Making Sense of the New Excessive and Unfair Pricing Provision in Canada's *Competition Act*

John Bodrug

Canada's *Competition Act* was amended in December 2023 to contemplate challenges to dominant firms for "directly or indirectly imposing excessive and unfair selling prices" in certain circumstances. A successful challenge can subject dominant firms (or jointly dominant firms) to prohibition orders, large fines, and orders to disgorge profits to third parties. This amendment was tacked on in the late stages of an extensive revision to the *Competition Act* with little debate or even prior advocacy for such a change. While the concept of unfair and excessive pricing has been part of competition laws in the European Union (EU) and other jurisdictions for many years, its enforcement has generally been controversial and sporadic. Given the full context of the abuse of dominance provision (section 79 of the *Competition Act*), the new amendment to that section may ultimately be interpreted to (more expressly) capture only exclusionary conduct that was already within the scope of that provision. Pending clarification by the courts, businesses operating in Canada are faced with a provision that lacks clear boundaries but carries potentially onerous consequences.

In this article, I discuss the potential scope of the Canadian excessive and unfair pricing amendment in light of experience with similar provisions in other jurisdictions, recognized goals and principles of competition law and policy, and Canada's abuse of dominance provision as a whole. I also review considerations and challenges associated with the concepts of "excessive" and "unfair" prices, as well as the types of orders that could be issued in respect of excessive and unfair pricing.

International Context and Controversy

On its face, sanctioning dominant firms for imposing excessive and unfair selling prices may seem a natural addition to competition legislation. Indeed, concepts of excessive or unfair pricing have been incorporated in various forms in competition laws in many jurisdictions, including the EU, individual EU member states, the UK, India, China, Russia, South Africa, Israel and others.[1] Nevertheless, the Organisation for Economic Co-operation and Development (OECD) has described excessive pricing as "one of the most controversial theories of harm in competition law."[2] Critics of laws prohibiting excessive pricing point to the risk of undermining investment incentives, both of firms already in the market and potential entrants, and the uncertainty associated with the concept. Advocates of sanctioning excessive pricing under competition laws express a desire to address high consumer prices in markets with limited potential for self-correction due, for example, to permanently high entry barriers, the absence of a regulator, or ineffective regulation.[3]

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[1] Excessive Pricing and Competition Law Enforcement 1 - 2 (Yannis Katsoulacos & Frederic Jenny eds., 2018).

[2] Org. for Econ. Coop. and Dev. [OECD], *OECD Policy Roundtables: Excessive Prices,* at i, 2011DAF/COMP(2011)18 (February 7, 2011), [hereinafter OECD 2011 Roundtable], https://www.oecd.org/daf/competition/abuse/49604207.pdf.

[3] Michal Gal, *Abuse of Dominance—Exploitative Abuses, in* Handbook of Competition Law 383, 414 (Lianos & Geradin, eds., 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2576042.

[S]ome competition authority representatives have recognized the need for limitations on the scope or application of any excessive or unfair pricing provisions.

Competition authorities rarely bring excessive or unfair pricing cases, likely because of the complexity of investigating, prosecuting and monitoring remedies for such cases, the availability of other means to more effectively address excessively high prices, and recognition of the risks and costs in the relevant markets and the economy more generally of creating unintended disincentives to investment and innovation.[4] Indeed, some competition authority representatives have recognized the need for limitations on the scope or application of any excessive or unfair pricing provisions.[5] The European Commission has also stated that "addressing excessive prices is an area of antitrust where limited and very cautious intervention is warranted."[6] However, where private actions are permitted for excessive or unfair pricing claims, plaintiffs are unlikely to be swayed by adverse impacts of over-deterrence.[7]

The concept of excessive and unfair pricing is new to Canada's *Competition Act*.[8] It is also not part of the antitrust laws of the United States, Canada's largest trading partner. U.S. antitrust law does not prohibit "excessive pricing" in and of itself and "U.S. antitrust law allows lawful monopolists, and *a fortiori* other market participants, to set their prices as high as they choose."[9] As the U.S. antitrust agencies have explained:

> Denying a lawful monopolist the fruits of its monopoly can diminish its incentive to compete in the first place. As Judge Learned Hand aptly put it: "[t]he successful competitor, having been urged to compete, must not be turned upon when he wins." The Supreme Court further elaborated on this notion in its 2004 *Trinko* decision, noting that "[t]he mere possession of monopoly power, and the concomitant

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4 Frederic Jenny, *Abuse of Dominance by Firms Charging Excessive or Unfair Prices: An Assessment, in* Excessive Pricing and Competition Law Enforcement 5, 9 (Yannis Katsoulacos & Frederic Jenny eds., 2018).

5 See for example: Amelia Fletcher & Alina Jardin, *Towards an Appropriate Policy for Excessive Pricing*, Annual Competition Law Workshop, Robert Schuman Centre, EUI Florence (June 9, 2007), https://www.eui.eu/Documents/RSCAS/Research/Competition/2007ws/200709-COMPed-Fletcher-Jardine.pdf (The Chief Economist and an Economic Advisor to the UK's Office of Fair Trading proposed a number of limitations on interventions against high prices, including that firms should not face fines or private damages for excessive pricing—¶¶ 4 and 48. The UK submitted this paper to the OECD 2011 Roundtable, *supra* note 2 at 288.)

