ABUSE OF JOINT DOMINANCE

IS THE CURE WORSE THAN THE DISEASE?

by

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ABUSE OF JOINT DOMINANCE:

Is the Cure Worse than the Disease?

Jason Gudofsky, Evangelia Litsa Kriaris and Lucian Vital[1]

I. INTRODUCTION

Many jurisdictions around the world have competition laws that prohibit or regulate abuse of dominance (and/or monopolization), and in some cases such laws also cover *joint* dominance. Provisions that cover joint dominance are intended to address the concern that firms which operate in oligopolistic markets may interact in such a way as to result in higher prices and profits for those firms, but a social welfare loss to consumers.

While the underlying rationale amongst jurisdictions for regulating joint dominance may be similar, there is no consensus on the type of firm behaviour required for a finding of joint dominance. For example, although it has been more than 20 years since the current abuse of dominance provisions were enacted in Canada's *Competition Act,* there still remains a lack of clarity as to the type of firm behaviour required for a finding of joint dominance in Canada.[2] Canada's Competition Bureau ("**Bureau**") has tried to provide some clarity on the matter through its release of guidelines on how it will enforce the abuse of dominance provisions of the *Competition Act*. However, following the recent release of draft updated guidelines (the (2009) *Draft Abuse of Dominance Guidelines*[3]) the law is uncertain. For instance, when comparing the Bureau's guidance in its still current (2001) *Abuse of Dominance Guidelines*[4] to that set out in its *Draft Abuse of Dominance Guidelines*, the Bureau appears to now cast a much wider net on the type of firm conduct that may lead to a finding of joint dominance. The Bureau's still current guidelines explain that, although the abuse provisions could capture a group of firms that coordinated their actions while not entering into an explicit agreement, "<u>something more than conscious parallelism must exist</u> before the Bureau can reach a conclusion that firms are participating in some form of coordinated activities" (emphasis added).[5] This passage has been dropped from the (2009) *Draft Abuse of Dominance Guidelines*. As noted by the Canadian Bar Association's National Competition Law Section, the Bureau's current position appears to be

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1 The authors would like to acknowledge the very helpful comments that they received from Steve Olley, Thomas Janssens, Joanna Goyder and Debbie Salzberger on earlier drafts of the paper.

2 Paragraph 79(1)(a) of the *Competition Act*, R.S.C. 1985, c. C-34 (the "***Competition Act***") provides that the abuse of dominance provisions apply to "one or more persons" who "substantially or completely control, throughout Canada or any area thereof, a class or species of business".

3 Updated Enforcement Guidelines on the Abuse of Dominance Provisions (Draft January 2009), ("***Draft Abuse of Dominance Guidelines***"), available online at: http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02942.html.

4 Enforcement Guidelines on the Abuse of Dominance Provisions (July 2001) ("***Abuse of Dominance Guidelines***"), available online at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/aod.pdf/$FILE/aod.pdf.

5 *Ibid.* at para. 3.2.1.

that the combined market share and the adoption of similar practices by firms that are alleged to be jointly dominant will be sufficient for a finding of joint dominance.[6]

Such a broad interpretation of the type of firm conduct required for a finding of joint dominance may have unintended consequences. For instance, it may potentially have a chilling effect on competition, particularly given the introduction of possible substantial administrative monetary penalties ("**AMPs**") for abuse of (sole or joint) dominance under the *Competition Act* in 2009. Added to this are the inherent evidentiary difficulties of establishing whether a firm has engaged in inappropriate behaviour and what the remedy (solution) should be where this has occurred. In fact, in many cases, the proposed remedy or cure (which could take the form of pricing regulation or structural changes) could be worse than the disease.

The purpose of this paper is not to critique the theory of abuse of joint dominance, nor to debate whether there are valid policy rationales for the inclusion of abuse of joint dominance provisions in antitrust legislation. Rather, we consider some of the practical challenges involved in regulating oligopolistic behaviour. We begin, in Parts II and III, by discussing the policy rationale behind regulating oligopolies and consider how the antitrust laws of different jurisdictions – in particular, Canada, the United States and the European Union ("**EU**") – address the concept of joint dominance. Next, we discuss the various forms of interaction among oligopolists in Part IV and turn to a discussion of the law pertaining to the abuse of joint dominance in Canada and the EU in Part V. Finally, in Part VI, we explore the question of what the proper standard for joint dominance *should* be, especially in light of the potential chilling effect on competition if potentially pro-competitive conduct is misconstrued as abusive. As discussed below, the issue is not an easy one and the consequences of inappropriate regulation can be serious.

II. REGULATION OF OLIGOPOLIES

The policy rationale behind the regulation of abuses of joint dominance originates in concerns relating to oligopolies – specifically, that oligopolies result in subcompetitive performance. The concern is rooted in the understanding that interdependent pricing results in higher prices and profits.[7] Unlike firms in a perfectly competitive market, oligopolists are interdependent – they make strategic decisions considering their competitors' actions and likely responses.[8] As Carlton and Perloff explain: "because there are only a few firms in an oligopoly,

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6 See the Canadian Bar Association's National Competition Law Section comments on the *Draft Abuse of Dominance Guidelines*, April 2009 at 5, available online at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CBA-comments.pdf/$FILE/CBA-comments.pdf ("**Joint CBA Comments**"). The *Draft Abuse of Dominance Guidelines* state the following: "[W]here these firms are each engaging in similar practices alleged to be anti-competitive, and they appear to together hold market power based on their collective share of the market, barriers to entry or expansion… the Bureau will consider these firms to hold a jointly dominant position." *Draft Abuse of Dominance Guidelines, supra* note 3 at para. 3.2.1(d).

7 Barry E. Hawk & Giorgio A. Motta, "Oligopolies and Collective Dominance: A Solution in Search of a Problem" (2008) (Eighth edition of the Treviso Conference on 'Antitrust Between EC Law and National Law'), Fordham University School of Law, November 2008), at 60, 61 and 67 ("**Hawk & Motta**"), available online at: http://ssrn.com/abstract=1301693.

8 Richard Whish, *Competition Law*. Sixth Edition. London: LexisNexis, 2009, at 546 ("**Whish**").

each firm can affect market price and hence rivals' profits… thus, oligopoly differs from competition and monopoly in that a firm *must* consider rival firms' behaviour to determine its own best policy".[9]

In the mid-20th century, empirical studies seemed to confirm that there was a "direct correlation between high concentration and profits" – e.g., firms in more concentrated markets earned higher profits.[10] Oligopolies were, therefore, considered a "problem that antitrust or competition law needed to address".[11]

However, the view and treatment of oligopolies has changed over time. Starting in the 1970's, the application of new game theoretical models provided fresh insight into the nature of strategic interactions between competitors and changed the way that oligopolists' responses to their rivals' actions were considered. Further, coordination by oligoplists was found to be more difficult than originally thought.[12] New empirical studies revealed that the link between concentration and high profits was not as strong as earlier studies had suggested and did not exist in many industries.[13] Indeed, some economists began to suggest that higher profits earned by oligopolies were actually the result of "greater efficiencies accompanying firm size and higher concentration", rather than anti-competitive conduct.[14] Accordingly, oligopolies began to be considered in a more agnostic light.[15]

Today, there remain, for better or worse, various tools that antitrust authorities have at their disposal to address any concerns they might have that oligopolies can result in subcompetitive performance.[16] These tools include provisions that prohibit cartels,[17] merger control laws,[18] direct regulatory regimes,[19] and laws that regulate abuses of joint dominance. The last is the focus of this paper.

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9 Carlton & Perloff, *Modern Industrial Organization*, 157 (4th ed., 2005) quoted in Hawk & Motta, *supra* note 7 at 60. See also B.A. Facey and D.H. Assaf, *Competition & Antitrust Law: Canada & The United States* (3rd ed., 2006) at 74 ("**Facey & Assaf**").

10 Hawk & Motta, *ibid.* at 60-61. See also Whish, *supra* note 8 at 546-547.

11 *Ibid*.

12 *Ibid*. at 61.

13 *Ibid*.

14 *Ibid*.

15 *Ibid*. See also Whish, *supra* note 8 at 547.

16 Hawk & Motta, *ibid*. at 65.

17 In many jurisdictions, overt coordination by oligopolists through agreement, which results in the formation of a cartel, is a criminal offence and can result in fines and imprisonment for offenders. One key difference between abuse of joint dominance and a cartel is that, in the case of the former, depending on the scope of the relevant law, it may be possible for conduct to be subject to an administrative or judicial order where the parties act in a parallel manner without agreement (i.e., as a normal market outcome), whereas in the case of the latter, the parties have forgone independent competitive conduct and instead have agreed to act in a particular manner in a market.

18 Regulators will consider both the unilateral and coordinated effects of a merger.

III. REGULATION OF ABUSES OF JOINT DOMINANCE

Jurisdictions around the world have taken different approaches to regulating abuses of joint dominance. In some jurisdictions, there are express provisions in antitrust laws that prohibit abuses of joint dominance (in a civil context), whereas in others, only abuses that take place through cartels are prohibited.

