

Abuse of Dominance: a Serious Anti-competitive Offence

An Overview of Bureau Enforcement Guidelines

Abuse of Dominance Enforcement *Guidelines* — Key Information on Corporate Behaviour

The Canadian economy is based on vigorous and fair competition with well-defined rules in place to govern acceptable corporate behaviour. Canada's *Competition Act* is designed to foster such competition and protect the marketplace against anti-competitive acts. The Act's provisions against abuse of market dominance are one of its three main pillars, along with merger review and criminal conspiracy prohibitions.

An understanding of abuse of dominance is important to the business community and consumers. To promote such an understanding, the Competition Bureau has published its *Enforcement Guidelines on the Abuse of Dominance Provisions* of the *Competition Act*. These Guidelines clearly explain the Act's abuse of dominance provisions and outline the Bureau's approach to investigating possible violations and obtaining compliance.

What is Market Dominance?

The Bureau considers market dominance to be synonymous with market power. Although it can be difficult to measure market power directly, the Bureau places greatest emphasis on key factors such as market share and barriers to entry. In defining market dominance, the Competition Bureau looks at whether a firm, or a group of firms, substantially or completely controls a product or service in a given geographic area.

Though there are no hard and fast rules governing the relationship between market share and market dominance, the Bureau is guided in its approach by the following general criteria when examining market conditions:

- A market share of less than 35%, held by one firm, does not generally raise concerns with the Bureau.
- A market share of 35% and over, held by one firm, generally raises some concern and prompts further examination by the Bureau.
- In the case of a group of firms, a combined market share exceeding 60% generally raises concerns and prompts further examination by the Bureau.

When does Market Dominance become Abuse of Dominance?

The *Competition Act* does not prohibit dominance or the presence of market power *per se*, and sheer market power alone, or even market dominance, does not constitute abuse of dominance. Abuse of dominance occurs when a dominant firm, or group of firms, substantially prevents or lessens

competition, by engaging in acts that aim to eliminate or discipline competitors, or simply to stop potential competitors from entering the market in question.

There are three essential elements to abuse of dominance; *all* must be present for an offence to occur:

- One or more firms must substantially or completely control a relevant market.
- The firm or firms must engage in anti-competitive activities.
- These actions must prevent or lessen competition substantially in a market, or be likely to do so in the future.

When examining an activity to determine if it is anti-competitive, the Bureau assesses whether it falls into one or more of the following categories:

- Does the activity raise competitors' costs, reduce their revenues, or prevent their access to key inputs or facilities?
- Does the activity constitute predatory conduct, particularly in a market with high barriers to entry?
- Does the activity facilitate or enhance the ability for groups of dominant firms to monitor each other in order to maintain or increase price levels?

The *Competition Act* provides an illustrative list of potentially anti-competitive acts. These include such things as unfair margin squeezing, acquiring a supplier to foreclose a competitor, freight equalization to impede competition, the use of fighting brands to eliminate a competitor, and the sale of articles below cost to discipline a competitor. However, the list is meant only as a guide and is not exhaustive. In a number of cases, the Bureau has alleged and proven that practices not listed in the Act can constitute anti-competitive acts.

Countering Abuse of Dominance - Enforcement and Corrective Measures

The Competition Bureau ensures compliance with the *Competition Act*. In its enforcement capacity, as in all of its activities, the Bureau is guided by the principles of transparency, fairness, timeliness and predictability.

Following an examination into complaints of anti-competitive activities, if the Bureau finds evidence of abuse of dominance, its first enforcement step will be to ask the dominant firm or group of firms to correct the situation in a manner that resolves the competition issue to the satisfaction of the Bureau. If there is no voluntary resolution, the Bureau will bring the matter before the Competition Tribunal, an independent body which rules on civil matters under the *Competition Act*.

Where the Competition Tribunal finds that abuse of dominance has occurred, it may make an order prohibiting the dominant firm from engaging in anti-competitive acts. Furthermore, if a prohibition order is not deemed adequate or sufficient to restore competition, the Tribunal may order various other remedies, including the divestiture of assets or shares for the firm, or group of firms, engaging in abuse of dominance activities.

Conclusion

The full *Enforcement Guidelines on the Abuse of Dominance Provisions of the Competition Act* provide details on all the elements outlined in this summary. They also include a number of appendices which provide excerpts from specific sections of the Competition Act, define various terms, and summarize Competition Tribunal rulings to date. The Guidelines are available on the Bureau's Web site or directly from the Bureau.

Under its Program of Advisory Opinions, the Bureau provides its views on proposed activities by businesses. Businesses are encouraged to seek advice on whether or not a proposed course of action would raise an issue under the *Competition Act*. For further information, contact the Competition Bureau at the address and telephone numbers below or visit its Web site.

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