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## Working Party No. 2 on Competition and Regulation

# Competition Enforcement and Regulatory Alternatives – Note by Canada

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This document reproduces a written contribution from Canada submitted for Item 1 of the 71st OECD Working Party 2 meeting on 7 June 2021.

More documents related to this discussion can be found at http://www.oecd.org/daf/competition/competition-enforcement-and-regulatory-alternatives.htm

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# *Canada*

## 1. Introduction

1. Canada's Competition Bureau (the "**Bureau**") is pleased to provide this submission to the OECD Competition Committee's roundtable on "Regulation and Competition".

2. The Bureau, headed by the Commissioner of Competition (the "**Commissioner**"), is an independent law enforcement agency of the Federal Government of Canada responsible for the administration and enforcement of the Competition Act (the "**Act**")[1] 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. While the interplay between competition and regulation can impact the Bureau's work across a broad range of its activities, such as those dealing with advocacy, criminal price-fixing and mergers, this submission is narrowly focused on the abuse of dominance provision, section 79, of the Act.[2] In particular, two cases brought forward by the Bureau before the courts in recent years have provided additional clarity on how this interplay may be addressed with respect to such civil enforcement matters.

4. An interpretative doctrine has arisen in Canadian jurisprudence whereby the Act may be found not to apply to certain conduct that is directed or authorized, expressly or impliedly, by other valid legislation, known as the Regulated Conduct Doctrine (the "**RCD**"). As set out in the Bureau's Bulletin on regulated conduct,[3] Canadian courts have in specified circumstances immunized entities engaging in conduct authorized or required by a validly enacted law from prosecution under the criminal provisions of the Act. However, the jurisprudence is less developed regarding the application of RCD with respect to conduct under the civil or reviewable trade practices provisions of the Act.

5. In this regard, the Commissioner's recent case against the *Vancouver Airport Authority* ("**VAA**") resulted in a Competition Tribunal (the "**Tribunal**")[4] decision that gave

[1] The full text of the Competition Act is available online at: http://lawslois.justice.gc.ca/eng/acts/C-34/index.html.

[2] Under section 79 of the Act, the Commissioner must demonstrate that:

a) The respondent substantially or completely controls a class or species of business throughout Canada or in a specific area of Canada. This requires the respondent to possess market power in a relevant product and geographic market. The Tribunal generally assesses market power by a firm's ability to set prices or other dimensions of competition above the competitive level;

b) The respondent has engaged in a practice of anti-competitive act. In order for conduct to be anti-competitive, it is necessary to balance evidence of anti-competitive intent with evidence of a business justification to determine the overall character of the conduct.

c) The conduct has, had or is likely to have the effect of preventing or lessening competition in Canada. This is generally supported by evidence of an increase in price, reduction of innovation, choice, or any other competitive element of the market.

[3] See Bulletin on "Regulated" Conduct, September 27, 2010.

[4] Commissioner of Competition v Vancouver Airport Authority, 2019 Comp. Trib. 6, while the Bureau is responsible for administering and enforcing the Act, it is ultimately the Tribunal's role to independently adjudicate cases brought forward by the Commissioner. It is also the Tribunal's discretion to impose orders and remedies when appropriate.

valuable guidance. The Tribunal found that the RCD was unavailable in respect of section 79 of the Act. In particular, the Tribunal held that this section of the Act was not worded so as to allow for the application of the RCD. The Tribunal's analysis is significant not only to the interpretation of section 79, but would likely apply to other reviewable trade practices provisions of the Act, such as refusals to deal or price maintenance, due to their similar structure.

6. Although the RCD was unavailable in respect of an alleged abuse of dominance, the Tribunal had noted in a prior decision that regulation would still be relevant to the extent a respondent in a civil case establishes that it engaged in the conduct to comply with the regulation. Understanding the regulatory framework and the purpose for which a person engages in conduct is therefore very important in the Bureau's assessment of whether the overall character of the respondent's conduct is anti-competitive. In the Commissioner's abuse of dominance case against the *Toronto Real Estate Board*[5] ("**TREB**") the Court underscored the requirements that would need to be met for compliance with another statute to be considered a valid business justification and not merely a pretext for anti-competitive conduct contrary to section 79.

## 2. Application of the Abuse of Dominance Provision of the Act to Regulated Entities

7. As a law of general application, the Act applies to firms in various industries and markets that are subject to many different Canadian federal and provincial laws. Regulators or regulated entities may have the powers to influence the competitive process without direct government oversight. For instance, they could be granting licenses to entrants to operate in the market, taxing specific services, or imposing other barriers or conditions on competition.

8. The interface between the Act and regulated conduct where such conduct could raise concerns from a competition law perspective has seen relatively limited jurisprudence. The Tribunal's 2019 decision on the Commissioner's case against the VAA was an important decision that gave the Bureau additional guidance as to the application of the abuse of dominance provision to those circumstances.