For example, in the United States, there is no provision that regulates abuses of joint dominance where firms are acting in a coordinated or interdependent manner so long as it is not as a result of an agreement or arrangement between them. While abuses of single-firm dominance are addressed under §2 of the *Sherman Act*[20] (the monopolization provision which prohibits a single firm from possessing or dangerously threatening to achieve monopoly power),[21] joint dominance (or joint monopolization) under §2 of the *Sherman Act* has been rejected by U.S. courts.[22] For a court to prohibit the formation of a "shared monopoly", evidence of conduct amounting to a conspiracy (an agreement) would be required, and this would be captured under §1 of the *Sherman Act*.[23]

In contrast, the law in the EU contemplates the regulation of joint dominance. Article 102 of the Treaty on the Functioning of the European Union ("**TFEU**") (formerly Article 82 of the Treaty of Rome) specifically prohibits "[a]ny abuse by <u>one or more undertakings</u> of a dominant position within the internal market or in a substantial part of it" (emphasis added).[24] In early cases, the European Court of Justice ("**ECJ**") interpreted this provision as applying to an undertaking acting alone or jointly with one or more additional undertakings.[25] Where the

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19 For example, Hawk & Motta describe how in the United Kingdom, the Competition Commission can undertake an in-depth inquiry of the market and enforce broad remedies (e.g., making more information available to consumers, changing the terms of agreements or the divestment of whole businesses). See Hawk & Motta, *supra* note 7 at 65.

20 July 2, 1890, ch. 647, 26 Stat. 209, 15 U.S.C., as amended.

21 *Midwest Gas Services v. Indiana Gas Company, Inc.,* 317 F.3d 703 (7th Cir. 2003).

22 Hawk & Motta, *supra* note 7 at 63. See also Facey & Assaf, *supra* note 9 at 245.

23 For example, in *JTC Petroleum Co. v. Piasa Motor Fuel*, 190 F.3d 775, 780 (7th Cir. 1999), the plaintiff road contractor sought review of a grant of summary judgment in favour of the defendants, also road contractors, in its suit to recover damages for alleged violations of the *Sherman Act* in connection with their refusal to supply the plaintiff with emulsion. With respect to §2, the court ruled that the plaintiff would have to prove on remand an agreement in order to prevail on its claim of attempted monopolization. That is, multiple firms may be liable under §2 of the *Sherman Act*, but only where there is proof of an agreement. See also Joint Comments of the American Bar Association Section of Antitrust Law and Section of International Law on the Canadian Competition Bureau's Draft Updated Enforcement Guidelines on the Abuse of Dominance Provisions (Sections 78 and 79 of the *Competition Act*), April 15, 2009, available online at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03057.html#ftn_7 ("**Joint ABA Comments**").

24 See Article 102 of the Treaty on the Functioning of the European Union ("**TFEU**"), *Official Journal C 115, 9.5.2008, p. 89–89*, available online at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E102:EN:HTML.

25 Albertina Albors-Llorens, "Collective Dominance in EC Competition Law: Trojan Horse or Useful Tool?" (2003) 5 Cambridge Y.B. Eur. Legal Stud. 151, at 152 ("**Albors-Llorens**"). For example, see Case 78/79 *Deutsche Grammophon v. Metro* [1971] ECR 487 at para. 17.

European Commission ("**EC**") finds an abuse of dominance, it has the power to impose a fine, to order undertakings to cease and desist from the abusive conduct, to order undertakings to adopt positive measures to end the infringement, and even to order the divestiture of assets.[26]

In Canada, the statutory provision that is equivalent to Article 102 also sets out an explicit reference to conduct by two or more persons. In particular, paragraph 79(1)(a) of the *Competition Act* provides that an abuse of dominance can be found where "one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business" (emphasis added).[27] Thus, multiple firms, together, can be found to be jointly dominant.[28] The Commissioner of Competition (the "**Commissioner**") is the only person that can initiate an application before the Competition Tribunal ("**Tribunal**") alleging an abuse of (sole or joint) dominance under section 79 of the *Competition Act*.[29] Where the Tribunal finds that firms have engaged in an abuse of joint dominance, it can issue an order prohibiting the firms from continuing to engage in such conduct, or where such an order would not be effective, it can direct the firms to take specific actions (such as the divestiture of assets or shares or

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26 Whish, *supra* note 8 at 210.

27 *Competition Act*, *supra* note 2 at para. 79(1)(a).

28 However, in order for such firms to be found to have engaged in an abuse of dominance, all of the elements of section 79 must be met. Under section 79, the Commissioner of Competition must establish, on a balance of probabilities, three elements in order for the Competition Tribunal to make an order that an undertaking(s) has engaged in an abuse of dominance. See *Canada (Commissioner of Competition) v. Canada Pipe Co.* (2006), 49 C.P.R. (4th) 241 (FCA) ("***Canada Pipe***") at para. 46.

First, the Commissioner must establish that one or more persons substantially or completely controls the relevant market. This element requires evidence that a dominant firm holds - or two or more dominant firms jointly hold - market power, namely the ability to profitably set prices above competitive levels for a considerable period of time, within a relevant market. See *Canada (Director of Investigation and Research, Competition Act) v. Laidlaw Waste Systems Ltd.* (1992), 40 C.P.R. (3d) 289 (Comp. Trib.) ("***Laidlaw***") and *Canada (Competition Act, Director of Investigation and Research) v. Tele-Direct (Publications) Inc.* (1997), 73 C.P.R. (3d) 1 (Comp. Trib.) ("***Tele-Direct***") at 82.

Second, the dominant firm must have – or dominant firms must have – engaged in a practice of anti-competitive acts. Section 78 of the *Competition Act* provides a non-exhaustive list of anti-competitive acts that trigger the application of this provision. The impugned anti-competitive conduct must be part of a "practice", meaning more than an "isolated act", and it must done for an anti-competitive purpose that is "predatory, exclusionary or disciplinary" vis-à-vis a competitor (or competitors). See *Canada Pipe*, *supra* and *Tele-Direct, supra* at 211. Individual anti-competitive acts taken together may constitute a practice.

While the test is an "anti-competitive" purpose, the Federal Court of Appeal in *Canada Pipe*, *supra* at paras. 87-88 stated that a valid business justification, while not an absolute defence, can be used to demonstrate that the "anti-competitive" effects are not the overriding purpose of the conduct in question. See *Canada Pipe, supra* at para. 77.

Third, the anti-competitive conduct must have had, is having or is likely to have the effect of preventing or lessening competition substantially in a market. Essentially, this element requires evidence that the alleged anti-competitive act will "preserve or enhance the dominant firm's market power." Primary consideration is given to whether the relevant market would have been substantially more competitive but for the allegedly anti-competitive conduct. See *Canada Pipe, supra* at paras. 35-38 and *Canada (Director of Investigation and Research, Competition Act) v. NutraSweet Co.* (1990), 32 C.P.R. (3d) 1 (Comp. Trib.) ("***NutraSweet***") at 47.

29 There is no private right of action for third parties to seek relief from the Tribunal under section 79 of the *Competition Act*; only the Commissioner can bring such a case.

requiring that certain conduct cease).[30] As a result of amendments to the *Competition Act* in March 2009, the Tribunal can now also order AMPs not exceeding $10 million to each firm (for the first order) where an abuse of joint dominance is found.[31]

The purpose of this paper is not to critique the theory of abuse of joint dominance, nor to debate whether there are valid policy rationales for the inclusion of abuse of joint dominance provisions in antitrust legislation. Clearly, the fact that jurisdictions treat such abuses differently confirms that there are divergent views (and policies) on this issue. This paper examines the concerns that the current state of the law in Canada poses for businesses that operate in an oligopolistic market – both from an application perspective (i.e., what forms of firm interaction can constitute joint dominance) and from an enforcement perspective (i.e., the implications of its application – e.g., is the cure worse than the disease?) This is particularly important in view of the fact that the Tribunal can now order AMPs where an abuse of dominance is found.

In this paper, we focus on the issues associated with identifying the type of firm conduct necessary for a finding of joint dominance, particularly in view of the remedies that could be imposed.

IV. OLIGOPOLISTIC INTERACTION

There are various ways that oligopolists can interact with their competitors in a market. Although the nomenclature varies and the various modes of interaction are sub-divided differently by different commentators,[32] for the purposes of our analysis, we have grouped such conduct into four broad categories.

At one end of the spectrum is overt collusion. Overt collusion refers to the practice of firms explicitly coordinating their behaviour (i.e., conspiring) in order to achieve supra-

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30 *Competition Act*, *supra* note 2 at subsections 79(1) and 79(2).

We note that until recently, there was no civil provision in the *Competition Act*, other than section 79, that regulated agreements between competitors. (Section 45 dealt with agreements in a criminal context.) However, as a result of the recent amendments to the *Competition Act*, agreements between competitors can now also be reviewed under a new civil provision – section 90.1.

31 *Competition Act*, *supra* note 2 at subsection 79(3.1). The penalty can be up to $15 million for each subsequent order.

32 For example, Edward Iaccobucci and Ralph Winter discuss "coordination" versus "conscious parallelism" in the context of the (2001) *Abuse of Dominance Guidelines.* See Edward M. Iacobucci & Ralph A. Winter, "Abuse of Joint Dominance in Canadian Competition Policy" (2010) 60 U. Toronto L.J. 219 at 223 ("**Iaccobucci & Winter**"). Felix Mezzanotte discusses "tacit collusion" versus "non-collusive, economic interdependence". See Felix E. Mezzanotte, "Interpreting the Boundaries of Collective Dominance in Article 102 TFEU" (2010) EBLR 519, at 527 ("**Mezzanotte I**"). Joseph Harrington describes conscious parallelism as a type of tacit collusion. See Joseph E. Harrington, "Posted Pricing as a Plus Factor", August 2010, available online at: http://www.econ.jhu.edu/pdf/Papers/wp565.pdf ("***Harrington***").

