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**BCUC INQUIRY INTO GASOLINE AND DIESEL
PRICES IN BC** **EXHIBIT A2-21**

**Re: British Columbia Utilities Commission – An Inquiry into Gasoline and Diesel Prices in British Columbia
– Project No. 1599007 – The Competition Bureau – Abuse of Dominance Enforcement Guidelines**

British Columbia Utilities Commission staff submit the following Guidelines for the record in this proceeding:

The Competition Bureau
Abuse of Dominance Enforcement Guidelines
March 7, 2019

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Sincerely,

Original signed by:

Patrick Wruck
Commission Secretary

/pw



Competition Bureau
Canada

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Canada

Abuse of Dominance

Enforcement Guidelines



Canada

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Preface

The Competition Bureau (the “Bureau”), as an independent law enforcement agency, ensures that Canadian businesses and consumers prosper in a competitive and innovative marketplace. Headed by the Commissioner of Competition (the “Commissioner”), the Bureau investigates anti-competitive practices and promotes compliance with the laws under its jurisdiction, including the *Competition Act* (the “Act”).¹

Competition among firms underpins a robust economy, incentivizing the creation of value and rewarding entrepreneurship and innovation. When firms compete on the merits, market forces generally deliver the most efficient and beneficial economic outcomes for society.

In some cases, however, dominant firms can frustrate this process by engaging in conduct that undermines competitive market forces, leading to inefficient outcomes. In these rare circumstances, the Bureau may rely upon the abuse of dominance (and other) provisions of the Act to address specific conduct and restore the competitive process.

These guidelines describe the Bureau’s general approach to enforcing the abuse of dominance provisions (sections 78 and 79 of the Act). They supersede all previous guidelines and statements of the Commissioner or other Bureau officials regarding the administration and enforcement of the Act’s abuse of dominance provisions.

The Abuse of Dominance Enforcement Guidelines do not replace the advice of legal counsel and are not intended to restate the law or to constitute a binding statement of how the Commissioner will proceed in specific matters. The decisions of the Commissioner and the ultimate resolution of issues will depend on the particular circumstances of the matter in question.

Throughout these guidelines, judicial decisions are referenced by abbreviations. Full citations may be found at the end of the document. Any reference to jurisprudence represents the Bureau’s interpretation of the law.

Final interpretation of the law is the responsibility of the Competition Tribunal (the “Tribunal”) and the courts.

¹

RSC 1985, c C-34.

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Executive Summary

- i. Abuse of a dominant position occurs when a dominant firm or a dominant group of firms engages in a practice of anti-competitive acts, with the result that competition has been, is, or is likely to be prevented or lessened substantially in a market. Simply being a dominant firm, or even a monopoly, does not in and of itself engage the abuse of dominance provisions of the Act.
- ii. Three elements must be established to constitute an abuse of dominance under section 79 of the Act:
 - one or more persons must substantially or completely control a class or species of business throughout Canada or any area thereof;
 - that person or those persons must have engaged in (within the previous three years) or be engaging in a practice of anti-competitive acts; and
 - the practice must have had, be having or be likely to have the effect of preventing or lessening competition substantially in a market.
- iii. To evaluate the first element, dominance, the Bureau generally first defines a market(s), and then evaluates whether the allegedly dominant firm (or firms) substantially or completely controls that market, i.e., has a substantial degree of market power within that market. In this context, markets are defined in reference to both a product and geographic dimension, based on demand substitution in the absence of alleged anti-competitive conduct. The Bureau then considers evidence of the existence and magnitude of market power, such as market shares and barriers to entry.
- iv. The second element considers the purpose of the impugned acts: whether the dominant firm (or firms) has engaged in a practice of conduct intended to have a predatory, exclusionary or disciplinary negative effect on a competitor. Exclusionary acts may make current or potential competitors less effective, for example by increasing their costs. Predatory acts involve a firm deliberately setting the price of a product(s) below an appropriate measure of its own cost to eliminate, discipline, or deter entry or expansion of a competitor. Disciplinary acts involve actions intended to dissuade an actual or potential competitor from competing vigorously, or otherwise disrupting the status quo in a market.

- v. When evaluating the purpose of an act, the Bureau considers both subjective evidence of intent (for example, business documents describing the purpose of an act) as well as objective evidence in the form of the reasonably foreseeable consequences of an act. The Bureau will weigh any evidence of anti-competitive intent against evidence that the act was engaged in pursuant to a legitimate business justification, that is, evidence that indicates the purpose of the act was efficiency-enhancing or pro-competitive.
- vi. The final element involves an analysis of whether competition – on prices, quality, innovation, or any other dimension of competition² – would be substantially greater in a market in the absence of the anti-competitive conduct. This assessment is a relative one, comparing the level of competition in a market with and without the alleged anti-competitive conduct, rather than an assessment of whether the absolute level of competition in a market is sufficient. The Bureau considers effects on both static competition (e.g., short-run prices and output), as well as dynamic competition (e.g., rivalry driven by product or process innovation).
- vii. On application to the Tribunal, the Bureau must establish each element of section 79 on the balance of probabilities. To this end, when evaluating conduct under section 79, the Bureau considers whether clear, convincing, and cogent evidence exists in support of each element. The Bureau evaluates the body of evidence on the whole, and may consider the same evidence in reference to more than one element. As a result, the Bureau’s analysis of different elements is often interconnected.
- viii. Where all three elements of section 79 are present, the Tribunal may prohibit the person (or persons) who engaged in the conduct from continuing to do so. In addition, or alternatively, if the Tribunal concludes that a prohibition order is not likely to restore competition, it may make an order directing the person (or persons) who engaged in the conduct to take any action that is reasonable and necessary to overcome the anti-competitive effects of the practice, including the divestiture of assets or shares. Finally, if the Tribunal issues a remedial order, it may also order the respondent to pay an administrative monetary penalty of up to \$10 million (or \$15 million for each subsequent order) to promote practices by that person (or persons) that are in conformity with the purposes of section 79.

² To simplify the discussion, unless otherwise indicated, the term “price” in these guidelines refers to all dimensions of competition, such as quality or innovation. References to an increase in price encompass an increase in the monetary price, but may also refer to a reduction in quality, product choice, service, innovation or other dimensions of competition.

- ix. When enforcing section 79, a significant consideration for the Bureau is to avoid chilling or deterring pro-competitive or efficiency-enhancing conduct. The Bureau recognizes that it is often challenging to distinguish anti-competitive conduct from aggressive competition on the merits, as in many cases the goal of aggressive competition is to marginalize rivals or eliminate them from a market. The Bureau recognizes that firms may acquire a dominant position by simply out-competing their rivals, for example, by offering higher quality products to consumers at a lower price. In these cases, sanctioning firms for simply being dominant would undermine incentives to innovate, outperform rivals and engage in vigorous competition. Such vigorous competition is the sort of competitive dynamic that the Act is designed to preserve and, where possible, enhance, as it ultimately leads to a more efficient allocation of resources.
- x. In considering enforcement action under section 79 of the Act, the Bureau carefully evaluates allegations of abuse of dominance on a case-by-case basis, in the context of structural and other market-specific characteristics. In the course of an examination or inquiry, the Bureau will typically afford parties the opportunity to respond to the Bureau's concerns regarding alleged contraventions of section 79 and discuss an appropriate resolution to address them.

Dominance

1. 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.” In other words, this first element of the Act’s abuse of dominance provision requires a finding of “dominance”.
2. Four factors are relevant to assessing dominance: (i) a “class or species of business” – generally, a product market; (ii) “in Canada or any area thereof” – generally, a geographic market; (iii) “control” – a substantial degree of market power; and (iv) “one or more persons” – joint dominance.³
3. Market definition in abuse of dominance cases is an analytical tool that may assist with the determination of whether a firm is dominant.⁴ The Tribunal has recognized that often it is neither possible nor necessary to precisely define a market (or markets) in proceedings under section 79.⁵ In some cases, it may be clear that a firm is dominant under all plausible market definitions.
4. While the following discussion contemplates defining markets in the context of selling goods or services, a similar exercise can be conducted when defining input markets from the perspective of a dominant buyer.

³ For the remainder of this document the terms “firm”, “person”, and “entity” will be used interchangeably. Similarly, unless otherwise indicated, any reference to a single allegedly dominant person should be read to include reference to either a single dominant person or multiple dominant persons.

⁴ As discussed further below, the Bureau may define different markets for the purposes of paragraphs 79(1)(a) and 79(1)(c). As such, market definition is also relevant to the assessment of competitive effects.

⁵ [TREB CT](#) at para 132.

A. A “Class or Species of Business”: Product Market

5. For the purposes of paragraph 79(1)(a), the Tribunal has held that a “class or species of business” is synonymous with a product market(s).⁶
6. Defining 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, focusing on demand responses.⁷
7. The “hypothetical monopolist test” provides a useful framework to conceptualize substitutability between products – an analytical framework the Tribunal has recognized can be helpful in cases under section 79.⁸ The Bureau considers whether a profit-maximizing hypothetical monopolist would impose and sustain a small but significant and non-transitory price increase for a candidate set of products above a given benchmark. In general, the smallest set of products in which the price increase would be sustained, including the product in respect of which the alleged abuse of dominance has occurred or is occurring, is defined as the product market.
8. Typically, the initial candidate market considered is a product in respect of which the alleged abuse of dominance has occurred or is occurring and its closest substitute. If a hypothetical monopolist could 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 (which could include the products of other firms). The analysis is repeated until the point at which the hypothetical monopolist would profitably impose and sustain such a price increase over the candidate market.

⁶ NutraSweet at 9. The term product also encompasses services ([see subsection 2\(1\) of the Act](#)).

⁷ The Bureau considers supply responses, or the ability of potential competitors to begin supplying in response to a price increase, when assessing the “control” element of paragraph 79(1)(a), such as when assessing market shares and participants, rather than when defining markets.

⁸ [TREB CT](#) at para 124.

9. For purposes of the hypothetical monopolist test, the Bureau generally considers a 5 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. Market characteristics may support using a different price increase or time period.
10. It is important to note that, in the context of abuse of dominance cases, the current price may not be the appropriate benchmark to use when defining the 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).⁹ 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, but rather are only considered substitutes for products in the market at price levels where market power has already been exercised.
11. 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.¹⁰ However, in practice, such direct evidence may be difficult to obtain.
12. For the above reasons, market definition for the purposes of section 79 will often focus on indicators of substitutability. Such indicators include:
 - **Views, strategies, behaviours and identity of buyers:** Whether buyers have substituted between products in the past, and whether they plan to do so in the future, can indicate whether a price increase in a candidate market is sustainable. Industry surveys, industry participants and industry experts may also provide helpful information with respect to products that may be substitutable. Documents prepared by the firm in question in the ordinary course of business may also prove useful in this regard.
 - **End-use and physical characteristics:** Functional interchangeability between two products is generally a necessary, but not sufficient, condition to warrant inclusion in the same 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 market.

⁹ [TREB CT](#) at paras 129-130.

¹⁰ When detailed data on the prices and quantities of the relevant products and their substitutes are available, statistical measures may be used to define 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 close substitutes for one another.

- **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 render product substitution an unlikely response to a small but significant and non-transitory price increase.
 - **Price relationships and relative price levels:** The presence of a strong correlation in price movement between two or more products over a significant period of time may suggest that the products fall within the same market.
13. The Bureau may consider it appropriate to define markets in reference to particular types of purchasers in certain circumstances, such as where sellers engage in price discrimination between different sets of buyers. For example, the Bureau may define two separate markets if a seller is able to effectively price discriminate between commercial customers and individual consumers. Similarly, the Bureau may define markets in reference to a particular level of a supply chain: for example, when assessing if a manufacturer is dominant in an industry where manufacturers sell through retailers, the Bureau may define a market as sales to retailers.
14. In some cases the Bureau may consider it appropriate to analyse several different (or potentially different) product markets together for the purposes of market definition. This could occur when evidence indicates that there may be more than one product market but that competitive conditions are sufficiently similar in each market such that analyzing them together does not affect the assessment of dominance. Where appropriate, the Bureau may analyse several geographic markets (discussed below) together in the same manner.
15. The Bureau may define a market as a group of diverse products that are not themselves substitutes for each other in cases where a sole, profit maximizing seller would increase the price of the group of the products because a sufficient number of buyers would not respond to the price increase by purchasing individual products from different sellers. This may occur, for example, where there are sufficiently large transaction costs associated with dealing with multiple sellers.
16. Special considerations arise when applying the hypothetical monopolist test to “multi-sided” platforms. For a multi-sided platform, demand for one “side” depends on use of another; one example would be an advertising service that matches buyers and sellers of a product, where greater buyer use increases the attractiveness to sellers, and greater seller use increases the attractiveness to buyers. Depending on the facts of a case, the Bureau may define a product market as one side of a multi-sided platform (i.e., consider the effects of a price increase on one side of the platform). However, when considering if a hypothetical monopolist would find it profit maximizing to impose that price increase, it may be necessary to account for the interdependence of demand, feedback effects, and changes in profit on all sides of the platform.¹¹ In other cases, the Bureau may view it appropriate to define a market to include multiple sides of the platform.

