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Canada

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# **Competitor property controls and the *Competition Act***

June 4, 2025

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Parliament recently made changes to the *Competition Act* that affect how the Competition Bureau approaches anti-competitive controls on the use of commercial retail real estate.

Below, we outline our enforcement approach to competitor property controls under the *Competition Act*. This is meant to provide guidance to businesses to help them comply with the new law. We may revise our approach as we gain more experience, as circumstances change, or as the law evolves.

Competitor property controls can raise serious competition concerns. However, not all competitor property controls meet the legal tests to raise issues under the *Competition Act*. Even if they do not, we still encourage firms to only use them where they increase competition. The widespread use of competitor property controls can make it more difficult for firms to enter new markets or expand, reducing the choices available to Canadians.

This guide is not a legal document and does not replace legal advice. It does not present a binding statement about how we will consider particular situations.

## Competitor property controls

Competitor property controls are restrictions on the use of commercial real estate. These property controls are common across Canada, especially in retail settings. This guidance addresses two primary types of property controls: exclusivity clauses and restrictive covenants.

### Exclusivity clauses

A clause within a commercial lease that limits how the land can be used by competitors to a tenant. This could prohibit the lessor from leasing a unit or a piece of land to a company that competes with an existing tenant, or limit what or how products can be sold.

### Restrictive covenants

A restriction on land that prevents a purchaser or owner of a commercial property from using the location to operate or lease to operators of certain types of businesses that compete with a previous owner.

These property controls insulate firms from competition. Therefore, by their nature these property controls can raise serious competition concerns. However, in limited cases they can also increase competition. An example would be if a property control is necessary for a firm to make pro-competitive investments, such as to enter a market.

Property controls have been the subject of international enforcement action as a result of the impact they can have on competition. For example, there are specific limitations on large grocers' ability to use property controls in both [New Zealand](#) and the [United Kingdom](#).

Changes to the abuse of dominance provisions (sections 78 and 79) and the anti-competitive collaboration provision (section 90.1) are relevant to our enforcement approach. Property controls used by dominant firms were already reviewable as abuses of dominance prior to the changes to the *Competition Act*.

The guidance on this webpage only applies to restrictions on the use of commercial real estate that affect competitors. Commercial leases or covenants on land may include other types of restrictions that are outside the scope of this guidance. Other types of restrictions can also raise issues under the *Competition Act* when they meet the applicable legal tests.

## Compliance advice

We encourage all businesses that use or are considering competitor property controls to review them and confirm that they are compliant with the *Competition Act*.

In most cases we investigate competitor property controls under the abuse of dominance and anti-competitive collaboration provisions of the *Competition Act*. We describe how the legal tests under these provisions can apply to competitor property controls below. These provisions may apply when at least one of the parties involved in a competitor property control has market power, including as a result of the property control.

Considering whether a competitor property control is justified because of a credible pro-competitive rationale is a key part of our analysis. We will not take enforcement action against competitor property controls that we believe are pro-competitive. Where not justified, this does not automatically mean that they will meet the legal tests to breach the *Competition Act*. However, considering if a competitor property control is justified may reduce the risk of being off-side of the *Competition Act*. In particular, we encourage all businesses that use or are considering them to ask themselves:

1. Is the property control necessary to allow a new business to enter the market or to encourage a new investment? Are there other ways to allow for this entry or investment that do not make it more difficult for rivals to compete?
2. Could this property control last for a shorter period of time?

3. Could this property control cover less geographic area?
4. Could this property control cover fewer products or services?

We discuss our approach to assessing if a property control is justified in more detail below.

We encourage tenants, lessors, landowners, and former landowners to eliminate or modify competitor property controls that are not justified. This applies to both competitor property controls that raise issues under the *Competition Act* and those that do not. Even if an individual competitor property control does not meet all legal requirements for enforcement it can still be a barrier to competition, especially if similar controls are widespread in a market.

Where competitor property controls raise issues under the *Competition Act* we will take appropriate action.

## Enforcement approach

This section explains how we consider competitor property controls under the *Competition Act*. It begins by discussing when property controls can be justified, which is a key part of our analysis.

### When can competitor property controls be justified?

For a business, the value of a competitor property control comes from how it can protect the business from competition. As such, property controls can raise significant competition concerns. However, there are certain limited situations where these types of restrictions can be justified because they increase competition overall, such as where they protect incentives for a retailer to make investments in order to enter a market. For example, a limited exclusivity clause may be pro-competitive if no retailer would otherwise make the necessary investments to become a key tenant in a new shopping plaza. Without the exclusivity clause there may be no retailers of a particular type in the shopping plaza, and so the clause increased competition. Alternatively, a similar clause could be necessary for a retailer to make investments to improve a space that it already leases. However, it is important to note that even in such cases the way the competitor property control protects these incentives is by insulating the retailer from the threat of competition from rivals.