The Bureau's still current guidelines distinguish between conscious parallelism and coordinated behaviour. They explain that, although the abuse provisions could capture a group of firms that coordinated their actions while not entering into an explicit agreement, "something more than conscious parallelism must exist before the Bureau can reach a conclusion that firms are participating in some form of coordinated activities" (emphasis added). See *Abuse of Dominance Guidelines, supra* note 4 at para. 3.2.1. This passage is no longer included in the (2009) *Draft Abuse of Dominance Guidelines.*

competitive profits. It requires an agreement between firms (e.g., to fix prices, allocate market share, etc.). Communication is required to establish the relationship and to sustain it.[33] Overtly collusive behaviour is generally considered criminal and subject to fines and imprisonment under criminal conspiracy provisions.[34]

A second category of conduct is tacit collusion/coordination – a behaviour in which "two or more firms are able to adopt a less vigorous mode of competition that enables them to increase prices" above competitive levels.[35] This "understanding" does not involve any explicit agreement or communication between firms (e.g., firms are able to earn supra-competitive profits without any type of direct or indirect contact).[36] Rather, firms recognize "the competitive interaction between themselves and competing firms" and adjust their strategies and actions accordingly.[37] Effectively, the actions of market players are similar to what they would be under overt collusion, but without an agreement.

A third category of conduct is conscious parallelism/interdependent behaviour,[38] which has been described by the Ontario court in *Large Lamps* as follows:[39]

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33 Lia Vitzilaiou & Constantinos Lambadarios, "The Slippery Slope of Addressing Collective Dominance Under Article 82 EC" *GCP: The Antitrust Chronicle* (October 2009), at 8 ("**Vitzilaiou & Lambadarios**"), available online at: https://www.competitionpolicyinternational.com/the-slippery-slope-of-addressing-collective-dominance-under-article-82-ec/.

34 In Canada, criminal conspiracies are prohibited under section 45 of the *Competition Act*, which, following amendments that came into force in March 2010, creates a *per se* offence. Section 45 prohibits only the most egregious cartel behaviour including price fixing, allocation of sales, territories, customers or markets and fixing production or supply. In the U.S., criminal conspiracies are prohibited under §1 of the *Sherman Act*. In the EU, the equivalent provision is Article 101 of the TFEU.

35 Simon Bishop & Andrea Lofaro, "A legal and economic consensus? the theory and practice of coordinated effects in EC merger control" (2004) 49 Antitrust Bull. 195, at 198-199 ("**Bishop & Lofaro**").

36 Mezzanotte I, *supra* note 32 at 527.

37 Bishop & Lofaro, s*upra* note 35 at 199.

38 Conscious parallelism also has been described by some authors as the conscious or knowledgeable adoption of uniform business practices, without any agreement or understanding, by competitors in a particular market. See W.T. Stanbury and G.B. Reschenthaler, "Oligopoly and Conscious Parallelism: Theory, Policy and The Canadian Cases", Osgoode Hall Law Journal, (1977) 15 Osgoode Hall L.J. 617, at 620 ("**Stanbury & Reschenthaler**").

Another commentator has described conscious parallelism as follows:

> Conscious parallelism is when supracompetitive prices are achieved without an agreement. An example often associated with adjacent gasoline or petrol stations is when one station raises its price to a supracompetitive level and the other station matches the price hike. While there may be mutual understanding regarding the underlying mechanism that stabilizes those supracompetitive prices (for example, any price undercutting results in a return to competitive prices), this understanding was not reached through any form of direct communication.

See Harrington, *supra* note 32.

39 *R. v. Canadian General Electric Company Ltd. et al.* (1976), 15 O.R. (2d) 360 (H.C.) at 407 ("***Large Lamps***").

> …pricing that emerges out of an oligopolistic market setting without communication or agreement among the sellers. The crux of the theory of conscious parallelism is briefly that the oligopolists are interdependent in their pricing: they base their pricing decisions in part on anticipated reactions to them. Put differently, the oligopolist is behaving in exactly the same way as a rational seller in a competitively structured market; he is simply taking into account the reactions of his rivals to any price cut or increase which he has to take into account because of the situation in which he finds himself.

Finally, at the other end of the spectrum is independent behaviour, in which firms compete with one another without coordination and without engaging in conscious parallel behaviour. This category may include, however, *un*conscious parallel behaviour.[40]

V. THE LAW OF ABUSE OF JOINT DOMINANCE

In order for firms to avoid the possibility of having their conduct subject to a Tribunal order under Canada's (joint) abuse of dominance provision of the *Competition Act*, they must understand the types of actions or interactions with competitors that could trigger a finding of joint dominance. However, as discussed below, there is no real clarity on this issue in Canada and none is provided by considering how other jurisdictions, such as the EU, have addressed this matter.[41] This causes a level of uncertainty in how firms should operate to avoid engaging in behaviour that would find them jointly dominant with other firms. We begin first with a discussion of the law in Canada and then turn to a consideration of the law in the EU.

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[40] Some question whether oligopolists can, in fact, engage in conduct that is completely "independent". As discussed by Stanbury & Reschenthaler, "[t]o ask an oligopolist to behave independently in the sense of not taking into account the actions and reactions of his competitors is to ask him to behave irrationally."

Furthermore, the authors state:

> The essence of an oligopoly is that the number of firms is sufficiently few that they are mutually dependent; a change in the price of output of any firm has a detectable effect upon all the firms in the relevant market. Plainly, if an oligopolist is going to exist over time he cannot be "self-determining" or "autonomous." He is, in fact, dependent on and is part of some larger group or system. He is affected by and influenced in his choice of action by others, namely the other members of the industry.

Stanbury & Reschenthaler, supra note 38 at 628.

The nature of oligopolies is such that their behaviour is interdependent, so whether "independent" behaviour which does not take into account competitors' actions is even possible, has been questioned. However, as Whish discusses in *Competition Law*, in some oligopolistic markets, interdependence is not that strong and competition is intense. While open price competition may be limited, non-price competition may be particularly strong, which may include such things as: offering better quality products and after-sales service, improved technical innovation through research and development, the use of loyalty schemes and the making of large investments to improve brand image. Whish, *supra* note 8 at 549.

[41] For the purposes of this paper, we have not considered the law in all jurisdictions that have abuse of joint dominance legislation. Rather, we focus on how the law has developed in the EU, given the size of commerce that is subject to, and the substantial development of, Article 102.

A. Canada

(i) Background

The *Competition Act*'s civil abuse of dominance provisions were introduced in 1986 in order to address the perceived ineffectiveness of the prior criminal provisions, which required a higher standard of proof – that is, proof beyond a reasonable doubt – of the "operation or likely operation of a completely controlled class of business in a market area to the detriment or against the public interest."[42] At the time that section 79 was added to the *Competition Act,* much consideration was given to restricting the application of the law to a single firm with an appropriately lower threshold of market power.[43] However, because there were very few industries in Canada in which only one firm controlled the market, it was determined that joint dominance combined with a "substantial or complete control" test would provide greater protection for small businesses and consumers.[44] Hence, the current abuse of dominance provision was included in the *Competition Act*.

While the provision clearly allows for the possibility of multiple firms, together, being found to be jointly dominant, the circumstances under which this will occur is not clear – i.e., what sort of firm interaction is required for firms to be found to be jointly dominant? Must firms be coordinating their actions in some way (e.g., through tacit coordination)? Or could firms be found to be jointly dominant where they acted completely independent of one another?

(ii) Description of the Competition Bureau's Current Position

The Bureau has attempted to provide some guidance by issuing guidelines on how it will analyze an abuse of joint dominance. While these guidelines do not have the force of law,[45] they help identify the Bureau's current thinking on the matter. As set out in the *Draft Abuse of Dominance Guidelines,* it is the Bureau's view that joint dominance can exist even in the absence of evidence of coordination between the firms that are alleged to be jointly dominant. In particular, the draft guidelines provide that the test for joint dominance is based on market conditions and on the actions of firms, without requiring evidence of coordination:[46]

> [W]here these firms are each engaging in similar practices alleged to be anticompetitive, and they appear to together hold market power based on their collective share of the market, barriers to

42 *R. v. K.C. Irving Ltd.*, [1978] 1 S.C.R. Also, see *Competition Law Amendments: A Guide*, Minister of Consumer and Corporate Affairs, The Honourable Michel Coté, December 1985 at 3 ("***Competition Law Amendments Guide***").

43 The potential application of the abuse of dominance provisions to the concept of joint dominance and conscious parallelism was the subject of significant criticism at the time. See C. Goldman and J. Bodrug, eds., *Competition Law of Canada* (New York: Juris Publishing, Inc., 2008) at 9-85 ("***Competition Law of Canada***").

44 See *Competition Law Amendments Guide*, *supra* note 42 at 22.

45 In *Canada (Commissioner of Competition) v. Superior Propane Inc.* (2001), 11 C.P.R. (4th) 289 the Federal Court of Appeal held that the Bureau's guidelines relating to mergers were "not law because they are not made under a grant of statutory authority, and cannot determine the meaning of the Act" (at para. 124).

46 See *Draft Abuse of Dominance Guidelines*, *supra* note 3 at para. 3.2.19(d).

> entry or expansion...the Bureau will consider these firms to hold a jointly dominant position.

