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ECONOMIC ANALYSIS AND EVIDENCE IN ABUSE CASES – Contribution from Canada

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This contribution is submitted by Canada under Session II of the Global Forum on Competition to be held on 6-8 December 2021.

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Economic analysis and evidence in abuse cases

– Contribution from Canada –

1. Canada’s Competition Bureau (the “**Bureau**”) is pleased to provide this submission to the OECD Global Forum on Competition Roundtable on “Economic Analysis and Evidence in Abuse Cases”.

2. The Bureau, headed by the Commissioner of Competition (the “**Commissioner**”)¹, is an independent law enforcement agency of the Federal Government of Canada responsible for the administration and enforcement of the *Competition Act* (the “**Act**”)² and certain other statutes. In carrying out its mandate, the Bureau strives to ensure that Canadian businesses and consumers have the opportunity to prosper in a competitive and innovative marketplace.

3. The modern abuse of dominance provisions, contained in sections 78 and 79 of the Act, came into force in 1986.³ Since their enactment, there have been eight abuse of dominance decisions rendered by the Competition Tribunal (the “**Tribunal**”). In order to have the Tribunal issue a remedial order under the abuse of dominance provisions, the Commissioner must establish the three elements of section 79 on the balance of probabilities by demonstrating that:

- The respondent substantially or completely controls a class or species of business throughout Canada or in a specific area of Canada;
- The respondent has engaged or is engaging in a practice of anti-competitive acts; and
- The conduct has, had or is likely to have the effect of preventing or lessening competition substantially in Canada.

4. To this end, when evaluating conduct under section 79, the Bureau considers whether clear, convincing, and cogent evidence exists in support of each element. The Bureau evaluates the body of evidence on the whole, and may consider the same evidence under more than one element. As a result, the Bureau’s analysis of different elements is often interconnected. Economic analysis underpins the Bureau’s evaluation of the conduct under each element. Importantly, no conduct that is deemed to be per se anti-competitive under the abuse of dominance provisions exists. The focus is on conduct that is predatory, exclusionary or disciplinary, and that causes substantial harm to competition.⁴

¹ “Bureau” and “Commissioner” are used interchangeably throughout this submission.

² The full text of the *Competition Act* is available online at: <http://lawslois.justice.gc.ca/eng/acts/C-34/index.html>.

³ The Act replaced the *Combines Investigation Act* in 1986 and introduced various new or revised provisions, including the abuse of dominant provisions.

⁴ The Bureau’s Abuse of Dominance Enforcement Guidelines contain a more detailed description of the Bureau’s enforcement approach on section 79, which is based upon jurisprudence, as well as recent economic thinking. The full text of the Guidelines is available online at: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04420.html>.

5. Each year, the Monopolistic Practices Directorate⁵ of the Bureau receives hundreds of complaints. These complaints are assessed to determine whether a potential breach under the abuse of dominance provisions warranting further investigation exists. From this subset of cases, a handful become formal inquiries under the Act and, of these, only a few require enforcement under the Act, including litigation in certain circumstances. These cases involve highly complex and technical analyses, resulting in lengthy and resource-intensive investigations.

6. In order to address the questions posed by the OECD, this submission will set out the Bureau's investigation process, and specifically the collection and treatment of economic evidence in the context of civil abuse of dominance cases. The submission will also provide a brief overview of the test under the three elements of section 79, informed by the relevant case law in this area. Finally, this submission will provide illustrative examples of the Bureau's economic evidence submitted under each element in two abuse of dominance cases successfully brought before the Tribunal.

1. Bureau's Investigation Process

7. In the context of the abuse of dominance provisions, the Bureau will carefully evaluate these allegations on a case-by-case basis, in light of structural and other market-specific characteristics. The Bureau's investigation process consists of several stages: preliminary examination, formal inquiry and civil litigation phase where the Commissioner seeks a remedial order before the Tribunal. Parties and the Commissioner may agree to a consensual remedy at any stage of this process, which typically becomes a consent agreement that is registered by the Tribunal. It is important to emphasize that the Commissioner does not have the ability to unilaterally impose remedies and that this authority resides with the Tribunal, a separate adjudicative body that operates independently and at arm's length from the Commissioner, as well as the Government of Canada.⁶

8. The Bureau has adopted a multidisciplinary team approach, by combining legal and economic skills in an attempt to provide efficient and effective resolution to competition issues. The investigating team is made up of a mix of lawyers, economists and paralegals, and the team may also engage with external economic experts retained under confidential contractual arrangements. Economists, both internal and external, play a key role in formulating and assessing potential abuse of dominance theories of harm, and whether the evidence supports one or more of them in a particular case.

