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June 29, 2018

Via email: ic.marketstudiesconsultation-consultationsurlesetudesdemarche.ic@canada.ca

Ms. Vicky Eatrides
Deputy Commissioner, Competition Promotion Branch
Competition Bureau
50 Victoria Street
Gatineau, QC K1A 0C9

Dear Ms. Eatrides:

Re: Market Studies Information Bulletin

The Competition Law Section of the Canadian Bar Association (CBA Section) welcomes the opportunity to comment on the draft *Market Studies Information Bulletin* issued for consultation by the Competition Bureau on May 1, 2018.

The CBA Section supports the Bureau's continuing efforts to increase transparency and give stakeholders the opportunity to comment on Bureau initiatives. Given that market studies require a significant commitment of time and resources by both the Bureau and private parties, we commend the Bureau for its meaningful consultation prior to finalizing the Bulletin.

We recognize the Bureau's desire to use market studies to understand the dynamics of a particular industry, to enhance its enforcement of the *Competition Act* and advocate for policies (and possible regulations) that enhance competition. However, we have several concerns about the Bureau's jurisdiction to conduct broad-based market studies (as opposed to inquiries or investigations where competitive concerns have been raised). Further, the significant costs and burdens imposed on private parties during market studies combined with the apparent lack of tangible outcomes from prior market studies suggest the need for broad-based market studies is, at best, questionable.

BUREAU'S LIMITED JURISDICTION TO CONDUCT MARKET STUDIES

The Bulletin states the "Bureau has the power to carry out market studies pursuant to various provisions of the Act, including sections 7, 125, and 126." However, these sections give only very limited powers to the Commissioner, not a broad, unfettered power to initiate market studies. The Bureau's policy on market studies should appropriately reflect the limits of the statutory mandate.

A. Sections 125 and 126 of the Act

Subsection 125(1) allows the Commissioner, “at the request of any federal board, commission or other tribunal or on his own initiative,” to “make representations and call evidence” before the federal body when those representations or evidence are relevant to or factor into a matter before the federal body. Subsection 126(1) allows the Commissioner to do the same with provincial boards, commissions or other tribunals.

On their face, these sections limit the Commissioner to make representations or call evidence only on topics relevant to a matter before a board, commission or tribunal, and to the factors the body is entitled to consider when determining a matter.

Sections 125 and 126 are further constrained by subsections 125(2)¹ and 126(2) which define “board, commission or other tribunal”. The definitions necessarily limit the types of forums where the Bureau may make representations or call evidence. A “board, commission or other tribunal” requires the following elements:

1. that the board, commission, tribunal or person carry on “regulatory activities”;
2. that the board, commission, tribunal or person “is expressly charged by or pursuant to an enactment of Parliament [or, in the case of a provincial board, an enactment of the legislature of a province]; and
3. that the enactment provides the board, commission, tribunal or person “with the responsibility of making decisions or recommendations related directly or indirectly to the production, supply, acquisition or distribution of a product”.

A board, commission or other tribunal must meet all three elements to be an appropriate forum where the Bureau may make representations or call evidence (Qualifying Board).

If a board, commission, tribunal or person does not meet all three elements (i.e., is not a Qualifying Board), we suggest sections 125 and 126 do not give the Commissioner the authority to make representations or call evidence before these bodies. As such, we also suggest sections 125 and 126 do not give the Bureau a residual power to conduct market studies in the absence of a Qualifying Board. The Bulletin should reflect the limitations in sections 125 and 126.

¹ Subsection 125(2) reads: “For the purposes of this section, “federal board, commission or other tribunal” means any board, commission, tribunal or person that carries on regulatory activities and is expressly charged by or pursuant to an enactment of Parliament with the responsibility of making decisions or recommendations related directly or indirectly to the production, supply, acquisition or distribution of a product.”

Subsection 126(2) is similarly worded for provincial legislatures.

B. Section 7 of the Act

The Bulletin states that, in addition to sections 125 and 126, the Bureau has the power to carry out market studies pursuant to section 7 of the Act and the Act's purpose clause.² Section 7 states the Commissioner shall be responsible for "the administration and enforcement of the Act".