¹¹ See [Visa](#) at para 189. Similarly, where the Bureau has defined a market as one side of a platform the Bureau, where appropriate, may consider effects of conduct on multiple sides of the platform when evaluating issues beyond market definition.

17. Additionally, challenges may arise in the application of the hypothetical monopolist test where services are offered at a zero-monetary price (for instance, where services are offered for free to attract users to a multi-sided platform that depends on advertisers for monetization). In such cases, firms may compete on dimensions other than monetary price, such as product quality. Although the Bureau may seek to analyze whether a hypothetical monopolist would find it profit maximizing to decrease a relevant non-price dimension of competition by a small but significant amount for a non-transitory period of time, this may not be feasible in practise. As a result, the Bureau's analysis may focus on qualitative indicators of substitutability. This analysis will generally be similar to assessing substitutability based on qualitative indicators in other cases, as discussed above.

B. “Throughout Canada or any Area Thereof”: Geographic Market

18. The Tribunal has held that the phrase “throughout Canada or any area thereof” is synonymous with a geographic market(s).¹²
19. A geographic market consists of all locations or supply points regarded as close substitutes by buyers. From a buyer perspective, a geographic market may include territory outside of Canada. Similar to product market definition, 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 price increase. A geographic market will consist of all locations or supply points that would have to be included for such a price increase to be profitable. 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).
20. The Bureau may consider if the area in which the allegedly dominant firm operates constitutes a geographic market. However, the Bureau may ultimately define geographic markets more broadly or more narrowly. In the latter case, where an allegedly dominant firm operates in more than one geographic market, the Bureau will seek to assess if competitive conditions materially vary across those markets. If competitive conditions are similar in several geographic markets, the Bureau may consider them together for analytical purposes.

¹²

NutraSweet at 20.

21. The Bureau will also consider indirect evidence of substitutability between locations or supply points when defining geographic markets, such as:
- **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, which may impact the geographic dimension of a buyer's purchases. 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 geographic market. The extent to which distant supply locations are taken into account in business plans, marketing strategies and other documentation of the firm 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 render substitution to sources of supply from other geographic areas an unlikely response to a small but significant and non-transitory price increase.
 - **Transportation costs, price levels, 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 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 any locational pricing differential to the point where purchases from distant sellers may be able to constrain a price increase.
22. While the principles above apply equally to domestic and international sources of competition, other considerations, such as tariffs, duties, quotas, regulatory impediments, government procurement policies, intellectual property laws, exchange rate fluctuations and international product standardization may be relevant when considering whether supply points located outside Canada should be included in the geographic market.

C. “Substantially or completely control”: Market Power

23. The Tribunal has held that the phrase “substantially or completely control” contemplates a substantial degree of market power.¹³ The Supreme Court of Canada has defined “market power” as “the ability to ‘profitably influence price, quality, variety, service, advertising, innovation or other dimensions of competition’”;¹⁴ the Tribunal has characterized a substantial degree of market power as one that “confers upon an entity considerable latitude to determine or influence price or non-price dimensions of competition in a market, including the terms upon which it or others carry on business in the market”.¹⁵ Market power may be reflected in an ability to restrict the output of other existing or potential market participants, and thereby profitably influence price (the “power to exclude”).¹⁶
24. When assessing if a firm holds a substantial degree of market power, the Bureau considers the body of relevant information and/or documents on the whole in order to determine the extent to which a firm has the ability to influence the market. The exact nature of the Bureau’s analysis and the weight accorded to any particular piece of information or document will depend on the circumstances of the case.
25. Market power can be measured directly or indirectly. Direct indicators of market power, such as evidence of supra-competitive profitability or pricing, are not always conclusive or indeed possible to assess; practical difficulties can arise in defining the “competitive” price level and the appropriate measure of cost to which prices should be compared.¹⁷
26. In many cases the Bureau examines a number of indirect indicators, both qualitative and quantitative, in conducting its analysis of market power, such as structural characteristics of a market (including market shares and any barriers to entry), the extent of technological change, the effects of a practice of anti-competitive acts, and customer or supplier countervailing power. The Bureau’s analytical approach to the assessment of these indicators is discussed in greater detail below.

¹³ [TREB CT](#) at para 173.

¹⁴ [Tervita](#) at para 44.

¹⁵ [TREB CT](#) at paras 174.

¹⁶ [TREB CT](#) at para 176.

¹⁷ 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. See Tele-Direct at 101 and [Canada Pipe CT](#) at para 161.

27. A firm that does not compete in a market may nonetheless substantially or completely control that market.¹⁸ When assessing if a firm holds a substantial degree of market power in a market in which it does not compete the power to exclude current or potential competitors will often be the focus of the Bureau's analysis. Conversely, indicators of market power such as market shares or supra-competitive profits may not be relevant in such circumstances, whereas they may be central to assessing market power where the allegedly dominant firm does compete in the market.
28. 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.¹⁹

i. Market Shares and Barriers to Entry

29. Jurisprudence has often relied on a combination of high market shares and barriers to entry as evidence 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 the existence of a substantial degree of market power.²⁰
30. All other things being equal, the larger the share of the market held by competitors, the less likely it is that the firm in question would be capable of exercising a substantial degree of market power. The ability of customers to switch to competitors if a firm attempts to increase price may be demonstrated by a large market presence of those competitors. In such cases, switching by a significant portion of a firm's customer base may be enough to render any increase in price unprofitable. However, the ability to switch may depend on various factors such as the speed and ease with which rival firms are able to accommodate increased demand for their products as the prices of rival suppliers increase, or any switching costs.
31. In addition to considering the market shares of current sellers of relevant products, the Bureau may also consider the shares of potential sellers that would participate in the market through a supply response if prices rose by a small but significant and non-transitory amount. In such a case, a firm could be considered a participant in the 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 market without incurring significant investment.

¹⁸ TREB FCA 1 at para 13.

¹⁹ The Tribunal has held that the use of the present tense in paragraph 79(1)(a) means that at the time a person engages in a practice of anti-competitive acts, they must be in a position of dominance in the market ([Direct Energy](#) at para 40). The Bureau may conclude that paragraph 79(1)(a) is satisfied where a firm attains dominance through a practice of anti-competitive acts, provided that the firm is dominant at some point in time when the practice is ongoing.

²⁰ However, as discussed in more detail below, in exceptional cases the Bureau may consider firms with relatively low market shares to possess a substantial degree of market power where other evidence establishes its existence.

32. 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 market are homogeneous and firms are operating at capacity, relative market shares should be similar regardless of the 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 current and future competitive significance of competitors.
33. 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 that substantially lessened or prevented competition.²¹
34. In many cases, the Bureau uses market shares as an initial screening mechanism to assess allegations of abuse of dominance. The Bureau's general approach is as follows:
- A market share below 50 percent will generally only prompt further examination if other evidence indicates the firm possesses a substantial degree of market power, or that it appears the firm is likely to realize the ability to exercise a substantial degree of market power through the alleged anti-competitive conduct within a reasonable period of time while that conduct is ongoing;
 - A market share of 50 percent or more will generally prompt further examination; and
 - 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.
35. In circumstances where the Bureau has not reached a final conclusion regarding the boundaries of the market, several plausible market definitions may present themselves. Where at least one plausible market definition exists that indicates an allegedly dominant firm possesses a substantial degree of market power, the Bureau may investigate further.

²¹ In Tele-Direct, at 83, 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 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 a substantial degree of market power could be found below that threshold.

36. 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 a substantial degree of market power.
37. Market shares are not the only factor the Bureau considers, and where other evidence provides sufficient indication that a firm may be dominant regardless of a relatively low market share the Bureau may investigate further.²² The types of evidence that may prompt the Bureau to investigate further include:
- **Direct evidence of market power:** Where available, evidence of supra-competitive pricing;
 - **Significant Commercial Leverage:** Market or demand characteristics may provide the allegedly dominant firm sufficient commercial leverage over upstream or downstream firms such that it may exercise a substantial degree of market power, for example, through the ability to affect a supplier’s dealings with other customers;
 - **Effects of the Anti-Competitive Acts:** An ability to cause prices to be higher in the market than would exist in the absence of the firm’s conduct may be evidence of the existence and or/magnitude of market power on the part of that firm;²³ and
 - **Other evidence of influence:** where a firm has otherwise demonstrated “considerable latitude”²⁴ to determine or influence a relevant dimension of competition.
38. The Bureau anticipates that, all else equal, these types of evidence are less likely to exist if the market share of the potentially dominant firm is small. However, there may be circumstances where market shares do not factor into the Bureau’s analysis, for instance, where a firm controls a market through the ability to exclude, as discussed below.
39. A high market share is not itself sufficient to establish a substantial degree of 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. As a result, the Bureau considers the extent to which barriers to entry or expansion may

²² The Tribunal has recognized that firms with relatively low market shares may possess some degree of market power. For example, in the context of other provisions of Part VIII of the Act, the Tribunal has found a firm to possess market power with a share as low as 33 percent ([Visa](#) at para 267), and has recognized that market shares may either overstate or understate a firm’s market power (Hillsdown at 318).

²³ See, for instance, [TREB CT](#) at para 196.

²⁴ See [TREB CT](#) at para 174.

limit the ability of rivals to respond to any exercise of market power. Barriers to entry or expansion can take many forms, including:

- **Sunk costs of entry or expansion:** Costs are sunk when they cannot be recovered if the firm exits a market. Sunk costs may pose a barrier to entry or expansion where the anticipated rewards to entry or expansion are anticipated to be less than the associated sunk costs, or there is sufficient risk that this will be the case as to have a deterrent effect;
- **Regulatory barriers:** In addition to their relevance to geographic market definition, regulatory controls relating to entry, tariff and non-tariff barriers to international or domestic trade may impede entry or expansion by competitors;
- **Economies of scale and scope:** Economies of scale occur when the average cost of producing a product declines the more of a product is produced, whereas economies of scope occur where the average costs of producing a product decline with the production of other products. Instances where such economies can be barriers to entry or expansion include when economies of scale prevent viable entry on a small scale or require entry to be on a sufficiently large scale to depress market prices, or where economies of scope require that a viable entrant must begin production of various products at once;
- **Market maturity:** Where market demand is not expected to increase, entry or expansion may be more difficult as any additional business must be converted from incumbents, rather than growth in market demand. Similarly, it may be easier to enter a market when it is young or growing, or less attractive to invest in assets that may be stranded due to decline in market demand;
- **Network effects:** Network effects occur when demand for a product depends on use of that product by others, and can be direct or indirect. Direct network effects occur when the demand for a product or service directly increases with more users, such as how the value of a communications network for an individual may increase with the number of other users of the network. In contrast, indirect network effects occur where greater use of a product or service by members of one group creates value for members of another group, potentially causing feedback effects. For example, in the case of a website that matches buyers and sellers of various products, the website becomes more valuable to buyers the more sellers use the website, and vice versa. All else equal a buyer may be indifferent to the number of other buyers that use the website, but if additional buyers attract additional sellers, a buyer indirectly benefits from greater use of the website by other buyers. Network effects may provide significant advantages to incumbent firms, making entry or expansion more difficult; and

- **Access to scarce or non-duplicable inputs:** An inability to access significant inputs that are required to be a viable competitor in a market may prevent entry or expansion.
40. The Bureau will examine the nature of any barriers to entry, including those created by the alleged practice of anti-competitive acts,²⁵ to assess whether entry would be timely, likely, and sufficient in scale and scope to make the exercise of a substantial degree 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 a substantial degree of market power. When assessing if entry will satisfy these criteria, the Bureau will generally seek to determine if the threat of entry or expansion has an appreciable effect on the allegedly dominant firm’s conduct.

ii. The Ability to Exclude

41. As noted above, the Tribunal has recognized that the ability to exclude – the ability to restrict the output of other actual or potential market participants, and thereby profitably influence price – constitutes market power.²⁶ Where through the impugned conduct assessed under paragraphs 79(1)(b) and 79(1)(c) a firm has demonstrated its ability to exclude rivals, this provides evidence that it has market power.²⁷
42. Assessing the existence and degree of market power through the ability to exclude is particularly relevant when a firm does not compete in a market in which the alleged anti-competitive effects are alleged to be occurring. A firm that does not compete in a particular market may nonetheless control it, for example, through control of a significant input to competitors in a market, or the ability to make rules that effectively control the business conduct of those competitors.²⁸ The Bureau does not view these two mechanisms as mutually exclusive: for example, a firm may leverage control of a significant input in order to impose and enforce rules that affect the business conduct of competitors in a market.
43. When assessing whether a firm controls a significant input in a market in which it does not compete (e.g., a downstream market), the Tribunal has indicated it is not necessary to define and establish dominance in an additional market defined around that input (e.g., an upstream market).²⁹ However, for the purposes of assessing if control of that input provides the ability to exclude, the Bureau will consider the extent to which substitutes exist to the input provided by the allegedly dominant firm, as well as the extent to which that input is necessary to compete. In the absence of

²⁵ Laidlaw at 331; Tele-Direct, at 95; Canada Pipe CT at paras 138, 146; Canada Pipe FCA 2 at paras 24-25, 36.