6 OECD 2011 Roundtable, *supra* note 2 at 321; see also Julie Bon & Mike Walker, *Excessive Pricing as an Antitrust Harm: Three UK Cases in Generic Pharmaceuticals*, *in* Antitrust Economics at a Time of Upheaval: Recent Competition Law Policy Cases on Two Continents 208, 229 (John Kwoka, Tomasso Valletti, & Lawrence White, eds., 2023) at 229 (The Chief Economic Advisor and a Deputy Chief Economic Advisor to the UK Competition and Markets Authority stated that "there are good reasons for competition authorities to be cautious with respect to excessive pricing cases" and "excessive pricing cases should be rare in competition law," but not ruled out completely).

7 Numerous private class actions seeking damages for excessive pricing have been commenced under Israeli competition law. *See e.g.,* Yossi Spiegel, *Antitrust Enforcement of the Prohibition of Excessive Prices: The Israeli Experience*, *in* Excessive Pricing and Competition Law Enforcement, 127, 130-136 (Yannis Katsoulacos & Frederic Jenny eds., 2018); *see also* Avner Finkelshtein, *The Supreme Court Sets a Very High Bar for Enforcing the Prohibition on Excessive Monopolistic Pricing*, Gornitsky & Co. (April 3, 2023), https://www.gornitzky.com/the-supreme-court-sets-a-very-high-bar-for-enforcing-the-prohibition-on-excessive-monopolistic-pricing/. At least one such action has resulted in a damages award at trial, but that award was overturned on appeal.

8 Some Canadian provinces have consumer protection legislation restricting unconscionable consumer transactions that may, for example, include charging a consumer a price that grossly exceeds prices available for similar products from other suppliers. Some provinces also have measures that allow for prohibitions on excessive prices, at least in respect of certain types of critical products in emergency circumstances, typically for a limited period of time after some type of demand or supply shock. For a discussion of provincial "price gouging" restrictions implemented at the onset of the COVID-19 pandemic *see* A. Banicevic & J. Bodrug, *COVID-19 in Canada: Competitor Collaborations, Pricing, Mergers, and Foreign Investment During (and After) the Pandemic*, Antitrust Source 40, 44 (August 2020), https://www.americanbar.org/content/dam/aba/publishing/antitrust-magazine-online/2020/august-2020/aug20_full_source.pdf . For a discussion of similar price gouging laws in the U.S., see A. O'Brien & B. Cummins, *The Price of Price-Gouging Laws*, Antitrust Source 41, 48 (June 2020), https://www.americanbar.org/content/dam/aba/publishing/antitrust-magazine-online/2020/june-2020/jun20_full_source.pdf.

9 Federal Trade Comm'n and U.S. Dep't of Justice, *OECD Working Party No. 2 on Competition and Regulation: Excessive Prices—United States*, at 2, OECD, DAF/COMP/WP2/WD(2011)65 (October 4, 2011), https://www.justice.gov/sites/default/files/atr/legacy/2014/05/30/278823.pdf.

> charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices at least for a short period is what attracts business acumen in the first place; it induces risk taking that produces innovation and economic growth." Therefore, limiting the freedom to set prices may well conflict with the underlying premise of antitrust policy, *i.e.,* promoting a robust competitive process that produces high-quality, innovative goods at low prices.[10]

Section 5 of the U.S. *Federal Trade Commission Act* prohibits "unfair methods of competition in or affecting commerce."[11] The U.S. 2011 OECD submission referenced an instance of high prices being one element of an enforcement action under a section 5 proceeding, but did not suggest that a high price was sufficient to violate section 5.[12] However, the FTC's 2022 policy statement on the scope of section 5 suggests that "exploitative" and "abusive" conduct can constitute unfair methods of competition.[13] The policy statement also cites a report of the House of Representatives at the time section 5 was enacted identifying as an example of conduct that should be prohibited under that section "the charging of exorbitant prices where the seller has a substantial monopoly."[14] That said, it is not clear that a high price can be characterized as an "unfair method of competition" within the scope of section 5.[15] (Notably, section 5 does not provide a private right of action—it empowers only the FTC to initiate an action for a violation of that section.)

Limited Legislative Consideration of Canada's Excessive and Unfair Pricing Amendment

The recent round of amendments to Canada's *Competition Act* arose from a public consultation initiated in November 2022,[16] which prompted more than 130 submissions with over 100 reform proposals.[17] Only one of those submissions briefly advocated that the Canadian government should align the *Competition Act* with the EU approach of allowing businesses to be fined for unfair prices.[18] While Canada's competition law enforcement agency, the Competition Bureau, advocated for extensive amendments to the *Competition Act*, it did not propose that an excessive or unfair pricing provision be added to the Act.[19]

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[10] *Id.* (footnotes omitted).

[11] 15 U.S.C. § 45, https://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title15-chapter2-subchapter1&edition=prelim.

[12] *OECD Working Party, supra* note 9, at 5.

[13] Federal Trade Comm'n, Commission File No. P221202, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act 9 (2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.

[14] *Id.* at 4, n. 16.

[15] Gregory J. Werden, *Unfair Methods of Competition Under Section 5 of the FTC Act: What is the Intelligible Principle?*, 85 Antitrust L.J. 819, 870-876 (2024).

[16] Innovation, Science and Economic Development Canada, The Future of Competition Policy in Canada (November 22, 2022), https://ised-isde.canada.ca/site/strategic-policy-sector/en/marketplace-framework-policy/competition-policy/future-competition-policy-canada.

[17] Innovation, Science and Economic Development Canada, The Future of Canada's Competition Policy Consultation—What We Heard Report (September 20, 2023), https://ised-isde.canada.ca/site/strategic-policy-sector/en/marketplace-framework-policy/competition-policy/consultation-future-competition-policy-canada/future-canadas-competition-policy-consultation-what-we-heard-report.

