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CT-2024-010

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34;

AND IN THE MATTER OF certain conduct of Google Canada Corporation and Google LLC relating to the supply of online advertising technology services in Canada;

AND IN THE MATTER OF an Application by the Commissioner of Competition for one or more orders pursuant to section 79 of the *Competition Act*.

B E T W E E N:

COMMISSIONER OF COMPETITION

Applicant

and

GOOGLE CANADA CORPORATION AND GOOGLE LLC

Respondents

REVISED SUPPLEMENTARY MOTION RECORD

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Exhibit 13 to the Cross-Examination of Professor Tadelis

Abuse of Dominance Enforcement Guidelines

Enforcement guidelines

March 7, 2019

> **Changes to the *Competition Act***
>
> Following recent changes to the *Competition Act*, the Competition Bureau is reviewing its guidelines and will update them to ensure clarity and transparency for Canadians.
>
> **For more information on the changes, please consult our guides:**
>
> - **Guide to the June 2024 amendments to the *Competition Act***
> - **Guide to the December 2023 amendments to the *Competition Act***
> - **Guide to the 2022 amendments to the *Competition Act***

Preface

The Competition Bureau (the "Bureau"), as an independent law enforcement agency, ensures that Canadian businesses and consumers prosper in a competitive and innovative marketplace. Headed by the Commissioner of Competition (the "Commissioner"), the Bureau investigates anti-competitive practices and promotes compliance with the laws under its jurisdiction, including the *Competition Act* (the "Act"). [1]

Competition among firms underpins a robust economy, incentivizing the creation of value and rewarding entrepreneurship and innovation. When firms compete on the merits, market forces generally deliver the most efficient and beneficial economic outcomes for society.

In some cases, however, dominant firms can frustrate this process by engaging in conduct that undermines competitive market forces, leading to inefficient outcomes. In these rare circumstances, the Bureau may rely upon the abuse of dominance (and other) provisions of the Act to address specific conduct and restore the competitive process.

These guidelines describe the Bureau's general approach to enforcing the abuse of dominance provisions (sections 78 and 79 of the Act). They supersede all previous guidelines and statements of the Commissioner or other Bureau officials regarding the administration and enforcement of the Act's abuse of dominance provisions.

The Abuse of Dominance Enforcement Guidelines do not replace the advice of legal counsel and are not intended to restate the law or to constitute a binding statement of how the Commissioner will proceed in specific matters. The decisions of the Commissioner and the ultimate resolution of issues will depend on the particular circumstances of the matter in question.

Throughout these guidelines, judicial decisions are referenced by abbreviations. Full citations may be found at the end of the document. Any reference to jurisprudence represents the Bureau's interpretation of the law.

Final interpretation of the law is the responsibility of the Competition Tribunal (the "Tribunal") and the courts.

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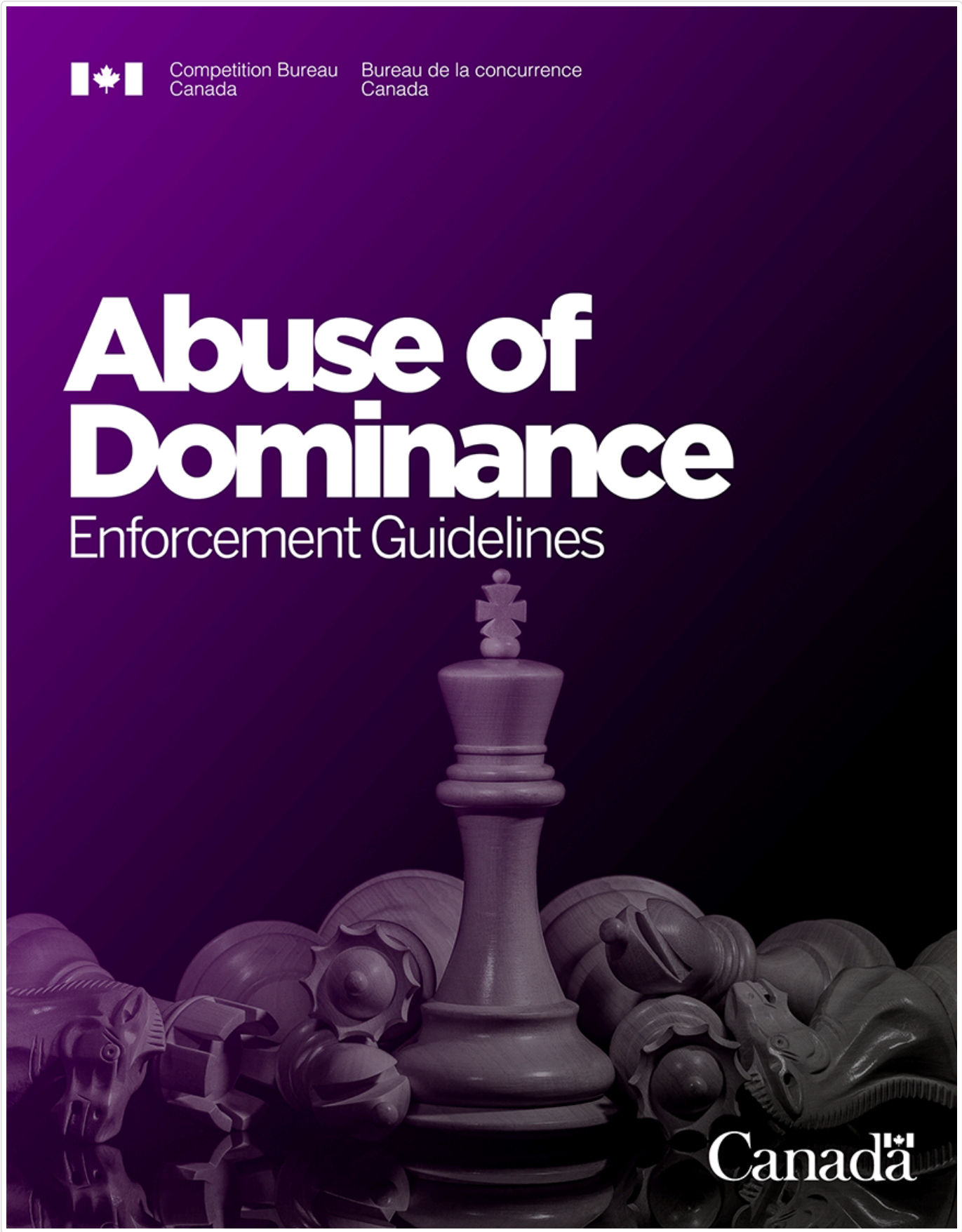

PDF (Portable Document Format); 1.52 MB (Megabyte); 62 pages

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Executive Summary

i. Abuse of a dominant position occurs when a dominant firm or a dominant group of firms engages in a practice of anti-competitive acts, with the result that competition has been, is, or is likely to be prevented or lessened substantially in a market. Simply being a dominant firm, or even a monopoly, does not in and of itself engage the abuse of dominance provisions of the Act.

ii. Three elements must be established to constitute an abuse of dominance under section 79 of the Act:

- one or more persons must substantially or completely control a class or species of business throughout Canada or any area thereof;
- that person or those persons must have engaged in (within the previous three years) or be engaging in a practice of anti-competitive acts; and
- the practice must have had, be having or be likely to have the effect of preventing or lessening competition substantially in a market.

iii. To evaluate the first element, dominance, the Bureau generally first defines a market(s), and then evaluates whether the allegedly dominant firm (or firms) substantially or completely controls that market, i.e., has a substantial degree of market power within that market. In this context, markets are defined in reference to both a product and geographic dimension, based on demand substitution in the absence of alleged anti-competitive conduct. The Bureau then considers evidence of the existence and magnitude of market power, such as market shares and barriers to entry.

iv. The second element considers the purpose of the impugned acts: whether the dominant firm (or firms) has engaged in a practice of conduct intended to have a

predatory, exclusionary or disciplinary negative effect on a competitor. Exclusionary acts may make current or potential competitors less effective, for example by increasing their costs. Predatory acts involve a firm deliberately setting the price of a product(s) below an appropriate measure of its own cost to eliminate, discipline, or deter entry or expansion of a competitor. Disciplinary acts involve actions intended to dissuade an actual or potential competitor from competing vigorously, or otherwise disrupting the status quo in a market.

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

vi. The final element involves an analysis of whether competition – on prices, quality, innovation, or any other dimension of competition [2] – would be substantially greater in a market in the absence of the anti-competitive conduct. This assessment is a relative one, comparing the level of competition in a market with and without the alleged anti-competitive conduct, rather than an assessment of whether the absolute level of competition in a market is sufficient. The Bureau considers effects on both static competition (e.g., short-run prices and output), as well as dynamic competition (e.g., rivalry driven by product or process innovation).

vii. On application to the Tribunal, the Bureau must establish each element of section 79 on the balance of probabilities. To this end, when evaluating conduct under section 79, the Bureau considers whether clear, convincing, and cogent evidence exists in support of each element. The Bureau evaluates the body of evidence on the whole, and may consider the same evidence in reference to more than one element. As a result, the Bureau's analysis of different elements is often interconnected.

viii. Where all three elements of section 79 are present, the Tribunal may prohibit the person (or persons) who engaged in the conduct from continuing to do so. In

addition, or alternatively, if the Tribunal concludes that a prohibition order is not likely to restore competition, it may make an order directing the person (or persons) who engaged in the conduct to take any action that is reasonable and necessary to overcome the anti-competitive effects of the practice, including the divestiture of assets or shares. Finally, if the Tribunal issues a remedial order, it may also order the respondent to pay an administrative monetary penalty of up to $10 million (or $15 million for each subsequent order) to promote practices by that person (or persons) that are in conformity with the purposes of section 79.

ix. When enforcing section 79, a significant consideration for the Bureau is to avoid chilling or deterring pro-competitive or efficiency-enhancing conduct. The Bureau recognizes that it is often challenging to distinguish anti-competitive conduct from aggressive competition on the merits, as in many cases the goal of aggressive competition is to marginalize rivals or eliminate them from a market. The Bureau recognizes that firms may acquire a dominant position by simply out-competing their rivals, for example, by offering higher quality products to consumers at a lower price. In these cases, sanctioning firms for simply being dominant would undermine incentives to innovate, outperform rivals and engage in vigorous competition. Such vigorous competition is the sort of competitive dynamic that the Act is designed to preserve and, where possible, enhance, as it ultimately leads to a more efficient allocation of resources.

x. In considering enforcement action under section 79 of the Act, the Bureau carefully evaluates allegations of abuse of dominance on a case-by-case basis, in the context of structural and other market-specific characteristics. In the course of an examination or inquiry, the Bureau will typically afford parties the opportunity to respond to the Bureau's concerns regarding alleged contraventions of section 79 and discuss an appropriate resolution to address them.

1. Dominance

1. Paragraph 79(1)(a) of the Act requires an assessment of whether "one or more persons substantially or completely control, throughout Canada or any area

thereof, a class or species of business." In other words, this first element of the Act's abuse of dominance provision requires a finding of "dominance".

2. Four factors are relevant to assessing dominance:
   i. a "class or species of business" – generally, a product market;
   ii. "in Canada or any area thereof" – generally, a geographic market;
   iii. "control" – a substantial degree of market power; and
   iv. "one or more persons" – joint dominance. [3]
3. Market definition in abuse of dominance cases is an analytical tool that may assist with the determination of whether a firm is dominant. [4] The Tribunal has recognized that often it is neither possible nor necessary to precisely define a market (or markets) in proceedings under section 79. [5] In some cases, it may be clear that a firm is dominant under all plausible market definitions.
4. While the following discussion contemplates defining markets in the context of selling goods or services, a similar exercise can be conducted when defining input markets from the perspective of a dominant buyer.

A. "Class or Species of Business": Product Market

5. For the purposes of paragraph 79(1)(a), the Tribunal has held that a "class or species of business" is synonymous with a product market(s). [6]
6. Defining product markets usually begins by examining the product in respect of which the alleged abuse of dominance has occurred or is occurring, and determining whether close substitutes exist for that product, focusing on demand responses. [7]
7. The "hypothetical monopolist test" provides a useful framework to conceptualize substitutability between products – an analytical framework the Tribunal has recognized can be helpful in cases under section 79. [8] The Bureau considers whether a profit-maximizing hypothetical monopolist would impose and sustain a small but significant and non-transitory price increase for a candidate set of products above a given benchmark. In general, the smallest set of products in which the price increase would be sustained, including the product in respect of

which the alleged abuse of dominance has occurred or is occurring, is defined as the product market.

8. Typically, the initial candidate market considered is a product in respect of which the alleged abuse of dominance has occurred or is occurring and its closest substitute. If a hypothetical monopolist could not impose a small but significant and non-transitory price increase above the benchmark, assuming the terms of sale of all other products remained constant, the candidate market is expanded to include the next-best substitute (which could include the products of other firms). The analysis is repeated until the point at which the hypothetical monopolist would profitably impose and sustain such a price increase over the candidate market.

9. For purposes of the hypothetical monopolist test, the Bureau generally considers a 5 percent price increase above the price level that would prevail absent the alleged anti-competitive act(s) to be significant and a one-year period to be non-transitory. Market characteristics may support using a different price increase or time period.

10. It is important to note that, in the context of abuse of dominance cases, the current price may not be the appropriate benchmark to use when defining the market, as some products that appear to be good substitutes at that price level might not be considered substitutes at price levels that would have prevailed in the absence of the alleged anti-competitive act(s). [9] Inclusion of these products could lead to an overly broad product market definition because these products do not discipline the market power of the dominant firm, but rather are only considered substitutes for products in the market at price levels where market power has already been exercised.

11. Direct evidence of buyer switching (i.e., changes in quantities purchased) in response to relative price changes can demonstrate substitutability for the purposes of market definition. [10] However, in practice, such direct evidence may be difficult to obtain.

12. For the above reasons, market definition for the purposes of section 79 will often focus on indicators of substitutability. Such indicators include:

Views, strategies, behaviours and identity of buyers:

Whether buyers have substituted between products in the past, and whether they plan to do so in the future, can indicate whether a price increase in a candidate market is sustainable. Industry surveys, industry participants and industry experts may also provide helpful information with respect to products that may be substitutable. Documents prepared by the firm in question in the ordinary course of business may also prove useful in this regard.

End-use and physical characteristics:

Functional interchangeability between two products is generally a necessary, but not sufficient, condition to warrant inclusion in the same market. In general, as buyers place greater value on the actual or perceived unique physical or technical characteristics of a product, the more likely it is that the product will fall within a distinct market.

Switching costs:

Transaction costs that buyers would have to incur to, among other things, retool, repackage, adapt their marketing, breach a supply contract or learn new procedures may render product substitution an unlikely response to a small but significant and non-transitory price increase.

Price relationships and relative price levels:

The presence of a strong correlation in price movement between two or more products over a significant period of time may suggest that the products fall within the same market.

13. The Bureau may consider it appropriate to define markets in reference to particular types of purchasers in certain circumstances, such as where sellers engage in price discrimination between different sets of buyers. For example, the Bureau may define two separate markets if a seller is able to effectively price discriminate between commercial customers and individual consumers. Similarly, the Bureau may define markets in reference to a particular level of a supply chain: for example, when assessing if a manufacturer is dominant in an industry where manufacturers sell through retailers, the Bureau may define a market as sales to retailers.

14. In some cases the Bureau may consider it appropriate to analyse several different (or potentially different) product markets together for the purposes of market definition. This could occur when evidence indicates that there may be more than

one product market but that competitive conditions are sufficiently similar in each market such that analyzing them together does not affect the assessment of dominance. Where appropriate, the Bureau may analyse several geographic markets (discussed below) together in the same manner.

15. The Bureau may define a market as a group of diverse products that are not themselves substitutes for each other in cases where a sole, profit maximizing seller would increase the price of the group of the products because a sufficient number of buyers would not respond to the price increase by purchasing individual products from different sellers. This may occur, for example, where there are sufficiently large transaction costs associated with dealing with multiple sellers.

16. Special considerations arise when applying the hypothetical monopolist test to "multi-sided" platforms. For a multi-sided platform, demand for one "side" depends on use of another; one example would be an advertising service that matches buyers and sellers of a product, where greater buyer use increases the attractiveness to sellers, and greater seller use increases the attractiveness to buyers. Depending on the facts of a case, the Bureau may define a product market as one side of a multi-sided platform (i.e., consider the effects of a price increase on one side of the platform). However, when considering if a hypothetical monopolist would find it profit maximizing to impose that price increase, it may be necessary to account for the interdependence of demand, feedback effects, and changes in profit on all sides of the platform. [11] In other cases, the Bureau may view it appropriate to define a market to include multiple sides of the platform.

17. Additionally, challenges may arise in the application of the hypothetical monopolist test where services are offered at a zero-monetary price (for instance, where services are offered for free to attract users to a multi-sided platform that depends on advertisers for monetization). In such cases, firms may compete on dimensions other than monetary price, such as product quality. Although the Bureau may seek to analyze whether a hypothetical monopolist would find it profit maximizing to decrease a relevant non-price dimension of competition by a small but significant amount for a non-transitory period of time, this may not be

feasible in practise. As a result, the Bureau's analysis may focus on qualitative indicators of substitutability. This analysis will generally be similar to assessing substitutability based on qualitative indicators in other cases, as discussed above.

B. "Throughout Canada or any Area Thereof": Geographic Market

18. The Tribunal has held that the phrase "throughout Canada or any area thereof" is synonymous with a geographic market(s). [12]

19. A geographic market consists of all locations or supply points regarded as close substitutes by buyers. From a buyer perspective, a geographic market may include territory outside of Canada. Similar to product market definition, the Bureau will generally apply the hypothetical monopolist test to examine the dimensions of buyer switching, from suppliers in one location to suppliers in another, in response to a small but significant and non-transitory price increase. A geographic market will consist of all locations or supply points that would have to be included for such a price increase to be profitable. As with product market definition, the geographic parameters of the market may be overstated if they include areas that would not be included at the price level that would prevail absent the alleged anti-competitive act(s).

20. The Bureau may consider if the area in which the allegedly dominant firm operates constitutes a geographic market. However, the Bureau may ultimately define geographic markets more broadly or more narrowly. In the latter case, where an allegedly dominant firm operates in more than one geographic market, the Bureau will seek to assess if competitive conditions materially vary across those markets. If competitive conditions are similar in several geographic markets, the Bureau may consider them together for analytical purposes.

21. The Bureau will also consider indirect evidence of substitutability between locations or supply points when defining geographic markets, such as:

    Views, strategies, behaviours and identity of buyers:
    Considerations relating to convenience or the particular characteristics of the product (e.g., fragility, perishability) may influence a buyer's choice of supplier in the event of a price increase. The Bureau will examine past and potential future behaviour of buyers as new options are made available, through, for instance,

advances in technology, which may impact the geographic dimension of a buyer's purchases. Third parties who are familiar with the industry in question may provide information regarding past and potential future industry developments that helps to define the geographic market. The extent to which distant supply locations are taken into account in business plans, marketing strategies and other documentation of the firm in question and of other sellers may also be useful indicators of geographic market definition.

Switching costs:

Transaction costs that buyers would have to incur to adapt their business to obtain the product from another source may render substitution to sources of supply from other geographic areas an unlikely response to a small but significant and non-transitory price increase.

Transportation costs, price levels, and shipment patterns:

In general, where prices in a distant area have historically exceeded or been lower than prices in the candidate geographic market by more than transportation costs, this may indicate that the distant area constitutes a separate market, for reasons that go beyond transportation costs. Conversely, if significant shipments of the product from a distant area in response to a price increase are likely, this may suggest that the distant area falls within the geographic market. In either case, the Bureau will assess whether a small but significant and non-transitory price increase in the candidate geographic market would change any locational pricing differential to the point where purchases from distant sellers may be able to constrain a price increase.

22. While the principles above apply equally to domestic and international sources of competition, other considerations, such as tariffs, duties, quotas, regulatory impediments, government procurement policies, intellectual property laws, exchange rate fluctuations and international product standardization may be relevant when considering whether supply points located outside Canada should be included in the geographic market.

C. "Substantially or completely control": Market Power

23. The Tribunal has held that the phrase "substantially or completely control" contemplates a substantial degree of market power. [13] The Supreme Court of Canada has defined "market power" as "the ability to ‘profitably influence price, quality, variety, service, advertising, innovation or other dimensions of

competition'"; [14] the Tribunal has characterized a substantial degree of market power as one that "confers upon an entity considerable latitude to determine or influence price or non-price dimensions of competition in a market, including the terms upon which it or others carry on business in the market". [15] Market power may be reflected in an ability to restrict the output of other existing or potential market participants, and thereby profitably influence price (the "power to exclude"). [16]

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

25. Market power can be measured directly or indirectly. Direct indicators of market power, such as evidence of supra-competitive profitability or pricing, are not always conclusive or indeed possible to assess; practical difficulties can arise in defining the "competitive" price level and the appropriate measure of cost to which prices should be compared. [17]

26. In many cases the Bureau examines a number of indirect indicators, both qualitative and quantitative, in conducting its analysis of market power, such as structural characteristics of a market (including market shares and any barriers to entry), the extent of technological change, the effects of a practice of anti-competitive acts, and customer or supplier countervailing power. The Bureau's analytical approach to the assessment of these indicators is discussed in greater detail below.

27. A firm that does not compete in a market may nonetheless substantially or completely control that market. [18] When assessing if a firm holds a substantial degree of market power in a market in which it does not compete the power to exclude current or potential competitors will often be the focus of the Bureau's analysis. Conversely, indicators of market power such as market shares or supra-competitive profits may not be relevant in such circumstances, whereas they may

be central to assessing market power where the allegedly dominant firm does compete in the market.

28. In the context of paragraph 79(1)(a), the relevant level of market power includes not only a firm's pre-existing market power (i.e., any market power held by the firm notwithstanding any alleged anti-competitive conduct), but also market power derived from any alleged anti-competitive conduct. [19]

i. Market Shares and Barriers to Entry

29. Jurisprudence has often relied on a combination of high market shares and barriers to entry as evidence of market power. While there is no definitive numeric threshold, the Bureau is of the view that high market share is usually a necessary, but not sufficient, condition to establish the existence of a substantial degree of market power. [20]

30. All other things being equal, the larger the share of the market held by competitors, the less likely it is that the firm in question would be capable of exercising a substantial degree of market power. The ability of customers to switch to competitors if a firm attempts to increase price may be demonstrated by a large market presence of those competitors. In such cases, switching by a significant portion of a firm's customer base may be enough to render any increase in price unprofitable. However, the ability to switch may depend on various factors such as the speed and ease with which rival firms are able to accommodate increased demand for their products as the prices of rival suppliers increase, or any switching costs.

31. In addition to considering the market shares of current sellers of relevant products, the Bureau may also consider the shares of potential sellers that would participate in the market through a supply response if prices rose by a small but significant and non-transitory amount. In such a case, a firm could be considered a participant in the market if significant sunk investments are not required to enter, and it could rapidly and profitably divert existing sales or capacity to begin supplying the market in response to such a price increase. For those firms that would participate in the market through a supply response, market share

calculations will include only the output or capacity that would likely become available to the market without incurring significant investment.

