply this framework in enforcement decisions. In particular, the "but-for" analysis is described at a high level, but the Guidelines do not explain how the Bureau will construct the counterfactual in complex or dynamic markets, or how it will address uncertainty where multiple plausible counterfactuals exist. Even though we acknowledge the need for a case-by-case assessment, greater transparency regarding the Bureau's approach to defining and testing the relevant counterfactual would assist businesses in assessing compliance risk.

The Guidelines' articulation of competitive harm, namely exclusion of rivals, reduced incentives to compete, and facilitation of coordination, mirrors the economic taxonomy set out elsewhere in the document, but does not meaningfully constrain the effects inquiry. As drafted, virtually any conduct that alters market outcomes could be characterized as affecting the intensity of competition, particularly in concentrated markets. The absence of clearer limiting principles risks blurring the line between conduct that is competitively harmful and conduct that merely changes the nature of competition without undermining the competitive process.

The emphasis on dynamic competition and long-term innovation is appropriate in principle, but the Guidelines do not explain how speculative or forward-looking harms will be substantiated. The absence of guidance on the standard of proof for alleged innovation harms, or on how such harms will be balanced against evidence of efficiencies, investment, or pro-competitive rationale, risks introducing uncertainty into enforcement outcomes, particularly in fast-moving or technology-driven markets.

Finally, while the Guidelines correctly note that smaller effects may be more concerning in already concentrated markets, they do not articulate how the Bureau will calibrate materiality in such circumstances. Without clearer guidance on how the degree, duration, and scope of harm will be assessed, especially under the lower adverse effect on competition threshold, businesses face difficulty in distinguishing between conduct that presents genuine enforcement risk and conduct that is unlikely to attract scrutiny.

To enhance predictability and compliance, the Bureau should consider supplementing Part 4 with additional guidance on how counterfactuals will be constructed and tested, the relative weight given to qualitative versus quantitative evidence, the evidentiary standards applicable to dynamic and innovation-based harms, and how materiality will be assessed under both the substantial lessening or prevention of competition and adverse effect on competition standards.

4. Part 5 – Remedies

We acknowledge that the Bureau's explanation of how the Bureau seeks remedies for anti-competitive conduct emphasizes flexibility, case-specific tailoring, and a hierarchy of remedies that address both immediate competition concerns and longer-term compliance objectives. The Guidelines also state that the Bureau will consider a firm's cooperation with an investigation when determining whether to seek an administrative monetary penalty ("**AMP**"), including factors such as voluntary resolution, responsiveness, and general attitude toward compliance. While this approach aims to encourage good-faith engagement, it raises concerns about predictability and fairness. The Guidelines do not clearly define what constitutes adequate cooperation or how different forms of engagement, or legitimate challenges to the Bureau's analysis, will affect AMP determinations. This lack of specificity creates uncertainty for firms, making it difficult to assess how their actions during an investigation might influence potential penalties and potentially giving the Bureau disproportionate leverage in contested cases. Greater transparency on how cooperation is measured and balanced would help ensure that the pursuit of compliance incentives does not inadvertently reduce firms' ability to defend themselves effectively.

5. Part 6 – Types of anti-competitive conduct and agreements

Part 6 of the Guidelines provides detailed guidance on how the ACCA provisions may apply to a wide range of conduct. Importantly, the Guidelines recognize that these types of conduct and agreements are not always anti-competitive and, in some cases, may have benefits which increase competition. For each practice—such as exclusive dealing, tying and bundling and refusals to supply—the Bureau provides commentary and corresponding examples of conduct which may engage the ACCA provisions.

We appreciate the Bureau's comprehensive summary of the ACCA provisions and applicable tests thereunder. However, to further increase the utility of this portion of the Guidelines, it would be helpful for the Bureau to outline how it interprets each section of ACCA provisions. As they currently stand, this portion of the draft Guidelines effectively largely summarises the statutory provisions and provides a laundry-list of factors it may consider in assessing whether there has been a contravention. While this is helpful, particularly to those unversed in the Act, we would welcome a more detailed sense of how the Bureau interprets the words and phrases in the sections and how it intends to enforce them in practice. Incorporating this level of guidance for each provision and legal test will provide increased certainty for businesses striving to remain compliant with the Act.

