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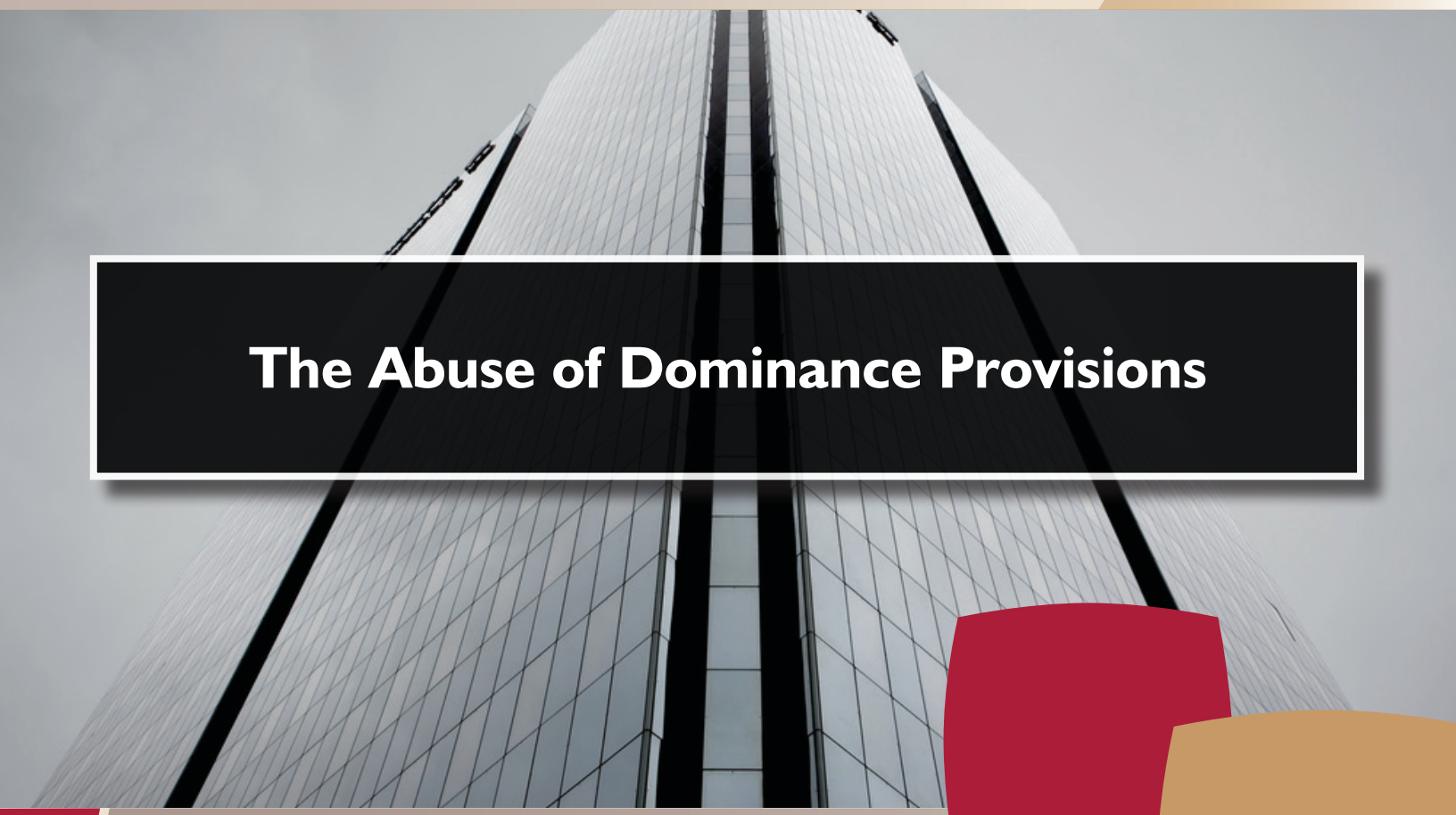
Enforcement Guidelines



The Abuse of Dominance Provisions

Sections 78 and 79 of the *Competition Act*

Canada

This publication is not a legal document. It contains general information and is provided for convenience and guidance in applying the *Competition Act*.

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Draft Enforcement Guidelines — *Enforcement Guidelines on the Abuse of Dominance in the Airline Industry*, February 2001
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PREFACE

These Guidelines describe the Competition Bureau's (the "Bureau") general approach to enforcing section 79 of the *Competition Act* (the "Act").[1] They supersede all previous guidelines and statements of the Commissioner of Competition (the "Commissioner") or other Bureau officials regarding the administration and enforcement of section 79.

These Guidelines do not provide an exhaustive review of all competition issues that may arise from a firm's[2] conduct, nor do they replace the advice of legal counsel. Guidance regarding future business conduct can be sought by requesting a binding written opinion on the applicability of section 79 from the Commissioner under section 124.1 of the Act.[3]

These Guidelines are not intended to restate the law or to constitute a binding statement of how the Commissioner will exercise discretion in a particular situation. The enforcement decisions of the Commissioner and the ultimate resolution of issues will depend on the particular circumstances of each case. Final interpretation of the law is the responsibility of the Competition Tribunal (the "Tribunal") and the courts.

