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Canadian Competition Tribunal Clarifies Scope for Justifying Alleged Abuses of Dominance

Vancouver Airport Authority Decision

In a decision released on October 17, 2019, the Canadian Competition Tribunal dismissed an application by the Commissioner of Competition alleging that the Vancouver Airport Authority (VAA) had abused a dominant position in the market for galley handling services (i.e., the loading and unloading of catering and related products on commercial aircraft) at Vancouver International Airport. The Commissioner alleged that the VAA, a not-for-profit corporation responsible for the management and operation of the Vancouver airport, had been preventing – without sufficient justification – new in-flight caterers (i.e., providers of galley handling and catering services) from competing at the airport, even though the VAA does not itself compete for the supply of galley handling or catering services.

The Tribunal determined that VAA has a dominant position in the market for galley handling services at the Vancouver airport through its power to grant or deny critical access to the airside (i.e., the runways, taxiways and apron where aircraft are parked), but that VAA's refusal to authorize more than a restricted number of in-flight caterers at the airport was motivated by an overriding purpose (i.e., preservation of at least two full-service in-flight catering providers at the airport) that was not anticompetitive. The Tribunal further determined that the Commissioner had not, in any event, established that the refusal gave rise to an actual or likely substantial lessening or prevention of competition in the relevant market.

The Commissioner's Application

The Commissioner filed an application with the Tribunal in September 2016 seeking an order under the abuse of dominance provisions in section 79 of the *Competition Act* (Act) in respect of VAA's decisions to allow, over a span of more than 20 years, only two in-flight caterers to operate at the Vancouver International Airport and to refuse to license new providers of in-flight catering services that are willing to meet market terms. In brief, the Commissioner alleged that VAA controlled the downstream market for galley handling services at the airport and that its restrictions on access to in-flight caterers had deprived airlines of the benefits of increased competition for galley handling services that additional providers would bring. Moreover, the Commissioner alleged that VAA had a plausible competitive interest in the galley handling market because, among other things, VAA earned concession fees from in-flight caterers based on the revenues the caterers earned. The Commissioner sought an order requiring VAA to authorize airside access, on non-discriminatory terms, to any in-flight catering firm that meets customary health, safety, security and performance criteria, for the purposes of providing galley handling services.

VAA contested the Commissioner's allegations, emphasizing in particular its statutory mandate to operate the airport in the public interest and claiming that its chief motivation at all times was to preserve and foster competition in galley handling services for the benefit of airlines and the airport itself, which competes with other airports to secure and retain airlines and flight routes. VAA argued that the Act's abuse of dominance provisions do not apply to its impugned conduct given the application of the "regulated conduct defence."

The Tribunal's Decision

In order to succeed in an abuse of dominance application, the Commissioner must establish, on a balance of probabilities, that the respondent is dominant in a relevant market and has engaged in a practice of anticompetitive acts that has had, is having or is likely to have the effect of substantially lessening or preventing competition in a market.

DOMINANCE (SUBSTANTIAL OR COMPLETE CONTROL OF A MARKET)

The Tribunal agreed with the Commissioner that VAA substantially or completely controlled the market for galley handling services at the Vancouver airport through its undisputed control over access to the airside, which the Tribunal found to be a necessary input for providing these services.

PRACTICE OF ANTICOMPETITIVE ACTS (OVERRIDING ANTICOMPETITIVE PURPOSE)

Plausible Competitive Interest

Because VAA does not compete in the relevant market at issue, the Tribunal explained that it must add an additional step to its analysis of whether VAA's impugned conduct amounted to a practice of anticompetitive acts. This step, which the Tribunal described as a "screen" to filter out, at a preliminary stage, conduct that is unlikely to amount to a practice of anticompetitive acts, involves assessing whether VAA had a "plausible competitive interest" in the relevant market. Specifically, the Tribunal will require "some credible, objectively ascertainable basis in fact" (beyond merely a conceptual basis) to believe that a respondent has a competitive interest in the relevant market, although such basis in fact needn't be "compelling." The Tribunal further cautioned that "the mere fact that an impugned practice may appear to be exclusionary on its face does not serve to eliminate the utility of the screen" since other aspects of the factual matrix may demonstrate the absence of a reasonably believable competitive interest in the relevant market.

