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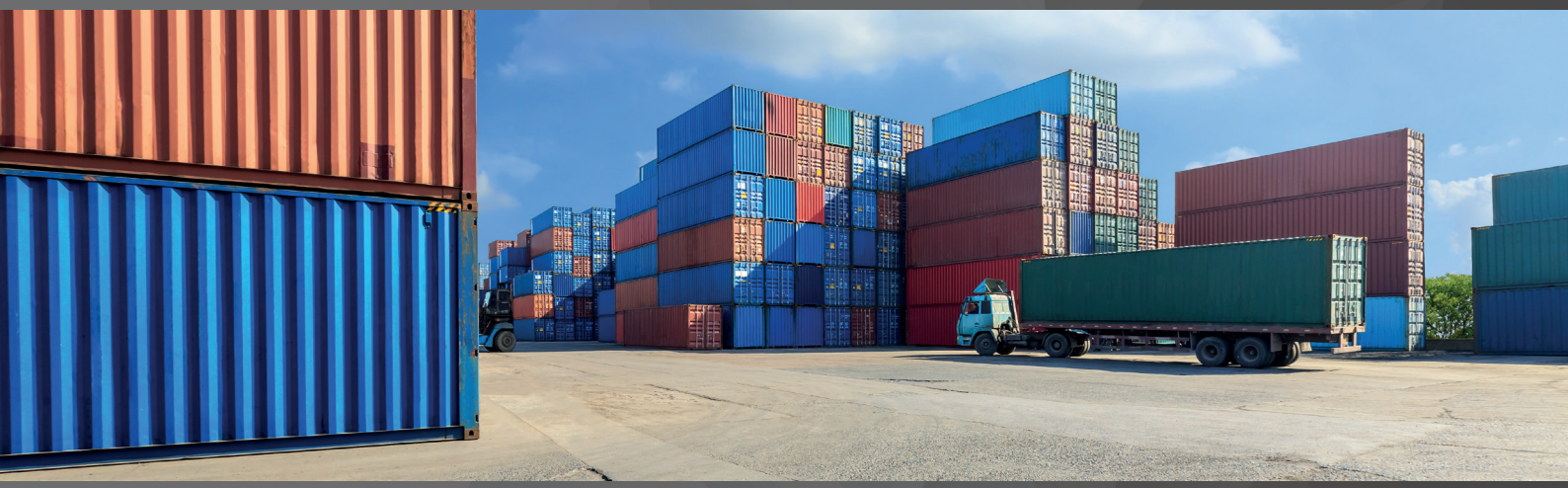

# Vertical Agreements and Dominant Firms 2020

A practical cross-border insight into vertical agreements and dominant firms

**Fourth Edition**

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# Q&A Chapters

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## 1 General

### 1.1 What authorities or agencies investigate and enforce the laws governing vertical agreements and dominant firm conduct?

The Commissioner of Competition (Commissioner) is responsible for the administration and enforcement of the *Competition Act*, R.S.C. 1985, c. C-34 (Act) and is the head of the Canadian Competition Bureau (Bureau), an independent agency within the Ministry of Innovation, Science and Economic Development. The Commissioner investigates and enforces the provisions of the Act related to vertical agreements and dominant firm conduct.

### 1.2 What investigative powers do the responsible competition authorities have?

While the Commissioner will often seek the voluntary cooperation of the target(s) of an investigation and third parties, the Commissioner has powers under the Act to obtain: a court order requiring a witness to be examined under oath (or solemn affirmation); the delivery of written responses to questions, under oath (or solemn affirmation); and the production of documents or other records, as well as a search warrant (search warrants are rarely used for vertical agreements and dominant firm conduct).

### 1.3 Describe the steps in the process from the opening of an investigation to its resolution.

A Bureau investigation is typically initiated following the receipt of a complaint about a party's conduct, and can lead to the commencement of a formal inquiry into the matter. Launching a formal inquiry is, generally, subject to the Commissioner's discretion, save in rare circumstances (specified in the Act) where an inquiry must be launched. The Commissioner may use his formal powers described in the response to question 1.2 should an inquiry be launched. All stakeholders, notably the target(s) of the investigations, can, and generally do, make submissions to the Commissioner.