²⁶ TREB CT at para 176.

²⁷ TREB CT at paras 182, 190, 254(n).

²⁸ TREB FCA 1 at para 13.

²⁹ TREB CT at paras 203-207.

acceptable substitutes, and if competitors in the market are unable to effectively compete without access to the input, the Bureau will conclude the allegedly dominant firm has a substantial degree of market power in that market (in the examples above, in the downstream market).

44. When assessing if a firm has the ability to impose rules that govern the conduct of competitors, the Bureau may consider the extent to which any rules are adhered to, or could be enforced by the allegedly dominant firm. If such rules are not adhered to or enforced, the Bureau is not likely to conclude the allegedly dominant firm has a substantial degree of market power on that basis.

iii. Other Factors

45. The Bureau may examine other potentially relevant indicators when assessing the existence and/or magnitude of market power, including:
 - **Countervailing power:** A customer or supplier may have the ability and incentive to constrain a firm's attempt to exercise a substantial degree of market power, such as by vertically integrating its own operations; refusing to buy or sell 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.

D. “One or more persons”: Joint Dominance

46. Section 79 contemplates that a group of firms may jointly substantially or completely control a market, satisfying paragraph 79(1)(a). The Bureau's analytical framework for assessing joint dominance is similar to that employed in examining single-firm dominance, and likewise focusses on the existence of a substantial degree of market power. Similar to single-firm dominance, the Bureau considers the ability of a firm or firms to exercise a substantial degree of market power, 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 a substantial degree of market power together.

47. 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.
48. In the absence of a sufficient competitive constraint from outside an allegedly jointly dominant group, if competition among group members is also insufficient to constrain prices to the competitive level, members of that group will be able to jointly exercise a substantial degree of market power. As a result, when assessing joint dominance, the Bureau may accord significant weight to how vigorously the allegedly jointly dominant firms compete with each other.³⁰ In the absence of vigorous competition the Bureau may conclude that the lack of mutual competitive constraint permits them to exercise a substantial degree of market power.
49. Similar or parallel conduct by firms is insufficient, on its own, for the Bureau to consider those firms to hold a jointly dominant position. Further, evidence of coordinated behaviour by firms in the allegedly jointly dominant group may be probative insofar as it may explain why members of the allegedly dominant group are not vigorously competing. However, the Bureau does not consider such evidence as necessary to establish that a group is jointly dominant, if there is other evidence that competition among members of the allegedly dominant group is not sufficient to discipline their exercise of a substantial degree of market power.
50. As with single-firm dominance, the ability to exercise a substantial degree of market power on a collective basis is not in and of itself sufficient to raise an issue under the abuse provisions of the Act. While a group of firms may collectively be able to exercise a substantial degree of 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. It may, however, be the case that a practice of anti-competitive acts facilitates joint dominance. For example, joint dominance may be enabled or reinforced through disciplinary conduct, as discussed below.

³⁰ Prices that appear to be at or near the competitive level could be evidence of vigorous competition. Other factors may include, but are not limited to, price competition among competitors, instability of market shares over time, attempts to solicit rival's customers, or "leapfrog" competition through innovation. Conversely, the absence of these factors on the part of firms within the allegedly jointly dominant group could indicate that these firms are not competing vigorously with one another.

Anti-competitive Acts

51. 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.

A. A “Practice”

52. 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.³¹ 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.

B. Anti-competitive Acts

53. Section 78 of the Act enumerates a non-exhaustive list of acts that are deemed to be anti-competitive in applying section 79.³² 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.³³ 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 a predatory, exclusionary, disciplinary, or some other

³¹ [Canada Pipe FCA 1](#) at para 60.

³² In addition, subsection 79(5) states that “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.” For information on the Bureau’s approach to reviewing business conduct involving intellectual property, see the Bureau’s [Intellectual Property Enforcement Guidelines](#).

³³ [Canada Pipe FCA 1](#) at para 66.

anti-competitive purpose.³⁴ On the latter, by way of example, conduct aimed at undermining the competitive process and the vigour with which other firms may compete may be considered as having the requisite anti-competitive purpose.

54. When assessing whether an act is anti-competitive, the purpose of an act may be established directly by evidence of subjective intent, inferred from the reasonably foreseeable consequences of the conduct, or both. 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.³⁵ In most cases, the purpose of the act can be inferred from the circumstances, and persons are assumed to intend the reasonably foreseeable consequences of their acts.³⁶
55. In some cases, when evaluating the overall character of a practice, evidence that the conduct was motivated by a legitimate business justification can outweigh evidence of anti-competitive purpose when the two are balanced against each other. The role of business justifications in evaluating the purpose of conduct is discussed further below.
56. For the purposes of paragraph 79(1)(b), a competitor is a person who competes in a market, and need not be a competitor of the allegedly dominant firm.³⁷ Thus, a firm that does not compete in a market may nonetheless engage in a practice of anti-competitive acts directed toward competitors in that market.

³⁴ The Federal Court of Appeal and Tribunal have acknowledged that paragraph 78(1)(f) does not contain an explicit reference to a purpose vis-à-vis a competitor. The Federal Court of Appeal has characterized the conduct in paragraph 78(1)(f) as reflecting "a self-serving intent, not a relative one intended to harm a competitor", and that on the premise of its earlier jurisprudence "requiring a predatory, exclusionary, or disciplinary negative effect on a competitor in all cases would render paragraph 78(1)(f) meaningless" ([TREB FCA 2](#) at para 54).

³⁵ [Canada Pipe FCA 1](#) at paras 72-73.

³⁶ NutraSweet at 35.

³⁷ [TREB CT](#) at para 277; [TREB FCA 1](#) at paras 17-20.

57. Where a firm that does not compete in a market is alleged to have engaged in a practice of anti-competitive acts, the Tribunal has indicated that it must be satisfied that the firm has a “plausible competitive interest” in adversely impacting competition in that market.³⁸ As noted above, the Federal Court of Appeal has characterized anti-competitive acts as those that have an intended negative effect on a competitor that is predatory, exclusionary, or disciplinary. Although the Bureau will typically consider the incentives of a dominant firm to limit competition, the Bureau may conclude that a firm that does not compete in a market has engaged in a practice of anti-competitive acts where an exclusionary, predatory, disciplinary, or other anti-competitive purpose can be demonstrated.
58. 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 three broad categories: (i) predatory conduct; (ii) exclusionary conduct; and (iii) disciplinary conduct.

i. Predatory Conduct

59. Predatory conduct involves a firm deliberately setting the price of a product(s) below an appropriate measure of its own cost to incur losses on the sale of product(s) in the 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.³⁹ Predatory pricing may be implicit (through discounts or rebates, for example), or explicit.
60. The Bureau considers that average avoidable cost is the most appropriate cost standard to use when determining if a dominant firm’s prices are below cost.⁴⁰ 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. Whether a cost is avoidable depends in part on the duration of the alleged predation as, in general, more costs become avoidable over time. Where the firm’s pricing of the product(s) does not cover its own average avoidable costs, the Bureau will consider the pricing to be predatory in the absence of evidence that the overriding purpose of the conduct was in furtherance of a credible efficiency or pro-competitive rationale. For example, it may be reasonable for a firm to sell excess, obsolete or perishable products at below-cost prices. Similarly, companies may use below-cost promotional pricing to induce customers to try a new product.

³⁸ **TREB CT** at paras 279-282.

³⁹ The Bureau will typically consider the question of whether a firm can recoup any losses incurred in predation in the analysis of whether the conduct has given rise to a substantial lessening or prevention of competition pursuant to paragraph 79(1)(c). In many cases the ability to recoup losses from predation will depend on barriers to entry that prevent new entry in response to supra-competitive prices, or re-entry by predicated firms. In the absence of recoupment in the past, present, or likely recoupment in the future, the Bureau would not typically consider paragraph 79(1)(c) to be satisfied.

⁴⁰ **Air Canada** at paras 76, 80.

61. There are difficulties inherent in applying a price-cost test to identify predatory pricing, all other things being equal. 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.

ii. Exclusionary Conduct

62. 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. Vigorous competition on the merits (e.g., offering superior services at a lower price) may force competitors to be more effective or result in their exit from a market, but does not engage the abuse of dominance provisions. In contrast, exclusionary conduct is designed to make current and/or potential rivals less effective, to prevent them from entering the market, or to eliminate them from the market entirely. Such conduct often does so by raising rivals’ costs or reducing rival’s revenues.
63. In a non-exhaustive list, 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. All such activities can, in certain circumstances, serve to increase a rival’s costs and/or reduce their revenues, which may make it more difficult for the rival to compete or result in its exclusion from the market.
64. The following is a brief discussion of three types of exclusionary conduct that may raise issues under the abuse of dominance provisions: exclusive dealing, tying and bundling, and refusals to supply. These are not the only categories of exclusionary conduct, nor are they mutually exclusive. Indeed, in the Bureau’s experience, individual anti-competitive acts may be viewed as part of more than one category, or otherwise blur the lines between them. For instance, the implementation of a tie can have the effect of inducing a firm’s customers to exclusively purchase a tied product from that firm.

Exclusive Dealing

65. Exclusive dealing occurs when a firm supplies its product or products to a customer on the condition that the customer or supplier buy and/or sell only those versions of the product(s). In addition or alternatively, exclusive dealing may also occur when a firm requires that customers (or suppliers) do not buy (and/or sell) products of competitors. Exclusive dealing can also take the form of a firm requiring or inducing its own suppliers to deal only with the firm itself and not with that firm's competitors. Exclusivity may be mandated explicitly, or induced through other methods, such as technological incompatibilities, requirements contracts, meet-or-release clauses, most-favoured-nation (MFN) clauses, or other contractual practices.
66. Exclusive dealing is not necessarily anti-competitive, and is often engaged in for reasons other than to exclude competitors. For example, exclusive dealing may solve "free rider" problems where a firm supplying a product to a downstream retailer also provides some service component, technological information, or aftermarket support that improves the product for consumers. If the retailer can use this information to improve the products of rival suppliers as well, the firm, without contractual protection, will have little incentive to provide this support. In such a case, exclusive dealing may preserve such an incentive to offer these services, which is generally to the benefit of consumers.
67. However, by inducing exclusivity from a sufficient quantity of suppliers or customers, a dominant firm may raise barriers to entry or expansion by raising rivals costs. Examples of how this may be achieved include denying rivals sufficient business to achieve economies of scale, preventing rivals from accessing necessary inputs, forcing rivals to compensate customers for the penalties incurred for switching, or inducing rivals to inefficiently vertically integrate.

