Competition Bureau Canada
Bureau de la concurrence Canada

Draft Information Bulletin on the Abuse of Dominance Provisions as Applied to the Telecommunications Industry

COMPETITION BUREAU

September 26, 2006

INFORMATION BULLETIN ON THE ABUSE OF DOMINANCE PROVISIONS AS APPLIED TO THE TELECOMMUNICATIONS INDUSTRY

PART 1 INTRODUCTION

1.1 Purpose and Scope of this Bulletin

The telecommunications industry is in transition from being governed by sector-specific regulation to laws of general application. This Bulletin (the "Bulletin") is part of the Competition Bureau's (the "Bureau") continuing effort to maintain a transparent and predictable enforcement policy. It describes the Bureau's approach under the abuse of dominance provisions (sections 78 and 79 of the *Competition Act*[1] (the "*Act*") with respect to conduct in the telecommunications industry to the extent that the Canadian Radio-television and Telecommunications Commission ("CRTC") has made a determination to refrain from regulating such conduct.[2]

Nothing in this Bulletin deviates from the enforcement approach outlined in the *Enforcement Guidelines on the Abuse of Dominance Provisions*.[3] This telecommunications-specific Bulletin was developed by the Bureau, in consultation with staff members of the CRTC.[4]

1.2 The Canadian Telecommunications Industry

The structure of the telecommunications industry is complex. Service providers often rely upon having access to important components of a competitor's network to provide an end-to-end service to their customers. At the same time, their suppliers are often fully integrated service providers able to offer the same range of service and competing for the same customers. As technical innovations are introduced, firms are finding niches to provide select services, while others are integrating packages or bundles of services together to attract customers.

Over the past twenty years, the telecommunications industry has migrated from a monopoly service delivery model to a more competitive sector with multiple suppliers. Since the early 1980s, Industry Canada has licensed multiple suppliers of mobile and fixed wireless telecommunications services and the CRTC has opened almost all

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[1] R.S.C., 1985, c. C-34.
[2] This Bulletin is not a binding statement of how the Bureau will exercise its discretion in a particular situation. Final interpretation of the law is the responsibility of the courts and the Competition Tribunal.
[3] Competition Bureau, "*Enforcement Guidelines on the Abuse of Dominance Provisions* (Sections 78 and 79 of the Competition Act)" (Ottawa: Industry Canada, 2001), online: Competition Bureau Canada <http://www.cb-bc.gc.ca> [*Enforcement Guidelines on the Abuse of Dominance Provisions*].
[4] CRTC staff members were consulted to provide their expertise concerning the telecommunications industry and the applicable regulatory frameworks. Input by CRTC staff members to Bureau staff members was not made on behalf of CRTC Commissioners and in no way binds the CRTC.

telecommunications markets to competition. In addition, the CRTC has forborne from economic regulation of most telecommunications services, including terminal equipment; toll; mobile wireless; interexchange private lines; retail Internet; international services; wide area networking; and certain other data services.

The move from a regulated to a competitive environment will have a significant impact for many in the industry, requiring all parties to adjust to the general competition framework of the *Act*. Given the complex relationships that exist within the industry and the history of competitive disputes which the CRTC has considered, the Bureau may receive a significant number of complaints within this sector. Where one firm, or group of firms, has market power, careful scrutiny needs to be given to the conduct of such firm or firms which may substantially lessen or prevent competition, *e.g.*, impeding or preventing effective competition in a market by existing or potential competitors.

1.3 The Abuse of Dominance Provisions

To the extent that the CRTC has forborne from regulating conduct related to a telecommunications service or class of services, complaints[5] that a firm with market power has engaged or is engaging[6] in a practice of anti-competitive acts can be dealt with under the abuse of dominance provisions contained in sections 78 and 79 of the *Act*.[7]

Under the *Act*, where the Commissioner is satisfied, on the evidence obtained through an investigation, that the elements of the abuse of dominance provisions are met, the Commissioner may make an application to the Competition Tribunal (the "Tribunal")[8] for adjudication of the matter. Only the Tribunal can issue a remedial order(s) to address a Part VIII reviewable practice under the *Act*.

Subsection 79(1) of the *Act* sets out the three elements that must exist for the Tribunal to make a finding that a firm (or group of firms) has abused its dominant position and issue a remedial order(s):

(a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business;
(b) that person or those persons have engaged, or are engaging, in a practice of anti-competitive acts; and

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[5] Section 10 of the *Act* sets out the conditions under which the Commissioner of Competition (the "Commissioner") may commence an inquiry. Reference to a complaint(s) in this Bulletin should be read as referring to any of the means cited therein.

[6] For the purposes of this Bulletin, the use of present tense can also be taken to include past and future tense as well, as may be relevant to the discussion.

[7] Consistent with the Bureau's *Technical Bulletin on "Regulated" Conduct* and past Bureau practice, the Bureau will not consider allegations of anti-competitive acts where the conduct is subject to regulation by the CRTC. Competition Bureau, *Technical Bulletin on "Regulated" Conduct*, (Ottawa; Industry Canada, 2006), online: Competition Bureau Canada <http://www.cb-bc.gc.ca>.

[8] *Competition Tribunal Act*, R.S.C., 1985, c. 19 (2nd Supp.).

(c) the practice has had, is having, or is likely to have the effect of preventing or lessening competition substantially in a market.

The first element requires the definition of a relevant product market(s) (i.e., a "class or species of business") and a relevant geographic market(s) (i.e., "throughout Canada or any area thereof"). It also requires a finding of market power or dominance (i.e., that "one or more persons substantially or completely control" the relevant market). The second element requires a practice[9] of anti-competitive acts (i.e., an act "…whose purpose is an intended negative effect on a competitor that is predatory, exclusionary or disciplinary"[10]). The third element places the focus of the inquiry squarely on the effects, or likely effects, of the act(s) on competition, rather than on individual competitors. Appendix A contains the full text of sections 78 and 79 of the Act.

1.4 Abuse of Dominance in the Telecommunications Industry

Certain characteristics of the telecommunications industry warrant special consideration in determining whether abuse of dominance has occurred. Generally, the telecommunications industry is a network industry with large sunk costs and significant economies of scale, density, and scope, implying that some firms are likely to have larger market shares than might be typical in non-network industries.[11] Interconnection, both among competitors in the same market (e.g., local telephone service) and across market boundaries (e.g., long distance call termination), is widespread and in many respects necessary for firms to compete. Proper definition of the relevant market in the telecommunications industry poses particular challenges because the sector is dynamic, shaped by constant and rapid technological change. Finally, certain acts are more likely to be the subject of an abuse of dominance complaint in the telecommunications industry, given the nature of the sector.[12]

[9] A "practice" may be one occurrence of an act that is sustained and systemic or different individual anti-competitive acts. *Canada (Director of Investigation and Research) v. NutraSweet Co.*, [1990] 32 C.P.R. (3d) 1 (Comp. Trib.) [*NutraSweet*] at p. 59.

[10] *Commissioner of Competition v. Canada Pipe Company Ltd./Tuyauteries Canada Ltée,* 2006 FCA 233 at para. 77 [*Canada Pipe*]. With respect to the meaning of "intended negative effect", the Court affirmed at paragraph 72 of its decision that: "Proof of the intended nature of the negative effect on a competitor can thus be established directly through evidence of subjective intent, or indirectly by reference to the reasonably foreseeable consequences of the acts themselves and the circumstances surrounding their commission, or both."

