JANUARY 18, 2024

New Excessive and Unfair Pricing Provisions in Force in Canada's *Competition Act*: Risk and Compliance Considerations

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Canada's *Competition Act* was amended effective December 15, 2023 to both (i) establish a new, more expansive framework for challenging anti-competitive conduct by dominant firms and (ii) specifically provide that it is an anti-competitive act for a dominant firm to directly or indirectly impose excessive and unfair selling prices.

As discussed in our recent bulletin, the new framework for abuse of dominance applies a different test depending on the remedy sought.

- To obtain an order from the Competition Tribunal (Tribunal) prohibiting the dominant entity or entities from engaging in the challenged conduct, the Commissioner of Competition (Commissioner), the head of the Competition Bureau, or a private litigant who has obtained leave now needs to establish only that (i) a firm is dominant (or a group of firms is jointly dominant) and (ii) the firm(s) engaged in a practice of anti-competitive acts.[1]
- To obtain other remedies (such as orders to pay monetary penalties, take actions to restore competition or, if certain further pending amendments to the *Competition Act* are enacted, make disgorgement payments), the Commissioner or private litigant will need to establish both dominance and that the challenged conduct is a practice of anti-competitive acts that prevents or lessens, or is likely to prevent or lessen, competition substantially.

For the purposes of the abuse of dominance provisions, an "anti-competitive" act means conduct intended to have a predatory, exclusionary or disciplinary negative effect on a competitor or to have an adverse effect on competition. The *Competition Act* now expressly includes as an anti-competitive act "directly or indirectly imposing excessive and unfair selling prices."

The concept of excessive and unfair pricing is new to Canada's *Competition Act*.[2] It is also not part of the antitrust laws of the United States, Canada's largest trading partner. However, the concept of excessive and unfair pricing has been incorporated in competition laws in the European Union (EU) and other jurisdictions for some time, although enforcement has been sporadic and controversial. Notably, only one of the over 130 written submissions made in the public consultations leading to the current round of amendments to the *Competition Act* briefly advocated that the Canadian government should align the *Competition Act* with the EU approach of allowing businesses to be fined for exploitative conduct, including setting unfair prices. While the Competition Bureau advocated for extensive amendments to the *Competition Act*, it did not propose that an excessive or unfair pricing provision be added to the Act.

The government's initial bill to amend the *Competition Act* (Bill C-56), introduced on September 21, 2023, was revised during committee review in November 2023 to include the new excessive and unfair pricing provision. The bill then proceeded quickly through Parliament, receiving royal assent less than two weeks later. The report of the Senate committee tasked with reviewing the bill stated that it was "contemptuous" that the committee was "afforded a very limited time to conduct its study of the bill" and, as a result, "was prevented from thoroughly studying the bill and properly performing its duties." The excessive pricing provision was therefore subject to minimal parliamentary debate and witness testimony. However, during the limited parliamentary hearing on the bill, in response to a Senator noting concerns that the excessive and unfair pricing amendment would require the Competition Bureau to enforce price controls, the Minister of Innovation, Science and Industry stated: "There is no place for price regulation in the [*Competition Act*]. This amendment was made because it is one element that could be considered." In the same hearing, the Commissioner described the new excessive and

unfair pricing provision as "very circumscribed" and added that the provision "is not going to make the Competition Bureau price regulators."

The Competition Bureau's guide to the December 2023 amendments also refers to the excessive and unfair pricing amendment and comments only: "Importantly, such a practice must be intended to have a predatory, exclusionary or disciplinary negative effect on a competitor, or to have an adverse effect on competition."

Persons carrying on business in Canada should therefore be aware of the new excessive and unfair pricing provision, both in contexts where they may be considered dominant or jointly dominant with respect to a product, and to assess the potential application of the new provision to their suppliers or competitors. The potential consequences of this provision are likely to expand with further amendments currently under consideration by Parliament that would allow private litigants and affected third parties to obtain disgorgement payments up to the value of the benefit derived from the challenged pricing if the conduct is found to have prevented or lessened competition substantially.