9. At each stage, the Bureau considers the types of evidence to collect, evaluates the allegations in light of the evidence and decides whether to pursue enforcement action. Where the Bureau determines that the evidence does not establish reviewable conduct under the Act, it will discontinue the investigation. Contested proceedings under the abuse of dominance provisions require the Commissioner to file an application with the Tribunal.

⁵ The Monopolistic Practices Directorate is the unit that investigates Abuse of Dominance and other non-merger civilly reviewable conduct subject to a competitive effects test.

⁶ Where a party is not satisfied with the Tribunal's decision, an appeal may be filed with the Federal Court of Appeal.

1.1. Preliminary Examination

10. The Bureau has the power to examine any potential reviewable conduct under the Act. Most preliminary abuse of dominance investigations are commenced upon receipt of a complaint that appears to raise potential issues under the abuse of dominance provisions. The Bureau can also commence preliminary investigations into potentially anti-competitive conduct that it has otherwise become aware of through intelligence gathering efforts.

11. During this first phase, the focus is on obtaining information from the complainant, and other market participants, including competitors, suppliers and customers, and analyzing it in light of the potential theories of harm. The process by which the Bureau obtains information at this stage is typically through interviews and voluntary requests for documents and data. Where the evidence supports a possible violation of the Act and there is reason to believe that grounds exist for the Tribunal to make an order, the Bureau may convert the preliminary investigation into a formal inquiry.

1.2. Formal Inquiry

12. Section 10 of the Act provides the Commissioner with the power to commence a formal inquiry with “the view of determining the facts”.⁷ After an inquiry has been commenced, the Bureau has access to a number of formal investigatory tools to assist in the collection of evidence. In an abuse of dominance inquiry, these tools are generally used to gather information from the targets of the inquiry, and may also be used to gather information from third parties with relevant information.

13. Under section 11 of the Act, the Bureau can apply for an order that a person (individual or corporate) participate in an oral examination, produce records (including data), and/or make and deliver written returns. When seeking an order from the court, the Bureau includes specifications setting out what information is being sought and other details (e.g. chosen time period for the information, the class of custodians of the information (e.g., information prepared or received by senior officers), the type of information – “reports and/or presentations”, etc). Specifications are drafted by the case team with input from internal legal counsel, internal economic experts, and (in some cases) external experts. The specifications are tailored to the conduct and their form and content will differ depending on the particulars of the inquiry. Examples of the type of information the Bureau might seek through an order include:

- *Records relating to the manufacturing, production, supply, marketing, sale or distribution of products in or into Canada:* These documents may help with product and geographic market definition;
- *Memoranda; reports; studies; surveys; analyses; presentations; strategic, marketing and business plans; evaluations; recommendations; directives; policies; and guidelines relating to any policy, practice or incentive related to the conduct at issue:* These documents may be relevant to the conduct and intent of the senior executives of the firm;

⁷ Section 10 of the Act sets out the circumstances where the Bureau shall commence an inquiry, namely where it has reason to believe that: (a) a Tribunal or court order has been violated; or (b) grounds exist for the Tribunal to make an order; or (c) a criminal offence has been, or is about to be committed. The Bureau may also commence an inquiry upon receipt of a six resident complaint or when directed by the Minister.

- *Financial statements showing company revenues, costs, profits and losses*: Detailed financial statements provide information which contribute to empirical analyses alongside information below.
- *Data sets, reports, studies, surveys, analyses, and strategic, marketing and business plans relating to market share, competition, competitors, markets, pricing, product or service quality, and potential for sales growth*: This request is primarily intended to gather information from parties to undertake potential empirical analyses to help assess market power, relevant market definition and competitive effects.