[11] A network industry is one where the value to one person of being connected to the network increases as more people join the network Sunk costs are expenditures that a firm cannot recover if it exits the market. Economies of density occur if unit costs decline as volume of output increases in a given region (e.g., urban vs. rural). Economies of scale occur if, over some interval of output, average total cost is decreasing. If the firm produces multiple outputs, the definition applies when the proportion of goods or services produced by the firm is held constant. Economies of scope occur when the cost of producing two products together is less than the combined costs of producing the two products separately. These concepts will be discussed in greater detail below.

[12] See, for example, the comments of the Telecommunications Policy Review Panel in this regard: Canada, *Telecommunications Policy Review Panel Final Report,* (Ottawa: Publishing and Depository Services Public Works and Government Services Canada, 2006), online: Telecommunications Policy Review Panel <http://www.telecomreview.ca> [*TPRP Report*] at 3-24 & 3-25.

1.5 Organization of this Bulletin

This Bulletin, which applies to abuse of dominance complaints in the telecommunications industry, is organized into seven parts and one appendix as follows:

- Part 2 sets out the Bureau's approach to the definition of the relevant product and geographic markets.
- Part 3 sets out the Bureau's approach to assessing market power.
- Part 4 sets out the Bureau's approach to identifying an act as anti-competitive.
- Part 5 sets out the Bureau's approach to determining whether a practice has had, is having, or is likely to have the effect of preventing or lessening competition substantially in a market.
- Part 6 describes the remedies that can be ordered to address an abuse of dominance.
- Part 7 provides concluding comments.
- Appendix A contains the text of sections 78 and 79 of the Act.

PART 2 MARKET DEFINITION

2.1 Role of Market Definition in Abuse of Dominance Cases

As noted in section 1.3 above, market definition is necessary to establish the first element of subsection 79(1), namely, that one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business.

Defining the relevant product and geographic markets traditionally focuses on identifying competitors that are likely to constrain the ability of a firm to profitably raise price[13] or otherwise restrict competition. Such competitors are identified by their provision of alternative products or geographic sources of supply to which buyers would be willing and able to substitute if the price for the product were to rise above competitive levels. As a practical matter, the way market definition principles are applied in abuse of dominance cases can differ from merger cases and forbearance analyses in that abuse cases are typically retrospective in nature while merger and forbearance analyses are typically prospective.

The boundaries of a market for competition analysis are delineated using the "hypothetical monopolist" framework to determine the smallest group of substitute products and the smallest region of production that a firm must control such that a profit-maximizing firm (the hypothetical monopolist) would have an incentive to implement a

[13] Unless otherwise indicated, price means price, output, quality, variety, service, advertising, innovation and other dimensions of competition. Therefore, raising price may also mean reducing these other non-monetary dimensions of competition.

small, but significant and non-transitory increase in price (referred to as a "SSNIP")[14] above competitive levels. The alleged anti-competitive acts effectively provide the initial candidate product and geographic market in which the acts have the potential to maintain or enhance market power. These acts also identify the time period during which it is alleged that the firm exercised any such market power.

2.2 Determining Competitive Price Levels – Avoiding the Cellophane Fallacy

In allegations of abuse of dominance, a SSNIP refers to an increase in price above *competitive* levels rather than *prevailing* levels. Using the prevailing price[15] could lead to overly broad definitions of product markets. This is because products that appear to be in the market based on the prevailing price may not be considered substitutes at competitive price levels. The same is true for geographic market definition. This problem was first identified in a case in the United States involving the producers of cellophane and is therefore referred to as the "cellophane fallacy".[16]

The potential for the cellophane fallacy necessitates an evaluation of whether, and if so the extent to which, the prevailing price differs from the competitive price. Market definition in allegations of abuse of dominance is therefore considerably more complicated than, for example, merger cases because it involves the often difficult assessment of the competitive price level. The Bureau ideally would begin this assessment by estimating the approximate price level for the product in the absence of the alleged practice of anti-competitive acts.[17]

Regardless of the Bureau's ability to make such an estimate in a given case, the Bureau will look to the following types of evidence in an effort to address the cellophane fallacy:

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[14] Generally, a 5 percent real price increase above competitive levels lasting for one year is considered to be a SSNIP. Where price refers to a non-monetary dimension of competition (e.g., quality, service, etc.), a SSNIP may refer to a *decrease below* competitive levels. With respect to the specific tests used under the SSNIP, it is recognized that market characteristics may sometimes necessitate using a different price increase or time period.

[15] The prevailing price is the price at which the product is currently offered to customers in the market.

[16] For an example of how the cellophane fallacy has been recognized in Canada, see *Canada (Director of Investigation and Research) v. Laidlaw Waste Systems Ltd.*, [1992] 40 C.P.R. (3d) 289 (Comp. Trib.) [*Laidlaw*].

[17] A number of observations relating to this estimate should be kept in mind. First, this method assumes that the competitive price can be accurately determined. If that is the case, the answer is immediately apparent without resorting to the market definition step. In such instances, the analysis is, in effect, defining the market and assessing competitive effects simultaneously and there is no need (except to complete the record) to actually delineate the market. Second, it is noteworthy that, since abuse cases typically proceed some time after the alleged anti-competitive act has taken place, it may be possible to observe prices and the number of competitors in the market both before the conduct was engaged in, and after. Where quantitative evidence is available, the competitive price may be estimated (recognizing that other factors that affect price may have also changed, which would make the estimate inaccurate in some cases). Where quantitative evidence is not available, the pattern of consumer switching behaviour over this period may provide some insight into which product and geographic areas are not close substitutes at the competitive price level.

- lack of functional interchangeability between the products of the alleged dominant firm and other potential competitors and differences in the technology and inputs used by different firms;[18]
- differences in the effect of cost shocks on prices;[19]
- differences in supply-side substitution across regions;
- supra-competitive profits being earned by the alleged dominant firm;[20]
- lack of positive price correlation between the products of the alleged dominant firm and its rivals; and
- substantial differences in price levels.[21]

There are several examples from past cases of evidence that avoids the cellophane fallacy. In *Laidlaw,* the Tribunal used observations of usual business practice in other geographic regions and the increase in costs if service was provided more than 50 kilometers away from a hub, to define relatively narrow geographic markets for commercial waste collection. In *NutraSweet,* the Tribunal defined the product market to be aspartame, in part because of the large price differences between Canada and the United States (where aspartame was still under patent protection), even though the set of similar sweeteners was essentially the same in both countries.[22] In *Canada Pipe,* the Tribunal relied on evidence of lack of price correlation between obvious substitutes; high profit margins; price differences between regions attributable to differences in competition; and domestic prices above import prices to define relevant markets and assess market power.[23]

In recently deregulated telecommunications markets, there may be added difficulty in assessing evidence and data. For example, in an abuse of dominance analysis, the Bureau may consider evidence, such as business plans, strategic documents and data, during both the regulated and forborne time periods but interpreting this evidence in the context of both time periods may prove difficult.

2.3 Relevant Product Market Definition

As noted in section 2.1 above, product market definition involves identifying whether there are close substitutes for the product in question such that buyers would switch to

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[18] Evidence that costs, and consequently competitive prices, are different indicates that the products are likely in different relevant markets.
[19] Evidence that costs shocks affect the alleged dominant firm's product (i.e., cause its price to change in response) but not those of its alleged rivals (i.e., do not cause their prices to change) suggests that the rivals' products are not in the same market.
[20] Evidence of accounting profits is usually very difficult to interpret.
[21] Substantial differences in price levels indicate that it is unlikely that the higher priced product constrains the market power of the lower priced product when it is priced at its competitive price. Accordingly, the higher priced product should be excluded from the market. This holds even where the two products are functionally interchangeable.
[22] *supra,* note 9.
[23] *supra* note 10.

these substitutes in the event of a SSNIP. If there are, these substitute products will be included in the relevant product market.