The Bureau may revisit certain aspects of these Guidelines in the future in light of experience, changing circumstances and decisions of the Tribunal and the courts.

1 *Competition Act*, R.S.C. 1985, c. C-34, as amended.

2 Unless otherwise indicated, the term "firm" in these Guidelines refers to any entity that may be considered a "person" for the purposes of paragraph 79(1)(a).

3 The Bureau's approach to written opinions is detailed in the *Competition Bureau Fee and Service Standards Handbook for Written Opinions* (Ottawa: Industry Canada, 2011).

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1. INTRODUCTION

Abuse of a dominant position occurs when a dominant firm or a dominant group of firms in a market engages in a practice of anti-competitive acts, with the result that competition has been or is likely to be prevented or lessened substantially.

Subsection 79(1) of the Act defines the constituent elements of abuse of dominance, each of which must be established for the Tribunal to grant a remedy:

> 79(1) Where, on application by the Commissioner, the Tribunal finds that
>
> (a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,
>
> (b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and
>
> (c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,
>
> the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.[4]

Section 79 guards against anti-competitive conduct by firms with market power, and promotes conditions under which all firms are afforded an opportunity to succeed or fail on the basis of their respective ability to compete; however, it does not seek to establish equality among competitors. For example, the fact that a firm holds market power is not, in and of itself, sufficient to warrant intervention under section 79. Likewise, charging higher prices to customers, or offering lower levels of service than would otherwise be expected in a more competitive market, will not alone constitute abuse of a dominant position. Rather, all elements of subsection 79(1) must be satisfied to constitute an abuse of dominance.

Paragraph 79(1)(a) of the Act focuses on market power. The Bureau considers market power, in the general sense, to be the ability to profitably maintain prices above the competitive level (or similarly restrict non-price dimensions of competition)[5] for a significant period of time. Market power can also arise on the buying side when a single firm or group of firms has the ability to profitably depress prices paid to sellers to a level that is below the competitive price for a significant period of time. The assessment of market power under paragraph 79(1)(a) accounts not only for a firm's pre-existing market power, but also for market power derived from the alleged anti-competitive conduct. Where a firm does not presently appear to have

4 In addition to prohibition orders, the Tribunal can make orders directing any actions as are reasonable and necessary to overcome the effects of the practice of anti-competitive acts, as well as order the payment of administrative monetary penalties.

5 Unless otherwise indicated, the term "price" in these Guidelines refers to all aspects of firms' actions that affect the interest of buyers. References to an increase in price encompass an increase in the nominal price, but may also refer to a reduction in product quality, choice, service, innovation or other dimension of competition that buyers value.

market power and is not likely to acquire it through the alleged conduct within a reasonable period of time,[6] the Bureau will generally not investigate allegations of abuse of dominance relating to that conduct under section 79 of the Act.

Paragraph 79(1)(b) focuses on whether the impugned conduct constitutes a practice of anti-competitive acts. Examples of business practices that could constitute anti-competitive acts are listed in section 78. This list, while broad, is not exhaustive, affording the Tribunal the discretion to address other types of anti-competitive conduct that are not explicitly enumerated.

Paragraph 79(1)(c) requires proof that the practice of anti-competitive acts has had, is having or is likely to have the effect of preventing or lessening competition substantially. This analysis is focused on the effect of the practice of anti-competitive acts on competition, rather than on individual competitors.

In the course of an examination or inquiry, the Commissioner will generally afford parties the opportunity to respond to the Bureau's concerns regarding alleged contraventions of section 79 and to propose an appropriate resolution to address them. Firms proposing voluntary revisions to existing business practices should be aware that, while such proposals will be given due consideration by the Bureau, any approved proposal will generally be embodied in a consent agreement and registered with the Tribunal pursuant to section 105 of the Act. Where a consensual resolution cannot be reached, the Commissioner may file an application with the Tribunal.

In considering enforcement action under section 79 of the Act, the Bureau evaluates allegations of abuse on a case-by-case basis in the context of structural and other market-specific characteristics. In the sections that follow, these Guidelines discuss the Bureau's approach to the assessment of each of the elements of subsection 79(1) and the remedies available under section 79.

2. THE ELEMENTS OF ABUSE – PARAGRAPH 79(1)(A)

Paragraph 79(1)(a) of the Act requires an assessment of whether "one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business." This element consists of four factors, the Bureau's approach to which is discussed below: (i) a "class or species of business"; (ii) "in Canada or any area thereof"; (iii) "control"; and (iv) "one or more persons."

6 In the sense that prices are at competitive levels, and it is not expected that the firm will have the ability to raise them. See section 2.3.

