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Recent Developments in Abuse of Dominance Law in Canada: When is Anti-Competitive Conduct Justified?

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When is Anti-Competitive Conduct Justified?

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On October 17, 2019, the Canadian Competition Tribunal dismissed an application by the Commissioner of Competition alleging that the Vancouver Airport Authority (VAA) had abused a dominant position in the market for in-flight catering services at Vancouver International Airport. The Commissioner alleged that the VAA, a not-for-profit corporation responsible for the management and operation of the Vancouver airport, had been preventing – without sufficient justification – new in-flight catering suppliers from competing at the airport, notwithstanding that the VAA does not itself directly compete for the supply of in-flight catering services.

The Tribunal's decision, which was not appealed by the Commissioner and is now final, is particularly notable for its clarification of the scope for dominant firms to justify their allegedly anti-competitive conduct, suggesting a greater degree of flexibility for doing so than may have been apparent from prior recent jurisprudence.

The decision also re-affirms that the Competition Act's abuse of dominance provisions apply to situations where the respondent has allegedly abused a dominant position in a market in which the respondent does not itself compete. This is of particular relevance in the "digital" sector, given the recent emphasis on how "gatekeeper" firms may control access to data and digital platforms even in markets where such firms do not participate directly.

The Tribunal's Decision

The Commissioner filed an application with the Tribunal in September 2016 seeking an order under the abuse of dominance provisions in section 79 of the Competition Act in respect of VAA's decisions to allow, over a span of more than 20 years, only two in-flight caterers to operate at the Vancouver International Airport and to refuse to license new providers of in-flight catering services that are willing to meet market terms. In brief, the Commissioner alleged that VAA controlled the downstream market for galley handling services at the airport and that its restrictions on access to in-flight caterers had deprived airlines of the benefits of increased competition for galley handling services that additional providers would bring.

In order to succeed in an abuse of dominance application, the Commissioner must establish, on a balance of probabilities, that the respondent is dominant in a relevant market and has engaged in a practice of anti-competitive acts that has had, is having or is likely to have the effect of substantially lessening or preventing competition in a market.

In its decision, the Tribunal agreed with the Commissioner that VAA has a dominant position in the market for galley handling services at the Vancouver airport through its power to grant or deny critical access to the airside (i.e., the runways, taxiways and apron where aircraft are parked).

A majority of the Tribunal also agreed with the Commissioner that VAA had a ”plausible competitive interest” in the galley handling market that distinguished it from a neutral upstream provider of inputs, and gave it a theoretical reason to engage in anticompetitive conduct affecting that market. The majority reasoned that since VAA had a contractual right to a percentage of the overall revenues earned by galley handling suppliers at the airport, it also had a plausible commercial interest in limiting competition in this downstream market in order to ensure a stable and higher revenue stream.

However, notwithstanding the foregoing, the Tribunal then went on to reject the Commissioner’s application on the grounds that VAA’s conduct did not constitute a “practice of anti-competitive acts”, which is one of the central requirements to prove abuse of dominance under the Competition Act. Specifically, the Tribunal held that the “overriding character” of VAA’s conduct was not anti-competitive because it was motivated predominantly by VAA’s legitimate concern that allowing additional in-flight caterers (especially firms without catering facilities at the airport) could lead to the exit of one of the two incumbent in-flight caterers at the airport, resulting in significant service disruption to airlines and consumers for an extended period of time. This, in turn, would adversely affect the airport’s reputation and ability to compete with other airports to attract and retain new airlines and flight routes.

As such, there was a legitimate business justification to VAA’s conduct that was actually pro-competitive, in the sense that VAA was motivated by a desire to preserve the existing competition, choice and reliability already offered by the two incumbent full-service in-flight caterers instead of risking the loss of these benefits (and/or significant disruption) by introducing a third in-flight catering service.

In reaching this conclusion, the Tribunal also observed that it should not “insert itself or second-guess the decision-making process of a business” and that the standard for assessing business justifications is not whether the decision was correct but “whether the individuals in question made a genuine and good faith decision on the basis of information that was sufficiently robust to withstand an allegation of having been so superficial that it lacked credibility or was otherwise inadequate”.

Although not strictly necessary for its decision, the Tribunal also concluded (in obiter) that the Commissioner had not established that VAA’s refusal to authorize additional in-flight caterers had resulted in or was likely to result in a substantial prevention or lessening of competition in the provision of galley handling services at the airport. While the Tribunal accepted that VAA’s refusal to license new in-flight caterers had prevented at least some new competition from materializing, it was not satisfied that the Commissioner had adduced sufficient evidence of “concrete market opportunities” that would have been available to new entrants to enable them to achieve sufficient scale to materially impact price or other dimensions of competition.

Implications

• Legitimate business justification "defence": The Tribunal's decision is most notable for its finding that VAA's conduct was "saved" by what the Tribunal considered to be legitimate business justifications. This reinforces the importance for potentially dominant firms of carefully developing and recording the efficiency and pro-competitive motivations for any proposed or continuing course of conduct that may otherwise be interpreted as having an exclusionary, predatory or disciplinary effect on competitors. Parties will also need to demonstrate that such justifications were more important in their decision-making than any subjective anti-competitive intent, or the reasonably foreseeable anti-competitive effects of the impugned conduct.

• Non-competitor "gatekeepers" likely to remain in spotlight: Although the Tribunal dismissed the Commissioner's application by finding that VAA had legitimate business justifications for its conduct, it did confirm that respondents may be found to be offside the Competition Act by engaging in anti-competitive acts in markets in which they do not compete. This is an important win for the Competition Bureau. It means that Bureau scrutiny of conduct by firms perceived to control markets in which they do not themselves compete is in our view unlikely to abate, particularly with the recent emphasis on enforcement in digital markets that may involve or depend on platforms allegedly controlled by non-competitors.

• Regulated Conduct Defence: As a final point, it is worth noting that the Tribunal rejected VAA's position that its conduct was not subject to review under the Act's abuse of dominance provisions because the conduct was authorized pursuant to VAA's statutory mandate and therefore the "regulated conduct defence" (RCD) applied. The RCD is a common law doctrine that provides a form of immunity from certain provisions of the Act where the conduct alleged to contravene the Act is required, directed or authorized, expressly or impliedly, by other validly enacted legislation. The Tribunal held that the RCD does not apply to the Competition Act's abuse of dominance provisions. That said, and in keeping with the key theme of its decision, the Tribunal made a point of emphasizing that a statutory or regulatory requirement may nonetheless constitute a legitimate business justification for conduct that is alleged to be a practice of anti-competitive acts.

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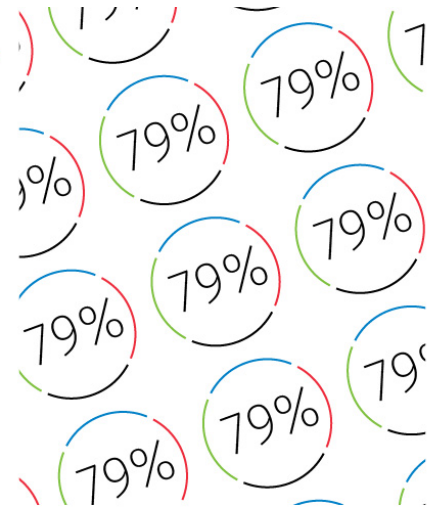

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