However, given the ambiguity of the concept of "excessive and unfair" prices, significant uncertainty will exist with respect to the potential application of the new provision pending judicial consideration and possibly guidance from the Competition Bureau. In addition, enforcement of the excessive pricing provisions in the EU has been controversial and sporadic, without providing clear guideposts with respect to these key elements of the corresponding EU provision.

In the meantime, the following considerations may be of assistance to Canadian businesses in understanding and minimizing risk under the *Competition Act*'s excessive and unfair pricing provisions.

Assessment Framework

Dominance. Only a person or group of persons that substantially or completely control a class or species of business in Canada or a part of Canada may be subject to an order in respect of excessive and unfair pricing. In this context, "control" means market power, which may be evidenced by an ability to profitably determine or influence pricing or other dimensions of competition in the market. While Competition Bureau guidelines suggest that firms with less than a 50% share of the relevant market are unlikely to be considered dominant, cases in which the Tribunal has found a respondent to control a market for the purposes of the abuse of dominance provisions have all involved market shares of greater than 75%.

In the context of excessive pricing, competition authorities in the EU have focused enforcement on suppliers with very high market shares, and often suppliers with monopoly or near monopoly positions. Indeed, in light of the potential adverse consequences of overly restrictive limits on pricing discussed below, some commentators have suggested that excessive pricing prohibitions should be applied only in exceptional cases and only against firms with very high levels of dominance. In this regard, the South African Competition Tribunal has found that a supplier must have "super dominance" with a share approximating 100% in a market that is "both uncontested and uncontestable" to warrant an order under South Africa's excessive pricing provisions.

In this context, it may also be noted that an entity can control a market for the purposes of Canada's abuse of dominance provisions without competing in the market. For example, a trade association has been held to control a market for Multiple Listing Service-based residential real estate services; and an airport authority has been held to control a market for catering services to airplanes at the airport. Notably, the new provision states that the concept of an anti-competitive act includes both direct and *indirect* imposition of excessive and unfair selling prices.

The concept of joint dominance of a business may apply, for example, where two or more firms present themselves to the market as a single supplier, such as through a joint venture. More controversially, the Competition Bureau has suggested, including in current draft guidelines, that it may consider firms engaging in consciously parallel conduct, without any agreement or understanding between them, to jointly control a market for the purposes of the abuse of dominance provisions. However, this position has not been tested in a contested matter before the Tribunal. A 2011 report by the Organisation for Economic Co-operation and Development (OECD) also raised concerns about the prospect of applying excessive pricing to joint dominance, including that it could be used as a shortcut to weaken procedural

and substantive requirements in other areas of competition law (such as criminal cartel enforcement) and create enhanced risk of discouraging investment and innovation.

Practice of Anti-competitive Acts. To qualify as an "anti-competitive act" under the abuse of dominance provisions, the excessive and unfair pricing must constitute a "practice," not just an isolated act without lasting impact. Accordingly, the longer a price is in effect, or the more frequently it is imposed, the greater is the chance of it being considered a practice and being challenged under the abuse of dominance provisions.

a. **Requisite Intent.** As noted above, the Competition Bureau's initial guidance indicates that, to be subjected to an order under the abuse of dominance provisions as an anti-competitive act, a practice of imposing excessive and unfair prices must be intended to have a predatory, exclusionary or disciplinary effect on a competitor, or to have an adverse effect on competition. We consider each of these potential intents below.

   Conduct intended to have a predatory, exclusionary or disciplinary effect on a competitor.

   In itself, a dominant firm's high price may, if it has any effect on competitors, create opportunities for competitors to enter the market or expand sales of the relevant product. A firm's high prices may lead customers to seek alternative suppliers, an impact that would have a positive effect on the firm's competitors.