32. Market shares can be measured in terms of revenues (dollar sales), demand units (unit sales), capacity (to produce or sell) or, in certain natural resource industries, reserves. If products in the market are homogeneous and firms are operating at capacity, relative market shares should be similar regardless of the unit of measurement. If firms have excess capacity, market shares based on capacity may best reflect their relative market position if they can easily increase supply in response to an increase in price. In the case of differentiated products, market shares based on dollar sales, demand units and/or capacity can lead to varying inferences with respect to firms' relative competitive positions, and shares based on revenues or demand units may be more probative in this regard. When calculating market shares, the Bureau will use the measurement that it considers best reflects the current and future competitive significance of competitors.

33. In contested abuse of dominance cases to date, market shares of those firms found to have abused their dominant position were very high, suggesting that, in those instances, customers were left with too few alternatives to discipline a price increase or other conduct by the firm that substantially lessened or prevented competition. [21]

34. In many cases, the Bureau uses market shares as an initial screening mechanism to assess allegations of abuse of dominance. The Bureau's general approach is as follows:

    - A market share below 50 percent will generally only prompt further examination if other evidence indicates the firm possesses a substantial degree of market power, or that it appears the firm is likely to realize the ability to exercise a substantial degree of market power through the alleged anti-competitive conduct within a reasonable period of time while that conduct is ongoing;
    - A market share of 50 percent or more will generally prompt further examination; and

- In the case of a group of firms alleged to be jointly dominant, a combined market share equal to or exceeding 65 percent will generally prompt further examination.

35. In circumstances where the Bureau has not reached a final conclusion regarding the boundaries of the market, several plausible market definitions may present themselves. Where at least one plausible market definition exists that indicates an allegedly dominant firm possesses a substantial degree of market power, the Bureau may investigate further.

36. The Bureau will also examine the durability of market shares in a particular market. If market shares have fluctuated significantly among competitors over time (for example, because firms regularly develop new technologies to "leapfrog" their competitors), a current high market share may be less indicative of a substantial degree of market power.

37. Market shares are not the only factor the Bureau considers, and where other evidence provides sufficient indication that a firm may be dominant regardless of a relatively low market share the Bureau may investigate further. [22] The types of evidence that may prompt the Bureau to investigate further include:

Direct evidence of market power:
Where available, evidence of supra-competitive pricing;

Significant Commercial Leverage:
Market or demand characteristics may provide the allegedly dominant firm sufficient commercial leverage over upstream or downstream firms such that it may exercise a substantial degree of market power, for example, through the ability to affect a supplier's dealings with other customers;

Effects of the Anti-Competitive Acts:
An ability to cause prices to be higher in the market than would exist in the absence of the firm's conduct may be evidence of the existence and or/magnitude of market power on the part of that firm; [23] and

Other evidence of influence:
where a firm has otherwise demonstrated "considerable latitude" [24] to determine or influence a relevant dimension of competition.

38. The Bureau anticipates that, all else equal, these types of evidence are less likely to exist if the market share of the potentially dominant firm is small. However, there may be circumstances where market shares do not factor into the Bureau's analysis, for instance, where a firm controls a market through the ability to exclude, as discussed below.

39. A high market share is not itself sufficient to establish a substantial degree of market power. A firm's attempt to exercise market power may be thwarted by expansion or entry of existing and/or potential competitors on a sufficient scale and scope if expansion and/or entry are expected to be profitable. As a result, the Bureau considers the extent to which barriers to entry or expansion may limit the ability of rivals to respond to any exercise of market power. Barriers to entry or expansion can take many forms, including:

    Sunk costs of entry or expansion:
    Costs are sunk when they cannot be recovered if the firm exits a market. Sunk costs may pose a barrier to entry or expansion where the anticipated rewards to entry or expansion are anticipated to be less than the associated sunk costs, or there is sufficient risk that this will be the case as to have a deterrent effect;

    Regulatory barriers:
    In addition to their relevance to geographic market definition, regulatory controls relating to entry, tariff and non-tariff barriers to international or domestic trade may impede entry or expansion by competitors;

    Economies of scale and scope:
    Economies of scale occur when the average cost of producing a product declines the more of a product is produced, whereas economies of scope occur where the average costs of producing a product decline with the production of other products. Instances where such economies can be barriers to entry or expansion include when economies of scale prevent viable entry on a small scale or require entry to be on a sufficiently large scale to depress market prices, or where economies of scope require that a viable entrant must begin production of various products at once;

    Market maturity:
    Where market demand is not expected to increase, entry or expansion may be more difficult as any additional business must be converted from incumbents, rather than growth in market demand. Similarly, it may be easier to enter a

market when it is young or growing, or less attractive to invest in assets that may be stranded due to decline in market demand;

Network effects:
Network effects occur when demand for a product depends on use of that product by others, and can be direct or indirect. Direct network effects occur when the demand for a product or service directly increases with more users, such as how the value of a communications network for an individual may increase with the number of other users of the network. In contrast, indirect network effects occur where greater use of a product or service by members of one group creates value for members of another group, potentially causing feedback effects. For example, in the case of a website that matches buyers and sellers of various products, the website becomes more valuable to buyers the more sellers use the website, and vice versa. All else equal a buyer may be indifferent to the number of other buyers that use the website, but if additional buyers attract additional sellers, a buyer indirectly benefits from greater use of the website by other buyers. Network effects may provide significant advantages to incumbent firms, making entry or expansion more difficult; and

Access to scarce or non-duplicable inputs:
An inability to access significant inputs that are required to be a viable competitor in a market may prevent entry or expansion.

40. The Bureau will examine the nature of any barriers to entry, including those created by the alleged practice of anti-competitive acts, [25] to assess whether entry would be timely, likely, and sufficient in scale and scope to make the exercise of a substantial degree of market power unsustainable. "Timely" means that entry will occur within a reasonable period of time; "likely" refers to the expectation that entry will occur; and "sufficient" means that entry would occur on a sufficient scale to prevent or deter firms from exercising a substantial degree of market power. When assessing if entry will satisfy these criteria, the Bureau will generally seek to determine if the threat of entry or expansion has an appreciable effect on the allegedly dominant firm's conduct.

ii. The Ability to Exclude

41. As noted above, the Tribunal has recognized that the ability to exclude – the ability to restrict the output of other actual or potential market participants, and

thereby profitably influence price – constitutes market power. [26] Where through the impugned conduct assessed under paragraphs 79(1)(b) and 79(1)(c) a firm has demonstrated its ability to exclude rivals, this provides evidence that it has market power. [27]

42. Assessing the existence and degree of market power through the ability to exclude is particularly relevant when a firm does not compete in a market in which the alleged anti-competitive effects are alleged to be occurring. A firm that does not compete in a particular market may nonetheless control it, for example, through control of a significant input to competitors in a market, or the ability to make rules that effectively control the business conduct of those competitors. [28] The Bureau does not view these two mechanisms as mutually exclusive: for example, a firm may leverage control of a significant input in order to impose and enforce rules that affect the business conduct of competitors in a market.

43. When assessing whether a firm controls a significant input in a market in which it does not compete (e.g., a downstream market), the Tribunal has indicated it is not necessary to define and establish dominance in an additional market defined around that input (e.g., an upstream market). [29] However, for the purposes of assessing if control of that input provides the ability to exclude, the Bureau will consider the extent to which substitutes exist to the input provided by the allegedly dominant firm, as well as the extent to which that input is necessary to compete. In the absence of acceptable substitutes, and if competitors in the market are unable to effectively compete without access to the input, the Bureau will conclude the allegedly dominant firm has a substantial degree of market power in that market (in the examples above, in the downstream market).

44. When assessing if a firm has the ability to impose rules that govern the conduct of competitors, the Bureau may consider the extent to which any rules are adhered to, or could be enforced by the allegedly dominant firm. If such rules are not adhered to or enforced, the Bureau is not likely to conclude the allegedly dominant firm has a substantial degree of market power on that basis.

iii. Other Factors

45. The Bureau may examine other potentially relevant indicators when assessing the existence and/or magnitude of market power, including:

    Countervailing power:
    A customer or supplier may have the ability and incentive to constrain a firm's attempt to exercise a substantial degree of market power, such as by vertically integrating its own operations; refusing to buy or sell other products or in other geographic markets from the firm; or encouraging expansion or entry of existing or potential competitors; and

    Technological change and innovation:
    Evidence of a rapid pace of technological change and the prospect of firms being able to "innovate around" or "leapfrog" an apparently entrenched position of an incumbent firm could be an important consideration, along with change and innovation in relation to distribution, service, sales, marketing, packaging, buyer tastes, purchase patterns, firm structure and the regulatory environment.

D. "One or more persons": Joint Dominance

46. Section 79 contemplates that a group of firms may jointly substantially or completely control a market, satisfying paragraph 79(1)(a). The Bureau's analytical framework for assessing joint dominance is similar to that employed in examining single-firm dominance, and likewise focusses on the existence of a substantial degree of market power. Similar to single-firm dominance, the Bureau considers the ability of a firm or firms to exercise a substantial degree of market power, taking into account market shares, barriers to entry and expansion and any other relevant factors. However, in the case of joint dominance, this exercise also requires an assessment of whether those firms that are alleged to be engaged in a practice of anti-competitive acts jointly control a class or species of business such that they hold a substantial degree of market power together.

47. As with single-firm dominance, the Bureau will assess the extent to which competition from existing rivals and from potential rivals (i.e., entrants) outside the allegedly jointly dominant group is likely to defeat the profitability of a price increase by the firms that are alleged to be jointly dominant. If these two sources of competition are not likely to constrain a price increase, the Bureau will then consider the nature of competition within the allegedly jointly dominant group.

48. In the absence of a sufficient competitive constraint from outside an allegedly jointly dominant group, if competition among group members is also insufficient to constrain prices to the competitive level, members of that group will be able to jointly exercise a substantial degree of market power. As a result, when assessing joint dominance, the Bureau may accord significant weight to how vigorously the allegedly jointly dominant firms compete with each other. [30] In the absence of vigorous competition the Bureau may conclude that the lack of mutual competitive constraint permits them to exercise a substantial degree of market power.

49. Similar or parallel conduct by firms is insufficient, on its own, for the Bureau to consider those firms to hold a jointly dominant position. Further, evidence of coordinated behaviour by firms in the allegedly jointly dominant group may be probative insofar as it may explain why members of the allegedly dominant group are not vigorously competing. However, the Bureau does not consider such evidence as necessary to establish that a group is jointly dominant, if there is other evidence that competition among members of the allegedly dominant group is not sufficient to discipline their exercise of a substantial degree of market power.

50. As with single-firm dominance, the ability to exercise a substantial degree of market power on a collective basis is not in and of itself sufficient to raise an issue under the abuse provisions of the Act. While a group of firms may collectively be able to exercise a substantial degree of market power, it is still necessary to establish that these firms' conduct constitutes a practice of anti-competitive acts that is preventing or lessening competition substantially. It may, however, be the case that a practice of anti-competitive acts facilitates joint dominance. For example, joint dominance may be enabled or reinforced through disciplinary conduct, as discussed below.

2. Anti-competitive Acts

51. Paragraph 79(1)(b) requires that a firm or firms "have engaged in or are engaging in a practice of anti-competitive acts". This element consists of two factors, the Bureau's approach to which is discussed below:

i. a "practice"; and

ii. anti-competitive acts.

A. A "Practice"

52. While a "practice" normally involves more than one isolated act, the Bureau considers that this element may be satisfied by a single act that is sustained and systemic, or that has had or is having a lasting impact in a market. [31] For example, a long-term exclusionary contract may effectively prevent the entry or expansion of competitors despite the fact that the contract itself could be viewed as a single act.

B. Anti-competitive Acts

53. Section 78 of the Act enumerates a non-exhaustive list of acts that are deemed to be anti-competitive in applying section 79. [32] An anti-competitive act is defined by reference to its purpose, and the requisite anti-competitive purpose is an intended negative effect on a competitor that is predatory, exclusionary, or disciplinary. [33] 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 a predatory, exclusionary, disciplinary, or some other anti-competitive purpose. [34] On the latter, by way of example, conduct aimed at undermining the competitive process and the vigour with which other firms may compete may be considered as having the requisite anti-competitive purpose.

54. When assessing whether an act is anti-competitive, the purpose of an act may be established directly by evidence of subjective intent, inferred from the reasonably foreseeable consequences of the conduct, or both. Although verbal or written statements of a firm's personnel may assist in establishing subjective intent, evidence of subjective intent is neither strictly necessary nor completely determinative. [35] In most cases, the purpose of the act can be inferred from the circumstances, and persons are assumed to intend the reasonably foreseeable consequences of their acts. [36]

55. In some cases, when evaluating the overall character of a practice, evidence that the conduct was motivated by a legitimate business justification can outweigh evidence of anti-competitive purpose when the two are balanced against each other. The role of business justifications in evaluating the purpose of conduct is discussed further below.

56. For the purposes of paragraph 79(1)(b), a competitor is a person who competes in a market, and need not be a competitor of the allegedly dominant firm. [37] Thus, a firm that does not compete in a market may nonetheless engage in a practice of anti-competitive acts directed toward competitors in that market.

57. Where a firm that does not compete in a market is alleged to have engaged in a practice of anti-competitive acts, the Tribunal has indicated that it must be satisfied that the firm has a "plausible competitive interest" in adversely impacting competition in that market. [38] As noted above, the Federal Court of Appeal has characterized anti-competitive acts as those that have an intended negative effect on a competitor that is predatory, exclusionary, or disciplinary. Although the Bureau will typically consider the incentives of a dominant firm to limit competition, the Bureau may conclude that a firm that does not compete in a market has engaged in a practice of anti-competitive acts where an exclusionary, predatory, disciplinary, or other anti-competitive purpose can be demonstrated.

58. In assessing whether a particular act is likely to be anti-competitive, the Bureau is of the view that anti-competitive conduct generally falls into three broad categories:

    i. predatory conduct;

    ii. exclusionary conduct; and

    iii. disciplinary conduct.

i. Predatory Conduct

59. Predatory conduct involves a firm deliberately setting the price of a product(s) below an appropriate measure of its own cost to incur losses on the sale of product(s) in the market(s) for a period of time sufficient to eliminate, discipline,

or deter entry or expansion of a competitor, in the expectation that the firm will thereafter recoup its losses by charging higher prices than would have prevailed in the absence of the impugned conduct. [39] Predatory pricing may be implicit (through discounts or rebates, for example), or explicit.

60. The Bureau considers that average avoidable cost is the most appropriate cost standard to use when determining if a dominant firm's prices are below cost. [40] Avoidable costs refer to all costs that could have been avoided by a firm had it chosen not to sell the product(s) in question. Whether a cost is avoidable depends in part on the duration of the alleged predation as, in general, more costs become avoidable over time. Where the firm's pricing of the product(s) does not cover its own average avoidable costs, the Bureau will consider the pricing to be predatory in the absence of evidence that the overriding purpose of the conduct was in furtherance of a credible efficiency or pro-competitive rationale. For example, it may be reasonable for a firm to sell excess, obsolete or perishable products at below-cost prices. Similarly, companies may use below-cost promotional pricing to induce customers to try a new product.

61. There are difficulties inherent in applying a price-cost test to identify predatory pricing, all other things being equal. The Bureau generally uses various "screens" prior to conducting an avoidable cost analysis. Specifically, the Bureau will examine whether the alleged predatory price can be matched by competitors without incurring losses (suggesting that discipline or exclusion, and subsequent recoupment, is unlikely to occur), as well as whether the alleged predatory price is in fact merely meeting competition by reacting to match a competitor's price.

ii. Exclusionary Conduct

62. In general, the Bureau is not concerned with conduct that forces competitors to be more effective, but rather with conduct that makes it more difficult for competitors to be effective. Vigorous competition on the merits (e.g., offering superior services at a lower price) may force competitors to be more effective or result in their exit from a market, but does not engage the abuse of dominance provisions. In contrast, exclusionary conduct is designed to make current and/or potential rivals less effective, to prevent them from entering the market, or to

eliminate them from the market entirely. Such conduct often does so by raising rivals' costs or reducing rival's revenues.

63. In a non-exhaustive list, section 78 describes various means by which a firm may engage in exclusionary conduct. These include: margin squeezing of a downstream competitor by a vertically-integrated supplier; vertical acquisitions; pre-empting scarce facilities or resources; adopting incompatible product specifications; and exclusive dealing. Other exclusionary strategies can include tying and bundling, and conduct that increases customer switching costs. All such activities can, in certain circumstances, serve to increase a rival's costs and/or reduce their revenues, which may make it more difficult for the rival to compete or result in its exclusion from the market.

64. The following is a brief discussion of three types of exclusionary conduct that may raise issues under the abuse of dominance provisions: exclusive dealing, tying and bundling, and refusals to supply. These are not the only categories of exclusionary conduct, nor are they mutually exclusive. Indeed, in the Bureau's experience, individual anti-competitive acts may be viewed as part of more than one category, or otherwise blur the lines between them. For instance, the implementation of a tie can have the effect of inducing a firm's customers to exclusively purchase a tied product from that firm.

Exclusive Dealing

65. Exclusive dealing occurs when a firm supplies its product or products to a customer on the condition that the customer or supplier buy and/or sell only those versions of the product(s). In addition or alternatively, exclusive dealing may also occur when a firm requires that customers (or suppliers) do not buy (and/or sell) products of competitors. Exclusive dealing can also take the form of a firm requiring or inducing its own suppliers to deal only with the firm itself and not with that firm's competitors. Exclusivity may be mandated explicitly, or induced through other methods, such as technological incompatibilities, requirements contracts, meet-or-release clauses, most-favoured-nation (MFN) clauses, or other contractual practices.

66. Exclusive dealing is not necessarily anti-competitive, and is often engaged in for reasons other than to exclude competitors. For example, exclusive dealing may

solve "free rider" problems where a firm supplying a product to a downstream retailer also provides some service component, technological information, or aftermarket support that improves the product for consumers. If the retailer can use this information to improve the products of rival suppliers as well, the firm, without contractual protection, will have little incentive to provide this support. In such a case, exclusive dealing may preserve such an incentive to offer these services, which is generally to the benefit of consumers.

67. However, by inducing exclusivity from a sufficient quantity of suppliers or customers, a dominant firm may raise barriers to entry or expansion by raising rivals costs. Examples of how this may be achieved include denying rivals sufficient business to achieve economies of scale, preventing rivals from accessing necessary inputs, forcing rivals to compensate customers for the penalties incurred for switching, or inducing rivals to inefficiently vertically integrate.

Tying and Bundling

68. Tying occurs when, as a condition of obtaining or using one product (the "tying" product), a firm requires or induces a customer to purchase another product as well (the "tied" product). Closely related, bundling typically refers to situations whereby products are sold together in fixed proportions. Tying and bundling are ubiquitous in many industries, as many items for sale can be viewed as distinct tied products or a bundle of different components. In many cases there are often strong cost efficiencies that motivate tying and bundling.

69. However, to the extent a tying or bundling strategy excludes, predates, or disciplines a competitor it may raise concerns under the abuse of dominance provisions of the Act. In particular, the Bureau will consider whether the tie excludes competitors in whole or in part by increasing their costs or reducing their revenue. For instance, a tie may result in a firm with a substantial degree of market power in one market creating, enhancing or maintaining its market power in a second market. Like exclusive dealing, tying may increase switching costs for consumers, deny rivals economies of scale or scope necessary for efficient production, or induce inefficient production choices by rivals.

70. Before concluding that a firm is engaging in tying, the Bureau will seek to determine whether the alleged tying and tied products are in fact separate products. A central question in the inquiry is the extent to which separate customer demand exists for the tying and tied products. The Bureau may also consider efficiencies that arise from a tie; if, for example, implementing a tie gives rise to efficiencies such that it is not commercially viable to offer the products separately, the Bureau would not conclude the tying and tied products to be separate products notwithstanding consumer demand.

Refusals to Supply

71. As a general matter, there is no obligation on any business to supply to, or buy a product from, another business. However, in some exceptional circumstances, refusals to supply may engage the abuse of dominance provisions.

72. In some cases, a firm may explicitly refuse to supply a product. However, concerns may also arise in relation to "constructive" refusals, where a firm agrees to supply on terms that are sufficiently onerous as to have the same effect as an explicit denial (e.g., charging a prohibitively high price).

73. For the Bureau to conclude that a refusal to supply is an anti-competitive act, it must be the case that the product or service being denied is both competitively significant and cannot otherwise be feasibly obtained (for example, from other suppliers or through self-supply). Where this is the case, the Bureau may conclude that it was reasonably foreseeable that the purpose of a refusal was to exclude a competitor, in the absence of a legitimate business justification.

74. When exercising its enforcement discretion in relation to refusals to supply, the Bureau is aware that competitively significant inputs are often the result of significant and costly investment and innovation, and forcing firms to supply may undermine incentives for firms to develop new and beneficial products and services.

iii. Disciplinary Conduct

75. The Bureau considers that a dominant firm engages in disciplinary conduct where it undertakes actions intended to dissuade an actual or potential competitor from competing more vigorously, or otherwise disrupting the status

quo in a market. Such conduct may not have a predatory or exclusionary purpose, but rather, be intended to soften competition. Section 78 provides two examples of potentially disciplinary conduct: paragraph 78(1)(d) contemplates the use of fighting brands to discipline a competitor, and paragraph 78(1)(i) refers to discipline through selling articles at a price lower than their acquisition cost.

76. Disciplinary conduct may play a role in facilitating, maintaining, or inducing coordination among firms. In many cases when firms engage in coordinated conduct, each participant faces an incentive to deviate from the coordinated outcome. For example, where firms coordinate in order to raise prices in a market, each participant in the coordination may have the incentive to lower its own prices in order to win additional sales from the other participants at the elevated prices. As a result, one of the requirements for coordinated behaviour to likely be sustainable is the ability to respond to any deviations from the terms of coordination through credible deterrent mechanisms. Disciplinary conduct may provide such a mechanism: by engaging in disciplinary conduct, a dominant firm can induce or preserve coordination by punishing – or credibly threatening to punish – deviations from a coordinated outcome.

77. Disciplinary conduct may also include actions that do not directly punish rivals, but rather, facilitate punishments or increase the credibility of threats to punish rivals. For example, if a firm adopts contractual terms with its customers that provide the firm with more information about the extent to which rivals are deviating from supra-competitive pricing, thereby increasing the likelihood discipline will occur, the Bureau may consider the contractual terms to be disciplinary conduct.

