IN FACT AND IN LAW

Competition

February 2002

Competition Bureau: Enforcement Guidelines on the Abuse of Dominance Provisions

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The Canadian Competition Bureau has published enforcement guidelines describing its approach to enforcing the abuse of dominance provisions found in the *Competition Act*. Given that the Competition Tribunal has rendered only six (6) decisions[1] under these provisions to date, and given that these decisions do not cover some of the key elements of the abuse of dominance provisions, such as joint dominance, the Bureau has prepared the guidelines to both reflect the jurisprudence and articulate its enforcement position on aspects of the abuse of dominance provisions where no jurisprudence exists.

A review of the jurisprudence suggests that an abuse of dominant position occurs when a firm or group of firms that is dominant in a given market engages in conduct that constitutes exclusionary, disciplinary or predatory behaviour towards competitors or potential competitors, with the result that competition is prevented or lessened substantially. Although it is part of the normal competitive process that some firms succeed while others fail, the abuse provisions establish the bounds of competitive behaviour for dominant firms and provide for corrective action where such firms go beyond legitimate competitive behaviour vis-à-vis their competitors in order to maintain, entrench or enhance their market power.

Only the Commissioner of Competition can make an application to the Tribunal for a remedial order under the abuse of dominance provisions. Such an application is preceded by an investigation or inquiry by the Competition Bureau, which would typically begin with the receipt of a complaint from other firms in the same industry alleging that a competitor's activities are inhibiting their ability to enter or compete in a market. Once the inquiry has begun, the Commissioner may use his formal powers of investigation.

Section 79(1) of the Competition Act sets out the three (3) essential elements required to prove the abuse of a dominant position by a market participant:

- substantial or complete control, throughout Canada or any area thereof, of a type of business;
- engaging in a practice of anti-competitive acts; and
- the practice prevents or lessens competition substantially in a market.

1 *Canada (Director of Investigation and Research)* v. *NutraSweet Co.* [1990], 32 C.P.R. (3d) 1 (Comp. Trib.) [hereinafter NutraSweet].
Canada (Director of Investigation and Research) v. *Laidlaw Waste Systems Ltd.* [1992], 40 C.P.R. (3d) 289 (Comp. Trib.).
Canada (Director of Investigation and Research) v. *The D&B Companies of Canada Ltd.* [1995], 64 C.P.R. (3d) 216 (Comp. Trib.).
Canada (Director of Investigation and Research) v. *Tele-Direct (Publications) Inc.* [1997], 73 C.P.R. (3d) 1 (Comp. Trib.).
Canada (Director of Investigation and Research) v. *Bank of Montreal* [1996], 68 C.P.R. (3d) 527 (Comp. Trib.).
Canada (Director of Investigation and Research) v. *AGT Director Ltd. et al.* [1994], C.C.T.D. No. 24 Trib. Dec. No CT9402/19.

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Substantial Control of a Market

The Bureau considers control to be synonymous with market power, where market power is the ability to profitably set prices above competitive levels for a considerable period of time. Market power may also be defined with respect to a material, non-transitory reduction in other factors of competition such as service, quality, variety, advertising and innovation. The Bureau normally regards a minimum of one (1) year as constituting a "considerable" period of time.

Market power is measured using a number of indicators, both qualitative and quantitative. These indicators include market share, barriers to entry and other market characteristics, including the countervailing power of customers and suppliers.

In the abuse of dominance cases that have been contested to date, the market shares of the dominant firms were very high, suggesting that in such instances customers had few alternatives to choose from in the event that the dominant firm increased prices above competitive levels or otherwise substantially lessened competition. A market share of thirty-five percent (35%) or more generally gives rise to concerns of dominance.

Anti-Competitive Acts

Section 78 lists examples of practices that constitute anti-competitive acts. The list covers a broad range of activities, although it is a non-exhaustive list.

The anti-competitive purpose of an act may be for predatory, exclusionary or disciplinary reasons. Typically, the purpose or intent of the act is inferred from the facts and circumstances. Where an anti-competitive act has been established that meets the threshold of substantially lessening or preventing competition in a market, the Bureau will normally try to resolve the competition issue with the party (or parties) in question. If this effort is unsuccessful, then the Bureau will bring the matter before the Tribunal.