Tying and Bundling

68. Tying occurs when, as a condition of obtaining or using one product (the "tying" product), a firm requires or induces a customer to purchase another product as well (the "tied" product). Closely related, bundling typically refers to situations whereby products are sold together in fixed proportions. Tying and bundling are ubiquitous in many industries, as many items for sale can be viewed as distinct tied products or a bundle of different components. In many cases there are often strong cost efficiencies that motivate tying and bundling.
69. However, to the extent a tying or bundling strategy excludes, predates, or disciplines a competitor it may raise concerns under the abuse of dominance provisions of the Act. In particular, the Bureau will consider whether the tie excludes competitors in whole or in part by increasing their costs or reducing their revenue. For instance, a tie may result in a firm with a substantial degree of market power in one market creating, enhancing or maintaining its market power in a second market. Like exclusive dealing, tying may increase switching costs for consumers, deny rivals economies of scale or scope necessary for efficient production, or induce inefficient production choices by rivals.

70. Before concluding that a firm is engaging in tying, the Bureau will seek to determine whether the alleged tying and tied products are in fact separate products. A central question in the inquiry is the extent to which separate customer demand exists for the tying and tied products. The Bureau may also consider efficiencies that arise from a tie; if, for example, implementing a tie gives rise to efficiencies such that it is not commercially viable to offer the products separately, the Bureau would not conclude the tying and tied products to be separate products notwithstanding consumer demand.

Refusals to Supply

71. As a general matter, there is no obligation on any business to supply to, or buy a product from, another business. However, in some exceptional circumstances, refusals to supply may engage the abuse of dominance provisions.
72. In some cases, a firm may explicitly refuse to supply a product. However, concerns may also arise in relation to “constructive” refusals, where a firm agrees to supply on terms that are sufficiently onerous as to have the same effect as an explicit denial (e.g., charging a prohibitively high price).
73. For the Bureau to conclude that a refusal to supply is an anti-competitive act, it must be the case that the product or service being denied is both competitively significant and cannot otherwise be feasibly obtained (for example, from other suppliers or through self-supply). Where this is the case, the Bureau may conclude that it was reasonably foreseeable that the purpose of a refusal was to exclude a competitor, in the absence of a legitimate business justification.
74. When exercising its enforcement discretion in relation to refusals to supply, the Bureau is aware that competitively significant inputs are often the result of significant and costly investment and innovation, and forcing firms to supply may undermine incentives for firms to develop new and beneficial products and services.

iii. Disciplinary Conduct

75. The Bureau considers that a dominant firm engages in disciplinary conduct where it undertakes actions intended to dissuade an actual or potential competitor from competing more vigorously, or otherwise disrupting the status quo in a market. Such conduct may not have a predatory or exclusionary purpose, but rather, be intended to soften competition. Section 78 provides two examples of potentially disciplinary conduct: paragraph 78(1)(d) contemplates the use of fighting brands to discipline a competitor, and paragraph 78(1)(i) refers to discipline through selling articles at a price lower than their acquisition cost.

76. Disciplinary conduct may play a role in facilitating, maintaining, or inducing coordination among firms. In many cases when firms engage in coordinated conduct, each participant faces an incentive to deviate from the coordinated outcome. For example, where firms coordinate in order to raise prices in a market, each participant in the coordination may have the incentive to lower its own prices in order to win additional sales from the other participants at the elevated prices. As a result, one of the requirements for coordinated behaviour to likely be sustainable is the ability to respond to any deviations from the terms of coordination through credible deterrent mechanisms. Disciplinary conduct may provide such a mechanism: by engaging in disciplinary conduct, a dominant firm can induce or preserve coordination by punishing – or credibly threatening to punish – deviations from a coordinated outcome.
77. Disciplinary conduct may also include actions that do not directly punish rivals, but rather, facilitate punishments or increase the credibility of threats to punish rivals. For example, if a firm adopts contractual terms with its customers that provide the firm with more information about the extent to which rivals are deviating from supra-competitive pricing, thereby increasing the likelihood discipline will occur, the Bureau may consider the contractual terms to be disciplinary conduct.
78. In assessing whether the purpose of a practice is disciplinary, the Bureau may be more likely to rely on subjective evidence of intent than when assessing other types of anti-competitive acts, particularly where the alleged disciplinary conduct consists of pricing behaviour alone. Because such disciplinary acts may be particularly difficult to distinguish from vigorous competition on the merits, the Bureau may be hesitant to conclude that an act has a disciplinary purpose based solely on its reasonably foreseeable consequences.⁴¹ When evaluating evidence of subjective intent, the Bureau will typically look for evidence of “something more” than the typical intent of a firm to best its competition. For example, where evidence indicates that a firm engaged in an aggressive competitive response not to meet (or beat) competition from a rival, but instead to induce that rival to compete less vigorously, the Bureau may conclude that “something more” is present.
79. Given the above, the Bureau anticipates that it would investigate allegedly disciplinary conduct in limited circumstances, and that it would generally have to be satisfied that the alleged conduct is disciplinary on its face.⁴²

⁴¹ Exceptions to this approach may exist. For example, if a firm engaged in similar behaviour after being sanctioned for disciplinary conduct, or if the Bureau observed substantially similar conduct in a market in which disciplinary conduct had previously taken place, the Bureau may put less of a focus on subjective evidence of intent.

⁴² The Bureau recognizes that difficulties may arise identifying an appropriate remedy for disciplinary anti-competitive acts. As with other conduct actionable under section 79, the appropriate remedy for a disciplinary act will ultimately depend on the specific facts of any given case. When determining the appropriate remedy for disciplinary conduct the Bureau will have regard to the spectrum of options afforded by section 79, including administrative monetary penalties where appropriate.

iv. Business Justifications

80. 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. 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."⁴³ 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.⁴⁴ Compliance with a statutory or regulatory requirement may also constitute a business justification, where an act is required to comply with that statutory or regulatory requirement.⁴⁵
81. Although the Bureau will consider any business justifications posited by the allegedly dominant firm, as the courts have recognized, where an allegedly dominant firm asserts a business justification it ultimately bears the burden of proof to establish it.⁴⁶
82. In assessing the overriding purpose of an alleged anti-competitive act, the Bureau will examine the credibility of any efficiency or pro-competitive claims raised by the allegedly dominant firm, their link to the alleged anti-competitive act, and the likelihood of these claims being achieved. In this assessment, the Bureau may seek evidence as to the role the asserted efficiency or pro-competitive justification played in the allegedly dominant firm's decision-making. In the absence of contemporaneous evidence that the asserted business justification rationally motivated the allegedly dominant firm, the Bureau will be less likely to conclude that the business justification is credible.

⁴³ [Canada Pipe FCA 1](#) at para 73.

⁴⁴ However, as the Tribunal has recognized, it is necessary to consider all known circumstances; for example, cost reductions that may be contemplated or realized by driving one's rivals from a market would not suffice to shield conduct that was primarily motivated by a predatory, exclusionary or disciplinary purpose (see [TREB CT](#) at para 295).

⁴⁵ [TREB FCA 2](#) at para 146.

⁴⁶ [TREB FCA 2](#) at para 144.

83. Additionally, after finding evidence in support of both an anti-competitive purpose and a claimed business justification, when assessing the overall character of a practice the Bureau may consider whether the claimed efficiency or pro-competitive benefits could have been achieved by credible alternate means that would have had a lesser impact on competitors, where appropriate. In conducting this analysis the Bureau would typically only consider alternative methods to achieve a business objective where either subjective evidence establishes the allegedly dominant firm considered those alternatives or there is clear objective evidence that it would be unreasonable for that firm to not have considered those alternatives (e.g., if a firm changes the manner in which it pursues a business objective, the Bureau would generally presume the firm considered maintaining its previous course of action).
84. Consistent with an approach noted by the Tribunal, when assessing the overall character of a practice the Bureau may consider if the alleged anti-competitive acts made no economic sense but for their anti-competitive effect on a competitor.⁴⁷ Conduct that makes no reasonably foreseeable economic sense but for an anti-competitive effect is likely to have an overarching anti-competitive purpose. However, circumstances may arise where the Bureau finds a practice satisfies paragraph 79(1) (b) even when, evaluating its reasonably foreseeable consequences, it may make economic sense without an anti-competitive effect on a competitor. Such cases may include where evidence of subjective intent establishes an anti-competitive purpose, or where the reasonably foreseeable economic benefits resulting from exclusion are sufficiently large compared to the other profits derived from the practice to make it clear that the overarching purpose was an anti-competitive effect on a competitor.⁴⁸

⁴⁷ **TREB CT** at paras 311-318. In addition, the Tribunal indicated that it may also have regard to whether the acts involved the sacrifice of short-term profits that would not be recouped but for the exclusion of a competitor. The Bureau's approach to such analysis is similar to what is set out above with respect to the no economic sense analysis.

⁴⁸ When analyzing whether conduct made no reasonably foreseeable economic sense but for the exclusion of a competitor, the Bureau will not always consider the appropriate counterfactual scenario (against which to assess relative economic benefits) to be the one in which the firm took no action whatsoever. For instance, where a firm is presented with two options and elects to pursue the one in which it foresees deriving greater profits due to exclusion (and lower profits from other sources) than the alternative, the Bureau would consider this to make no economic sense but for the exclusion of a competitor.

85. Business justifications are relevant to the assessment of anti-competitive purpose and do not directly bear on the analysis of competitive effects pursuant to paragraph 79(1)(c).⁴⁹ The Bureau is not required to quantify any efficiencies resulting from a practice of anti-competitive acts, but will consider any such efficiencies within the purpose-focussed assessment of paragraph 79(1)(b).⁵⁰

⁴⁹ [Canada Pipe FCA 1](#) at para 87.

⁵⁰ The Tribunal has recognized that business justifications “do not give rise to the quantitative assessment contemplated by the efficiency exception in section 96 of the Act” and that “it would be much more difficult, and perhaps even completely intractable, in the section 79 context” ([TREB CT](#) at para 291).

Competitive Effects

86. Paragraph 79(1)(c) requires that 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 is dominant and has 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 in one or more markets.⁵¹ Generally speaking, a substantial lessening or prevention of competition occurs when an impugned practice causes a materially greater degree of market power to exist than in the absence of the practice.
87. 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 is instead 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.⁵²
88. To satisfy paragraph 79(1)(c), conduct can either **lessen** or **prevent** competition. The Tribunal has recognized that the general analytical approach is similar in either case, but important differences exist. Conduct that lessens competition typically permits the exercise of new or increased market power through lessening the constraint posed by current or potential competitors. Conduct that prevents competition, in contrast, typically preserves existing market power by preventing new competition that would have materialized in the absence of the impugned practice.⁵³

⁵¹ When assessing competitive effects pursuant to paragraph 79(1)(c) the Bureau analyzes effects in reference to a market, which in turn engages the concepts of market definition. The Bureau is of the view that the markets for the purposes of paragraphs 79(1)(a) and 79(1)(c) need not be the same; that is, section 79 may apply where a firm is dominant in one market but substantially lessens or prevents competition in another (see, for instance, Tele-direct at 214). When necessary, the Bureau applies the same approach to market definition for the purposes of paragraph 79(1)(c) as it does in reference to paragraph 79(1)(a), discussed above.

⁵² This test was accepted by the Federal Court of Appeal in [Canada Pipe FCA 1](#) at para 38. The Court stated that other tests might also be appropriate depending on the circumstances.

⁵³ [TREB CT](#) at paras 472-474.

89. In many cases, a substantial lessening or prevention of competition is accomplished by erecting or strengthening barriers to entry or expansion. Through increased barriers to entry or expansion, competitors or potential competitors are inhibited or deterred from competing as vigorously as they otherwise would, thereby disciplining the exercise of market power.⁵⁴ In examining anti-competitive acts and their effects on barriers to entry or expansion, 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 exercise of market power, the Bureau will conclude that the acts in question result in a substantial lessening or prevention of competition.⁵⁵
90. Although the Bureau's conceptual approach focusses on increased barriers to entry or expansion, the Bureau may also assess the effects of a practice of anti-competitive acts on various indicators of the intensity of competition. Such indicators include whether, in the absence of the practice of anti-competitive acts, the extent to which:
- monetary prices would be lower;
 - product quality, service, innovation, or choice would be greater; or
 - switching between products or suppliers would be more frequent.