The *Draft Abuse of Dominance Guidelines'* silence with respect to coordination is a marked departure from the Bureau's still current guidelines in this area, which explained that, although the abuse provisions could capture a group of firms that coordinated their actions while not entering into an explicit agreement, "something more than conscious parallelism must exist before the Bureau can reach a conclusion that firms are participating in some form of coordinated activities."[47] It is also a marked departure from other statements previously made by the Bureau, including a 2006 speech by the former Commissioner, Sheridan Scott, addressing the US Federal Trade Commission and Department of Justice, who stated: "[i]n order for the Bureau to conclude that there has been a potential joint abuse of dominance there must be evidence to show coordinated behaviour albeit short of "conspiracy" covered by our criminal cartel provisions."[48]

The difference between the Bureau's current (2001) guidelines and its draft (2009) guidelines suggest that the Bureau's current position appears to leave open the possibility that conscious parallelism and even *un*conscious parallelism (i.e., conduct by several firms that may result in similar effects, whether or not either firm anticipated the other's conduct) may be sufficient to constitute jointly dominant behaviour.[49] Similarly, the *Draft Abuse of Dominance Guidelines* do not address any possible distinction between anti-competitive jointly dominant behaviour based on conscious parallelism versus pro-competitive conduct involving, for example, price "matching" or "meeting the competition".[50] The evolution in the Bureau's thinking about the application of section 79 of the *Competition Act* to abuse of joint dominance is not a result of a change in the statutory provision or jurisprudence since the current (2001) guidelines were published.

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47 *Abuse of Dominance Guidelines, supra* note 4 at para. 3.2.1.

48 Speaking Notes for Sheridan Scott Commissioner of Competition, Competition Bureau, "Abuse of Dominance Under the Competition Act", Federal Trade Commission/Department of Justice Hearings on Single-firm Conduct, Washington D.C., September 12, 2006, available online at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02179.html.

49 See Joint ABA Comments, *supra* note 23.

Prior legislative proposals of the abuse of dominance provisions (which were not adopted) expressly sought to encompass conscious parallelism (e.g. inter-firm coordination in the absence of an agreement). However, these provisions were later dropped after receiving significant criticism from the business community. One could argue that since proposed bills, which specifically permitted remedial orders in respect of conscious parallelism were not passed by Parliament, the absence of a specific reference to this concept in the *Competition Act* suggests an intention that it not be included within the scope of section 79 (i.e., if Parliament rejected draft provisions relating to conscious parallelism, then it would seem inappropriate for the Bureau to now interpret abuse of joint dominance on this basis). Nevertheless, as described further above, the Bureau's current position leaves open the possibility that unconscious parallelism (i.e., conduct by several firms that may result in similar effects, whether or not either firm anticipated the other's conduct) would be caught by section 79 of the *Competition Act*. See *Competition Law of Canada, supra* note 43 at 9-85 - 9-86.

50 *Supra* note 3.

Indeed, none of the contested abuse of dominance cases that the Commissioner has brought before the Tribunal under section 79 have considered the issue of joint dominance. There have, however, been three cases where the parties have entered into consent agreements with the Bureau to resolve the Commissioner's concerns in respect of abuses of joint dominance. Unfortunately, these cases provide no further insight as to what type of behaviour would be required for a finding of joint dominance. In the first case, *Interac*, the issue of conscious parallelism was not addressed, as the respondents had entered into an explicit agreement with each other through the Interac association.[51] Similarly, in the second case, *AGT,* the respondents' activities were governed by an agreement.[52] In the third case, *Waste Management,* nothing in the consent agreement indicated any coordinated action by the firms.[53] However, as this case was resolved on consent, it provides little assistance in identifying the minimum criteria for joint dominance. Like the *Draft Abuse of Dominance Guidelines*, it is simply illustrative of the Bureau's current approach, which does not seem to require coordination among firms in order for the firms to be considered jointly dominant.

Also illustrative of the Bureau's current approach to joint dominance is an ongoing case involving the Canadian Real Estate Association ("**CREA**").[54] On February 8th, 2010, the Commissioner filed a Notice of Application alleging that, among other things, CREA and its members used their control of MLS (a multiple listing service) and related trademarks to impose exclusivity restrictions on their use, thereby maintaining their dominance in the market for the

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[51] In *Bank of Montreal et al v. The Director of Investigation and Research* (CT-1995-002) ("***Interac***"), a consent order was issued against a group of banks that had acted collectively, through the Interac association, to exclude other banks from participating in the network. The consent order required the respondents to amend the by-laws of the Interac association to remove restrictions on membership by other financial institutions, allow indirect access by other commercial entities, modify the governance of Interac with respect to the composition of its board, and modify pricing practices and procedures for approving new network services. This case, however, did not address the issue of conscious parallelism because the respondents had entered into an explicit agreement with each other through the Interac association.

[52] In *Canada (Director of Investigation and Research) v. AGT Directory Ltd.* (CT-1994-002) ("***AGT***"), the Director (former title of the Commissioner) alleged that the respondents, publishers of yellow pages telephone directories in Canada, had jointly engaged in a practice of anti-competitive acts. The Director alleged that each of the respondents substantially or completely controlled, in each of their respective territories, the business of publishing telephone directories, and that jointly they controlled a class or species of business for the purposes of paragraph 79(1)(a) of the *Competition Act*. The respondents had been accused of foreclosing the entry of independent third parties and of the respondents in each of their respective territories (e.g., market allocation). This case provides some insight into how the Bureau may view joint dominance (i.e., that parties with unilateral dominance in specific areas may be viewed as collectively dominant if similar activities take place in all of the areas and these are considered together).

[53] In *Waste Services (CA) Inc. and Waste Management of Canada Corporation (formerly Laidlaw Waste Systems Ltd.) v. The Commissioner of Competition (formerly the Director of Investigation and Research)* (CT-2009-003) ("***Waste Management***"), the Bureau alleged that Waste Services (CA) Inc. and Waste Management of Canada Corporation were foreclosing competition by using long-term contracts that locked in customers and included similar, and highly restrictive terms such as automatic renewal clauses, liquidated damages and rights of first refusal. According to the Commissioner's theory of competitive harm, these contracts resulted in substantially less competitive markets for commercial waste collection services in central Vancouver Island, leading to higher prices and reduced choice for businesses.

[54] *The Commissioner of Competition v. The Canadian Real Estate Association* (CT-2010-002). Like the *Interac* case, this case sheds little light on the issue of coordination since members of CREA operate through an explicit association.

supply of residential real estate brokerage services throughout Canada. This case has not yet been heard or decided by the Tribunal, and hence can offer no further insight on the state of the law regarding abuse of joint dominance in Canada.[55]

There is, therefore, no Canadian jurisprudence which discusses the type of firm interaction required to trigger a finding of joint dominance. To date, the only cases that the Commissioner has brought before the Tribunal alleging joint dominance have been resolved on consent.[56] Moreover, while the Bureau has attempted to provide some guidance in this area, through the issuance of its *Draft Abuse of Dominance Guidelines*, the expanded scope propounded by the draft guidelines is not, as noted, based on any case law and, in any event, will not bind the Tribunal or Canadian courts. Furthermore, as previously noted, there is no concept of abuse of joint dominance under §2 of the *Sherman Act* and, as discussed below, the Bureau's proposed approach goes beyond the approach taken by the EC to the abuse of joint dominance under Article 102.

B. European Union

(i) Background

The EC and European courts have considered the issue of joint dominance (sometimes referred to in the EU as collective dominance) in several cases where it was alleged that firms had engaged in conduct contrary to Article 102. While the law has evolved over time, the general standard applicable in the EU is that firms can be found to be collectively dominant where they have presented themselves or acted together on a particular market as a single or "collective entity"[57] and this fact would be established through some sort of "links".

In one of the leading cases in this area, *Compagnie Maritime Belge*,[58] the ECJ stated:[59]

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55 Although the words "joint dominance" do not appear in the Notice of Application for CREA, the Bureau's theory of the case must involve joint dominance, as it is the members of CREA that compete, not CREA itself. Without such a theory of joint dominance, presumably the case would fail to meet the element set out at section 79(1)(b), as explained by the Federal Court of Appeal in *Canada Pipe*, that requires the anti-competitive to be aimed at a competitor.

56 Because these cases have been resolved on consent, they provide limited insight into what is required for a finding of joint dominance. Specifically, firms may choose to settle a matter for a variety of reasons (e.g., the costs of fighting a case exceed the costs of settlement, nuisance costs of litigation make fighting unfeasible, etc). Hence, settlement should not be considered an admission or concession by the respondents that they had contravened section 79 of the *Competition Act.*

57 Joined cases C-395/96P and C-296/96P, *Compagnie maritime belge transports SA (C-395/96P), Compagnie maritime belge transports* SA (C-396P) and Dafra-Lines A/S (C-396/96P) v. Commission of the European Communities, 2000, ECR, I-1365 ("***Compagnie Maritime Belge***"); Case C-393/92, *Municipality of Almelo and others v. NV Energiebedrijf Ijsselmij*, 1994, ECR. I-1477 ("***Almelo***"); Case C-96/94, *Centro Servizi Spediporto v Spedizioni Marittima del Porto Srl,* 1995, ECR, I-2883. See also Vitzilaiou & Lambadarios, *supra* note 33 at 2-3.

58 *Compagnie Maritime Belge*, *supra* note 57. In this case, the firms were linked in a number of ways, including by way of membership in CEWAL, a shipping conference (i.e., an agreement between two or more shipping companies to provide scheduled cargo and/or passenger service on a particular trade route under uniform rates and common terms), and by a non-competition agreement. These linkages were sufficient for a finding that the firms presented themselves on the market as a collective entity.

> [A] dominant position may be held by two or more economic entities legally independent of each other, provided that from an economic point of view they present themselves or act together on a particular market as a collective entity.
>
> ...
>
> <u>In order to establish the existence of a collective entity as defined above, it is necessary to examine the economic links or factors which give rise to a connection between the undertakings concerned.</u> (emphasis added)

The ECJ also explained:[60]

> ...for the purposes of analysis under Article [102] of the Treaty, it is necessary to consider whether the undertakings concerned together constitute a collective entity vis-à-vis their competitors, their trading partners and consumers on a particular market. It is only where that question is answered in the affirmative that it is appropriate to consider whether that collective entity actually holds a dominant position and whether its conduct constitutes abuse.