   However, a predatory, exclusionary or disciplinary effect on competitors might be found when combined with other conduct. For example, a dominant firm might impose a higher price following below-cost pricing as part of a predatory pricing strategy to drive out competitors and subsequently recoup its losses with higher prices once the competition is eliminated or disciplined. (Notably, such a predatory pricing strategy would have been within the scope of the abuse of dominance provisions even before the recent amendment.)

   Also, in some contexts, issues of exclusionary or disciplinary intent might arise where a vertically integrated dominant firm supplies competitors in a downstream market with an important or essential input in that market. Competitors may not be able to compete effectively in the downstream market if the cost of the input exceeds certain levels.

   Conduct intended to have an adverse effect on competition.

   Arguably, high prices in themselves should not be viewed as an adverse effect *on competition*. Rather, it seems more likely that some effect on the process of competition is required. However, apart from predatory, exclusionary and disciplinary effects, it is not clear what other effects of high prices may be found to have an adverse effect on competition under the new provision.

   Indeed, as some commentators on the EU excessive pricing provisions have noted, restricting a dominant firm from charging "excessive" prices may discourage competition from new entry into or investment in a market. Typically, relatively high prices can signal an entry or expansion opportunity to competitors or potential competitors. The U.S. Supreme Court has also commented that the opportunity to charge monopoly prices at least for a short period is what attracts business acumen and induces risk taking and economic growth.

   Accordingly, prohibitions on pricing above certain levels, let alone ill-defined levels, may risk hindering the competitive process. Interpreting and applying the new anti-competitive act of imposing excessive and unfair pricing in a way that has an adverse effect on competition by discouraging entry would be contrary to the purpose of the *Competition Act* and Parliament's intention in adding the new anti-competitive act. It therefore seems reasonable to expect that the Tribunal would not interpret or apply the new provision in an overly expansive way that is likely to dampen competition overall.

b. **Subjective Intent and Reasonably Foreseeable Effects.** Since June 2022, the definition of an "anti-competitive act" has specifically required that it be "intended" to have a specified effect. The prior legislation had only a non-exhaustive list of anti-competitive acts. Courts interpreted the concept of an anti-competitive act as conduct engaged in for an anti-competitive purpose, which generally involved a predatory, exclusionary or disciplinary effect on a competitor. The purpose of challenged conduct could be established by either direct evidence of subjective intention or consideration of the reasonably foreseeable objective effects of the conduct. Where conduct had both anti-competitive and pro-competitive motivations, courts would weigh the two and assess the overall character of the conduct. It remains to be seen how courts will approach the revised definition generally, and particularly in the context of alleged excessive and unfair pricing with respect to whether objectively foreseeable effects are sufficient to establish "intent." As discussed below, to the extent that a dominant firm has legitimate business justifications for imposing a particular price, they would likely be relevant to assessing whether the price is "excessive" or "unfair" even if they are not taken into account in evaluating the "intent" of the conduct.

c. **Intellectual Property.** A section of the abuse of dominance provisions that pre-dates the December 2023 amendments states that "an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under" the federal *Copyright Act*, *Patent Act*, *Trademarks Act* and any other federal legislation "pertaining to intellectual or industrial property" is not an anti-competitive act. It remains to be seen whether this section might, for example, be held to protect a patent holder's pricing of its patented product from challenge as an anticompetitive act under the new excessive and unfair pricing provision.

Assessing Whether a Price Is "Excessive and Unfair"

Excessive Price

Only "excessive" prices may provide grounds for an order under the *Competition Act*'s new provision. There is no consensus on an appropriate approach to assessing whether a price is excessive; nor do the EU cases adopt a consistent approach. Determining whether a price is excessive requires (i) confirming the price that is being or has been imposed, (ii) establishing an appropriate benchmark against which the price is to be measured and (iii) determining whether the difference between the actual price and the benchmark is excessive.

Benchmarks referenced by competition authorities to assess whether prices are excessive have included both (i) price-cost comparisons and profitability analyses and (ii) price comparisons across geographies, time and/or competitors. The EU and other jurisdictions typically adopt a case-by-case approach rather than a single set of criteria.