78. In assessing whether the purpose of a practice is disciplinary, the Bureau may be more likely to rely on subjective evidence of intent than when assessing other types of anti-competitive acts, particularly where the alleged disciplinary conduct consists of pricing behaviour alone. Because such disciplinary acts may be particularly difficult to distinguish from vigorous competition on the merits, the Bureau may be hesitant to conclude that an act has a disciplinary purpose based solely on its reasonably foreseeable consequences. [41] When evaluating evidence of subjective intent, the Bureau will typically look for evidence of "something

more" than the typical intent of a firm to best its competition. For example, where evidence indicates that a firm engaged in an aggressive competitive response not to meet (or beat) competition from a rival, but instead to induce that rival to compete less vigorously, the Bureau may conclude that "something more" is present.

79. Given the above, the Bureau anticipates that it would investigate allegedly disciplinary conduct in limited circumstances, and that it would generally have to be satisfied that the alleged conduct is disciplinary on its face. [42]

iv. Business Justifications

80. An additional factor in the determination of whether an act is anti-competitive is whether it was in furtherance of a legitimate business objective. A business justification is not a defence to an allegation that a firm has engaged in anti-competitive conduct, but rather, an alternative explanation for the overriding purpose of that conduct. Proof of the existence of **some** legitimate business purpose underlying the conduct is not sufficient. Rather, the Federal Court of Appeal has said that "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." [43] Depending on the circumstances, this could include, for example, reducing the firm's costs of production or operation, or improvements in technology or production processes that result in innovative new products or improvements in product quality or service. [44] Compliance with a statutory or regulatory requirement may also constitute a business justification, where an act is required to comply with that statutory or regulatory requirement. [45]

81. Although the Bureau will consider any business justifications posited by the allegedly dominant firm, as the courts have recognized, where an allegedly dominant firm asserts a business justification it ultimately bears the burden of proof to establish it. [46]

82. In assessing the overriding purpose of an alleged anti-competitive act, the Bureau will examine the credibility of any efficiency or pro-competitive claims

raised by the allegedly dominant firm, their link to the alleged anti-competitive act, and the likelihood of these claims being achieved. In this assessment, the Bureau may seek evidence as to the role the asserted efficiency or pro-competitive justification played in the allegedly dominant firm's decision-making. In the absence of contemporaneous evidence that the asserted business justification rationally motivated the allegedly dominant firm, the Bureau will be less likely to conclude that the business justification is credible.

83. Additionally, after finding evidence in support of both an anti-competitive purpose and a claimed business justification, when assessing the overall character of a practice the Bureau may consider whether the claimed efficiency or pro-competitive benefits could have been achieved by credible alternate means that would have had a lesser impact on competitors, where appropriate. In conducting this analysis the Bureau would typically only consider alternative methods to achieve a business objective where either subjective evidence establishes the allegedly dominant firm considered those alternatives or there is clear objective evidence that it would be unreasonable for that firm to not have considered those alternatives (e.g., if a firm changes the manner in which it pursues a business objective, the Bureau would generally presume the firm considered maintaining its previous course of action).

84. Consistent with an approach noted by the Tribunal, when assessing the overall character of a practice the Bureau may consider if the alleged anti-competitive acts made no economic sense but for their anti-competitive effect on a competitor. [47] Conduct that makes no reasonably foreseeable economic sense but for an anti-competitive effect is likely to have an overarching anti-competitive purpose. However, circumstances may arise where the Bureau finds a practice satisfies paragraph 79(1)(b) even when, evaluating its reasonably foreseeable consequences, it may make economic sense without an anti-competitive effect on a competitor. Such cases may include where evidence of subjective intent establishes an anti-competitive purpose, or where the reasonably foreseeable economic benefits resulting from exclusion are sufficiently large compared to the other profits derived from the practice to make it clear that the overarching purpose was an anti-competitive effect on a competitor. [48]

85. Business justifications are relevant to the assessment of anti-competitive purpose and do not directly bear on the analysis of competitive effects pursuant to paragraph 79(1)(c). [49] The Bureau is not required to quantify any efficiencies resulting from a practice of anti-competitive acts, but will consider any such efficiencies within the purpose-focussed assessment of paragraph 79(1)(b). [50]

3. Competitive Effects

86. Paragraph 79(1)(c) requires that the conduct in question "has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market". In other words, having determined that the firm is dominant and has engaged in a practice of anti-competitive acts, it remains necessary to determine whether this practice has resulted or is likely to result in substantial harm to competition in one or more markets. [51] Generally speaking, a substantial lessening or prevention of competition occurs when an impugned practice causes a materially greater degree of market power to exist than in the absence of the practice.

87. Demonstrating a substantial lessening or prevention of competition does not entail an assessment of whether the absolute level of competition in a market is substantial or sufficient, but is instead a relative assessment of the level of competitiveness in the presence and absence of the impugned practice. In carrying out this assessment, the Bureau's general approach is to ask whether, but for the practice in question, there would likely be substantially greater competition in the market in the past, present, or future. [52]

88. To satisfy paragraph 79(1)(c), conduct can either **lessen** or **prevent** competition. The Tribunal has recognized that the general analytical approach is similar in either case, but important differences exist. Conduct that lessens competition typically permits the exercise of new or increased market power through lessening the constraint posed by current or potential competitors. Conduct that prevents competition, in contrast, typically preserves existing market power by preventing new competition that would have materialized in the absence of the impugned practice. [53]

89. In many cases, a substantial lessening or prevention of competition is accomplished by erecting or strengthening barriers to entry or expansion. Through increased barriers to entry or expansion, competitors or potential competitors are inhibited or deterred from competing as vigorously as they otherwise would, thereby disciplining the exercise of market power. [54] In examining anti-competitive acts and their effects on barriers to entry or expansion, the Bureau focuses its analysis on determining the state of competition in the market in the absence of these acts. If, for example, it can be demonstrated that, but for the anti-competitive acts, an effective competitor or group of competitors would likely emerge within a reasonable period of time to challenge the exercise of market power, the Bureau will conclude that the acts in question result in a substantial lessening or prevention of competition. [55]

90. Although the Bureau's conceptual approach focusses on increased barriers to entry or expansion, the Bureau may also assess the effects of a practice of anti-competitive acts on various indicators of the intensity of competition. Such indicators include whether, in the absence of the practice of anti-competitive acts, the extent to which:
    - monetary prices would be lower;
    - product quality, service, innovation, or choice would be greater; or
    - switching between products or suppliers would be more frequent.

91. Whether any lessening or prevention of competition is substantial is assessed in terms of its degree, duration, and the extent to which it extends throughout the market. There is no definitive threshold past which a given lessening or prevention qualifies as substantial. Rather, substantiality is assessed based on market specific factors, including the market power of the allegedly dominant firm. As the Tribunal has confirmed, "where a firm with a high degree of market power is found to have engaged in anti-competitive conduct, smaller impacts on competition resulting from that conduct will meet the test of being "substantial" than where the market situation was less uncompetitive to begin with." [56]

92. When assessing whether a practice of anti-competitive acts gives rise to a substantial lessening or prevention of competition, the Bureau may rely on either

qualitative (e.g., business documents, views of industry participants, etc.) or quantitative evidence (e.g., econometric studies). [57] The Bureau seeks to evaluate the causal impact of the practice of anti-competitive acts by comparing the state of competition in the market to a counter-factual scenario where the practice did not take place. In conducting this assessment, the Bureau may seek evidence that directly speaks to the counter-factual scenario (e.g., the views of market participants), as well as evidence from natural experiments in the market at issue or in other markets.

93. Natural experiments are often useful to assess a counterfactual by examining historical events that link changes in competitive conditions (e.g., entry or exit of firms, presence of certain competitors, products, services, or contractual practices) to changes in observable effects. In appropriate circumstances, the study of events and their impact on competition in one market can be very informative to an assessment of likely effects in another market. For example, the Bureau may seek evidence on how competitive outcomes differ in similar markets where the impugned conduct did not take place, or examine evidence relating to the state of competition in the market before and after a practice of anti-competitive acts (or other events, such as the exit of a competitor) to determine its causal effect.

94. When assessing the impact of a practice of anti-competitive acts, the Bureau may consider effects on both static competition (e.g., the impact on prices and output) and dynamic competition (e.g., rivalry driven by product or process innovation). Indeed, conduct that creates or enhances barriers that reduce dynamic competition, such as innovation, which the Tribunal has characterized as "the most important form of competition", [58] is of particular concern to the Bureau. However, due to its forward-looking and uncertain nature, effects on dynamic competition are often more challenging to assess than effects on static competition. In such cases, natural experiments from other markets (where available) may assist in establishing competitive effects.

95. The potential for enforcement action to chill dynamic competition in favour of increased static competition is an important consideration for the Bureau in determining whether to pursue an enforcement action, or even what remedy to

pursue if enforcement action is warranted. Healthy dynamic competition may result in sequential "winner take all" competition for a market based on product quality or innovation, with the result that the successful firm acquires market power. Often, it is the prospect of market power that provides the incentive for firms to engage in dynamic competition. Focussing enforcement on static outcomes may result in longer term harm as it may undermine the incentives for firms to engage in beneficial dynamic competition, and caution must be exercised when intervening in fast-moving markets. However, this potential result does not give dominant firms a license to lessen or prevent competition. In particular, where a dominant firm raises barriers that prevent more (or potentially more) innovative rivals from challenging its position, the Bureau will not hesitate to take action where appropriate.

4. Remedies

96. The Bureau considers potential remedies early in any investigation or inquiry under section 79 in order to determine the nature, scope, and the means by which a remedy may be implemented. Where the Bureau is satisfied that the evidence supports a conclusion that section 79 is engaged, a number of avenues to remedy the situation are available.

A. Consensual Resolutions

97. Generally speaking, in using the range of enforcement tools available, the Bureau encourages and facilitates voluntary compliance and will often attempt to achieve a negotiated settlement in response to a breach of section 79. [59]

98. Where the Bureau has concluded section 79 is engaged, in most circumstances the Bureau will require that any proposed remedy agreed upon be formalized in a consent agreement and registered with the Tribunal pursuant to section 105 of the Act. [60] Consent agreements entered into by the Bureau and a respondent must be based on terms that could be the subject of an order of the Tribunal. Upon registration, consent agreements have the same force and effect as orders of the Tribunal.

B. Orders of the Competition Tribunal

99. Where the Bureau is satisfied that the evidence supports an application to the Tribunal under section 79 and the Bureau cannot resolve a case on a consensual basis, or where a consensual remedy is not considered appropriate in the circumstances, the Bureau may make an application to the Tribunal for a remedial order. [61]

100. Where the Tribunal finds that the elements of section 79 are met, the Act grants the Tribunal broad discretionary remedial powers to address the anti-competitive conduct in question. This includes the ability to impose both behavioral and structural remedies, varying from prohibition orders (subsection 79(1)), prescriptive orders requiring that certain corrective action be taken (subsection 79(2)) and the imposition of administrative monetary penalties (subsection 79(3.1)).

i. Prohibition and Prescriptive Orders

101. Pursuant to subsection 79(1), the Tribunal may issue an order prohibiting a respondent from engaging in the impugned practice of anti-competitive acts. In addition or alternatively, if the Tribunal finds that an order prohibiting the practice is not likely to restore competition in the affected market, subsection 79(2) provides that the Tribunal may issue an order directing the respondent to take any such actions as are reasonable and necessary to overcome the effects of the practice of anti-competitive acts, including the divestiture of assets or shares. [62] Other actions may include, for instance, changes to contractual terms, or the establishment of a corporate compliance program. The Bureau typically views prohibition and prescriptive orders as complementary and, where appropriate, may seek orders that both prohibit the anti-competitive conduct and direct the respondent to take positive steps or actions as are necessary to restore competition in the market.

102. Failure to comply with an order rendered under section 79 (other than subsection 79(3.1)) or a consent agreement registered with the Tribunal under section 105 is a criminal offence. [63]

ii. Administrative Monetary Penalties

103. Where the Tribunal issues an order pursuant to subsections 79(1) and/or 79(2) of the Act, it may also, pursuant to subsection 79(3.1), order the respondent to pay an administrative monetary penalty ("AMP"). Such a penalty may not exceed $10 million for the first order, or $15 million for each subsequent order. The purpose of an AMP in an abuse of dominance case is to promote practices by the person from whom an AMP is sought that are in conformity with the purposes of section 79, not to punish the respondent for the anti-competitive conduct. [64] Failure to pay an AMP by a respondent may be enforced civilly as a debt due to the Crown. [65]

104. The Bureau generally considers AMPs as a complement to other remedies available under section 79 that are designed to restore competition. Given their purpose to promote practices by the dominant firm that are in conformity with the purposes of section 79 the Bureau's decision to seek AMPs and their amounts will depend to a great extent on the facts specific to each case.

105. When assessing whether an AMP is appropriate, the Bureau will consider factors such as:

    i. the respondent's willingness to collaborate in a timely manner with the Bureau in the context of the investigation or inquiry, including to immediately cease the impugned conduct when the Bureau raises competition concerns;

    ii. the respondent's history of compliance with the Act; and

    iii. whether the evidence suggests the respondent intended not to comply with the Act, or showed a wanton or reckless disregard for the Act.

106. When the Bureau determines that an AMP is warranted in the circumstances, the determination of its amount will be guided by the aggravating and mitigating factors set out in subsection 79(3.2) of the Act:

- The effect on competition in the 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 the Act by the person against whom the order is being made; and
- Any other relevant factor.

107. The amount of an AMP is to be determined based on the totality of the relevant considerations in the circumstances; no single factor is determinative.

108. In cases where an AMP is sought, the Bureau will be mindful to seek AMPs of the quantum necessary to ensure that AMPs do not merely become the "cost of doing business" for a dominant firm engaging in anti-competitive conduct, within the statutory limits, while also ensuring that they are not excessive or disproportionate in the circumstances and serve their statutory purpose, i.e., to promote conduct that is in compliance with the purposes of the abuse of dominance provisions.

109. The Bureau is guided by similar considerations and factors when determining whether to include an AMP in consent agreements in respect of abuse of dominance and in establishing the amount.

5. Illustrative Examples

110. The following examples are designed to illustrate the analytical framework that may be applied by the Bureau in the enforcement of section 79. These examples are not intended to provide an exhaustive catalogue of all conduct that may raise issues under section 79, and depending on the facts of any individual case the Bureau may depart from the analytical approach set out below. As with these Guidelines generally, the Bureau's discussion of the examples below does not replace the advice of legal counsel and is not intended to restate the law or to constitute a binding statement of how the Commissioner will exercise discretion in a particular situation. The enforcement decisions of the Commissioner and the ultimate resolution of issues will depend on the particular circumstances of the matter in question.

Example 1 – Mere Exercise of Market Power

111. HO3 and SANTA are firms that compete in respect of the supply of Santa hats in Canada. These two firms are the most important players in the market with market shares of 65 percent and 20 percent for HO3 and SANTA respectively. High barriers to entry make it difficult for a new entrant to enter the market. Recently, HO3 unilaterally raised the prices for the Santa hats it sells in Canada by over 250 percent. The Bureau has received complaints that HO3 has abused its dominant position.

Analysis

112. Although it is necessary for a firm to possess a substantial degree of market power in order to contravene section 79, this alone is not sufficient to raise issues under the abuse of dominance provisions of the Act. Even where a firm may be dominant, it must also be engaging in a practice of anti-competitive acts that gives rise to a substantial lessening or prevention of competition. The Bureau would not view HO3's price increase as an anti-competitive act as it does not exclude, predate, or discipline a competitor or a potential competitor. Further, because the price increase is a result of HO3's pre-existing market power, not a practice of anti-competitive acts, paragraph 79(1)(c) cannot be established.

Example 2 – Market Definition

113. DUTY is one of several manufacturers of heavy-duty drills in western Canada. During the last year, SMASH, a manufacturer with a great reputation in the market for high-end hammers, started marketing "hyper-duty" drills to retailers in western Canada. These "hyper-duty" drills are 20 percent more expensive than the ones offered by DUTY, but they are also 30 percent more powerful. SMASH, DUTY, and all other drill manufacturers in western Canada only sell their products through unaffiliated retail channels.

114. Different drill manufacturers operate in eastern Canada, and shipments of drills between the two regions are limited, accounting for approximately 5 percent of drills purchased in western Canada. The share of eastern Canadian produced drills purchased in western Canada has remained relatively stable despite price fluctuations between the two regions. However, within western Canada, prices

generally follow each other across the region and shipments of drills are observed in response to price differentials.

115. SMASH has complained to the Bureau, alleging that DUTY has engaged in a practice of anti-competitive acts relating to certain of DUTY's contracting practices. As part of its complaint, SMASH has presented evidence that its costs, and consequently its prices, have increased as a result of DUTY's conduct, while the prices of DUTY and other traditional drills remained stable.

Analysis

116. This example will focus on product and geographic market definition.

117. To initially conceptualize substitutability, the Bureau would generally use the hypothetical monopolist test. In order to do so, the Bureau may seek data on substitution patterns between different drill types and manufacturers. In addition, the Bureau would seek information on qualitative factors relating to substitutability; as set out above, these include

    i. functional interchangeability,

    ii. views, strategies, behaviour and identity of buyers,

    iii. trade views, strategies and behaviour (inter-industry competition),

    iv. price relationships and relative price levels, and

    v. switching costs.

    For example, the Bureau would seek to examine if the additional power or higher cost from the "hyper-duty" drills prevents or limits substitution, or if the hyper-duty drills are interoperable with existing equipment. Such information may be sought from sources including contractors, retailers and other drill manufacturers.

118. In this instance, as all drill manufacturers only sell their products through retailers, the Bureau would likely seek to define a market relating to the sale of drills to retailers, rather than consumers. However, as substitution at the retail level could be informed by consumer demand, evidence on end-consumer preferences and substitution patterns may be relevant.

119. When defining markets for the purpose of section 79, it is necessary to assess substitutability at the price that would have prevailed absent the impugned conduct. In this case, the Bureau may accord particular weight to evidence of substitutability from before the period DUTY engaged in the alleged conduct. However, the Bureau would consider the evidence that the increase in price for "hyper-duty" drills was not correlated with an increase in price for traditional drills to be indicative that they are not in the same market.

120. Similarly, the Bureau would use the hypothetical monopolist test to examine the bounds of the geographic market, i.e., the extent of retailer switching from drill manufacturers in one region to manufacturers in another region. Generally, the Bureau would look at whether an area is sufficiently insulated from price pressures emanating from other areas so that its unique characteristics can result in its prices differing significantly in any period of time from those in other areas. Due to the pricing differentials with eastern Canada, different competitors, and limited imports that do not vary with the price differential, the Bureau would likely conclude that eastern Canada should not be included in the same geographic market as western Canada. The fact that drill manufacturers compete across western Canada and that prices and purchases track each other across the region would support the conclusion that western Canada is the appropriate geographic market.

Example 3 – Market Power

121. SUBSTANTIAL is Canada's premier supplier of toques. Toques are sold in specialized boutiques; although toque retailers usually stock several brands of toque, they do not typically sell unrelated products. SUBSTANTIAL has a market share of 40 percent. There are six other competitors who evenly account for the remainder of the market.

122. Information gathered by the Bureau suggests that a substantial number of consumers have a strong preference for SUBSTANTIAL's products, and only shop at retailers that stock them. Other customers do not share this preference, and are willing to consider other substitutes, but no other brand of toque attracts similar customer loyalty. Consumers view SUBSTANTIAL's products as key to

establishing credibility as a toque boutique, and a retailer that does not carry SUBSTANTIAL toques will be significantly disadvantaged against its rivals as a result. For these reasons, SUBSTANTIAL is able to obtain considerably more favourable support from retail channels, including favourable placement and expenditure on promotional activities.

123. A competitor of SUBSTANTIAL has complained to the Bureau, alleging that SUBSTANTIAL has engaged in a practice of anti-competitive acts relating to SUBSTANTIAL's contractual terms with retailers which have excluded itself and other competitors. They have provided credible evidence that as a result of SUBSTANTIAL's practice, the price SUBSTANTIAL charges for toques has risen by more than 33 percent.

Analysis

124. The purpose of this hypothetical is to illustrate the Bureau's approach to assessing market power in the context of abuse of dominance. For the purposes of this analysis, the Bureau has already determined that the market is toques sold to retailers in Canada.

125. The Bureau will typically begin with an assessment of whether a firm holds a substantial degree of market power based on structural considerations. This involves determining the market and then assessing market shares and barriers to entry. In the absence of other evidence, based on these factors alone, the Bureau will not typically find dominance in cases where the allegedly dominant firm has a market share of less than 50 percent. However, in some cases, contextual factors may suggest that market shares may not be representative of the full extent of a firm's market power and may prompt further investigation by the Bureau.

126. In this case, evidence of SUBSTANTIAL's leverage over retail channels and the competitive impact of SUBSTANTIAL's actions would likely prompt further investigation. When assessing the extent to which SUBSTANTIAL has commercial leverage over its retail channels, one factor the Bureau would consider is whether SUBSTANTIAL is willing and able to discipline retailers that do not comply with SUBSTANTIAL's terms, or if the threat of punishment is sufficient to exert leverage

over retailers. If SUBSTANTIAL is able to unilaterally demand and receive considerably more favourable terms than other suppliers or dictate the level of support other brands of toque receive, the Bureau may consider this an indicator of market power. A key element of the Bureau's analysis would be examining the underlying consumer demand for SUBSTANTIAL's products, and the amount of switching that would occur if the prices of SUBSTANTIAL's products increased notwithstanding any alleged anti-competitive acts. The Bureau may also consider that the evidence that SUBSTANTIAL's toque prices increased by more than 33 percent as a result of SUBSTANTIAL's alleged anti-competitive conduct suggests SUBSTANTIAL has market power.

127. Given these factors, the Bureau may conclude that SUBSTANTIAL substantially or completely controls a market within the meaning of paragraph 79(1)(a), that is, it possesses a substantial degree of market power, notwithstanding SUBSTANTIAL's market share of 40 percent.

Example 4 – Joint Dominance

128. BUDDY, PAL, and CHUM are manufacturers of tandem bicycles, who sell their products through retailers. All three are roughly the same size, and each has a market share of approximately 33 percent. These market shares have remained stable over the past five years. Evidence suggests that BUDDY, PAL, and CHUM do not materially attempt to solicit the customers of the other, and there is very little customer switching between the firms.

129. BUDDY, PAL, and CHUM engage in long-term contracts with retailers that include automatic renewals, significant liquidated damages clauses in the event of early termination, and meet-or-release clauses that apply for a period subsequent to a contract being terminated in accordance with its conditions. These contracts both limit incentives for BUDDY, PAL, and CHUM to compete among each other and make it more difficult for new entrants to acquire customers.

130. FRIENDLY has unsuccessfully attempted to enter the market for tandem bicycles. Despite offering lower prices, FRIENDLY was unable to secure a sufficient number of customers due to the contracting practices of BUDDY, PAL, and CHUM. Without

the ability to realize the economies of scale necessary to compete with the incumbents, FRIENDLY was forced to abandon its efforts to enter the market.

Analysis

131. This hypothetical will focus on assessing whether BUDDY, PAL, and CHUM are jointly dominant, rather than the other elements of section 79. The Bureau has already established that the product market is tandem bicycles, and the geographic market is Canada.

