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COMPETITION COMMITTEE**

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ROUNDTABLE ON FIDELITY REBATES

- Note by Canada -

15 -17 June 2016

*This document reproduces a written contribution from Canada submitted for item 6 of the 125th OECD Competition committee on 15-17 June 2016.
More documents related to this discussion can be found at www.oecd.org/daf/competition/fidelity-rebates.htm*

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1. Introduction

1. Canada's Competition Bureau (the "Bureau") is pleased to provide this submission to the OECD Competition Committee's 15-17 June 2016 Roundtable on "Fidelity Rebates". The Bureau is an independent law enforcement agency that is headed by the Commissioner of Competition (the "Commissioner"), and is responsible for the administration and enforcement of the *Competition Act*¹ (the "Act") and other relevant legislation.² In carrying out its legislative mandate, the Bureau strives to ensure that Canadian businesses and consumers have the opportunity to prosper in a competitive and innovative marketplace.

2. The aim of this submission is to provide an overview of the Bureau's experience with investigating alleged anti-competitive fidelity rebate programs. The submission provides: (1) background information, including terminology and presumptions of competitive effects of fidelity rebates, (2) the analytical framework applicable to fidelity rebates, including the relevant statutory provisions, economic analytical framework, and past cases involving fidelity rebates, and (3) policy considerations guiding the Bureau's decisions regarding prioritization of investigations.

1 *Competition Act*, RSC, 1985, c. C-34, as amended.

2 The Competition Bureau is also responsible for the administration and enforcement of the *Consumer Packaging and Labelling Act* RSC, 1985, c. C-38 (non-food products), the *Textile Labelling Act* RSC, 1985, c. T-10, and the *Precious Metals Marking Act*, RSC, 1985, c. P-19.

2. Context on Fidelity Rebate Investigations

2.1 Terminology

3. The Bureau, in enforcing the Act, evaluates allegations on a case-by-case basis in the context of structural, factual and market-specific conditions. Although the Act does not expressly define fidelity rebates or other share-of-needs rebates,³ the Bureau can, and does, investigate alleged anti-competitive effects resulting from the same, and may do so under certain civil provisions of the Act. For the purposes of this submission, the term “fidelity rebate,” unless otherwise defined, shall refer to programs whereby sellers offer buyers a rebate or discount that is conditional on the buyer demonstrating loyalty in the purchases they make.

2.2 Presumptions on Competitive Effects

4. The Bureau does not have presumptions specific to fidelity rebates given the ambiguous competitive effects relating to such programs. The basic operating assumption of the Bureau is that competition is good for both business and consumers, and the Bureau is typically not concerned with conduct that encourages competitors to compete more effectively. However, conduct that creates, preserves, or enhances market power by erecting or strengthening barriers to expansion or entry, thus making it more difficult for competitors or potential competitors from challenging the market power of that firm, may prompt further investigation.

5. The Bureau’s stance with respect to fidelity rebates recognizes that they can be considered a legitimate form of price competition. The Bureau believes that fidelity rebates are common and can be pro-competitive in certain circumstances. For instance, the Bureau has argued in that past that fidelity rebates can be pro-competitive where they: (1) benefit consumers through lower prices, and (2) generate efficiencies, such as encouraging supplying firms to invest in marketing and development of new products, and encouraging distributors to concentrate efforts on promoting the supplier’s products. These activities could increase interbrand competition.⁴

6. In other circumstances, fidelity rebates can be anti-competitive. For example, suppliers may use fidelity rebates to discourage buyers from trading with a rival supplier, which could occur where the supplier’s rebate is conditional upon the buyer purchasing most or all of their requirements from the supplier. If a sufficient number of buyers are induced by the fidelity rebate to switch their purchasing behaviour, a large share of the relevant market could be foreclosed to the rival supplier, and have the effect of raising the rival supplier’s costs (for example, by the competitor’s loss of economies of scale associated with such foreclosure). In those instances, fidelity rebates may attract scrutiny under the Act.

3 Secretariat, Directorate for Financial and Enterprise Affairs Competition Committee, “Fidelity Rebates”, Background note by the Secretariat (DAF/COMP(2016)5), para 7.

4 The Commissioner of Competition v. Canada Pipe Company Ltd., 2005 Comp. Trib. 3 (“Canada Pipe Tribunal Decision”) (Expert Affidavit of Thomas W. Ross filed August 26, 2004) at Para 86.

3. Assessing the Competitive Effects of Fidelity Rebates

3.1 Legislative Framework

7. The Act does not expressly refer to fidelity rebates, nor does it include provisions specific to fidelity rebates. However, fidelity rebates may be reviewable under certain provisions aimed at preventing restrictive trade practices. Specifically, fidelity rebates may be reviewable as exclusive dealing (pursuant to section 77 of the Act) or as an abuse of dominant position (pursuant to sections 78 and 79 of the Act). In many instances, they may be reviewed under both provisions. These provisions are attached hereto as Appendix “A”.