However, courts and regulators have identified numerous challenges in assessing costs and profitability, including determining what costs should be included and appropriate time frames to recognize expenditures. Allocating costs for a multiproduct firm dominant in only some of its product markets may be particularly challenging, as are cost allocations for multinational entities with transfer-pricing arrangements. Riskier products with less certain demand or prospects of successful entry may also require higher levels of anticipated profit to induce entry or investment. Further, in some cases it has been suggested that a price could be considered excessive even where it is close to or even below cost if the dominant firm is inefficient and has higher costs than would be expected in a more competitive market.

Similarly, an OECD report on excessive pricing provisions concluded that in a comparison of prices that two firms charge, or that the same firm charges in separate markets, it will not always be obvious whether higher prices in one market can be attributed to the exercise of market power by a firm, or whether they might be caused by other factors such as higher costs.

The requisite magnitude above a benchmark to constitute an "excessive" price would seem to require a value judgment and policy choice, and not just a statistical quantification. In some EU proceedings, prices 22% to 50% above a comparator level of costs, competitive prices or "economic value" were found to be excessive, although other cases addressed prices found to be more than 2,000% or even 10,000% above a relevant benchmark.

Unfair Price

In order to constitute an anti-competitive act, a price must be both excessive and unfair. Presumably fairness is to be assessed in light of the interests of both the purchaser and the supplier, including the need for a supplier to recover its costs and investments, and any other legitimate reasons for imposing a particular price such as a material improvement of the product. It may also be appropriate for "fairness" to take into account the supplier's commercial risk and a desire to provide incentives to innovate. Notably, the purpose clause in section 1.1 of the *Competition Act* includes both the objective of promoting the efficiency and adaptability of the Canadian economy, as well as providing consumers with competitive prices.

In addition, excessive and unfair pricing is an anti-competitive act only if it is "imposed". Accordingly, prices resulting from negotiations with a purchaser that has significant buying power may be relatively less likely to constitute anti-competitive acts. Similarly, it may be relatively less likely that prices for discretionary or luxury products could be considered "unfair," in contrast, for example, to prices for essential products and services.

Role of Enforcement Discretion

In light of the uncertainties in establishing whether a price is excessive and the potential adverse market implications of penalizing or prohibiting prices as "excessive," many commentators have argued that competition authorities should be cautious in their enforcement of excessive pricing provisions. In particular, while intervention may improve allocative efficiency between the supplier and its customers, it risks undermining dynamic efficiency in the economy to a far greater degree by undermining incentives for entry or future investment and innovation. On the other hand, in the case of non-intervention, there may still be the prospect of the market self-correcting if other firms enter or expand in the market. Some commentators have suggested that the adverse impacts of overly restrictive enforcement of excessive pricing provisions are likely to be greatest in dynamic industries with frequent technological change and a need for ongoing investment or trial and error.

Regulated Industries

In certain contexts, Canadian courts have held that conduct authorized or directed by valid federal or provincial legislation is outside the scope of prohibitions in the *Competition Act*. The "regulated conduct defence" has been developed principally in relation to criminal offences such as price fixing. Its application to reviewable conduct such as abuse of dominance is less settled. That said, to the extent that pricing is authorized, directed or subject to regulatory oversight by a government entity with a public interest mandate, it would likely be more challenging for the Commissioner or a private applicant to establish that such pricing is "unfair" for the purposes of the expanded abuse of dominance provisions.

Potential Remedies

Orders prohibiting the conduct

If the Commissioner or a private applicant establishes that a respondent has engaged in a practice of imposing excessive and unfair pricing, the Tribunal may make an order prohibiting the person from engaging in such conduct. Presumably, any such order would need to be clear enough for the respondent to reasonably be able to determine whether its pricing complied with the order. Further, while the Commissioner has stated that the Competition Bureau does not want to be a price regulator, it may be challenging for the Tribunal to make a prohibition order that does not constrain price competition in a manner that amounts to price regulation by setting maximum price caps.