[18] Canadian Anti-Monopoly Project, *Submissions: Consultation on the future of competition policy in Canada: Labour, consumer or public interest groups,* Government of Canada (May 31, 2023), https://ised-isde.canada.ca/site/strategic-policy-sector/en/marketplace-framework-policy/competition-policy/submissions-consultation-future-competition-policy-canada/labour-consumer-or-public-interest-groups (Submission of the Canadian Anti-Monopoly Project (CAMP)).

[19] Competition Bureau, *The Future of Competition Policy in Canada,* Government of Canada (March 15, 2023), https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/promotion-and-advocacy/regulatory-adviceinterventions-competition-bureau/future-competition-policy-canada.

The excessive and unfair pricing provision was . . . not subject to substantive Parliamentary debate or witness testimony.

A government bill to amend the *Competition Act* (Bill C-56), introduced on September 21, 2023, was revised during House of Commons committee review in November 2023 to include an excessive and unfair pricing provision. The bill then proceeded rapidly through the Parliamentary approval process and came into effect on December 15, 2023.[20] The report of the Senate committee tasked with reviewing the Bill stated that it was "contemptuous" that the committee was "afforded a very limited time to conduct its study of the bill" and, as a result, the committee "was prevented from thoroughly studying the bill and properly performing its duties."[21] The excessive and unfair pricing provision was therefore not subject to substantive Parliamentary debate or witness testimony.

As discussed below, the potential consequences of this provision have expanded with subsequent *Competition Act* amendments introducing, as of June 20, 2025, an ability for private litigants and affected third parties to obtain disgorgement payments for abuse of dominance, including excessive and unfair pricing.[22]

Canada's Abuse of Dominance Provisions

The imposition of excessive and unfair selling prices is now one potential component of an abuse of dominance under section 79 of the *Competition Act*. The following sets out the elements of and remedies available under section 79.

Either the Commissioner of Competition, the head of Canada's Competition Bureau, or a private party may apply for an order under the abuse of dominance provisions to the Competition Tribunal, a quasi-judicial body comprised of federal court judges and lay members. Private parties must obtain leave to bring an action before the Tribunal. To obtain leave, a private applicant has to demonstrate that its business was directly and substantially affected by the challenged conduct. However, as of June 20, 2025 the Act will require only that part of the applicant's business be affected, and also allow the Tribunal to grant leave where it considers the application to be in the public interest.

Dominance. Only a person or group of persons that substantially or completely controls a class or species of business in Canada may be subject to an order for imposing excessive and unfair pricing under the abuse of dominance provisions. In this context, "control" means market power, which may be evidenced by an ability to profitably determine or influence pricing or other dimensions of competition in the market.[23] While Competition Bureau guidelines suggest that firms with less than a 50% share of the relevant market are unlikely to be considered dominant,[24] cases in which the Tribunal has found that a respondent controls a market for the purposes of the abuse of dominance provisions have all involved market shares of greater than 80%.[25]

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[20] For details of the consideration of Bill C-56 in Parliament, see: Parliament of Canada, *Bill C-56: An Act to amend the Excise Tax Act and the Competition Act*, LEGISINFO, https://www.parl.ca/legisinfo/en/bill/44-1/c-56.

[21] STANDING SENATE COMM. ON NAT'L FIN., FIFTEENTH REPORT OF THE STANDING COMMITTEE ON NATIONAL FINANCE, 44th Parl., 1st Sess. (Dec. 13, 2023), https://sencanada.ca/en/committees/NFFN/Report/124257/44-1.

[22] Fall Economic Statement Implementation Act, 2023 (S.C. 2024. C.15), § 247(2), 441, amending *Competition Act*, R.S.C., 1985, c. C-34, § 79 (4.1) (Can.), in force as of June 20, 2025.

[23] Commissioner of Competition v. Toronto Real Estate Board, 2016 Comp Trib 7, ¶ 173 (Can.), https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/462979/index.do.

[24] Competition Bureau, Abuse of Dominance Enforcement Guidelines (March 7, 2019), ¶ 125 [hereinafter Guidelines], https://competition-bureau.canada.ca/how-we-foster-competition/education-and-outreach/abuse-dominance-enforcement-guidelines.

[25] OMAR WAKIL, 2024 ANOTATED COMPETITION ACT 386 (2024).

An entity can also control a market for the purposes of Canada's abuse of dominance provisions without competing in the market. For example, a trade association has been held to control a market for Multiple Listing Service-based residential real estate services and an airport authority has been held to control a market for catering services to airplanes at the airport.[26]

The concept of joint dominance of a business may apply where two or more firms present themselves to the market as a single supplier, such as through a joint venture. More controversially, the Competition Bureau may even consider firms engaging in parallel conduct—without any agreement or understanding between them—to jointly control a market for the purposes of the abuse of dominance provisions.[27] However, the Competition Tribunal has not considered this position in a contested matter.[28] The 2011 OECD Report raised concerns about the prospect of applying joint dominance to excessive pricing, including the potential for joint dominance to be used as a shortcut to weaken procedural and substantive requirements in other areas of competition law (such as criminal cartel enforcement) and creating an enhanced risk of discouraging investment and innovation.[29]

The *Competition Act*'s framework for abuse of dominance applies different criteria depending on the type of remedy sought—i.e., a prohibition order, an order to take remedial actions, or an order to pay a fine or make a disgorgement payment. These criteria are discussed below.