3.1.1 Exclusive Dealing - Section 77 of the Act

8. The exclusive dealing provision was introduced to address situations where the practice of exclusive dealing “deprives the market of products which are in demand and which would produce needed price competition in the market.”⁵ The Act defines exclusive dealing as a practice where the customer is coerced or induced “to deal only or primarily in products” of a supplier.⁶

9. The requisite elements of exclusive dealing under the Act are: (1) the practice must be engaged in by a “major supplier”⁷ or it must be “widespread in a market”; (2) the practice must impede entry into or expansion of a firm, product or sales, or otherwise have an exclusionary effect; and (3) the practice must have, or be likely to, result in a substantial lessening of competition.⁸

3.1.2 Abuse of Dominance - Sections 78 and 79 of the Act

10. The abuse of dominance provisions guard against anti-competitive conduct by firms with market power, and promote conditions under which firms are afforded an opportunity to succeed or fail on the basis of their respective ability to compete. The Act does not seek to establish equality among competitors.⁹

11. To establish an abuse of dominant position contrary to the Act, the Commissioner must show that: (1) one or more persons substantially or completely controls a class or species of business, which is synonymous with having market power in the relevant market(s); (2) the person or persons with market power must have engaged in or be engaging in a practice of anti-competitive acts; and (3) the practice of

5 Bureau of Competition Policy, Consumer and Corporate Affairs, Stage 1, Competition Policy, Background Papers, Ottawa, April 1976, page 9.

6 s. 77(1) of the Act.

7 The Tribunal in the Director of Investigation and Research v The NutraSweet Company (CT-1989-002) (“NutraSweet”) adopted the definition of “major supplier” by the Restrictive Trade Practices Commission in Director of Investigation and Research v. Bombardier Ltd. (198), 53 CPR (2d) 47 at 55 which stated that a major competitor is “one whose actions are taken to have an appreciable or significant impact on the markets where it sells (see para 165).

8 s. 77(2) of the Act.

9 Competition Bureau Canada, “The Abuse of Dominance Provisions – Enforcement Guidelines”, online: (2012) < [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-abuse-of-dominance-provisions-e.pdf/\\$FILE/cb-abuse-of-dominance-provisions-e.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-abuse-of-dominance-provisions-e.pdf/$FILE/cb-abuse-of-dominance-provisions-e.pdf)> “AOD Enforcement Guidelines,” page 1.

anti-competitive acts must have had, be having, or be likely to have the effect of preventing or lessening competition substantially in a market.¹⁰

12. While the Act does not expressly define an anti-competitive act, the statute provides a non-exhaustive, illustrative list of anti-competitive acts.¹¹ Further, the courts have defined an anti-competitive act as one that has as its purpose an intended predatory, exclusionary, or disciplinary effect on a competitor.¹² As such, exclusionary conduct may be captured under the abuse of dominance provisions.

3.1.3 Discussion on Legislative Framework

13. The Act does not include provisions specific to fidelity rebates or discounting practices generally; therefore, the analytical framework for fidelity rebates, and the requisite elements to be established, would be the same as other investigations under the relevant provisions. The Commissioner has the burden of establishing each of the elements under the statutory provisions. As further discussed below, the firm bears the burden of putting forward any business justifications for their behaviour, including any pro-competitive effects or claimed efficiencies, given that the firm is in possession of the information necessary to evaluate any efficiencies claimed.

14. In deciding whether to investigate conduct under the exclusive dealing provision, the abuse of dominance provisions, or both, one of the factors considered by the Bureau is the remedy sought. For example, under the exclusive dealing provision, the Tribunal (as defined below) has the discretion to make behavioural orders that it believes “necessary to overcome the effect [of the practice] in the market or to restore or stimulate competition in the market” (including prohibiting the supplier from continuing to engage in the exclusive dealing).¹³ However, unlike the abuse of dominance provisions, financial penalties are not available for findings of exclusive dealing. Should administrative monetary penalties be sought, then an application would need to be brought forward under the abuse of dominance provisions.¹⁴

15. The courts have recognized a parallel structure and logic between the exclusive dealing and abuse of dominance provisions. First, both provisions require a finding that the firm in question occupies a position of dominance. Specifically, the exclusive dealing provision refers to a “major supplier of a product in a market” while the abuse of dominance provisions requires that “one or more persons substantially or completely control...a class or species of business.”¹⁵ Second, both provisions require an anti-competitive

10 For more information on the Bureau’s general approach to enforcing the abuse of dominance provisions of the Act, please see the AOD Enforcement Guidelines.

11 The Tribunal in NutraSweet recognized that conduct not specifically mentioned in section 78 can constitute an anti-competitive act.

12 This was first expressed in NutraSweet, and was confirmed by the Federal Court of Appeal in *Commissioner of Competition v Canada Pipe Company Ltd./Tyuauteries Canada Ltee*, 2006 FCA 233 (“Canada Pipe”) at para 65. Note that the Federal Court of Appeal and the Tribunal have acknowledged that paragraph 78(1)(f) is an exception to the standard as it does not contain a reference to a purpose vis-à-vis a competitor. Further note the Bureau’s AOD Enforcement Guidelines state that “while many types of anti-competitive conduct may be intended to harm competitors, the Bureau considers that certain acts not specifically directed at competitors could still be considered to have an anti-competitive purpose” (see page 10).

13 See s. 77(2) of the Act.

14 Please see s. 79(3.1) of the Act, which allows the Tribunal to order an administrative monetary penalty not exceeding CAD\$10 million (or CAD\$15 million in the case of subsequent orders).