⁵⁴ This could include causing rivals to adopt more accommodating competitive reactions.

⁵⁵ 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 by dominant firms. The Federal Court of Appeal has held that a duration of two years will usually be sufficient to establish an effect ([TREB FCA 2](#) at para 64).

91. Whether any lessening or prevention of competition is substantial is assessed in terms of its degree, duration, and the extent to which it extends throughout the market. There is no definitive threshold past which a given lessening or prevention qualifies as substantial. Rather, substantiality is assessed based on market specific factors, including the market power of the allegedly dominant firm. As the Tribunal has confirmed, “where a firm with a high degree of market power is found to have engaged in anti-competitive conduct, smaller impacts on competition resulting from that conduct will meet the test of being “substantial” than where the market situation was less uncompetitive to begin with.”⁵⁶
92. When assessing whether a practice of anti-competitive acts gives rise to a substantial lessening or prevention of competition, the Bureau may rely on either qualitative (e.g., business documents, views of industry participants, etc.) or quantitative evidence (e.g., econometric studies).⁵⁷ The Bureau seeks to evaluate the causal impact of the practice of anti-competitive acts by comparing the state of competition in the market to a counter-factual scenario where the practice did not take place. In conducting this assessment, the Bureau may seek evidence that directly speaks to the counter-factual scenario (e.g., the views of market participants), as well as evidence from natural experiments in the market at issue or in other markets.
93. Natural experiments are often useful to assess a counterfactual by examining historical events that link changes in competitive conditions (e.g., entry or exit of firms, presence of certain competitors, products, services, or contractual practices) to changes in observable effects. In appropriate circumstances, the study of events and their impact on competition in one market can be very informative to an assessment of likely effects in another market. For example, the Bureau may seek evidence on how competitive outcomes differ in similar markets where the impugned conduct did not take place, or examine evidence relating to the state of competition in the market before and after a practice of anti-competitive acts (or other events, such as the exit of a competitor) to determine its causal effect.
94. When assessing the impact of a practice of anti-competitive acts, the Bureau may consider effects on both static competition (e.g., the impact on prices and output) and dynamic competition (e.g., rivalry driven by product or process innovation). Indeed, conduct that creates or enhances barriers that reduce dynamic competition, such as innovation, which the Tribunal has characterized as “the most important form of competition”,⁵⁸ is of particular concern to the Bureau. However, due to its forward-looking and uncertain nature, effects on dynamic competition are often more challenging to assess than effects on static competition. In such cases, natural experiments from other markets (where available) may assist in establishing competitive effects.

⁵⁶ Tele-Direct at 247.

⁵⁷ Although in certain circumstances the Bureau may undertake quantitative studies of competitive effects when assessing potential abuses of dominance, it is not necessary for the Bureau to adduce quantitative evidence to establish a substantial prevention or lessening of competition ([TREB FCA 2](#) at paras 101, 104).

⁵⁸ [TREB CT](#) at para 712.

95. The potential for enforcement action to chill dynamic competition in favour of increased static competition is an important consideration for the Bureau in determining whether to pursue an enforcement action, or even what remedy to pursue if enforcement action is warranted. Healthy dynamic competition may result in sequential “winner take all” competition for a market based on product quality or innovation, with the result that the successful firm acquires market power. Often, it is the prospect of market power that provides the incentive for firms to engage in dynamic competition. Focussing enforcement on static outcomes may result in longer term harm as it may undermine the incentives for firms to engage in beneficial dynamic competition, and caution must be exercised when intervening in fast-moving markets. However, this potential result does not give dominant firms a license to lessen or prevent competition. In particular, where a dominant firm raises barriers that prevent more (or potentially more) innovative rivals from challenging its position, the Bureau will not hesitate to take action where appropriate.

4 Remedies

96. The Bureau considers potential remedies early in any investigation or inquiry under section 79 in order to determine the nature, scope, and the means by which a remedy may be implemented. Where the Bureau is satisfied that the evidence supports a conclusion that section 79 is engaged, a number of avenues to remedy the situation are available.

A. Consensual Resolutions

97. Generally speaking, in using the range of enforcement tools available, the Bureau encourages and facilitates voluntary compliance and will often attempt to achieve a negotiated settlement in response to a breach of section 79.⁵⁹
98. Where the Bureau has concluded section 79 is engaged, in most circumstances the Bureau will require that any proposed remedy agreed upon be formalized in a consent agreement and registered with the Tribunal pursuant to section 105 of the Act.⁶⁰ Consent agreements entered into by the Bureau and a respondent must be based on terms that could be the subject of an order of the Tribunal. Upon registration, consent agreements have the same force and effect as orders of the Tribunal.

⁵⁹ See also the Bureau's [*Competition and Compliance Framework*](#).

⁶⁰ Where the Commissioner has concluded the elements of section 79 are satisfied, the Commissioner will not typically discontinue an inquiry or application if the dominant firm unilaterally ceases its practice of anti-competitive acts unless the dominant firm enters into a consent agreement. This provides certainty and predictability to the Bureau and market participants that the anti-competitive conduct will not be resumed. In some cases the Bureau may seek compensation for investigative costs as part of a consent agreement. Additionally, the Bureau may seek administrative monetary penalties in consent agreements, where appropriate.

B. Orders of the Competition Tribunal

99. Where the Bureau is satisfied that the evidence supports an application to the Tribunal under section 79 and the Bureau cannot resolve a case on a consensual basis, or where a consensual remedy is not considered appropriate in the circumstances, the Bureau may make an application to the Tribunal for a remedial order.⁶¹
100. Where the Tribunal finds that the elements of section 79 are met, the Act grants the Tribunal broad discretionary remedial powers to address the anti-competitive conduct in question. This includes the ability to impose both behavioral and structural remedies, varying from prohibition orders (subsection 79(1)), prescriptive orders requiring that certain corrective action be taken (subsection 79(2)) and the imposition of administrative monetary penalties (subsection 79(3.1)).

i. Prohibition and Prescriptive Orders

101. Pursuant to subsection 79(1), the Tribunal may issue an order prohibiting a respondent from engaging in the impugned practice of anti-competitive acts. In addition or alternatively, if the Tribunal finds that an order prohibiting the practice is not likely to restore competition in the affected market, subsection 79(2) provides that the Tribunal may issue an order directing the respondent to take any such actions as are reasonable and necessary to overcome the effects of the practice of anti-competitive acts, including the divestiture of assets or shares.⁶² Other actions may include, for instance, changes to contractual terms, or the establishment of a corporate compliance program. The Bureau typically views prohibition and prescriptive orders as complementary and, where appropriate, may seek orders that both prohibit the anti-competitive conduct and direct the respondent to take positive steps or actions as are necessary to restore competition in the market.

⁶¹ The Commissioner is the only party that may make applications to the Tribunal under section 79. See [subsection 79\(1\) of the Act](#).

⁶² Subsection 79(2) permits the Tribunal to grant both prescriptive behavioural remedies (e.g., compelling a respondent to undertake certain mandatory conduct) and structural remedies (e.g., the divestiture of assets). The Bureau does not seek structural remedies to abuses of dominance in the vast majority of circumstances, but may consider doing so where an abuse of dominance causes structural changes in a market such that competition cannot be restored by a behavioural remedy alone. For example, where a practice has removed effective pre-existing competitors from a market where barriers to entry (that are not created or enhanced by the abuse of dominance) have increased over time with the result that new entry is not feasible, the Bureau may seek a divestiture that would permit a new entrant to be a viable competitor. This could either be in lieu of or in addition to a prohibition order under subsection 79(1) and/or a prescriptive behavioural remedy under subsection 79(2).

102. Failure to comply with an order rendered under section 79 (other than subsection 79(3.1)) or a consent agreement registered with the Tribunal under section 105 is a criminal offence.⁶³

ii. Administrative Monetary Penalties

103. Where the Tribunal issues an order pursuant to subsections 79(1) and/or 79(2) of the Act, it may also, pursuant to subsection 79(3.1), order the respondent to pay an administrative monetary penalty (“AMP”). Such a penalty may not exceed \$10 million for the first order, or \$15 million for each subsequent order. The purpose of an AMP in an abuse of dominance case is to promote practices by the person from whom an AMP is sought that are in conformity with the purposes of section 79, not to punish the respondent for the anti-competitive conduct.⁶⁴ Failure to pay an AMP by a respondent may be enforced civilly as a debt due to the Crown.⁶⁵
104. The Bureau generally considers AMPs as a complement to other remedies available under section 79 that are designed to restore competition. Given their purpose to promote practices by the dominant firm that are in conformity with the purposes of section 79 the Bureau’s decision to seek AMPs and their amounts will depend to a great extent on the facts specific to each case.
105. When assessing whether an AMP is appropriate, the Bureau will consider factors such as: (i) the respondent’s willingness to collaborate in a timely manner with the Bureau in the context of the investigation or inquiry, including to immediately cease the impugned conduct when the Bureau raises competition concerns; (ii) the respondent’s history of compliance with the Act; and (iii) whether the evidence suggests the respondent intended not to comply with the Act, or showed a wanton or reckless disregard for the Act.

⁶³ See [section 66 of the Act](#).

⁶⁴ See [subsection 79\(3.3\) of the Act](#).

⁶⁵ See [section 79.1 of the Act](#).

106. When the Bureau determines that an AMP is warranted in the circumstances, the determination of its amount will be guided by the aggravating and mitigating factors set out in subsection 79(3.2) of the Act:
- The effect on competition in the market;
 - The gross revenue from sales affected by the practice;
 - Any actual or anticipated profits affected by the practice;
 - The financial position of the person against whom the order is made;
 - The history of compliance with the Act by the person against whom the order is being made; and
 - Any other relevant factor.
107. The amount of an AMP is to be determined based on the totality of the relevant considerations in the circumstances; no single factor is determinative.
108. In cases where an AMP is sought, the Bureau will be mindful to seek AMPs of the quantum necessary to ensure that AMPs do not merely become the “cost of doing business” for a dominant firm engaging in anti-competitive conduct, within the statutory limits, while also ensuring that they are not excessive or disproportionate in the circumstances and serve their statutory purpose, i.e., to promote conduct that is in compliance with the purposes of the abuse of dominance provisions.
109. The Bureau is guided by similar considerations and factors when determining whether to include an AMP in consent agreements in respect of abuse of dominance and in establishing the amount.

Illustrative Examples

110. The following examples are designed to illustrate the analytical framework that may be applied by the Bureau in the enforcement of section 79. These examples are not intended to provide an exhaustive catalogue of all conduct that may raise issues under section 79, and depending on the facts of any individual case the Bureau may depart from the analytical approach set out below. As with these Guidelines generally, the Bureau's discussion of the examples below does not replace the advice of legal counsel and is 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 the matter in question.

A. Example 1 – Mere Exercise of Market Power

111. HO3 and SANTA are firms that compete in respect of the supply of Santa hats in Canada. These two firms are the most important players in the market with market shares of 65 percent and 20 percent for HO3 and SANTA respectively. High barriers to entry make it difficult for a new entrant to enter the market. Recently, HO3 unilaterally raised the prices for the Santa hats it sells in Canada by over 250 percent. The Bureau has received complaints that HO3 has abused its dominant position.

Analysis

112. Although it is necessary for a firm to possess a substantial degree of market power in order to contravene section 79, this alone is not sufficient to raise issues under the abuse of dominance provisions of the Act. Even where a firm may be dominant, it must also be engaging in a practice of anti-competitive acts that gives rise to a substantial lessening or prevention of competition. The Bureau would not view HO3's price increase as an anti-competitive act as it does not exclude, predate, or discipline a competitor or a potential competitor. Further, because the price increase is a result of HO3's pre-existing market power, not a practice of anti-competitive acts, paragraph 79(1)(c) cannot be established.