In our view, a broad enforcement provision does not give sufficient statutory authority to the Commissioner to exercise powers not specifically assigned under the Act. All exercises of public authority must find their source in law, and decision makers may not exercise authority not specifically assigned to them.³ In the absence of clear statutory language giving the Commissioner the power to conduct market studies, a strong argument could be made that market studies outside the circumstances of sections 125 and 126 would be conducted with no legal authority.

Parliament would have expressly granted the Commissioner the ability to conduct market studies had that been Parliament's intent. In other situations where Parliament gives regulatory bodies power to conduct market studies, surveys and similar assessments, Parliament has clearly outlined the powers.⁴

Statements of past Commissioners support the position that the Act does not confer authority to conduct market studies. In 2003, then Commissioner Konrad von Finckenstein appeared before the House Committee on Industry, Science and Technology to discuss possible causes of an increase in the price of gasoline, the potential negative effects of an increase, and potential corrective measures. In his opening remarks, Mr. von Finckenstein responded to a request to conduct an investigation in the Canadian oil and gasoline industries by observing:

As we indicated in our response to this request, while the Bureau's mandate includes the very important role of being investigator and advocate for competition, the current legislation does not provide the Bureau with the authority to conduct an industry study.⁵ [emphasis added]

² See footnote 4 of the Bulletin.

³ *Dunsmuir v. New Brunswick*, 2008 SCC 9, available [online](#): [Dunsmuir] at paras. 28-29.

⁴ For example:

The *Office of the Superintendent of Financial Institutions Act* provides for disclosure of information that "has been obtained as a result of an industry-wide or sectoral survey conducted by the Superintendent in relation to an issue or circumstances that could have an impact on the financial condition of financial institutions" (RSC 1985, c 18, (3rd Supp), Part I, s 22(3)(b)).

The *Broadcasting Act* expressly grants the Canadian Radio-Television and Telecommunications Commission powers to "undertake, sponsor, promote or assist in research relating to any matter within its jurisdiction under this Act ..." (SC 1991, c 11, s 14(1)).

The *Financial Consumer Agency of Canada Act* grants the Commissioner broad powers to "carry on any activity that he or she considers necessary" in furtherance of the objects in subsection 3(2) and 3(3). These objects include promoting consumer awareness about the obligations of financial institutions, fostering cooperation, monitoring and evaluating trends and emerging issues that may have an impact on consumers of financial products and services, and collaborating with stakeholders. (SC 2001, c 9, ss 3(2), 3(3), 5(5), 5(6)).

⁵ House of Commons Committee on Industry, Natural Resources, Science and Technology Evidence, 37th Parl., 2nd Sess., No. 40 (May 5 2003) at 1535. [Finckenstein].

In response to a subsequent question on the relationship between volume targets, shareholder pressure, and prices in the petroleum industry, Mr. von Finckenstein reiterated “it’s not part of our mandate”⁶ to answer such an industry specific question.

Similarly, then Commissioner Sheridan Scott appeared before the House Committee on Industry, Science and Technology in November 2004, where she was asked why a market study power was not added to the Act after Commissioner von Finckenstein’s appearance before the Committee in 2003:

Mr. Paul Crête: At the time, the Committee was carrying out a comprehensive study [on gasoline prices] which involved reviewing the legislation as a whole. So, I’m a little surprised that three years later, after quite properly carrying out extensive consultations, we end up with a bill that is completely silent on the most contentious issue affecting society today. The oil companies are a very good example, but that would also apply to a variety of industries. Do you not think this aspect of the legislation should be updated as soon as possible?

Ms. Sheridan Scott: It’s a question of consultations. Market studies were the second issue that some people had problems with. We had suggested that the Bureau be able to conduct its own studies. However, the problem revolves around the fact that we have the power to launch criminal proceedings. So, if we were able to carry out general studies, we might end up facing problems with the Charter of Rights and Freedoms, for example, if the testimony of individuals provided in a general context led us to carry out a criminal investigation.