Grounds for Prohibition Orders. To obtain an order from the Competition Tribunal prohibiting a dominant entity from engaging in a practice[30] of anti-competitive acts, an applicant needs to establish only that the dominant firm engaged in such a practice. Section 78 of the Act defines an "anti-competitive act" to mean any act "intended to have a predatory, exclusionary, or disciplinary effect on a competitor, or to have an adverse effect on competition," and to include any of several specified acts that include "directly or indirectly imposing excessive and unfair selling prices."[31] Accordingly, the Tribunal can prohibit conduct based only on the *intent* of a dominant firm in engaging in such conduct.

Alternatively, even if it does not constitute a practice of anti-competitive acts, a dominant firm can provide grounds for a prohibition order under the abuse of dominance provisions if its conduct has had or is likely to have the *effect* of preventing or lessening competition substantially in a market where the dominant firm has a plausible competitive interest and the effect is not the result of superior competitive performance.[32]

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[26] *Toronto Real Estate Board*, 2016 Comp Trib 7, ¶ 173 (Can.); *see also* Commissioner of Competition v. Vancouver Airport Authority, 2019 Comp Trib 6 (Can.), https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/465215/index.do?q=CT-2016-015+429.

[27] Guidelines, *supra* note 24, ¶¶ 48 and 49.

[28] John Bodrug, *Joint Dominance*, Canadian Competition Record, Summer 2003, at 104; George Addy, John Bodrug & Charles Tingley, *Abuse of Dominance in Canada: Reflections on 25 Years of Section 79 Enforcement*, 25 Canadian Competition L.R. 276 (2012).

[29] OECD 2011 Roundtable, *supra* note 2 at 74-75.

[30] The longer a price is in effect, or the more frequently it is imposed, the greater is the prospect of it being considered a practice for the purposes of the abuse of dominance provisions. The Competition Bureau considers that a single act could constitute a practice if it is sustained or systemic or has a lasting impact in a market. *See* Guidelines, *supra* note 24, at ¶ 52.

[31] Competition Act, R.S.C., 1985, c. C-34, § 78 (Can.).

[32] *Id.*, § 79(1)(b). The concept of a "plausible competitive interest" originates from the Competition Tribunal's decision in *Toronto Real Estate Board*, 2016 Comp Trib 7, ¶¶ 279—282: "In the case of an entity that is upstream or downstream from the relevant market, this may involve demonstrating that the entity has a plausible competitive interest that is different from the typical interest of a supplier in cultivating downstream competition for its goods or services, or the typical interest of a customer in cultivating upstream competition for the supply of the goods or services that it purchases"(¶ 282). In *Vancouver Airport Authority*, 2019 Comp Trib 6 (Can.), ¶¶ 458—510, the airport authority was held to control certain markets for catering aircraft at the airport in part because it had the power to exclude competitors from that market, and to have a plausible competitive interest in the market arising from its interest in the overall level of concession fees payable by caterers that it permitted to serve airlines at the airport.

In a given case, even assuming relatively high prices were somehow found to prevent or lessen competition substantially, if the firm's ability to charge such prices were attributable to better quality or features of its product, the firm may well avoid an effects-based prohibition order by virtue of the superior competitive performance defense. This defense might also, for example, preclude an order against a dominant firm based on a high profit margin if that margin was achieved because of lower production costs relative to its competitors.

The superior competitive performance defense does not expressly apply for an intent-based prohibition order (or the types of remedial or disgorgement orders discussed below). However, a price set with a view to maximizing profit in light of customer demand for superior products might not be viewed as having the requisite anti-competitive intent.

Remedial Orders. To obtain orders to take actions necessary and reasonable to overcome the effects of a dominant firm's conduct in a relevant market (including divestiture of assets or shares), the applicant would need to establish that the challenged conduct is a practice of anti-competitive acts that prevents or lessens, or is likely to prevent or lessen, competition substantially—i.e., the applicant would need to establish both anticompetitive intent *and* effect.[33]

Disgorgement to Private Parties. Where a private party obtains either a prohibition or a remedial order under the abuse of dominance provisions of the *Competition Act*, as of June 20, 2025, the Tribunal may order the dominant firm to pay an amount up to the value of the benefit derived from the conduct that is the subject of the order to be distributed among the applicant and any other person affected by the conduct.[34] Such "disgorgement" orders can therefore be issued in respect of conduct that has either anti-competitive intent or effect.

Monetary Penalties. If the Tribunal finds that a person has engaged in or is engaging in a practice of anti-competitive acts that has had or is having the effect of preventing or lessening competition substantially in a market in which the person has a plausible competitive interest, and it makes a prohibition order or a remedial order against that person under the abuse of dominance provisions, the Tribunal may also order that person to pay a monetary penalty in an amount not exceeding the greater of

(a) C$25,000,000 and, for each subsequent order, an amount not exceeding C$35,000,000, and

(b) three times the value of the benefit derived from the anti-competitive practice, or, if that amount cannot be reasonably determined, 3 percent of the person's annual worldwide gross revenues.

Requisite Intent for an Anti-Competitive Act

Arguably, high prices in themselves should not be viewed as an adverse effect on competition.

To be subjected to an order under the abuse of dominance provisions as an "anti-competitive act," a practice of imposing excessive and unfair prices must be "intended to have a predatory, exclusionary, or disciplinary effect on a competitor, or to have an adverse effect on competition." Each of these criteria is discussed below.

Predatory, exclusionary or disciplinary effect on a competitor. In itself, a dominant firm's high price to customers may, if it has any effect on competitors, create opportunities for competitors to enter the market or to expand sales of the relevant product. A firm's high prices may lead customers to seek alternate suppliers—an impact which would have a positive effect on the firm's competitors.

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[33] Competition Act, *supra* note 31, § 79(2).

[34] *Supra* note 22, amending *Competition Act* §§ 79(4.1), 79(4.2) & 75(1.3)(a) to (g) effective June 20, 2025.