In assessing whether products are close substitutes for one another, what matters are the characteristics of the product and consumers' ability and willingness to switch from one product to another.[24] Direct evidence of switching behaviour in response to a SSNIP (i.e., price changes and concomitant quantity changes) would indicate substitutability.[25] In the absence of direct evidence, a number of factors may assist in determining product substitutability. These include the views, strategies, behaviour and identity of buyers and sellers or other market participants; end-use or functional interchangeability of the products; physical and technical characteristics of the products; switching costs; and other impediments to trade. [26]

2.4 Relevant Product Market Definition in the Telecommunications Industry

A number of issues related to product substitutability are particularly likely to arise, or to be relevant, in the telecommunications industry.

For example, in considering an allegation of abuse of dominance by a firm in its provision of local residential telephone service, the Bureau would first assess the willingness and ability of consumers to substitute to other local residential telephone services provided by different technologies (e.g., circuit switched, IP, and wireless technologies) to determine whether the services provided by these technologies are in the same product market. As part of this exercise, the Bureau would consider whether there are characteristics of a particular local residential telephone service (e.g., reliability and clarity) that sufficiently differentiate it from other local residential telephone services such that customers are unlikely to switch in response to a SSNIP. The Bureau would also consider whether there are costs involved in switching, which would make switching a less likely response to a SSNIP. Examples of such switching costs include penalties associated with terminating an existing contract before it expires; service charges

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[24] Competition Bureau, *Merger Enforcement Guidelines*, (Ottawa, Industry Canada, 2004), online: Competition Bureau Canada <http://www.cb-bc.gc.ca>. The Bureau's *Merger Enforcement Guidelines* clarify that market definition looks only at demand responses (i.e., the incentive and ability of consumers to change their consumption patterns and turn to existing competitors). Supply responses (e.g., the likely responses of "potential" competitors) are important when assessing the potential for the exercise of market power, but are not examined when defining relevant markets. Whether this is done at both the market definition and assessment of market power stages of the analysis or solely in the latter, does not substantively affect the analysis since both existing and potential competitors must be considered before making a conclusion on the market power question. However, since evidence of demand responses is usually distinct from, and usually comes from different sources than, evidence of supply substitution, the Bureau has found as an operational matter that separating the analysis into two steps can be helpful, particularly when dealing with cases in complex industries such as telecommunications.

[25] *Canada (Director of Investigation and Research) v. The D&B Companies of Canada Ltd.*, [1995] 64 C.P.R. (3d) 216 (Comp. Trib.) [*Nielsen*].

[26] These factors are described in greater detail in the *Enforcement Guidelines on the Abuse of Dominance Provisions*, *supra*, note 3 at 11-12.

associated with migrating to another service provider; and new equipment that is required to use a similar service offered by a competitor (e.g., a wireless phone handset).

Bundling is a market definition issue that may be relevant in the telecommunications industry. A bundle is an offering of a package of services at a price benefit compared to the price of the individual services in the package taken on a stand-alone basis. A bundle could include any number of communications services, such as video; high-speed Internet access; wireless, long distance and\or local telephony services; and, optional local services. Generally, bundling of multiple communications services gives rise to the possibility that the relevant product market will be defined as the bundle. Whether bundles define the market may depend on whether there is a significant enough difference in cost to consumers between buying a bundle and buying each service independently. Bundles maybe a separate product market if consumers would not turn to separate services if the bundled price increases by a SSNIP. If that is the case, relevant markets could be defined around the bundles.

However, a few key services may differentiate one service provider's bundle from that of another's and accordingly may significantly affect the willingness of consumers to substitute between bundles. In such cases, if not all competitors can offer a comparable bundle, aggregation may not be possible. In the alternative, to the extent that any key service of the bundle is simply a function of the intelligence of the network/technology, and other providers can access the appropriate software on similar terms to provide that service as part of their bundle, it is unlikely that such services will be sufficient to differentiate one supplier's bundle from another. In this case, aggregation of the product market as described above may be possible.[27] .

2.5 Relevant Geographic Market Definition

For the purpose of geographic market definition, what matters is the ability and willingness of consumers to switch from suppliers at one location to suppliers in another location in response to a SSNIP. A relevant geographic market consists of the smallest region within which a "hypothetical monopolist" of all sources of supply that are regarded as close substitutes by buyers, could impose a SSNIP.[28]

In the absence of direct evidence of switching behaviour in response to a SSNIP, a number of factors may assist in ascertaining consumers' willingness to switch between suppliers in different locations. These generally include the views, strategies, behaviour and identity of buyers; trade views, strategies and behaviour; switching costs;

[27] A discussion of the potential for bundling to constitute a practice of anti-competitive acts is set out in Section 4.4.

[28] When geographic price discrimination is present (and buyers and third parties are unable to arbitrage between low and high price areas), geographic markets are defined around the location of each targeted group of buyers.

transportation costs; price relationships and relative price levels; shipment patterns; and foreign competition.[29]

2.6 Relevant Geographic Market Definition in the Telecommunications Industry

For many telecommunications services, the provision of the service is tied to a location and the number of competitive alternatives that are available to consumers can differ depending on where they live or carry on business.[30] In such cases, geographic market definition typically involves starting with the location(s) where telecommunications service is supplied and considering whether customers would switch to suppliers at a different location in response to a SSNIP.[31] For example, with respect to telecommunications services, the Bureau would define the relevant geographic market based on a specific location if subscribers to services provided at that location were not willing to substitute to services supplied at a different location.[32] In essence, a household or place of business theoretically could be defined as a relevant geographic market.

Where appropriate, the Bureau would aggregate all locations that have the same competitive alternatives (within the product market) for the relevant telecommunications services into a single geographic market. In some cases, such aggregation may follow directly from an examination of the geographic location of networks and consumers. Where there are differences in the geographic coverage of competing networks (i.e., “holes”), it may be necessary to also look at the factors listed in section 2.5 in order to ascertain whether a hypothetical monopolist would impose a SSNIP with respect to such customers.

After such aggregation, a geographic market can be defined around the network of a dominant firm based on its overlapping footprint with competing networks that provide the relevant telecommunications services (i.e., in assessing which locations have the same competitive alternatives, the Bureau includes potential competitors that can easily provide service to that location). Aggregation of geographic markets identified by

[29] These factors are described in greater detail in the *Enforcement Guidelines on the Abuse of Dominance Provisions*, *supra* note 3 at 12-13.

[30] Examples include local residential telecommunications services and many business services.

[31] Whether consumers are able and willing to buy service from suppliers at other locations in general depends on the extent of transaction costs. If transaction costs are sufficiently high, an analysis of demand responses indicates that each location will be a relevant geographic market holding the product market definition constant.

[32] A key issue involves the extent of transaction costs incurred by a subscriber at a given location to substitute to an alternative location for access. *Prima facie* it seems very unlikely that a subscriber at one location would cancel service there and substitute to access at another location in the face of a SSNIP. If this is true, then every location is a relevant geographic market and only suppliers that can provide access to that location are in the market.

competitive alternatives (including potential entrants) is generally sufficient to delineate geographic markets that are appropriate for the identification of market power.[33]

For telecommunications services that are not tied to the location of a customer's residence or place of business (e.g., mobile telecommunications, terminal equipment), the analysis of geographic market would proceed immediately to the factors described in section 2.5.