132. First, the Bureau would seek to assess whether firms outside the allegedly dominant group, either existing competitors or potential entrants, can discipline any exercise of market power by BUDDY, PAL, or CHUM. In this case, as there are no other firms in the market, the focus of this assessment would be on potential entrants. The Bureau would consider the barriers to entry that exist, as well as the history of failed entry by FRIENDLY. Unless the Bureau found that barriers to entry were low (including barriers created by the conduct at issue), the Bureau may conclude that potential entrants could not discipline the joint exercise of market power by the incumbents.

133. The Bureau would then examine if competition between BUDDY, PAL, and CHUM is sufficient to prevent a joint exercise of market power to a substantial degree. Relevant information to this assessment includes factors such as the stability of market shares over time, the lack of active solicitation of the others' clients, and low customer switching, which would suggest that BUDDY, PAL, and CHUM jointly possess a substantial degree of market power. That BUDDY, PAL, and CHUM have adopted similar contractual terms may be relevant to this analysis to the extent they lessen the vigour of competition among the three, and therefore facilitate the joint exercise of market power.

134. As a result, the Bureau could conclude BUDDY, PAL, and CHUM are jointly dominant in the market for tandem bicycles in Canada, satisfying the requirement of paragraph 79(1)(a). [66]

Example 5 – Predatory Pricing

135. CHATEAU and DOMAINE are two Canadian maple-infused ice wine producers. Both produce only one type of wine, which is unique to these two vineyards. Indeed, both are located on a major hill in Gatineau with a particular micro-climate that cannot be found anywhere else in the world and this gives their products a distinctive taste which is sought after by connoisseurs.

136. Following a change in the leadership of CHATEAU, last year its new management substantially increased production and now offers customers a $40 rebate to the regular $50 price on each bottle of this year's vintage of its classic ice wine. Following this, DOMAINE contacted the Bureau alleging that this constitutes predatory pricing.

Analysis

137. Allegations of predatory pricing are examined under section 79 of the Act. Predatory pricing occurs when a firm deliberately prices below its own costs in order to eliminate or discipline existing rivals or to deter entry. This can substantially lessen or prevent competition when the firm engaging in the predation can subsequently recoup its losses by charging prices above the level that would otherwise have prevailed. For the purposes of this example, assume that the wines of CHATEAU and DOMAINE constitute the product market, the geographic market is Canada, and that CHATEAU holds a substantial degree of market power within that market.

138. As a pre-condition for predatory pricing, the Bureau considers it necessary for the relevant products to be priced below their average avoidable costs. Regarding this particular fact situation, a relevant initial way to assess the validity of DOMAINE's concerns would be to seek information from DOMAINE on its own costs and profitability. If CHATEAU's price is above DOMAINE's own costs, the Bureau would conclude that DOMAINE is not likely to be excluded by the pricing strategy and as a result, the requirements of paragraph 79(1)(c) are not likely met. Further, this would cast doubt on the assertion that CHATEAU is pricing below its own costs.

139. When assessing CHATEAU's average avoidable costs, the Bureau's focus will be on determining those costs that would have been avoided had CHATEAU not produced and sold the wine subject to the pricing strategy, including any opportunity costs. For simplicity, assume that there are four categories of costs that CHATEAU incurs:

    Bottles:
    CHATEAU purchases bottles shortly before bottling a given vintage based on the quantity it needs;

    Barrels:
    CHATEAU has a fixed stock of aging barrels, which is larger than what it typically requires at any time and CHATEAU rents excess barrels out to other vineyards;

    Labour:
    CHATEAU has a permanent staff who can only be fired in extreme circumstances, and hires seasonal labour to assist with grape planting, harvesting, processing, and bottling; and

    Land:
    CHATEAU is 68 years into a 100 year lease for the land the vineyard is situated on, cannot increase or reduce the amount of land it leases, and cannot use the land for any other purpose.

140. Because the quantity of bottles CHATEAU purchases varies based on the amount of wine CHATEAU produces, the Bureau would view this as an avoidable cost. Conversely, because CHATEAU cannot increase or reduce the amount of land it leases, the Bureau would not view land as an avoidable cost regardless of what share of CHATEAU's total costs the lease represents.

141. Because CHATEAU rents out barrels to other vineyards, when it uses them to age its own wine CHATEAU incurs an opportunity cost for the foregone rent it otherwise would have received. As a result, this foregone rent becomes an avoidable cost even if CHATEAU would not have purchased additional barrels.

142. Certain elements of CHATEAU's labour costs would likely be avoidable, while others may not be. Any seasonal labour CHATEAU retained for the purposes of producing the wine subject to the pricing strategy would be avoidable. If CHATEAU would not have hired any additional permanent employees to produce

the wine, and as CHATEAU is limited in its ability to terminate permanent employees, these costs would not be avoidable, depending on the duration of the pricing strategy. To illustrate, if the pricing occurs for a short period, CHATEAU may not be able to alter its costs related to permanent employees. However, if it persists for a longer time such that permanent employees may quit or retire and CHATEAU would have discretion as to whether to hire replacements, permanent labour costs may become avoidable.

143. The Bureau would typically also seek to determine if there is credible evidence of a legitimate business objective on the part of CHATEAU – e.g., if they were meeting a price set by a competitor, selling excess, obsolete or perishable inventory, or seeking to induce customers to try a new product.

144. Having determined CHATEAU's avoidable costs, the Bureau would then compare this to the price of the wine subject to the pricing strategy. In the absence of a credible business justification, if CHATEAU is pricing below its average avoidable cost, the Bureau would likely conclude that CHATEAU has engaged in a practice of anti-competitive acts.

145. In addition, even where a firm is pricing below its average avoidable costs, in order to substantially lessen or prevent competition and thereby raise issues under the Act it must be likely for a firm to recoup the losses it incurred through its pricing strategy. If any attempt to subsequently raise prices would be thwarted by timely new entry, re-entry, or remaining competitors, the below cost pricing will not give rise to a substantial lessening or prevention of competition. In such cases, if the dominant firm successfully raises prices, and barriers prevent new entry, re-entry or expansion of existing competitors from being sufficiently timely or sufficient to discipline the exercise of market power on the part of the dominant firm, competition will be substantially prevented or lessened.

146. Barriers to entry may be created or strengthened by the predation. For example, by developing a "reputation for predation" a dominant incumbent may create the perception that entry will be unprofitable, deterring actual or potential entrants.

147. In this case, the Bureau would evaluate if any attempt by CHATEAU to raise prices and exercise market power would be thwarted by re-entry by DOMAINE, or by new entry. In this case, if re-entry by DOMAINE is unlikely or would not discipline

CHATEAU's market power and a new entrant would be unable to obtain the land, assets, or know-how necessary to produce a competing wine, or would face significant reputational barriers due to being an unproven entrant that would prevent it from disciplining CHATEAU's market power, the Bureau may conclude that recoupment is possible and that the conduct substantially lessens or prevents competition.

Example 6 – Exclusive Dealing

148. A panopticon is a consumer electronic device that has become ubiquitous since its introduction three years ago. Most major consumer electronics manufacturers started developing their own panopticons and are competing to offer the best panopticons to consumers with the most advanced features.

149. Panopticons collect a significant volume of data on their users, including location and spending habits. Realizing the value of this data, several companies, known as panopticon data aggregators, started buying panopticon data directly from the panopticon manufacturers in order to analyze it and monetize the intelligence mined from the data. One of the key uses of aggregated panopticon data is providing insights into consumer preferences and purchases for advertising and marketing purposes.

150. In Canada, unlike in the United States where there are three major panopticon data aggregators, only one firm is offering these services. That firm, named THOTH, has been collecting panopticon data for the last two years and uses this data to enhance the capabilities of its algorithm, making its product even more desirable to customers. Having two years of Canadian panopticon data in its algorithm gives THOTH a significant competitive advantage over any entrant in the market for panopticon data aggregation in Canada. Further, THOTH collects data on how its customers use THOTH's aggregated data, which permit it to further improve the quality of its algorithm.

151. Over the last year, THOTH has started signing new ten-year contracts with all its suppliers of panopticon data in Canada. These contracts include significant monetary penalties for early termination, as well as bonus payments for providing THOTH exclusive access to data. THOTH claims that these contractual

terms are necessary in order for it to recoup the significant investments it has made in integrating the data from its suppliers into its algorithm. Further, THOTH claims that the exclusivity payments incentivize data suppliers to technologically integrate themselves with THOTH's platform, increasing the quality of data THOTH collects and improving the analysis it can provide to customers.

152. ENKI, THOTH's largest competitor in the United States, has complained to the Bureau that because of these contractual terms ENKI cannot secure the data it would require to enter the Canadian market and compete with THOTH.

Analysis

153. For the purposes of this hypothetical, assume that the Bureau has already defined a product market around panopticon data aggregation in Canada, and that THOTH is dominant in that market.

154. When assessing if THOTH has engaged in a practice of anti-competitive acts, the Bureau would likely focus its analysis on the payments for exclusive access to panopticon data. [67] In particular, the Bureau would seek to determine if the purpose of the payments was to foreclose access to panopticon data in order to exclude rivals.

155. When assessing the purpose of the contractual terms, the Bureau may examine evidence relating to the negotiation of the contractual terms. This analysis may consider whether the contractual terms were included at the request of THOTH or the suppliers. In the latter case, the Bureau may assess THOTH's intent in agreeing to the supplier's request, or any modifications to the supplier's request that may have been made at the behest of THOTH.

156. As part of the Bureau's investigation, in addition to seeking any subjective evidence of intent on the part of THOTH, the Bureau may seek to determine if excluding ENKI was a reasonably foreseeable consequence of the contractual terms. This may include gathering information on the extent to which substitutes exist for the data suppliers subject to the THOTH contracts, whether additional suppliers could enter or ENKI could self-supply with data, and if the payments for exclusivity have the effect of inducing some or all data suppliers to not deal with ENKI. The Bureau would also assess the extent to which ENKI requires data from

all suppliers to be viable in the market. The Bureau may also examine whether, even without the exclusivity payments, it was reasonably foreseeable that panopticon data suppliers would not have supplied data to ENKI. If the contractual terms have the effect of preventing a sufficient number of data suppliers from dealing with ENKI and there are no viable alternatives, the Bureau could conclude that a negative exclusionary effect on a competitor was reasonably foreseeable.

157. The Bureau may also assess any relevant business justifications for the contractual terms advanced by THOTH. Here, it argues that the exclusivity payments incentivize beneficial technological integration. If, for example, there was no contemporaneous evidence at the time the contractual terms were entered into that the payments would improve technological integration and thereby product quality, the Bureau would be unlikely to find THOTH's justification credible. Even if there is some evidence of the benefits of the payments, if there was contemporaneous evidence suggesting THOTH considered other options to achieve similar outcomes through less restrictive means (e.g., contracting for similar services instead of requiring exclusivity) the Bureau may not consider THOTH's business justification persuasive.

158. The Bureau may also consider whether THOTH's exclusivity payments made economic sense but for the exclusion of competitors. This would involve trading off the costs of the exclusivity payments against any revenues that would be derived from benefits other than exclusion (e.g., increased sales of aggregated panopticon data due to higher quality, if any). In the absence of demonstrated revenues that do not depend on exclusion, the Bureau could consider this an indicator that the exclusivity payments have an anti-competitive purpose.

159. The Bureau would then consider whether the contractual terms substantially lessened or prevented competition in the market for panopticon data aggregation, i.e., if the contractual terms permit THOTH to exercise materially greater market power in the past, present, or likely in the future.

160. In this circumstance, the Bureau would seek to determine the extent to which barriers to entry are the result of THOTH's contractual terms, as compared to characteristics of the market itself. For instance, in an industry characterized by

network effects, the extent to which barriers to entry already exist must be taken into account when assessing the effect of the clauses on competition. Here, THOTH's superior algorithm resulting from two years of panopticon data aggregation and customer use data may create sufficiently strong barriers that the contractual terms have no incremental effect.

161. The Bureau would seek to determine if, in the absence of THOTH's contractual terms, entry would be timely, likely, and sufficient to discipline the market power of THOTH. In order to assess the effects of the contractual terms, the Bureau may seek information on the state of competition in the United States where there are no exclusivity clauses, and the views of other potential entrants. If evidence indicated that entry would be unlikely because of the market structure even in the absence of such clauses, it would make the Bureau significantly less likely to conclude that there has been, is, or is likely to be a prevention of competition resulting from the clauses.

162. If the contractual terms are having the incremental effect of deterring entry, the Bureau would seek to assess the competitive significance of that entry. This may include examining evidence on the relative state of competition in markets for panopticon data aggregation where no such exclusivity clauses with suppliers exist, such as the United States. If evidence indicated that prices paid for panopticon data would be substantially lower, quality of services higher, or that there would be substantially more innovation in the absence of the contractual terms, the Bureau could conclude that THOTH's conduct has substantially prevented competition.

Example 7 – Tied Selling

163. GORDIAN produces hitches, which are used in a variety of industrial applications. Use of a hitch requires rope, which quickly degrades and often needs to be replaced.

164. As late as two years ago there were four different producers of rope, including GORDIAN. At that time a rival producer, ALEXANDER, began developing plans to introduce a competing product to GORDIAN's hitches. ALEXANDER planned to leverage synergies between hitch and rope production to reduce costs and offer

hitches at a price 20 percent below GORDIAN. Shortly afterward, GORDIAN introduced a policy requiring that only GORDIAN rope may be used with its hitches in order for the hitch to qualify for warranty coverage. Following this, the vast majority of hitch users switched to GORDIAN rope. As a result ALEXANDER and other third party rope manufacturers exited the market, and, as ALEXANDER was no longer able to rely on production efficiencies between hitches and rope, abandoned its efforts to compete with GORDIAN hitches.

165. GORDIAN claims that this policy was implemented because of low quality third party rope causing damage to its hitches, increasing GORDIAN's costs to provide service and lowering the reputation of its products.

Analysis

166. For the purposes of this hypothetical, assume that the Bureau has already defined a product market around hitches, and that GORDIAN is dominant in that market. Further, subject to hitches and rope being separate products (as discussed below), assume that the Bureau has defined rope to be a product market. In both cases, assume that the geographic market is Canada.

167. The Bureau would seek to determine whether the alleged tying and tied products are in fact separate products. A central question in the inquiry is the extent to which separate customer demand exists for the tying and tied products. The Bureau may also consider efficiencies that arise from a tie; if, for example, implementing a tie gives rise to efficiencies such that it is not commercially viable to offer the products separately the Bureau could not conclude the tying and tied products to be separate notwithstanding consumer demand.

168. In this case, when evaluating whether separate demand exists, the Bureau may consider the history of hitches and rope being purchased from different manufacturers, as well as the views of current and potential rope purchasers. Based on these facts, the Bureau could conclude that separate demand exists.

169. The Bureau could also consider whether implementing the tie gives rise to efficiencies such that it is not practical to offer hitches and rope as separate products. Because the economies of scope between rope and hitches rely on their joint production rather than the tie, the economies of scope would not be

considered as part of this analysis. Here, the Bureau could consider the history of the two products being sold separately to be dispositive, and conclude that hitches and rope are separate products.

170. The Bureau may then turn to assessing whether GORDIAN's purpose in implementing the tie was anti-competitive; in this case, focussing on whether the tie was intended to exclude one or more competitors in the market for rope . This would involve examining evidence of GORDIAN's subjective intent in implementing the tie, as well as the reasonably foreseeable effects of the tie.

171. The Bureau would typically examine the extent to which the tie is binding, that is, the extent to which the tie was likely to divert demand in the market for rope to GORDIAN. For instance, if hitch users can readily turn to effective substitutes for GORDIAN's warranty services at a sufficiently low cost, exclusion from the change to the warranty policy is not likely to be reasonably foreseeable (and similarly, if the tie is not binding, it is unlikely to prevent or lessen competition substantially). The Bureau would also examine the extent to which entry would be effective both into the market for hitches in the absence of economies of scope between hitches and rope, as well as the feasibility and effectiveness of entry into both markets simultaneously.

172. The Bureau would also consider any business justifications posited by GORDIAN. In this case, this may include gathering evidence on the extent to which third party rope caused hitch breakdowns prior to the tie, whether breakdowns have decreased following the tie, and if customer satisfaction with hitches has improved.

173. If subjective or objective evidence suggests the tie was instituted with exclusionary intent, and that evidence in support of the business justification was not compelling, the Bureau could conclude that GORDIAN has engaged in a practice of anti-competitive acts.

174. The Bureau would then consider whether the tie has, is, or is likely to cause a substantial lessening or prevention of competition in either the market for hitches or the market for rope. For example, if the Bureau concluded that the tie had raised barriers to entry in the market for hitches by denying economies of

scope with rope production, the Bureau could conclude that there has been a substantial prevention or lessening of competition.

Example 8 – Trade Association Rules

175. SOL is a provincial trade association of solar panel manufacturers. Among other activities, SOL coordinates industry quality and performance standards for exclusive use of its members, and certifies compliance with these standards. Purchasers of solar panels have come to recognize and demand the certification SOL provides, and uncertified solar panels see markedly lower sales. Because of the significant benefits these standards provide, virtually all solar panel manufacturers in the province are members of SOL. There are similar trade associations to SOL in other provinces, who engage in similar activities. SOL is purely a trade association: it does not produce solar panels, and has not been provided with any powers or regulatory role by any federal or provincial statute.

176. There are many solar panel manufacturers that are members of SOL, and no individual member has a market share of more than 5 percent. The past several years have seen various solar panel manufacturers enter and exit the market.

177. SUNNY is a highly successful solar panel manufacturer outside the province in which SOL operates. Unlike other solar panel manufacturers who sell homogenous solar panels through traditional retail channels, SUNNY has pursued a business model where customers may order personalized solar panels through the internet, which are then shipped directly. Many consumers consider SUNNY's solar panels to be more convenient, of higher quality relative to those of its competitors, but at a comparable cost. SUNNY has grown rapidly in its native province, and is considering expanding its operations across the country.

178. Around the time SUNNY began rapidly expanding, SOL passed rules prohibiting its members from selling customized products directly to consumers. SOL claims that because customized solar panels are more varied, if they bypass traditional retail channels (where they can be more readily monitored) they cannot be subject to the same level of testing and cannot be certified as part of the standard for panels established by SOL. SUNNY has complained to the Bureau, stating that it wishes to begin operating in SOL's province, but is prevented due to

the rules of SOL. SUNNY claims that without certification by SOL, demand for SUNNY's products will be markedly reduced and as a result its entry based on its current business model will not be viable.

Analysis

179. For the purpose of this hypothetical, assume the Bureau has determined the market to consist of solar panels sold in the province in which SOL operates.

180. Having defined the market, the Bureau would assess whether SOL substantially or completely controls that market. Although the Bureau may seek to understand if substitutes exist for the services of SOL -- for example, if alternate certifications exist that SOL's members can effectively substitute for SOL's -- the Bureau may not engage in a separate market definition exercise around the services of SOL or assess its market power in that second market. However, the existence and feasibility of substitutes for SOL's services may be relevant in assessing if SOL holds a substantial degree of market power in solar panels, the reasonably foreseeable effects of SOL's restrictions, and if such restrictions give rise to a substantial lessening or prevention of competition.

181. When determining whether SOL substantially or completely controls the market for solar panels, the Bureau could consider the extent to which SOL can influence factors such as price, quality, variety, service, advertising or innovation in the market for solar panels. This would typically include an examination of whether membership in SOL and access to its certification is commercially necessary to compete in the market, and the extent to which SOL can enforce its rules on its members. If, for example, SOL can effectively exclude competitors or types of competition from the market, the Bureau could consider this requirement satisfied. In this case, the Bureau may seek to assess the extent to which consumer demand for a manufacturer's solar panels depends on SOL's certification. If consumer demand was sufficiently reduced for uncertified solar panels as to make it infeasible to compete, the Bureau could conclude SOL has a substantial degree of market power.

182. The Bureau will then seek to understand if SOL has engaged in a practice of anti-competitive acts. As SOL does not compete in the market for solar panels, the

Bureau may seek to determine if SOL has a plausible competitive interest in negatively affecting competition in the market for solar panels. As SOL is a trade association that acts in the interests of its members, the Bureau would likely conclude that it has such a competitive interest.

183. The Bureau would seek to evaluate the purpose of the rules adopted by SOL. This may include examination of contemporaneous evidence of SOL's intent, such as documents or statements by SOL's officers, that speak to the intent behind SOL's rule changes. The Bureau may also consider whether exclusion of business models such as SUNNY's was a reasonably foreseeable consequence of the rules adopted by SOL. The Bureau would also consider any business justifications put forward by SOL, evaluate their credibility, and determine whether these business justifications outweigh any evidence of anti-competitive intent. When evaluating the justification that individualized products may not conform to the standards set by SOL, the Bureau may evaluate the experience from areas where comparable restrictions are not adopted and the extent to which SOL conducted any studies to support the need for its restrictions. The Bureau may also have regard to whether the restrictions made economic sense, but for the exclusion of disruptive competition.

184. The Bureau would then seek to evaluate whether the restrictions give rise to a substantial lessening or prevention of competition. In doing so, the Bureau would consider whether there would be substantially greater competition among the members of SOL in the absence of the restrictions. Notably, the Bureau would not consider the relatively small market shares of the individual members of SOL or entry and exit (i.e., the absolute level of competition in the market), as dispositive in this regard. The Bureau's concern could be that the rules of SOL exclude or impede entrants (or potential entrants), as well as innovation among the members of SOL, leading to reduced dynamic competition. Relevant factors would include if the restrictions increased barriers to entry and expansion, whether the restrictions reduced the range of solar panels offered or their quality, and whether the restrictions have reduced innovation. The Bureau may find natural experiments in other markets persuasive, as well as the projections of businesses regarding the services they could offer but for the restrictions. The Bureau would also seek to assess whether other members of SOL would be

offering higher quality services, be more innovative, or otherwise be engaging in more vigorous competition in the absence of the restrictions.

Example 9 – Disciplinary Conduct (1)

185. STATIC is Canada's largest provider of Secured Lending Cross-swaps (SLCs), a type of consumer-facing financial product, selling 60 percent of all SLCs in Canada. STATIC has one competitor, DYNAMIC, who accounts for the remaining 40 percent of sales. Since the entry of STATIC and DYNAMIC, significant tax incentives for the industry have been terminated and regulatory requirements for new entrants were increased, making new entry prohibitively difficult.

186. Competitive conditions in the SLC market – market shares, fee levels, and service offerings – have remained generally stable over the past decade. Documents gathered by the Bureau suggest that each market participant has historically realized that they benefit from less vigorous competition between each other, and have not traditionally attempted to solicit each other's customers, reduced their prices, or improved their service offerings.