14. At this stage, the Bureau may also select and retain an external economic expert in one of two roles. An expert is hired as a consulting expert when they are not expected to testify. In this role, the expert is essentially a member of the investigation team similar to that of a Bureau internal economist whose advice may inform the conduct of the investigation. Alternatively, the Bureau may hire an economic expert to provide opinion evidence in litigation before the Tribunal. Given the evidentiary rules under Canadian law with respect to the admissibility and weight of expert opinion evidence, the communications and information sharing between the testifying expert and the Bureau are carefully managed by legal counsel.

15. Regardless of whether an external expert is retained, the strength of the economic evidence usually plays a key role in determining the investigation team's recommendation to the Commissioner as to whether to challenge conduct and seek an order before the Tribunal.

1.3. Civil Litigation Phase

16. Where the Commissioner concludes that the evidence establishes reviewable conduct under the Act, a range of potential consensual remedies are available under the abuse of dominance provisions. Resolution of these matters is dealt with on a case-by-case basis.⁸ Negotiated settlements at this stage typically take the form of a consent agreement that addresses the magnitude and scope of the competition issues identified. Consent agreements are registered by the Tribunal and have the force of a Tribunal order.

17. The Commissioner has no power to compel a change in business conduct or impose administrative monetary penalties. Those powers are reserved for the Competition Tribunal and the courts. Where consensual resolution is unavailable or otherwise not appropriate, the Bureau can apply under section 79 to the Tribunal for an order to prohibit the practice of anti-competitive acts on the part of the dominant firm.

18. As noted above, the Bureau frequently relies on an economic expert to provide opinion evidence when a matter proceeds to litigation. A testifying economic expert is required to submit a report to the Tribunal. In order to ensure that the expert opinion is both admissible and accorded significant weight, it is important for the expert to indicate the information that she has relied on when drafting her report and for the Bureau to have evidence substantiating the facts that the expert has relied on when reaching her expert opinion. In many cases, the facts that the expert relies on are based on witness statements obtained by the investigation team from relevant industry players such as customers,

⁸ The Bureau published the Competition and Compliance Framework in 2015. This framework sets out various outreach, enforcement and advocacy instruments used by the Bureau in a comprehensive, integrated approach to promoting compliance with the *Competition Act*. The full text of the framework is available online at: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03982.html>.

suppliers and rivals of the target firm, the target’s own evidence, as well as any data gathered during the investigation.

19. The content of the expert report will vary depending on the types of analysis that the expert is able to undertake and this depends on the nature of information that was available to the expert including the availability of data. At a basic level, an expert will usually discuss the economic theory relevant to the particular facts of a case and perhaps business justifications that a dominant firm has put forward to justify its conduct. In addition, an expert will usually present evidence of product substitutability to support their opinion of the relevant product and geographic market(s) and provide estimates of the target firm’s market share within the market(s). If determined helpful and sufficient information is available, the expert may also provide empirical analysis such as regression analysis to support their opinion as to the target’s market power and the impact of the target’s conduct on competition in the relevant market(s).

20. There are many practical considerations when choosing an expert to testify before the Tribunal, including ensuring that the expert has the right expertise. In a recent abuse of dominance decision, the Tribunal considered the admissibility of the Respondent’s expert evidence, including whether the expert’s evidence was necessary to assist the trier of fact and whether he was a “properly qualified expert”.⁹ The Tribunal accepted and qualified the expert as an expert in airline and airport economics. On the issue of whether his evidence was necessary, the expert’s opinion evidence in relation to one of the questions in his report was ultimately deemed inadmissible as the Tribunal did not need expert evidence on issues solely to be determined by the panel as the trier of fact.

2. Economic Evidence in Abuse of Dominance Cases

2.1. Bureau’s analysis under section 79(1)(a): one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business¹⁰

21. To evaluate the first element, dominance, the Bureau generally first defines a market(s), and then evaluates whether the allegedly dominant firm(s) substantially or completely controls that market, *i.e.*, has a substantial degree of market power within that market.¹¹ In this context, the Tribunal has held that markets are defined in reference to both a product and geographic dimension, based on demand substitution in the absence of

⁹ See *The Commissioner of Competition v Vancouver Airport Authority*, 2019 Comp Trib 6. In addressing the issue of admissibility of expert evidence, the Tribunal applied the principles articulated by the Supreme Court of Canada in *R v Mohan*, [1994] 2 SCR 9, 114 DLR (4th) 419.