PART 3 MARKET POWER ASSESSMENT

3.1 Role of Market Power Assessment in Abuse of Dominance Cases

Having defined the relevant market, the next step is to assess whether a firm or group of firms is dominant in that market (i.e., that *one or more persons substantially or completely control* the relevant market). A dominant firm[34] (i.e., a firm that has market power) will be able to act independently of competitive discipline to a material degree. Therefore, market power may be defined with respect to the ability of a firm to profitably cause one or more components of competition encompassed within the concept of price (i.e., price, output, quality, variety, service, advertising or innovation, etc.) to significantly deviate from competitive levels for a sustainable period of time (i.e., impose a SSNIP). It is then necessary to identify all competitors and assess the extent to which they actually or potentially constrain any market power that the firm in question might otherwise possess.

Given the difficulty inherent in measuring market power directly (due to a lack of direct evidence other than price, profit levels, and the conduct of the firm in question), the Bureau also relies upon a number of indirect indicators – both qualitative and quantitative – of market power. These indicators include, but are not necessarily limited to, the following:

- market share;

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[33] For example, in its review of the Rogers/Microcell merger, the Bureau found the geographic market to be less than national in scope. A national market was rejected because there were some differences in the number of competitors, product offerings and prices across provinces, and there was no persuasive explanation showing that a SSNIP could not have been imposed on a provincial basis. The Bureau did not pronounce on whether the geographic market could have been defined more narrowly (e.g., individual cities) since it was determined that the findings would have been the same whether markets were defined as provinces or more locally. It was determined that an aggregate description of the geographic market (i.e., provinces) was appropriate.

[34] Unless otherwise indicated, reference to a firm means a firm or a group of firms. It is possible that a group of unaffiliated firms may possess market power even if no single member of the group is dominant by itself. The assessment of market power in a joint dominance case is discussed in greater detail in the *Enforcement Guidelines on the Abuse of Dominance Provisions*, *supra* note 3 at 16-17.

- barriers to entry[35]; and
- other market characteristics, such as the extent of technological change and countervailing power.

Each of these is discussed in more detail below.

3.2 Market Share

An important factor in assessing market power, along with barriers to entry, is market share. The Bureau's view is that high market share is usually necessary, but not sufficient, to establish market power.[36] In the contested abuse of dominance cases heard to date, the market shares of the dominant firms were very high, suggesting that in these instances customers had few alternatives to choose from in the event that the dominant firm increased price above competitive levels.[37]

Market share can be measured in terms of dollar sales; demand units such as minutes, lines or circuits; or capacity. If products in the relevant market are homogeneous and firms are all operating at capacity, market shares based on dollar sales, demand units or capacity should all yield similar results. As products are more differentiated, market shares based on dollar sales, demand units and/or capacity increasingly differ. The Bureau therefore collects information necessary to calculate market share on all of these bases.

3.3 Barriers to Entry

As noted above, high market share does not determine market power. Without barriers to entry, any attempt by a firm with high market share to exercise market power is likely to be met with entry or expansion such that the firm would lose enough customers to its rivals that it is not profitable to attempt to raise prices above competitive levels. Barriers to entry can include: significant economies of scale; sunk costs; regulatory barriers; long-term contracts; market maturity; and the reputation of incumbents.

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[35] Unless otherwise indicated, entry into, or entering, a market refers to both entry by new firms and expansion by existing firms.

[36] Generally, the Bureau will continue with an examination of a matter if the market share of the party in question exceeds 35 percent, or in the case of a joint dominance case, a joint market share that exceeds 60 percent.

[37] For example, in *Canada (Director of Investigation and Research) v.Tele-Direct (Publications) Inc.*, [1997] 73 C.P.R. (3d) 1 (Comp. Trib.) [*Tele-Direct*], 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 in local telephone directory advertising markets. 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, but this does not imply that market power could never be found below 50 percent.

A competitor must not only be able to enter, but must also be able to remain in the market long enough to recover its sunk investments.[38] Entry must be timely, likely and sufficient before it can constrain the exercise of market power. Timely means that entry will occur relatively quickly[39]; likely refers to the expectation that entry will be profitable; and sufficient means that entry would deter firms from raising prices by a significant amount. If entry is timely, likely and sufficient, then attempts to exercise market power by a firm will be unsuccessful as entry creates substitute products for consumers. In assessing barriers to entry, the Bureau will also consider the possibility of supply-side substitution. This includes potential service providers that would incur relatively substantial sunk costs to enter the market or expand their operations.

A thorough entry analysis will involve consideration of all possible barriers to entry. However, in telecommunications markets, certain barriers to entry are more common than others. These include sunk costs, regulatory barriers, economies of scale and network effects, long-term contracts and market maturity.

In telecommunications, sunk costs would include a large fraction of the costs to build or upgrade a network for the purpose of offering a particular service or services. Regulatory barriers can include any federal, provincial and municipal regulations that affect a firm's ability to enter a market or expand its operations. In telecommunications, foreign ownership restrictions, access to rights of way, allocation of spectrum, and other regulatory obligations imposed on providers of particular services may constitute barriers to entry. Network effects occur in the telecommunications industry where the value of a product or service increases as more customers use that product or service, *e.g.*, as more customers join the network. Long-term contracts refer to commercial agreements binding a firm and its customers to the agreement for an extended period of time. The maturity of the market being assessed is relevant because in general, it will be more difficult to enter a mature market and compete with firmly entrenched players (i.e., incumbents may enjoy longstanding and good reputations and close relationships with customers, which can be significant barriers to entry).

3.4 Other Market Characteristics

The Bureau will consider other factors in assessing market power. Factors other than market share and barriers to entry that are particularly important to the assessment of telecommunications markets are the extent of countervailing power, and technological change and innovation.

In determining whether a firm has the ability to exercise market power, the Bureau assesses whether one or more customers have a countervailing ability to constrain an exercise of market power. For example, large business customers (such as financial

[38] As the Tribunal noted in *Laidlaw*, the term "barriers to entry" carries with it the connotation of sustainability, *supra* note 16.
[39] In the Bureau's analysis, the beneficial effects of entry on prices in this market normally must occur within a two-year period.

institutions) may be able to constrain the ability of a firm to exercise market power if these customers can switch to other service providers in a reasonable timeframe, vertically integrate their operations, induce the expansion of existing service providers, or encourage the entry of potential service providers.[40]

The Bureau also takes into account the nature and extent of change and innovation in a relevant market in assessing market power. In addition to technological change and innovation in products and processes, an assessment is made of the general impact on competition of the nature and extent of other forms of change and innovation.[41] The stage of market growth is also informative since entry into start-up and growing markets is less difficult and time consuming and the dynamics of competition generally change more rapidly than in mature markets.

3.5 Assessing Market Power in Telecommunications Markets

In many telecommunications markets, the provision of the service is tied to a location and the number of competitive alternatives that are available to consumers can differ depending on where they live or carry on business. In such cases, the Bureau believes that capacity, including network coverage, typically represents an important measure of market power. Unused capacity enhances the incentive and ability of a service provider to compete for customers in response to a price increase by the allegedly dominant firm. Network coverage is an important component of capacity in that it represents the ability of a service provider, due to its physical presence, to offer service to customers of the allegedly dominant firm. When substantial excess capacity remains in a market, allowing firms to easily increase supply in response to an increase in price, the ability to raise price above competitive levels may be considerably lower than what a simple concentration measure might suggest.[42]

In addition, a firm that owns or controls a network and is not operating in the relevant market but can enter in a timely manner without incurring relatively substantial sunk costs will be considered in the market when assessing market power.[43] Such entrants

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[40] Where price discrimination is possible, not all customers may be able to counter an attempt to impose a SSNIP. For example, a firm may be able to increase price to some customers who may not have the options available to other customers, even though those other customers may be able to resist a price increase. In such cases, the group of customers that cannot counter the price increase may constitute a relevant market. If the firm has market power in such a relevant market and abuses such market power, the Bureau would examine whether there is likely a substantial lessening of competition with respect to such a group of consumers.