2.1 A "Class or Species of Business"

For the purposes of paragraph 79(1)(a), the Tribunal considers a "class or species of business" to be synonymous with a relevant product market(s).[7]

Defining relevant product markets usually begins by examining the product in respect of which the alleged abuse of dominance has occurred or is occurring, and determining whether close substitutes exist for that product.[8] The Bureau generally employs the "hypothetical monopolist" test[9] to initially conceptualize substitutability between products by considering whether a hypothetical monopolist would impose and sustain a small but significant and non-transitory price increase for the product in question above a given benchmark.[10]

It is important to note that, in the context of abuse of dominance cases, the current price typically will not be the appropriate benchmark to use when defining the relevant market, as some products that appear to be good substitutes at that price level might not be considered substitutes at price levels that would have prevailed in the absence of the alleged anti-competitive act(s). Inclusion of these products could lead to an overly broad product market definition because these products do not discipline the market power of the dominant firm(s), but rather are only considered substitutes for products in the market at price levels where market power has already been exercised.

The smallest candidate market considered is the allegedly abusive firm's product. If a hypothetical monopolist controlling that product would not impose a small but significant and non-transitory price increase above the benchmark, assuming the terms of sale of all other products remained constant, the candidate market is expanded to include the next-best substitute. The next-best substitute could include the products of firms that continue to sell in the presence of the alleged anti-competitive act, as well as the products of firms that have been identified as likely to have been excluded. The analysis is repeated until the point at which the hypothetical monopolist would profitably impose and sustain such a price increase over the set of candidate products.[11] In general, the smallest set of products in which the price increase would be sustained is defined as the relevant product market.

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7 *Canada (Director of Investigation and Research, Competition Act) v. NutraSweet Co.* (1990), 32 C.P.R. (3d) 1 (Comp. Trib.) at 9 [*NutraSweet*].

8 Although a usual step in establishing market power, market definition is not an end in itself and may defy precision in all cases. The Bureau's approach to market definition is intended to generally conceptualize substitutability.

9 This approach is consistent with the approach to defining markets outlined in Part 4 of the *Bureau's Merger Enforcement Guidelines* ("MEGs") (Ottawa: Industry Canada, 2011).

10 In most cases, the Bureau considers a five percent price increase above the price level that would prevail absent the alleged anti-competitive act(s) to be significant and a one-year period to be non-transitory. To identify this price level, the Bureau may look at the price that prevailed prior to the implementation of the alleged anti-competitive act(s), or the price level in other geographic regions in which the anti-competitive act is not employed. Market characteristics may support using a different price increase or time period.

11 While this description contemplates defining markets in the context of selling, a similar "hypothetical monopsonist" exercise can be conducted when defining input markets from the perspective of a dominant buyer and switching by its suppliers. For more information, see Part 9 of the MEGs.

This approach seeks to define the universe of products over which a firm could be found to exercise market power, focusing on demand responses (*i.e.*, buyer substitution) to relative price changes.[12]

Direct evidence of buyer switching (*i.e.*, changes in quantities purchased) in response to relative price changes can demonstrate substitutability for the purposes of market definition;[13] however, in practice, such direct evidence may be difficult to obtain. With or without direct evidence, the Bureau considers a number of qualitative factors in determining product substitutability for the purposes of defining relevant product markets, including:

- *Views, strategies, behaviours and identity of buyers:* Whether buyers substituted between products in the past, and whether they plan to do so in the future, can provide an indication of whether a price increase is sustainable. Industry surveys, industry participants and industry experts may provide helpful information on past and potential future developments in the industry with respect to products that are alleged to provide a significant constraining influence. Documents prepared by the firm(s) in question in the ordinary course of business may also prove useful in this regard;
- *End-use and physical characteristics:* Functional interchangeability is generally a necessary, but not sufficient, condition for two products to warrant inclusion in the same relevant market. In general, as buyers place greater value on the actual or perceived unique physical or technical characteristics of a product, the more likely it is that the product will fall within a distinct relevant market;
- *Switching costs:* Transaction costs that buyers would have to incur to, among other things, retool, repackage, adapt their marketing, breach a supply contract or learn new procedures, may be sufficient to suggest that switching is an unlikely response to a small but significant and non-transitory price increase; and
- *Price relationships and relative price levels:* The absence of a strong correlation in price movement between two products over a significant period of time may suggest that the products do not fall within the same relevant market.

12 Supply responses (*i.e.*, the ability of potential competitors to begin supplying the relevant market in response to an increase in price) are also important when assessing the potential for the exercise of market power, but the Bureau examines such responses later in its analysis – either when identifying participants in the relevant market or when examining entry into the relevant market. See Parts 4.2 and 5.1 of the MEGs.

13 When detailed data on the prices and quantities of the relevant products and their substitutes are available, statistical measures may be used to define relevant product markets. Demand elasticities indicate how buyers change their consumption of a product in response to a change in the product's price (own-price elasticity) or in response to changes in the price of another identified product (cross-price elasticity). While cross-price elasticities do not directly measure the ability of a firm to increase price, they are particularly useful for determining whether differentiated products are substitutes for one another and whether such products are part of the same relevant market.