A good example of the issue is the Bureau's approach to contracts that reference rivals, and specifically Most Favoured Nation ("**MFN**") clauses. The guidelines say that they "can be pro-competitive […] However, contracts that reference rivals can also harm competition." This is different from the approach taken in other jurisdictions. For example, the European Commission ("**EC**") has refrained from condemning narrow MFNs absent evidence of appreciable anti-competitive effects, thereby maintaining a relatively high evidentiary threshold for intervention. In its Vertical Guidelines, the EC reaffirmed its position that all MFN clauses continue to benefit from the block exemption with the exception of wide MFNs imposed by providers of online intermediation cases. Wide MFNs imposed by online intermediation platforms, regardless of dominance, are excluded restrictions that cannot benefit from the Vertical Block Exemption Regulation. This sort of clear guidance is more useful to business than a "self-help" list of factors to assess.

Staying with the MFN example, the Guidelines' skeptical framing risks exposing efficiency-enhancing MFNs (including narrow parity clauses) to enforcement absent clear evidence of competitive harm. The absence of any clear sense of what sorts of MFNs the Bureau thinks could be problematic may increase legal uncertainty for firms operating across jurisdictions and chill pro-competitive contracting.

This legal uncertainty is compounded by the Bureau's contemplation of scrutiny of MFNs under multiple civil provisions of the Competition Act, including abuse of dominance, section 90.1 (civil agreements that substantially prevent or lessen competition), and section 77 (exclusive dealing, tied selling and market restriction). This multiplicity of potential enforcement pathways materially expands the Bureau's jurisdictional reach relative to other legal frameworks. From a policy perspective, the ability to characterise the same MFN clause under several statutory provisions introduces a high degree of enforcement optionality. While this may enhance flexibility for the Bureau, it also risks creating legal uncertainty for businesses, which may be unable to predict ex ante which analytical framework will apply, or which efficiencies will be recognised as relevant. Though we recognise that, as a technical legal matter, the Bureau has wide discretion, the objective of the guidelines should be to outline clearly the circumstances in which the Bureau will focus its enforcement resources.

We also recognise the Bureau's approach on excessive pricing. Other jurisdictions, like the EU and UK have set very rigorous legal and economic standards for these types of cases, given the significant risk of runaway cases (either enforcement or standalone) if a low standard is inadvertently established.

6. Part 7 – The ACCA Provisions

6.1.1 Dominance (Subsection 79(1))

The draft Guidelines note that the Bureau may investigate for single firm dominance if the firm has a market share of 50 percent or more and, for joint dominance, when a group of firms have a combined market share of 65 percent or more. However, the Guidelines caveat these statements with an acknowledgement that, in some cases, the Bureau may: investigate further despite low

market shares; consider other evidence that a firm possesses a substantial degree of market power; or consider evidence that a firm or group of firms may gain a substantial degree of market power.

From the perspective of an international audience, the Bureau's discussion of dominance is short and would benefit from greater detail. In the EU, for example, dominance is not just market power with higher market shares but is the "power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers on the relevant market." There are no formal market share thresholds for finding dominance under EU law. While the EC refers to 50 percent in its guidance, this threshold is based on isolated and dated case law. In practice, most cases in which dominance was found concern cases with very high market shares, typically above 80 or 90 percent, held over a sufficiently long period of time (at least 3–5 years). We understand the same is true in Canada. The Bureau indicates in particular that "we will generally investigate further if for single firm dominance, they have a market share of 50 percent or more". Under EU competition law, market shares cannot be analyzed in isolation but require to be interpreted in light of the relevant market factors. In particular, it is important to analyze the trend of market shares over time, the innovation cycles, the purchasing methods used on the market (typically in bidding markets with tenders, the company winning a large tender may have a large market share, but that market share does not reflect the intensity of competition to win the existing tender and the next tender). EU law requires market shares to remain stable over time to be a reliable indicator of dominance.