[41] These include change and innovation in relation to distribution, service, sales, marketing, packaging, buyer tastes, purchase patterns, firm structure, the regulatory environment and the economy as a whole.

[42] For example, in geographic markets where there are two independent facilities-based service providers (a facility-based service provider is one that owns and operates its own networks) with sunk costs that are not capacity constrained and are equally capable of offering the relevant product, the capacity market share of each would be 50%.

[43] Supply responses (e.g., the likely responses of "potential" competitors) are important when assessing the potential for the exercise of market power, but are not examined when defining relevant markets, *supra* note 24.

could feasibly add capacity to the relevant market in response to a SSNIP in order to discipline an exercise of market power.[44] An example of this is a network requiring some technical upgrade to offer a competing service.

PART 4 ANTI-COMPETITIVE ACTS

4.1 Anti-Competitive Acts in the Telecommunications Industry

Having defined the relevant product and geographic markets and determined that a firm or group of firms is dominant, the second element required under subsection 79(1) is to establish that the firm or group of firms in question has engaged in or is engaging in a "practice of anti-competitive acts." The jurisprudence has established that a "practice" under section 79 can encompass one occurrence that is sustained or systematic over a period of time, or a number of different acts taken together.[45]

The Federal Court of Appeal has confirmed that "(a)n anti-competitive act is one whose purpose is an intended negative effect on a competitor that is predatory, exclusionary or disciplinary."[46] In keeping with this interpretation, the Bureau will generally find that acts that fall into one or more of the following general categories are potentially anti-competitive:

- acts to raise rivals' costs (or reduce rivals' revenues);
- predatory conduct; and
- acts to facilitate coordinated behaviour among firms (facilitating practices).[47]

Certain types of anti-competitive acts may be more common in, or perhaps even unique to, the telecommunications industry. The following sections describe activities that may form the basis of complaints under section 79 in the telecommunications industry and outlines the approach that the Bureau will typically adopt when it is considering whether a dominant firm is engaging in a practice of anti-competitive acts.

4.2 Raising Rivals' Costs and Market Foreclosure

As noted in the *Enforcement Guidelines on the Abuse of Dominance Provisions*, a dominant firm may undertake a number of strategies that raise the costs of a rival, or reduce a rival's revenues, thereby making the rival a less effective competitor. It may also engage in practices that have the effect of excluding competitors by hindering or denying current or potential rivals access to the inputs necessary to compete (market

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[44] This is consistent with the approach in the *Merger Enforcement Guidelines*, *supra*, note 24, at 4.1.

[45] *NutraSweet, supra*, note 9.

[46] *Canada Pipe*, *supra* note 10.

[47] For a discussion on the Bureau's approach to acts that facilitate coordinated behaviour among firms (facilitating practices), see the *Enforcement Guidelines on the Abuse of Dominance Provisions*. Acts that raise rivals' costs and predatory conduct in the telecommunications industry are discussed further below.

foreclosure). For example, it could exercise its market power over an input that its rivals need to compete (e.g., by exclusive contracts that deny rivals access to efficient distribution or retailing).

Within the telecommunications sector, competitive entry can follow a number of models – facilities-based entry, entry via unbundled network elements, resale and sharing, or a combination of these methods.[48] Facilities-based entry involves competition between at least two facilities-based service providers (e.g., local exchange services). Entry via unbundled network elements involves entry by service providers that may own parts of their own network but also rely on regulated access to elements of the incumbent's network in order to offer their products to consumers (e.g., where local telecommunications access is provided using the unbundled loops of an incumbent).

Conduct by the dominant firm to disrupt compatibility, to reduce the quality of the service offered by its rivals or raise the costs of its rivals is potentially an anti-competitive act. Under the facilities-based entry model, many of the opportunities for a potentially dominant firm to raise the costs of its rival may be absent since the entrant's network operates, to a large part, independently from that of the incumbent firm. Many of the remaining opportunities for a dominant firm to disadvantage its rivals may involve conduct that remains subject to regulation (e.g., number portability, interconnection, and access to support structures).

Other potentially anti-competitive acts of this type by a dominant firm in the telecommunications industry could include:

- creating artificial switching costs;
- acquiring control of suppliers of an input needed to compete; and
- requiring or inducing suppliers of an input needed to compete to not supply its rival.

The unbundled network elements model, whereby the entrant relies upon access to the incumbent's facilities to complete its network, raises a different set of concerns. Under this model, the CRTC will have mandated access by competitors to facilities of the dominant firm under its statutory authority. Consistent with the Bureau's *Technical Bulletin on "Regulated" Conduct* (and past Bureau practice), the Bureau will not consider allegations of anti-competitive acts related to regulated facilities, only allegations that a dominant firm has refused access, or is providing discriminatory access, to an unregulated facility.

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[48] A "network element" is either software, hardware or a combination of both that primarily performs a telecommunications service function. "Resale" is the subsequent sale or lease on a commercial basis, with or without adding value, of a distinct telecommunications service or distinct telecommunications facilities provided by a supplier on a wholesale basis.

A different issue could arise in a market with competing facilities-based service providers when a third party is unsuccessful in its attempts to negotiate access to a facility that it requires in order to supply its services. In those circumstances, the facility would not necessarily be considered "essential" for purposes of assessing alleged abuse of dominance because there are alternative suppliers of the service. Having said that, if all (or a significant proportion) of the facilities-based competitors are engaged in a joint denial of access, the Bureau would examine the reasons underlying the decision by each facilities-based supplier to refuse access to the service. If the denial of access is found to be a coordinated refusal to exclude or discipline the third party, it may constitute an anti-competitive act. However, this behaviour might more properly be addressed under either the conspiracy or the refusal to deal provisions of the *Act*.

4.2.1 Margin Squeezing

A specific example of raising rivals' costs that is a source of frequent complaint in the telecommunications sector is margin squeezing. Subsection 78 (1)(*a*) of the *Act* describes the anti-competitive act of "…squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer's entry into, or expansion in, a market." Margin squeezing can take different forms. Examples of squeezing include:

- the supplier raises the wholesale price relative to the retail price, thus squeezing the margin between the wholesale and retail prices;
- the wholesale price remains the same but the supplier lowers the retail price, compelling his or her customer/competitor to follow suit; and
- a new retail service is introduced at a low price relative to the existing wholesale service.

From a competition policy perspective, the mere observation of margin erosion is not sufficient to support a conclusion that a dominant firm has engaged in an anti-competitive act. The fact that margins are being squeezed may speak to the vigour of competition in the market concerned, and does not necessarily reflect a predatory, exclusionary or disciplinary purpose.[49]

In considering the overall effect of any anti-competitive act, the Bureau will examine the underlying purpose of the act. Specifically, the Bureau will consider whether the act is based on justifiable business practices that would be found in otherwise competitive markets. For example, if a vertically integrated dominant firm sells a wholesale service to both competitors and large business end-users, an increase in the wholesale price may not constitute an anti-competitive act even if it impedes the ability of unintegrated competitors to compete with it in the downstream (retail) market. This would be the case if an examination of the evidence shows that the primary reason for the price increase

[49] A full discussion of the theory and the Bureau's approach to margin squeezing is set out in Appendix III of the *Enforcement Guidelines on the Abuse of Dominance Provisions, supra*, note 3.

related to increased costs associated with serving large business end-users, even though that sector does not compete in retail markets.