On the facts of the case before it, the Tribunal's judicial members (but not the lay member, an economist) concluded that VAA had a plausible competitive interest in the galley handling market but commented that the interest "falls very close to the lower limit of what the Tribunal considers a [plausible competitive interest] to be." The finding of a plausible competitive interest flowed from the structure of the concession fees charged by VAA to in-flight caterers, according to which VAA collected a percentage of overall revenues that the caterers earned. This "participation in the upside," together with VAA's ability to exclude additional galley handling suppliers from operating at the airport, created a commercial and economic interest in the downstream market that the Tribunal's judicial members said distinguished VAA from a neutral upstream provider of inputs. The Tribunal's lay member disagreed, finding that the loss of concession fee revenue that might be avoided by preventing entry into the galley handling market was too speculative, too small and too easily offset by other factors to form the basis of a plausible competitive interest.

Legitimate Business Justifications

Having narrowly found that VAA had a plausible competitive interest in the downstream galley handling market, the Tribunal went on to consider the second step of its analysis – namely whether the Commissioner had established that VAA's refusal to authorize additional in-flight catering firms at the airport constituted a practice of anticompetitive acts. Notably, the Tribunal acknowledged that VAA's subjective intention in refusing to authorize additional in-flight caterers, as well as the objectively foreseeable consequences of that refusal, was to exclude competitors from the market; however, the Tribunal went on to find that the "overriding character" of the refusal was nevertheless legitimate rather than anticompetitive.

Specifically, the Tribunal was satisfied on the evidence that VAA's refusal to allow additional in-flight caterers to operate at the airport was motivated predominantly by VAA's concern that allowing additional in-flight caterers (especially firms without catering facilities at the airport) could lead to: (i) the exit of one of the two incumbent in-flight caterers, leaving only one full-service provider; (ii) the risk of significant service disruption to airlines and consumers (particularly international and first-class passengers requiring freshly prepared meals); and (iii) the potential risk to the airport's reputation and its ability to compete with other airports to attract and retain new airlines and flight routes.

While the Tribunal acknowledged that the above-noted concerns were not all strictly related to achieving efficiencies, such as cost reductions or improvements in service, it emphasized that business justifications "can also take on other incarnations, including pro-competitive explanations for why the impugned conduct was undertaken." In this regard, the Tribunal found, among other things, that VAA was motivated by a desire to *preserve* for airlines the competition, choice and reliability already offered by the two incumbent full-service in-flight caterers instead of risking the loss of these benefits (and/or significant disruption) if one of them were forced to exit through loss of business to a new entrant, particularly one that did not offer a full suite of in-flight catering services.

Notably, the Tribunal did not agree with the Commissioner's position that (i) the relative haste of VAA's initial decisions not to authorize additional in-flight caterers at the airport (i.e. based on a single one hour internal meeting between VAA's CEO and a manager knowledgeable about in-flight catering at the airport) and (ii) VAA's failure to consult certain airlines and industry research in reaching its decisions, undermined the adequacy and credibility of the explanations VAA provided for those decisions. Instead, the Tribunal considered that "it should not insert itself into or second-guess the decision-making process of businesses and impose upon them an arbitrary burden that they would not otherwise impose on themselves, when acting in good faith." Indeed, the Tribunal clarified that the question is not the relative correctness or thoroughness of VAA's senior management but rather "whether the individuals in question made a genuine and good faith decision on the basis of information that was sufficiently robust to withstand an allegation of having been so superficial that it lacked credibility or was otherwise inadequate." In the absence of a suggestion or evidence that VAA willfully ignored information that might not support its decision, the Tribunal was not prepared to impose a burden on VAA or future respondents to "conduct research for additional information that might undermine or contradict the genuine decision that it reached."

SUBSTANTIAL LESSENING OR PREVENTION OF COMPETITION

Although the Tribunal's conclusion that VAA had not engaged in a practice of anticompetitive acts was sufficient to dismiss the Commissioner's application, the Tribunal nonetheless went on to find that the Commissioner had not established that VAA's refusal to authorize additional in-flight caterers at the airport had resulted in or was likely to result in a substantial prevention or lessening of competition in the provision of galley handling services at the airport. While the Tribunal accepted that VAA's refusal to license new in-flight caterers had prevented at least some new competition from materializing, it was not satisfied that the Commissioner had adduced sufficient evidence of "concrete market opportunities" that would have been available to new entrants to enable them to achieve sufficient scale to materially affect price or other dimensions of competition. In this regard, the Tribunal noted that in-flight catering contracts tended to be relatively long term and there was no

evidence that such contracts were currently available or would soon become available for airlines at the airport, although these facts may have put the Commissioner in a rather challenging situation practically, to the extent that launching an abuse of dominance application only upon the occurrence of an RFP could be too late to secure an effective remedy. The Tribunal also remarked, among other things, that VAA's authorization of a third in-flight caterer at the airport (after the Commissioner had filed his application) made it more difficult for the Commissioner to demonstrate that further entry would be likely to bring about materially greater competition than exists at the airport currently.