187. Six months ago, DYNAMIC hired a new CEO who publically stated that DYNAMIC would begin a new program of customer acquisition, cutting fees by 10 percent and developing a new and more convenient smartphone application for customers to monitor and manage their SLCs. Shortly thereafter, STATIC launched a second branding of SLCs, QUANTIFY, through which STATIC began selling SLCs at a 70 percent discount to regular fees. After one month, DYNAMIC announced it would continue with its pricing; STATIC immediately further dropped the fees of the QUANTIFY brand to 20 percent of historical levels, announcing that it would continue to offer these fees as long as DYNAMIC continued with its customer acquisition program. The following month, DYNAMIC's CEO stated they would abandon their customer acquisition program, citing changed competitive conditions. STATIC withdrew the QUANTIFY brand from the market.

188. Following a complaint to the Bureau and a preliminary investigation, evidence indicates that STATIC was not pricing below its average avoidable costs at any point. However, internal correspondence and memos indicated that, through launching QUANTIFY, STATIC intended to punish DYNAMIC for adopting a new fee

strategy and deter DYNAMIC from continuing its low fees, rather than simply matching or beating DYNAMIC's pricing. STATIC has told the Bureau it was simply a pro-competitive, aggressive response to DYNAMIC's pricing.

Analysis

189. Assume the Bureau has defined the market as SLCs sold in Canada, and concluded that STATIC holds a substantial degree of market power.

190. When assessing if STATIC's conduct is an anti-competitive act, the Bureau may accord particular weight to subjective evidence of intent, in order to distinguish a disciplinary act from aggressive competition on the merits. In particular, the Bureau may look for evidence that, in launching QUANTIFY, STATIC was attempting to punish DYNAMIC for its customer acquisition program, and restore market conditions to the historical status quo. When evaluating the overarching purpose of STATIC's conduct, the Bureau could also consider documentary evidence that other competitive responses on the part of STATIC would have been profitable had DYNAMIC not abandoned its customer acquisition program.

191. If the Bureau were satisfied that STATIC's conduct constituted a practice of anti-competitive acts, the Bureau would seek to determine if it caused a substantial lessening or prevention of competition. This could involve assessing the fee levels that would have likely prevailed if STATIC had adopted a different response and DYNAMIC had persisted in its customer acquisition strategy, as well as any non-price effects from DYNAMIC abandoning its new smartphone application.

Example 10 – Disciplinary Conduct (2)

192. WILDERNESS is the largest retailer of outdoor equipment in Canada, and sells products primarily online. Due to advantages such as sophisticated recommendation algorithms driven by consumer data, WILDERNESS enjoys significant customer loyalty. WILDERNESS is well known for using algorithms and the automated collection of data to monitor and respond to market trends.

193. For the past three years, WILDERNESS has sold over 85 percent of tents purchased in Canada. There are two producers of tents, YURT and BIVOUAC.

194. FRONTIER is a rival e-commerce retailer that has recently commenced operations in Canada, and has begun selling tents, produced by both YURT and BIVOUAC. To date, FRONTIER has made minimal inroads to the Canadian market and at present facilitates sales of only 4 percent of tents.

195. Until recently, prices for tents on FRONTIER's platform have been comparable to those on WILDERNESS's. In the past few months FRONTIER has begun competing more aggressively on sales of tents, offering discounts up to 20 percent below WILDERNESS's prices. However, when FRONTIER began doing so, both YURT and BIVOUAC found that orders of their products were being shipped substantially slower to customers by WILDERNESS, and their products featured notably less favorable placement on WILDERNESS's website. Although WILDERNESS has not confirmed that this is the direct result of FRONTIER's pricing behavior, both YURT and BIVOUAC have taken steps to prevent FRONTIER from undercutting WILDERNESS on tents. When they did so, previous service levels and website placement with WILDERNESS resumed.

196. FRONTIER has complained to the Bureau in relation to WILDERNESS's conduct.

Analysis

197. For the purposes of this hypothetical, assume that the Bureau has defined a relevant market that consists of the retail sale of tents in Canada, and that the Bureau has concluded that WILDERNESS has a substantial degree of market power in that market.

198. Depending on the facts and evidence the Bureau could evaluate WILDERNESS's conduct as either exclusionary or disciplinary, or both. To the extent that WILDERNESS intended to increase FRONTIER's costs in order to make FRONTIER a less effective competitor in the market for tents, the Bureau may view WILDERNESS as engaging in exclusionary conduct. Alternatively, if, for example, WILDERNESS intended to deter FRONTIER from competing more vigorously without affecting its ability to compete, the Bureau may view this as disciplinary conduct.

199. In either case, to evaluate FRONTIER's claims, the Bureau may seek evidence from WILDERNESS with respect to the operation of its monitoring algorithms,

fulfillment services, and decisions with respect to website placement, including the extent to which sales of YURT and BIVOUAC's products were indeed contingent on FRONTIER's lower pricing.

200. In order to evaluate if WILDERNESS's conduct gives rise to a substantial lessening or prevention of competition, the Bureau would seek evidence that but for the impugned conduct, prices would be lower in the market for tents. This would likely involve examining the extent to which FRONTIER would lower its prices in the absence of the impugned conduct. As part of this analysis, the Bureau would likely analyze the extent to which YURT and BIVOUAC are impacted by WILDERNESS's conduct, the causal impact of WILDERNESS's conduct on YURT and BIVOUAC's decision to prevent FRONTIER from undercutting WILDERNESS, as well as the extent to which FRONTIER would capture a significant share of WILDERNESS's former consumers if WILDERNESS continued to degrade its quality of service in relation to tent orders. The Bureau would also assess the duration of the lessening or prevention of competition; for example, if FRONTIER was engaging in promotional pricing for a limited period of time with little lasting benefit to FRONTIER's ability to compete with WILDERNESS, the Bureau would be less likely to conclude competition is substantially prevented or lessened.

Full citations of judicial decisions

Air Canada:

Commissioner of Competition v Air Canada, 2003 Comp Trib 13

Canada Pipe CT:

Commissioner of Competition v Canada Pipe, 2005 Comp Trib 3

Canada Pipe FCA 1:

Canada (Commissioner of Competition) v Canada Pipe Co, 2006 FCA 233, leave to appeal refused (10 May 2007).

Canada Pipe FCA 2

Canada (Commissioner of Competition) v Canada Pipe Company Ltd, 2006 FCA 236, leave to appeal refused, (10 May 2007).

Direct Energy:

The Commissioner of Competition v Direct Energy Marketing Limited, 2015 Comp Trib 2

Hillsdown:

Canada (Director of Investigation and Research) v Hillsdown Holdings Ltd (1992), 41 CPR (3d) 289 (Comp Trib)

Laidlaw:

Canada (Director of Investigation and Research) v Laidlaw Waste Systems Ltd (1992), 40 CPR (3d) 289 (Comp Trib)

NutraSweet:

Canada (Director of Investigation and Research) v NutraSweet Co (1990), 32 CPR (3d) 1 (Comp Trib)

Tele-Direct:

Canada (Director of Investigation and Research) v Tele-Direct (Publications) Inc. (1997), 73 CPR (3d) 1 (Comp Trib)

Tervita:

Tervita v Canada (Commissioner of Competition), 2015 SCC 3.

TREB CT:

The Commissioner of Competition v The Toronto Real Estate Board, 2016 Comp Trib 7

TREB FCA 1:

Commissioner of Competition v Toronto Real Estate Board, 2014 FCA 29, leave to appeal refused (24 July 2014).

TREB FCA 2:

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

Visa:

The Commissioner of Competition v Visa Canada Corporation and MasterCard International Incorporated, 2013 Comp Trib 10

Footnotes

1 RSC 1985, c C-34.

2 To simplify the discussion, unless otherwise indicated, the term "price" in these guidelines refers to all dimensions of competition, such as quality or innovation. References to an increase in price encompass an increase in the monetary price, but may also refer to a reduction in quality, product choice, service, innovation or other dimensions of competition.

3 For the remainder of this document the terms "firm", "person", and "entity" will be used interchangeably. Similarly, unless otherwise indicated, any reference to a single allegedly dominant person should be read to include reference to either a single dominant person or multiple dominant persons.

4 As discussed further below, the Bureau may define different markets for the purposes of paragraphs 79(1)(a) and 79(1)(c). As such, market definition is also relevant to the assessment of competitive effects.

5 TREB CT at para 132.

6 NutraSweet at 9. The term product also encompasses services (see subsection 2(1) of the Act).

7 The Bureau considers supply responses, or the ability of potential competitors to begin supplying in response to a price increase, when assessing the "control" element of paragraph 79(1)(a), such as when assessing market shares and participants, rather than when defining markets.

8 TREB CT at para 124.

9 TREB CT at paras 129-130.

10 When detailed data on the prices and quantities of the relevant products and their substitutes are available, statistical measures may be used to define product markets. Demand elasticities indicate how buyers change their consumption of a product in response to a change in the product's price (own-price elasticity) or in response to changes in the price of another identified product (cross-price elasticity). While cross-price elasticities do not directly measure the ability of a firm to increase price, they are particularly useful for determining whether differentiated products are close substitutes for one another.

11 See Visa at para 189. Similarly, where the Bureau has defined a market as one side of a platform the Bureau, where appropriate, may consider effects of conduct on multiple sides of the platform when evaluating issues beyond market definition.

12 NutraSweet at 20.

13 TREB CT at para 173.

14 Tervita at para 44.

15 TREB CT at paras 174.

16 TREB CT at para 176.

17 The Tribunal has accepted some direct indicators as evidence of market power, such as a high price-to-average-cost margin and corresponding high accounting profits. Similarly, significant variations in price by region, along with the ability to lower prices in response to increased competition or entry, has been accepted by the Tribunal as evidence of supra-competitive pricing in higher-price regions. In these cases, direct indicators alone were insufficient to establish market power, which was substantiated through the use of indirect indicators. See Tele-Direct at 101 and Canada Pipe CT at para 161.

18 TREB FCA 1 at para 13.

19 The Tribunal has held that the use of the present tense in paragraph 79(1)(a) means that at the time a person engages in a practice of anti-competitive acts, they must be in a position of dominance in the market (Direct Energy at para 40). The Bureau may conclude that paragraph 79(1)(a) is satisfied where a firm attains dominance through a practice of anti-competitive acts, provided that the firm is dominant at some point in time when the practice is ongoing.

20 However, as discussed in more detail below, in exceptional cases the Bureau may consider firms with relatively low market shares to possess a substantial degree of market power where other evidence establishes its existence.

21 In Tele-Direct, at 83, the Tribunal stated that it would require evidence of "extenuating circumstances, in general, ease of entry" to overcome a prima facie determination of control based on market shares of 80 percent and higher; whereas, in Laidlaw, the Tribunal observed that a market share of less than 50 percent would not give rise to a prima facie finding of dominance. However, this does not preclude the possibility that a substantial degree of market power could be found below that threshold.

22 The Tribunal has recognized that firms with relatively low market shares may possess some degree of market power. For example, in the context of other provisions of Part VIII of the Act, the Tribunal has found a firm to possess market power with a share as low as 33 percent (Visa at para 267), and has recognized that market shares may either overstate or understate a firm's market power (Hillsdown at 318).

23 See, for instance, TREB CT at para 196.

24 See TREB CT at para 174.

25 Laidlaw at 331; Tele-Direct, at 95; Canada Pipe CT at paras 138, 146; Canada Pipe FCA 2 at paras 24-25, 36.

26 TREB CT at para 176.

27 TREB CT at paras 182, 190, 254(n).

28 TREB FCA 1 at para 13.

29 TREB CT at paras 203-207.

30 Prices that appear to be at or near the competitive level could be evidence of vigorous competition. Other factors may include, but are not limited to, price competition among competitors, instability of market shares over time, attempts to solicit rival's customers, or "leapfrog" competition through innovation. Conversely, the absence of these factors on the part of firms within the allegedly jointly dominant group could indicate that these firms are not competing vigorously with one another.

31 Canada Pipe FCA 1 at para 60.

32 In addition, subsection 79(5) states that "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." For information on the Bureau's approach to reviewing business conduct involving intellectual property, see the Bureau's *Intellectual Property Enforcement Guidelines*.

33 Canada Pipe FCA 1 at para 66.

34 The Federal Court of Appeal and Tribunal have acknowledged that paragraph 78(1)(f) does not contain an explicit reference to a purpose vis-à-vis a competitor. The Federal Court of Appeal has characterized the conduct in paragraph 78(1)(f) as reflecting "a self-serving intent, not a relative one intended to harm a competitor", and that on the premise of its earlier jurisprudence "requiring a predatory, exclusionary, or disciplinary negative effect on a competitor in all cases would render paragraph 78(1)(f) meaningless" (TREB FCA 2 at para 54)

35 Canada Pipe FCA 1 at paras 72-73.

36 NutraSweet at 35.

37 TREB CT at para 277; TREB FCA 1 at paras 17-20.

38 TREB CT at paras 279-282.

39 The Bureau will typically consider the question of whether a firm can recoup any losses incurred in predation in the analysis of whether the conduct has given rise to a substantial lessening or prevention of competition pursuant to paragraph 79(1)(c). In many cases the ability to recoup losses from predation will depend on barriers to entry that prevent new entry in response to supra-competitive prices, or re-entry by predated firms. In the absence of recoupment in the past, present, or likely recoupment in the future, the Bureau would not typically consider paragraph 79(1)(c) to be satisfied.

40 Air Canada at paras 76, 80.

41 Exceptions to this approach may exist. For example, if a firm engaged in similar behaviour after being sanctioned for disciplinary conduct, or if the Bureau observed substantially similar conduct in a market in which disciplinary conduct had previously taken place, the Bureau may put less of a focus on subjective evidence of intent.

42 The Bureau recognizes that difficulties may arise identifying an appropriate remedy for disciplinary anti-competitive acts. As with other conduct actionable under section 79, the appropriate remedy for a disciplinary act will ultimately depend on the specific facts of any given case. When determining the appropriate remedy for disciplinary conduct the Bureau will have regard to the spectrum of options afforded by section 79, including administrative monetary penalties where appropriate.

43 Canada Pipe FCA 1 at para 73.

44 However, as the Tribunal has recognized, it is necessary to consider all known circumstances; for example, cost reductions that may be contemplated or realized by driving one's rivals from a market would not suffice to shield conduct that was primarily motivated by a predatory, exclusionary or disciplinary purpose (see TREB CT at para 295).

45 TREB FCA 2 at para 146.

46 TREB FCA 2 at para 144.

47 TREB CT at paras 311-318. In addition, the Tribunal indicated that it may also have regard to whether the acts involved the sacrifice of short-term profits that would not be recouped but for the exclusion of a competitor. The Bureau's approach to such analysis is similar to what is set out above with respect to the no economic sense analysis.

48 When analyzing whether conduct made no reasonably foreseeable economic sense but for the exclusion of a competitor, the Bureau will not always consider the appropriate counterfactual scenario (against which to assess relative economic benefits) to be the one in which the firm took no action whatsoever. For instance, where a firm is presented with two options and elects to pursue the one in which it foresees deriving greater profits due to exclusion (and lower profits from other sources) than the alternative, the Bureau would consider this to make no economic sense but for the exclusion of a competitor.

49 Canada Pipe FCA 1 at para 87.

50 The Tribunal has recognized that business justifications "do not give rise to the quantitative assessment contemplated by the efficiency exception in section 96 of the Act" and that "it would be much more difficult, and perhaps even completely intractable, in the section 79 context" (TREB CT at para 291).

51 When assessing competitive effects pursuant to paragraph 79(1)(c) the Bureau analyzes effects in reference to a market, which in turn engages the concepts of market definition. The Bureau is of the view that the markets for the purposes of paragraphs 79(1)(a) and 79(1)(c) need not be the same; that is, section 79 may apply where a firm is dominant in one market but substantially lessens or prevents competition in another (see, for instance, Tele-direct at 214). When necessary, the Bureau applies the same approach to market definition for the purposes of paragraph 79(1)(c) as it does in reference to paragraph 79(1)(a), discussed above.

52 This test was accepted by the Federal Court of Appeal in Canada Pipe FCA 1 at para 38. The Court stated that other tests might also be appropriate depending on the circumstances.

53 TREB CT at paras 472-474.

54 This could include causing rivals to adopt more accommodating competitive reactions.

55 When assessing a reasonable time period for potential competitors to provide effective competition in the absence of the anti-competitive acts, the Bureau will assess the time required for competitors to develop products and marketing plans, to build facilities or make adjustments to existing facilities, and to achieve a level of sales sufficient to prevent or discipline a material price increase by dominant firms. The Federal Court of Appeal has held that a duration of two years will usually be sufficient to establish an effect (TREB FCA 2 at para 64).

56 Tele-Direct at 247.

57 Although in certain circumstances the Bureau may undertake quantitative studies of competitive effects when assessing potential abuses of dominance, it is not necessary for the Bureau to adduce quantitative evidence to establish a substantial prevention or lessening of competition (TREB FCA 2 at paras 101, 104).

58 TREB CT at para 712.

59 See also the Bureau's *Competition and Compliance Framework*.

60 Where the Commissioner has concluded the elements of section 79 are satisfied, the Commissioner will not typically discontinue an inquiry or application if the dominant firm unilaterally ceases its practice of anti-competitive acts unless the dominant firm enters into a consent agreement. This provides certainty and predictability to the Bureau and market participants that the anti-competitive conduct will not be resumed. In some cases the Bureau may seek compensation for investigative costs as part of a consent agreement. Additionally, the Bureau may seek administrative monetary penalties in consent agreements, where appropriate.

61 The Commissioner is the only party that may make applications to the Tribunal under section 79. See subsection 79(1) of the Act.

62 Subsection 79(2) permits the Tribunal to grant both prescriptive behavioural remedies (e.g., compelling a respondent to undertake certain mandatory conduct) and structural remedies (e.g., the divestiture of assets). The Bureau does not seek structural remedies to abuses of dominance in the vast majority of circumstances, but may consider doing so where an abuse of dominance causes structural changes in a market such that competition cannot be restored by a behavioural remedy alone. For example, where a practice has removed effective pre-existing competitors from a market where barriers to entry (that are not created or enhanced by the abuse of dominance) have increased over time with the result that new entry is not feasible, the Bureau may seek a divestiture that would permit a new entrant to be a viable competitor. This could either be in lieu of or in addition to a prohibition order under subsection 79(1) and/or a prescriptive behavioural remedy under subsection 79(2).

63 See section 66 of the Act.

64 See subsection 79(3.3) of the Act.

65 See section 79.1 of the Act.

66 In addition to the above factors, the Bureau would also consider any other relevant evidence that a substantial degree of market power exists on the part of BUDDY, PAL, or CHUM, such as direct evidence of market power, or an ability to exclude.

67 Because the contractual terms have been consistently inserted into ten-year agreements with data suppliers, the Bureau would consider THOTH to be engaged in a practice.

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ontact the Competition Bureau

Exhibit 14 to the Cross-Examination of Professor Tadelis

Big data and innovation: key themes for competition policy in Canada

Canada

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Introduction

On September 18, 2017 the Competition Bureau (Bureau) released a discussion paper titled "Big data and Innovation: Implications for Competition Policy in Canada".[1] Consistent with its commitment to engage with stakeholders on important areas of public policy, that paper was meant to prompt discussion on how big data should affect competition law enforcement under the *Competition Act* (Act). To facilitate this discussion, the Bureau solicited public comments on its website and engaged with stakeholders in a variety of international and domestic fora.[2] This document is a synthesis of key themes revealed in the Bureau's review of this important topic informed by this feedback.

The topic of big data and competition law enforcement continues to garner significant attention and elicit concern. In May 2017, *The Economist* claimed that "there is cause for concern. Internet companies' control of data gives them enormous power. Old ways of thinking about competition, devised in the era of oil, look outdated in what has come to be called the 'data economy.' A new approach is needed."[3] In brief, the Bureau believes that the emergence of firms that control and exploit data can raise new challenges for competition law enforcement but does not, in and of itself, necessitate an immediate cause for concern. There is little evidence that a new approach to competition policy is needed although big data may require the use of tools and methods that are somewhat specialized and, thus, may be less familiar to competition law enforcement. The fundamental aspects of the analytical framework (e.g., market definition, market power, competitive effects) should continue to guide enforcement.

Several overarching themes emerged in the Bureau's review.

- **Déjà vu**: "Big data" is not an entirely new phenomenon. In fact, not only have firms been developing and using data for a very long time, competition law enforcement has dealt with "big data" issues in a number of instances, even if many such data cases preceded common use of the moniker.[4]
- **Guiding analytical principles remain valid**: The key principles of competition law enforcement remain valid in big data investigations. Specifically, proper enforcement must strike the right balance between taking steps to prevent behaviour that truly harms competition and over-enforcement that chills innovation and dynamic

[1] The press release and discussion paper are available on the Bureau's website.
[2] Public comments are available on the Bureau's website. The Bureau also received some comments that were provided on condition of anonymity.
[3] "The world's most valuable resource is no longer oil, but data." *The Economist*. May 6, 2017.
[4] For example, firms that provide insurance have long collected and exploited data so that pricing appropriately reflects risk. Advances in information technology are permitting additional exploitation of data. The discussion paper noted competition law disputes involving data related to airline global distribution systems, as well as *Nielsen* and *Tele-Direct*, which are older litigated conduct cases well-known to Canadian competition law practitioners.

competition. Equally important, competition law and policy should continue to rely on market forces to lead to beneficial outcomes, not regulate prices or other outcomes. Enforcers should not, for example, condemn firms merely because they are "big" or possess valuable big data. Companies that achieve a leading market position—even a dominant one—by virtue of their own investment, ingenuity, and competitive performance should not be penalized for doing so. Imposing a penalty for excellence removes the incentives to pursue excellence.

- **Enforcement framework remains intact**: The Bureau's enforcement framework remains intact when examining matters that involve big data. In cartel enforcement, an agreement amongst competitors is a central element of the offence and such an agreement is harmful regardless of whether it was implemented via a mechanism that relied on data. Similarly, the Bureau ensures truth in advertising by discouraging deceptive marketing practices and by encouraging the provision of sufficient information for consumers to make informed choices. Deception harms consumers no matter whether that deception makes use of data, or whether it results in the collection of more data from consumers. In mergers and monopolization, the framework should continue to be based on the principle that enforcement is appropriate when a consolidation of ownership or a dominant firm's anti-competitive conduct leads to a substantial lessening or prevention of competition. While application of that principle has been uncontroversial, recent commentary has questioned its applicability in big data matters. The Bureau's review indicated that these bedrock principles continue to be appropriate in big data matters.

While these themes provide important guidance, the Bureau identified additional themes which suggest a note of caution when addressing this emerging issue. The first is that big data can have implications for other policy areas beyond competition law but the Bureau will restrict its attention to its mandate as set out in the Act. A second theme is that Canadian competition law jurisprudence is less developed in certain areas; as new guidance is provided by the Tribunal and the courts, the Bureau's approach will need to adjust accordingly. Lastly, while big data holds considerable promise to increase economic efficiency, it is possible that only a fraction of that promise has been realized as of yet and new innovative business practices will become prominent only in the future. With that context, it is important to maintain a degree of humility and recognize that very broad and categorical guidance may be difficult to offer.