Preventing or Lessening Competition Substantially

The requirement of "preventing or lessening competition substantially in a market" puts the focus of the Bureau's analysis on the state of competition rather than on the competitors themselves. Thus, if it can be demonstrated that, but for the anti-competitive acts, an effective competitor or group of competitors would emerge within a reasonable period of time to challenge the dominance of the firm (or firms) under investigation, the Bureau will conclude that the acts in question constitute a substantial lessening or prevention of competition.

It should be noted that many of the anti-competitive acts described at Section 78 may be undertaken by a dominant firm without resulting in a substantial lessening of competition. Thus, in each abuse of dominance case, once the Bureau has established that a dominant firm has engaged in anti-competitive acts, it will then consider whether these acts will result in a substantial lessening of competition.

Examples of anti-competitive behaviour that may attract the Bureau's attention include threatening rivals with litigation and predatory pricing, which is defined as selling at a price below a certain measure of cost in order to harm a competitor.

Another example of an anti-competitive act was found in the *NutraSweet*[2] case where NutraSweet had imposed contract clauses requiring or inducing exclusivity. These clauses stipulated that customers were obligated to purchase all of their aspartame from NutraSweet.

Joint Dominance

Where a group of firms is alleged to be jointly dominant, a combined market share of sixty percent (60%) or more will generally prompt further examination by the Bureau.

1 See *NutraSweet*, supra, note 1.

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Although there has never been a decision of the Tribunal with regard to whether or not joint dominance exists in a given situation, the guidelines provide some indication of how the Bureau would evaluate such a situation.

Typically, within an oligopoly, firms base their decisions on how their rivals have behaved in the past. Firms therefore often end up acting in a "consciously parallel" fashion, according to the Bureau's guidelines, thereby achieving higher profits than would be the case in a competitive environment. The Bureau has adopted a position that recognizes that something more than mere conscious parallelism must exist before the Bureau will reach a conclusion that firms are participating in some form of coordinated activities.

To infer control by a group of firms, the Bureau will consider the following:

- whether the group of firms collectively accounts for a large share of the relevant market;
- any evidence that the alleged coordinated behaviour is intended to increase prices or is for the purpose of engaging in some form of anti-competitive act;
- any evidence of barriers to entry into the group, or barriers to entrants into the relevant market;
- any evidence based on the particular facts of the case that members of the group have acted to inhibit intra-group rivalry; and
- any evidence that a significant number of customers cannot exercise countervailing power to offset the attempted abuse.

Facilitating Practices

Facilitating practices enhance the ability of firms to coordinate their behaviour in order to increase or maintain prices. This behaviour would sustain the group's joint dominance in the relevant market. Typically, firms would monitor one another to ensure that no firm changes its prices unilaterally. Examples of facilitating practices would include pre-announcing price increases and publicizing price lists.

Remedies

Following an inquiry by the Bureau, the Commissioner prefers to have any proposed remedy agreed upon by a party being investigated, rather than taking action against such party at the Competition Tribunal. Typically, though, the Commissioner would have a remedy that has been agreed upon by the party in question reviewed by the Tribunal. Also, the Commissioner would usually make the resolution public in order to ensure that the process remains transparent and that all interested parties are informed that the matter has been resolved.

If a matter proceeds to the Tribunal, the Tribunal may proclaim an order prohibiting the continuance of the anti-competitive practices in question or any order that is reasonable and necessary to overcome the effects of the practice of anti-competitive acts, including the divestiture of assets or shares. Fines or prison terms may also be imposed on a company or its management by the Tribunal.

Conclusion

This bulletin is intended merely to provide general guidance with respect to the enforcement guidelines on the abuse of dominance provisions in the Competition Act. Of course, the particular circumstances of each case will dictate how the Competition Bureau actually enforces the provisions. For an analysis of your company's particular situation, please contact Serge Bourque at (514) 877-2997, Patrick Buchholz at (514) 877-2931 or Larry Markowitz at (514) 877-3048.

In addition to providing advice and representation, the Competition Law team at *Lavery, de Billy* can conduct seminars for your employees in order to inform and guide them with respect to competition law compliance.

Mtres. Bourque, Buchholz and Markowitz are the co-authors of the *Loi sur la concurrence annotée* (Les Éditions Yvon Blais inc., 2000), an annotated version of the *Competition Act (Canada)*.

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