

Revised Abuse of Dominance Guidelines bring welcome and noteworthy guidance on numerous issues

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In this Update

- On March 7, 2019, the Competition Bureau (Bureau) released updated *Abuse of Dominance Enforcement Guidelines*.
- The Guidelines provide a detailed outline of the Bureau's approach to the abuse of dominance provisions in section 79 of the *Competition Act*.
- The Guidelines indicate the Bureau's view that parallel, albeit unilateral, conduct by competitors in relatively concentrated markets may ground a finding of joint dominance.
- The meaning of "plausible competitive interest" remains unclear.
- The Guidelines confirm that when determining 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."
- There are certain portions of the Guidelines that take positions which are not clearly reflected in the jurisprudence and therefore push the boundaries of the law by a considerable extent.

On March 7, 2019, the Competition Bureau (Bureau), under the direction of newly appointed Commissioner Boswell, released updated *Abuse of Dominance Enforcement Guidelines* (Guidelines), available [here](#). The Guidelines are not materially different from the draft guidelines, which were released for public consultation in March 2018, available [here](#). We commend the Bureau in having consulted broadly and injecting further clarity in the Guidelines. While we are appreciative of the Bureau providing more detailed guidance on business justifications and mitigating concerns about a potential increase in mandated access remedies in the context of alleged refusals to supply, we continue to believe that the Bureau has taken positions in certain areas which are not supported by the jurisprudence and create unnecessary uncertainty for businesses. We are also of the view that the meaning of "plausible competitive interest" requires further clarity. Such clarity may be forthcoming from the Competition Tribunal's [decision](#) on the Commissioner's application for an order under section 79 against the Vancouver Airport Authority (VAA), which is expected this year.^[1]

General

The Guidelines provide a detailed outline of the Bureau's approach to the abuse of dominance provisions in section 79 of the *Competition Act* (Act) and provide examples to

illustrate the application of this approach to various fact scenarios.

Recall that for the Competition Tribunal (Tribunal) to find an abuse of a dominant position pursuant to section 79 of the Act, the Commissioner must establish that:

1. One or more persons substantially or completely control a class or species of business throughout Canada or any area thereof;
2. That person or those persons have engaged in or are engaging in a practice of anti-competitive acts; and
3. The practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market.

Where the Tribunal finds that the elements of section 79 have been established, it may issue a prohibition or prescriptive order to restore competition in the market. In addition, the Tribunal may issue an administrative monetary penalty of up to \$10 million (and up to \$15 million for subsequent orders).

The Guidelines were issued nearly one year after the prior draft was released for public consultation in March 2018, and replace the [previous guidance](#) issued in 2012. Osler participated in the 2018 public consultation, raising particular concerns regarding the Bureau's removal of the 35% safe harbour threshold and the expanded application of joint dominance. In that submission, we suggested that the Bureau should elaborate on the circumstances in which a firm may be considered to have a "plausible competitive interest in a market" where it is not a competitor in the market or a trade association of competitors in the market, as was the situation in [TREB](#). Osler's public consultation submission to the Bureau is available [here](#) [PDF].

The not-so-safe harbour

In the draft guidelines, the Bureau replaced its longstanding guidance that market shares of less than 35% will generally not prompt further examination under section 79, with a general statement that market shares below 50% may prompt further investigation in certain circumstances. We, as well as other stakeholders, strongly urged the Bureau to reconsider the removal of the 35% market share safe harbour threshold, below which a market participant would not generally be considered to possess market power.

In response to this concern, the Guidelines clarify that the Bureau will generally only investigate a firm with a market share below 50% for engaging in anti-competitive conduct in circumstances where other evidence indicates that the business possesses a "substantial degree of market power"²¹ despite its lower market share. While this is an improvement on the wording in the draft guidelines, it nonetheless increases uncertainty for businesses with relatively low market shares. Further, it remains unclear what gap in its analytical approach or its enforcement efforts the Bureau is seeking to fill with this change.

Joint dominance equals parallel unilateral conduct in a concentrated market

While the Guidelines offer further clarity on the Bureau's approach to joint dominance, they clearly indicate the Bureau's view that parallel, albeit unilateral, conduct by competitors in relatively concentrated markets may ground a finding of joint dominance:

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. In the absence of vigorous competition the Bureau may conclude that the lack of mutual competitive constraints permits them to exercise a substantial degree of market power.

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 behavior 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.^[3]

In the Bureau's view, the absence of vigorous competition (through, for example, price competition, instability of market shares over time, attempts to solicit each other's customers, or innovation competition) could be indicative of joint dominance. Moreover, co-ordination between allegedly jointly dominant market participants need not be demonstrated in order to support a finding of joint dominance.

Accordingly, firms in relatively concentrated markets must be cognizant of engaging in unilateral conduct that could be viewed as an anti-competitive act for purposes of the Act, even if a particular firm does not on its own possess market power. If multiple competitors in such a market each unilaterally decide to engage in similar conduct (e.g., by adopting similar restrictive contractual terms with customers), the Bureau may conclude that the competitors are jointly dominant, potentially raising concerns under section 79.

The meaning of “plausible competitive interest” remains unclear

Unfortunately, the Guidelines do not materially expand upon the application of *TREB* outside of the trade association context (or specifically how the Bureau might demonstrate a firm's “plausible competitive interest” in a market in which it does not compete). While demonstrating plausible competitive interest may be straightforward in the case of a trade association in light of *TREB*, it is unclear how this principle would be applied in other circumstances. For example, the Guidelines offer no indication as to what, if anything, would constitute a plausible competitive interest that could result in an abuse of dominance concern where a business operates upstream or downstream from the relevant market.