Further guidance would provide businesses with clarity to enable them to structure their conduct in alignment with the Bureau's enforcement priorities and the Act. While we appreciate that the Bureau requires flexibility in its enforcement approach, caveats and exceptions to clear guidance can leave businesses at a loss as to how to conduct their operations. Similarly, while we appreciate that in theory there could be a finding of dominance at 50 percent or more, the Guidelines would benefit from the Bureau stating outright that, as a practical matter and based on case law, shares would have to be considerably higher. If there are to be caveats and exceptions, it would be helpful if the Bureau more clearly articulated the specific circumstances in which those caveats and exceptions are likely to be relevant.

6.1.2 Joint dominance

We have a broad, conceptual concern, that the discussion of joint abuse of dominance suggests that it is commonplace where it is in fact exceptional. Competition enforcers in other jurisdictions tend either to not have the concept or have it but in practice do not pursue such cases.

Cases in Europe, for example, are rare and mostly old, which means that they are of limited help in assessing how the EC would now approach such cases. What is clear in Europe is that the establishment of a joint or collective dominance is a very complicated exercise that is undertaken on a case-by-case basis. The most recent indication of the EC's view is set out in its 2024 draft "Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings":

a) finding of collective dominance requires that two or more economic entities that are legally independent of each other present themselves or act together on a particular market as a collective entity from an economic point of view. Once this has been established, the assessment of dominance is based on essentially the same factors that are relevant for single dominance [including the rebuttable presumption of dominance where the collective market share is above 50 percent].

To establish collective dominance, it is necessary to examine the economic links or factors giving rise to a connection between the undertakings concerned that enable them to act together independently of their competitors, their customers and consumers. Such a connection may result from the nature and terms of an agreement between the undertakings concerned or from the implementation of such agreement, or it may result from structural or other links (*e.g.*, personal ties), provided that those links lead the undertakings to present themselves or act together as a collective entity. This could be the case if undertakings have concluded cooperation agreements that lead them to coordinate their activities on the market, or if cross-shareholdings, participation in joint ventures, interlocking directorships or other links in law lead the undertakings concerned to coordinate and act as a collective entity.

Other important jurisdictions, like Australia, simply do not have the concept at all. There is no concept of 'joint dominance' under the Australian misuse of market power law. The law recognises that 'more than one corporation may have a substantial degree of power in a market', however a single corporation (together with its related bodies corporate) must meet the threshold requirement of possessing substantial market power. While there may be an aggregation of market power held by the corporation and related bodies corporate, this does not apply where the parties are unrelated (even if the corporations have a close relationship).

According to the draft Guidelines, one of the factors the Bureau may consider in assessing joint dominance is whether competition is limited among members of a group by reason of an agreement between the firms that harms competition between them. Due to the conceptual overlap between the above and section 90.1, it would be helpful for the Bureau to clarify the circumstances under which it will pursue enforcement under each of section 90.1 and section 79 as it relates to joint conduct where there is an agreement. Otherwise put, when will the Bureau investigate an alleged agreement as indicative of an abuse of joint dominance, as opposed to an anti-competitive agreement under section 90.1?

More generally, and importantly, the Guidelines should clearly state that joint dominance will be rare and detail the specific circumstances in which the Bureau will pursue a joint dominance case.

6.1.3 Remedies

a) **<u>Order stopping the anti-competitive conduct or agreement (subsection 79(1))</u>**

We appreciate the level of detail provided by the Bureau in this subsection. Specifically, the explanation regarding how the Bureau will determine whether to seek an order, including the cir-

cumstances under which the Bureau will be more or less likely to exercise its enforcement discretion, is a clear example of the level of explanation desired throughout the draft Guidelines.