Where the Commissioner determines that the relevant provisions of the Act have been engaged, he will, generally, try to resolve the issue(s) with the target. Where a negotiated resolution is not possible, the Commissioner may apply for a remedy to the Competition Tribunal (Tribunal) (a specialised body comprised of Federal court judges and lay experts responsible for adjudicating applications relating to civilly reviewable matters) for an order remedying the conduct.

### 1.4 What remedies (e.g., fines, damages, injunctions, etc.) are available to enforcers?

The remedies ordered by the Tribunal will depend on the relevant provision(s) of the Act in issue. The Tribunal can generally prohibit a party from engaging in the anti-competitive conduct. Certain provisions contain additional remedies, such as ordering a party to supply customers on usual trade terms (refusal to deal), ordering a party to accept a third party as a customer on usual trade terms (price maintenance), and ordering a party to pay an administrative monetary penalty (AMP) (abuse of dominance).

### 1.5 How are those remedies determined and/or calculated?

The Tribunal may order a remedy only to the extent permissible by the relevant provision(s) and necessary to address the anti-competitive harm. AMPs may only be ordered to promote practices that are in conformity with the purposes of the abuse of dominance provisions. In determining the amount of the AMP, the Tribunal must consider: the practice's effect on competition in the relevant market; the gross revenue from sales affected by the practice; any actual or anticipated profits from the practice; the financial position of the target(s); the history of the target(s)' compliance with the Act; and any other relevant factor. The maximum AMP for a party's first contravention is C$10 million (up to C$15 million for subsequent contraventions).

### 1.6 Describe the process of negotiating commitments or other forms of voluntary resolution.

Generally, the Commissioner will propose a remedy to the target(s) and, if a resolution can be reached, the parties will enter into a (binding) consent agreement. The consent agreement sets


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out the target's obligations including any applicable AMPs or costs payable to the Commissioner. Once filed with the Tribunal, it has the same force and effect as an order of the Tribunal.

### 1.7 At a high level, how often are cases settled by voluntary resolution compared with adversarial litigation?

A substantial majority of cases are resolved between the Commissioner and the target on a negotiated basis, either through discontinuation of the investigation or inquiry, or a consent agreement prior to or pending any litigation initiated by the Commissioner.

### 1.8 Does the enforcer have to defend its claims in front of a legal tribunal or in other judicial proceedings? If so, what is the legal standard that applies to justify an enforcement action?

Absent a negotiated resolution, the Commissioner must apply to the Tribunal for relief. To be successful in his application, the Commissioner must establish, on a balance of probabilities, that the relevant provision(s) of the Act has been contravened.

### 1.9 What is the appeals process?

A Tribunal decision can be appealed to the Federal Court of Appeal (FCA) (with leave on questions of fact and as of right for questions of law). The FCA's decision can be appealed to the Supreme Court of Canada, with leave.

### 1.10 Are private rights of action available and, if so, how do they differ from government enforcement actions?

Parties directly affected by certain vertical conduct can, with leave, apply to the Tribunal for relief concerning another party's contravention of the Act's refusal to deal, price maintenance, and exclusive dealing, tied selling and market restriction provisions. Relief is limited to that available under the relevant provision. No such private right of access is available with respect to abuse of dominance.

Private rights of action for damages are not available with respect to the vertical agreements or abuse of dominance provisions of the Act, save where a party has suffered damages as a result of another's breach of a Tribunal order with respect to those provisions. Such an action can be commenced before a provincial superior court or the Federal Court (not the Tribunal) and can be brought as a class action (where applicable).

### 1.11 Describe any immunities, exemptions, or safe harbours that apply.

No immunities or safe harbours apply to the Act's vertical conduct or abuse of dominance provisions, but there are "exemptions" applicable to certain such provisions, for example where:

- the entities are affiliated (price maintenance, exclusive dealing, tied selling and market restriction);
- proceedings have been commenced or an order is being sought relating to the same conduct under other provisions of the Act (price maintenance and abuse of dominance); and
- the conduct constitutes the mere exercise or enjoyment of an intellectual or industrial property right (abuse of dominance).