However, a predatory, exclusionary or disciplinary effect on competitors might be found when high pricing is combined with other conduct. For example, a dominant firm might impose a higher price following below-cost pricing as part of a predatory pricing strategy to drive out competitors and subsequently recoup its losses with higher prices once the competition is eliminated or disciplined. Notably, such a predatory pricing strategy was within the scope of the abuse of dominance provisions even before the 2023 amendments to the *Competition Act*.

Also, in some contexts, issues of exclusionary or disciplinary intent might arise where a vertically integrated dominant firm supplies competitors in a downstream market with an important or essential input in that market. Competitors may not be able to compete effectively in the downstream market if the cost of the input exceeds certain levels. Again, such conduct could have constituted an anti-competitive act before the 2023 amendments. The definition of an "anti-competitive act" already expressly included "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".

Adverse Effect on Competition. Arguably, high prices in themselves should not be viewed as an adverse effect *on competition*. Rather, it seems more consistent with the purposes of the *Competition Act* that some effect on the *process of competition* is required.[35] The FTC describes the longstanding basic objective of antitrust laws as protecting the process of competition for the benefit of consumers.[36] However, apart from the aforementioned predatory, exclusionary and disciplinary effects, it is not clear how a dominant firm's high prices may be found to have an adverse effect on competition under the new excessive and unfair pricing provision.

In a 2018 submission, the Competition Bureau characterized excessive pricing as a market outcome rather than conduct that hinders the competitive process:

> The *Competition Act* does not contain a prohibition against excessive pricing. Consequently, the Bureau's advocacy and enforcement work focuses on protecting the competitive process rather than enforcing a particular market outcome. In other words, the Bureau's work targets the disease (lack of competition) rather than the symptom (excessive prices). This approach ensures that the Bureau is not required to engage in price regulation, which is at odds with traditional Canadian competition law principles.[37]

The distinction between price regulation and protecting the competitive process also arose during the limited Parliamentary hearings on Bill C-56. In response to a Senator noting concerns that the excessive and unfair pricing amendment would require the Competition Bureau to enforce price controls, the federal Minister of Innovation, Science and Industry stated that: "There is no place for price regulation in the [Competition Act]. …This amendment was made because it is one element

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[35] Section 1.1 of the *Competition Act, supra* note 31 provides that "The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices."

[36] Federal Trade Comm'n, *Guide to Antitrust Laws*, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws.

[37] Competition Bureau, *Competition Bureau Submission to the OECD on Excessive Pricing in Pharmaceuticals*, Government of Canada (November 5, 2018), https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/promotion-and-advocacy/regulatory-adviceinterventions-competition-bureau/competition-bureau-submission-oecd-excessive-pricing-pharmaceuticals.

that could be considered."[38] In the same hearing, the Commissioner of Competition described the new excessive and unfair pricing provision as "very circumscribed" by the requisite intent and added that the provision "is not going to make the Competition Bureau price regulators."[39]

The scope of an "adverse effect on competition" may therefore emerge as a critical and appropriate limitation on the Canadian excessive and unfair pricing provision, effectively limiting the provision to exclusionary conduct that is also within the scope of other examples in the definition of an "anti-competitive act" that were present before Bill C-56. The amendment can be seen as a clarification rather than an expansion of the concept of an anti-competitive act. Notably, a former Senior Economic Counsel with the U.S. Department of Justice has forcefully argued that, having regard to the purpose and history of the equivalent provisions in the EU, those provisions should also be interpreted to prohibit only conduct that harms competition, as distinct from sanctioning conduct solely because it is considered to be "exploitative."[40] Similarly, one of the current members of the Competition Tribunal asserted, before joining the Tribunal, that pursuing purely exploitative conduct under abuse of dominance provisions is inconsistent with the paramount objectives of competition policy, noting that it is not consistent with either the goal of maximizing consumer surplus or the goal of maximizing total surplus.[41]

[P]rohibitions on pricing above certain levels, let alone ill-defined levels, may risk hindering the competitive process.

Indeed, prohibitions on pricing above certain levels, let alone ill-defined levels, may risk hindering the competitive process. Interpreting and applying the new anti-competitive act of imposing excessive and unfair pricing in a way that has an adverse effect on competition by discouraging entry or investment would be contrary to the purposes of the *Competition Act* and Parliament's intention in adding the imposition of excessive and unfair pricing to the definition of an anti-competitive act. It therefore seems reasonable to expect that the Competition Tribunal will not interpret or apply the new provision in an overly expansive way that is likely to dampen competition overall.

Subjective Intent and Reasonably Foreseeable Effects. Since 2022, the definition of an "anti-competitive act" has specifically required that it be "intended" to have a specified effect. The prior legislation simply provided a non-exhaustive list of anti-competitive acts. Courts had interpreted the concept of an anti-competitive act as conduct engaged in for an anti-competitive purpose, which generally involved a predatory, exclusionary or disciplinary effect on a competitor. The purpose of challenged conduct could be established by either direct evidence of subjective intention or consideration of the reasonably foreseeable objective effects of the conduct. Where conduct had both anti-competitive and pro-competitive motivations, courts would weigh the motivations and assess the overall character of the conduct.[42] It remains to be seen how courts will approach the revised definition of an anti-competitive act, particularly in the context of whether

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[38] Canada, *Senate Debates*, Sen. of Can., 44th Parliament, vol. 153, no 171, Dec. 13, 2023, 5258.