2.2 "Throughout Canada or any Area Thereof"

The Tribunal considers "throughout Canada or any area thereof" to be synonymous with a relevant geographic market(s).[14]

Again, the Bureau will generally apply the hypothetical monopolist test to examine the dimensions of buyer switching, from suppliers in one location to suppliers in another, in response to a small but significant and non-transitory increase in price, beginning with the area in which the allegedly abusive firm operates.[15] A relevant geographic market will consist of all locations or supply points that would have to be included for such a price increase to be profitable.

The Bureau will consider a variety of qualitative factors when defining relevant geographic markets, including:

- *Views, strategies, behaviours and identity of buyers:* Considerations relating to convenience or the particular characteristics of the product (*e.g.*, fragility, perishability) may influence a buyer's choice of supplier in the event of a price increase. The Bureau will examine past and potential future behaviour of buyers as new options are made available through, for instance, advances in technology. Third parties who are familiar with the industry in question may provide information regarding past and potential future industry developments that helps to define the relevant geographic market. The extent to which distant sellers are taken into account in business plans, marketing strategies and other documentation of the firm(s) in question and of other sellers may also be useful indicators of geographic market definition;
- *Switching costs:* Transaction costs that buyers would have to incur to adapt their business to obtain the product from another source may be sufficient to render switching an unlikely response to a small but significant and non-transitory price increase;
- *Transportation costs and shipment patterns:* In general, where prices in a distant area have historically exceeded or been lower than prices in the candidate geographic market by more than transportation costs, this may indicate that the distant area constitutes a separate relevant market, for reasons that go beyond transportation costs. Conversely, if significant shipments of the product from a distant area in response to a price increase are likely, this may suggest that the distant area falls within the geographic market. In either case, the Bureau will assess whether a small but significant and non-transitory price increase in the candidate geographic market would change this pricing differential to the point where distant sellers may be able to constrain this price increase by shipping the product into the relevant market; and

14 *NutraSweet, supra* note 7 at 20. Despite the reference to "throughout Canada or any area thereof," the relevant geographic market may, from a consumer perspective, include territory outside of Canada. As with product market definition, this approach is primarily conceptual and may defy precision.

15 As with product market definition, the geographic parameters of the market may be overstated if they include areas that would not be included at the price level that would prevail absent the alleged anti-competitive act(s).

- *Foreign competition:* While the principles above apply equally to domestic and international sources of competition, other considerations, such as tariffs, quotas, regulatory impediments, anti-dumping complaints or duties, government procurement policies, intellectual property laws, exchange rate fluctuations, and international product standardization may be relevant when examining the influence of foreign-based suppliers.

2.3 "Substantially or completely control"

The Tribunal considers "substantially or completely control" to be synonymous with market power.[16] As described above, in a general sense, market power is the ability of a single firm or a group of firms to profitably maintain prices above the competitive level, or other elements of competition such as quality, choice, service, or innovation below the competitive level, for a significant period of time.[17]

In enforcing section 79, the Bureau is concerned with the creation, enhancement or preservation of market power resulting from a practice of anti-competitive acts. In the context of paragraph 79(1)(a), the relevant level of market power includes not only a firm's pre-existing market power (*i.e.*, any market power held by the firm notwithstanding any alleged anti-competitive conduct), but also market power derived from any alleged anti-competitive conduct. While the Bureau will not commence an application under section 79 of the Act where a firm does not presently appear to have market power, the Bureau will generally investigate allegations of abuse of dominance if it appears a firm is likely to obtain market power through an alleged practice of anti-competitive acts within a reasonable period of time.

Market power can be measured directly and indirectly. Direct indicators of market power, such as profitability or evidence of supra-competitive pricing, are not always conclusive; practical difficulties can arise in defining the "competitive" price level and the appropriate measure of cost to which prices should be compared.[18]

In any event, the Bureau examines a number of indirect indicators, both qualitative and quantitative, in conducting its analysis of market power, such as:

- market share, including share stability and distribution;
- barriers to entry, including the conduct of the allegedly dominant firm(s); and

16 *NutraSweet, supra* note 7 at 28.

17 The Bureau generally considers a "significant" period of time to be one year, although this does not preclude the possibility that the Bureau will pursue cases where market power has been in place for less than one year. In these instances, the Bureau will examine the likelihood that this market power would persist, or be enhanced, in the absence of enforcement action under section 79.

18 The Tribunal has accepted some direct indicators as evidence of market power, such as a high price-to-average-cost margin and corresponding high accounting profits. Similarly, significant variations in price by region, along with the ability to lower prices in response to increased competition or entry, has been accepted by the Tribunal as evidence of supra-competitive pricing in higher-price regions. In these cases, direct indicators alone were insufficient to establish market power, which was substantiated through the use of indirect indicators.

- other market characteristics, including the extent of technological change and customer or supplier countervailing power.

The objective of this analysis is to determine the extent to which a firm or group of firms is constrained from raising prices owing to the presence of effective competition or the likelihood of competitive entry. The Bureau's analytical approach to the assessment of each of these indicators is discussed in greater detail below.