Thus, firms that behave as a collective entity in their dealings with other market players (e.g., competitors, trading partners, consumers, etc.), by virtue of some sort of connection or "link", can be found to be collectively dominant. It has been held that these connections or links can be economic or contractual,[61] or can arise from other factors that connect two or more undertakings to enable them to behave as a common entity.[62] However, the following comments

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59 *Ibid*. at paras. 36 and 41.

60 *Ibid*. at para. 39. See also Mezzanotte I, *supra* note 32 at 525.

61 In one of the first cases to consider the issue of joint dominance, *Italian Flat Glass,* the Court of First Instance (now called the General Court) found that two or more independent economic entities could be found to be jointly dominant, *vis-à-vis* the other operators on the same market, through "economic links". See Joined Cases T-68/89, T-77/89 and T-78/89 *Società Italiano Vetro v. Commission* [1992] ECR II-1403 at para 358. See also Albors-Llorens, *supra* note 25 at 154-155.

62 In a subsequent case, *Almelo,* the European Court of Justice held that "undertakings must be linked in such a way that they adopt the same conduct in the market, in order to be collectively dominant". In this case, the companies were connected through a trade association, which involved an exclusive purchase obligation contained in the general terms and conditions of contracts for the supply of electricity in the Netherlands. These terms and conditions were drawn up by the local trade association. See *Almelo* at para. 42. See also Albors-Llorens, *supra* note 25 at 155-156.

In *Irish Sugar plc. v. Commissioner of the European Communities* Case T-228/97 [1999] ECR II-2969 ("***Irish Sugar***"), the Court of First Instance determined that "links" included the company's equity holdings in the distributor company and representation on its board, as well as economic ties (e.g., its commitment to cover the cost of all promotions and rebates offered by the distributor to individual customers). In that case, the Court of First Instance had also upheld the decision of the EC which had determined that collective dominance could apply in a vertical commercial relationship which involved a supplier and one of its distributors. See *Irish Sugar* at paras. 61-64. The decision of the Court of First Instance was appealed before the European Court and the appeal was dismissed by Order of 10 July 2001 (Case C-497/99). See also Albors-Llorens, *supra* note 25 at 163-164.

of the ECJ in *Compagnie Maritime Belge* raise the question of whether these links also can include links arising from market structure (such as the relationship of interdependence between oligopolists):[63]

> The existence of a collective dominant position may therefore flow from the nature and terms of an agreement, from the way in which it is implemented and, consequently, from the links or factors which give rise to a connection between undertakings which result from it. Nevertheless, the existence of an agreement or of other links in law is not indispensable to a finding of a collective dominant position; <u>such a finding may be based on other connecting factors and would depend on an economic assessment and, in particular, on an assessment of the structure of the market in question</u>. (emphasis added)

The precise meaning of the ECJ's concluding remarks in the above passage, that "connecting factors" could be established by an "economic assessment" of the particular market structure, is not certain since the ECJ did not clearly describe the types of economic interactions between firms that must exist to find that two or more firms operate as a collective entity in a market (i.e., if there was no link in law or through agreement).[64] The judgment has spurred debate as to whether the ECJ's words broadened the meaning of "collective entity" to include tacit collusion/coordination between firms or whether it went even further - that "mere oligopolistic interdependence" could be found to be an 'economic link' or 'connecting factor' that could establish collective dominance under Article 102.[65]

Moreover, subsequent case law added to the debate. Both the EC and ECJ considered the issue of joint dominance in the context of merger cases – specifically, whether the EC Merger Regulation ("**ECMR**") "would apply to concentrations likely to create or strengthen a position of joint or collective dominance".[66] The EC and ECJ considered and applied the principles developed in the Article 102 cases to the assessment of dominance under the ECMR.[67] However, their conclusions relating to the type of firm behaviour to which collective dominance could apply went further than the Article 102 cases. Specifically, in *Sony/BMG*,[68] the ECJ confirmed "that a group of firms can hold a position of pre-existing collective dominance if they are engaged in tacitly collusive conduct prior to a merger".[69]

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63 Mezzanotte I, *supra* note 32 at 526.

64 Vitzilaiou & Lambadarios, *supra* note 33 at 6. Mezzanotte I, *supra* note 32 at 526.

65 See the following: Mezzanotte I, *supra* note32 at 526. Vitzilaiou & Lambadarios, *supra* note 33 at 6 and Hawk & Motta, *supra* note 7 at 90-91.

66 Albors-Llorens, *supra* note 25 at 158.

67 Hawk & Motta, *supra* note 7 at 92.

68 Case C-413/06 P, *Bertelsmann AG v. Independent Music Publishers & Labels Association*, 5 CMLR 17 (ECJ) ("***Sony/BMG***")

69 Felix E. Mezzanotte, "Using Abuse of Collective Dominance in Article 102 TFEU to Fight Tacit Collusion: The Problem of Proof and Inferential Error" (2010) 33 W. Comp. 1 77, at 77-78 ("**Mezzanotte II**").

The reference and inclusion of Article 102 case law in the determination of "collective dominance" under the ECMR raises questions as to whether the court's decisions could "influence the law of collective dominance in Article 102".[70] In other words, could a finding of "collective dominance" be made in an Article 102 case by establishing that the parties had engaged in tacit collusion/coordination?[71]

To date, collective dominance has been applied by the EC in limited circumstances.[72] There have been no cases in which firms accused of engaging in abusive conduct under Article 102 have been found to be collectively dominant on the basis of tacit collusion/coordination. The decisions have been limited to firms that had some sort of economic or contractual links.[73]

In *Sony/BMG,* the ECJ defined collective dominance in the context of merger control as follows at paras. 122-123:

> A collective dominant position... may thus arise as the result of a concentration where, in view of the actual characteristics of the relevant market and of the alteration of those characteristics that the concentration would entail, the latter would make each member of the oligopoly in question, as it becomes aware of the common interests, consider it possible, economically rational, and hence preferable, to adopt on a lasting basis a common policy on the market with the aim of selling at above competitive prices, without having to enter into an agreement or resort to a concerted practice within the meaning of Article 81 EC and without any actual or potential competitors, let alone customers or consumers, being able to react effectively.
>
> Such a tacit coordination is more likely to emerge, if competitors can easily arrive at a common perception as to how the coordination should work, and, in particular, of the parameters that lend themselves to being a focal point of the proposed coordination. Unless they can form a shared tacit understanding of the terms of the coordination, competitors might resort to practices that are prohibited by Article 81 EC in order to be able to adopt a common policy on the market. Moreover, having regard to the temptation which may exist for each participant in a tacit coordination to depart from it in order to increase its short-term profit, it is necessary to determine whether such coordination is sustainable. In that regard, the coordinating undertakings must be able to monitor to a sufficient degree whether the terms of the coordination are being adhered to. There must therefore be sufficient market transparency for each undertaking concerned to be aware, sufficiently precisely and quickly, of the way in which the market conduct of each of the other participants in the coordination is evolving. Furthermore, discipline requires that there be some form of credible deterrent mechanism that can come into play if deviation is detected. In addition, the reactions of outsiders, such as current or future competitors, and also the reactions of customers, should not be such as to jeopardise the results expected from the coordination.

See also Mezzanotte I, *supra* note 32 at 535.

70 Mezzanotte II, *supra* note 69 at 77.

71 There is substantial debate on this issue (e.g., whether different standards should apply when dealing with *ex-ante* rather than *ex-post* situations) and, given the decisions under Article 102 and the ECMR, it is not clear how the ECJ would decide on the tacit collusion/coordination issue in the future. See Vitzilaiou & Lambadarios, *supra* note 33 at 10. According to Professor Whish: "One of the most complex and controversial issues in Community competition law has been the application – or non-application – of Article [102] EC and the ECMR to so-called 'collective dominance'". See Whish, *supra* note 8 at 556.

72 Hawk & Motta, *supra* note 7 at 103.

73 Sophia Stephanou, "Collective Dominance Through Tacit Coordination: The Case for Non-Coordination Between Article 82 and Merger Control 'Collective Dominance' Concepts" *GCP: The Antitrust Chronicle*

Collective dominance has not been found under Article 102 where firms merely exhibited oligopolistic interdependence.[74]

Further, the treatment of collective dominance (or lack thereof) in the EC's recently published guidance paper may indicate that the EC does not want to pursue Article 102 cases solely on the basis of tacit collusion/coordination. Specifically, in 2005, the EC published a staff discussion paper ("**Discussion Paper**") on the application of EC Treaty competition rules on the abuse of a dominant market position (under Article 102). The Discussion Paper was designed to "promote a debate as to how EU markets are best protected from dominant companies' exclusionary conduct" and suggested "a framework for the continued vigorous enforcement" of Article 102.[75]

The Discussion Paper addressed the issue of collective dominance stating:[76]

> [T]he existence of an agreement or of other links in law is not indispensable to a finding of a collective dominant position. Such a finding may be based on other connecting factors and depends on an economic assessment and, in particular, on an assessment of the structure of the market in question.
>
> …
>
> A finding of abuse of a collective dominant position is typically based on showing that the collectively dominant undertakings have tacitly or expressly been following a common policy on the market, at least in regard to the abusive conduct.

