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Canada's Competition Bureau Offers Guidance on Excessive and Unfair Pricing

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Traduction en cours.

As we have discussed in a prior bulletin and a more detailed analysis, Canada's *Competition Act* was recently amended to both (i) establish a new, more expansive framework for challenging anti-competitive conduct by dominant firms and (ii) specifically provide that it may be an anti-competitive act for a dominant firm to directly or indirectly impose excessive and unfair selling prices.

Our earlier commentary identified certain ambiguities regarding the concept of "excessive and unfair" prices, giving rise to uncertainty about the scope of its application pending judicial consideration and possible guidance from the Competition Bureau.

On November 7, 2024, the Bureau issued preliminary guidance on some of the recent changes to the *Competition Act*, including the new excessive and unfair pricing provision. This guidance includes responses to several frequently asked questions (FAQs) that provide helpful information on the Bureau's approach to this new provision.

In essence, the FAQs state that:

- To be subject to challenge under the abuse of dominance provisions of the *Competition Act*, charging high prices must be either (i) intended to have certain types of negative effects on a competitor or an adverse effect on competition or (ii) have the effect of harming competition substantially.
- In themselves, high prices are not normally intended to have such an effect. Nor do they usually have such an effect, regardless of the intention.
- The Bureau expects that it will be rare for the Bureau to investigate claims of excessive and unfair pricing.

The following excerpts from the Bureau's guidance are particularly clear and helpful:

> **Is charging high prices, or "price gouging," an abuse of dominance?**
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> No, not on its own. Simply charging high prices to consumers is not usually an abuse of dominance regardless of how high those prices are. For example, it is usually not an abuse of dominance if a firm charges high prices for a limited product or service that is in high demand, or if it charges some customers higher prices than others.
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> An abuse of dominance may allow a dominant firm to increase their prices, but this does not mean high prices are an abuse of dominance themselves.
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> **When can charging excessive and unfair prices be an abuse of dominance?**
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> Charging high prices would only be an abuse of dominance where it is done by a dominant firm and either:
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> - meets the definition of an anti-competitive act because it is intended to have certain types of negative effects on a competitor or an adverse effect on competition, or

– has the effect of harming competition substantially.

> If a firm charges too high a price this normally encourages customers to seek out other options which helps its competitors. So, high prices are not normally intended to have a negative effect on a competitor.
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> Similarly, a firm usually does not charge high prices so that it can adversely affect competition. Firms make investments and take risks in the hope of making profits. High prices may therefore be how a firm is rewarded for those investments or risks. High prices can also attract new firms to enter the market.
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> Charging excessive and unfair prices could also have the effect of harming competition substantially…This will only be the case where the pricing itself harms competition and is not simply high because the firm's dominant position allows it to charge high prices…

The Bureau also points out that high prices may be the result of distinct anti-competitive behaviour that is independently subject to challenge under the *Competition Act*. (For example, exclusionary conduct by a dominant firm might lead to higher prices than would otherwise prevail.) In such cases, the Bureau would be more likely to investigate the behaviour that allows a dominant firm to charge a high price, not the high price itself.

The Bureau's guidance also suggests that, in some circumstances, charging excessive and unfair prices may be an anti-competitive act when the prices amount to a "constructive refusal" to supply. ("A constructive refusal occurs when a firm says it is willing to supply a product, but only in a way that means purchasing it is not a real option, such as because it is too expensive. The outcome is the same as if it simply refused to supply.") Similarly, the guidance suggests that high pricing may be an element of a tying strategy by a dominant firm that ties two products together "by charging an excessive and unfair price if they are purchased separately instead of together." In either case, however, an anti-competitive intent or effect would still be required to establish an abuse of dominant position under the *Competition Act*. (Refusals to supply may also be subject to challenge under other provisions of the *Competition Act*.)

The Bureau notes that its preliminary guidance may change over time. It is also not binding on courts or the Competition Tribunal. In this regard, it is notable that, as of June 20, 2025, where private litigants challenge conduct under the abuse of dominance provisions, the Tribunal will have a new power to order disgorgement payments to affected persons up to the value of the benefit derived from the abusive conduct. Private applicants will also benefit from a more permissive test for obtaining leave to commence an action before the Tribunal (see Davies' bulletin detailing these changes to the *Competition Act*). Nevertheless, it can be expected that the Tribunal would give careful consideration to the Bureau's guidance in any private applications commenced under the abuse of dominance provisions of the *Competition Act*.

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