The remainder of this document elaborates upon these themes in the specific context of mergers and monopolistic practices, cartels, and deceptive marketing practices.

Mergers and monopolistic practices

Some have questioned whether competition law is up to the task of assessing mergers and single-firm conduct that involve big data. The Bureau's review indicated that it is. Feedback on the Bureau's discussion paper from stakeholders including the Canadian Bar Association, the American Bar Association, and the International Bar Association supports this view, and indeed demonstrates an important consensus.[5] While not all commentators may agree, the emergence of this general consensus is an important development.

Consequently, in assessing mergers and monopolistic practices, the Bureau will generally apply its traditional analysis of market definition, market power, and competitive effects. That framework is applicable and helpful for effective enforcement in big data matters just as it has been applicable and helpful to enforcement in a diverse array of contexts and industries. For example, big data merger and monopolistic practices enforcement will be based on standard horizontal and vertical theories of harm.

While the standard framework can be usefully applied to big data matters, a competition analysis of big data will not necessarily be straightforward because big data matters may also require specialized tools and methods. Big data can be an output that is sold and priced just as any other good, but it can also be an input that is neither sold nor priced. In the latter scenario, the tools and methods used for competition analysis may need to be adopted to account for issues related to, for example, platforms and network effects.

- **Platforms** bring multiple types of users together. Data-driven platforms are numerous (e.g., Google, Uber, Amazon). As such, to analyze big data cases correctly, it is frequently important to analyze platforms correctly.
    - The most important insight from platforms is that the nature of a "transaction" or

[5] *Canadian Bar Association*: "We support the Bureau's statements regarding the need to preserve incentives to innovate and resist intervention to regulate outcomes or remedy market power obtained through legitimate means. Similarly, we agree that simply acquiring valuable data through competition on the merits is not, on its own, subject to scrutiny under the Competition Act – even if it results in a company obtaining market power. We also agree with the overarching premise that it is neither necessary nor appropriate to apply different rules to big data simply because it involves data, as opposed to a physical product. Indeed, many if not all of the competition considerations relevant to data are not new and do not require a departure from well-established competition principles."
American Bar Association: "The Paper generally concludes that the Bureau can utilize existing enforcement approaches to address issues arising from big data under existing provisions of the Competition Act, provided that the nature and effects of big data are appropriately analyzed in specific situations. In general the Sections agree with this approach."
International Bar Association: "The Antitrust Committee applauds the Bureau's recognition of the need 'to assess the impact of mergers and business practices involving data on a case-by-case basis'. The Draft Discussion Paper generally adopts the approach that Canada's existing merger law framework and the Competition Bureau's enforcement guidelines are sufficient to address big data issues arising in merger transactions, provided that case-by-case assessments are careful to include attention to distinctive attributes of big data such as non-rivalrous consumption, non-price dimensions of competition, zero priced services, two-sided markets, challenges associated with predicting future 'prevention of competition', and dynamic efficiencies. The Antitrust Committee agrees that this general approach appears to be sound."

"price" differs from non-platforms. For example, a "high" price on one side of a platform might not be evidence of market power or anti-competitive effects because it results from a "low" price on another side of the platform.

  - A current example is a ride sharing application's use of big data to help match riders and drivers. When the application charges a "high" price to riders that does not necessarily mean that it is exercising market power or competition has been harmed. For example, in times of high rider demand and low driver supply, the application may increase rider prices and increase payments to drivers so that the amount the platform retains from each ride is unchanged. That change in rider and driver prices lowers demand and increases supply to better allocate scarce resources. In principle, the use of big data to tailor pricing to particular situations can be pro-competitive and increase economic efficiency.

- **Network effects** are present in a product if a consumer benefits when other consumers increase their consumption of that product. Network effects are common in the digital economy. For example, a social media platform is more valuable to a user when more of her acquaintances use that same platform. Somewhat differently, a user of a search engine may benefit when more users search on that platform to the extent that extra searches can be used to improve the overall search product. The most important implication of network effects for competition law is that they can be both an efficiency that benefits consumers but also a barrier to entry that may limit competition. But in that sense, network effects are similar to other ways that firms may increase economic efficiency while raising barriers to entry. For example, firms may exploit economies of scale or develop innovative products that are attractive to consumers. Just as competition law enforcement does not challenge a firm that exploits economies of scale or sells attractive products unless that firm engages in an anti-competitive act, competition law enforcement ought not challenge a firm exploiting network effects absent an anti-competitive act.

Of course, big data cases are subject to the same difficult and sometimes controversial issues that arise in non-big data matters. The extent to which those issues are prominent varies as a function of the particularities of each case and the nature of competition analysis—not whether the case involves big data.

For example:

- Much of competition law is **prospective** so, by its nature, implicates uncertainty. That uncertainty is not only present in industries with rapid and significant change, but is a general feature of competition law enforcement.[6]

[6] For example, decisions about the likely state of competition "but for" a merger or anti-competitive practice always rely, to some extent, on identifying the likeliest counterfactual from a range of uncertain/unobservable alternatives.

- Competition law applies in a wide variety of factual circumstances so that specific methods cannot be and should not be applied rigidly.[7]
    - The analysis of **market power** is no exception. For example, the Bureau recognizes that market share may sometimes overestimate or underestimate a firm's market power. Similarly, the market shares of two firms may imprecisely reflect the degree of their current competitive interaction. Additionally, because a firm's current market share may overstate or understate its future competitive significance, it is possible that a firm with very low share but with access to a resource that is scarce and valuable (e.g., scarce and valuable data) may be found to possess market power. That statement is consistent with the Bureau's position on market share and concentration as articulated in the MEGs.[8]
    - Relatedly, the MEGs note that "Market definition is not necessarily the initial step, or a required step, but generally is undertaken."[9] The logic underlying that statement applies equally to big data as to non-big data cases—particularly in cases where the probative value of the hypothetical monopolist framework may be limited.
- Competition law usually concerns effects on price, although the Courts have recognized that enforcement can and should also address **non-price effects**.[10] Such effects may be prominent in big data cases to the extent that data may lead to innovative improvements in products and services. Quality is a leading example of a non-price dimension of competition, although what constitutes "quality" will vary from case to case. It is conceivable, for example, that in some cases consumers may view privacy as an important element of quality. The Bureau is aware of no convincing evidence to rule out categorically **privacy** as a factor that may affect consumer

[7] Merger Enforcement Guidelines Foreword "Given that merger law applies to a wide variety of factual circumstances, these guidelines are not applied rigidly. As such, this document sets out the Bureau's general approach to merger review and is not a binding statement of how the analysis is carried out in any particular case. The specific facts of a case, as well as the nature of the information and data available, determine how the Bureau assesses a proposed transaction and may sometimes require methodologies other than those noted here."

[8] Merger Enforcement Guidelines ¶ 5.9. "The Bureau has established the following thresholds to identify and distinguish mergers that are *unlikely* to have anti-competitive consequences from those that require a more detailed analysis: The Commissioner *generally* will not challenge a merger on the basis of a concern related to the unilateral exercise of market power when the post-merger market share of the merged firm would be less than 35 percent." (emphasis added)

[9] Merger Enforcement Guidelines ¶ 3.1. That approach is consistent with a developing consensus in competition law that market definition, particularly in cases involving differentiated products, can be problematic.

[10] *The Commissioner of Competition v The Toronto Real Estate Board*, 2016 Comp. Trib. 7, at ¶ 4 "The Tribunal reached that conclusion after finding, among other things, that the VOW Restrictions have substantially reduced the degree of non-price competition in the supply of MLS-based residential real estate brokerage services in the GTA, relative to the degree that would likely exist in the absence of those restrictions. Most importantly, this includes a considerable adverse impact on innovation, quality and the range of residential real estate brokerage services that likely would be offered in the GTA, in the absence of the VOW Restrictions." See also Merger Enforcement Guidelines ¶¶ 12.29, 12.30, 12.31.

perception of the quality of a service that uses big data, and as a result could be a relevant dimension of competition between firms.[11] That is not to say that the Bureau is aware of evidence to necessarily rule privacy in as a factor that affects consumer perception of quality; nor is that to understate the challenges present in analyzing non-price effects. Finally, while the Bureau recognizes that other enforcement agencies may have oversight of certain aspects relevant to the quality of goods and services, including privacy, that oversight does not limit the Bureau's responsibility to enforce the Act.

- No formulaic approach identifies the appropriate **remedy** in any particular merger or conduct case. One potential remedy imposes a **duty to deal** on an offending party in a conduct case. The Bureau is mindful that mandating a duty to deal can potentially chill incentives to innovate and should therefore be pursued only in exceptional circumstances in big data cases as in non-big data cases.
- Mergers can lessen competition through **coordinated effects.** Big data could facilitate coordinated interaction; big data could also facilitate vigorous competition. Thus, in any particular case, the use of big data may increase or decrease the likelihood of coordinated interaction among competitors. Case-specific facts guide coordinated effects theories independent of whether coordinated behavior may be facilitated through the use of big data or algorithms.[12]

Cartels

A prominent question in cartel law enforcement is whether the advent of computer algorithms that rely on big data should lead to a rethinking of competition law enforcement. Fundamentally, the Bureau believes that question should be answered in the negative. Specifically, irrespective of the use of big data or algorithms, an *agreement* among competitors is central to enforcement of the criminal provisions of the Act dealing with **hard-core cartels**. **Conscious parallelism**, where there is no evidence of an agreement, does not engage the cartel provisions nor should cartel law enforcement be changed to address such unilateral conduct. Even if big data may **facilitate** the formation of a cartel, the presence of data creates no presumptions and does not change what must be a case- and fact-specific analysis. Even in a changing technological and commercial environment, businesses can employ traditional efforts, such as corporate compliance programs, to minimize their exposure to potentially criminal liability.[13]

[11] For example, the "DuckDuckGo" search engine attempts to distinguish itself by promising not to track users and otherwise highlighting privacy.
[12] For guidance on the Bureau's general framework for the analysis of coordinated effects see Part 6 of the Merger Enforcement Guidelines.
[13] The Bureau's Bulletin on Corporate Compliance Programs provides guidance to help Canadian businesses design their own program to prevent or minimize their risk of contravening the Act, and to detect contraventions, should they occur.

- In Canada, **hard-core cartel** provisions prohibit agreements between competitors to fix prices, allocate markets, or restrict output that constitute "naked restraints" on competition, as well as undisclosed agreements between competitors with respect to bids or tenders. Hard-core cartels are the most egregious form of anti-competitive conduct and are prohibited pursuant to **criminal** cartel provisions under the Act.
    - Cartels have used data to facilitate and implement agreements for a long time, and cartels may leverage technological innovation to facilitate their operations. Big data and algorithms have allowed for increasingly innovative means of implementing and monitoring adherence to cartel agreements. For example, big data is used to calibrate algorithms that adjust prices almost instantaneously. The use of such tools can have pro-competitive benefits, but can also be used to facilitate more "sophisticated", albeit not completely novel, ways to conspire.[14]
    - A cartel agreement can be reached in many ways, such as orally, through email, or through deliberate collective use of an algorithm meant to reduce competition. Thus, big data does not alter the core elements of a cartel case: there must be an agreement or "meeting of the minds" among competitors to fix or control prices or production or allocate markets; despite the increasing sophistication of the tools, the offence remains rooted in the *agreement* to do the prohibited conduct itself.
    - Some commentators have suggested that artificial intelligence (AI) technology may, in the future, fundamentally impact competitive dynamics and have called for greater guidance on how enforcement should treat situations where cartel agreements are reached purely through interactions between different AI technologies, absent any direct human involvement. The Bureau has observed no evidence of this type of collusion but is aware of the theoretical debate about how it might manifest. Nevertheless, without the benefit of evidence about the nature, or even feasibility, of such collusion, it is premature to provide guidance. That being said, the Bureau recognizes that technology and business practices continue to evolve.
- In contrast to hard-core cartels, **conscious parallelism** includes situations where, in the absence of an agreement to limit competition, competitors *unilaterally* adopt similar or identical business practices or pricing, as a result of rational and profit-maximizing strategies based on observations of market trends and activities of competitors. Conscious parallelism does not fall within the purview of cartel law enforcement in Canada.

[14] Examples include sharing large data sets of inventory information to facilitate an output restriction agreement, or a "hub-and-spoke" agreement between competitors to use the same algorithm in maintaining prices for a large array of products.

- In a growing digital economy, companies are using data tools, such as pricing algorithms facilitated by big data, to observe, analyze and respond to changes in the behaviour of both consumers and competitors. To be clear, in certain instances, big data may soften competition to the extent industry participants use it to recognize that there is a degree of interdependence to their decisions. But in other cases, big data may sharpen competition and be pro-competitive. For example, firms may use big data to offer goods and services with new features that are attractive to consumers. Whatever the ultimate effect, monitoring activities and analysis of data are now more advanced, although hardly new. Rather, the unilateral use of more sophisticated algorithms extends practices that companies employed even before the advent of modern information technology.
- Given the broad consensus that a business' unilateral monitoring and responding to data collected on its competitors is not per se anti-competitive, it is difficult to suggest that the use of big data be prohibited in performing these same activities. While some commentators have suggested that conscious parallelism will become increasingly common and problematic due to wider use of big data, those concerns have neither been subject to empirical scrutiny nor are they reflected in any current consensus among competition lawyers and economists. At such a stage, suggesting a fundamental shift in cartel law enforcement is premature. Of course, the Bureau will continue to assess further evidence on this developing issue.

- More nuanced questions related to cartel law enforcement arise in circumstances that go beyond purely unilateral data collection and analysis and involve parallel behaviour and **facilitating practices**. In Canadian cartel law enforcement, facilitating practices involve activities that may be viewed as an indicator of the existence of an agreement between competitors.[15]
  - Facilitating practices have existed well before the advent of big data. Examples include circulating price lists to competitors, advance announcement of price changes, and adoption of similar pricing systems. Big data and algorithms may expand the array of activities that constitute facilitating practices. For example, disclosing a pricing algorithm to competitors may be construed as akin to distributing a price list to competitors and provide evidence relevant to the issue of whether an agreement exists.
  - As big data technology continues to evolve, it is difficult to predict the ways in which it may facilitate, or indicate the existence of, anti-competitive

[15] Section 45(3) of the *Competition Act* permits the court to infer the existence of a conspiracy, agreement or arrangement from circumstantial evidence, with or without direct evidence of communication between or among the alleged parties to it.

agreements or arrangements. Each situation is case-specific and will depend on the particular facts. Nonetheless, businesses face risks when they engage in facilitating practices that lead to outcomes that mirror those that would be achieved through a hard-core cartel.

Deceptive marketing practices

The Bureau ensures truth in advertising by discouraging deceptive marketing practices and by encouraging firms to provide sufficient information to allow informed choices. In this respect, big data has great potential to deliver value to consumers. For example, big data can enable targeted advertising based on a consumer's interests, which may present relevant and useful information, reduce search costs, and allow consumers to make more informed choices.

The life cycle of big data can be divided into four phases: 1) collection, 2) compilation and consolidation, 3) analysis, and 4) use.[16] Consumers are frequently implicated in the first phase of the life cycle—collection—as they sometimes represent the original source of data. Consumers are also implicated at the final phase—use—when firms use big data to promote their products and services. The rules relating to misleading advertising apply to the collection and use of big data just as they do in more familiar contexts. The overarching principle remains the same: firms should not mislead consumers. Commentators agreed that the Bureau's current deceptive marketing provisions can be applied to cases involving big data.[17]

It is useful to distinguish between deceptive marketing issues that are related to the collection of data, and those that are related to the use of data:

- **Collecting data through deceptive means**: Advances in technology are allowing firms to collect large amounts of data from many sources, including consumers themselves. When firms collect data, they should be cognizant of the representations they make to consumers.
    - When firms make **false or misleading representations** about their collection of data, consumers may be led to provide information that they would not otherwise have offered or acquire products that they might not otherwise

[16] "Big Data: A tool for inclusion or seclusion." US Federal Trade Commission. January 2016.

[17] *American Bar Association*: "The Sections commend the Bureau for discussing how its current enforcement frameworks in the consumer protection context can be applied to cases involving big data. Broadly speaking, the deceptive marketing provisions of the Competition Act cover false or misleading representations made to the public to promote any business interests, directly or indirectly. The Paper helpfully outlines specific criminal offences and reviewable practices where big data may be most likely to raise issues."

Canadian Bankers Association: "We also agree that, while big data may be a new context in relation to deceptive business practices, the rules relating to misleading advertising apply the same way as they always would (e.g. to validate performance claims, ordinary selling price claims etc.)"

select. Put simply, firms should truthfully represent pertinent information to allow consumers to make informed choices.

- There is potential for overlapping enforcement activities under the Act and under **privacy** law. Canada's Office of the Privacy Commissioner (OPC) has a mandate under the *Personal Information Protection and Electronic Documents Act (*PIPEDA*)* to protect and promote privacy rights in the collection, use, and disclosure of personal information. One principle holds that PIPEDA "is intended to prevent organizations from collecting information by misleading or deceiving individuals about the purpose for which information is being collected."[18] Similarly, the Act condemns representations made to the public that are false or misleading in a material respect.[19]Therefore, the Bureau's mandate to ensure truth in advertising may overlap with the OPC's mandate to protect privacy rights. Both mandates are important to protect consumers in the digital economy. The Bureau will continue to enforce provisions of the Act even if the offending actions may be subject to enforcement under PIPEDA. The Bureau shares the OPC's view of the importance of collaboration in this area and looks forward to working with the OPC to protect Canadian consumers.[20]

- **Using data to deceive**: Big data opens new avenues for firms to promote their products or services. When firms use data to reach consumers, deceptive practices may manifest themselves in a number of ways. The current enforcement framework applies in the same way as it does in other contexts and companies should continue to be vigilant to ensure that they steer clear of misleading practices. Below are some examples for illustrative purposes, which are outlined in greater detail in the Bureau's discussion paper.
  - Reviews are data that inform consumer purchasing decisions. Regardless of whether such data amounts to "big" data, the practice of submitting fake reviews on review websites, a practice known as **astroturfing**, can diminish the usefulness of those data, thereby, harming consumers. Astroturfing and **native advertising**, the practice of disguising an advertisement by making it similar to the news, articles, product reviews, or entertainment that consumers are viewing online, continue to be emerging issues as firms increasingly use data and social media as inputs in marketing campaigns. As in other contexts, firms should safeguard against consumer deception by adequately disclosing who is making the representation or on whose behalf the representation is made.

[18] *Personal Information Protection and Electronic Documents Act*, Part 1 Principle 4.3.5.
[19] See section 74.01(1)(a) of the *Competition Act*.
[20] See the OPC's public comment: "As a result, our Office would be pleased to discuss how the OPC and the Competition Bureau could cooperate in addressing these emerging challenges, in an effort to help business better understand their compliance obligations to better protect and develop the trust of individuals as it pertains to Canada's digital economy."

- Similarly, firms should continue to ensure that representations in respect of **ordinary selling prices** are accurate. Companies should use caution when promoting their products using market price claims derived from analysis of data as verifying the accuracy of the data may be challenging.
- Big data may be used to create **targeted advertising** that benefits consumers by offering personalized content and recommendations. At the same time, exploitation of rich data sets about consumers' online behaviour may allow for the targeting of vulnerable consumers. Certain sections of the Act specifically note that "vulnerability" is an aggravating factor that courts shall consider in sentencing and in determining the amount of an administrative monetary penalty.[21]
- Consumers benefit from relevant and substantiated **performance claims** about products they are considering buying. The emergence of the "Internet of Things" may lead to a broader use of performance claims derived from third-party data. For example, users of Wi-Fi connected home appliances may be able to test the energy efficiency of their appliances and companies that sell such appliances may obtain these data from third parties to promote their products. Such crowd-sourced performance claims may not be free of external influence. Nevertheless, the Act provides flexibility to assess performance claims so that the focus can be on the most important question: are the representations supported by adequate and proper testing?

Conclusion

Competition law enforcement is not new. And throughout its history, it has been applied to continually changing commercial practices and technologies. Another constant has been an ongoing debate as new perspectives and theories, some influenced by those changes to commercial practices and technologies, emerge. From that perspective, the current debate about whether competition law enforcement can meet the challenge posed by big data is to be expected and appropriate. While it welcomes the opportunity to participate in this debate, the Bureau believes that the emergence of firms that control and exploit data can raise new challenges for competition law enforcement but is not, in and of itself, a cause for concern. Although big data may implicate somewhat specialized and less familiar tools and methods, the traditional framework of competition law enforcement can usefully continue to guide the Bureau's work.

[21] See sections 52, 53, and 74.1 of the *Competition Act*.

Exhibit 15 to the Cross-Examination of Professor Tadelis

Reference: *The Commissioner of Competition v. Superior Propane Inc.*, 2000 Comp. Trib. 16

File no.: CT1998002

Registry document no.: 238a

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, and the *Competition Tribunal Rules*, SOR/94-290, as amended;

AND IN THE MATTER OF an inquiry pursuant to subsection 10(1)(b) of the *Competition Act* relating to the proposed acquisition of ICG Propane Inc. by Superior Propane Inc.;

AND IN THE MATTER OF an application by the Commissioner of Competition under section 92 of the *Competition Act*.

B E T W E E N :

The Commissioner of Competition

(applicant)

and

Superior Propane Inc.

ICG Propane Inc.

(respondents)

Dates of hearing: 20011009 to12, 20011015

Members: Nadon J. (presiding); L.P. Schwartz and C. Lloyd

Date of order: 20020404

Order signed by: Nadon J.

REASONS AND ORDER FOLLOWING THE REASONS FOR JUDGMENT OF THE FEDERAL COURT OF APPEAL DATED APRIL 4, 2001

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[130] Yet, as is clear from Muris' critique, the Tribunal cannot but note that there is strong debate within the American antitrust regime over the appropriate treatment of efficiencies in merger review.

H. DIFFERENCES BETWEEN CANADIAN AND AMERICAN APPROACHES TO MERGERS AND EFFICIENCIES

[131] It is clear that the Court has placed weight on the American approach to antitrust and on the views of American commentators who, in line with that approach, are antagonistic to the Total Surplus Standard. In so doing, the Court does not appear to take account of the historic and continuing hostility toward efficiencies in merger review under American antitrust law and the reasons for that hostility, and it may not have completely realized the several critical, and perhaps subtle, ways in which the merger provisions of Canada's Act differ from the antitrust statutes and the judicial histories thereof in the United States.

(1) Market Structure Considerations

[132] First, under subsection 92(2) of the Act, evidence consisting solely of market share or concentration is insufficient for the Tribunal to conclude that a merger will lessen or prevent competition substantially. This provision is a reaction to the incipiency doctrine adopted by the U.S. Supreme Court in *Brown Shoe* and to the structuralist presumption arising from *Philadelphia National Bank*. It should not be forgotten that American merger review had, by the 1960s, focussed virtually entirely on whether the post-merger market share was large enough to support a finding of illegality. It was not until its decision in *General Dynamics* (*U.S.* v. *General Dynamics Corp.* 415 U.S. 486 (1974)) in 1974 that the United States Supreme Court departed from rigid reliance on calculated market shares and gave consideration to other pertinent factors.