REGULATED CONDUCT DEFENCE

The Tribunal's decision also addressed (and rejected) VAA's position that its conduct was not subject to review under the Act's abuse of dominance provisions because the conduct was authorized under VAA's statutory mandate and therefore the regulated conduct defence (RCD) applied. The RCD is a common law doctrine that provides a form of immunity from certain provisions of the Act when the conduct alleged to contravene the Act is required, directed or authorized, expressly or impliedly, by other validly enacted legislation. While the RCD clearly applies in appropriate cases to shield a respondent from the application of the Act's criminal conspiracy provisions (see, e.g., our bulletin discussing the Ontario Court of Appeal decision in *Hughes v Liquor Control Board of Ontario*), the potential application of the RCD in connection with other provisions of the Act, including the civil abuse of dominance provisions in section 79, has received less direct judicial consideration.

The Tribunal concluded that, as a matter of law, the RCD does not apply in the context of the Act's abuse of dominance provisions. It outlined two general preconditions for the application of the RCD: (i) Parliament must have intended to provide "leeway" to those acting in accordance with a valid regulatory scheme and (ii) the conduct that is otherwise prohibited by the Act must be *specifically* required, directed or authorized by validly enacted legislative or regulatory language, with the level of specificity being not particularly high and depending on the factual context. The Tribunal found that neither of these preconditions were satisfied in this case.

First, the Tribunal determined that there was nothing in the wording of the abuse of dominance provisions to clearly indicate that Parliament intended those provisions to yield to conduct authorized by a valid regulatory regime. Past RCD cases have highlighted leeway language in the prior version of the Act's conspiracy provisions requiring that competition be lessened or prevented "unduly" in order to discern Parliament's intention to provide scope for the operation of valid statutory regimes (whose effects could not comfortably be interpreted to be "undue"). However, the Tribunal found no similar leeway language in section 79 of the Act, including the requirement that impugned conduct lessen or prevent competition "substantially," as that expression merely conveyed a sense of seriousness or significance, but not impropriety or wrongfulness. Indeed, the Tribunal considered that the civil law context of section 79 distinguished it from prior cases in which the RCD was applied based on the principle that conduct engaged in pursuant to a valid regulatory scheme cannot also be an offence against the state (e.g., a criminal conspiracy). The Tribunal further concluded that there was no unresolvable conflict between VAA's mandate and compliance with the Act's abuse of dominance provisions. It found that section 79's requirement not to prevent or lessen competition substantially was a narrow and appropriate limit on entities exercising statutory powers to pursue their respective public interest mandates in light of the Act's intended general application, as framework legislation, to all industries across Canada.

Second, in addition to finding that the RCD did not in principle apply to the Act's abuse of dominance provisions, the Tribunal determined that the second pre-condition to the RCD's application also was not met, in that VAA's refusal to license additional in-flight caterers was not specifically required, directed or authorized by validly enacted legislation or regulation. The Tribunal found that the instruments relied on by VAA, including a statement of purposes in its articles of continuance and an Order-in-Council and ground lease transferring the management, operation and maintenance of the airport to VAA, were not sufficiently specific and could not be read as expressly or by necessary implication requiring, directing or authorizing the impugned conduct.

Although the Tribunal found that the RCD did not apply to section 79 cases as a matter of law, it made a point of emphasizing that a statutory or regulatory requirement may nonetheless constitute a legitimate business justification for conduct that is alleged to be a practice of anticompetitive acts. In this regard, the Tribunal referred to the decision of the Federal Court of Appeal in a prior abuse of dominance case brought by the Commissioner against the Toronto Real Estate Board (TREB), which found that an obligation to comply with privacy law could in principle provide a legitimate business justification for engaging in impugned conduct. In the TREB case, however, such an argument failed as the evidence was not found to demonstrate that the impugned conduct was in fact implemented to comply with the privacy statute invoked to justify the conduct.

Implications

The Tribunal's decision is dense and lengthy – 831 paragraphs – and covers a variety of issues, often in *obiter*, that are likely to arise and receive additional Tribunal or appellate consideration in future cases. For now, here are our key takeaways:

LEGITIMATE BUSINESS JUSTIFICATION "DEFENCE" RISES FROM THE ASHES

– The Tribunal's decision is most notable for its treatment of legitimate business explanations for allegedly anticompetitive conduct, which has been an area of considerable uncertainty given arguably limiting jurisprudence from the Federal Court of Appeal in a prior decision known as *Canada Pipe*. The Tribunal's apparent resuscitation of a meaningful role for legitimate business justifications, particularly in the face of evidence that impugned conduct has an unambiguously intended negative effect on competitors in a market, reinforces the importance for potentially dominant firms to carefully develop and record the efficiency and pro-competitive motivations for any proposed or continuing course of conduct that may otherwise be interpreted as having an exclusionary, predatory or disciplinary effect on competitors.