B. Example 2 – Market Definition

113. DUTY is one of several manufacturers of heavy-duty drills in western Canada. During the last year, SMASH, a manufacturer with a great reputation in the market for high-end hammers, started marketing “hyper-duty” drills to retailers in western Canada. These “hyper-duty” drills are 20 percent more expensive than the ones offered by DUTY, but they are also 30 percent more powerful. SMASH, DUTY, and all other drill manufacturers in western Canada only sell their products through unaffiliated retail channels.
114. Different drill manufacturers operate in eastern Canada, and shipments of drills between the two regions are limited, accounting for approximately 5 percent of drills purchased in western Canada. The share of eastern Canadian produced drills purchased in western Canada has remained relatively stable despite price fluctuations between the two regions. However, within western Canada, prices generally follow each other across the region and shipments of drills are observed in response to price differentials.
115. SMASH has complained to the Bureau, alleging that DUTY has engaged in a practice of anti-competitive acts relating to certain of DUTY’s contracting practices. As part of its complaint, SMASH has presented evidence that its costs, and consequently its prices, have increased as a result of DUTY’s conduct, while the prices of DUTY and other traditional drills remained stable.

Analysis

116. This example will focus on product and geographic market definition.
117. To initially conceptualize substitutability, the Bureau would generally use the hypothetical monopolist test. In order to do so, the Bureau may seek data on substitution patterns between different drill types and manufacturers. In addition, the Bureau would seek information on qualitative factors relating to substitutability; as set out above, these include (i) functional interchangeability, (ii) views, strategies, behaviour and identity of buyers, (iii) trade views, strategies and behaviour (inter-industry competition), (iv) price relationships and relative price levels, and (v) switching costs. For

example, the Bureau would seek to examine if the additional power or higher cost from the “hyper-duty” drills prevents or limits substitution, or if the hyper-duty drills are interoperable with existing equipment. Such information may be sought from sources including contractors, retailers and other drill manufacturers.

118. In this instance, as all drill manufacturers only sell their products through retailers, the Bureau would likely seek to define a market relating to the sale of drills to retailers, rather than consumers. However, as substitution at the retail level could be informed by consumer demand, evidence on end-consumer preferences and substitution patterns may be relevant.
119. When defining markets for the purpose of section 79, it is necessary to assess substitutability at the price that would have prevailed absent the impugned conduct. In this case, the Bureau may accord particular weight to evidence of substitutability from before the period DUTY engaged in the alleged conduct. However, the Bureau would consider the evidence that the increase in price for “hyper-duty” drills was not correlated with an increase in price for traditional drills to be indicative that they are not in the same market.
120. Similarly, the Bureau would use the hypothetical monopolist test to examine the bounds of the geographic market, i.e., the extent of retailer switching from drill manufacturers in one region to manufacturers in another region. Generally, the Bureau would look at whether an area is sufficiently insulated from price pressures emanating from other areas so that its unique characteristics can result in its prices differing significantly in any period of time from those in other areas. Due to the pricing differentials with eastern Canada, different competitors, and limited imports that do not vary with the price differential, the Bureau would likely conclude that eastern Canada should not be included in the same geographic market as western Canada. The fact that drill manufacturers compete across western Canada and that prices and purchases track each other across the region would support the conclusion that western Canada is the appropriate geographic market.

C. Example 3 – Market Power

121. SUBSTANTIAL is Canada’s premier supplier of toques. Toques are sold in specialized boutiques; although toque retailers usually stock several brands of toque, they do not typically sell unrelated products. SUBSTANTIAL has a market share of 40 percent. There are six other competitors who evenly account for the remainder of the market.
122. Information gathered by the Bureau suggests that a substantial number of consumers have a strong preference for SUBSTANTIAL’s products, and only shop at retailers that stock them. Other customers do not share this preference, and are willing to consider other substitutes, but no other brand of toque attracts similar customer loyalty. Consumers view SUBSTANTIAL’s products as key to establishing credibility as a toque boutique, and a retailer that does not carry SUBSTANTIAL toques will be significantly disadvantaged against its rivals as a result. For these reasons, SUBSTANTIAL is able to obtain considerably more favourable support from retail channels, including favourable placement and expenditure on promotional activities.

123. A competitor of SUBSTANTIAL has complained to the Bureau, alleging that SUBSTANTIAL has engaged in a practice of anti-competitive acts relating to SUBSTANTIAL's contractual terms with retailers which have excluded itself and other competitors. They have provided credible evidence that as a result of SUBSTANTIAL's practice, the price SUBSTANTIAL charges for toques has risen by more than 33 percent.

Analysis

124. The purpose of this hypothetical is to illustrate the Bureau's approach to assessing market power in the context of abuse of dominance. For the purposes of this analysis, the Bureau has already determined that the market is toques sold to retailers in Canada.
125. The Bureau will typically begin with an assessment of whether a firm holds a substantial degree of market power based on structural considerations. This involves determining the market and then assessing market shares and barriers to entry. In the absence of other evidence, based on these factors alone, the Bureau will not typically find dominance in cases where the allegedly dominant firm has a market share of less than 50 percent. However, in some cases, contextual factors may suggest that market shares may not be representative of the full extent of a firm's market power and may prompt further investigation by the Bureau.
126. In this case, evidence of SUBSTANTIAL's leverage over retail channels and the competitive impact of SUBSTANTIAL's actions would likely prompt further investigation. When assessing the extent to which SUBSTANTIAL has commercial leverage over its retail channels, one factor the Bureau would consider is whether SUBSTANTIAL is willing and able to discipline retailers that do not comply with SUBSTANTIAL's terms, or if the threat of punishment is sufficient to exert leverage over retailers. If SUBSTANTIAL is able to unilaterally demand and receive considerably more favourable terms than other suppliers or dictate the level of support other brands of toque receive, the Bureau may consider this an indicator of market power. A key element of the Bureau's analysis would be examining the underlying consumer demand for SUBSTANTIAL's products, and the amount of switching that would occur if the prices of SUBSTANTIAL's products increased notwithstanding any alleged anti-competitive acts. The Bureau may also consider that the evidence that SUBSTANTIAL's toque prices increased by more than 33 percent as a result of SUBSTANTIAL's alleged anti-competitive conduct suggests SUBSTANTIAL has market power.
127. Given these factors, the Bureau may conclude that SUBSTANTIAL substantially or completely controls a market within the meaning of paragraph 79(1)(a), that is, it possesses a substantial degree of market power, notwithstanding SUBSTANTIAL's market share of 40 percent.

D. Example 4 – Joint Dominance

128. BUDDY, PAL, and CHUM are manufacturers of tandem bicycles, who sell their products through retailers. All three are roughly the same size, and each has a market share of approximately 33 percent. These market shares have remained stable over the past five years. Evidence suggests that BUDDY, PAL, and CHUM do not materially attempt to solicit the customers of the others, and there is very little customer switching between the firms.
129. BUDDY, PAL, and CHUM engage in long-term contracts with retailers that include automatic renewals, significant liquidated damages clauses in the event of early termination, and meet-or-release clauses that apply for a period subsequent to a contract being terminated in accordance with its conditions. These contracts both limit incentives for BUDDY, PAL, and CHUM to compete among each other and make it more difficult for new entrants to acquire customers.
130. FRIENDLY has unsuccessfully attempted to enter the market for tandem bicycles. Despite offering lower prices, FRIENDLY was unable to secure a sufficient number of customers due to the contracting practices of BUDDY, PAL, and CHUM. Without the ability to realize the economies of scale necessary to compete with the incumbents, FRIENDLY was forced to abandon its efforts to enter the market.

Analysis

131. This hypothetical will focus on assessing whether BUDDY, PAL, and CHUM are jointly dominant, rather than the other elements of section 79. The Bureau has already established that the product market is tandem bicycles, and the geographic market is Canada.
132. First, the Bureau would seek to assess whether firms outside the allegedly dominant group, either existing competitors or potential entrants, can discipline any exercise of market power by BUDDY, PAL, or CHUM. In this case, as there are no other firms in the market, the focus of this assessment would be on potential entrants. The Bureau would consider the barriers to entry that exist, as well as the history of failed entry by FRIENDLY. Unless the Bureau found that barriers to entry were low (including barriers created by the conduct at issue), the Bureau may conclude that potential entrants could not discipline the joint exercise of market power by the incumbents.
133. The Bureau would then examine if competition between BUDDY, PAL, and CHUM is sufficient to prevent a joint exercise of market power to a substantial degree. Relevant information to this assessment includes factors such as the stability of market shares over time, the lack of active solicitation of the others' clients, and low customer switching, which would suggest that BUDDY, PAL, and CHUM jointly possess a substantial degree of market power. That BUDDY, PAL, and CHUM have adopted similar contractual terms may be relevant to this analysis to the extent they lessen the vigour of competition among the three, and therefore facilitate the joint exercise of market power.

134. As a result, the Bureau could conclude BUDDY, PAL, and CHUM are jointly dominant in the market for tandem bicycles in Canada, satisfying the requirement of paragraph 79(1)(a).⁶⁶

E. Example 5 – Predatory Pricing

135. CHATEAU and DOMAINE are two Canadian maple-infused ice wine producers. Both produce only one type of wine, which is unique to these two vineyards. Indeed, both are located on a major hill in Gatineau with a particular micro-climate that cannot be found anywhere else in the world and this gives their products a distinctive taste which is sought after by connoisseurs.
136. Following a change in the leadership of CHATEAU, last year its new management substantially increased production and now offers customers a \$40 rebate to the regular \$50 price on each bottle of this year's vintage of its classic ice wine. Following this, DOMAINE contacted the Bureau alleging that this constitutes predatory pricing.

Analysis

137. Allegations of predatory pricing are examined under section 79 of the Act. Predatory pricing occurs when a firm deliberately prices below its own costs in order to eliminate or discipline existing rivals or to deter entry. This can substantially lessen or prevent competition when the firm engaging in the predation can subsequently recoup its losses by charging prices above the level that would otherwise have prevailed. For the purposes of this example, assume that the wines of CHATEAU and DOMAINE constitute the product market, the geographic market is Canada, and that CHATEAU holds a substantial degree of market power within that market.
138. As a pre-condition for predatory pricing, the Bureau considers it necessary for the relevant products to be priced below their average avoidable costs. Regarding this particular fact situation, a relevant initial way to assess the validity of DOMAINE's concerns would be to seek information from DOMAINE on its own costs and profitability. If CHATEAU's price is above DOMAINE's own costs, the Bureau would conclude that DOMAINE is not likely to be excluded by the pricing strategy and as a result, the requirements of paragraph 79(1)(c) are not likely met. Further, this would cast doubt on the assertion that CHATEAU is pricing below its own costs.
139. When assessing CHATEAU's average avoidable costs, the Bureau's focus will be on determining those costs that would have been avoided had CHATEAU not produced and sold the wine subject to the pricing strategy, including any opportunity costs. For simplicity, assume that there are four categories of costs that CHATEAU incurs:

⁶⁶ In addition to the above factors, the Bureau would also consider any other relevant evidence that a substantial degree of market power exists on the part of BUDDY, PAL, or CHUM, such as direct evidence of market power, or an ability to exclude.

- Bottles: CHATEAU purchases bottles shortly before bottling a given vintage based on the quantity it needs;
 - Barrels: CHATEAU has a fixed stock of aging barrels, which is larger than what it typically requires at any time and CHATEAU rents excess barrels out to other vineyards;
 - Labour: CHATEAU has a permanent staff who can only be fired in extreme circumstances, and hires seasonal labour to assist with grape planting, harvesting, processing, and bottling; and
 - Land: CHATEAU is 68 years into a 100 year lease for the land the vineyard is situated on, cannot increase or reduce the amount of land it leases, and cannot use the land for any other purpose.
140. Because the quantity of bottles CHATEAU purchases varies based on the amount of wine CHATEAU produces, the Bureau would view this as an avoidable cost. Conversely, because CHATEAU cannot increase or reduce the amount of land it leases, the Bureau would not view land as an avoidable cost regardless of what share of CHATEAU's total costs the lease represents.
141. Because CHATEAU rents out barrels to other vineyards, when it uses them to age its own wine CHATEAU incurs an opportunity cost for the foregone rent it otherwise would have received. As a result, this foregone rent becomes an avoidable cost even if CHATEAU would not have purchased additional barrels.
142. Certain elements of CHATEAU's labour costs would likely be avoidable, while others may not be. Any seasonal labour CHATEAU retained for the purposes of producing the wine subject to the pricing strategy would be avoidable. If CHATEAU would not have hired any additional permanent employees to produce the wine, and as CHATEAU is limited in its ability to terminate permanent employees, these costs would not be avoidable, depending on the duration of the pricing strategy. To illustrate, if the pricing occurs for a short period, CHATEAU may not be able to alter its costs related to permanent employees. However, if it persists for a longer time such that permanent employees may quit or retire and CHATEAU would have discretion as to whether to hire replacements, permanent labour costs may become avoidable.
143. The Bureau would typically also seek to determine if there is credible evidence of a legitimate business objective on the part of CHATEAU – e.g., if they were meeting a price set by a competitor, selling excess, obsolete or perishable inventory, or seeking to induce customers to try a new product.
144. Having determined CHATEAU's avoidable costs, the Bureau would then compare this to the price of the wine subject to the pricing strategy. In the absence of a credible business justification, if CHATEAU is pricing below its average avoidable cost, the Bureau would likely conclude that CHATEAU has engaged in a practice of anti-competitive acts.