We therefore suggested referring these matters to the Tribunal...but that option would also give rise to some procedural problems. So, we are now trying to find a model that would operate as effectively as possible without giving rise to this kind of procedural problem. We would certainly be prepared to use a model, but not one that doesn’t work.⁷ [emphasis added]

Further, the Bureau has recently noted the lack of statutory authority during the Commissioner’s speech at the 2018 CBA Spring Conference:

For the Bureau to be an effective advocate of competition for Canadian consumers, it needs formal powers to conduct market studies. That includes the power to compel information to conduct the studies... Canada’s lack of formal market study powers falls below international standards...Having formal market study powers would allow the Bureau to more robustly study and make recommendations regarding issues that currently cause substantial economic harm to Canadian consumers and businesses.⁸ [emphasis added]

⁶ *Ibid.* at 1705.

⁷ House of Commons Committee on Industry, Natural Resources, Science and Technology Evidence, 38th Parl., 1st Sess., No. 8 (November 18 2004) at 1600 [Scott].

⁸ Competition Bureau, Remarks by John Pecman, Commissioner of Competition at the Canadian Bar Association Spring Conference, *Building antitrust with trust*, May 10, 2018, available [online](#): see also Competition Bureau, *Competition Bureau Submission to the OECD Competition Committee Roundtable on Methodologies for Conducting Market Studies*, May 4, 2017, available [online](#): “While the Act grants the Commissioner the express authority to appear before federal and provincial boards, commissions and other regulators to advocate for competition, there is no provision that specifically empowers the Bureau to undertake market studies” [emphasis added].

The comments in the *Wilson Report*⁹ on the Bureau's role in competition advocacy (including its use of market studies) suggest that a potential reason Parliament has not granted the Competition Bureau a formal market study power is that other bodies are better suited to conduct these studies. The *Wilson Report* noted:

There are concerns about expanding the role of the Competition Bureau to include additional formal competition advocacy responsibilities in terms of possibly overwhelming its limited resources or causing the Competition Bureau to lose its focus on, or creating a conflict with, its core enforcement responsibilities. In this connection, the Panel is of the view that it is preferable to vest the responsibility for undertaking market studies as well as similar competition advocacy activities in another specialized and independent institution.

The Panel is of the view that the core mandate of the Competition Bureau is, and ought to continue to be, to enforce and promote compliance with the *Competition Act*.¹⁰ [emphasis added]

The Wilson Report's recommendations also align with comments made by Commissioners von Finckenstein and Scott when they appeared before Parliament.¹¹

MARKET STUDY SELECTION AND SCOPING

A. Identifying Potential Market Studies

The Bulletin states "where there is no obvious violation of the Act and yet impediments to competition appear to exist in a sector, the Bureau may use a market study to examine those impediments." As discussed in more detail above, this position appears to rely on the Commissioner's general enforcement and administration powers under section 7 of the Act. However, if there is no ascertainable violation of the Act, the Commissioner may not have the proper authority to act under section 7 in any capacity.

⁹ Competition Policy Review Panel, *Compete to Win* (Ottawa: Industry Canada, 2008) [Wilson Report].

¹⁰ *Ibid.* p. 60.

¹¹ See Finckenstein at 1535: "It seems to me that it would be preferable to have a study on the overall situation carried out by an independent body that would have authority, that would be able to summon witnesses and gather information. It should also have the power to protect confidential information that someone is not necessarily going to want to share, but which would be vital in order to reach a conclusion based on the real facts...As we stated, the Canadian International Trade Tribunal would be able to do this. These analyses would have to be done in an objective manner by a public body that would have the authority to obtain information and the means to protect confidential information" [emphasis added].

See also 1605 where Commissioner Scott highlighted the Canadian International Trade Tribunal as the model of an agency that could more appropriately conduct market studies, as well as other potential options including studies under the *Inquiries Act* and in-depth studies by Parliamentary Committees.

The Bulletin states:

the Bureau generally researches and evaluates several potential sectors before undertaking a market study. The Bureau will seek to identify sectors that are important to the Canadian economy, where the findings of a market study could be used to help promote the efficiency and adaptability of the Canadian economy and provide consumers with competitive products and product choices. [emphasis added]

The Bulletin also states that the Bureau would like to conduct these studies where “impediments to competition appear to exist”. This suggests the Bureau is not simply using these studies to educate itself but rather, may be looking for potential violations of the Act.