15 Note that the exclusive dealing provision requires that the exclusive dealing be engaged in by a major supplier of a product in a market or be widespread in a market. As such, it is not always necessary to show

act.¹⁶ Third, both provisions require a finding that competition has actually been or is likely to be substantially lessened.¹⁷ However, it should be cautioned that although an overlapping analysis may result from the parallel structure, the legal tests applicable under these two provisions would not necessarily produce identical results in all factual circumstances.¹⁸ Given the similarities between the statutory provisions for exclusive dealing and abuse of dominance, to the extent that fidelity rebates may have exclusionary effects on a competitor, it is possible for an application to be brought forward under both provisions of the Act. This was the approach taken by the Bureau in past cases involving fidelity rebates.

3.2 *Economic analytical framework for exclusionary conduct*

16. Exclusionary conduct is designed to: (1) make existing or potential rivals less effective at disciplining the exercise of a firm's market power; (2) prevent them from entering the market; or (3) eliminate competitors from the market entirely. Exclusionary conduct often achieves such goals by raising rivals' costs.¹⁹

17. The Bureau, in conducting its analysis, may examine whether a firm's fidelity rebate program increases a competitor's costs, which may force that competitor to raise its prices, making it more difficult for the competitor to compete, or result in the competitor's exclusion from the market. For example, where fidelity rebates increase customer switching costs and make customers more difficult for competitors to acquire, this may constitute exclusionary conduct.²⁰

18. Fidelity rebates may allow the incumbent firm to ultimately maintain or increase its prices, which can be profitable if the costs associated with the rebate are offset by the ultimate increase in revenue, or by the preservation of revenues that would otherwise be lost from competitive entry or expansion.²¹

3.3 *Jurisprudence*

19. Litigated competition law matters are heard at the Competition Tribunal, a statutorily created, specialized federal adjudicative body in Canada that operates independently from the Bureau (the "Tribunal"). The Tribunal is composed of judicial and lay members, who provide their expertise in economics, industry, commerce or public affairs.²² The Tribunal has exclusive jurisdiction to hear and

that the firm in question occupies a position of dominance when engaging in the exclusive dealing analysis. For more information, see subsection 77(2) of the Act.

16 Specifically, s. 77(2) of the Act requires a practice of exclusive dealing resulting in barriers to entry or expansion or an exclusionary effect, and s. 79(1) of the Act requires a practice of anti-competitive acts, the interpretation of which is discussed in Section III.a.ii.

17 See para 21 Canada Pipe.

18 Paras 22 and 98 of Canada Pipe. Further, the exclusive dealing and abuse of dominance analytical frameworks may contemplate a difference in temporal effects: section 77 prohibits conduct "with the result that competition is or is likely to be lessened substantially" (i.e. present or future), whereas section 79 is engaged when a practise "had, is having, or is likely to have the effect of preventing or lessening competition substantially" (i.e. past, present, or future).

19 AOD Enforcement Guidelines, page 11.

20 AOD Enforcement Guidelines, page 11.

21 AOD Enforcement Guidelines, page 11.

22 s. 3 of the Competition Tribunal Act, RSC 1985, c. 19 ("Competition Tribunal Act"). Most cases heard under Part VIII of the Act (matters reviewable by the Tribunal) are heard by a panel of three members. This panel must include one judicial member, and the balance of the panel is typically made up on two lay members.

dispose of matters under Part VIII of the Act, Matters Reviewable by Tribunal, among other things. Appeals from the Tribunal are referred to the Federal Court of Appeal, an appellate court that hears cases concerning federal matters.²³

20. There is limited jurisprudence in Canada with respect to anti-competitive fidelity rebates. Canada Pipe (as further discussed below)²⁴ has been the only case heard at the Tribunal with respect to fidelity rebates within the last ten years. However, there are two other cases that have also examined fidelity rebate schemes: NutraSweet²⁵ and D&B²⁶. D&B was a case involving a buyer-side fidelity rebate, which is outside of the scope of this submission.

3.3.1 *Canada Pipe Company Ltd.*

21. Canada Pipe sold cast-iron drain, waste, and vent (“DWV”) products to various distributors in Canada, who in turn sold them to contractors for use in construction projects. Canada Pipe was alleged to control between 80-90% of the Canadian market for cast-iron DWV products. The fidelity rebate program in question, the Stocking Distributor Program, involved quarterly and annual percentage rebates that Canada Pipe provided to distributors in return for stocking only Canada Pipe-supplied cast-iron DWV products. The rebate was based on exclusivity, not volume. Although a minimum purchase was required, beyond that threshold amount, rebates and discounts were identical regardless of the size of the purchase. No penalties were imposed on distributors for opting out of the program, though they would be charged a higher (non-discounted) price for the cast-iron DWV products. The distributors were free to stock other companies’ non-cast iron DWV products, but were required to purchase cast-iron DWV products exclusively from Canada Pipe in order to be eligible for the rebates.²⁷

22. The Commissioner filed an application with the Tribunal alleging that the Stocking Distributor Program was an anti-competitive practice contrary to the exclusive dealing and abuse of dominance provisions. The Commissioner alleged that the Stocking Distributor Program gave Canada Pipe the ability to set prices above competitive levels, deter new entry and expansion of competitors in the relevant markets, and induce stock distributors’ compliance, thus exercising its market power.²⁸