¹⁰ As noted in footnote 4, please refer to the Bureau’s Abuse of Dominance Enforcement Guidelines for a more detailed description of the Bureau’s analysis under section 79(1)(a), which is based upon jurisprudence, as well as recent economic thinking.

¹¹ See *Canada (Director of Research and Competition) v. Teledirect (Publications) Inc.*(1997), 73 CPR (3d) 1 (Comp Trib) (referred to as “**Tele-Direct**”).

alleged anti-competitive conduct.¹² The Bureau then considers evidence of the existence and magnitude of market power, such as market shares and barriers to entry.¹³

22. When assessing if a firm holds a substantial degree of market power, the Bureau considers the body of relevant information and/or documents on the whole in order to determine the extent to which a firm has the ability to influence the market. The exact nature of the Bureau’s analysis and the weight accorded to any particular piece of information or document will depend on the circumstances of the case.

23. Market power can be measured directly or indirectly. The Tribunal has recognized that direct indicators of market power, such as evidence of supra-competitive profitability or pricing, are not always conclusive or indeed possible to assess to establish market power.¹⁴ Consequently, the Bureau examines a number of indirect indicators, both qualitative and quantitative, in conducting its analysis of market power, such as structural characteristics of a market (including market shares and any barriers to entry), the extent of technological change, the effects of a practice of anti-competitive acts, and customer or supplier countervailing power. The Tribunal has also recognized that the ability to exclude – the ability to restrict the output of other actual or potential market participants, and thereby profitably influence price – constitutes market power, as discussed in more detail below.

2.1.1. Economic evidence considered by the Tribunal under section 79(1)(a) in the TREB case

24. Economic analysis of the evidence and data collected is critical in the assessment of a firm’s market power. The following section provides an illustrative example of an abuse of dominance case involving significant economic analysis under section 79(1)(a).

25. In 2011, the Commissioner applied to the Tribunal alleging that, owing to its control over the Multiple Listing Service (“MLS”), a comprehensive database of real estate listings and a key input for the provision of residential real estate brokerage services, and its related Virtual Office Website (“VOW”)¹⁵ Policy, the Toronto Real Estate Board (“TREB”) had abused its dominant position.¹⁶ TREB, the respondent in the TREB Decision, is Canada’s largest real estate board, with over 50,000 licensed real estate brokers and agents across the Greater Toronto Area (“GTA”).

26. In the TREB Decision, the Commissioner was concerned with the restrictions that TREB imposed on the display and use of property data, including data related to sales, by certain innovative real estate members. TREB prevented the display of that data over digital platforms such as VOWs. Innovative real estate brokers and agents also wished to use

¹² See *Canada (Director of Investigation and Research) v NutraSweet Co* (1990), 32 CPR (3d) 1 (Comp Trib) (referred to as “NutraSweet”).

¹³ The Tribunal considers “control” of a market to be synonymous with market power and recent case law has clarified that a “substantial” degree of market power is required. See *The Commissioner of Competition v The Toronto Real Estate Board*, 2016 Comp. Trib. 7 (referred to as the “TREB Decision”).

¹⁴ See NutraSweet, *supra* at footnote 12.

¹⁵ A VOW is a secure, password-protected website that enables residential real estate customers to search a database containing MLS information.

¹⁶ TREB Decision, *supra* at footnote 13. The full text of the decision is available online at: <https://decisions.ct-ct.gc.ca/ct-tc/cdo/en/462979/1/document.do>. The Commissioner was ultimately successful in his litigation following multiple appeals and hearings before the Tribunal and Federal Court of Appeal culminating in a supreme court decision in 2018 that dismissed TREB’s leave to appeal in from the 2016 decision.

disaggregated data for analysis and to offer innovative analytical tools to consumers over these VOWs.

27. With respect to the issue of market power, the Tribunal held that the power to exclude falls squarely within the definition of market power to the extent that it “...*comprises an ability to restrict the output of other actual or potential market participants, and thereby to profitably influence price...*” In other words, the Tribunal’s determination meant that an input supplier that does not directly compete in a given market can nevertheless be found to control that market through its power to exclude or restrict competition.