[133] Whereas the decisions in *Brown Shoe* and *Philadelphia National Bank* reflected the economic learning of the day, the drafters of the amendments to Canada's Act in 1986

I. AMERICAN COMMENTARY

[150] The Court refers approvingly (Appeal Judgment, at paragraph 137) to American commentators who clearly articulate consumer protection as the overriding objective of U.S. antitrust laws. However, the merger provisions of Canada's Act are not so focussed on consumer protection. It appears to the Tribunal that American commentators have generally not realized this. Instead, they have been quick to attack section 96 of Canada's Act, and always on the basis that it diverges from the approach under American antitrust law. In this, the commentators are entirely correct, but they ignore Canadian economic conditions and concerns, in particular, the comparatively small size of the Canadian economy.

[151] For example, in his analysis of the Act, Professor Ross advocates that the phrase "prevention or lessening of competition" in subsection 96(1) be interpreted in the same way as the phrase "restrain or injure competition unduly" in section 45 (presumably paragraph 45(1)(d)) and hence prevent redistributions of wealth from anti-competitive mergers as Parliament intended for criminal conspiracy (S. Ross, *Afterword-Did the Canadian Parliament Really Permit Mergers That Exploit Canadian Consumers So That The World Can Be More Efficient?*, Antitrust Law Journal, vol. 65, Issue 1, Fall 1996 at 641) [hereinafter, *Ross*]. The Tribunal disagrees with this view. If Parliament had intended the same meanings to these phrases, it would have used the same language when it added section 96 to the Act in 1986.

[152] Secondly, Professor Ross notes the concern that the Consumer Surplus Standard would "...effectively read an efficiency defence out of the Competition Act" (Ross, at 647). Referring to the *obiter dicta* comments of Reed J. in the *Hillsdown* decision, he concludes that that standard would permit mergers where the efficiency gains are "...almost certain" and the "threat of substantially lessened competition is only likely..." (Ross, at 648). However, nothing in the Act suggests this, and in the Tribunal's view, the requirement that efficiency gains be shown on a balance of probabilities applies equally to any effects that are asserted.

[153] Professor Ross may be correct to conclude that subsection 96(2) is inconsistent with the Total Surplus Standard (Ross, at 648), but it is also inconsistent with the Consumer Surplus Standard and the Modified Surplus Standard.

[154] Professor Ross defines and criticizes a "total Canadian welfare model" because, when it results in blocking a merger by excluding efficiency gains and effects outside of Canada, it violates the non-discrimination requirements under international treaties and agreements (Ross, at 643-644). In the Tribunal's understanding, the "total Canadian welfare model" as defined by Professor Ross includes consideration of the deadweight loss to the Canadian economy and losses due to income transfer from Canadian consumers to foreign shareholders. Accordingly, it is a version of the Consumer Surplus Standard in which effects are limited to those experienced in Canada. As discussed below, the Tribunal disagrees with his conclusion regarding Canada's international obligations and his interpretation of the purpose clause of the Act.

[155] In the Tribunal's view, Professor Ross appears to be antagonistic to any approach that differs from the approach adopted in the United States. Indeed, although his position is not entirely clear, his view appears to the Tribunal to be that no harm from an anti-competitive merger should be tolerated, regardless of proven efficiency gains. Although he refers to a consumer welfare standard, he appears to articulate the Modified Price Standard, which was criticized by Professor Townley at the first hearing.

[156] The Court's reliance on Professor Brodley's article is puzzling since that article does not discuss Canadian law at all (Joseph F. Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress* (1987) 62 N.Y.U. Law Review, 1020) [hereinafter, *Brodley*]. It cites neither the Act nor the Canadian MEGs, and it does not express surprise at the interpretation of section 96 adopted in the MEGs. Instead, addressing the on-going debate within American antitrust law Professor Brodley writes that one approach to reconciling efficiency and consumer welfare would be to abandon the consumer interest. In light of Congressional and judicial decisions, he finds this unacceptable (Brodley, at 1035-36).

[157] Professor Brodley emphasizes that consumer protection is the goal of American antitrust law. Regarding economic goals, he concludes:

...These economic objectives can be implemented by placing greater emphasis on stability and predictability of antitrust rules, preventing exclusionary conduct that threatens production efficiency, and recognizing a limited efficiencies defense when otherwise restrictive conduct would enhance production or innovation efficiency. (Brodley, at 1053)

Professor Brodley's article serves as a reminder of the debate within American antitrust law as it adapts to economic conditions a century after the antitrust laws were first introduced. It discusses Canada's approach not at all.

[158] The Tribunal does not criticize the American antitrust regime, but it notes that it is the result of circumstances, policies, and judicial interpretation of the pertinent statutes that are unique to the United States. The opinions of American commentators on Canada's Act, whether cited by the Court or by the Commissioner, should be seen in the context of historical and continuing hostility toward efficiencies in merger review in the United States.

[159] In the Tribunal's view, the prevailing hostile approach to efficiencies in American antitrust law derives from the primary focus of that regime on consumer protection. The adoption of the American approach to efficiencies under the Act would, without question, introduce the hostility that characterizes that approach. As noted above, the amendments in 1986 to the merger provisions of the *Combines Investigation Act* were primarily focussed on economic efficiency.

J. DOES THE TOTAL SURPLUS STANDARD VITIATE SECTION 92?

[160] In its Reasons, the Tribunal emphasized that the Consumer Surplus Standard could not be correct in law because it frustrates the attainment of efficiency that was

[282] In the Tribunal's opinion, the definitional problem reflects differences of opinion regarding the relationship between section 96 and the purpose clause. As it stated in its Reasons, the Tribunal views section 96 as a clear instruction that competition is not be to maintained or encouraged as otherwise required by the purpose clause. On this view, the Tribunal's task is clear; there is no conflict in the operation of these two important provisions.

(4) Additional Effects

[283] It is clear from the history of American antitrust law that the conjoining of economic power and political power was a clear concern. Other values were also protected under American antitrust law, including job loss, effects on local communities, and decentralization by the absolute protection of small businesses. These effects are clearly matters that would have to be considered qualitatively if they were held to be effects for the purpose of section 96. Apart from the effect on small and medium-sized enterprises, such effects were not held to result from the instant merger.

[284] The larger issue in regard to most of these concerns is that they are not connected to any of the objectives of Canadian competition policy, so it will be difficult to introduce them into the inquiry under section 96. For example, the Tribunal observed that job loss resulting from an anti-competitive merger was not an effect of lessening of competition for the purpose of section 96 because such losses also result from mergers that are not anti-competitive and in that case the Commissioner can take no notice thereof under the Act (Reasons, at paragraphs 443-444).

[285] The Tribunal agrees with the respondents that, having considered all of the concerns raised by the Commissioner (i.e. deadweight loss, interdependent pricing, service quality, etc.) to consider, in addition, the creation, *per se*, of monopoly as a qualitative factor under section 96 is to double-count those effects (Respondents' Memorandum on Redetermination Proceedings, paragraph 87 at 40). Accordingly, the

Exhibit 16 to the Cross-Examination of Professor Tadelis

Premerger Notification and the Merger Review Process

Under the Hart-Scott-Rodino (HSR) Act, parties to certain large mergers and acquisitions must file premerger notification and wait for government review. The parties may not close their deal until the waiting period outlined in the HSR Act has passed, or the government has granted early termination of the waiting period. The FTC administers the premerger notification program, and its staff members answer questions and maintain a website with helpful information about how and when to file. The FTC also provides daily updates of deals that receive early termination.

Steps in the Merger Review Process

Step One: Filing Notice of a Proposed Deal

Not all mergers or acquisitions require a premerger filing. Generally, the deal must first have a minimum value and the parties must be a minimum size. These filing thresholds are updated annually. In addition, some stock or asset purchases are exempt, as are purchases of some types of real property. For further help with filing requirements, see the FTC's Guides to the Premerger Notification Program. There is a filing fee for premerger filings.

For most transactions requiring a filing, both buyer and seller must file forms and provide data about the industry and their own businesses. Once the filing is complete, the parties must wait 30 days (15 days in the case of a cash tender offer or a bankruptcy) or until the agencies grant early termination of the waiting period before they can consummate the deal.

Step Two: Clearance to One Antitrust Agency

Parties proposing a deal file with both the FTC and DOJ, but only one antitrust agency will review the proposed merger. Staff from the FTC and DOJ consult and the matter is "cleared" to one agency or the other for review (this is known as the "clearance process"). Once clearance is granted, the investigating agency can obtain non-public information from various sources, including the parties to the deal or other industry participants.

Step Three: Waiting Period Expires or Agency Issues Second Request

After a preliminary review of the premerger filing, the agency can:

1. terminate the waiting period prior to the end of the waiting period (grant Early Termination or "ET");
2. allow the initial waiting period to expire; or
3. issue a Request for Additional Information ("Second Request") to each party, asking for more information.

If the waiting period expires or is terminated, the parties are free to close their deal. If the agency has determined that it needs more information to assess the proposed deal, it sends both parties a Second Request. This extends the waiting period and prevents the companies from completing their deal until they have "substantially complied" with the Second Request and observed a second waiting period. A Second Request typically asks for business documents and data that will inform the agency about the company's products or services, market conditions where the company does business, and the likely competitive effects of the merger. The agency may conduct interviews (either informally or by sworn testimony) of company personnel or others with knowledge about the industry.

Step Four: Parties Substantially Comply with the Second Requests

Typically, once both companies have substantially complied with the Second Request, the agency has an additional 30 days to review the materials and take action, if necessary. (In the case of a cash tender offer or bankruptcy, the agency has 10 days to complete its review and the time begins to run as soon as the buyer has substantially complied.) The length of time for this phase of review may be extended by agreement between the parties and the government in an effort to resolve any remaining issues without litigation.

Step Five: The Waiting Period Expires or the Agency Challenges the Deal

The potential outcomes at this stage are:

1. close the investigation and let the deal go forward unchallenged;
2. enter into a negotiated consent agreement with the companies that includes provisions that will restore competition; or
3. seek to stop the entire transaction by filing for a preliminary injunction in federal court pending an administrative trial on the merits.

Unless the agency takes some action that results in a court order stopping the merger, the parties can close their deal at the end of the waiting period. Sometimes, the parties will abandon their plans once they learn that the agency is likely to challenge the proposed merger.

Previous:
Mergers

Up

Exhibit 17 to the Cross-Examination of Professor Tadelis

For Your Information

FTC, DOJ Issue Fiscal Year 2023 Hart-Scott-Rodino Notification Report and Announce Corrected Fiscal Year 2022 Report

October 10, 2024

Tags: Competition | Bureau of Competition | Merger | Hart-Scott-Rodino Act (HSR)

The Federal Trade Commission, together with the Justice Department's Antitrust Division, released their annual report detailing fiscal year 2023 data on the HSR Premerger Notification Program, which alerts the agencies to transactions that may substantially lessen competition in violation of federal law.

The agencies' 46th Annual Hart-Scott-Rodino Report notes that in fiscal year 2023, 1,805 transactions were reported under the HSR Act, nearly one quarter of which were valued at more than $1 billion, continuing a trend in recent years towards larger and more complicated transactions.

The FTC and DOJ together filed 28 merger enforcement actions in fiscal year 2023. The Commission brought 16 merger enforcement challenges in fiscal year 2023, two in which it reached consent orders for public comment, 10 in which the transaction was abandoned or restructured as a result of antitrust concerns raised during the investigation, and four in which the Commission initiated administrative or federal court litigation. These

Related actions

46th Report (FY 2023)

45th Report (FY 2022) (Corrected)

Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya Regarding The Final Premerger Notification Form and the Hart-Scott-Rodino Rules and Regarding the FY2023 HSR Annual Report to Congress

Dissenting Statement of Commissioner Andrew N. Ferguson Regarding the FY2023 HSR Annual Report to Congress

enforcement actions preserved competition in numerous sectors of the economy, including technology, consumer goods and services, pharmaceuticals, healthcare, transportation, agriculture, manufacturing, and energy.

The report includes statistical tables profiling HSR filings and investigations during fiscal year 2023. Appendices provide a summary of transactions for the past 10 years, as well as the number of transactions reported and the number of transactions by industry group.

Dissenting Statement of Commissioner Melissa Holyoak Regarding Hart-Scott-Rodino Annual Report, Fiscal Year 2023

Topics

Merger Review

Corrected Fiscal Year 2022 Report

The Commission today also released a corrected version of the FY22 HSR Report, updating two numbers in that report. First, in describing the FTC's merger enforcement actions in FY22, the report stated there were seven abandoned or restructured transactions. The correct number, as reflected in the updated report, is five. Second, while the report stated that the Commission issued consent orders in 11 transactions, the correct number is 12 transactions. Correcting these numbers reduces the FTC total merger enforcement actions in FY22 from 24 to 23.

Enacted by Congress in 1976, the Hart-Scott-Rodino Act gives the federal government the opportunity to investigate and challenge mergers that are likely to harm consumers before injury occurs.

The Commission vote to issue the FY23 HSR Report and corrections to the FY22 HSR Report was 3-2, with Commissioners Holyoak and Ferguson dissenting. Chair Lina M. Khan issued a statement joined by Commissioners Rebecca Kelly Slaughter and Alvaro M. Bedoya. Commissioners Melissa Holyoak and Andrew N. Ferguson issued separate statements.

The Federal Trade Commission works to promote competition, and protect and educate consumers. The FTC will never demand money, make threats, tell you to transfer money, or promise you a prize. You can learn more about how competition benefits consumers or file an antitrust complaint. For the latest news and resources, follow the FTC on social media, subscribe to press releases and read our blog.

Contact Information

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Exhibit 18 to the Cross-Examination of Professor Tadelis

PUBLIC

Federal Trade Commission
Bureau of Competition

Department of Justice
Antitrust Division

Hart-Scott-Rodino Annual Report

Fiscal Year 2023

October 1, 2022 through September 30, 2023

Section 7A of the Clayton Act
Hart-Scott-Rodino Antitrust Improvements Act of 1976
(Forty-Sixth Annual Report)

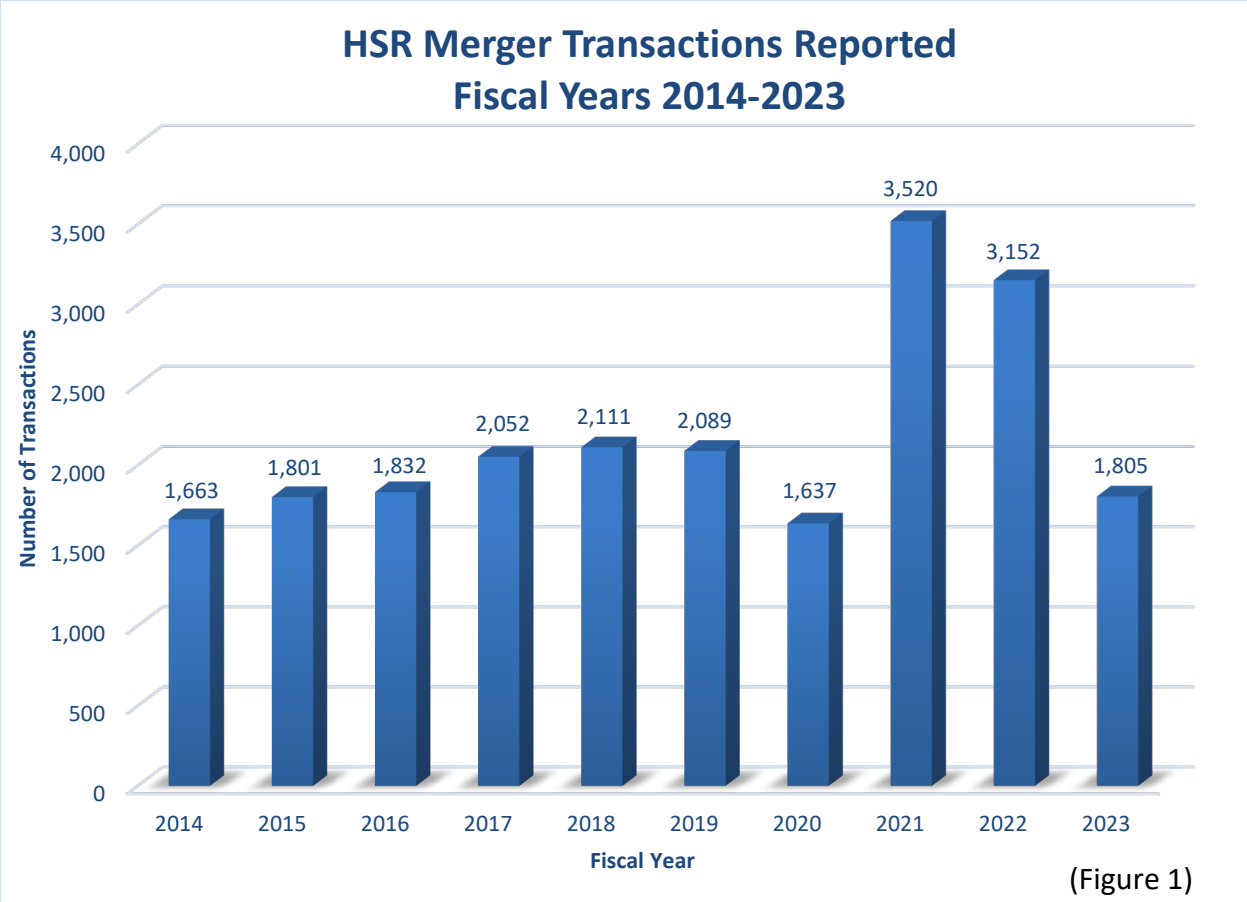
Lina Khan
Chair
Federal Trade Commission

Jonathan Kanter
Assistant Attorney General
Antitrust Division

INTRODUCTION

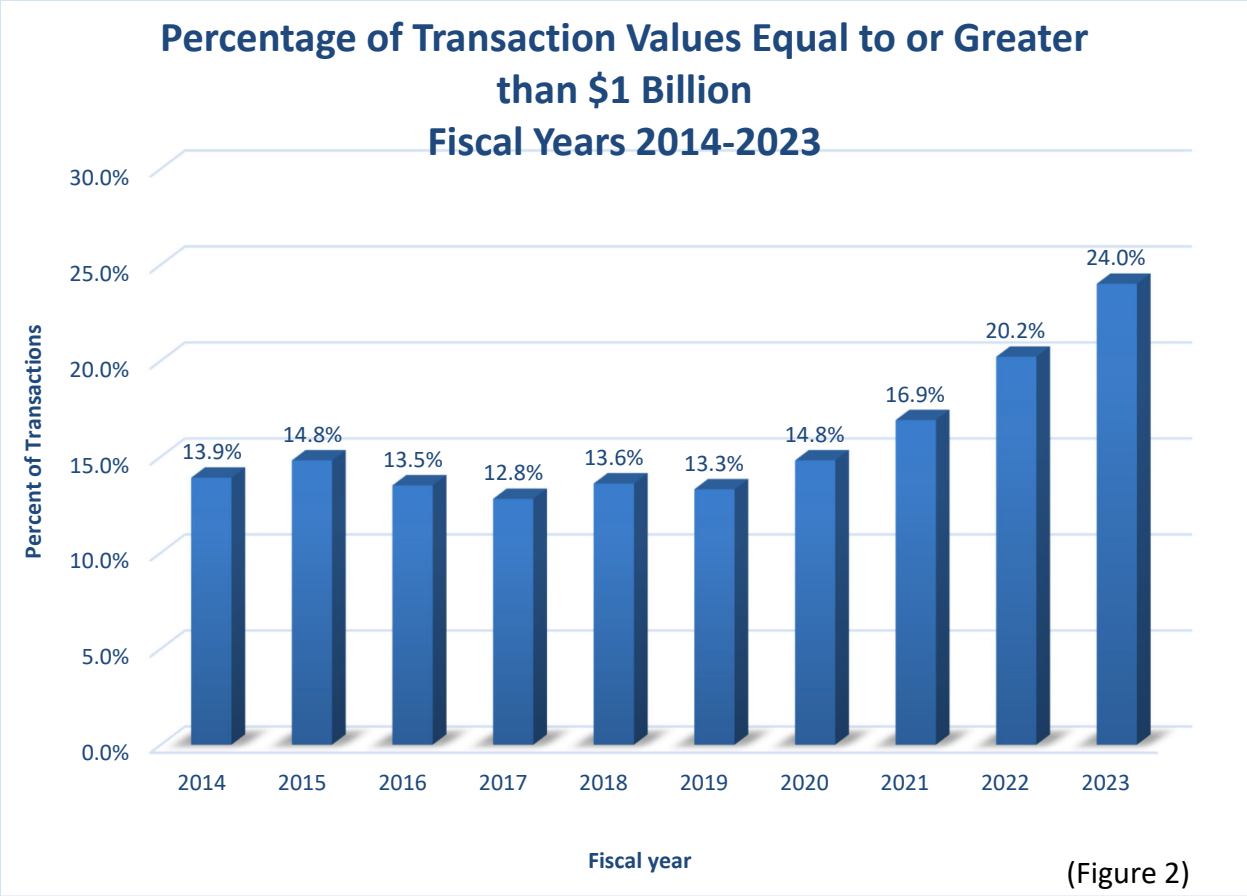
The Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435 (HSR Act or the Act), together with Section 13(b) of the Federal Trade Commission Act and Section 15 of the Clayton Act, enables the Federal Trade Commission (FTC or Commission) and the Antitrust Division of the Department of Justice (Antitrust Division or Division) to prevent anticompetitive mergers, acquisitions, and other types of transactions and to prevent interim harm to competition associated with those transactions. The premerger notification program was instrumental in alerting the Commission and the Division to transactions that became the subjects of the numerous enforcement actions brought in fiscal year 2023.[1]

The Commission and the Antitrust Division continue their efforts to protect competition by identifying and investigating those mergers and acquisitions that raise potentially significant competitive concerns. Together, the FTC and the Division represent the American people's front-line defense against unlawful industry consolidation, and stopping illegal mergers is central to that mission. In fiscal year 2023, 1,805 transactions were reported under the HSR Act. *See* Figure 1 below. Nearly one-fourth of the transactions reviewed by the agencies were valued over $1 billion (see Table I), continuing a trend in recent years towards larger and more complex transactions. *See* Figure 2 below.



(Figure 1)

[1] Fiscal year 2023 covered the period from October 1, 2022 through September 30, 2023.