[39] Senate of Can., Standing Senate Comm. on Nat'l Fin.: Evidence, at 88:27 (December 13, 2023), https://sencanada.ca/en/Content/Sen/Committee/441/NFFN/88EV-56553-E. The Competition Bureau's guide to the December 2023 amendments similarly comments with regard to the excessive pricing amendment that: "Importantly, such a practice must be intended to have a predatory, exclusionary or disciplinary negative effect on a competitor, or to have an adverse effect on competition." Competition Bureau, *Guide to the December 2023 amendments to the* Competition Act, GOVERNMENT OF CANADA (December 18, 2023), https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/guide-december-2023-amendments-competition-act.

[40] Gregory J. Werden, *Exploitative Abuse of a Dominant Position: A Bad Idea That Now Should Be Abandoned* 17 Eur. Competition J. 682-713 (2021), https://www.tandfonline.com/doi/full/10.1080/17441056.2021.1930451.

[41] Paul Crampton, *Abuse of Dominance and Exploitative Conduct—Lessons from the Canadian Experience*, Annual Proceedings of the Fordham Competition Law Institute; International Antitrust Law & Policy: Fordham Competition Law 2008 525, 544 - 547 (Barry E. Hawk ed., Juris Publ'g 2009).

[42] *Vancouver Airport Authority*, 2019 Comp Trib 6 (Can.), ¶ 514 - 520.

objectively foreseeable effects are sufficient to establish "intent." In any event, to the extent that a dominant firm has legitimate business justifications for imposing a particular price, they would likely also be relevant in assessing whether the price is "excessive" or "unfair," even if they are not sufficient to avoid a characterization of the conduct as having an intended adverse effect on competition.

Assessing Whether a Price is "Excessive" and "Unfair"

To constitute an anti-competitive act, a price must be both excessive and unfair. Each of these concepts, and the requisite degree of magnitude, is discussed below.

Excessive Price. Only "excessive" prices may provide grounds for an order under the *Competition Act*'s new provision. Determining whether a price is excessive requires (i) confirming the price that is being or has been imposed, (ii) establishing an appropriate benchmark against which that price is to be measured, and (iii) determining whether the difference between the actual price and the benchmark is excessive.

There is no international consensus on an appropriate approach to assessing whether a price is excessive, nor do the EU cases adopt a consistent approach. Benchmarks used by competition authorities to assess whether prices are excessive have included both (i) price-cost comparisons and profitability analyses, and (ii) price comparisons across geographies, time and/or competitors. The EU and other jurisdictions typically adopt a case-by-case approach rather than generally applicable criteria.

While some mark-up over costs should be permissible to incentivize investment and innovation, courts and regulators have identified numerous challenges in assessing costs and profitability, including determining what costs should be included and appropriate time frames to recognize expenditures. Allocating costs in a two-sided market or for a multiproduct firm that is dominant in only some of its product markets may be particularly challenging, as are cost allocations for multinational entities with transfer pricing arrangements. Riskier products with less certain demand or prospects of successful entry may also require higher levels of anticipated profit to induce entry or investment. In a market or industry (e.g., music recording) in which relatively few product launches are successful, relatively high returns on the few successful launches may be needed to sustain a firm or induce market participation generally.[43] On the other hand, it has been suggested that, in some cases, a price could be considered excessive even where it is close to or even below cost if the dominant firm is inefficient because of a lack of competition and has higher costs than would be expected in a competitive market.[44]

While some EU courts have found excessive pricing based on comparisons to pricing by the dominant firm or by other firms in different geographic markets,[45] an OECD report observed that, in comparing prices that two firms charge, or that the same firm charges in separate markets, it will not always be obvious whether higher prices in one market can be attributed to the exercise of

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[43] David Evans & Jorge Padilla, *Excessive Prices: Using Economics to Define Administrable Legal Rules*, 1 J. Comp. L. & Econ. 97, 114—115 (2005).

[44] Gal, *supra* note 3 at 386, 400; *see also* Case 242/88, Lucazeau v. SACEM [1989] ECR 281, ¶ 29 (the European Court of Justice stating that if a dominant firm's costs are higher than the costs borne by firms providing the same service elsewhere, prices might be excessive, even if profits are not).

[45] Case 27/76 United Brands Co. v. Commission of the European Communities, 1978 E. Comm. Ct. J. Rep. 207, 21 Comm. Mkt. L.R. 429 (1978).

market power by a firm, or whether they might be caused by other factors such as higher costs or different regulatory regimes.[46]

In some cases, a competition authority or private plaintiff has focused on a dominant firm's price increase or decrease prompted by a change in corporate strategy, a sale of the relevant product or business, or an external event such as entry of a new competitor, arguing that the lower price is an appropriate benchmark and the higher price is excessive. For example, the UK Competition and Markets Authority (CMA) successfully prosecuted Pfizer and a distributor for excessive pricing after the price of a Pfizer phenytoin sodium anti-epileptic drug increased more than 2000 percent immediately after Pfizer changed its distribution model by de-branding the drug and selling certain marketing rights to the distributor.[47] Conversely, Tnuva, the leading supplier of cottage cheese in Israel, was sued in a class action for alleged excessive pricing after it quickly dropped the price of cottage cheese by approximately 24 percent in response to a consumer boycott organized through social media demanding a price reduction.[48] Cases involving a very large price increase might be supported by a cost-based analysis, absent a significant increase in costs contemporaneously with the price increase. However, basing an excessive price determination solely on a price *decrease* risks creating disincentives for a dominant firm to adopt a new lower price strategy, which would be at odds with the purposes of the *Competition Act*.[49]

Presumably, a price's fairness is to be assessed in light of the interests of both the purchaser and the supplier . . .