### 1.12 Does enforcement vary between industries or businesses?

Generally, no; however, the Bureau may identify certain industries, or even practices, as enforcement priorities.

### 1.13 How do enforcers and courts take into consideration an industry's regulatory context when assessing competition concerns?

The Commissioner and Tribunal will take into account how industry regulations may affect a party's conduct and/or the competitive dynamics in the relevant market. For example, regulations that authorise the conduct, expressly or impliedly, may affect the remedy sought or granted (or whether a remedy will be sought or granted at all) and regulations that limit entry may be important in assessing whether the target(s) has market power, a required element of abuse of dominance. However, the Commissioner takes the position, supported by recent Tribunal case law, that the regulated conduct defence does not apply to the Act's vertical agreement and dominant firm provisions.

### 1.14 Describe how your jurisdiction's political environment may or may not affect antitrust enforcement.

The political environment does not generally affect the Commissioner's enforcement of the vertical conduct or abuse of dominance provisions of the Act, although it may affect his strategic enforcement priorities and thus the resources dedicated to certain matters.

### 1.15 What are the current enforcement trends and priorities in your jurisdiction?

The Bureau is particularly concerned with industries that impact the greatest number of Canadians, most recently in the digital space. For example, Bureau investigations have over the past decade considered conduct related to residential real estate, pharmaceuticals, all-inclusive travel packages, seed and crop protection products, agreements relating to E-books, and airport catering services at airports.

### 1.16 Describe any notable recent case law developments in respect of, e.g., vertical agreements, dominant firms and/or vertical merger analysis.

One notable recent case is the Commissioner's application before the Tribunal alleging that the Vancouver Airport Authority (VAA) abused its dominant position for catering services at the Vancouver International Airport (YVR) by denying licences to catering service providers. The Tribunal ultimately dismissed the Commissioner's application, determining that the VAA had not engaged in anti-competitive acts as it had a legitimate business justification for limiting the number of in-flight catering firms at YVR and the conduct did not substantially prevent or lessen competition. (*The Commissioner of Competition v. Vancouver Airport Authority*, 2019 Comp. Trib. 6 (CT-2016-015).)

While the Bureau has typically focused on horizontal issues in merger reviews, they are increasingly raising vertical concerns. For example, the Bureau's recent review of Canadian National Railway's (CN) proposed acquisition of H&R Transport Limited (H&R) had both horizontal and vertical dimensions, given that


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CN was a vertically-integrated supplier of rail services to downstream competitors including H&R. Ultimately, the deal was cleared on efficiencies grounds under section 96 of the Act.

## 2 Vertical Agreements

### 2.1 At a high level, what is the level of concern over, and scrutiny given to, vertical agreements?

The Commissioner will investigate and may pursue vertical agreements which (or are likely to) substantially lessen or prevent, or have an adverse effect on, competition; however, these provisions of the Act have not been a high enforcement priority for the Commissioner and have not been the subject of recent (public) enforcement action.

### 2.2 What is the analysis to determine (a) whether there is an agreement, and (b) whether that agreement is vertical?

The Act's focus is not on the existence of a "vertical agreement" but on the nature of the vertical (often unilateral) conduct and whether it contravenes the relevant provision(s) of the Act, e.g., by adversely affecting or substantially lessening or preventing competition.

### 2.3 What are the laws governing vertical agreements?

The main provisions of the Act regulating practices associated with vertical relationships are: refusal to deal (section 75); price maintenance (section 76); exclusive dealing; tied selling; market restriction (section 77); and abuse of dominance (sections 78–79). (Please see questions 2.16–2.18, 2.22 and section 3 for a discussion of these provisions.)

Vertical agreements may also be assessed in the context of merger reviews (section 92).

### 2.4 Are there any types of vertical agreements or restraints that are absolutely ("*per se*") protected? Are there any types of vertical agreements or restraints that are *per se* unlawful?

No, there are no types of vertical agreements or restraints that are *per se* protected or unlawful.

### 2.5 What is the analytical framework for assessing vertical agreements?

The analytical framework is dependent on the relevant provision(s) of the Act. (Please see questions 2.16–2.18, 2.22 and section 3.)