2.3.1 Market Share

Jurisprudence has established that market share is one of the most important indicators of market power. While there is no definitive numeric threshold, the Bureau is of the view that high market share is usually a necessary, but not sufficient, condition to establish market power.

All other things being equal, the larger the share of the market held by competitors, the less likely it is that the firm(s) in question would be capable of exercising market power. Where competitors have a large market presence, customers can switch to these alternatives if a firm or group of firms attempts to increase price. In such cases, defection of a significant portion of a firm's customer base may be enough to render any increase in price unprofitable.[19]

In addition to considering the market shares of current sellers of relevant products, the Bureau will also consider the shares of potential sellers that would participate in the relevant market through a supply response if prices rose by a small but significant and non-transitory amount. In such a case, a firm would be considered a participant in the relevant market if significant sunk investments are not required to enter, and it could rapidly and profitably divert existing sales or capacity to begin supplying the market in response to such a price increase. For those firms that would participate in the market through a supply response, market share calculations will include only the output or capacity that would likely become available to the relevant market without incurring significant investment.

Market shares can be measured in terms of revenues (dollar sales), demand units (unit sales), capacity (to produce or sell) or, in certain natural resource industries, reserves. If products in the relevant market are homogeneous and firms are operating at capacity, relative market shares should be similar regardless of unit of measurement. If firms have excess capacity, market shares based on capacity may best reflect their relative market position if they can easily increase supply in response to an increase in price. In the case of differentiated products, market shares based on dollar sales, demand units and/or capacity can lead to varying inferences with respect to firms' relative competitive positions, and shares based on revenues or demand units may be more probative in this regard. When calculating market shares, the Bureau will use the measurement that it considers best reflects the future competitive significance of competitors.

In contested abuse of dominance cases to date, market shares of those firms found to have abused their dominant position were very high, suggesting that, in those instances, customers were left with too few alternatives to discipline a price increase or other conduct by the firm

19 The ability to defect may depend on the speed and ease with which rival firms are able to accommodate increased demand for their products as the prices of rival suppliers increase, plus any additional switching costs.

that substantially lessened competition.[20] When investigating allegations of abuse of dominance, the Bureau's general approach is as follows:

- A market share of less than 35 percent will generally not prompt further examination.
- A market share between 35 and 50 percent will generally only prompt further examination if it appears the firm is likely to increase its market share through the alleged anti-competitive conduct within a reasonable period of time.
- A market share of 50 percent or more will generally prompt further examination.
- In the case of a group of firms alleged to be jointly dominant, a combined market share equal to or exceeding 65 percent will generally prompt further examination.

In addition to the firm's market share, distribution of the remaining market among competitors is relevant. While the likelihood of a single firm's ability to sustain a price increase rises with its market share, it also increases with the disparity between its market share and those of its competitors, as a firm facing a disparate group of smaller rivals may be able to exercise more unilateral market power than a firm facing a single rival accounting for the remainder of the market.

The Bureau will also examine the durability of market shares in a particular market. If market shares have fluctuated significantly among competitors over time (for example, because firms regularly develop new technologies to "leapfrog" their competitors), a current high market share may be less indicative of market power.

2.3.2 Barriers to Entry

As explained in section 2.3.1, a high market share is not itself sufficient to prove market power. A firm's attempt to exercise market power may be thwarted by expansion or entry of existing and/or potential competitors on a sufficient scale and scope if expansion and/or entry are expected to be profitable.

Factors that reduce the likelihood of profitability for an entrant or expanding player can constitute barriers to entry. These barriers can take many forms, including sunk costs, regulatory barriers, economies of scale and scope, market maturity, network effects, access to scarce or non-duplicable inputs, and existing long-term contracts. The Bureau will examine the nature of any barriers to entry to assess whether entry would be timely, likely, and sufficient in scale and scope to make the exercise of market power unsustainable. "Timely" means that entry will occur within a reasonable period of time; "likely" refers to the expectation that entry will occur; and "sufficient" means that entry would occur on a sufficient scale to prevent or deter firms from exercising market power.

20 In *Canada (Director of Investigation and Research) v. Tele-Direct (Publications) Inc.* (1997), 73 C.P.R. (3d) 1 (Comp. Trib.) [*Tele-Direct*], the Tribunal stated that it would require evidence of "extenuating circumstances, in general, ease of entry" to overcome a *prima facie* determination of control based on market shares of 80 percent and higher; whereas, in *Canada (Director of Investigation and Research) v. Laidlaw Waste Systems Ltd.* (1992), 40 C.P.R. (3d) 289 (Comp. Trib.) [*Laidlaw*], the Tribunal observed that a market share of less than 50 percent would not give rise to a *prima facie* finding of dominance. However, this does not preclude the possibility that market power could never be found below that threshold.