However, this part of the Discussion Paper was much criticised for being both overly broad and vague, and in the EC's Guidance Paper published in 2009 (which sets out its guidance on its enforcement priorities in applying Article 102) there is no discussion on collective

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(October 2009), at 5 ("**Stephanou**") available online at: https://www.competitionpolicyinternational.com/collective-dominance-through-tacit-coordinationthe-case-for-non-coordination-between-article-82-and-merger-control-collective-dominance-concept/.

74 Hawk & Motta, *supra* note 7 at 103.

75 See European Commission Staff Discussion Paper, December 19, 2005, available online at: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/05/1626&format=HTML&aged=1&language=EN&guiLanguage=en. See also "DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses" (December 2005), available online at http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf.

76 See *ibid.* at paras. 44 and 74.

The Discussion Paper provided little guidance on when a finding of joint dominance could be made and left open the possibility that such could be established in the absence of an agreement between firms. It did, however, provide a list of factors that might facilitate coordination among firms (e.g., the ability of firms to monitor each others' conduct, the existence of sufficient deterrent mechanisms, and the absence of effective competitive restraints). See *ibid*. at paras. 46-50.

dominance.[77] It has been suggested that this express exclusion "may be interpreted as a tacit acknowledgement that addressing [collective dominance] under Article [102] is not within the Commission's priorities".[78]

VI. FINDING THE APPROPRIATE STANDARD FOR JOINT DOMINANCE UNDER CANADIAN LAW

In order for firms to develop business practices designed to avoid engaging in behaviour that would constitute joint dominance, it is important for them to know the types of actions or interaction with other firms that could garner a finding of joint dominance.[79] As discussed above, there is no jurisprudence under Canada's *Competition Act* that provides specific guidance on this issue. The position that the Bureau articulated in its *Draft Abuse of Dominance Guidelines* may capture a broad range of behaviour (though, as noted, the Bureau's approach to joint dominance is not based on jurisprudence). The question thus arises: what should be the proper standard? Specifically, are there (or should there be) any minimum requirements for establishing that a firm is jointly dominant? There are varied opinions on this issue.

On one side of the debate are those who believe that tacit collusion/coordination should be sufficient for a finding of joint dominance. Specifically, because collusion/coordination (whether overt or covert) may result in monopoly or near-monopoly prices, there is a resulting net loss to social welfare and it is believed that regulation is required to address it.[80] Collusion allows firms to "substitute coordination for the risks of competition on the understanding that collusion pays more than competition".[81] Collusion may result not only in higher prices (and

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77 European Commission, "Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings", (2009/C 45/02) ("**Guidance Paper**") available online at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:045:0007:0020:EN:PDF.

78 Vitzilaiou & Lambadarios, *supra* note 33 at 10.

Some have commented that "the lack of clear policy objectives" underlying the collective dominance doctrine may have "lead to a significant decrease in the European Commission's interest in [collective dominance] situations" – hence the exclusion of collective dominance from the EC's "enforcement priorities". See Frederic Depoortere & Giorgio Motta, "The Doctrine of Collective Dominance: All Together Forever?" *GCP: The Antitrust Chronicle* (October 2009), at 2 ("**Depoortere & Motta**"), available online at: https://www.competitionpolicyinternational.com/the-doctrine-of-collective-dominance-all-together-forever/.

It is interesting to note that in one of the earliest cases dealing with joint dominance, *Hoffmann La Roche* (98/526/EC, 4 February 1998, Case No. IV/M.950 – *Hoffmann La Roche/Boehringer Mannheim*) ("***Hoffmann La Roche***"), the ECJ "appeared to exclude the possibility that tacit coordination could be addressed under Article" 102. See Patrick Massey & Moore McDowell, "Joint Dominance and Tacit Collusion: An Analysis of the Irish Vodafone/O2 Case and the Implications for Competition and Regulatory Policy" (March 2008) UCD Centre for Economic Research Working Paper Series, at 7 ("**Massey & McDowell**"), available online at: http://www.ucd.ie/economics/research/papers/2008/WP08.05.pdf. See also Whish, *supra* note 8 at 558-559.

79 Vitzilaiou & Lambadarios, *supra* note 33 at 10.

80 Mezzanotte I, *supra* note 32 at 527.

81 *Ibid.*

profits), but also in lower quality products and reduced choice.[82] An additional identified benefit of regulating tacit collusion/coordination is that cartels, which may not have been prosecuted because of a lack of (discoverable) evidence of agreement between firms, would be captured under a lower civil evidentiary standard.[83]

Accepting tacit collusion/coordination as being sufficient for a finding of joint dominance is not without concern. For one thing, successful tacit collusion/coordination between firms is far from inevitable because firms are prone to act in a self-interested manner.[84] Thus, even where firms may have reached a tacit "understanding" (without agreement) to charge higher prices, any one firm, by deviating from this understanding, may be able to increase its profits by charging a slightly lower price. Hence, there is always a "tension between the *incentive to coordinate* behaviour with rivals to achieve higher prices for all and the *incentive to deviate* from the coordinated pattern of behaviour once it is established".[85] For tacit collusion/coordination to be successfully established and sustained over time, each firm must believe that all other firms are taking similar actions and that the benefits of coordination outweigh those of deviation.[86]

Second, there are pragmatic considerations – for tacit collusion/coordination to be sustainable over time, communication or some form of signalling is likely necessary (to both introduce and sustain it).[87] For example, changes in market conditions inevitably arise (e.g., entry of a new competitor, changes in demand, economic crises, etc.) and these very well may require readjustments to the "understanding" of the terms of coordination between the firms.[88] Moreover, if one of the tacitly-colluding firms readjusts its behaviour, "in order to protect the group's market position", such action can be misinterpreted by the other tacitly-colluding firm(s) as a deviation from the "understanding", in which case the tacit collusion/coordination would become unsustainable.[89] As noted by Felix E. Mezzanotte:[90]

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82 Mezzanotte II, *supra* note 69 at 84.

83 Hawk & Motta, *supra* note 7 at 103. Some wonder whether this, in fact, is a good thing – e.g. if regulators come to the wrong conclusion that firms are tacitly colluding/coordinating when they are actually overtly colluding (in secret), this would risk misdirecting their investigation and could result in them taking the wrong remedial actions. See Mezzanotte II, *supra* note 69 at 80 and 100.

84 Bishop & Lofaro, *supra* note 35 at 199.

85 *Ibid*. at 200.

86 *Ibid*.

87 Vitzilaiou & Lambadarios, *supra* note 33 at 8. Vitzilaiou & Lambadarios explain:

> [C]ollusion is not easily sustainable without any communication whatsoever, mainly due to the complexity caused by the presence of multiple equilibria in repeated game models. To put it simply, faced with multiple equilibria, firms cannot be certain about what game competitors will choose to play making it difficult to adjust their business strategy accordingly. At this point, in order to sustain collusion, firms will probably need to communicate. *Ibid*.

88 *Ibid.*

89 See Mezzanotte II, *supra* note 69 at 98.

90 *Ibid.* at 96.

> This rationale is seemingly consistent with evidence from experimental economics indicating that communication matters for collusion, not least because collusion can be less successful and profitable in the absence of it. It is also congruent with further experimental evidence, suggesting that collusion without communication is not easy. This blend of theory and experimental evidence seems to undermine the plausibility of the conduct of tacit collusion.

A third concern with using tacit collusion/coordination as the basis for finding firms to be jointly dominant is that it is difficult to distinguish such conduct from conscious parallelism/oligopolistic interdependence, which prior to the (2009) *Draft Abuse of Dominance Guidelines* was insufficient for the Bureau to find joint dominance.[91] Some have commented that in order to positively identify tacit collusion/coordination, one would need to determine the degree of parallelism that would be legally acceptable in an oligopoly and then prove that the firms' behaviour surpassed that threshold. However, "determining a safe haven of permitted parallelism is extremely difficult, if not impossible."[92] Moreover, economic theory has not yet been able to develop a positive legal test to identify tacit collusion/coordination and some question whether it will, in fact, be able to do so.[93]

Not having a test that can positively identify tacit collusion/coordination means that behaviour which does not fall within this category may be misinterpreted as such. For example, if a market exhibits a lack of vigorous competition, tacit collusion/coordination may be

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91 The problem this poses was discussed by Stanbury and Reschenthaler:

> The dilemma for anti-combines enforcement is that the parallel behaviour which is witnessed when all the firms in an industry announce identical price changes within a short period of time may be a reflection of a formal conspiracy, or it may simply reflect a series of independent decisions in the market. For example, costs of materials may have risen for all firms in an industry such that a price increase is necessary if a reasonable profit is to be maintained. All firms are aware that costs have risen and a price increase deemed necessary. One firm announces a price increase; all others follow the lead and raise their prices, aware that if they are selling substantially similar products, their prices must be comparable. No conspiracy in the legal sense has occurred. Each firm has made its own decisions, but it has done so in response to a common motivating factor, fully aware of the interdependence of the major firms in the market. On the other hand, the process may only be a façade, a means by which to maintain supra-competitive prices, using the announcement of increased costs as a coordinating device. Typically, there is no assurance of which is the correct interpretation.

See Stanbury & Reschenthaler, *supra* note 38 at 627.