4.2.2 Denial of Access to a Facility

An example of market foreclosure is denying access to facilities[50] that may be "essential" for competition but are not subject to regulation by the CRTC. For the purposes of section 79 of the *Act*, an "essential" facility is an input that provides the firm controlling it with the power to lessen or prevent competition in a relevant downstream market. Section 79 of the *Act* is concerned with abuse of this market power that has resulted, results or is likely to result in a substantial lessening or prevention of competition, not the exercise of any market power inherent in the facility.[51]

In an allegation of abuse of dominance involving an essential facility, the conduct at issue would be an actual or constructive[52] denial of access to the facility. For such a denial to raise an issue under the *Act*, the following conditions must be present:

(i) A vertically integrated firm that is dominant in two markets.[53] The first relevant market is the upstream market (or wholesale market) for the facility. The second relevant market is the downstream market (or retail market) in which the facility is an input. A necessary condition for concluding that there is dominance in the upstream market is that it is not practical or feasible for competitors to duplicate the facility in question.

(ii) A denial of access to the facility for the purpose of excluding competitors from entering or expanding in the downstream market or otherwise negatively affecting their ability to compete.

(iii) The denial has had, is having or is likely to have the effect of substantially lessening or preventing competition in the downstream market.[54]

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[50] Use of the term "facility" in this document may refer to a pertinent facility, function, or service that may be "essential" as defined in the text.

[51] Under the abuse provisions of the *Act,* what is of concern is not the existence of dominance (i.e., the exercise of market power) but conduct that maintains or enhances market power. For instance, if there is evidence that the dominant firm can prevent entry of alternative providers of the essential facility by excluding or impeding unintegrated downstream competitors, then a denial of access may maintain the upstream firm's market power. This could potentially result in a substantial lessening or prevention of competition in both the upstream and downstream markets.

[52] Constructive denial is a practice that has the equivalent effect of an actual denial, e.g., by charging a prohibitively high access price for the facility.

[53] The firm that controls the essential facility need not be explicitly vertically integrated; it can achieve the same result by contract, e.g., by designating one downstream firm as its exclusive retailer. Similarly, a firm may operate indirectly in the wholesale market by selling access to a facility to another wholesaler that then supplies the retail market.

[54] This concept is discussed in greater detail below and in Section 5.

When considering an allegation of abuse of dominance involving an essential facility, market power must be present in both the upstream market for the facility and in the downstream market in which the facility is used as an input. The Bureau takes a sequential approach by first assessing the market power of the allegedly dominant firm in the downstream market – this first requires that the downstream market be defined. Market power is assessed in the time period in which the practice of anti-competitive act(s) is alleged to have occurred or is occurring. The ability of the allegedly dominant firm to exercise market power in the downstream market will depend on the willingness and ability of consumers to switch to alternative providers who do not rely on access to that allegedly dominant firm's facility. If that firm does not have market power downstream, the denial of access to the facility cannot amount to an abuse of dominance.

If the Bureau determines that the firm is dominant in the downstream market, it will then consider whether it is also dominant in the upstream market. Market definition upstream is more complex because demand for the alleged essential facility is derived from the demand for the product in the downstream market. The ability of the owner of an alleged essential facility to raise prices depends on the willingness and ability of the parties seeking access (downstream competitors) to turn to alternative inputs. It will also depend on the willingness and ability of consumers to obtain the product or service from alternative providers or from the parties seeking access to the alleged essential facility using alternative facilities. For dominance to exist in the upstream and downstream markets, it must be difficult or impossible for downstream competitors to substitute toward other inputs or to practically or reasonably duplicate the facility, and the ability of consumers to switch to alternative providers must be limited.

With a finding of market power, a denial of access is an anti-competitive act when its purpose is to exclude or impede actual or potential competitors. To infer such a purpose, it must be difficult or impossible for those competitors to substitute other inputs or to practically or reasonably duplicate the facility. The requirement that it is not practical or feasible for a competitor to duplicate the facility means that such an entrant would not find it feasible to enter or compete effectively if it had to self-supply the facility. At the same time, for the purpose to be anti-competitive, the supplier must have the necessary capacity, or have the willingness and ability to build the necessary capacity, to supply those competitors. In its examinations of denial of access complaints, the Bureau will also take into account any vertical efficiency effects of the conduct.

Before the Tribunal is able to issue any remedial order under section 79, it must be shown that the practice of anti-competitive acts must actually, or be likely to, substantially lessen or prevent competition in the downstream market. Accordingly, if control of the facility is a source of dominance in both an upstream and downstream market and the denial of access has been for an anti-competitive purpose, the Bureau's "but for" analysis would then focus on whether the denial of access leads to materially higher prices downstream than would occur if the dominant firm charged the profit-maximizing access

price to downstream competitors.[55] This concept is discussed in greater detail in Section 5.

4.3 Predatory Pricing

Predatory pricing involves a firm deliberately selling at below-cost prices for a sufficiently long period of time that a rival will be eliminated from the market or that competition will otherwise be diminished in the expectation that the firm will be subsequently able to recoup its losses by charging prices above competitive levels.

In considering a complaint of predation under section 79, the challenge is separating instances of true predatory conduct (i.e., conduct that results in the maintenance or enhancement of market power and a substantial lessening or prevention of competition) from competitive behaviour. The risk is that by wrongly pursuing activity that is truly pro-competitive, beneficial pricing behaviour will be unnecessarily constrained, to the detriment of both the target of the complaint and, most importantly, consumers. As a result, the Bureau will have a high evidentiary requirement to pursue a predation case.

A key determinant in assessing allegations of predatory pricing is the cost structure of the dominant firm. At the theoretical level, establishing an appropriate test to determine below-cost pricing is difficult. Competition authorities have adopted various measures to address this issue, including average variable cost and avoidable costs[56]. When circumstances warrant, these cost measures allow authorities to address genuine instances of anti-competitive conduct while leaving sufficient room for the kind of price cutting that competition is intended to stimulate.

Below-cost pricing practices by a dominant firm can harm competition and be profitable only if they maintain or enhance its market power. This may be possible through the elimination of a rival in cases where entry barriers are sufficiently high so as to prohibit or discourage potential entrants from entering the market in response to price increases by the dominant firm following its predatory action. In the absence of such barriers, predation may be profitable if it deters potential competitors from entering the market for fear of a repeated predatory episode. The success of such a strategy depends on the extent to which the costs of the entrant are sunk. If the costs are sunk and hence it is difficult for the assets to be redeployed to other uses (other markets), then inducing the entrant's exit will reduce the profitability of predation and recoupment in the same market because the assets may be used subsequently by another party. If the investment is abandoned by

[55] The "profit-maximizing access price" would be that at the time of the denial (i.e., assuming the downstream market structure absent the denial).

[56] The variable costs of producing a given level of output of a good or service are those costs (such as the costs of labour and material inputs) that vary with changes in the amount of that output. Average variable cost is a firm's total variable cost divided by the total output of the good or service produced by the firm. The Competition Tribunal defined avoidable costs to be "all costs that can be avoided by not producing the good or service in question. In general, the avoidable cost of offering a service will consist of the variable costs and the product-specific fixed costs that are not sunk." *Canada (Director of Investigation and Research) v. Air Canada* (2003), 26 C.P.R. (4th) 476 (Comp. Trib.) at para. 76.

the entrant for a period of time, degradation of the facility and/or loss of required rights-of-way may occur. This may delay the timing and increase the cost of redeploying of the facility in question, or even affect the decision to re-deploy the facility, and increase the profitability of the predation strategy.