– However, while the Tribunal was apparently willing to extend a significant measure of deference to VAA's explanation for its conduct, it also emphasized that the Tribunal's assessment will be highly dependent on the factual context and evidence in each particular case. Assuming the existence of good faith business justifications can be established, a respondent will still need to demonstrate that such justifications were more important in its decision-making process than any subjective anticompetitive intent or the reasonably foreseeable anticompetitive effects of its impugned

conduct. The Tribunal's analysis may also have been influenced by its finding of insufficient evidence to establish a substantial prevention or lessening of competition arising from VAA's refusals to license additional in-flight caterers at the airport. To date, there has not been a fully contested abuse of dominance case in which the Tribunal has found a substantial prevention or lessening of competition but no requisite anticompetitive purpose.

NON-COMPETITOR "GATEKEEPERS" LIKELY TO REMAIN IN SPOTLIGHT

– The Tribunal helpfully clarified aspects of the "plausible competitive interest" (PCI) screen it will use to limit the scope of cases alleging abuse of dominance against firms that do not compete in the market they are alleged to control. However, it is apparent from the Tribunal's analysis that finding a plausible competitive interest in the relevant market may be a low bar for the Commissioner to hurdle in many cases.

– It is also not clear that the PCI screen developed and now refined by the Tribunal will create or increase material certainty for potentially dominant firms. This is because a failure by the Commissioner to pass the PCI screen does not, according to the Tribunal, necessarily result in success for a respondent but rather creates a "presumption" that the respondent's impugned conduct does not have the requisite anticompetitive purpose. However, such a presumption is already inherent in the Commissioner's burden to establish a practice of anticompetitive acts, making it unclear whether the PCI screen avoids a detailed analysis of anticompetitive acts or otherwise provides tangible practical guidance in an antitrust counselling context.

– In any event, the Competition Bureau's careful scrutiny of conduct by firms perceived to control markets in which they do not themselves compete is, in our view, unlikely to abate, particularly with the recent emphasis on enforcement in digital markets that may involve or depend on platforms. The Tribunal's refinements to the PCI screen appear unlikely to curb such scrutiny.

LIMITED SCOPE FOR RELYING ON REGULATED CONDUCT IN DEFENDING ABUSE OF DOMINANCE

– Unless and until the Tribunal's stance on the RCD is reconsidered in another case (particularly before the Federal Court of Appeal), businesses are on notice that their regulated conduct will not be shielded from review under the Act's abuse of dominance provisions. In its press release announcing that it would not appeal the Tribunal's decision, the Bureau stated that it was pleased with this aspect of the decision and that, "[g]oing forward, the Bureau will continue to vigorously enforce these provisions of the Act [... including] taking enforcement action, where appropriate, against regulated entities that are engaged in anti-competitive conduct."

– Indeed, the Tribunal's reasoning for excluding the application of the RCD to section 79 strongly suggests that the Tribunal would not accept the application of the RCD to shield conduct from review under *any* of the Act's civil provisions, including provisions relating to mergers, refusals to deal, price maintenance, exclusive dealing and other restrictive trade practices.

– That said, it is also clear from the Tribunal's decision that the regulatory context surrounding

impugned conduct may nonetheless be highly relevant to the Tribunal's analysis under section 79, including whether an applicable regulatory regime or mandate can form the basis for, or contribute to, a legitimate business justification sufficient to offset any evidence of an otherwise anticompetitive (i.e., exclusionary, predatory or disciplinary) purpose in pursuing a particular course of conduct.

– Indeed, relief under section 79 is discretionary, and there may be room for contextual factors, whether related to a regulatory regime or otherwise, to appropriately influence the Tribunal's exercise of remedial discretion. This occurred in a prior case involving an application by the Commissioner against Visa and MasterCard under the Act's civil price maintenance provisions. In that case the Tribunal noted that it would have exercised its discretion not to issue a remedial order, even if the Commissioner had proven her case, because, among other things, a Tribunal order would have been a "blunt instrument" with potentially unintended consequences compared to a more nuanced regulatory solution that could better account for the intricacies of the credit card system as a whole.

Read the Tribunal's decision.

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