2.3.3 Other Factors

The Bureau will examine other indicators when assessing market power, including:

- *Countervailing power:* A customer may have the ability and incentive to constrain a firm's attempt to exercise market power by vertically integrating its own operations; refusing to buy other products or in other geographic markets from the firm; or encouraging expansion or entry of existing or potential competitors; and
- *Technological change and innovation:* Evidence of a rapid pace of technological change and the prospect of firms being able to "innovate around" or "leapfrog" an apparently entrenched position of an incumbent firm could be an important consideration, along with change and innovation in relation to distribution, service, sales, marketing, packaging, buyer tastes, purchase patterns, firm structure and the regulatory environment.

2.4 "One or more persons": Joint Dominance

Section 79 explicitly contemplates that a group of firms may possess market power even if no single member of the group holds market power on its own. The Bureau's analytical framework for assessing joint dominance is similar to that employed in examining single-firm dominance; namely, the Bureau defines a relevant market and considers the ability of a firm or firms to exercise market power within that market, taking into account market shares, barriers to entry and expansion and any other relevant factors. However, in the case of joint dominance, this exercise also requires an assessment of whether those firms that are alleged to be engaged in a practice of anti-competitive acts jointly control a class or species of business such that they hold market power together.

As with single firm dominance, the Bureau will assess the extent to which competition from existing rivals and from potential rivals (*i.e.*, entrants) outside the allegedly jointly dominant group is likely to defeat the profitability of a price increase by the firms that are alleged to be jointly dominant. If these two sources of competition are not likely to constrain a price increase, the Bureau will then consider the nature of competition within the allegedly jointly dominant group.

Vigorous price and non-price rivalry among firms is an indicator of competitive markets. If the firms in the allegedly jointly dominant group are, in fact, competing vigorously with one another, they will not be able to jointly exercise market power.[21] Similar or parallel conduct by firms is insufficient, on its own, for the Bureau to consider those firms to hold a jointly

21 Prices that appear to be at or near the competitive level could be evidence of such competition. Other factors may include, but are not limited to, price-matching competition among competitors, frequent customer switching, or "leapfrog" competition through innovation. Conversely, the absence of these types of behaviours, and the existence of high price-to-average-cost margins and corresponding high accounting profits by firms within the allegedly jointly dominant group, could provide some indication that these firms are not competing vigorously with one another. Evidence of coordinated behaviour by firms in the allegedly jointly dominant group may be probative, although the Bureau does not consider such evidence as being strictly necessary to establish that these firms are not competing vigorously with one another.

dominant position; firms may engage in similar practices that are pro-competitive, such as matching price reductions or making similar competitive offers to customers.

As with single-firm dominance, the ability to exercise market power on a collective basis is not sufficient to raise an issue under the abuse provisions of the Act. While a group of firms may collectively hold market power, it is still necessary to establish that these firms' conduct constitutes a practice of anti-competitive acts that is preventing or lessening competition substantially.

3. THE ELEMENTS OF ABUSE – PARAGRAPH 79(1)(B)

Paragraph 79(1)(b) requires that a firm or firms "have engaged in or are engaging in a practice of anti-competitive acts". This element consists of two factors, the Bureau's approach to which is discussed below: (i) a "practice"; and (ii) anti-competitive acts.

3.1 A "Practice"

While a "practice" normally involves more than one isolated act, the Bureau considers that this element may be satisfied by a single act that is sustained and systemic, or that has had or is having a lasting impact in a market. For example, a long-term exclusionary contract may effectively prevent the entry or expansion of competitors despite the fact that the contract itself could be viewed as a single act.

3.2 Anti-Competitive Acts

Section 78 of the Act enumerates a non-exhaustive list of acts that are deemed to be anti-competitive in applying section 79. The Federal Court of Appeal has stated that an anti-competitive act is defined by reference to its purpose, and the requisite anti-competitive purpose is an intended negative effect on a competitor that is predatory, exclusionary, or disciplinary.[22] However, the Federal Court of Appeal and Tribunal have acknowledged that paragraph 78(1)(f) is an exception to this standard in that it does not contain a reference to a purpose vis-à-vis a competitor. In any event, while many types of anti-competitive conduct may be intended to harm competitors, the Bureau considers that certain acts not specifically directed at competitors could still be considered to have an anti-competitive purpose.

When assessing whether an act is anti-competitive, the purpose of an act may be proven directly by evidence of subjective intent, or inferred from the reasonably foreseeable consequences of the conduct. Although verbal or written statements of a firm's personnel may assist in establishing subjective intent, evidence of subjective intent is neither strictly necessary nor completely determinative.[23] In most cases, the purpose of the act can be inferred from the

22 *Canada (Commissioner of Competition) v. Canada Pipe Co. 2006 FCA 233 [Canada Pipe (FCA)]* at para. 66.