Orders to restore competition and monetary penalties

If the imposition of excessive and unfair pricing has prevented or lessened competition substantially, or is likely to do so, and a prohibition on such pricing is not likely to restore competition, the Tribunal may also impose a significant monetary penalty[3] and make an order directing actions, including divestitures of assets or shares, that are reasonable and necessary to overcome the effects of the practice in the relevant market. Further proposed amendments to the *Competition Act* currently before Parliament would also allow the Tribunal to order a respondent to pay a private applicant and others affected by the conduct an amount up to the value of the benefit derived from the challenged pricing.[4]

Successful prosecutions of excessive pricing in the EU have sometimes resulted in fines. Commentators have noted numerous practical difficulties that would be associated with an order prohibiting a certain level of pricing. Such an order would give rise to, among other things, considerable ongoing scope for changed circumstances that would warrant variation of the order on the basis that the prohibited pricing has ceased to be excessive or unfair, particularly in dynamic markets.

Importantly, even where the elements of an abuse of dominance have been established, the Tribunal retains the discretion not to issue an order. For example, if it is established that a dominant firm has engaged in excessive and unfair pricing, but not that the pricing is likely to prevent or lessen competition substantially, it is conceivable that, in a particular case, the Tribunal could conclude that the issuance of a pricing prohibition order would be ineffective in achieving its intended result of restoring competition, or would even be anti-competitive, and refrain from issuing a prohibition order on that basis.

Practical Considerations and Compliance Tips

Canadian businesses that wish to minimize the risk of being challenged under the new excessive and unfair pricing provisions of the *Competition Act* may consider the following steps.

Identify potential dominance—that is, identify any products or plausible markets in which the business might reasonably be considered to have a dominant position, having regard to market shares and conditions such as barriers to entry. For practical purposes, products that may be viewed as necessities or non-discretionary expenditures could be an area of focus.

Consider potential benchmarks against which prices for such products could be measured, including the following:

- Unusual price increases outside the normal course of business, such as significantly higher prices adopted following a change in pricing or distribution strategy or following a merger or acquisition.
- Prices of the same product in other distribution channels or in other geographic markets.
- Products for which the business is able to sustain significantly higher prices than its competitors.
- The cost of producing, distributing and marketing the product. In this regard, it may be helpful to document all costs attributable or linked to the product.

Document rationales for significant price increases or for differences from potential benchmarks, particularly having regard to plans to expand production, distribution, R&D or long-term viability of the business.

The Davies Competition Law group will continue to monitor and report on further developments relevant to excessive and unfair pricing and other aspects of the recent and further proposed amendments to the *Competition Act*.

[1] Even if it does not constitute a practice of anti-competitive acts, conduct engaged in by dominant firm(s) can also be challenged under the abuse of dominance provisions if it has had or is likely to have the effect of preventing or lessening competition substantially in a market in which the dominant firm(s) have a plausible competitive interest and the effect is not the result of superior competitive performance. However, the addition of the imposition of excessive and unfair pricing to the definition of "anti-competitive act" does not assist with a challenge on that basis.

[2] Some Canadian provinces have consumer protection legislation restricting unconscionable consumer transactions that may, for example, include charging a consumer a price that grossly exceeds prices available for similar products from other suppliers. Some provinces also have measures that allow for prohibitions on excessive prices, at least in respect of certain types of critical products, in emergency circumstances, typically for a limited period of time after some type of demand or supply shock. See Davies' discussion of provincial "price gouging" restrictions implemented at the onset of the COVID-19 pandemic.

[3] The Tribunal could issue a monetary penalty of up to the greater of (i) C$25 million (C$35 million for subsequent orders) and (ii) three times the benefit derived from the anti-competitive practice, or if that amount cannot be reasonably determined, 3% of the respondent's annual worldwide gross revenues.

[4] As currently proposed, the power for the Tribunal to order such a payment to private applicants would not come into force until one year after the amending legislation receives royal assent.

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