23. In particular, the Commissioner alleged that the “exclusivity and full line forcing combined with [Canada Pipe’s] pricing involving a lower unit price and high quarterly and annual rebates for stocking distributors, create[d] an insurmountable barrier to entry.”²⁹ Essentially, the Stocking Distributor Program induced distributors to purchase Canada Pipe’s line of cast-iron DWV products in its entirety. Once distributors were locked into the Stocking Distributor Program, the distribution network was foreclosed to other suppliers who could no longer compete at the margin but had to compete for the distributors’ entire requirements for cast-iron DWV products. The Stocking Distributor Program significantly raised the costs of entry by creating high switching costs and forcing new suppliers to offer a full line of products and to compensate the distributors for the lost rebates if they stopped buying exclusively from the Canada Pipe.³⁰

23 s. 13, Competition Tribunal Act.

24 Canada Pipe and Canada Pipe Tribunal Decision, above.

25 NutraSweet, above.

26 Director of Investigation and Research v. D&B Companies of Canada Ltd. (CT-1994-001).

27 For details on the Stocking Distributor Program discounts, please see para 14 of Canada Pipe.

28 Canada Pipe Tribunal Decision (Commissioner of Competition’s Reply at para 12).

29 Canada Pipe Tribunal Decision (Commissioner of Competition’s Reply at para 14).

30 Canada Pipe Tribunal Decision (Commissioner of Competition’s Reply at para 14).

24. To support the Commissioner’s position, the Commissioner submitted testimonial evidence showing that there had not been any effective and viable entry in the relevant markets.³¹ The Commissioner’s expert, Dr. Thomas Ross, testified that the effect of the Stocking Distributor Program made it prohibitively costly for a distributor to source a portion of its cast-iron DWV from Canada Pipe and source its remaining needs from a competitive supplier.³² A competing manufacturer of cast-iron DWV products, Vandem Industries, submitted evidence “the capacity of a [Canada Pipe] competitor to satisfy all needs of a distributor needing cast-iron DWV pipe and fittings...is non-existent in Canada.”³³ Sierra Marketing Inc., an importer, also testified to the difficulties of establishing a new distribution network.³⁴

25. The Tribunal concluded that Canada Pipe, while dominant in the relevant markets, had not engaged in a practice of anti-competitive acts, and in any case there had not been a substantial lessening or prevention of competition attributable to the Stocking Distributor Program.³⁵ The Commissioner appealed the Tribunal’s decision, and the Federal Court of Appeal found that the Tribunal had erred by applying the incorrect legal tests under exclusive dealing and abuse of dominance provisions and sent the matter back to the Tribunal for redetermination. The Commissioner and Canada Pipe negotiated a settlement by way of a consent agreement prior to the rehearing, pre-empting the Tribunal’s re-determination of the case with the legal test put forward by the Federal Court of Appeal.

3.3.2 *The NutraSweet Company*

26. In 1989, the Director of Investigation and Research³⁶ (the “Director”) filed an application against NutraSweet, a supplier of aspartame that controlled approximately 95% of the Canadian market for aspartame. Supply contracts between NutraSweet and purchasers of aspartame included certain contractual provisions that were associated with exclusivity: (1) exclusive supply clauses requiring the customer to purchase all of its aspartame requirements from NutraSweet and exclusive use clauses requiring the customer to use its aspartame as the sole or primary sweetener in the buyer’s products; (2) trademark and logo display allowance, providing for a substantial discount conditional upon the buyer’s use of the NutraSweet logo and name on the packaging and advertisements of their own products. In order to have

31 Canada Pipe Tribunal Decision (Commissioner of Competition’s Reply at para 18). Sierra Marketing Inc. also testified to the difficulties of establishing a new distribution network (see para 264) Sierra was an importer to the British Columbia market, and had been denied access to the main distribution channels because of the Stocking Distributor Program (see para 94).

32 Canada Pipe Tribunal Decision (Submissions of the Commissioner of Competition’s Reply at para 254).

33 Canada Pipe Tribunal Decision (Submissions of the Commissioner of Competition’s Reply at para 255).

34 Sierra was an importer to the British Columbia market, and had been denied access to the main distribution channels because of the Stocking Distributor Program. See Canada Pipe Tribunal Decision (Submissions of the Commissioner of Competition’s Reply at paras 94 and 264).

35 In reaching its conclusion, the Tribunal found that the evidence fell short of establishing the anti-competitive nature of the Stocking Distributor Program: (1) while the Stocking Distributor Program was contractual in nature, the terms were not as “offensive” as in previous cases; (2) the Tribunal accepted Canada Pipe’s need to sell a certain volume in DWV products in order to maintaining full production of all product lines, and that there were “recognizable advantages in having a reliable source able to manufacture and supply a full line of cast-iron pipe DWV products for the Canadian market; (3) costs of full or partial switching were not a significant deterrent to prevent distributors from considering other suppliers; and (4) the rebates did not prevent entry or expansion of competitors as there was still sufficient competition remaining in the industry between existing and new suppliers. For more detail, please see paragraphs 256 to 262 in the Canada Pipe Tribunal Decision.