### 2.6 What is the analytical framework for defining a market in vertical agreement cases?

The market has both a product (goods or services) and geographic market dimension.

The product market will include the product(s) associated with the anti-competitive conduct and any close substitutes. Buyer behaviour, product end-use and physical characteristics, switching costs, and price relationships/levels are amongst the factors considered.

The geographic market will include the location where the relevant product is sold and any other locations which provide supply substitutes. Buyer behaviour, switching costs, transportation costs, and shipment patterns are amongst the factors considered.

### 2.7 How are vertical agreements analysed when one of the parties is vertically integrated into the same level as the other party (so-called "dual distribution")? Are these treated as vertical or horizontal agreements?

The Commissioner will generally assess agreements between suppliers and distributors in a dual distribution arrangement as vertical agreements under the civil provisions of the Act. However, where the agreements are, effectively, agreements to restrain competition amongst competitors, such as by allocating markets, the Bureau can also consider such agreements under the cartel (criminal) or competitor collaboration (civil) provisions of the Act.

### 2.8 What is the role of market share in reviewing a vertical agreement?

Certain provisions only apply where a target is dominant or is a "major supplier" in a market. Market share will be an important, but not determinative, factor in such cases.

Additionally, the extent of the target's market power will be important in assessing the relevant conduct's effect on competition, and market share will be a factor in that regard.

### 2.9 What is the role of economic analysis in assessing vertical agreements?

Economic analysis, inclusive of the financial assessment of profit maximising conduct, is fundamental to determining the relevant conduct's actual or likely effect on competition.

### 2.10 What is the role of efficiencies in analysing vertical agreements?

Outside of the merger review context, there is no express (statutory) role for efficiencies; however, the business justification(s) for alleged abusive conduct, which may relate to efficiencies, may be relevant. Moreover, the promotion of efficiency is an enumerated purpose of the Act and those purposes are to be considered in assessing whether conduct is likely to prevent or lessen competition substantially in abuse of dominance cases (*Canada (Commissioner of Competition) v. Canada Pipe Co.* 2006 FCA 233 at para. 48, leave to appeal to SCC refused [2006] S.C.C.A. No. 366). In the context of merger reviews, there is an explicit exemption for mergers that result in efficiencies that offset any anti-competitive effects (section 96).

### 2.11 Are there any special rules for vertical agreements relating to intellectual property and, if so, how does the analysis of such rules differ?

Section 32 of the Act empowers the Federal Court, on application by the Attorney General of Canada, to make a remedial order(s) if it finds that a firm has used its IP rights to unduly restrain or injure trade or unduly limit, lessen or prevent competition. Only two such applications have ever been made (in 1969 and 1970), and both cases were settled before proceeding to full


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hearings with no remedial order being issued. (Please see question 3.13 regarding IP rights and the abuse of dominance provisions of the Act.)

### 2.12 Does the enforcer have to demonstrate anticompetitive effects?

Yes, either an "adverse effect" on competition, a "substantial lessening" or a "substantial lessening or prevention" of competition (depending on the relevant provision of the Act).

### 2.13 Will enforcers or legal tribunals weigh the harm against potential benefits or efficiencies?

Please see question 2.10.

### 2.14 What other defences are available to allegations that a vertical agreement is anticompetitive?

Please see question 1.11.

### 2.15 Have the enforcement authorities issued any formal guidelines regarding vertical agreements?

Yes. The Bureau has issued guidelines relating to price maintenance and abuse of dominance. (See http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03787.html (Price Maintenance Guidelines) and https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04420.html (Abuse of Dominance Guidelines).)

### 2.16 How is resale price maintenance treated under the law?

Price maintenance occurs where a supplier: (a) by "agreement, threat, promise or any like means", influences upward or discourages the reduction of the price at which a customer or other reseller supplies, offers to supply, or advertises a product within Canada; or (b) refuses to supply a product to, or otherwise discriminates against, any person because of that person's low pricing policy, and results in an adverse effect on competition in a market.

The price maintenance provisions do not apply where the customer and supplier are in a principal/agent relationship, or the customer used the product(s) as a loss leader or to attract customers to buy other products (and not to generate a profit), was engaged in misleading advertising, or provided substandard service.