In our view, by identifying sectors in this manner, the Bureau risks presupposing its findings before conducting its study. If the decision to initiate a market study is based on the Bureau’s pre-existing view that a sector faces competitive challenges, the Bureau should ensure that its pre-existing views do not shape the design or scope of a market study. Given the potential impact of a market study on the Bureau’s enforcement and advocacy efforts, the proper design and scope of any market study will be critical to ensuring the validity of its findings.

The Bulletin also states that the Bureau relies on a range of information in identifying potential market sectors.¹² The Bulletin correctly states “the Bureau cannot compel any person to provide data or information in the context of a market study.” The Bulletin should explicitly address how the Bureau will ensure the design and scope of a study and the Bureau’s resulting efforts are not influenced by any biases introduced by initial sources of the market study process.

Footnote 6 of the Bulletin references the value of formal investigative powers to conduct market studies. To the extent the Bureau takes the view that formal investigative powers are necessary (as suggested by Commissioner Pecman in his outgoing speeches), then the Bureau should give its rationale and explain why the market studies performed to date have been inadequate for the Bureau’s purposes.

B. Market Study Selection

The Bulletin indicates the Bureau will take into account a wide variety of factors concurrently prior to selecting a market study, including the following factors:

1. Does a forum to present the Bureau’s findings exist, and is there a high level of public interest?
2. Will the Bureau bring forward unique arguments, unlikely to be presented by others?

¹² The sources include: suggestions received through the Bureau’s Advocacy Suggestion Form; input from stakeholders, including the legal and business communities, consumer groups, academics and others; complaints received by the Bureau; previous Bureau activities in a given sector or matters examined by the Bureau’s enforcement branches that appear to indicate competition issues in a sector, but which may not be suitable for enforcement action; competition concerns raised in public policy discussions, media reports or work done by other competition agencies; evaluation of the economic impact of legislation, regulation or policies; legislative or regulatory proposals or proceedings and other federal or provincial policy initiatives; and requests from federal or provincial governments, policymakers or regulators.

3. Will the Bureau be able to gauge the impact of its advocacy efforts?
4. Will the Bureau's efforts have clear, tangible benefits for Canadians? How widely and deeply will the impact be felt?

On the first factor, the existence of a forum where the Bureau can present its findings could be viewed as a necessary requirement rather than just one factor among others in determining whether the Bureau should select a market study. Unless relying solely on section 7 of the Act as the source of the Bureau's authority (which as discussed above is questionable), the CBA Section suggests this factor be more prominent. The Bureau's references to sections 125 and 126 in its comments on follow-up to market studies at page 15 of the Bulletin would similarly require revision.

On the second factor, the Bureau should consider whether regulatory bodies are better able to assess competitive dynamics in regulated industries that may be chosen for a market study. The Bulletin identifies four sample market studies: FinTech, beer, self-regulated professions and generic drugs. In each of these studies, the Bureau was acting in a heavily regulated area.¹³ Instead of conducting its own market study, the Bureau could encourage these regulated bodies to engage in competition analysis, given their expertise in their own regulatory regimes.

Conversely, in view of experiences in past studies of regulated industries, it may be appropriate for the Bureau to focus on assessments of regulatory barriers rather than on studies of a market generally. Thus, the Bureau could focus its analysis on the laws and regulations impeding competition.

For example, in the self-regulated professions study, the Bureau "identified several areas that seemed of general concern, industry restrictions on entering the profession, overly narrow scopes of practice, restrictions on advertising, use of suggested fee guides, and restrictions on business structures." As such, the Bureau's recommendations focused on the parties that regulated the profession rather than the market participants themselves. While market participants can be involved in the study, the Bureau may frame its efforts around, and focus its analysis on, the regulatory framework or policies of the relevant regulator that are impeding competition rather than focus on the conduct of market participants (i.e., Canadian businesses acting within the existing regulatory regimes)

¹³ The expert regulatory agencies in the areas studied are:

- FinTech: provincial securities regulators like the Ontario Securities Commission; federal and provincial consumer protection regulators; the Office of the Superintendent of Financial Institutions; the Financial Transactions and Reports Analysis Centre of Canada; and the Office of the Privacy Commissioner of Canada.
- Beer (Ontario): Liquor Control Board of Ontario; Alcohol and Gaming Commission of Ontario; Canada Revenue Agency (under the *Excise Act* and *Excise Act, 2001*) and Canadian Food Inspection Agency.
- Self-regulated professions: the Bureau examined five professions: accountants, lawyers, optometrists, pharmacists and real estate agents. These professions are governed by provincial governing bodies. For example, in Ontario, the five professions are regulated by the Chartered Professional Accountants Ontario, the Law Society of Ontario, the College of Optometrists of Canada, the Ontario College of Pharmacists, and the Real Estate Council of Ontario.
- Generic Drugs: Health Canada's Health Products and Food Branch.

For the third and fourth factors, the Bureau should examine whether a consideration of these factors as part of the selection criteria is appropriate. Consideration of these factors requires the Bureau to know (or at least presuppose) that the market study will have a measureable impact and produce clear, tangible benefits at the time it selects the study. However, it is our view that the Bureau should not initiate a market study with a conclusion already in mind.

In addition, we believe that relying on the input of stakeholders who may have their own strategic agenda may skew the assessment of these factors. Finally, in respect of the fourth factor (which takes into account “clear, tangible benefits for Canadians”), it would be helpful for the Bulletin to give examples of prior market studies resulting in benefits for Canadians.

C. Market Study Scope

The Bulletin asserts “the Bureau will typically attempt to narrow the scope of its market studies, where appropriate, to target the most important issues that may be impacting competition. This can take the form of presenting key questions that the market study will address (and potentially identifying issues that the market study will not examine).” The importance of selecting the right questions is critical, as how the study is framed can impact its outcome.

The Bulletin states the Bureau will try to narrow the study’s scope by “comparing prices in jurisdictions with regulations that restrict entry against prices in jurisdictions with less restrictive regulations.” Depending on the subject matter, cross-jurisdictional price comparisons can be problematic. Differences in price may be tied to a variety of factors (e.g. historical, environmental or technological), that may make a clear basis for comparison difficult. The Bureau should ensure that any cross-jurisdictional price comparisons are based on accurate and appropriately comparable information, to minimize the risk of the analysis leading to recommendations that could harm Canadian businesses.

D. Information Gathering

We recognize that all relevant information must be obtained for a market study to have real value. However, we also support the Bureau’s intent to make every effort to reduce associated costs and burdens on private parties in responding to market studies. It is also helpful that the Bulletin explains that the Bureau will not require or request day-to-day business documents as part of a market study.

While it is helpful that the Bulletin notes “the Bureau does not use market studies to seek information for its enforcement activities”, any comfort parties might take from this statement is negated by the later statement “where a market study uncovers evidence that the Act may have been contravened, that evidence may be used in an enforcement action”.

While the Bureau may not start by seeking information on possible infractions, it is clear the Bureau takes the view that it can use information collected as part of a market study for enforcement purposes. As discussed in more detail below, the prospect of a participant’s information being used by the Bureau to initiate an enforcement action against the participant reduces the incentive to co-operate in market studies.

The Bulletin also states that the Bureau may retain experts as part of its market study process. Hiring industry, economic or other experts for such work may be expensive and difficult to justify given the Bureau’s limited resources.

In 2016-2017, the Bureau had only \$14.4 million in non-salary expenditures for experts for all 138 ongoing investigations and 35 advocacy initiatives. Hiring an expert for a market study would take away from the limited resources available to the Bureau during its enforcement-related investigations, investigations which could provide a tangible return to Canadians and Canadian businesses in the form of administrative monetary penalties and more competitive markets. Conversely, due to the same limited resources, the Bureau may be unable to hire an expert during a market study where one would otherwise be needed to properly determine and interpret the collected information. In this scenario, the Bureau may publish results and issue recommendations that are incomplete and do not reflect the realities of the industry.