28. In reaching its conclusion with respect to the issue market power, the Tribunal relied heavily on the testimony of the Commissioner’s economic expert and a variety of evidence relating to market definitions. For instance, the Commissioner’s economic expert produced analysis of evidence of the volume of real estate transactions on the MLS system as well as the fact that home buyers and sellers enter into contracts for the supply of a bundle of MLS-based residential real estate brokerage services, rather than paying separately for unbundled services to establish the relevant market.

29. The Commissioner’s economic expert also discussed evidence relating to substitutability with respect to other data sources. The Tribunal was persuaded that while home buyers and home sellers may be sourcing information that they value elsewhere on the Internet, they are doing so *in addition to* procuring MLS-based real estate brokerage services. The same is true with respect to the complementary services offered by home appraisers, home inspectors, mortgage specialists and real estate.

2.2. Bureau’s analysis under section 79(1)(b): that person or those persons have engaged in or are engaging in a practice of anti-competitive acts¹⁷

30. The second element considers the purpose of the act in question. The Tribunal and courts have held that an anti-competitive act is defined by reference to its purpose, and the requisite anti-competitive purpose is an intended negative effect on a competitor that is exclusionary, predatory or disciplinary.¹⁸ Exclusionary acts may make current or potential competitors less effective, for example by increasing their costs. Predatory acts involve a firm deliberately setting the price of a product(s) below an appropriate measure of its own cost to eliminate, discipline, or deter entry or expansion of a competitor. Disciplinary acts involve actions intended to dissuade an actual or potential competitor from competing vigorously, or otherwise disrupting the status quo in a market.

31. When evaluating the purpose of an act, the Bureau considers both subjective evidence of intent (for example, business documents describing the purpose of an act) as well as objective evidence in the form of the reasonably foreseeable consequences of an act. The Bureau will weigh any evidence of anti-competitive intent against evidence that the act was engaged in pursuant to a legitimate business justification, that is, evidence that indicates the purpose of the act was efficiency-enhancing or pro-competitive.¹⁹ Although the Bureau will consider any business justifications posited by the allegedly dominant firm,

¹⁷ As noted in footnote 4, please refer to the Bureau’s Abuse of Dominance Enforcement Guidelines for a more detailed description of the Bureau’s analysis under section 79(1)(b), which is based upon jurisprudence, as well as recent economic thinking.

¹⁸ See *Canada (Commissioner of Competition) v Canada Pipe Co*, 2006 FCA 233, leave to appeal refused (10 May 2007) (referred to as “**Canada Pipe**”).

¹⁹ See *Canada Pipe*, *ibid.*

as the courts have recognized, where an allegedly dominant firm asserts a business justification it ultimately bears the burden of proof to establish it.²⁰

2.2.1. Economic evidence considered by the Tribunal under 79(1)(b) in the Air Canada case

32. Economic analysis plays an important role in assessing anti-competitive conduct, and particularly in respect of predatory conduct. The following section provides an illustrative example of an abuse of dominance case where the Tribunal considered economic evidence in light of the alleged predatory conduct under section 79(1)(b).

33. In 2001, the Commissioner brought an application to the Tribunal pursuant to section 79 of the Act, alleging that Air Canada had engaged in predatory conduct on a number of passenger airline service routes.²¹ Specifically, the Commissioner alleged that Air Canada responded to the entry of two airlines on seven routes by increasing its capacity and/or decreasing its fares, in a manner that did not cover the avoidable cost of operating the flights on such affected routes.²²

34. The Tribunal ordered that the Application be heard in two phases, with Phase I limited to the application of the avoidable cost test and related questions.²³ The Tribunal defined avoidable costs as “[a]ll 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.” The Tribunal generally adopted the approach advocated by the Bureau on how to apply the avoidable cost test as part of its overall consideration on whether Air Canada’s conduct was anti-competitive in nature.

35. Despite the discrete issues considered in Phase I, the hearing of the Application lasted 40 days and a total of 499 exhibits were introduced. The Bureau called two fact witnesses to provide evidence as to the business realities and the nature of competition of the airline industry. Additionally, the Bureau presented the evidence of three experts: an accounting expert, an expert in airline economics and an expert in economics.