Even where this is the case, competitor property controls that limit competition more than necessary are not justified. We assess three key factors when considering if a competitor property control is justified:

- **Timeframe:** Competitor property controls should only last as long as necessary to protect incentives for entry or investment. The longer a competitor property control lasts, the less likely it is to be justified. We consider this on a case-by-case basis, including the specific nature of any investments and their commercial context. We note that in the United Kingdom, certain large grocery retailers cannot enter into exclusivity clauses that last for more than five years from when a store first starts trading, subject to certain exceptions.
- **Geographic area:** Competitor property controls should cover the smallest geographic area necessary. For example, exclusivity clauses that limit competition at other properties owned by the lessor are generally not justified.
- **Products and services:** Competitor property controls should not limit competitors more than necessary in the products or services they cover. The more extensive restrictions are, the less likely they are to be justified.

## Exclusivity clauses

Exclusivity clauses are only justified in limited circumstances, such as where they go no further than necessary to encourage new entry or to allow a tenant to make investments to develop their store. This could be because once a key tenant has made the investments necessary to open their store and attract customers to the plaza, the increased customer base may make it more attractive for competitors to open stores in the plaza as well. The presence of competitors could in turn reduce the benefit the key tenant receives from its investments in opening their store. This could reduce or eliminate their incentive to make the investments unless they are protected by an exclusivity clause.

Lessors of property should also consider if exclusivity clauses are justified. For example, imagine a lessor receives interest from several comparably suitable tenants. Some require an exclusivity clause, and others do not. Therefore, an exclusivity clause would not be necessary to encourage new entry or investment. We recognize that whether a different tenant would be appropriate may depend on a variety of factors, including the nature of their business, how they would fit within the mix of retailers in the area, and how effective they would be at attracting customers to the development.

## Restrictive covenants

Restrictive covenants are particularly concerning. They apply to the land itself and can restrict future owners of the land. They tend to be long lasting and can create areas where no competitor can operate. This can be particularly true when restrictive covenants are widely used in an area. Importantly, restrictive covenants create advantages for companies that have historically operated in an area based on their past ownership of land. For these reasons restrictive covenants used by firms with market power are more likely to attract scrutiny. We do not consider their use to be justified outside of exceptional circumstances.

## Enforcement under the abuse of dominance provisions

Amendments to the abuse of dominance provisions changed the requirements for the Competition Tribunal to remedy anti-competitive behaviours. If a **dominant firm or group of firms** engages in behaviours that **either**:

- **are anti-competitive business practices**, because they are intended to have an exclusionary, predatory, or disciplinary effect on a competitor or to have an adverse effect on competition; or
- **have the effect of harming competition**, in the past, present, or likely in the future

the Tribunal can issue an order ending that behaviour. The Tribunal can also order other measures to restore competition or to issue an administrative monetary penalty if the behaviours are **both** a practice of anti-competitive acts and have the effect of harming competition.

## Dominance

Dominance is the ability to exercise a substantial degree of market power, which can be thought of as a significant ability to influence competition in that market. This can include the ability to restrict competitors or competition. Market power can allow a firm to charge higher prices or offer lower quality services than it would in a more competitive market.

Depending on the circumstances, we may analyze dominance at a local, regional, or industry level. This could depend on factors like how broadly competitor property controls are used and how competition occurs. For example, if an incumbent firm uses competitor property controls across a region where a new retailer would have to develop a local supply chain to serve several stores we may be more likely to analyze dominance at a regional level. Dominance at any of these levels may be sufficient.

When we analyze dominance we may consider several factors, including:

- The ability to restrict competitors or competition
- The presence of effective competitors, which we often consider based on market share
- Barriers to entry in the market, including barriers to entry created by the competitor property control
- The position of the firm in the broader industry
- Evidence of bargaining leverage, including the ability to seek the competitor property control

Dominance can be created by the competitor property control itself in cases where there is already a lack of existing effective competitors and it creates a significant barrier to competitors entering the market.

In most cases, we consider the party who proposed or benefits competitively from the competitor property control to be a potential target of an abuse of dominance investigation.

