AUGUST 19, 2024

Canadian Competition Bureau Stakes Out Aggressive Stance on Property Controls in Preliminary Enforcement Guidance

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Following the Canadian Competition Bureau's 2023 Retail Grocery Market Study in which it recommended that provincial and territorial governments take measures to limit property controls in the grocery industry, including banning their use, the Bureau recently released for public comment a statement (Statement) setting out its preliminary enforcement position with respect to what it calls "competitor property controls," namely,

- **exclusivity clauses** in commercial leases that limit the landlord's ability to lease other units or property to persons that compete with the tenant; and
- **covenants** that run with the land and prevent subsequent owners from using the location for specified purposes that compete with a previous owner.

The Bureau's Overarching View: Property Controls Are Justified Only in Limited Circumstances

The Statement puts forth a generally hostile view of competitor property controls. It begins with a general observation, untethered to specific provisions of the *Competition Act*, that, because property controls insulate firms from competition, they inherently "can raise serious competition concerns" and are justified only in limited circumstances.

Specifically, according to the Bureau, the circumstances in which property controls may be justified are very circumscribed (emphasis added):

> [I]n limited cases [competitor property controls] can be justified if they are necessary for a firm to make investments that increase competition, such as to enter a market. Even in these cases they must be as limited as possible to be justified.
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> [T]here are certain limited situations where these types of restrictions can be justified because they increase competition overall, such as where they protect incentives for a retailer to make investments in order to enter a market. For example, **a limited exclusivity clause may be pro-competitive if no retailer would otherwise make the necessary investments to become a key tenant in a new shopping plaza.** Without the exclusivity clause there may be no retailers of a particular type in the shopping plaza, and so the clause increased competition. However, **it is important to note that even in such cases the way the competitor property control protects these incentives is by insulating the retailer from the threat of competition from rivals.**
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> As noted above, both the duration of a competitor property control and the scope of the restriction it imposes on competition are key considerations when assessing if a competitor property control is justified. **Competitor property controls that limit competition more than necessary are not justified.**

Indeed, the Bureau suggests that parties may be required to consider potentially less restrictive alternatives (including with other counterparties) before concluding that an exclusivity clause can be justified:

> **Exclusivity clauses are only justified in limited circumstances, such as where they go no further than necessary to encourage new entry or to allow a tenant to make investments to develop their storefront.** This could be because once a key tenant has made the investments necessary to open their store and attract customers to the plaza, the increased customer base may make it more attractive for competitors to open stores in the plaza as well. The presence of competitors could in turn reduce the benefit the key tenant receives from its investments in opening their store. This could reduce or eliminate their incentive to make the investments unless they are protected by an exclusivity clause.
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> **Even where such justifications exist, lessors of property should also consider if there are other suitable tenants who do not require an exclusivity clause, or would require a less restrictive exclusivity clause.** We recognize that whether a different tenant would be appropriate may depend on a variety of factors, including the nature of their business, how they would fit within the mix of retailers in the area, and how effective they would be at attracting customers to the development.

The Statement takes an even firmer view with respect to restrictive covenants that run with the land:

> **Restrictive covenants are exclusionary.** Restrictive covenants apply to the land itself, and can restrict future owners of the land. They tend to be long lasting, and can create areas where no competitor can operate. Importantly, restrictive covenants create advantages for companies that have historically operated in an area based on their past ownership of land. **We do not consider their use to be justified outside of exceptional circumstances.**

The Bureau's approach suggests a heavier burden to demonstrate a covenant's reasonableness than is generally reflected in the courts' approach to the common law standard. At common law, restrictive covenants such as property controls are not enforceable unless the covenant is reasonable with respect to the interests of both the parties and the public. Restrictive covenants between sophisticated commercial parties have rarely been held unenforceable on public interest grounds. Particularly where such parties have equal bargaining power, courts have tended to take the view that they would overrule the parties' judgment of what is reasonable in their respective interests only in exceptional cases. If landlords had to exhaustively canvass other potential tenants before providing a requested exclusivity covenant to a potential new tenant, as is suggested by the Bureau's Statement, they would be faced with significant additional costs and delays.

Application of Specific *Competition Act* Provisions to Property Controls

The Statement proceeds to address how competitor property controls may be challenged by the Bureau under the abuse of dominance and anti-competitive agreement provisions of the *Competition Act*. While competitor property controls could previously have been reviewed under the *Competition Act* if they were imposed by a dominant firm and prevented or lessened competition substantially, the Act has recently been amended in ways that

i. enhance the ability of the Bureau and private parties to obtain orders prohibiting the use of property controls by firms with a dominant position in a market (without the need to show a substantial lessening or prevention of competition) and

ii. will enable remedies to address property controls in agreements between non-competitors like landlords and tenants, even in the absence of a dominant firm or a jointly dominant group of firms, if it can be shown that the agreement has the effect of substantially lessening or preventing competition in a relevant market.

Even if the Bureau considers that a competitor property control is not "justified," before the Bureau can obtain a remedial order or monetary penalty from the Competition Tribunal, it must establish all the requisite elements of a relevant provision of the *Competition Act*. The Statement presents an incomplete overview in this regard as it does not acknowledge the circumstances in which the Bureau must demonstrate a *substantial* prevention or lessening of competition to obtain such a remedial order or a penalty. Instead, the Statement gives the impression that any harm to competition is sufficient. The Statement also does not discuss how the Bureau would go about defining relevant markets (from either a product or a geographic dimension) in which the competitive impact of a competitor property control will be assessed.