36 Note that this was the previous name for the Commissioner’s position.

the logo appear on the package or the advertisements, only NutraSweet brand aspartame could be used; and (3) meet-or-release clauses, providing NutraSweet the option to meet a lower price offered or to release the customer to purchase from another supplier, and most-favoured nation clauses.

27. The Director made two allegations against NutraSweet: (1) that its contract terms created an exclusive supply relationship that restricted entry or expansion by existing or potential entrants in contravention of the exclusive dealing provision, and (2) that NutraSweet was selling below its acquisition cost, which is set out as an anti-competitive act in the abuse of dominance provisions.³⁷ The Director argued that the terms of the supply contracts tied up a large percentage of the market, making it difficult for competitors to enter the market, as demonstrated by the difficulties faced by existing and would-be competitors in making inroads on NutraSweet's market shares.³⁸

28. The Director submitted evidence that with the exception of one company, Tosoh Canada Ltd., all suppliers and manufacturers who had the capability to produce and market aspartame in Canada had left the Canadian market and were no longer tendering for the supply of aspartame in Canada.³⁹ The Director also submitted expert evidence that the significant financial investments required for a firm to successfully compete, including marketing expenses, research and development, and production costs (including particularly significant sunk costs), made entry risky. NutraSweet's production capacity and long term supply contracts with major diet soft drink beverage manufacturers (the largest customers in the market) also made it very difficult for competitors to capture a share of the market sufficient to support an efficiently scaled production plant prior to NutraSweet's response.⁴⁰

29. The Tribunal found the impugned contractual provisions to be anti-competitive and concluded that financial incentives and the exclusivity clause amounted to exclusive dealing. Although sales were not conditioned on the customer dealing exclusively with NutraSweet, the fidelity rebates financially induced customers to deal only in the respondent's brand of aspartame, and to refrain from using another producer's aspartame, which led to exclusivity and made it virtually impossible for competitors to enter the market.⁴¹ The Tribunal held that the branding strategy was pursued for the purpose of excluding future or existing competition, rather than for efficient distribution or use of the product.

37 See s. 78(1)(i) of the Act.

38 NutraSweet (Notice of Application at paras 8 to 10). Also note that in paragraph 66 of the Notice of Application, it alleged that with the exception of one company (Tosoh Canada Ltd.), "all of the suppliers and manufacturers who possess the capability to produce aspartame and market it in Canada have left the Canadian market and are no longer tendering for the supply of aspartame in Canada. Steven Globberman, an expert retained by the Bureau noted in his affidavit the significant financial investments required for a firm to successfully compete, including marketing expenses, research and development from highly complicated process of synthesizing aspartame, the high costs associated with production (particularly significant sunk costs). In addition, the expert found that it would be difficult for competitors to enter or expand before NutraSweet had time to respond given its production capacity. The long term supply contracts that NutraSweet had with major diet soft drink beverage manufacturers also made it difficult for a rival to capture a share of the market sufficient to support and efficient scale plant without NutraSweet having the time and opportunity to respond. See: NutraSweet (Public Affidavit Evidence of Steven Globberman). Donald Thompson, also retained by the Bureau, reached similar conclusions in his affidavit. See: NutraSweet (Public Affidavit Evidence of Donald Thompson).

39 NutraSweet (Notice of Application at para 66).

40 NutraSweet (Public Affidavit Evidence of Steven Globberman), and NutraSweet (Public Affidavit Evidence of Donald Thompson).

41 NutraSweet at para 47.

30. Further, the display and promotion allowance were also found to induce exclusivity because where the buyer (1) decided to not use NutraSweet exclusively in a product, they would not be able to use the logo and thus be disqualified from the promotional allowance, or (2) preferred to not use NutraSweet's logo, the buyer would essentially be forced to purchase all of their aspartame needs from a different supplier as it would be too expensive to buy from NutraSweet without the promotional discounts. New suppliers would have to be sufficiently established to meet those needs, and customers would need to be willing to purchase from the new supplier. As a result, the Tribunal issued an order prohibiting NutraSweet from entering into or enforcing the impugned contract terms with Canadian customers unless such terms also appeared in contracts between NutraSweet and any competitors of the Canadian customers.⁴²

3.4 Discussion on Analytical Framework

31. The means through which the Bureau tests the necessary conditions in each of the exclusive dealing and abuse of dominance provisions will be dependent on the factual circumstances specific to each case. In conducting its analysis, the Bureau will typically gather evidence from the target of the investigation and third parties, in addition to examining publically available information and retaining industry and economic experts.

3.4.1 Market power

32. The Bureau considers market power, in the general sense, to be the ability to profitably maintain prices above the competitive level or similarly restrict non-price dimensions of competition such as product quality, choice, service, or innovation for a significant period of time (typically a year).⁴³ In assessing the competitive effects of unilateral conduct, the Bureau will generally first define the relevant product and geographic market(s) and then look to direct and indirect indicators of market power. Given that direct indicators of market power, such as profitability or evidence of supra-competitive pricing are not always conclusive, the Bureau will also look at quantitative and qualitative indirect indicators of market power, such as: (1) market shares, (2) barriers to entry, (3) customer countervailing power, and (4) technological change and innovation.⁴⁴ The Bureau will also consider the ability of existing or potential competitors to discipline the exercise of market power, or to enter the market in response to a dominant firm exercising its market power.