9. This case was focused on allegations that VAA was engaging in anti-competitive conduct that prevented one or more in-flight caterers from entering and competing in the market. As the entity in charge of managing and operating the Vancouver International Airport, VAA asserted that by virtue of the RCD, it was immune from the Act in connection with its refusal to allow a third in-flight caterer to operate at the Vancouver International Airport. VAA limited the number of competitors to just two with the view that a third competitor would disrupt competition at the airport. VAA asserted that the market could not support three competitors and that any disruption caused by potential exit of one or more of the incumbent providers would be detrimental to the airport.

10. The Bureau had concerns with this conduct and submitted that VAA ought to be granting licenses and allow the competitive process to select successful competitors. The Bureau further submitted that VAA might have been incentivized to limit competition in order to collect more licensing fees, which were linked to the revenues of the incumbent caterers.

[5] Commissioner of Competition v. Toronto Real Estate Board, 2016 Comp. Trib. 7 aff'd *Canada (Commissioner of Competition) v. Toronto Real Estate Board*, 2017 FCA236.

## 3. The Regulated Conduct Doctrine

11. VAA submitted that it should be shielded from section 79 because it was authorized by statute to engage in the alleged conduct in order to fulfil its public interest mandate. The Commissioner disagreed with VAA that the RCD was available because the wording of section 79 provided no leeway to apply the RCD. The Commissioner also submitted that the regulation VAA relied upon for authorization provided insufficient authority for VAA to engage in exclusionary conduct.

12. The Tribunal held that the RCD *"effectively seeks to reconcile federal and provincial jurisdictions to ensure that the Act serves its objectives without interfering with validly enacted provincial regulatory schemes"*.[6] In considering the application of the RCD to cases under section 79 of the Act, the Tribunal held that two requirements would need to be met. First, the specific provision of the Act would need to have language that allows room for other laws to operate, and therefore for conduct to fall outside of the scope of the Act. This was characterized as the necessity for the Act to contain "leeway" language. Second, the respondent would need to show that the alleged conduct was required, compelled, mandated or authorized by validly enacted legislation. If the RCD was found to apply, it would effectively shield VAA from the application of section 79 of the Act.

13. The first criterion relies on the idea that federal legislation would supersede provincial laws, unless the federal legislation itself implicitly or explicitly contemplates the possibility for other legislation to operate. This notion of "leeway" language was an important element in the Tribunal's examination of whether section 79 of the Act allowed for those other laws to operate. In its decision, the Tribunal indicated that if section 79 contained clear leeway language such as "unduly" or "the public interest", it may suggest that Parliament contemplated the possibility for other laws to operate within the abuse of dominance provision. The Tribunal underlined that *"compliance with the edicts of a validly enacted provincial measure can hardly amount to something that is* "contrary to the public interest" *or to something that is* "undue"[7]. In short, if leeway language exists, then the Tribunal would likely be unwilling to find that conduct required, compelled, mandated or authorized by a valid provincial statute could be characterized as a contravention of the Act.

14. With respect to the first criteria, the Tribunal determined that section 79 did not contain leeway language. In doing so, the Tribunal held that it was not Parliament's intent that the conduct in question would be shielded from section 79 where such conduct was required or authorized by another regulatory regime. With respect to the second criterion, the Tribunal found that despite the RCD's origins as a doctrine concerning the interpretation of federal and provincial legislation, the RCD could also apply when the impugned conduct is alleged to be authorized by federal legislation. In that case, principles of statutory interpretation would be applied to reconcile perceived conflicts between the Act and the requirements of other federal legislation.[8]

*15.* In particular, the Tribunal recognized that even if a respondent was subject to a valid regulation pursuant to another statute, it would not give them carte blanche. Specifically, the Tribunal indicated that, "*simply because an industry is regulated does not mean that all anti-competition practices are authorized within that industry"* and that

[6] Commissioner of Competition v Vancouver Airport Authority, 2019 Comp. Trib. 6, at para. 192.

[7] *Ibid*., at para. 191.

[8] *Ibid*., at paras. 256-257.

parties cannot *"use their statutory authority as a springboard (or disguise) to engage in anti-competitive practices beyond what is authorized by the relevant regulatory statutes"*.[9]

16. The Tribunal ultimately determined that while VAA's mandate under the Canadian Aviation Regulations was broad, there were no provisions in other statutes that required, directed, mandated or authorized VAA to limit the number of air caterers to two. The authority VAA had did not impede VAA from complying with section 79. The Tribunal therefore concluded that neither of the two requirements of the RCD were met, and that VAA's conduct was not shielded from section 79 of the Act. The reasoning in this decision has broad implications for all regulated entities across Canada as it relates to section 79 of the Act and arguably other reviewable trade practices provisions.

## 4. Analysis of Anti-competitive Intent and Regulatory Compliance

17. The Tribunal's decision regarding RCD highlighted that the abuse of dominance provisions apply to regulated entities and regulated conduct. The regulatory framework, however, remains an important consideration in the substantive analysis of the abuse of dominance provisions as it is relevant to the intent of the conduct as well. The Act requires that for conduct to contravene section 79, the overall purpose or character of the respondent's conduct must be anti-competitive.