The Commissioner (or a private party, with leave) may apply to the Tribunal for relief and, if successful, the Tribunal can issue an order prohibiting the conduct from continuing or requiring the party to accept another person as a customer on usual trade terms.

### 2.17 How do enforcers and courts examine exclusive dealing claims?

The Act has a separate exclusive dealing provision, and defines it as being any practice whereby a supplier of a product either as a condition of supply or through an inducement requires a customer to deal only or primarily in certain products, or refrain from dealing with certain products. Exclusive dealing is only subject to a remedy where:

(a) it is widespread in a market or is engaged in by a major supplier;
(b) it is likely to: (i) impede entry into or expansion of a firm in a market; (ii) impede the introduction of a product into or expansion of sales of a product in a market; or (iii) have any other exclusionary effect in a market; and
(c) competition is or is likely to be lessened substantially.

The Commissioner (or a private party, with leave) may apply to the Tribunal for relief and, if successful, the Tribunal can issue an order prohibiting the conduct from continuing and containing any other requirement that is necessary to restore or stimulate competition. No order will be issued where the practice is carried on for a reasonable time (only) to facilitate entry of a new supplier or a new product.

Exclusive dealing can also be considered under the abuse of dominance (please see section 3) provisions of the Act.

### 2.18 How do enforcers and courts examine tying/supplementary obligation claims?

The Act has a separate tied selling provision, and defines it as being any practice whereby a supplier of a product either as a condition of supply or through an inducement requires a customer to acquire a second product from the supplier (or its nominee), or refrain from using or distributing, in conjunction with the tying product, another product that is not of a brand or manufacture designated by the supplier (or its nominee). Tied selling is only subject to a remedy where:

(a) it is widespread in a market or is engaged in by a major supplier;
(b) it is likely to: (i) impede entry into or expansion of a firm in a market; (ii) impede the introduction of a product into or expansion of sales of a product in a market; or (iii) have any other exclusionary effect in a market; and
(c) competition is or is likely to be lessened substantially.

The Commissioner (or a private party, with leave) may apply to the Tribunal for relief and, if successful, the Tribunal can issue an order prohibiting the conduct from continuing and containing any other requirement that is necessary to restore or stimulate competition in the market. No order will be issued where the practice is reasonable, having regard to the relationship between the products.

Tied selling can also be considered under the abuse of dominance (please see section 3) provisions of the Act.

### 2.19 How do enforcers and courts examine price discrimination claims?

There is no longer any provision in the Act that expressly deals with price discrimination, but the Commissioner takes the position that such conduct can be considered under the abuse of dominance provisions (please see section 3). No price discrimination matter has, however, been taken by the Commission since the price discrimination provision was removed from the Act.

### 2.20 How do enforcers and courts examine loyalty discount claims?

Loyalty discounts are considered under the exclusive dealing (please see question 2.17) and abuse of dominance (please see section 3) provisions of the Act.


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### 2.21 How do enforcers and courts examine multi-product or "bundled" discount claims?

Multi-product or "bundled" discounts are considered under the tied selling (please see question 2.18) and abuse of dominance (please see section 3) provisions of the Act.

### 2.22 What other types of vertical restraints are prohibited by the applicable laws?

**Refusal to Deal**

Where a supplier refuses to supply a customer with a product, the Tribunal may issue a remedy where:

(a) the product is in ample supply;
(b) the customer who is refused supply is:
  i. substantially affected in its business or precluded from carrying on its business;
  ii. unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market; and
  iii. willing and able to meet the usual trade terms; and
(c) the refusal to deal is having or is likely to have an adverse effect on competition in a market.

The Commissioner (or a private party, with leave) may apply to the Tribunal for relief and, if successful, the Tribunal can issue an order requiring the party to supply the product on usual trade terms.

**Market Restriction**

Where a party requires a customer to sell a product only in a defined market as a condition of supplying that product, or exacts a penalty from the customer if it supplies the product outside a defined market, the Tribunal may issue a remedy where the practice is widespread in a market or is engaged in by a major supplier, and is likely to substantially lessen competition in relation to the product.