92 Vitzilaiou & Lambadarios, *supra* note 33 at 8.

93 Vitzilaiou and Lambadarios argue that all we have at our disposal are negative tests – e.g. excluding collusion for theoretical reasons, identification of market features which may facilitate and/or sustain tacit collusion, etc. *Ibid*. at 7-8. See also Mezzanotte II, *supra* note 69 at 79.

suspected. However, there may be non-collusive reasons why this is the case (e.g., firms may be aligned at prices close to the competitive price because of vigorous competition, etc.).[94]

The difficulties with identifying tacit collusion/coordination lead to two further problems:

- proving firms engaged in tacit collusion/coordination will place a heavy evidentiary burden on regulators, making enforcement "very complex, time-consuming, costly, and thus unlikely";[95] and

- the opportunity to erroneously characterize firm conduct as falling into the wrong category would be "very high",[96] resulting in other problems. These can include: high costs (which may include AMPs, loss of reputation, litigation costs, etc.); harm to social welfare if it results in divestiture and ultimate deconcentration of competitive oligopolies;[97] and further harm to social welfare if it creates incentives that otherwise would not be present for firms to engage in tacit collusion/coordination if they believe they ultimately will be penalized for engaging in it, even though they had not.[98]

As a result of the problems associated with the identification of tacit collusion/coordination (particularly the difficulties inherent in distinguishing it from conscious parallelism/oligopolistic interdependence), there are those on the other side of the debate who argue that tacit collusion/coordination and conscious parallelism/oligopolistic interdependence should not be distinguished[99] – in other words, a finding that a firm has engaged in either behaviour should be sufficient to support a finding of joint dominance.[100]

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94 See Stephanou, *supra* note 73 at 6. Other noncollusive reasons for this apparent lack of competition may include: consumer behaviour placing more importance on non-price factors and difficulties consumers may have in comparing prices. See also Mezzanotte II, *supra* note 69 at 87-88.

Mezzanotte further states: "The literature has long conceived this question as posing a problem of identification, notably how to differentiate tacitly collusive from competitive conduct." *Ibid.* at 78.

95 *Ibid*. at 101.

96 *Ibid*. at 80.

97 *Ibid*. at 100.

98 As noted by Mezzanotte: "[S]ince lawful conduct will be punished anyway, the argument goes, firms prefer to profit from anti-competitive behaviour as 'precautionary action'. Put differently, the [regulator's] error may foster rather than preclude tacit collusion." *Ibid*.

99 There are still others who question the need for regulating joint dominance in the first place, instead leaving joint conduct exclusively to provisions dealing with horizontal agreements.

100 For example, in "Canada's Draft Abuse of Dominance Guidelines: A Comparative Look", Lilla Csorgo approves of the change made in the *Draft Abuse of Dominance Guidelines* with respect to no longer discussing any distinction between conscious parallelism and coordination. She argues that the change is reasonable for a number of reasons, including the difficulty of distinguishing between conscious parallelism and coordination. According to Csorgo: "The difference between conscious parallelism and coordination is not clear in economics, and if it were clear, how to distinguish between the two – particularly since the effects may be uniform – would still not be." Lilla Csorgo, "Canada's Draft Abuse of Dominance Guidelines: A Comparative Look", Competition Bureau, Canada, (June 8, 2009) ("**Csorgo**") at 33.

Moreover, those who support a broad interpretation of joint dominance tend to argue that the economic effects of conscious parallelism/oligopolistic interdependence may in fact be as harmful as those associated with collusive or coordinated behaviour.[101] These could include: significantly higher prices than would exist in a competitive market and could be sustained over a considerable period of time; inhibited or delayed innovation and technological change; excess capacity persisting over long periods of time and acting as a barrier to entry; inefficiency in production and distribution due to lack of competition – resulting in higher costs for the firms and "a loss to society as a whole as more resources are used than are necessary with the best available production process".[102]

Additionally, they argue that a finding of collective dominance does not mean that firms automatically will be found to have breached section 79 of the *Competition Act*. Joint dominance in itself is not unlawful. For there to be an infringement there must be conduct that amounts to an abuse targeted at a competitor and there must be a substantial adverse effect on competition. The Commissioner is thus required to establish all three elements of the provision before the Tribunal will find that a firm has contravened section 79. Thus, while a firm may be found to be collectively dominant, it may not be found to have engaged in an abuse of dominance.

Moreover, an argument could be made that a consideration of the policy rationale behind the inclusion of this provision in the *Competition Act* may in fact support such an interpretation. Legislators clearly determined that oligopolies <u>may</u> be problematic and section 79 was one of the provisions they introduced to try and address this concern. However, because section 79 also requires proof of two additional elements, it can be inferred that legislators only considered oligopolies to be problematic <u>if</u> they engaged in anti-competitive acts directed at a competitor and this resulted in a substantial lessening or prevention of competition.

We have several concerns with the above line of reasoning in support of a broad interpretation of joint dominance.

First, while joint dominance in and of itself is not sufficient to ground an order under section 79 of the *Competition Act,* the fact that the first element could be so easily established would risk putting firms under closer and unwarranted scrutiny, simply because they operated in an oligopolistic market. Moreover, demonstrating that the firm had not engaged in conduct which was in breach of the other two elements of section 79 may have its own evidentiary issues, and so this alone cannot be sufficient to warrant an all-encompassing test under the first element.

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101 Stanbury & Reschenthaler, *supra* note 38 at 620-622. See also Csorgo, *supra* note 100.

102 Stanbury & Reschenthaler, *ibid.* Stanbury & Reschenthaler also state:

> Even in the absence of technical inefficiency, there is a "deadweight burden" to society that occurs when oligopolists jointly restrict output below the competitive level. In addition, in many cases of oligopoly, the firms involved must invest considerable sums to attain or defend their position of market power. Such expenditures may take the form of advertising and product differentiation activities, and lobbying efforts to obtain or maintain favourable antitrust legislation. … [T]he resources expended in seeking or maintaining market power represent a social waste. *Ibid.*

A second concern is well described in the following passage:[103]

> Since, by definition, interdependence exists in an oligopoly, all competition authorities would have to do to establish [joint dominance] is add together the market shares of as many undertakings as necessary until the dominance threshold is reached… Apart from being clearly inadmissible, this approach also poses a practical problem: If oligopolistic interdependence is the only link between undertakings and no other bond exists that somehow individualizes the relation between two (or more) of them, there are no criteria as to which undertakings' market shares must be considered. Therefore competition authorities will be forced to find all oligopolists collectively dominant, a decision that is hardly sustainable.

Thus, if nothing further than oligopolistic interdependence is required for a finding of joint dominance, then any firm could be captured as long as the market shares added up to the requisite dominance threshold.[104] Imagine a market with four large players and many smaller players, where collectively the four players have a market share of more than 80%, but individually a firm may only have between a 15% to 25% market share. Under the above reasoning, a firm with a relatively moderate market share may be found to be jointly dominant if its shares are included with those of its competitors and collectively the requisite market share threshold is exceeded. This cannot be correct for several reasons:

- It would mean that a different standard would apply to firms suspected of engaging in joint dominance than would apply to firms suspected of engaging in single firm dominance. In the case of single firm dominance, the Commissioner must establish more than a firm's market share. She also must demonstrate that the firm has the ability to exercise market power. In *Laidlaw*, the Tribunal stated: "Market share is only a prima facie indication of market power. As has been noted, other considerations must also be taken into account."[105] Thus, it would seem wholly inappropriate and unfair, let alone contrary to the findings of the Tribunal with respect to single firm dominance, to apply a different standard to joint dominance.

- In order to give each element of section 79 meaning, joint dominance cannot be determined solely on the basis of market share. If market shares alone were sufficient, element one would be established in every case, as long as a sufficient number of firms (and their respective market shares) were considered in the calculation. As a result, the proof of this element simply would be met on a *pro forma* basis. If legislators intended

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103 Vitzilaiou & Lambadarios, *supra* note 33 at 6-7.

104 In its comments on the Bureau's *Draft Abuse of Dominance Guidelines,* the Canadian Bar Association noted: "The revised discussion, therefore, does not require any linkage between the alleged jointly dominant firms; the combined market share and the adoption of similar practices by those firms will be sufficient to warrant a finding of joint dominance" (emphasis added). See *Joint CBA Comments, supra* note 6 at 5.

105 *Laidlaw, supra* note 28 at para. 118.

for this element to be made out so simply, then the provision would have been drafted this way (i.e., explicitly stating that joint dominance would be found if a certain market share threshold were exceeded). Clearly, something more must have been intended.

- While oligopolistic firms can take steps to prevent themselves from engaging in conduct that would trigger elements two and three, there is nothing that they can do to prevent their conduct from triggering element one (short of taking steps to reduce their market share or to behave in an economically irrational manner, neither of which would be prudent or the goal of competition law). This too does not seem reasonable.

- The fact that firms that are not the market leader (by market share) might be viewed as dominant might actually hurt competition, as it could lead them to 'hold their punches'. This concern was described in comments by Gerald Masoudi on the proposed abuse of joint dominance provisions of China's draft antimonopoly law as follows:[106]

> By raising the possibility that the number 2 and number 3 firms in a market might be viewed as being in a dominant market position, however, the Antimonopoly Law would be sending the message that China does not want these firms to use the full range of competitive tools available to compete aggressively against the market leader. Treating these firms as dominant (and thereby making them more cautious about competing) is likely to hurt competition, since it is often the case that the number 2 and number 3 firms will be in the best position to compete most effectively against the top firm in the market.

A third concern with using a broad interpretation of joint dominance is that it may actually be difficult to distinguish tacit collusion/coordination <u>and</u> conscious parallelism/oligopolistic interdependence from purely independent conduct which could result in *un*conscious parallelism.[107] This raises the same concerns discussed above, regarding the effects of erroneously targeting firms that are not actually jointly dominant. These can include: placing a heavy evidentiary burden on regulators, making enforcement complex, time-consuming and costly; high costs to firms to fight a false conviction; and harm to social welfare.