145. In addition, even where a firm is pricing below its average avoidable costs, in order to substantially lessen or prevent competition and thereby raise issues under the Act it must be likely for a firm to recoup the losses it incurred through its pricing strategy. If any attempt to subsequently raise prices would be thwarted by timely new entry, re-entry, or remaining competitors, the below cost pricing will not give rise to a substantial lessening or prevention of competition. In such cases, if the dominant firm successfully raises prices, and barriers prevent new entry, re-entry or expansion of existing competitors from being sufficiently timely or sufficient to discipline the exercise of market power on the part of the dominant firm, competition will be substantially prevented or lessened.
146. Barriers to entry may be created or strengthened by the predation. For example, by developing a “reputation for predation” a dominant incumbent may create the perception that entry will be unprofitable, deterring actual or potential entrants.
147. In this case, the Bureau would evaluate if any attempt by CHATEAU to raise prices and exercise market power would be thwarted by re-entry by DOMAINE, or by new entry. In this case, if re-entry by DOMAINE is unlikely or would not discipline CHATEAU’s market power and a new entrant would be unable to obtain the land, assets, or know-how necessary to produce a competing wine, or would face significant reputational barriers due to being an unproven entrant that would prevent it from disciplining CHATEAU’s market power, the Bureau may conclude that recoupment is possible and that the conduct substantially lessens or prevents competition.

F. Example 6 – Exclusive Dealing

148. A panopticon is a consumer electronic device that has become ubiquitous since its introduction three years ago. Most major consumer electronics manufacturers started developing their own panopticons and are competing to offer the best panopticons to consumers with the most advanced features.
149. Panopticons collect a significant volume of data on their users, including location and spending habits. Realizing the value of this data, several companies, known as panopticon data aggregators, started buying panopticon data directly from the panopticon manufacturers in order to analyze it and monetize the intelligence mined from the data. One of the key uses of aggregated panopticon data is providing insights into consumer preferences and purchases for advertising and marketing purposes.
150. In Canada, unlike in the United States where there are three major panopticon data aggregators, only one firm is offering these services. That firm, named THOTH, has been collecting panopticon data for the last two years and uses this data to enhance the capabilities of its algorithm, making its product even more desirable to customers. Having two years of Canadian panopticon data in its algorithm gives THOTH a significant competitive advantage over any entrant in the market for panopticon data aggregation in Canada. Further, THOTH collects data on how its customers use THOTH’s aggregated data, which permit it to further improve the quality of its algorithm.

151. Over the last year, THOTH has started signing new ten-year contracts with all its suppliers of panopticon data in Canada. These contracts include significant monetary penalties for early termination, as well as bonus payments for providing THOTH exclusive access to data. THOTH claims that these contractual terms are necessary in order for it to recoup the significant investments it has made in integrating the data from its suppliers into its algorithm. Further, THOTH claims that the exclusivity payments incentivize data suppliers to technologically integrate themselves with THOTH's platform, increasing the quality of data THOTH collects and improving the analysis it can provide to customers.
152. ENKI, THOTH's largest competitor in the United States, has complained to the Bureau that because of these contractual terms ENKI cannot secure the data it would require to enter the Canadian market and compete with THOTH.

Analysis

153. For the purposes of this hypothetical, assume that the Bureau has already defined a product market around panopticon data aggregation in Canada, and that THOTH is dominant in that market.
154. When assessing if THOTH has engaged in a practice of anti-competitive acts, the Bureau would likely focus its analysis on the payments for exclusive access to panopticon data.⁶⁷ In particular, the Bureau would seek to determine if the purpose of the payments was to foreclose access to panopticon data in order to exclude rivals.
155. When assessing the purpose of the contractual terms, the Bureau may examine evidence relating to the negotiation of the contractual terms. This analysis may consider whether the contractual terms were included at the request of THOTH or the suppliers. In the latter case, the Bureau may assess THOTH's intent in agreeing to the supplier's request, or any modifications to the supplier's request that may have been made at the behest of THOTH.
156. As part of the Bureau's investigation, in addition to seeking any subjective evidence of intent on the part of THOTH, the Bureau may seek to determine if excluding ENKI was a reasonably foreseeable consequence of the contractual terms. This may include gathering information on the extent to which substitutes exist for the data suppliers subject to the THOTH contracts, whether additional suppliers could enter or ENKI could self-supply with data, and if the payments for exclusivity have the effect of inducing some or all data suppliers to not deal with ENKI. The Bureau would also assess the extent to which ENKI requires data from all suppliers to be viable in the market. The Bureau may also examine whether, even without the exclusivity payments, it was reasonably foreseeable that panopticon data suppliers would not have supplied data to ENKI. If the contractual terms have the effect of preventing a sufficient number of data suppliers from dealing with ENKI and there are no viable alternatives, the Bureau could conclude that a negative exclusionary effect on a competitor was reasonably foreseeable.

⁶⁷ Because the contractual terms have been consistently inserted into ten-year agreements with data suppliers, the Bureau would consider THOTH to be engaged in a practice.

157. The Bureau may also assess any relevant business justifications for the contractual terms advanced by THOTH. Here, it argues that the exclusivity payments incentivize beneficial technological integration. If, for example, there was no contemporaneous evidence at the time the contractual terms were entered into that the payments would improve technological integration and thereby product quality, the Bureau would be unlikely to find THOTH's justification credible. Even if there is some evidence of the benefits of the payments, if there was contemporaneous evidence suggesting THOTH considered other options to achieve similar outcomes through less restrictive means (e.g., contracting for similar services instead of requiring exclusivity) the Bureau may not consider THOTH's business justification persuasive.
158. The Bureau may also consider whether THOTH's exclusivity payments made economic sense but for the exclusion of competitors. This would involve trading off the costs of the exclusivity payments against any revenues that would be derived from benefits other than exclusion (e.g., increased sales of aggregated panopticon data due to higher quality, if any). In the absence of demonstrated revenues that do not depend on exclusion, the Bureau could consider this an indicator that the exclusivity payments have an anti-competitive purpose.
159. The Bureau would then consider whether the contractual terms substantially lessened or prevented competition in the market for panopticon data aggregation, i.e., if the contractual terms permit THOTH to exercise materially greater market power in the past, present, or likely in the future.
160. In this circumstance, the Bureau would seek to determine the extent to which barriers to entry are the result of THOTH's contractual terms, as compared to characteristics of the market itself. For instance, in an industry characterized by network effects, the extent to which barriers to entry already exist must be taken into account when assessing the effect of the clauses on competition. Here, THOTH's superior algorithm resulting from two years of panopticon data aggregation and customer use data may create sufficiently strong barriers that the contractual terms have no incremental effect.
161. The Bureau would seek to determine if, in the absence of THOTH's contractual terms, entry would be timely, likely, and sufficient to discipline the market power of THOTH. In order to assess the effects of the contractual terms, the Bureau may seek information on the state of competition in the United States where there are no exclusivity clauses, and the views of other potential entrants. If evidence indicated that entry would be unlikely because of the market structure even in the absence of such clauses, it would make the Bureau significantly less likely to conclude that there has been, is, or is likely to be a prevention of competition resulting from the clauses.
162. If the contractual terms are having the incremental effect of deterring entry, the Bureau would seek to assess the competitive significance of that entry. This may include examining evidence on the relative state of competition in markets for panopticon data aggregation where no such exclusivity clauses with suppliers exist, such as the United States. If evidence indicated that prices paid for panopticon data would be substantially lower, quality of services higher, or that there would be substantially more innovation in the absence of the contractual terms, the Bureau could conclude that THOTH's conduct has substantially prevented competition.

G. Example 7 – Tied Selling

163. GORDIAN produces hitches, which are used in a variety of industrial applications. Use of a hitch requires rope, which quickly degrades and often needs to be replaced.
164. As late as two years ago there were four different producers of rope, including GORDIAN. At that time a rival producer, ALEXANDER, began developing plans to introduce a competing product to GORDIAN's hitches. ALEXANDER planned to leverage synergies between hitch and rope production to reduce costs and offer hitches at a price 20 percent below GORDIAN. Shortly afterward, GORDIAN introduced a policy requiring that only GORDIAN rope may be used with its hitches in order for the hitch to qualify for warranty coverage. Following this, the vast majority of hitch users switched to GORDIAN rope. As a result ALEXANDER and other third party rope manufacturers exited the market, and, as ALEXANDER was no longer able to rely on production efficiencies between hitches and rope, abandoned its efforts to compete with GORDIAN hitches.
165. GORDIAN claims that this policy was implemented because of low quality third party rope causing damage to its hitches, increasing GORDIAN's costs to provide service and lowering the reputation of its products.

Analysis

166. For the purposes of this hypothetical, assume that the Bureau has already defined a product market around hitches, and that GORDIAN is dominant in that market. Further, subject to hitches and rope being separate products (as discussed below), assume that the Bureau has defined rope to be a product market. In both cases, assume that the geographic market is Canada.
167. The Bureau would seek to determine whether the alleged tying and tied products are in fact separate products. A central question in the inquiry is the extent to which separate customer demand exists for the tying and tied products. The Bureau may also consider efficiencies that arise from a tie; if, for example, implementing a tie gives rise to efficiencies such that it is not commercially viable to offer the products separately the Bureau could not conclude the tying and tied products to be separate notwithstanding consumer demand.
168. In this case, when evaluating whether separate demand exists, the Bureau may consider the history of hitches and rope being purchased from different manufacturers, as well as the views of current and potential rope purchasers. Based on these facts, the Bureau could conclude that separate demand exists.

169. The Bureau could also consider whether implementing the tie gives rise to efficiencies such that it is not practical to offer hitches and rope as separate products. Because the economies of scope between rope and hitches rely on their joint production rather than the tie, the economies of scope would not be considered as part of this analysis. Here, the Bureau could consider the history of the two products being sold separately to be dispositive, and conclude that hitches and rope are separate products.
170. The Bureau may then turn to assessing whether GORDIAN's purpose in implementing the tie was anti-competitive; in this case, focussing on whether the tie was intended to exclude one or more competitors in the market for rope . This would involve examining evidence of GORDIAN's subjective intent in implementing the tie, as well as the reasonably foreseeable effects of the tie.
171. The Bureau would typically examine the extent to which the tie is binding, that is, the extent to which the tie was likely to divert demand in the market for rope to GORDIAN. For instance, if hitch users can readily turn to effective substitutes for GORDIAN's warranty services at a sufficiently low cost, exclusion from the change to the warranty policy is not likely to be reasonably foreseeable (and similarly, if the tie is not binding, it is unlikely to prevent or lessen competition substantially). The Bureau would also examine the extent to which entry would be effective both into the market for hitches in the absence of economies of scope between hitches and rope, as well as the feasibility and effectiveness of entry into both markets simultaneously.
172. The Bureau would also consider any business justifications posited by GORDIAN. In this case, this may include gathering evidence on the extent to which third party rope caused hitch breakdowns prior to the tie, whether breakdowns have decreased following the tie, and if customer satisfaction with hitches has improved.
173. If subjective or objective evidence suggests the tie was instituted with exclusionary intent, and that evidence in support of the business justification was not compelling, the Bureau could conclude that GORDIAN has engaged in a practice of anti-competitive acts.
174. The Bureau would then consider whether the tie has, is, or is likely to cause a substantial lessening or prevention of competition in either the market for hitches or the market for rope. For example, if the Bureau concluded that the tie had raised barriers to entry in the market for hitches by denying economies of scope with rope production, the Bureau could conclude that there has been a substantial prevention or lessening of competition.