### **Anti-competitive business practices**

When assessing if a behaviour is an anti-competitive business practice, we may consider factors like:

- Subjective evidence of intent, for example, business documents describing the reasons for the behaviour
- The likely outcome of the behaviour, as we can infer that firms intended the reasonably foreseeable consequences of their actions
- Any pro-competitive or efficiency enhancing justifications for the behaviour

Restricting competition is inherent in a competitor property control. This is because restricting competition is the source of a competitor property control's value. Competitor property controls may prevent competitors from entering markets in locations that would be competitively significant or exclude them from a market entirely. If a competitor property control is not capable of restricting competition it does not provide any benefit, raising questions about why it exists.

However, as discussed, there are certain limited situations where these types of restrictions can support competition. We will consider these types of justifications as we determine whether a competitor property control is an anti-competitive business practice. In the absence of evidence of this type of pro-competitive justification we will likely consider competitor property controls used by dominant firms to be anti-competitive business practices. As noted, we do not consider the use of restrictive covenants to be justified outside of exceptional circumstances.

As discussed above, the duration of a competitor property control and the scope of the restriction it imposes on competition are key considerations when assessing if it is justified. We assess whether the duration and scope of a competitor property control are appropriate on a case-by-case basis.

### **Effect of harming competition**

When assessing the effect a competitor property control has on competition, we consider if it creates, increases, or protects the market power of one of the targets in a market or is likely to do so. This may be different than the market where the target is dominant. Our analysis focuses on the barriers to entry or expansion created by the competitor property control and the existence of effective competition. Barriers to entry or expansion include restricting tenants from selling products or services that compete with the lessor or other retailers. We may ask questions like:

- Are there other competitors already in the market?
- How effective are competitors?
- Are there other feasible options for commercial real estate available to competitors?
- Would competitors be less effective if they used other commercial real estate?
- Does a competitor need to establish several stores in an area to be effective?
- Are there other barriers to entry or expansion that already exist, that may compound the effects of the competitor property control?

### **Remedies**

Where a dominant firm uses a competitor property control that is an anti-competitive business practice or has the effect of harming competition we will likely seek an order prohibiting its use or enforcement.

If we determine that a competitor property control is **both** an anti-competitive business practice **and** has the effect of harming competition we may also seek additional measures to restore competition and administrative monetary penalties. For restrictive covenants, we are likely to seek administrative monetary penalties in addition to other remedies where possible, due to the heightened concern associated with this type of control.

When we seek administrative monetary penalties from a firm, we seek ones that are meaningful and are designed to encourage that firm to comply with the provision. We are guided by factors set out in the *Competition Act*.

## Enforcement under the anti-competitive collaboration provision

Section 90.1 of the *Competition Act* applies to agreements that have the effect of harming competition in the past, present, or likely in the future. Section 90.1 applies to agreements that either:

- Involve at least two competitors, or
- Do not involve competitors **if** a significant purpose of any part of the agreement is to prevent or lessen competition in a market.

To raise issues under section 90.1 the agreement must also have the effect of harming competition. The harm to competition must be substantial. If these requirements are met, the Tribunal can:

- prohibit any person from carrying out any activities related to the agreement
- order any person against whom an order is sought to take other measures to restore competition
- order any person to take any action if both we and the person agree
- order the payment of administrative monetary penalties

Agreements that contain property controls are not usually between competitors. Therefore, where this is the case section 90.1 can apply to agreements that include property controls if a significant purpose of any part of the agreement is to harm competition in a market and the agreement has the effect of harming competition.

When assessing an agreement that contains a competitor property controls, we focus on if the agreement has the effect of harming competition. If so, we expect that the agreement will raise issues under section 90.1. This is because if the agreement has the effect of harming competition it will likely also have a significant purpose to do so.

It is a crime for competitors to agree to fix prices, allocate markets, or restrict supply of goods or services.

Where a competitor property control raises issues under section 90.1, the remedies we seek will depend on the circumstances of the case. This could include:

- prohibiting the terms of the competitor property control and their enforcement
- requiring other measures to restore competition where necessary
- seeking administrative monetary penalties.

When we investigate agreements under section 90.1, we typically consider all parties to the agreement to be potential targets of our investigation. In the context of competitor property controls, this could include:

- tenants and lessors, in the case of exclusivity clauses
- buyers and sellers of property, in the case of restrictive covenants

We may seek different remedies from different parties to an agreement, depending on the circumstances.

### Further reading:

- [Guide to the December 2023 amendments to the \*Competition Act\*](#)
- [Competitor Collaboration Guidelines](#)
- [Competition Act](#)

# 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:

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