36. The Bureau engaged an economic expert to carry out an analysis of the cost and revenue data obtained from Air Canada to determine the extent to which services provided by Air Canada or its affiliates on the relevant routes were at fares that did not cover the avoidable cost of offering the services. In addition to his avoidable cost analysis, the expert also provided his advice relating to the four questions posed by the Tribunal relating to how avoidable costs should be calculated:

²⁰ See *Toronto Real Estate Board v Commissioner of Competition*, 2017 FCA 236, leave to appeal refused (23 August 2018).

²¹ *The Commissioner of Competition v. Air Canada*, 2003 Comp. Trib. 13 (referred to as the “**Air Canada case**”). The full text of the decision is available online at: <https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/464434/1/document.do>.

²² Section 78 of the Act enumerates a non-exhaustive list of acts that are deemed to be anti-competitive in applying section 79. Several of the acts under section 78 address predatory conduct. This application was brought under the airline-specific abuse of dominance provisions of the Act, including paragraph 78(1)(j), which has since been repealed. However, the principles of the avoidable cost test may be applied to predatory pricing conduct more generally.

²³ The Commissioner was successful at the Phase I of the hearing. Phase II was to deal with the balance of the application, including dominance and competitive effects. However, the application was ultimately discontinued on the basis that Air Canada had determined that it would not appeal the Phase I decision, as well as other significant changes that had taken place, including Air Canada’s filing for protection from bankruptcy.

- What is the appropriate unit or units of capacity to examine?
- What categories of costs are avoidable and when do they become avoidable?
- What is the appropriate time period or periods to examine?
- What, if any, recognition should be given to “beyond contribution.”

37. To aid and supplement the economic expert’s analysis, the Bureau also engaged an accounting expert and an expert in airline economics. Among other issues, the accounting expert provided an overview of various cost definitions, an analysis of Air Canada’s costs, and the appropriateness of utilizing Air Canada cost information for the purpose of the avoidable cost test. The airline economics expert provided his views on issues that were central to the questions that the Tribunal raised. In particular, he opined on whether a scheduled flight or a route was the appropriate unit of capacity to consider for a cost test of predation in the airline industry. He also provided an opinion as to whether “beyond revenue” should be included as revenue in the test and he provided his views as to the appropriate time periods for an airline to make operational capacity decisions, assess flight performance and make necessary adjustments. Finally, he provided an analysis comparing Air Canada’s capacity decisions on the relevant routes for the period when Air Canada was alleged to be engaging in predation relative to other time periods and other routes.

38. The views and opinions of these experts supported the report of the economic expert by providing a foundation for the economic expert’s use of Air Canada’s cost data and the choice of capacity unit and time periods for the avoidable cost test. In this way, all three experts complemented and supported each other and provided a well-rounded expert analysis to address the issues raised by the Tribunal in the Phase I hearing.

2.3. Bureau’s analysis under section 79(1)(c): the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market²⁴

39. The final element involves an analysis of whether competition – on prices, quality, innovation, or any other dimension of competition – would be substantially greater in a market in the absence of the anti-competitive conduct. This assessment is a relative one, comparing the level of competition in a market with and without the alleged anti-competitive conduct, rather than an assessment of whether the absolute level of competition in a market is sufficient.²⁵ Substantiality is assessed based on market specific factors, including the market power of the allegedly dominant firm. The Tribunal has previously confirmed, “where a firm with a high degree of market power is found to have engaged in anti-competitive conduct, smaller impacts on competition resulting from that conduct will meet the test of being “substantial” than where the market situation was less uncompetitive to begin with”.²⁶

40. In conducting this assessment, the Bureau may seek evidence that directly speaks to the counter-factual scenario (e.g., the views of market participants), as well as evidence from natural experiments in the market at issue or in other markets.

²⁴ As noted in footnote 4, refer to the Bureau’s Abuse of Dominance Enforcement Guidelines for a more detailed description of the Bureau’s analysis under section 79(1)(c), which is based upon jurisprudence, as well as recent economic thinking.

²⁵ See Canada Pipe, *supra* footnote 18.

²⁶ See Tele-Direct, *supra* at footnote 11.