H. Example 8 – Trade Association Rules

175. SOL is a provincial trade association of solar panel manufacturers. Among other activities, SOL coordinates industry quality and performance standards for exclusive use of its members, and certifies compliance with these standards. Purchasers of solar panels have come to recognize and demand the certification SOL provides, and uncertified solar panels see markedly lower sales. Because of the significant benefits these standards provide, virtually all solar panel manufacturers in the province are members of SOL. There are similar trade associations to SOL in other provinces, who engage in similar activities. SOL is purely a trade association: it does not produce solar panels, and has not been provided with any powers or regulatory role by any federal or provincial statute.
176. There are many solar panel manufacturers that are members of SOL, and no individual member has a market share of more than 5 percent. The past several years have seen various solar panel manufacturers enter and exit the market.
177. SUNNY is a highly successful solar panel manufacturer outside the province in which SOL operates. Unlike other solar panel manufacturers who sell homogenous solar panels through traditional retail channels, SUNNY has pursued a business model where customers may order personalized solar panels through the internet, which are then shipped directly. Many consumers consider SUNNY's solar panels to be more convenient, of higher quality relative to those of its competitors, but at a comparable cost. SUNNY has grown rapidly in its native province, and is considering expanding its operations across the country.
178. Around the time SUNNY began rapidly expanding, SOL passed rules prohibiting its members from selling customized products directly to consumers. SOL claims that because customized solar panels are more varied, if they bypass traditional retail channels (where they can be more readily monitored) they cannot be subject to the same level of testing and cannot be certified as part of the standard for panels established by SOL. SUNNY has complained to the Bureau, stating that it wishes to begin operating in SOL's province, but is prevented due to the rules of SOL. SUNNY claims that without certification by SOL, demand for SUNNY's products will be markedly reduced and as a result its entry based on its current business model will not be viable.

Analysis

179. For the purpose of this hypothetical, assume the Bureau has determined the market to consist of solar panels sold in the province in which SOL operates.
180. Having defined the market, the Bureau would assess whether SOL substantially or completely controls that market. Although the Bureau may seek to understand if substitutes exist for the services of SOL – for example, if alternate certifications exist that SOL’s members can effectively substitute for SOL’s – the Bureau may not engage in a separate market definition exercise around the services of SOL or assess its market power in that second market. However, the existence and feasibility of substitutes for SOL’s services may be relevant in assessing if SOL holds a substantial degree of market power in solar panels, the reasonably foreseeable effects of SOL’s restrictions, and if such restrictions give rise to a substantial lessening or prevention of competition.
181. When determining whether SOL substantially or completely controls the market for solar panels, the Bureau could consider the extent to which SOL can influence factors such as price, quality, variety, service, advertising or innovation in the market for solar panels. This would typically include an examination of whether membership in SOL and access to its certification is commercially necessary to compete in the market, and the extent to which SOL can enforce its rules on its members. If, for example, SOL can effectively exclude competitors or types of competition from the market, the Bureau could consider this requirement satisfied. In this case, the Bureau may seek to assess the extent to which consumer demand for a manufacturer’s solar panels depends on SOL’s certification. If consumer demand was sufficiently reduced for uncertified solar panels as to make it infeasible to compete, the Bureau could conclude SOL has a substantial degree of market power.
182. The Bureau will then seek to understand if SOL has engaged in a practice of anti-competitive acts. As SOL does not compete in the market for solar panels, the Bureau may seek to determine if SOL has a plausible competitive interest in negatively affecting competition in the market for solar panels. As SOL is a trade association that acts in the interests of its members, the Bureau would likely conclude that it has such a competitive interest.
183. The Bureau would seek to evaluate the purpose of the rules adopted by SOL. This may include examination of contemporaneous evidence of SOL’s intent, such as documents or statements by SOL’s officers, that speak to the intent behind SOL’s rule changes. The Bureau may also consider whether exclusion of business models such as SUNNY’s was a reasonably foreseeable consequence of the rules adopted by SOL. The Bureau would also consider any business justifications put forward by SOL, evaluate their credibility, and determine whether these business justifications outweigh any evidence of anti-competitive intent. When evaluating the justification that individualized products may not conform to the standards set by SOL, the Bureau may evaluate the experience from areas where comparable restrictions are not adopted and the extent to which SOL conducted any studies to support the need for its restrictions. The Bureau may also have regard to whether the restrictions made economic sense, but for the exclusion of disruptive competition.

184. The Bureau would then seek to evaluate whether the restrictions give rise to a substantial lessening or prevention of competition. In doing so, the Bureau would consider whether there would be substantially greater competition among the members of SOL in the absence of the restrictions. Notably, the Bureau would not consider the relatively small market shares of the individual members of SOL or entry and exit (i.e., the absolute level of competition in the market), as dispositive in this regard. The Bureau's concern could be that the rules of SOL exclude or impede entrants (or potential entrants), as well as innovation among the members of SOL, leading to reduced dynamic competition. Relevant factors would include if the restrictions increased barriers to entry and expansion, whether the restrictions reduced the range of solar panels offered or their quality, and whether the restrictions have reduced innovation. The Bureau may find natural experiments in other markets persuasive, as well as the projections of businesses regarding the services they could offer but for the restrictions. The Bureau would also seek to assess whether other members of SOL would be offering higher quality services, be more innovative, or otherwise be engaging in more vigorous competition in the absence of the restrictions.

I. Example 9 – Disciplinary Conduct (1)

185. STATIC is Canada's largest provider of Secured Lending Cross-swaps (SLCs), a type of consumer-facing financial product, selling 60 percent of all SLCs in Canada. STATIC has one competitor, DYNAMIC, who accounts for the remaining 40 percent of sales. Since the entry of STATIC and DYNAMIC, significant tax incentives for the industry have been terminated and regulatory requirements for new entrants were increased, making new entry prohibitively difficult.
186. Competitive conditions in the SLC market – market shares, fee levels, and service offerings – have remained generally stable over the past decade. Documents gathered by the Bureau suggest that each market participant has historically realized that they benefit from less vigorous competition between each other, and have not traditionally attempted to solicit each other's customers, reduced their prices, or improved their service offerings.
187. Six months ago, DYNAMIC hired a new CEO who publically stated that DYNAMIC would begin a new program of customer acquisition, cutting fees by 10 percent and developing a new and more convenient smartphone application for customers to monitor and manage their SLCs. Shortly thereafter, STATIC launched a second branding of SLCs, QUANTIFY, through which STATIC began selling SLCs at a 70 percent discount to regular fees. After one month, DYNAMIC announced it would continue with its pricing; STATIC immediately further dropped the fees of the QUANTIFY brand to 20 percent of historical levels, announcing that it would continue to offer these fees as long as DYNAMIC continued with its customer acquisition program. The following month, DYNAMIC's CEO stated they would abandon their customer acquisition program, citing changed competitive conditions. STATIC withdrew the QUANTIFY brand from the market.

188. Following a complaint to the Bureau and a preliminary investigation, evidence indicates that STATIC was not pricing below its average avoidable costs at any point. However, internal correspondence and memos indicated that, through launching QUANTIFY, STATIC intended to punish DYNAMIC for adopting a new fee strategy and deter DYNAMIC from continuing its low fees, rather than simply matching or beating DYNAMIC's pricing. STATIC has told the Bureau it was simply a pro-competitive, aggressive response to DYNAMIC's pricing.

Analysis

189. Assume the Bureau has defined the market as SLCs sold in Canada, and concluded that STATIC holds a substantial degree of market power.
190. When assessing if STATIC's conduct is an anti-competitive act, the Bureau may accord particular weight to subjective evidence of intent, in order to distinguish a disciplinary act from aggressive competition on the merits. In particular, the Bureau may look for evidence that, in launching QUANTIFY, STATIC was attempting to punish DYNAMIC for its customer acquisition program, and restore market conditions to the historical status quo. When evaluating the overarching purpose of STATIC's conduct, the Bureau could also consider documentary evidence that other competitive responses on the part of STATIC would have been profitable had DYNAMIC not abandoned its customer acquisition program.
191. If the Bureau were satisfied that STATIC's conduct constituted a practice of anti-competitive acts, the Bureau would seek to determine if it caused a substantial lessening or prevention of competition. This could involve assessing the fee levels that would have likely prevailed if STATIC had adopted a different response and DYNAMIC had persisted in its customer acquisition strategy, as well as any non-price effects from DYNAMIC abandoning its new smartphone application.

J. Example 10 – Disciplinary Conduct (2)

192. WILDERNESS is the largest retailer of outdoor equipment in Canada, and sells products primarily online. Due to advantages such as sophisticated recommendation algorithms driven by consumer data, WILDERNESS enjoys significant customer loyalty. WILDERNESS is well known for using algorithms and the automated collection of data to monitor and respond to market trends.
193. For the past three years, WILDERNESS has sold over 85 percent of tents purchased in Canada. There are two producers of tents, YURT and BIVOUAC.

194. FRONTIER is a rival e-commerce retailer that has recently commenced operations in Canada, and has begun selling tents, produced by both YURT and BIVOUAC. To date, FRONTIER has made minimal inroads to the Canadian market and at present facilitates sales of only 4 percent of tents.
195. Until recently, prices for tents on FRONTIER's platform have been comparable to those on WILDERNESS's. In the past few months FRONTIER has begun competing more aggressively on sales of tents, offering discounts up to 20 percent below WILDERNESS's prices. However, when FRONTIER began doing so, both YURT and BIVOUAC found that orders of their products were being shipped substantially slower to customers by WILDERNESS, and their products featured notably less favorable placement on WILDERNESS's website. Although WILDERNESS has not confirmed that this is the direct result of FRONTIER's pricing behavior, both YURT and BIVOUAC have taken steps to prevent FRONTIER from undercutting WILDERNESS on tents. When they did so, previous service levels and website placement with WILDERNESS resumed.
196. FRONTIER has complained to the Bureau in relation to WILDERNESS's conduct.

Analysis

197. For the purposes of this hypothetical, assume that the Bureau has defined a relevant market that consists of the retail sale of tents in Canada, and that the Bureau has concluded that WILDERNESS has a substantial degree of market power in that market.
198. Depending on the facts and evidence the Bureau could evaluate WILDERNESS's conduct as either exclusionary or disciplinary, or both. To the extent that WILDERNESS intended to increase FRONTIER's costs in order to make FRONTIER a less effective competitor in the market for tents, the Bureau may view WILDERNESS as engaging in exclusionary conduct. Alternatively, if, for example, WILDERNESS intended to deter FRONTIER from competing more vigorously without affecting its ability to compete, the Bureau may view this as disciplinary conduct.
199. In either case, to evaluate FRONTIER's claims, the Bureau may seek evidence from WILDERNESS with respect to the operation of its monitoring algorithms, fulfillment services, and decisions with respect to website placement, including the extent to which sales of YURT and BIVOUAC's products were indeed contingent on FRONTIER's lower pricing.

200. In order to evaluate if WILDERNESS's conduct gives rise to a substantial lessening or prevention of competition, the Bureau would seek evidence that but for the impugned conduct, prices would be lower in the market for tents. This would likely involve examining the extent to which FRONTIER would lower its prices in the absence of the impugned conduct. As part of this analysis, the Bureau would likely analyze the extent to which YURT and BIVOUAC are impacted by WILDERNESS's conduct, the causal impact of WILDERNESS's conduct on YURT and BIVOUAC's decision to prevent FRONTIER from undercutting WILDERNESS, as well as the extent to which FRONTIER would capture a significant share of WILDERNESS's former consumers if WILDERNESS continued to degrade its quality of service in relation to tent orders. The Bureau would also assess the duration of the lessening or prevention of competition; for example, if FRONTIER was engaging in promotional pricing for a limited period of time with little lasting benefit to FRONTIER's ability to compete with WILDERNESS, the Bureau would be less likely to conclude competition is substantially prevented or lessened.

Full citations of judicial decisions

Air Canada:

Commissioner of Competition v Air Canada, 2003 Comp Trib 13

Canada Pipe CT:

Commissioner of Competition v Canada Pipe, 2005 Comp Trib 3

Canada Pipe FCA 1:

Canada (Commissioner of Competition) v Canada Pipe Co, 2006 FCA 233, leave to appeal refused (10 May 2007).

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