33. In contested fidelity rebate cases to date, the market shares of those firms were found to be very high. However, the absence of high market shares does not provide a safe-harbour, and does not preclude the Commissioner from examining firms with anti-competitive fidelity rebates.⁴⁵

3.4.2 Practice of anti-competitive acts

34. The exclusive dealing and abuse of dominance provisions require a practice of exclusive dealing or a practice of anti-competitive acts. While a "practice" normally involves more than a single isolated act,

42 Note that The Tribunal did not accept the Director's allegations regarding NutraSweet selling below acquisition cost. The Tribunal agreed with NutraSweet that acquisition cost does not easily lend itself to manufacturing situations. See NutraSweet at para 54.

43 AOD Enforcement Guidelines, page 1.

44 AOD Enforcement Guidelines, page 6.

45 For example, the exclusive dealing provision requires that the practice be engaged in by a "major supplier" or because it is "widespread in a market". Conduct can be widespread in a market without being engaged in by parties that collectively have market power (as required by the abuse of dominance provisions).

it may nonetheless be satisfied by a single act that is sustained and systemic, or that has had or is having a lasting impact in a market.⁴⁶

35. The meaning and interpretation of “exclusive dealing” and “anti-competitive acts” has been discussed in greater detail above, in sections III.a.i and III.a.ii, respectively.

- **Role of Business Justifications**

36. As stated above, courts have held that within the section 79 analysis, an anti-competitive act is identified by having as its purpose an intended predatory, exclusionary, or disciplinary effect on a competitor. Legitimate business justifications for the behaviour are one consideration to be weighed when assessing the overall character or overarching purpose of the conduct, along with the reasonably foreseeable or expected objectives of the effects, and evidence of subjective intent. According to the Federal Court of Appeal in *Canada Pipe*,

*“In appropriate circumstances, proof of a valid business justification for the conduct in question can overcome the deemed intention arising from the actual or foreseeable effects of the conduct, by showing that such anti-competitive effects are not in fact the overriding purpose of the conduct in question. In essence, a valid business justification provides an alternative explanation as to why the impugned act was performed. To be relevant in [establishing that the dominant firm has engaged in a practice of anti-competitive acts], a business justification must be a credible efficiency or pro-competitive rationale for the conduct in question, attributable to the respondent, which relates to and counterbalances the anti-competitive effects and/or subjective intent of the acts” (emphasis added).*⁴⁷

37. The Federal Court of Appeal has stated that the valid business justification doctrine is not an absolute defence to otherwise anti-competitive conduct.⁴⁸ Rather, it may be one factor used to assess the nature of the alleged anti-competitive act:

*“A business justification for an impugned act is properly relevant only as it is pertinent and probative in relation to the determination required by paragraph 79(1)(b), namely the determination as to whether the purpose for which the act as performed was a predatory, exclusionary or disciplinary effect on a competitor....a valid business justification can, in appropriate circumstances, overcome the deemed intention arising from the actual or foreseeable negative effects of the conduct on competitors, by demonstrating that such anti-competitive effects are not in fact the overriding purpose of the conduct in question.”*⁴⁹

38. When assessing the overriding purpose of an alleged anti-competitive practice, the Bureau will assess the credibility of business justifications raised by the firm(s), their link to the impugned practice and the likelihood of the efficiency or pro-competitive claims being achieved. The Bureau will generally require detailed and comprehensive information that substantiates the efficiency gains claimed by the firm, including evidence showing the nature, magnitude, likelihood and timeliness of the asserted gains, and why the alleged efficiency gains are not likely to be achieved if a Tribunal order is made.

46 AOD Enforcement Guidelines, page 10. An example of a single act that may have a lasting impact is a long-term exclusionary contract may effectively prevent the entry or expansion of competitors.

47 *Canada Pipe*, para 73.

48 *Canada Pipe*, para 88.

49 *Canada Pipe*, para 87.

39. Each of the anticipated efficiencies claimed would be assessed against the nature of potential orders that may be made (such as an order prohibiting the fidelity rebate program) to determine whether those gains would likely be attained by alternative means if the potential orders are made. Efficiency gains not affected by the order are not included in this balancing analysis. Depending on the circumstances, legitimate business objectives could include reducing the firm's production or operating costs, or improvements in technological or production processes that lead to innovation or improvements to product quality or service.⁵⁰

40. In *Canada Pipe*, the Tribunal addressed two business justifications put forward by *Canada Pipe*: (1) that the Stocking Distributor Program's rebate structure encouraged competition by creating a level playing field between small and large distributors as the discounts were based on loyalty rather than volume, and (2) that the Stocking Distributor Program enabled the high-volume sales necessary to enable the company to maintain a full line of products. The Tribunal rejected the first business justification (despite acknowledging that although the argument put forward is an enunciated purpose of the Act, it was unrelated to the analysis) and accepted the second business justification on the basis that it enabled the company to produce a full product line. The Federal Court of Appeal disagreed with the Tribunal's findings relating to business justifications, noting that although maintaining a full product line is beneficial to customers, "improved consumer welfare is on its own insufficient to establish a valid business justification" for the purposes of assessing whether the dominant firm is engaging in a practice of anti-competitive acts.⁵¹

50 AOD Enforcement Guidelines, page 11.

51 *Canada Pipe*, para 90.