The Commissioner (or a private party, with leave) may apply to the Tribunal for relief and, if successful, the Tribunal can issue an order prohibiting the conduct from continuing and containing any other requirement that is necessary to restore or stimulate competition in the market.

### 2.23 How are MFNs treated under the law?

MFNs are typically considered under the abuse of dominance provisions of the Act. (See, e.g., *Canada (Director of Investigation and Research) v. The D & B Companies of Canada Ltd.* (1995), 64 C.P.R. (3d) 216 (Comp. Trib.) and section 3, below.) However, in a recent case dealing with E-books, MFNs were also considered under section 90.1 of the Act, as part of a collaboration between (potential) competitors, with the Commissioner asserting that agreements that included MFN clauses and restricted the ability of E-book retailers to discount the retail price for E-books were anti-competitive and contrary to section 90.1.

## 3 Dominant Firms

### 3.1 At a high level, what is the level of concern over, and scrutiny given to, unilateral conduct (e.g., abuse of dominance)?

The Commissioner takes seriously conduct which engages the Act's abuse of dominance provisions and will take action to remedy such conduct before the Tribunal. Having said that, the Bureau pursues a limited number of such cases before the Tribunal.

### 3.2 What are the laws governing dominant firms?

The provisions of the Act applicable to dominant firms are sections 78 and 79, and to a limited extent section 77 (please see questions 2.17, 2.18 and 2.22 in that regard).

Under section 79, abuse of dominance occurs where the Commissioner establishes:

- **Dominance** – One or more firms substantially or completely control(s) a market.
- **Anti-competitive conduct** – The dominant firm(s) has (have) engaged in a practice of anti-competitive acts, generally described as acts to predate, discipline, or exclude a competitor(s). A non-exhaustive list of (potentially) "anti-competitive acts" is set out in section 78 and includes margin squeezing, exclusive dealing, predatory pricing, selective introduction of "fighting brands", and other conduct.
- **A substantial prevention or lessening of competition (SPLC)** – The anti-competitive conduct has had, is having or is likely to result in, a SPLC in a relevant market.

Where the Tribunal finds that section 79 has been engaged, it can issue an order prohibiting the firm(s) from continuing to engage in the anti-competitive conduct, or where such an order would not be effective, it can direct the firm(s) to take certain specific actions such as the divestiture of assets or shares (although that has never been ordered). Additionally, the Tribunal can order the firm(s) to pay AMPs.

Only the Commissioner can apply to the Tribunal for an order under section 79; there is no private right of access for third parties nor private right of action for damages.

### 3.3 What is the analytical framework for defining a market in dominant firm cases?

Please see the response to question 2.6.

### 3.4 What is the market share threshold for enforcers or a court to consider a firm as dominant or a monopolist?

The Bureau's *Abuse of Dominance Guidelines* note that in the case of single firm conduct, a market share of 50% or more will generally prompt review while market shares below 50% (and more than 35%) 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 realise 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". To date, all of the contested abuse of dominance cases in Canada have involved single firms with market shares in excess of 70%.

In the case of "joint abuse", the *Abuse of Dominance Guidelines* provide that a combined market share equal to or exceeding 65% "will generally prompt further examination".

### 3.5 In general, what are the consequences of being adjudged "dominant" or a "monopolist"? Is dominance or monopoly illegal *per se* (or subject to regulation), or are there specific types of conduct that are prohibited?

Neither dominance nor monopoly is illegal under the Act. Only


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conduct engaged in by a dominant party (parties) or monopolist, where all of the elements of section 79 are established, is problematic (please see question 3.2).

### 3.6 What is the role of economic analysis in assessing market dominance?

Economic analysis is fundamental to determining a firm's dominance, as well as assessing the anti-competitive conduct's effect on competition.

### 3.7 What is the role of market share in assessing market dominance?

Market share will be an important but not determinative factor in assessing dominance (please see question 3.4).

### 3.8 What defences are available to allegations that a firm is abusing its dominance or market power?

Section 79 contains only a few limitations on its application, notably:

- Subsection 79(4) provides that the Tribunal must consider whether a firm's practice is a result of superior competitive performance; and
- Subsection 79(5) provides that the exercise or enjoyment of an intellectual or industrial property right is not "an anti-competitive act".