Unfair Price. Presumably, a price's fairness is to be assessed in light of the interests of both the purchaser and the supplier, including the need for a supplier to recover its costs and investments, and any other legitimate reasons for imposing a particular price. It may also be appropriate for "fairness" to take into account the supplier's commercial risk and the objective of encouraging innovation in the Canadian economy.

In some cases, the European Commission has taken into account the economic value of the relevant product to customers, such that it may not be unfair for a dominant firm to charge more than its competitors for a product that has relatively greater value to customers, even if the firm's profit margin is high.[50]

In addition, in Canada, excessive and unfair pricing is an anti-competitive act only if it is "imposed." Accordingly, prices resulting from negotiations with a purchaser that has significant countervailing purchasing power might not constitute anti-competitive acts on that basis.

Requisite Magnitude. In some European proceedings, prices about 25 to 50 percent above a benchmark level of costs, competitive price, or economic value were found to be excessive,[51] although in some other cases prices found to be excessive were thousands of percent above a relevant benchmark.[52]

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[46] Jenny, *supra* note 4, at 49; OECD Policy Roundtables, Evidentiary Issues in Proving Dominance 42, DAF/COMP(2006)35 (October 9, 2008), https://one.oecd.org/document/DAF/COMP(2006)35/en/pdf.

[47] Bon & Walker, *supra* note 6, at 212-215.

[48] Spiegel, *supra* note 7 at 132-133.

[49] Ariel Ezrachi & David Gilo, *Excessive Pricing, Entry, Assessment, and Investment: Lessons from the* Mittal *Litigation* 76 Antitrust L.J. 873, 891 (2010).

[50] Gal, *supra* note 3, at 405; Case COMP/A.36.568/D3 Scandlines Sverige AB v Port of Helsingborg [2006] 4 CMLR 22 (Scandlines); Case COMP/A.36.570/D3 Sundbusserne v Port of Helsingborg [2006] 4 CMLR 23 (Sundbusserne).

[51] David Gilo, *A Coherent Approach to the Antitrust Prohibition of Excessive Pricing by Dominant Firms*, *in* Excessive Pricing and Competition Law Enforcement 99,120 (Yannis Katsoulacos & Frederic Jenny eds., 2018).

[52] Bon & Walker, *supra*, n. 6, at 217- 219 and 222—223. The authors discuss excessive pricing cases initiated by the UK's Competition and Markets Authority involving prices of certain drugs found in one case to be up to over 2,000 percent above cost and in another case to be as much as over 6,000 percent above cost.

Some commentators have noted that the concepts of "excessive" and "unfair" price lack a sound economic basis.[53] The requisite magnitude above a benchmark to constitute an "excessive" price therefore requires a value judgement and a policy choice, and not just a formulaic quantification. A wide range of factors and considerations could therefore be relevant in a particular case to assess the requisite degree above a benchmark, or whether any particular degree of excessiveness is unfair. For example, it may be relatively less likely that prices for discretionary or luxury products would be considered either "excessive" or "unfair," in contrast to prices for essential products and services.

Regulated Conduct and Exercise of Statutory Intellectual Property Rights

In certain contexts, Canadian courts have held that conduct authorized or directed pursuant to valid federal or provincial legislation is outside the scope of prohibitions in the *Competition Act*.[54] The "regulated conduct" defense has been developed principally in relation to criminal offences such as price fixing by competitors. Its application to reviewable conduct such as abuse of dominance is less settled. That said, to the extent that pricing is authorized, directed or subject to regulatory oversight by a government entity with a public interest mandate, it may be challenging for the Commissioner of Competition or a private applicant to establish that such pricing is "unfair" for the purposes of the abuse of dominance provisions. For example, Canada's Patented Medicine Review Board is tasked with reviewing the prices of patented medicines sold in Canada to ensure that they are not excessive.

In addition, section 79(5) of the *Competition Act*, which pre-dates the December 2023 amendments, states that "an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under" the federal *Copyright Act*, *Patent Act*, *Trademarks Act* and any other federal legislation "pertaining to intellectual or industrial property" is not an anti-competitive act. This section might, for example, be held to protect a patent holder's pricing of its patented product from challenge as an anti-competitive act under the new excessive and unfair pricing provision.

Considerations for Potential Competition Tribunal Orders

Prohibition Orders. If the Commissioner of Competition or a private applicant establishes that a respondent has engaged in a practice of imposing excessive and unfair pricing, the Competition Tribunal may make an order prohibiting the person from imposing such pricing. To be enforceable, any such order would need to be clear enough for the respondent to reasonably determine whether its pricing complied with the order.[55] Further, while the Commissioner has stated that he does not want to be a price regulator,[56] it may be challenging for the Tribunal to craft an enforceable prohibition order that does not amount to price regulation by setting maximum price caps.

Particularly in dynamic markets, an order prohibiting pricing above a certain level would also present the ongoing possibility of changed market conditions that may provide grounds for variations of the order on the basis that the prohibited pricing has ceased to be excessive or unfair.[57]

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[53] Jenny, *supra* note 4, at 57.

[54] Competition Bureau, *"Regulated" Conduct*, Government of Canada (Sept. 27, 2010), https://competition-bureau.canada.ca/how-we-foster-competition/education-and-outreach/publications/regulated-conduct.

[55] Nadeau Ferme Avicole Ltee v. Groupe Westco Inc., 2010 Comp. Trib. 2 at ¶ 54, https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/463571/index.do ("The order must be clear…Ambiguity in an order should be resolved to the benefit of the alleged contemnor.").

[56] Standing Senate Committee, *supra* note 39.

[57] Competition Act, *supra* note 31, §106.