3.4.3 *Substantial lessening of competition*

41. Assessing whether the relevant market would be substantially more competitive in the absence of the impugned anti-competitive behaviour requires a relative comparative assessment of competitiveness in a market with and without the impugned practice of anti-competitive acts, and then determining whether the prevention or lessening of competition, if any, can be characterized as “substantial”.⁵² An approach endorsed by the Federal Court of Appeal is a but-for analysis: “would the relevant markets – in the past, present or future – be substantially more competitive but for the impugned practice of anti-competitive acts?”⁵³ Some considerations may include whether: (1) entry or expansion by a potential or existing competitor might be substantially faster, more frequent or more significant without the impugned conduct, (2) switching between products and suppliers may be substantially more frequent, (3) prices might be substantially lower, and (4) product quality might be substantially greater.⁵⁴

4. **Policy Considerations for Prioritizing Investigations**

42. The Bureau’s investigations and enforcement actions under the civil provisions of the Act are typically driven by complaints submitted by parties such as private individuals or businesses, though the Bureau may also initiate an investigation upon becoming aware of potential competition issues through other means.

43. A preliminary assessment is usually undertaken prior to the commencement of an investigation. As part of the preliminary assessment, the Bureau considers whether the alleged conduct may contravene the Act, among other things. If a concern appears to have merit, the Bureau may commence an investigation into the matter. The Bureau’s decision to pursue an investigation and the prioritization of investigations into certain conduct is subject to a number of considerations, including (1) the Bureau’s strategic planning process, and (2) the likely impact of the alleged anti-competitive behaviour, giving priority to conduct that has a greater negative impact to competition in the Canadian marketplace.

44. The Bureau’s strategic planning process includes an environmental scan to identify trends, opportunities, and risks related to competition enforcement. The findings from the environmental scan help to shape the priorities and objectives of the Bureau’s annual plan, which communicates to Canadian consumers and stakeholders in the business and legal communities the Bureau’s priorities and objectives for the coming year. For example, an area of focus for the Bureau currently includes supporting innovation in the digital economy. The Bureau also publishes a three-year strategic plan, which acts as a roadmap to guide the Bureau’s longer-term operational and enforcement activities.⁵⁵ As such, rather than focusing on a particular category of conduct (e.g. fidelity rebates), the Bureau typically takes on investigations if they are aligned with the Bureau’s priorities and strategic vision.

45. It is not the Bureau’s standard practice to conduct ex-post assessments of cases. However, the Bureau is currently engaged in an examination of how it conducts performance measurement in order to enhance meaningful reporting of the impact of its activities.

52 Canada Pipe para 37.

53 Canada Pipe, para 38.

54 Canada Pipe, para 58.

55 The Competition Bureau “2015-2018 Strategic Vision” online: <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03934.html>>.

5. CONCLUSION

46. The Bureau is active in carrying out its mandate in the enforcement and administration of the Act. Where there is sufficient evidence to demonstrate that a fidelity rebate or other rebate programs may constitute a violation of the Act, the Bureau has taken, and will continue to take, appropriate enforcement action to address such concerns.

APPENDIX "A"

RELEVANT PROVISIONS OF THE *COMPETITION ACT*

Exclusive Dealing, Tied Selling and Market Restriction

Definitions

77 (1) For the purposes of this section,

exclusive dealing means

- any practice whereby a supplier of a product, as a condition of supplying the product to a customer, requires that customer to
 - deal only or primarily in products supplied by or designated by the supplier or the supplier's nominee, or
 - refrain from dealing in a specified class or kind of product except as supplied by the supplier or the nominee, and
- any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (a)(i) or (ii) by offering to supply the product to the customer on more favourable terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs; (*exclusivité*)

market restriction means any practice whereby a supplier of a product, as a condition of supplying the product to a customer, requires that customer to supply any product only in a defined market, or exacts a penalty of any kind from the customer if he supplies any product outside a defined market; (*limitation du marché*)

tied selling means

- any practice whereby a supplier of a product, as a condition of supplying the product (the "tying" product) to a customer, requires that customer to
 - acquire any other product from the supplier or the supplier's nominee, or
 - refrain from using or distributing, in conjunction with the tying product, another product that is not of a brand or manufacture designated by the supplier or the nominee, and

- any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (a)(i) or (ii) by offering to supply the tying product to the customer on more favourable terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs. (ventes liées)

Exclusive dealing and tied selling

(2) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that exclusive dealing or tied selling, because it is engaged in by a major supplier of a product in a market or because it is widespread in a market, is likely to

- impede entry into or expansion of a firm in a market,
- impede introduction of a product into or expansion of sales of a product in a market, or
- have any other exclusionary effect in a market,

with the result that competition is or is likely to be lessened substantially, the Tribunal may make an order directed to all or any of the suppliers against whom an order is sought prohibiting them from continuing to engage in that exclusive dealing or tied selling and containing any other requirement that, in its opinion, is necessary to overcome the effects thereof in the market or to restore or stimulate competition in the market.

Market restriction

(3) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that market restriction, because it is engaged in by a major supplier of a product or because it is widespread in relation to a product, is likely to substantially lessen competition in relation to the product, the Tribunal may make an order directed to all or any of the suppliers against whom an order is sought prohibiting them from continuing to engage in market restriction and containing any other requirement that, in its opinion, is necessary to restore or stimulate competition in relation to the product.