### 3.9 What is the role of efficiencies in analysing dominant firm behaviour?

Efficiencies are not expressly referenced in section 79, but they are relevant to a consideration of whether the relevant conduct constitutes an "anti-competitive act", notably a "legitimate business justification" (which "must be a credible efficiency or pro-competitive rationale for the conduct in question"). The Bureau's *Abuse of Dominance Guidelines* note that business justifications could include "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".

### 3.10 Do the governing laws apply to "collective" dominance?

Yes; however, there is currently no Tribunal jurisprudence on what would constitute an abuse of joint dominance (for example, whether co-ordinated behaviour between firms is required or whether conscious parallelism would be sufficient).

### 3.11 How do the laws in your jurisdiction apply to dominant purchasers?

The Commissioner and Tribunal will undertake the same analysis in determining whether the actions of a dominant firm (or jointly dominant firms) constitute an abuse of dominance; however, there is no Tribunal jurisprudence on purchaser dominance.

### 3.12 What counts as abuse of dominance or exclusionary or anticompetitive conduct?

Section 78 contains a non-exhaustive list of nine acts that could trigger the application of section 79. Anticompetitive conduct is identified by its purpose, which must be an "an intended predatory, exclusionary or disciplinary negative effect on a competitor" (*Canada (Commissioner of Competition) v. Canada Pipe Co.* 2006 FCA 233 at para. 66). Examples of acts not found in this list but asserted by the Commissioner to be anti-competitive are: contracting practices requiring or inducing exclusivity; evergreen, meet-or-release or MFN clauses; intimidation through litigation; and tied selling.

### 3.13 What is the role of intellectual property in analysing dominant firm behaviour?

Subsection 79(5) of the Act provides that the exercise of an IP right will not be considered an anti-competitive act for the purposes of section 79. In its *Intellectual Property Enforcement Guidelines*, the Bureau takes the position that a mere exercise of an IP right will not be regulated under the general provisions of the Act, but only under section 32. (*Intellectual Property Enforcement Guidelines* (13 March 2019), available online at: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04421.html.) (Please see question 2.11 for a discussion of section 32.) Where intellectual property rights are exercised in an anti-competitive manner, the exception does not apply (*Toronto Real Estate Board v. Commissioner of Competition*, 2017 FCA 236, paras. 179–181).

### 3.14 Do enforcers and/or legal tribunals consider "direct effects" evidence of market power?

Yes, direct indicators (e.g., whether profits, pricing policies or customer service indicate market power) will be considered in assessing market power. However, the Bureau has noted in its *Abuse of Dominance Guidelines* that such indicators are not always conclusive. As a result, the Bureau (and the Tribunal) will also consider indirect indicators (such as market share, barriers to entry, countervailing buyer power, etc.) in assessing market power.

### 3.15 How is "platform dominance" assessed in your jurisdiction?

The Act assesses conduct that would constitute an abuse of dominance irrespective of the industry; the Tribunal has not considered cases where "platform dominance" was an issue.

### 3.16 Are the competition agencies in your jurisdiction doing anything special to try to regulate big tech platforms?

The Bureau is not a regulatory agency, only a law enforcement agency. Thus, it cannot regulate big tech platforms. However, in May 2019, the Bureau held a forum to discuss competition policy in the digital era (*Highlights from the Competition Bureau's Data Form* (30 August 2019), available online at: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04492.html). This discussion identified popular and political concerns over the "…small number of digital platforms that control vast amounts of data. Platforms that are increasingly seen as gatekeepers to the digital economy by controlling access for businesses looking to compete online".


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The Bureau has since identified competition relating to the digital marketplace as a priority of its 2020–2024 strategic vision (*Competition in the digital age* (11 February 2020), available online at: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04513.html). No applications to the Tribunal have been made targeting vertical conduct by such digital platforms.

**3.17 Under what circumstances are refusals to deal considered anticompetitive?**

Please see the response to question 2.22.

## 4 Miscellaneous

**4.1 Please describe and comment on anything unique to your jurisdiction (or not covered above) with regard to vertical agreements and dominant firms.**

The relevant information has been covered in the responses above.


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