While an independent expert's assessment of collected evidence would likely be helpful in checking any biases from participants, any decision to allocate funds for experts in market studies must also be weighed against the impact on the Bureau's remaining budget to retain experts for enforcement activities.

E. Treatment of Confidential Information

The CBA Section appreciates the Bulletin's reaffirmation of the Bureau's position on the protection of confidential information. However, given the breadth of circumstances where the Bureau has the discretion to communicate confidential information, additional assurances may be required to encourage stakeholders to participate in a market study. In particular, additional protections may be required to assure participants that any information given by them will not be used in enforcement actions against them.

We commend the Bureau's statement that it is unlikely to conduct market studies where it may overlap with any enforcement efforts. The CBA Section urges the Bureau to go further and indicate that it will not typically commence or continue a market study if there is a material risk that it will conduct enforcement actions or investigations involving persons who it has asked to, or reasonably anticipates will, give information as part of a market study, within some reasonable period of time.

Despite this safeguard, it is possible that a market study will be undertaken, and subsequent enforcement activity may occur involving individuals who have given information to the market study. We note the Bureau's commitment to protecting confidential information voluntarily provided during market studies pursuant to section 29 of the Act. However, section 29 explicitly allows information to be used for the purposes of enforcing the Act.

To avoid discouraging participation in market studies by firms likely to have the most relevant information, we urge the Bureau to indicate that it will not typically use (directly or indirectly) information voluntarily given as part of a market study in an enforcement action against the person who provided the information. This could be parallel to the Bureau's commitment not to use information obtained in settlement decisions or from failed leniency discussions. As a practical matter, the number of occasions where the Bureau would be denied the ability to use such information would be limited, but a commitment of this nature would be invaluable in encouraging participation in market studies by firms most likely to possess important marketplace information.

F. Competition Analysis

The Bulletin's discussion of competition analysis focuses on whether there are impediments to competition and recommending remedies for these impediments. The Bulletin uses regulatory barriers to illustrate the approach to resolving impediments.

The Bureau's focus on regulatory barriers is consistent with the CBA Section's suggestion above that the Bureau should normally select market studies with a view of examining regulatory barriers as opposed to the conduct of market participants in a particular industry. If the Bureau agrees, it would be helpful to explain that assessments of and recommendations on regulatory barriers are not simply illustrations of what the Bureau may do in market studies, but is in fact the Bureau's usual priority.

G. Changing Scope or Discontinuing a Market Study

The CBA Section supports the Bulletin's acknowledgement that the Bureau may discontinue a market study where it believes an action by a regulator or other stakeholder reduces the need for a study. We also recommend discontinuing the study where the Bureau's initial research or consultation has not garnered sufficiently broad input from stakeholders (in particular industry participants) for the Bureau to understand the full market dynamics.

H. Pre-Public Consultations

We support pre-public consultations to validate and refine the findings of a market study. In addition to consulting with market study participants, the Bureau should also consult stakeholders who elected not to participate in the study. This would address the possible concern that stakeholders most willing to participate in a market study may be those who are unhappy with the status quo from a business, as opposed to a competition perspective or have a strategic agenda. While publishing an interim draft for public comment is a necessary step, it is also appropriate to proactively reach out to stakeholders to solicit their input and that they be given enough time to comment on the draft report.

Summary and Conclusion

While the CBA Section understands the Bureau's desire to conduct market studies, we believe the Act only confers limited powers to do so. A market study conducted by the Bureau should fall within the scope of the Bureau's mandate under the Act. To the extent the Bureau takes a broader view of its ability to conduct market studies, it should do so only where it believes there is a clear need. This is especially important given the resources required to conduct meaningful market studies – and competing resource required for matters that fall more clearly in the Bureau's legislative remit.

Additional protection on the Bureau's use of information given in a market study should be included in section 29 of the Act to encourage participation (and ensure a meaningful market study).

The CBA Section appreciates the opportunity to comment on the draft Market Studies Information Bulletin. We would be pleased to discuss our comments in more detail.

Yours truly,

(original letter signed by Marc-André O'Rourke for Anita Banicevic)

Anita Banicevic
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