In the telecommunications sector, the Bureau would take a sequential approach to examining predatory pricing complaints by evaluating various factors to determine the nature or purpose of the alleged anti-competitive acts. This approach is comprised of three steps.

First, the Bureau would consider whether the alleged predatory price is likely to drive the complainant, or other firms, out of the market. In this context, the Bureau would assess whether the alleged predatory price is below the average avoidable costs of the firm that is alleged being driven from the market. The Bureau would also consider the likelihood of exit when costs are sunk, making redeployment of the assets to other uses difficult.

Second, if the first condition is satisfied, the Bureau would compare the alleged predatory price to the alleged predator's avoidable costs. The Bureau is not likely to pursue a complaint where the alleged predator earns profits in that market at the alleged predatory price. As a general principle, where a dominant telecommunications service provider's response to competition consists only of reducing prices to levels which match, but do not undercut those of a competitor ("meeting the competition"), the Bureau will not take enforcement action when considering allegations of predation.

Third, if the first and second conditions are satisfied (i.e., the alleged predatory price is likely to drive the complainant or other firms out of the market and the alleged predatory price is below avoidable cost), the Bureau would evaluate the likelihood that the alleged predator will be able to recoup the profit sacrifice that its predation strategy would entail.[57] The profitability of the practice requires that predation maintain or enhance the market power necessary for recoupment. This requires that there are barriers to entry. As a result, the Bureau will examine the nature of the costs incurred by the entrant as well as any other barriers to entry.

In undertaking this three-step approach, the Bureau would consider the impact of continued regulation in other telecommunications markets. For instance, the incentives to engage in predation in one geographic market to either create a reputation or signal that entry into other markets would not be profitable may not exist if recoupment in those markets is not possible because of continued and effective regulation. On the other hand, if regulation allows costs of providing unregulated services to be passed on to customers of the regulated service, the regulated firm may have an unusually credible threat to predate in those unregulated markets by cross-subsidizing.

[57] In assessing the likelihood of recoupment, the Bureau will look to economic theories of predation, with confirming evidence, for reasons to expect that subsequent entry (or re-entry into the market) would not deter the alleged predator from charging post-predation prices significantly above competitive levels.

4.4 "Targeted Pricing" in the Telecommunications Industry

"Targeted pricing" refers to the practice of offering certain customers a significantly better price than charged previously, or that deviates from what it usually charges other customers in the market, in order to either win or retain the customer in the face of a more competitive offer. Some telecommunications industry participants have argued that such pricing may have an effect similar to predatory pricing (i.e., preventing entry or inducing exit) even if it is not below cost.

In the context of telecommunications, to the extent that the dominant firm can identify customers who have switched to competitors, it may have an incentive to "win back" the customer by offering a better price. If there are fixed and sunk costs associated with customer acquisition, then the effect of targeted pricing can result in exit from, or may deter entry into, the market as these costs are not recovered by the entrant. In addition, if an entrant expects to face targeted pricing, it may not find it worthwhile to sink the costs necessary to enter the market as a whole.

However, as is the case with predation, the challenge in demonstrating that targeted pricing constitutes an anti-competitive act is being able to separate truly competitive conduct (which forms the basis for price competition and the competitive process) from actions that are designed to induce exit and/or hinder entry.[58] Targeted pricing, and other tactics in which one firm commits to meet the prices of its competitors, are used in many different sectors (e.g., magazine sales promotions, coupon promotions, etc.) and are not inherently anti-competitive. In forborne markets, preventing targeting could chill price competition and frustrate the competitive process, to the detriment of consumers.

One example of the difficulty in addressing targeted pricing is that the theory of anti-competitive targeted pricing depends on the assumption that the dominant firm can target the customers lost to a competitor and not its remaining customers. However, this may be difficult, depending upon the behaviour of the dominant firm's customers. For instance, if the rollout of a telephony service on an existing network is not on the basis of a customer at a time but rather on a system-wide basis (i.e., relatively large geographic areas), then customers of the incumbent who are in the entrant's service area may recognize that they too can take advantage of the incumbent's targeted pricing by switching to the entrant, raising the cost to the incumbent of engaging in that tactic.

In its decision in *Tele-Direct*, the Tribunal discussed the inherent difficulty in establishing objective criteria that can distinguish between targeted pricing that is harmful and that which is beneficial competitive conduct.[59] The Tribunal noted that the closest analogy to the concept of targeting is predation and that the cost-revenue test used in predation cases provided an objective standard for distinguishing competitive pricing

[58] As with predation, the Bureau will not take enforcement action with regards to targeted pricing where it is shown that a dominant telecommunications service provider's pricing is a response to competition at levels which match, but do not undercut those of a competitor ("meeting the competition").
[59] *Tele-Direct*, *supra* note 38 at 289-290.

from predation. Should the targeted price exceed avoidable costs, the Bureau would require considerable ancillary evidence in support of the claim that the conduct of targeting constituted an anti-competitive act before it would consider pursuing the matter further.

4.5 Bundling

From a competition law perspective, bundling may raise enforcement issues under the *Act* in limited circumstances. Consumers generally benefit from bundling because it typically offers them a package of products at better prices than are otherwise available. It may also prompt competitors to broaden their product offerings in order to maintain as complete a set of products as that of their competitors.

Bundling could prompt concerns if it is viewed as a means to raise the costs for rivals or, in the alternative, as a means by which to engage in predation. In terms of raising rivals costs, a practice of bundling may meet the competition law definition of tied selling.[60] In this context, if it is shown that the practice is impeding entry or expansion of firms offering some or all of the bundled services, or is having some other form of exclusionary effect, it could constitute an anti-competitive act. By way of example, a long-term contract that is required in conjunction with the sale of a bundle could constitute an anti-competitive act if it is designed to raise rivals costs. With respect to predation, the practice of bundling could be viewed as an anti-competitive act when a firm offers below avoidable cost pricing for the bundle of products. An assessment of such a situation will be complicated by the assignment of costs across multiple markets.

PART 5 SUBSTANTIAL LESSENING OR PREVENTION OF COMPETITION

Subsection 79(1) requires that “the practice [of anti-competitive acts] has had, is having, or is likely to have the effect of preventing or lessening competition substantially in a market.” The focus of the inquiry at this stage is on the impact of the practice in question on competition, not on competitors. The Bureau analyzes a potential substantial lessening or prevention of competition using a “but for” test: “but for” the practice in question, would there be substantially greater competition in the relevant market, in the past, present, or future?[61] The Tribunal has agreed that a relative assessment of whether the relevant markets would be substantially more competitive in the absence of the impugned practice, rather than an absolute assessment of whether the prevailing level of competition is sufficient, is required.[62]

More specifically, a substantial lessening or prevention of competition is an effect that significantly preserves or enhances barriers to entry and/or expansion. In examining

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[60] See subsection 77(1) of the *Act.*
[61] This test was endorsed by the Federal Court of Appeal. *Canada Pipe*, *supra* note 10 at para. 38.
[62] *Laidlaw, supra* note 16 at 346.

whether barriers to entry are preserved or enhanced the Bureau will focus on whether the practice in question has materially altered the prospects or feasibility of entry, such as whether, "but for" the practice in question, an effective competitor or group of competitors could have emerged within a reasonable period of time to challenge the market power of the firm responsible for that practice.[63]

There are a variety of other considerations in determining whether or not there has been a substantial lessening or prevention of competition, such as whether or not consumer prices might be significantly lower, or product quality, innovation, or choice significantly greater, in the absence of the practice.