23 *Ibid.* at para. 72-73.

circumstances, and persons are assumed to intend the reasonably foreseeable consequences of their acts.[24]

An additional factor in the determination of whether an act is anti-competitive is whether it was in furtherance of a legitimate business objective. A business justification is not a defence to an allegation that a firm has engaged in anti-competitive conduct, but rather an alternative explanation for the overriding purpose of that conduct, if and as required, that a firm can put forward where the Bureau believes that purpose to be anti-competitive. For such purposes, proof of the existence of *some* legitimate business purpose underlying the conduct is not sufficient. Rather, the Federal Court of Appeal has said that "a business justification must be a credible efficiency or pro-competitive rationale for the conduct in question, attributable to the respondent, which relates to and counterbalances the anti-competitive effects and/or subjective intent of the acts."[25] Depending on the circumstances, this could include, for example, reducing the firm's costs of production or operation, or improvements in technology or production processes that result in innovative new products or improvements in product quality or service. When assessing the overriding purpose of an alleged anti-competitive practice, the Bureau will examine the credibility of any efficiency or pro-competitive claims raised by the allegedly dominant firm(s), their link to the alleged anti-competitive practice, and the likelihood of these claims being achieved.

In assessing whether a particular act is likely to be anti-competitive, the Bureau is of the view that anti-competitive conduct generally falls into two broad categories: (i) exclusionary conduct; and (ii) predatory conduct.

3.2.1 Exclusionary Conduct

In general, the Bureau is not concerned with conduct that forces competitors to be more effective, but rather with conduct that makes it more difficult for competitors to be effective. Exclusionary conduct is designed to make current and/or potential rivals less effective at disciplining the exercise of a firm's market power, to prevent them from entering the market, or to eliminate them from the market entirely. Such conduct often does so by raising rivals' costs.

Section 78 describes various means by which a firm may engage in exclusionary conduct. These include: margin squeezing of a downstream competitor by a vertically-integrated supplier; vertical acquisitions; pre-empting scarce facilities or resources; adopting incompatible product specifications; and exclusive dealing. Other exclusionary strategies can include tying and bundling, and conduct that increases customer switching costs and makes customers more difficult for rivals to acquire. All such activities can, in certain circumstances, serve to increase a rival's costs and may force that rival to raise its prices, which may make it more difficult for the rival to compete or result in its exclusion from the market. This may allow the dominant firm to maintain or increase its prices, which can be profitable if the costs of the exclusionary strategy are offset by the ultimate increase in revenue, or by the preservation of revenues that would otherwise be lost, owing to competitive entry or expansion.

24 *NutraSweet, supra* note 7 at 35.

25 *Canada Pipe (FCA), supra* note 22 at para. 73.

3.2.2 Predatory Conduct

Predatory conduct involves a firm deliberately setting the price of a product(s) below an appropriate measure of cost to incur losses on the sale of product(s) in the relevant market(s) for a period of time sufficient to eliminate, discipline, or deter entry or expansion of a competitor, in the expectation that the firm will thereafter recoup its losses by charging higher prices than would have prevailed in the absence of the impugned conduct. Predatory pricing may be implicit (through discounts or rebates, for example), or explicit.

The Bureau's view is that average avoidable cost is the most appropriate cost standard to use when determining if a dominant firm's prices are below cost. Avoidable costs refer to all costs that could have been avoided by a firm had it chosen not to sell the product(s) in question during the period of time the policy has been in place.[26] The Bureau will examine whether an alleged predatory price is able to cover the dominant firm's average avoidable cost of supplying the product(s) in question during the time period over which the alleged predation has occurred.

As there are difficulties inherent in applying a price-cost test and in distinguishing between predatory and competitive pricing (as both involve lower prices in the short term), the Bureau generally uses various "screens" prior to conducting an avoidable cost analysis. Specifically, the Bureau will examine whether the alleged predatory price can be matched by competitors without incurring losses (suggesting that discipline or exclusion, and subsequent recoupment, is unlikely to occur), as well as whether the alleged predatory price is in fact merely "meeting competition" by reacting to match a competitor's price.

4. THE ELEMENTS OF ABUSE – PARAGRAPH 79(1)(C)

Paragraph 79(1)(c) examines whether the conduct in question "has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market". In other words, having determined that the firm or firms have engaged in a practice of anti-competitive acts, it remains necessary to determine whether this practice has resulted or is likely to result in substantial harm to competition.

Demonstrating a substantial lessening or prevention of competition does not entail an assessment of whether the absolute level of competition in a market is substantial or sufficient, but rather a relative assessment of the level of competitiveness in the presence and absence of the impugned practice. In carrying out this assessment, the Bureau's general approach is to ask whether, but for the practice in question, there would likely be substantially greater competition in the market in the past, present, or future.[27]

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26 Avoidable costs include variable costs (costs that vary with output, such as labour, materials, rent and utility costs, and depreciation) and product-specific fixed costs (costs that do not vary with output, such as the cost of land, buildings, and machinery) but do not include sunk costs (historical costs that cannot be recovered if a firm stops producing). Avoidable costs do not include common costs that cannot be directly attributed to a particular product or products.