18. When evaluating the overall purpose of the conduct, the Bureau considers both subjective evidence of intent (for example, business documents describing the purpose of the conduct) as well as objective evidence in the form of the reasonably foreseeable consequences of the conduct. 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.[10]

19. Compliance with other laws and the advancement of the public interest may fall within the factual matrix relevant to the Commissioner in understanding the rationale behind the conduct even if the RCD does not shield the respondents from the application of section 79. As a result, it is important to assess the claims of respondents or parties under investigation that the purpose for their conduct is not an intention to exclude competitors but is instead driven by a desire to comply with other laws or advance their stated public mandate.

20. The abuse of dominance case against TREB is an example of a case where the respondent presented regulatory compliance as a justification for the alleged conduct. In that case however, TREB was not able to persuade the courts that its conduct was motivated or required by regulatory compliance. Consequently, the courts did not conclude that pro-competitive or efficiency enhancing considerations were the overriding purpose of the conduct. Instead, the case, which escalated to the Federal Court of Appeal ("**FCA**") following TREB's loss before the Tribunal, resulted in a decision favourable to the Commissioner and provided valuable guidance on how to approach such situations.[11]

[9] *Ibid*., at para.194.

[10] Abuse of Dominance Guidelines, https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04420.html

[11] TREB subsequently appealed the 2017 FCA decision to the Supreme Court of Canada but its application for leave to appeal was ultimately dismissed in 2018.

21. In the case against TREB, 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 virtual office websites. Innovative real estate brokers and agents also wished to use disaggregated data for analysis and to offer innovative analytical tools to consumers over these virtual office websites. It is important to note that while the display and use of such data over innovative platforms were prohibited, TREB permitted members to share real estate information with customers or clients through more traditional means such as in person, through e-mail or by fax.

22. The Commissioner was concerned with TREB's restrictions because they prevented new and innovative online real estate brokers from entering the market. These restrictions would instead entrench the already established traditional brokers, whom TREB was alleged to be protecting. In its arguments, TREB claimed that it needed to restrict the use and display of the data because it had to comply with several regulations, including privacy legislation.

23. After holding that *"legal considerations, such as privacy, may provide legitimate justification for an impugned practice",*[12] the FCA assessed whether there was a factual nexus between the statutory requirement and the impugned conduct. In particular, the FCA held that if "*it can be established that a business practice or policy exists as a matter of a statutory or regulatory requirement, whether compliance was the original or seminal motivation for the policy is of no consequence*".[13] The assessment of whether regulatory compliance could constitute a legitimate business justification ultimately depends on the evidence pertaining to the respondent's conduct.

24. The FCA made clear that it was TREB's burden to adduce evidence to substantiate the claim that the conduct was necessary in order to comply with regulations. In this case, TREB was ultimately not able to put forward compelling evidence that displaying the disputed data online would indeed be a contravention of privacy laws. After reviewing the evidence, the FCA also affirmed the Tribunal's finding that TREB was motivated by a desire to maintain control over data in an effort to forestall new forms of competition, and not by any efficiency, pro-competition, or genuine privacy concerns. In short, the FCA was satisfied that the overall character of TREB's conduct was anti-competitive.

25. The FCA's decision gives guidance that regulatory compliance can be a relevant factor in determining whether the overall purpose of conduct is anti-competitive in nature or driven by legitimate business considerations. However, the FCA decision also makes it clear that bald claims of regulatory compliance cannot act as a shield to competition legislation. It remains the burden of the respondent to put forward compelling evidence to link the conduct with the regulation. More recently, the Commissioner has adopted this enforcement approach in in other cases, most notably the Otsuka investigation in early 2020.[14]

26. While the TREB decision provides clarity on the analysis of the assessment of anti-competitive conduct, the interaction between the enforcement of the civil provisions and regulated conduct in Canada will involve case-by-case assessment by the Bureau. Should regulated entities or even regulators engage in conduct that is directly authorized or

[12] Toronto Real Estate Board v. Commissioner of Competition, 2017 FCA 236, at para. 145.

[13] Ibid., at, para. 146. (Federal Court of Appeal)

[14] Competition Bureau statement regarding its inquiry into alleged anti-competitive conduct by Otsuka, 2020

required by a valid regulatory framework but is also clearly driven by anti-competitive motives, these are matters that the Bureau may bring before the Tribunal for determination.

## 5. Conclusion

27. This submission, which is focused on the abuse of dominance provision of the Act, discussed the interaction between regulation and competition law enforcement in Canada through two litigated matters that advanced the Bureau's understanding of how this interplay may be addressed by the courts. This is an area that will gain even more clarity as the Bureau moves forward with future enforcement actions as well as dialogue and engagement with its international partners.