b) **Administrative monetary penalties (subsection 79(3.1))**

While the draft Guidelines set out the statutory framework for AMPs under subsection 79(3.1), they do not provide practical guidance on the Bureau's enforcement approach. Historically, the Bureau has rarely sought AMPs in abuse of dominance cases. Businesses would therefore benefit from clarity on the circumstances under which such penalties will be pursued. As in other parts of the Guidelines, the Bureau lists factors that it will consider, but attributes no weight to any of the factors and no sense of how they will be assessing in practice. For example, if a firm promptly ceases the impugned conduct upon Bureau engagement, can it reasonably expect that the Bureau will refrain from seeking an AMP? The Guidelines do not provide that level of clarity. (Clear guidance on this point in particular would reinforce the compliance-oriented purpose of AMPs and provide greater certainty for businesses.)

6.1.4 Limitations and exceptions

a) **Limitation periods (subsection 79(6))**

We welcome additional guidance regarding the Bureau's interpretation of the three-year limitation period. Specifically, it would be beneficial for businesses to understand the Bureau's enforcement stance regarding conduct that was mistakenly engaged in and voluntarily stopped (*i.e.*, whether the Bureau will offer businesses comfort that the Bureau will not apply to the Tribunal with respect to such conduct any time during the subsequent three-year period).

6.1.5 How section 90.1 applies to agreements that do not involve competitors

In this section, the Bureau appears to introduce a rebuttable presumption for agreements that do not involve competitors: specifically, if any agreement has the effect of substantially harming competition, the Bureau may presume that it has a significant purpose to prevent or lessen competition in any market in the absence of credible evidence to the contrary.

With respect, we disagree with the Bureau's interpretation of the Act on this point. The statutory language of section 90.1 does not create a rebuttable presumption regarding the relationship between the effects of any agreement and its significant purpose. It clearly requires that the Bureau establish a "significant purpose" as an element of the reviewable practice. Simply put, the introduction of a reverse onus through Guidelines – requiring businesses to mount credible evidence to prove that an agreement between non-competitors does not have a significant purpose to prevent or lessen competition – is not supported by a plain reading of the Act. (Nor are we aware of any jurisprudence that would support the Bureau's position on this issue.)

6.2 Refusal to Deal (Section 75) and 7.4 Price Maintenance (Section 76)

As a global observation concerning the draft Guidelines' commentary regarding sections 75 and 76 of the Act, it would be helpful for the Bureau more specifically to outline the circumstances under which the Bureau will enforce these little-used provisions. A more transparent account of where these provisions sit within the Bureau's enforcement priorities – or whether they are, in practice, most likely to be at issue in the context of private actions – will assist businesses and their advisors in understanding and mitigating risk. As drafted, there is nothing in the Guidelines to suggest that – as is the case – the Bureau has not publicly enforced these provisions since the private right of action was introduced into the legislation. (Which the Bureau supported on the basis that the conduct covered by these provisions was largely of a private, contractual nature.)

7. The intersection between the ACCA provisions and other parts of the Act

In our view, the Bureau's draft guidance on the intersection between the merger provisions, the deceptive marketing practices provisions and the cartel provisions offers helpful commentary for Canadian businesses and legal practitioners alike. We appreciate the Bureau's thoughtful, pragmatic analysis concerning the relationship between these provisions of the Act.

8. Conclusion

The Section commends the Bureau for its substantial work in developing the draft Guidelines and for its commitment to ongoing consultation. At the same time, we believe the Guidelines could be significantly strengthened by the Bureau adopting firmer positions – and citing to the legal basis for its interpretations – instead of laying out an array of circumstances under which it may or may not enforce certain provisions.

Additional specificity on market power assessments, the boundaries of joint dominance, and the Bureau's approach to remedies – including administrative monetary penalties – among other sections of the Guidelines, would materially enhance predictability for businesses operating in good faith. Further guidance on the interpretation of rarely enforced provisions would likewise assist firms in navigating an increasingly complex enforcement landscape.

Overall, we appreciate the Bureau's willingness to engage with the legal and business communities. We hope that our feedback contributes to a streamlined final set of Guidelines that deliver the clarity needed to support principled and predictable Canadian competition law enforcement.