PART 6 REMEDIES

6.1 Alternative Case Resolutions

If the Commissioner, having investigated a complaint of abuse of dominance, is satisfied that the evidence supports an application to the Tribunal for a remedy, the Commissioner will present to the parties any preliminary concerns regarding the alleged contravention of the *Act*. The parties are afforded the opportunity to respond to the Commissioner's concerns and can propose alternative means of addressing those concerns in order to avoid an application to the Tribunal.

Resolution of these matters is dealt with on a case-by-case basis. In most circumstances, the Commissioner's preference would be to have a remedy agreed upon by the parties affirmed in a consent agreement pursuant to sections 105 and 106 of the *Act*. In instances where an alternative (non-litigious) course of action has been adopted to resolve competition issues, the Commissioner will make the resolution public to ensure that all interested parties have been informed of the fact that the matter has been resolved.

6.2 Orders of the Competition Tribunal

Where, on application by the Commissioner, the Tribunal finds that the elements of subsection 79(1) are met, it may make an order prohibiting a respondent firm or firms from engaging in the practice of anti-competitive acts. In addition, or alternatively, if the Tribunal finds that an order prohibiting the continuance of the practice is not likely to restore competition in the affected market, the Tribunal may, pursuant to subsection 79(2), make an order directing any such actions, including the divestiture of assets or shares, as are reasonable and necessary to overcome the effects of the practice of anti-competitive acts.

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[63] In the Bureau's analysis, a period of two years would be "reasonable".

In some cases, the Tribunal has explicitly ordered access to certain facilities or services.[64] However, access will not improve competitive performance in a market if it is provided at a prohibitive price. The Tribunal has stated that it does not function as a price regulator, such as through ongoing oversight of rates or access price setting.[65] The Bureau also does not have the legislative mandate to act as a binding price regulator in access disputes. Having said that, the level of the access price would usually be an important consideration in assessing whether a firm is in compliance with the order to provide access.[66]

Subsection 79(2) gives the Tribunal broad discretion in making orders, and in limited circumstances this has included orders specifying formulas for setting prices.[67] However, such orders do not involve ongoing oversight and instead specify what would constitute compliance with the order. Specific disputes over what would constitute "reasonable" access prices could be resolved through third-party mediation or arbitration.

PART 7. CONCLUSIONS

This document outlines the Competition Bureau's approach to enforcing the abuse of dominance provisions contained in sections 78 and 79 of the *Act*.

The Bureau cannot, however, provide guidance for every situation and the circumstances of each case will ultimately determine how the Bureau will exercise its enforcement discretion. Under its Program of Advisory Opinions, the Bureau has historically provided its views on proposed actions by businesses. Consequently, telecommunications companies can seek advice on whether or not a proposed course of action would raise an issue under the *Act*.

For further information, contact the Competition Bureau:

Information Centre
Competition Bureau

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[64] For example, see *Nielsen, supra* note 25 where the Tribunal ordered Nielsen to provide access to scanner data to its competitors. In *Canada (Director of Investigation and Research) v. Bank of Montreal,* [1996] 68 C.P.R. (3d) 527 (Comp. Trib.) [*Interac*], the Tribunal addressed the issue of access to a network using a consent order.
[65] *Tele-Direct*, *supra* note 38 at 255.
[66] In *Tele-Direct*, the Tribunal articulated its view that a commission arrangement at a minimum rate of 15 per cent would constitute acceptable compliance with its order prohibiting tying, *supra* note 38.
[67] For example, in *Nielsen*, *supra* note 25, the Tribunal ordered that historical data be provided to the entrant provided that the entrant agreed to pay a price for the data based on a cost-based formula. On consent, in *Interac*, *supra* note 67, the Tribunal's order specified a cost-based formula to set the "switch fee" (i.e., the inter-member network user fee).

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Appendix "A"

The Abuse of Dominance Provisions of the *Competition Act*

(Sections 78 and 79)

78. (1) For the purposes of section 79, "anti-competitive act", without restricting the generality of the term, includes any of the following acts:

(*a*) squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer's entry into, or expansion in, a market;

(*b*) acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;

(*c*) freight equalization on the plant of a competitor for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;

(*d*) use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;

(*e*) pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market;

(*f*) buying up of products to prevent the erosion of existing price levels;

(*g*) adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent his entry into, or to eliminate him from, a market;

(*h*) requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor's entry into, or expansion in, a market;

(*i*) selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor;

(*j*) acts or conduct of a person operating a domestic service, as defined in subsection 55(1) of the *Canada Transportation Act*, that are specified under paragraph (2)(*a*); and

(*k*) the denial by a person operating a domestic service, as defined in subsection 55(1) of the *Canada Transportation Act*, of access on reasonable commercial terms to facilities or services that are essential to the operation in a market of an air service, as defined in that subsection, or refusal by such a person to supply such facilities or services on such terms.

(2) The Governor in Council may, on the recommendation of the Minister and the Minister of Transport, make regulations

(*a*) specifying acts or conduct for the purpose of paragraph (1)(*j*); and

(*b*) specifying facilities or services that are essential to the operation of an air service for the purpose of paragraph (1)(*k*).

R.S., 1985, c. 19 (2nd Supp.), s. 45; 2000, c. 15, s. 13.

79. (1) Where, on application by the Commissioner, the Tribunal finds that

(*a*) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,

(*b*) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and

(*c*) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,

the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

(2) Where, on an application under subsection (1), the Tribunal finds that a practice of anti-competitive acts has had or is having the effect of preventing or lessening competition substantially in a market and that an order under subsection (1) is not likely to restore competition in that market, the Tribunal may, in addition to or in lieu of making an order under subsection (1), make an order directing any or all the persons against whom an order is sought to take such actions, including the divestiture of assets or shares, as are reasonable and as are necessary to overcome the effects of the practice in that market.

(3) In making an order under subsection (2), the Tribunal shall make the order in such terms as will in its opinion interfere with the rights of any person to whom the

order is directed or any other person affected by it only to the extent necessary to achieve the purpose of the order.

(3.1) Where the Tribunal makes an order under subsection (1) or (2) against an entity who operates a domestic service, as defined in subsection 55(1) of the *Canada Transportation Act*, it may also order the entity to pay, in such manner as the Tribunal may specify, an administrative monetary penalty in an amount not greater than $15 million.

(3.2) In determining the amount of an administrative monetary penalty, the Tribunal shall take into account the following:

(*a*) the frequency and duration of the practice;

(*b*) the vulnerability of the class of persons adversely affected by the practice;

(*c*) injury to competition in the relevant market;

(*d*) the history of compliance with this Act by the entity; and

(*e*) any other relevant factor.

(3.3) The purpose of an order under subsection (3.1) is to promote practices that are in conformity with this section, not to punish.

(4) In determining, for the purposes of subsection (1), whether a practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market, the Tribunal shall consider whether the practice is a result of superior competitive performance.

(5) 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.

(6) No application may be made under this section in respect of a practice of anti-competitive acts more than three years after the practice has ceased.

(7) No application may be made under this section against a person

(*a*) against whom proceedings have been commenced under section 45, or

(*b*) against whom an order is sought under section 92

on the basis of the same or substantially the same facts as would be alleged in the proceedings under section 45 or 92, as the case may be.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1990, c. 37, s. 31; 1999, c. 2, s. 37; 2002, c. 16, s. 11.4.

79.1 The amount of an administrative monetary penalty imposed on an entity under subsection 79(3.1) is a debt due to Her Majesty in right of Canada and may be recovered as such from that entity in a court of competent jurisdiction.

2002, c. 16, s. 11.5.