Damage awards

(3.1) For greater certainty, the Tribunal may not make an award of damages under this section to a person granted leave under subsection 103.1(7).

Where no order to be made and limitation on application of order

(4) The Tribunal shall not make an order under this section where, in its opinion,

- exclusive dealing or market restriction is or will be engaged in only for a reasonable period of time to facilitate entry of a new supplier of a product into a market or of a new product into a market,
- tied selling that is engaged in is reasonable having regard to the technological relationship between or among the products to which it applies, or

- tied selling that is engaged in by a person in the business of lending money is for the purpose of better securing loans made by that person and is reasonably necessary for that purpose,

and no order made under this section applies in respect of exclusive dealing, market restriction or tied selling between or among companies, partnerships and sole proprietorships that are affiliated.

Where company, partnership or sole proprietorship affiliated

(5) For the purposes of subsection (4),

- one company is affiliated with another company if one of them is the subsidiary of the other or both are the subsidiaries of the same company or each of them is controlled by the same person;
- if two companies are affiliated with the same company at the same time, they are deemed to be affiliated with each other;
- a partnership or sole proprietorship is affiliated with another partnership, sole proprietorship or a company if both are controlled by the same person; and
- company, partnership or sole proprietorship is affiliated with another company, partnership or sole proprietorship in respect of any agreement between them whereby one party grants to the other party the right to use a trade-mark or trade-name to identify the business of the grantee, if
 - the business is related to the sale or distribution, pursuant to a marketing plan or system prescribed substantially by the grantor, of a multiplicity of products obtained from competing sources of supply and a multiplicity of suppliers, and
 - no one product dominates the business.

When persons deemed to be affiliated

(6) For the purposes of subsection (4) in its application to market restriction, where there is an agreement whereby one person (the "first" person) supplies or causes to be supplied to another person (the "second" person) an ingredient or ingredients that the second person processes by the addition of labour and material into an article of food or drink that he then sells in association with a trade-mark that the first person owns or in respect of which the first person is a registered user, the first person and the second person are deemed, in respect of the agreement, to be affiliated.

Inferences

(7) In considering an application by a person granted leave under section 103.1, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by the application.

Abuse of Dominant Position

78 (1) For the purposes of section 79, anti-competitive act, without restricting the generality of the term, includes any of the following acts:

- squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer's entry into, or expansion in, a market;
- acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;
- freight equalization on the plant of a competitor for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;
- use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;
- pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market;
- buying up of products to prevent the erosion of existing price levels;
- adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent his entry into, or to eliminate him from, a market;
- requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor's entry into, or expansion in, a market; and
- selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor.
- and (k) [Repealed, 2009, c. 2, s. 427]
- (2) [Repealed, 2009, c. 2, s. 427]

Prohibition where abuse of dominant position

79 (1) Where, on application by the Commissioner, the Tribunal finds that

- one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,

- that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and
- the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,

the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

Additional or alternative order

(2) Where, on an application under subsection (1), the Tribunal finds that a practice of anti-competitive acts has had or is having the effect of preventing or lessening competition substantially in a market and that an order under subsection (1) is not likely to restore competition in that market, the Tribunal may, in addition to or in lieu of making an order under subsection (1), make an order directing any or all the persons against whom an order is sought to take such actions, including the divestiture of assets or shares, as are reasonable and as are necessary to overcome the effects of the practice in that market.

Limitation

(3) In making an order under subsection (2), the Tribunal shall make the order in such terms as will in its opinion interfere with the rights of any person to whom the order is directed or any other person affected by it only to the extent necessary to achieve the purpose of the order.

Administrative monetary penalty

(3.1) If the Tribunal makes an order against a person under subsection (1) or (2), it may also order them to pay, in any manner that the Tribunal specifies, an administrative monetary penalty in an amount not exceeding \$10,000,000 and, for each subsequent order under either of those subsections, an amount not exceeding \$15,000,000.

Aggravating or mitigating factors

(3.2) In determining the amount of an administrative monetary penalty, the Tribunal shall take into account any evidence of the following:

- the effect on competition in the relevant market;
- the gross revenue from sales affected by the practice;
- any actual or anticipated profits affected by the practice;
- the financial position of the person against whom the order is made;
- the history of compliance with this Act by the person against whom the order is made; and
- any other relevant factor.

Purpose of order

(3.3) The purpose of an order made against a person under subsection (3.1) is to promote practices by that person that are in conformity with the purposes of this section and not to punish that person.

Superior competitive performance

(4) In determining, for the purposes of subsection (1), whether a practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market, the Tribunal shall consider whether the practice is a result of superior competitive performance.

Exception

(5) For the purpose of this section, an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the Copyright Act, Industrial Design Act, Integrated Circuit Topography Act, Patent Act, Trade-marks Act or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act.

Limitation period

(6) No application may be made under this section in respect of a practice of anti-competitive acts more than three years after the practice has ceased.

Where proceedings commenced under section 45, 49, 76, 90.1 or 92

(7) No application may be made under this section against a person on the basis of facts that are the same or substantially the same as the facts on the basis of which

- proceedings have been commenced against that person under section 45 or 49; or
- an order against that person is sought by the Commissioner under section 76, 90.1 or 92