Helpful confirmation that ordinary course refusals to supply only attract section 79 scrutiny in exceptional cases

The Guidelines helpfully acknowledge that ordinary course refusals to supply would only engage section 79 in exceptional circumstances. That is to say, while a business is not obligated to supply any other business, the Bureau may conclude that a refusal to supply is anti-competitive if “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).”^[4]

Remedies mandating supply can raise concerns on a number of fronts, including relating to data protection or the stifling of innovation. Such concerns are particularly heightened in the high tech and financial services sectors, where it is often argued that access to sensitive personal and confidential information may be considered essential to the ability to effectively compete. Such claims must be thoroughly tested and the regulatory and contractual regimes pursuant to which such information is collected and may be used must be carefully considered before resorting to a data supply remedy.

In an effort to mitigate concerns about an increasing willingness to mandate data access remedies, the Guidelines state explicitly that “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.”¹⁵¹ This is consistent with the finding of the Bureau in its *Big data and innovation: key themes for competition policy in Canada* study where it states:

No formulaic approach identifies the appropriate **remedy** in any particular merger or conduct case. One potential remedy imposes a **duty to deal** on an offending party in a conduct case. The Bureau is mindful that mandating a duty to deal can potentially chill incentives to innovate and should therefore be pursued only in exceptional circumstances in big data cases as in non-big data cases. [emphasis added]

Expanded guidance on business justifications

By way of background, Canadian jurisprudence has established, and the Guidelines confirm, that when determining 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.”¹⁶¹ As set out in the Guidelines, a business justification is not a defence to an allegation that a firm has engaged in anti-competitive conduct, but rather provides an “alternative explanation for the overriding purpose of that conduct.”¹⁷¹ The Guidelines do make clear that in certain circumstances, “a legitimate business justification can outweigh evidence of anti-competitive purpose when the two are balanced against each other.”¹⁸¹ Possible legitimate business justifications include reducing operational or production costs, improving technology or processes which enhance product or service offerings, and complying with statutory or regulatory requirements.¹⁹¹

The Guidelines outline the Bureau’s approach to business justification claims as follows:

- The Bureau will examine the credibility of any efficiency or pro-competitive claims, the link to the alleged anti-competitive act, and the likelihood of these benefits being achieved. Notably, the Guidelines state that “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.”¹¹⁰¹ This speaks to the importance of thoroughly and clearly documenting any pro-competitive business justification for conduct that could potentially be construed as anti-competitive. Given the Bureau’s broad approach to joint dominance described above, this includes unilateral conduct by a firm that does not on its own possess market power.
- Where evidence supports that a firm’s conduct was motivated by both an anti-competitive purpose and a claimed business justification, the Bureau may consider whether the

claimed business justification could have been achieved by credible alternate means that would have had a lesser impact on competitors. The Guidelines indicate that the Bureau will typically only consider such alternative methods 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.”^[11] Accordingly, firms ought to give careful consideration to alternate means of achieving a particular efficiency or pro-competitive benefit and properly document the rationale for having rejected any considered alternative.

- Citing the Tribunal’s decision in *TREB*, the Guidelines confirm that conduct making “no reasonably foreseeable economic sense but for an anti-competitive effect is likely to have an overarching anti-competitive purpose.”^[12] However, the Guidelines go on to caution that even where certain conduct does make economic sense without an anti-competitive effect, such conduct may still be considered anti-competitive. A determination in this manner may occur in circumstances “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”^[13] that the overarching purpose was clearly anti-competitive.

The Guidelines confirm that business justifications are relevant considerations as part of the paragraph 79(1)(b) analysis and do not directly impact the competitive effects assessment in paragraph 79(1)(c). Similarly, as there is no efficiencies defence to section 79, the Guidelines confirm that the Bureau is not required to quantify any efficiencies resulting from an anti-competitive practice, “but will consider any such efficiencies within the purpose-focussed assessment of paragraph 79(1)(b).”^[14]

Final thoughts: Potential impact of VAA decision

We appreciate the Bureau’s continued efforts to provide greater clarity on its approach to complex and developing areas of competition law and policy in Canada. However, there are certain portions of the Guidelines that take positions which are not clearly reflected in the jurisprudence and therefore push the boundaries of the law by a considerable extent. Also, as noted above, the Guidelines were issued prior to the release of the Tribunal’s pending decision in VAA. Among the questions the Tribunal directed to each of the parties in the proceedings were ones specific to the challenging issues regarding the scope of the “plausible competitive interest” concept and the assessment of business justification claims. Accordingly, we may soon have additional Tribunal guidance to consider on these topics and possibly a further a revision to the Guidelines.

^[11] *The Commissioner of Competition v. Vancouver Airport Authority*, CT-2016-015. The Commissioner alleges that VAA abused its dominant market position by excluding potential competitors for the provision of in-flight catering at the Vancouver International Airport. Osler acted as external counsel to a witness for the Commissioner in this matter.

^[2] Guidelines at para. 34.

^[3] Guidelines at paras. 48-49.

^[4] Guidelines at para. 73.

^[5] Guidelines at para. 74.

^[6] Guidelines at para. 54. See also *Canada (Commissioner of Competition) v. Canada Pipe Co.*, 2006 FCA 233 at paras. 72-73 and *Canada (Director of Investigation and Research) v. NutraSweet Co.* (1990), 32 CPR (3d) 1 (Comp Trib) at 35.

^[7] Guidelines at para. 80.

^[8] Guidelines at para. 55.

^[9] Guidelines at para. 80.

^[10] Guidelines at para. 82.

^[11] Guidelines at para. 83.

^[12] Guidelines at para. 83.

^[13] Guidelines at para 84.

^[14] Guidelines at para. 85.