41. Abuse of dominance cases have historically relied on a combination of qualitative (e.g., business documents, views of industry participants, etc.) and quantitative evidence (e.g., econometric studies) in a determination of a substantial lessening or prevention of competition.²⁷

2.3.1. Economic evidence considered by the Tribunal under 79(1)(c) in the TREB case

42. Economic analysis is critical in the assessment of a result in harm to competition. The following section provides an illustrative example of the Tribunal's treatment of the economic analysis under section 79(1)(c) in an abuse of dominance decision.

43. In the TREB Decision discussed above, the Tribunal noted that dynamic competition, including innovation, is the most important type of competition and consumers are deprived of the benefits of enhanced services when members are shielded from disruptive competition. The Tribunal considered evidence from 15 lay witnesses and three expert witnesses in reaching its determination that TREB's restrictions had substantially prevented competition in the GTA residential real estate market.²⁸

44. The Tribunal's analytical framework relied on assessing whether prices were, are or likely would be, materially higher than in the absence of the impugned practice and/or whether non-price dimensions of competition, such as quality, variety, service, advertising or innovation would be materially lower than in the absence of the impugned practice.

45. Critical to the economic analysis of whether the prevention or lessening of competition is substantial is the Tribunal's view that there is no obligation on the Commissioner to quantify the anti-competitive effects or economic harm of an impugned practice of anti-competitive acts. Instead, the Tribunal determined that the Commissioner can use either quantitative or qualitative evidence in order to satisfy the requirements of paragraph 79(1)(c). This is particularly the case in innovation cases such as TREB where it may be difficult to measure the impact on dynamic competition.

46. Consequently, the Tribunal placed significant weight on evidence from lay witnesses in the form of witness statements and testimonies, industry analysis and other forms of qualitative evidence. What was particularly notable was the use of "natural experiments" as a means to introduce probative evidence for the Tribunal to assess the competitive impact of disruptive digital platforms in other geographic areas. Natural experiments are often useful to assess a counterfactual by examining historical events that link changes in competitive conditions (e.g., entry or exit of firms, presence of certain competitors, products, services, or contractual practices) to changes in observable effects. In the TREB Decision, this included testimonies from witnesses who operated VOWs in the United States or other areas in Canada who were prevented from entering the GTA residential real estate market and operating similar business models. The evidenced provided by those witnesses related to factors such as adoption rates, growth of their business models, the competitive response of incumbents and benefits to consumers in those other markets. Through the use of these "natural experiments", the Tribunal was able to compare the state of competition in markets where restrictions on digital platforms such as VOWs did not exist as compared to the GTA.

²⁷ See *Toronto Real Estate Board v Commissioner of Competition*, 2017 FCA 236, leave to appeal refused (23 August 2018).

²⁸ See TREB Decision, *supra* at footnote 13 at paragraph 705.

47. On the basis of the evidence led by the Commissioner's witnesses, the Tribunal concluded the five following anti-competitive effects:

- Increased barriers to entry and expansion: There has been a significant adverse impact on entry into, and expansion within, the relevant market by web based and other brokerages in the GTA.
- Increased costs imposed on VOWs: TREB's VOW restrictions undermine the ability of brokerages operating full information VOWs to compete by discriminating against them, raising their costs, and reducing their chances of success.
- Reduced range of brokerage services: But for TREB's VOW restrictions, there would have been, and likely would be, a greater range of innovative and value-added tools, features, and other services.
- Reduced quality of brokerage service offerings: The quality of certain important service offerings in the market would likely be significantly greater but for TREB's VOW restrictions. For instance, market analysis could be based on more comprehensive information, adding value to both the home sellers and the home buyers.
- Reduced Innovation: But for TREB's VOW restrictions, there would have been, and likely would be, considerably more innovation in the relevant market, and brokerages operating full information VOWs likely would have an important impact on how dynamic competition unfolds.

3. Conclusion

48. This submission discussed economic analysis typically undertaken in the Bureau's investigation of abuse of dominance cases based upon jurisprudence from the Tribunal, as well as the approach in two cases successfully brought by the Commissioner before the Tribunal. The Bureau is always looking for practical insights to incorporate in its economic analyses and looks forward to engaging with its international partners.