Orders to Restore Competition. If the Competition Tribunal finds that a practice of anti-competitive acts is likely to prevent or lessen competition substantially, but a prohibition of such conduct is "not likely to restore competition" in a relevant market, the Tribunal can also make an order directing respondents to "take actions, including the divestiture of assets or shares, that are reasonable and necessary to overcome the effects of the practice" in the market. However, if the anti-competitive acts were confined to the imposition of excessive and unfair pricing, it is unclear what type of further order could "restore competition," which presumably refers to restoring the competitive process.

If excessive and unfair pricing were part of a broader practice of anti-competitive acts that had exclusionary effects on upstream or downstream competitors, the Commissioner or a private applicant might conceivably seek divestiture of one of the entities in a vertical distribution chain. For example, the DOJ and a number of states are seeking an order requiring Live Nation to divest Ticketmaster to cure alleged anti-competitive harm arising from, among other things, the alleged tying of Ticketmaster's primary ticketing services to Live Nation's concert booking and promotion services.[58] As noted above, however, exclusionary conduct by a dominant firm in a vertical distribution context could have been challenged under the abuse of dominance provisions before the concept of imposing excessive and unfair selling prices was added to the *Competition Act*'s list of anti-competitive acts.

Monetary Penalties and Payments. If the imposition of excessive and unfair pricing is likely to prevent or lessen competition substantially in a market, then the Tribunal may also impose significant monetary penalties.[59] Successful prosecutions of excessive pricing in Europe have sometimes resulted in fines.[60] Amendments to the *Competition Act* that come into effect on June 20, 2025 will similarly allow the Tribunal to order a respondent to pay a private applicant and others affected by the conduct an amount up to the value of the benefit derived from the challenged pricing.

[E]ven where the elements of an abuse of dominance have been established, the Tribunal retains the discretion not to issue an order.

However, some UK competition agency representatives have recommended that neither fines nor private damage awards be imposed for excessive pricing because of the risk of over deterrence.[61] This is a factor that Canada's Competition Tribunal could take into account in setting the quantum of any fine or disgorgement payment for excessive and unfair pricing.

Tribunal Discretion. Importantly, even where the elements of an abuse of dominance have been established, the Tribunal retains the discretion not to issue an order. For example, if it is established that a dominant firm has engaged in excessive and unfair pricing, but not that the pricing is likely to prevent or lessen competition substantially, it is conceivable that, in a particular case, the Tribunal could conclude that the issuance of a pricing prohibition order would be

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[58] United States v. Live Nation Entertainment, Inc. and Ticketmaster L.L.C., 1:24-cv-03973, Complaint (S.D.N.Y. 2024).

[59] The Tribunal could issue a monetary penalty of up to the greater of (i) $25 million ($35 million for subsequent orders) and (ii) three times the benefit derived from the anti-competitive practice, or if that amount cannot be reasonably determined, 3 percent of the respondent's annual worldwide gross revenues.

[60] For example, the UK's Competition and Markets Authority (CMA) held that Pfizer charged an excessive price for phenytoin sodium capsules (a drug used to treat epilepsy) and imposed a £63 million fine on Pfizer and a £6.7 million fine on its distributor, Flynn: Competition and Markets Authority, *Press Release: £70 Million in fines for pharma firms that overcharged NHS*, Government of the United Kingdom (July 21, 2022), https://www.gov.uk/government/news/70-million-in-fines-for-pharma-firms-that-overcharged-nhs

[61] Fletcher & Jardine, *supra* note 5, at 12.

ineffective in achieving a result intended by Parliament, or would even be anti-competitive, and refrain from issuing a prohibition order on that basis.[62]

Takeaways

In light of the language of the *Competition Act*, it seems clear and sensible that, to be subject to an order under the abuse of dominance provisions for a practice of imposing excessive and unfair pricing, a dominant firm's high price must be intended to or have the likely effect of either (i) a predatory, exclusionary or disciplinary effect on a competitor or (ii) an adverse effect on *the process of* competition. For practical purposes, the application of the new excessive and unfair pricing provision may be limited to predatory, exclusionary or disciplinary contexts, such as where a vertically integrated dominant firm charges excessive and unfair prices for an important input to its downstream competitors. It is not obvious how imposing excessive and unfair selling prices could otherwise negatively impact the process of competition.

Even where grounds exist to challenge excessive and unfair prices, prohibition orders may be ineffective or unenforceable and require extensive ongoing monitoring and revision. Other potential remedies, including fines and disgorgement payments, carry significant risks of dampening innovation and the competitive process. In light of these challenges, a more fulsome evaluation of the provision and its potential unintended consequences than was permitted in its expedited addition to the December 2023 amendments to the *Competition Act* may be warranted.

In the meantime, and pending clarification from the courts, firms carrying on business in Canada that may be viewed as dominant in a market are faced with unclear concepts of excessive and unfair pricing that make it challenging to establish generally applicable guidelines to ensure compliance. That said, such firms may be well advised to document their business rationales and justifications for price increases outside of day-to-day responses to market conditions. ●

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[62] *See, e.g.,* Canada (Director of Investigation and Research) v. Hillsdown Holdings (Canada) Ltd. (1992), 41 C.P.R. (3d) 289, 91-92 (Comp. Trib.), https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/465017/index.do?q=+Canada+%28Director+of+Investigation+and+Research%29+v.+Hillsdown+Holdings+%28Canada%29+Ltd (stating that, even if the Competition Tribunal had found the challenged merger to provide grounds for an order under the merger provisions of the Competition Act, the Tribunal would have declined to order a divestiture because such an order would have been ineffective to restore competition in the circumstances).