Abuse of Dominance

To obtain an order under the abuse of dominance provisions of the *Competition Act*, the Bureau or a private party must establish that the respondent substantially controls a relevant market. In the context of a retailer obtaining an exclusivity covenant in a lease, the geographic dimension of the relevant market has typically corresponded to a relatively local area based on customer draw patterns. Notably, contested cases to date in which the Bureau has established dominance have all involved market shares in excess of 75%, which significantly limits the scope of the abuse of dominance provisions. (The Statement does not discuss what is required for a firm to be considered dominant. This omission risks creating an exaggerated impression of the scope of the provision, which may be exacerbated by an assertion in the Statement that the mere fact of a competitor property control may itself be evidence of dominance.)

The concept of a group of firms jointly dominating a business may apply where two or more firms present themselves to the market as a single supplier, such as through a joint venture. More controversially, some other Bureau guidelines indicate that the Bureau may consider firms engaging in parallel conduct — without any agreement or understanding between them — to jointly control a market for the purposes of the abuse of dominance provisions. However, the Competition Tribunal has not considered this position in a contested matter. If the Competition Tribunal were to adopt this position, the abuse of dominance provisions could have much broader scope, including with respect to competitor property controls.

The recently amended abuse of dominance provisions allow the Competition Tribunal to issue a prohibition order if a dominant firm (or jointly dominant firms) engage in a practice of anti-competitive acts, which includes conduct intended to exclude competitors. Since the Statement asserts that the Bureau views competitor property controls as inherently anti-competitive (unless they can be shown to *increase* competition through inducing new entry), the Statement would seem to raise an expectation that the Bureau will routinely seek prohibition orders against dominant firms that employ such controls.

If the Bureau can demonstrate that a competitor property control is likely to prevent or lessen competition in a relevant market, that would be an alternative basis for seeking a prohibition order, and may also provide grounds for seeking additional orders to restore competition (e.g., an order to divest assets) or pay significant monetary penalties. Such monetary penalties may be up to the greater of C$25 million (and C$35 million for each subsequent order), and three times the value of the benefit obtained from the anti-competitive conduct, or 3% of the respondent's annual worldwide gross revenues if that value cannot be reasonably determined. In its Statement, the Bureau notes that it is likely to seek monetary penalties, in addition to injunctive relief, if the dominant firm's conduct involves restrictive covenants that run with the land, reflecting the Bureau's heightened concern with this type of competitor property control.

Private parties that obtain leave from the Tribunal may also seek injunctive relief and, as of June 20, 2025, will also be able to seek monetary payments up to the value of the benefit that the respondent derived from the abusive conduct.

Anti-Competitive Agreements

The Statement also points out that, as of December 15, 2024, a provision of the *Competition Act* enabling challenges to competitor agreements will be expanded to also cover agreements between non-competitors for which a significant purpose is to prevent or lessen competition. The Bureau can seek the same range of orders as under the abuse of dominance provisions provided that it can demonstrate that the agreement is likely to prevent or lessen competition substantially. The Bureau will not need to prove dominance under this provision, but anti-competitive intent will not be sufficient. Accordingly, the Bureau will have to prove a likely substantial anti-competitive effect in a relevant market, even to obtain just a prohibition order.

Private parties will also be able to commence proceedings under this provision as of June 20, 2025.

In addition, the Statement notes that where a competitor property controls is included in an agreement between competitors, it may be considered under the criminal offence in section 45 of the *Competition Act*. That offence generally prohibits agreements between competitors to, among other things, prevent or lessen supply of a product or service. Notably, however, section 45 includes a defence where such an agreement is ancillary and directly related to a broader lawful agreement and reasonably necessary for giving effect to the objective of that broader agreement.

Targets of Enforcement Action

Although the relevant legislative provisions may apply to property controls limiting competition in any sector, the Statement appears to be focused on the Bureau's approach to addressing anti-competitive controls on the use of commercial *retail* real estate. Indeed, the Bureau is actively investigating the use of property controls by two major grocery retailers across Canada, with a particular focus on the Halifax region.

The Statement also notes that in abuse of dominance proceedings the Bureau will "in most cases...consider the party who proposes or benefits competitively from the competitor property control to be a target of [its] investigation." However, when the Bureau is looking at property controls as potentially anti-competitive agreements, it will "typically consider all parties to the agreement to be targets of [its] investigation...[and] this could include both tenants and lessors." That said, even if a landlord is not a target of an investigation, it could still be drawn into investigative processes and be required to produce extensive data or documents, for example.

Bureau's Request for Feedback

According to the Statement, the Bureau's approach to property controls "continues to develop" and may be revised as the Bureau gains more experience, circumstances change or the law evolves. The Bureau is inviting feedback on the Statement until October 7, 2024 to help inform its enforcement approach.

Stakeholder comments may be useful to assist the Bureau in developing its guidance on circumstances in which competitor property controls are efficiency-enhancing, and not anti-competitive. Consideration might be given, for example, to recognizing the prevalence of property controls that are not designed to harm competition, such as restrictions on property uses that do not closely compete with the person benefiting from the restriction— for example, lease restrictions on "noxious" uses in nearby premises that do not contribute positively to the retail environment at a particular plaza or parts of it.

Takeaways

The Statement encourages businesses that use competitor property controls to consider the following questions:

- Is the property control necessary to allow a new business to enter the market or to encourage a new investment?
- Could the property control last for a shorter period of time?
- Could the property control cover fewer products or services?
- Could the property control cover less geographic area?

To minimize risk of Bureau enforcement action, commercial landlords and tenants may wish to review their exclusivity clauses and restrictive covenants, particularly in respect of retail properties, with a view to both assessing and documenting justifications for the scope of the restrictions, and why less restrictive alternatives would not be sufficient.

Landlords and tenants or relevant trade associations or other interested stakeholders may also wish to consider providing feedback to the Bureau to inform the Bureau's further consideration of the rationale for and impacts of competitor property controls.

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