27 This test was accepted by the Federal Court of Appeal in *Canada Pipe (FCA), supra* note 22 at para. 38. The

Generally speaking, a substantial lessening or prevention of competition creates, preserves, or enhances market power. A firm can create, preserve, or enhance market power by erecting or strengthening barriers to expansion or entry, thus inhibiting competitors or potential competitors from challenging the market power of that firm. In examining anti-competitive acts and their effects on entry barriers, the Bureau focuses its analysis on determining the state of competition in the market in the absence of these acts. If, for example, it can be demonstrated that, but for the anti-competitive acts, an effective competitor or group of competitors would likely emerge within a reasonable period of time to challenge the market power of the firm(s), the Bureau will conclude that the acts in question result in a substantial lessening or prevention of competition.[28]

A variety of other considerations, in addition to effects on entry and expansion, are relevant to the determination of whether there has been, or likely could be, a substantial lessening or prevention of competition, including whether, in the absence of the practice of anti-competitive acts, consumer prices might be substantially lower; product quality, innovation, or choice might be substantially greater; or consumer switching between products or suppliers might be substantially more frequent.

Court stated that other tests might also be appropriate depending on the circumstances.

28 When assessing a reasonable time period for potential competitors to provide effective competition in the absence of the anti-competitive acts, the Bureau will assess the time required for competitors to develop products and marketing plans, to build facilities or make adjustments to existing facilities, and to achieve a level of sales sufficient to prevent or discipline a material price increase.

APPENDIX: RELEVANT PROVISIONS OF THE ACT

78(1) For the purposes of section 79, "anti-competitive act", without restricting the generality of the term, includes any of the following acts:

(a) squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer's entry into, or expansion in, a market;

(b) acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;

(c) freight equalization on the plant of a competitor for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;

(d) use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;

(e) pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market;

(f) buying up of products to prevent the erosion of existing price levels;

(g) adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent his entry into, or to eliminate him from, a market;

(h) requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor's entry into, or expansion in, a market; and

(i) selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor.

79(1) Where, on application by the Commissioner, the Tribunal finds that

(a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,

(b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and

(c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,

the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

(2) Where, on an application under subsection (1), the Tribunal finds that a practice of anti-competitive acts has had or is having the effect of preventing or lessening competition substantially in a market and that an order under subsection (1) is not likely to restore competition in that market, the Tribunal may, in addition to or in lieu of making an order under subsection (1), make an order directing any or all the persons against whom an order is sought to take such actions, including the divestiture of assets or shares, as are reasonable and as are necessary to overcome the effects of the practice in that market.

(3) In making an order under subsection (2), the Tribunal shall make the order in such terms as will in its opinion interfere with the rights of any person to whom the order is directed or any other person affected by it only to the extent necessary to achieve the purpose of the order.

(3.1) If the Tribunal makes an order against a person under subsection (1) or (2), it may also order them to pay, in any manner that the Tribunal specifies, an administrative monetary penalty in an amount not exceeding $10,000,000 and, for each subsequent order under either of those subsections, an amount not exceeding $15,000,000.

(3.2) In determining the amount of an administrative monetary penalty, the Tribunal shall take into account any evidence of the following:

(a) the effect on competition in the relevant market;

(b) the gross revenue from sales affected by the practice;

(c) any actual or anticipated profits affected by the practice;

(d) the financial position of the person against whom the order is made;

(e) the history of compliance with this Act by the person against whom the order is made; and

(f) any other relevant factor.

(3.3) The purpose of an order made against a person under subsection (3.1) is to promote practices by that person that are in conformity with the purposes of this section and not to punish that person.

(4) In determining, for the purposes of subsection (1), whether a practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market, the Tribunal shall consider whether the practice is a result of superior competitive performance.

(5) For the purpose of this section, an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the *Copyright Act, Industrial Design Act, Integrated Circuit Topography Act, Patent Act, Trade-marks Act* or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act.

(6) No application may be made under this section in respect of a practice of anti-competitive acts more than three years after the practice has ceased.

(7) No application may be made under this section against a person on the basis of facts that are the same or substantially the same as the facts on the basis of which

(a) proceedings have been commenced against that person under section 45 or 49; or

(b) an order against that person is sought by the Commissioner under section 76, 90.1 or 92.

79.1 The amount of an administrative monetary penalty imposed on an entity under subsection 79(3.1) is a debt due to Her Majesty in right of Canada and may be recovered as such from that entity in a court of competent jurisdiction.

HOW TO CONTACT THE COMPETITION BUREAU

Anyone wishing to obtain additional information about the *Competition Act*, the *Consumer Packaging and Labelling Act* (except as it relates to food), the *Textile Labelling Act*, the *Precious Metals Marking Act* or the program of written opinions, or to file a complaint under any of these acts should contact the Competition Bureau's Information Centre:

Web site

www.competitionbureau.gc.ca

Address

Information Centre
Competition Bureau
50 Victoria Street
Gatineau, Quebec K1A 0C9

Telephone

Toll-free: 1-800-348-5358
National Capital Region: 819-997-4282
TTY (for hearing impaired) 1-800-642-3844

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819-997-0324