A fourth and, in our view, very important concern with including conscious parallelism/oligopolistic interdependence among the conduct that could establish joint dominance is the concern with devising a proper remedy for its treatment, which could take the form of pricing regulation or structural remedies. The problem was well expressed by Professor Whish:[108]

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[106] Gerald F. Masoudi, "Some Comments on the Abuse-of-Dominance Provisions of China's Draft Antimonopoly Law" (Presented to the UIBE Competition Law Center Conference on Abuse of Dominance: Theory and Practice, in Beijing, China, July 21, 2007), available online at: http://justice.gov/atr/public/speeches/225357.htm.

[107] See Vitzilaiou & Lambadarios, *supra* note 33 at 8. See also Mezzanotte II, *supra* note 69 at 78.

[108] Whish, *supra* note 8 at 551.

> Some would favour making any parallelism in price between oligopolists illegal. This however would be quite inappropriate: it would be absurd to forbid firms from behaving in a parallel manner if this is an inevitable consequence of the structure of the market. To put the point another way, it would be strange indeed if competition law were to mandate that firms should behave irrationally, by not acting in parallel, in order to avoid being found to have infringed competition law.

Similarly, U.S. Judge Breyer expressed concerns with determining the correct remedy in *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 484 (1st Cir. 1988):[109]

> Courts … have almost uniformly held … that … individual pricing decisions (even when each firm rests its own decisions upon its belief that competitors will do the same) do *not* constitute an unlawful agreement under section 1 of the Sherman Act. That is not because such pricing is desirable (it is not), but because it is close to impossible to devise a judicially enforceable remedy for 'interdependent' pricing. How does one order a firm to set its prices without regard to the likely reactions of its competitors?

In *Atlantic Sugar,*[110] the Supreme Court of Canada considered whether merely parallel behaviour could be sufficient to ground a conspiracy conviction.[111] The Court determined that "merely parallel pricing behaviour is not subject to antitrust punishment; rather, some kind of explicit agreement is necessary"[112] Iacobbuci and Winter concluded that the Court "reached an entirely defensible outcome from a policy perspective" because:[113]

> ...there is no practical remedy for purely parallel behaviour... Asking profit-maximizing entities not to behave in a profit-maximizing way is not a successful policy strategy. In the end, the only possibly effective remedy for parallel behaviour among oligopolists is price regulation. Unless the state is willing to assume responsibility for setting prices in a vast range of industries with possibly oligopolistic tendencies, the law should refrain from intervention in almost all cases of purely parallel pricing behaviour.

In addition to regulating firm behaviour, a second way to remedy the joint dominance "problem" is by means of structural remedies – e.g. ordering a restructuring of the market,

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109 Case referred to in Hawk & Motta, *supra* note 7 at 70.

110 *Atlantic Sugar Refineries Co. Ltd. v. Canada (A.G.)* (1980), 54 C.C.C. (2d) 373 (S.C.C.), [1980] 2 S.C.R. 644 ("***Atlantic Sugar***").

111 The case related to conduct under both the monopolization and conspiracy provisions of the *Combines Investigation Act.*

112 Iaccobucci & Winter, *supra* note 32 at 229.

113 *Ibid*. at 228.

divestitures, etc. This too has its own concerns – e.g. devising a remedy that does not sacrifice scale economies (which are difficult to measure) can pose a significant obstacle to effective and appropriate structural relief.[114] Furthermore, a structural remedy may not resolve the issue of parallel behaviour.

The problems posed by the remedies issue is aptly summarized by Professor Hovenkamp:[115]

> [F]orcing an oligopolist to price as if its market were perfectly competitive would (1) require it to act irrationally given its circumstances and (2) involve the antitrust court in price control, for which it is not suited. Further, (3) it would also treat the oligopolist more stringently than the monopolist, which would not make sense… Absent collusion of the usual sort, lawful oligopolists – those who have obtained their market position because of economies of scale, patents, or other competitive superiority – should be able, like the monopolist, to take advantage of the natural consequence of their position.

Thus, the "difficulties in fashioning an appropriate and effective remedy are particularly serious".[116] They include not only concerns relating to the effect of behavioural remedies (i.e., requiring a firm to act irrationally and imposing on regulators the responsibility to control prices), but also concerns relating to complicated, if not impossible, structural remedies, that could cause more harm than good. Furthermore, to the extent that the parties can resolve the Commissioner's concerns in order to avoid litigation, it places the Commissioner and firms in a bizarre position of agreeing to the same limitations on their future behaviour with the Commissioner (i.e., as a practical matter, it is highly doubtful that a firm alleged to be jointly dominant would be prepared to agree on a remedy with the Commissioner unless that firm was assured that the other firm – or firms – alleged also to be jointly dominant agreed to the same limitations on their future conduct).

Finally, a remedy may end up penalizing a firm that is actually an effective competitor and one that has obtained its market position through economies of scale or other competitive superiority, which can actually add to social welfare.[117] In the end, the cure may in fact be worse than the disease. Thus, from a purely pragmatic perspective, it is essential to consider the circumstances under which the remedies available for an abuse of joint dominance actually increase competition in the marketplace and the circumstances under which those remedies (or, if not actually imposed, the possibility of those remedies being imposed) potentially damage competition in the marketplace. Simply stated, the regulation of joint dominance poses a

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[114] Hawk & Motta, *supra* note 7 at 64.

[115] Areeda and Hovenkamp, at para. 810b (2d ed. 2000) quoted in Hawk & Motta, *supra* note 7 at 64.

[116] *Ibid*.

[117] Furthermore, subsection 79(4) of the *Competition Act* provides that, in determining whether a practice meets the substantial prevention or lessening of competition test, the Tribunal also must consider whether the impugned conduct "is a result of superior competitive performance", with the implication being that in such circumstance no order should be made under section 79.

problem not only in identifying the proper behaviour that establishes it, but also in determining the proper remedy to alleviate any abuse.[118]

VII. CONCLUSIONS

The current uncertainty as to the state of the law poses challenges for both businesses and for regulators. Given the lack of jurisprudence on point and the Bureau's *Draft Abuse of Dominance Guidelines*, which seem to capture a wider range of conduct than the Bureau's 2001 *Abuse of Dominance Guidelines* that are still in force, businesses face the risk of being placed under scrutiny based on the market structure in which they operate. This enhanced scrutiny potentially has costs for both businesses and consumers, even where it does not lead to an order by the Tribunal.

Businesses operating in oligopolistic markets face the increased risk of having to bear the cost of defending themselves against allegations of abuse of joint dominance given the potential ease with which the first prong of the three-part test for abuse of dominance under section 79 (i.e., establishing joint dominance) could be satisfied. In addition to any legal costs, even those firms that are not market leaders may feel compelled to 'pull their punches' when competing in the marketplace in order to avoid accusations that they are part of a jointly dominant group of firms that is engaging in abusive conduct. This chilling effect may not only harm individual businesses, but consumers also may be denied the benefits of vigorous competition. This is an important factor to take into consideration. As described by the Tribunal in *Tele-Direct:*[119]

> It would not be in the public interest to prevent or hamper even dominant firms in an effort to compete on the merits. Competition, even 'tough' competition, is not to be enjoined by the Tribunal but rather only anticompetitive conduct.
>
> ...
>
> Decisions by the Tribunal restricting competitive action on the grounds that the action is of overwhelming intensity would send a chilling message about competition that is, in our view, not consistent with the purpose of the Act, as set forth in Section 1.1

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118 This can be distinguished from merger control where the Bureau can challenge mergers that create or enhance the conditions for joint, interdependent behaviour between firms. To this end, Iacobucci and Winter note that:

> There is only one context in which antitrust law can and does address purely independent but parallel behaviour (the so-called oligopoly problem): competition policy can take steps to ensure that an oligopoly structure that gives rise to the threat of parallel behaviour does not emerge in the first place. While breaking up existing oligopolies is wholly impractical, merger review allows the authorities to prevent a merger that would allow a significantly greater risk of anti-competitive parallel behaviour. Merger review is not without its challenges, in that it is anything but straightforward to determine the likely competitive impact of a merger, but offers one practical remedy for the oligopoly problem in those cases where a concentrated market would, the absence of antitrust regulation, come about through mergers. *Supra* note 32 at 237, footnote 19.

119 *Tele-Direct*, *supra* note 28 at paras. 539 and 610.

Protracted investigations, even where they do not result in orders by the Tribunal, potentially send a harmful message to businesses. Further, the availability of AMPs now adds to the risks faced by businesses.

Where investigations eventually lead to a finding of abuse of joint dominance, the difficulties associated with the law regarding joint dominance is compounded since designing appropriate remedies in this context is especially problematic. These include, among others, having competition regulators engage in price control, potentially requiring an oligopolist to behave in an economically irrational manner, treating an oligopolist more stringently than a monopolist and imposing structural remedies that could cause more harm than good. Moreover, where investigations are resolved on consent, the Commissioner and the firms under investigation, could be placed in the peculiar position of agreeing to abide by business practices that, in fact, make the market less, not more competitive.

What is to be done? The authors recommend that the Bureau's final guidelines on abuse of dominance maintain the position in the current guidelines that more than conscious parallelism is necessary to establish joint dominance. Whether or not economic theory supports a broader application of the concept of joint dominance, the Bureau must be mindful that its guidelines, by casting a wide net, may have a chilling effect on perfectly competitive, economic rational behaviour. Given the potential pro-competitive rationales and effects of conduct of the "acceptable" variety, and the uncertainties faced by businesses as to how regulators perceive the distinction between the "acceptable" and the "unacceptable", it is important that regulators take care to avoid inadvertently deterring vigorous competition – a task that has been made only more urgent given the current availability of AMPs under the *Competition Act* and the particular challenges associated with designing appropriate remedies in the context of joint dominance.