(Figure 2)

During fiscal year 2023, the Federal Trade Commission and the Antitrust Division worked to block unlawful mergers across a range of industries, including pharmaceuticals, transportation, hospitals, agriculture, mortgage lending, financial services, cement, construction, healthcare advertising, broadcasting, medical devices, electricity, and reproductive health services. The Commission took action against 16 deals: two in which it issued consent orders for public comment; ten in which the transaction was abandoned or restructured as a result of antitrust concerns raised during the investigation; and four in which the Commission initiated administrative or federal court litigation.[2] The Division took action against 12 merger transactions: two that were blocked through lawsuits in U.S. district courts and ten in which the transaction was abandoned or restructured after the Division raised concerns about the threat it posed to competition. In some cases, the parties abandoned their merger plans prior to a complaint, avoiding the expense of extended litigation for both the

[2] To avoid double-counting, this Report includes only those merger enforcement actions in which the Commission or the Antitrust Division took its first public action during fiscal year 2023 and does not fully reflect all the merger enforcement activities of the agencies, including litigation resulting in consent orders and/or divestitures during FY 2023 or on-going investigations and litigation.

parties and the agency.[3] Collectively, the agencies' enforcement actions preserved competition across the American economy.

The Federal Trade Commission

FTC Enforcement Actions by Deal Size:[4]

< $500M	3
Between $500M and $1B	1
Between $1B and $10B	1
Over $10B	3

Summary Numbers for Enforcement Actions:[5]

Complaints Filed	4
Litigated Win	1
Consent Entered in the Course of Litigation[6]	2
Litigation Ongoing	1
Consent Filed with Complaint	2
Abandoned or Restructured Pre-Complaint	10

A major area of focus of the FTC was protecting competition in healthcare markets. The FTC challenged Amgen's $27.8 billion proposed acquisition of Horizon Therapeutics, alleging that the transaction—one of the largest pharmaceutical deals in recent memory—would

[3] *See, e.g.,* Press Release, Fed. Trade Comm'n*, Statement of Elizabeth Wilkins, Director of the FTC's Office of Policy Planning, on the Decision of SUNY Upstate Medical University and Crouse Health System, Inc. to Drop Their Proposed Merger* (Feb. 16, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/02/statement-elizabeth-wilkins-director-ftcs-office-policy-planning-decision-suny-upstate-medical; Press Release, Fed. Trade Comm'n*, Statement Regarding the Termination of CalPortland Company's Attempted Acquisition of Assets Owned by Rival Cement Producer Martin Marietta Materials, Inc*. (Apr. 28, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/04/statement-regardingtermination-calportland-companys-attempted-acquisition-assets-owned-rival-cement*;* Press Release, Fed. Trade Comm'n, *Statement Regarding the Termination of Boston Scientific Corporation's Attempted Acquisition of a Majority Stake in M.I. Tech Co., Ltd.* (May 24, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/05/statement-regarding-termination-boston-scientificcorporations-attempted-acquisition-mi-tech*;* Press Release, Fed. Trade Comm'n, *Statement Regarding Termination of CooperCompanies' Attempted Acquisition of Cook Medical's Reproductive Health Business* (Aug. 1, 2023), https://www.ftc.gov/news-Pevents/news/press-releases/2023/08/statement-regarding-termination-coopercompanies-attemptedacquisition-cook-medicals-reproductive; Press Release, *Infineum USA L.P., Acquisition Terminated* (Feb. 16, 2023), https://www.infineum.com/en-gb/news/acquisition-terminated/.

[4] Transaction values represent only those Commission actions for which the value of the transaction has been publicly disclosed.

[5] In addition to the Complaints filed in FY2023, the FTC's litigation wins in the fiscal year included *Illumina/Grail*. In March 2023, the Commission found that DNA sequencing provider Illumina's $7.1 billion vertical acquisition of GRAIL, Inc., which makes a multi-cancer early detection (MCED) test, was likely to substantially reduce competition in U.S. market for research, development, and commercialization of cancer tests and ordered Illumina to divest Grail. https://www.ftc.gov/system/files/ftc_gov/pdf/d09401commissionfinalopinion.pdf.

[6] Matters where the Commission successfully reached a resolution even after federal court litigation had been initiated are listed under "Consent Orders" but not under "Litigated Wins." "Litigated Wins" here lists only those matters where an evidentiary hearing was completed and a decision was issued by the court.

substantially lessen competition in the market for FDA-approved drugs and would enable Amgen to pressure insurance companies and pharmacy benefit managers into favoring Horizon's two monopoly products, Tepezza and Krystexxa. After the complaint was filed, the parties agreed to a consent order, prohibiting the bundling of any Amgen product with Horizon's medications used to treat thyroid eye disease and chronic refractory gout—and protecting Americans who rely on these treatments.

The Commission also filed an administrative complaint and sought a preliminary injunction challenging the $700 million proposed acquisition of Propel Media, Inc. by IQVIA, the world's largest provider of health care data, alleging that the deal would unlawfully reduce competition and raise health care prices for Americans. After a two-week hearing, the U.S. District Court for the Southern District of New York granted the Commission's preliminary injunction, prompting the parties to abandon their merger plans.[7]

The Commission's merger enforcement work also prompted firms to abandon deals involving reproductive fertility treatments, medical stents, and the combination of two major healthcare systems—protecting patients across the country.

The Commission's work also protected homebuyers from higher costs. The Commission filed an administrative complaint and sought a preliminary injunction challenging Intercontinental Exchange's (ICE) $13.1 billion proposed acquisition of Black Knight, which would have combined the two largest providers of home mortgage loan origination systems. After the complaint was filed, the parties agreed to a consent order to divest Black Knight's Optimal Blue and Empower business platforms to Constellation Web Solutions and prohibiting the parties from enforcing any noncompete or non-solicit provisions against employees.[8] The structural relief obtained by the FTC helped protect competition in key areas of the mortgage origination process, protecting homebuyers and lenders from higher costs. The FTC's merger enforcement work also led to the abandonment of an acquisition involving major cement producers that would have further concentrated the market and risked raising costs for construction and infrastructure projects.

Lastly, the FTC challenged Microsoft's $69 billion acquisition of Activision, alleging that Microsoft would have both the means and motive to harm competition by degrading Activision's game quality or player experience on rival gaming platforms, or limiting or withholding Activision's content—creating a walled garden rather than maintaining an open market. After the district court denied a preliminary injunction, the Commission appealed and the case is moving forward in the Commission's administrative proceedings.[9]

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[7] *FTC v. IQVIA Holdings, Inc.*, No. 1:23-cv-06188 (S.D.N.Y. Jan. 8, 2024 (Op. & Order)).

[8] *See* Press Release, Fed. Trade Comm'n, *FTC Approves Final Order Resolving Antitrust Concerns Surrounding ICE, Black Knight Deal* (Nov. 3, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/11/ftc-approves-final-order-resolving-antitrust-concerns-surrounding-ice-black-knight-deal.

[9] *In the Matter of Microsoft Corporation and Activision Blizzard, Inc.,* FTC Dkt. C-9412 (complaint filed on Dec. 8, 2022).

The Department of Justice

Enforcement Actions by Deal Size:

< $500M	2
Between $500M and $1B	2
Between $1B and $10B	7
JV Affecting Commerce Above $5B[10]	1

Summary Numbers for Enforcement Actions:

Complaints Filed[11]	1
Litigated Win[12]	2
Consent Entered in the Course of Litigation [13]	1
Abandoned Post-Complaint	0
Consent Filed with Complaint	0
Abandoned or Restructured Pre-Complaint	10

Two of the Division's most noteworthy achievements helped protect competition that benefits airline passengers. In one case, the United States and a group of state Attorneys General successfully persuaded a district court to unwind a joint venture between American Airlines and JetBlue Airways. In a second, related case, the United States and its state Attorneys General partners persuaded another judge to block JetBlue's proposed acquisition of Spirit Airlines. As the court observed in *JetBlue-Spirit,* that acquisition "does violence to the core principle of antitrust law: to protect the United States' markets – and its market participants – from anticompetitive harm."[14] These enforcement efforts protected millions of travelers—especially the most price-sensitive ones—flying on hundreds of routes across the country.

Two other enforcement efforts highlight the Division's commitment to protecting competition across key industries. Tenaris, S.A. sought to acquire Benteler Steel & Tube

[10] This reflects the trial victory in *United States v. American Airlines Group Inc.*, No. CV 21-11558-LTS, 2023 WL 4766220 (D. Mass. July 26, 2023). As described further below, *see infra* note 33, the Division previously had categorized this enforcement effort as a non-merger matter for purposes of its annual reporting, but reports it here as a merger matter, in part because of the court's findings after trial.

[11] The complaint filed in FY 23 was *United States v. JetBlue Airways Corp. and Spirit Airlines*, 1:23-cv-10511 (D. Mass. filed March 7, 2023). Because the "Litigated Win" and "Consent Entered" rows reflect cases filed before FY 23, the sum of the "Litigated Win" and "Consent Entered" rows is greater than the "Complaints Filed" row.

[12] This includes *United States v. Bertelsmann SE & Co. KGaA, Penguin Random House, LLC, ViacomCBS, Inc., and Simon & Schuster, Inc.*, 1:21-cv-02886 (D.D.C. filed Nov. 2, 2021), which was discussed in the 2022 annual report because it was initiated in fiscal year 2022, but reached resolution in fiscal year 2023, and also includes the Antitrust Division's trial victory against American Airlines Group Inc. and JetBlue Airways Corp. *See infra* notes 31-33.

[13] In *United States v. ASSA ABLOY AB and Spectrum Brands Holdings, Inc.*, 1:22-cv-02791-ABJ (D.D.C. filed Sept. 15, 2022), the U.S. District Court for the District of Columbia entered final judgment on September 13, 2023, requiring ASSA ABLOY to divest assets and abide by other remedies. Like *U.S. v. Bertelsmann*, this case was discussed in the 2022 annual report because it was initiated in fiscal year 2022, but reached resolution in fiscal year 2023.

[14] *United States v. JetBlue Airways Corp.*, 712 F. Supp. 3d 109 (D. Mass. 2024).

Manufacturing Corp. The proposed acquisition, if completed, would have diminished competition in the domestic supply of seamless tubing and production casing, important types of steel pipe used in the extraction of oil and gas. In February 2023, Tenaris and Benteler abandoned this transaction in the face of potential enforcement action by the Antitrust Division.

In March 2023, Vistra Corporation announced its plan to acquire Energy Harbor Corporation's nuclear plants in PJM Interconnection (PJM), the regional transmission organization that manages the electricity grid for more than 65 million consumers in all or parts of 13 states and the District of Columbia. The Antitrust Division and the Federal Energy Regulatory Commission (FERC) share jurisdiction to review acquisitions of electric power plants. In accordance with President Biden's Executive Order[15] mandating that executive branch agencies take a whole-of government approach to protecting competition, the Antitrust Division submitted a comment to assist FERC's review of the announced merger. The Division explained that the proposed acquisition could increase Vistra's ability or incentive to withhold electricity from a plant located in Ohio in order to raise wholesale electricity prices in part of the PJM region, specifically Ohio and Pennsylvania. In response to the Division's concerns and further action from FERC, Vistra offered to restructure its proposed acquisition by divesting that power plant in Ohio. FERC issued an Order on February 16, 2024, mandating the divestiture.[16]

The Commission's Premerger Notification Office (PNO) website[17] includes instructions for completing the HSR form, information on the HSR rules, current filing thresholds, filing fee instructions, and procedures for submitting post-consummation filings. The website also provides frequently asked questions regarding HSR filing requirements, the number of HSR transactions submitted each month, and contact information for PNO staff.[18]

BACKGROUND OF THE HSR ACT

Section 201 of the HSR Act amended the Clayton Act by adding a new Section 7A, 15 U.S.C. § 18a. In general, the HSR Act requires that certain proposed acquisitions of voting securities, non-corporate interests, or assets be reported to the Commission and the Antitrust Division prior to consummation. The parties must then wait a specified period, usually 30 days (15 days in the case of a cash tender offer or bankruptcy sale), before they may complete the transaction. Whether a particular acquisition is subject to these requirements depends on the value of the acquisition and, in certain acquisitions, the size of the parties as measured by their sales and assets. Acquisitions valued below a certain threshold, acquisitions involving parties with assets and sales below a certain threshold, and certain classes of acquisitions that have been viewed as less likely to raise antitrust concerns are excluded from the Act's coverage.

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[15] Exec. Order No. 14036, 86 Fed. Reg. 36987 (July 9, 2021).
[16] *Energy Harbor Corp. Vistra Corp.,* 186 FERC ¶ 61,129 (Feb. 16, 2024).
[17] *See* Fed. Trade Comm'n, *Premerger Notification Program* (Aug. 28, 2024), https://www.ftc.gov/enforcement/premerger-notification-program.
[18] Resource materials are available on the PNO website; in addition, PNO staff is always available to help HSR practitioners comply with HSR notification requirements.

The Commission, with the concurrence of the Assistant Attorney General for the Antitrust Division, promulgated final rules implementing the premerger notification program on July 31, 1978. At that time, a comprehensive Statement of Basis and Purpose was published, containing a section-by-section analysis of the rules and an item-by-item analysis of the filing form.[19] The program became effective on September 5, 1978. The Commission, with the concurrence of the Assistant Attorney General, has amended the rules and the filing form on many occasions over the years to improve the program's effectiveness and to lessen the burden of complying with the rules, while ensuring that the agencies receive sufficient information to analyze the underlying transaction.[20]

The primary purpose of the statutory scheme, as the legislative history makes clear, is to provide the antitrust enforcement agencies with the opportunity to identify and review potentially anticompetitive mergers and acquisitions before they are consummated. The premerger notification program, with its filing and waiting period requirements, facilitates this goal.

If either reviewing agency determines during the waiting period that further inquiry is necessary, the reviewing agency is authorized by Section 7A(e) of the Clayton Act to issue a request for additional information and documentary material (Second Request).[21] The Second Request extends the waiting period for a specified period of time (usually 30 days, but 10 days in the case of a cash tender offer or bankruptcy sale) after all parties have complied with the Second Request (or, in the case of a tender offer or bankruptcy sale, after the acquiring person complies). This additional time provides the reviewing agency with the opportunity to analyze the information and to take appropriate action before the transaction is consummated. If the reviewing agency believes that a proposed transaction may substantially lessen competition or tend to create a monopoly, the agency may challenge the transaction.

A STATISTICAL PROFILE OF THE PREMERGER NOTIFICATION PROGRAM

The appendices to this Report provide a statistical summary of the operation of the premerger notification program. Appendix A shows, for the ten-year period covering fiscal years 2014-2023, the number of transactions reported; the number of filings received; the number of merger investigations in which Second Requests were issued; and the number of transactions in which requests for early termination of the waiting period were received,

[19] 43 Fed. Reg. 33450 (July 31, 1978).
[20] *See* Fed. Trade Comm'n *Legal Library: Statements of Basis and Purpose* (June 29, 2023), https://www.ftc.gov/enforcement/premerger-notification-program/statute-rules-and-formal-interpretations/statements-basis-purpose.
[21] 15 U.S.C. §18a(e)(1)(A) ("The Federal Trade Commission or the Assistant Attorney General may, prior to the expiration of the 30-day waiting period (or in the case of a cash tender offer, the 15-day waiting period) . . . . require the submission of additional information or documentary material relevant to the proposed acquisition.").

granted, and not granted.[22] Appendix A also shows the number of transactions in which Second Requests could have been issued, as well as the percentage of transactions in which Second Requests were issued. Appendix B provides a month-by-month comparison of the number of transactions reported and the number of filings received for fiscal years 2014 through 2023.

The statistics set out in these appendices show that the number of transactions reported in fiscal year 2023 decreased from the record high number of transactions reported in fiscal years 2021 and 2022 but were generally in line with the number of reported transactions over the past decade.[23] Of the 1,805 reported transactions in fiscal year 2023, Second Requests could have been issued in 1,735 of them. The FTC issued 26 Second Requests in FY 2023. In FY 2023, the Division issued 11 Second Requests. *See* Table I.

The tables (Tables I through XI) in Exhibit A contain information regarding the agencies' enforcement activities for transactions reported in fiscal year 2023. The tables provide, for example, various characteristics of transactions, the number and percentage of transactions in which one antitrust agency granted the other clearance to commence an investigation, and the number of merger investigations in which either agency issued Second Requests. Table III of Exhibit A shows that in fiscal year 2023, the agencies received clearance to conduct an initial investigation in 10.2 percent of the total number of transactions reported. The tables also provide the number of transactions based on the dollar value of transactions reported and the reporting threshold indicated in the notification report. In fiscal year 2023, the aggregate dollar value of reported transactions was $1.6 trillion.[24]

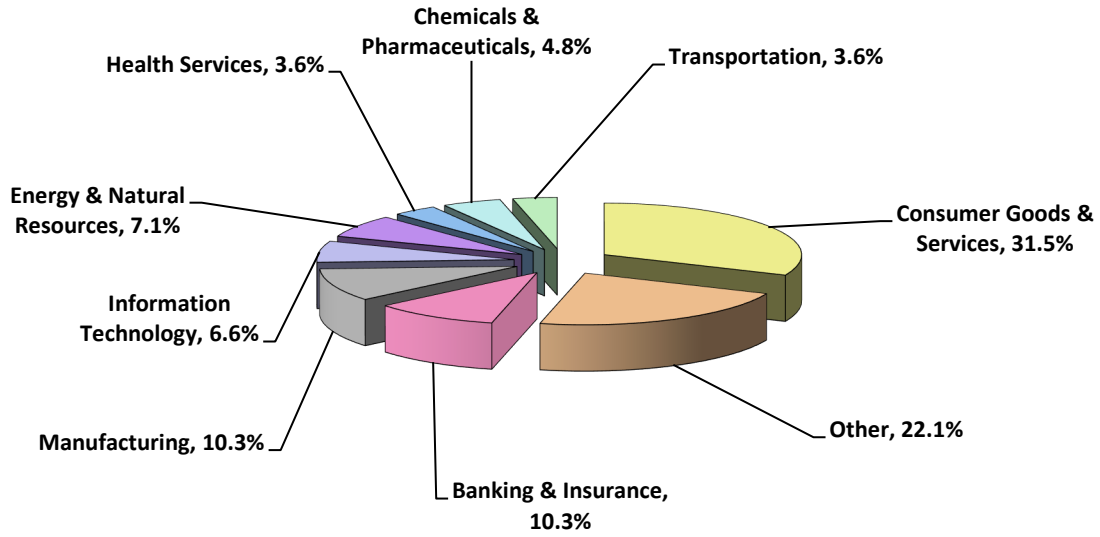
Tables X and XI provide the number of transactions, by broad industry group, in which the acquiring person and the acquired entity, respectively, derived the most revenue. Figure 3 illustrates the percentage of adjusted transactions within industry groups for fiscal year 2023 based on the acquired entity's operations, reflecting the breadth of the agencies' experience in reviewing transactions that impact every sector of the U.S. economy[25]

[22] The term "transaction," as used in Appendices A and B and Exhibit A to this Report, does not refer only to individual mergers or acquisitions. A particular merger, joint venture, or acquisition may be structured such that it involves more than one filing that must be made under the HSR Act.

[23] This Report, like previous Reports, also includes annual data on "adjusted transactions in which a Second Request could have been issued" (adjusted transactions). *See* Appendix A & Appendix A n.2 (explaining calculation of that data). There were 1,735 adjusted transactions in fiscal year 2023, and the data presented in the Tables and the percentages discussed in the text of this Report (*e.g.*, percentage of transactions resulting in Second Requests) are based on this figure.

[24] The information on the value of reported adjusted transactions for fiscal year 2023 is drawn from a database maintained by the Premerger Notification Office.

[25] The category designated as "Other" consists of industry segments that include construction, educational services, performing arts, recreation, and other non-classifiable businesses.



(Figure 3)

DEVELOPMENTS WITHIN THE PREMERGER PROGRAM

1. *Threshold Adjustments*

The 2000 amendments to the HSR Act require the Commission to publish adjustments to the Act's jurisdictional and filing fee thresholds in the Federal Register annually, for each fiscal year beginning on September 30, 2004, based on the change in the gross national product, in accordance with Section 8(a)(5) of the Clayton Act. The Commission amended the rules in 2005 to provide a method for future adjustments as required by the 2000 amendments, and to reflect the revised thresholds contained in the rules. The Commission usually publishes the revised thresholds annually in January, and they become effective 30 days after publication.

On January 26, 2023, the Commission published a notice[26] to reflect adjustment of the reporting thresholds as required by the 2000 amendments[27] to Section 7A of the Clayton Act, 15 U.S.C. § 18a. The revised thresholds, including an increase in the size of transaction threshold from $101 million to $111.4 million, became effective February 27, 2023. The thresholds are calculated based on the prior year's GNP. In addition to the adjustment of the reporting thresholds, the Commission announced new merger filing fees based on the size of the proposed transaction. The 2023 Consolidated Appropriations Act now requires the FTC to

[26] 88 Fed. Reg. 5006 (Jan. 26, 2022).
[27] 15 U.S.C. §18a(a). *See* Pub. L. No. 106-553, 114 Stat. 2762.

revise the HSR filing fee thresholds on an annual basis based on an amount equal to the percentage increase, if any, in the consumer price index.

2. *HSR Compliance*

The Commission and the Antitrust Division continued to monitor compliance with the premerger notification program's filing and waiting period requirements and initiated a number of compliance investigations in fiscal year 2023. The agencies use several methods to oversee compliance, including monitoring news outlets and industry publications for transactions that may not have been reported in accordance with the HSR Act's requirements. Industry sources, such as competitors, customers, and suppliers, interested members of the public, and, in certain cases, the parties themselves, also provide the agencies with information about transactions and possible violations of the Act's requirements.

Under Section 7A(g)(1) of the Act, any person that fails to comply with the Act's notification and waiting period requirements is liable for a civil penalty of up to $50,120 for each day the violation continues.[28] The antitrust agencies examine the circumstances of each violation to determine whether to seek penalties.[29] During fiscal year 2023, 22 post-consummation "corrective" filings were received.

3. *HSR Form Change Rulemaking*

In June 2023, the Commission, with the concurrence of the Antitrust Division, voted out a notice of proposed rulemaking to change the premerger notification form and associated instructions, as well as the premerger notification rules implementing the HSR Act. On September 27, 2024, the Commission, again with the concurrence of the Antitrust Division, voted out a Final Rule that incorporates updates and revisions to the premerger notification form, instructions, and rules. The changes to the form and associated instructions will enable the agencies to more effectively and efficiently screen transactions for potential competition issues within the initial waiting period.

[28] Dollar amounts specified in civil monetary penalty provisions within the Commission's jurisdiction are adjusted for inflation in accordance with the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. No. 114-7 (Nov. 2, 2015). The adjustments have included an increase in the maximum civil penalty from $10,000 to $11,000 for each day during which a person is in violation of Section 7A(g)(1) (61 Fed. Reg. 54548 (Oct. 21, 1996), corrected at 61 Fed. Reg. 55840 (Oct. 29, 1996)), to $16,000 effective February 10, 2009 (74 Fed. Reg. 857 (Jan. 9, 2009)), to $40,000 effective August 1, 2016 (81 Fed. Reg. 42476 (June 30, 2016)), to $46,517 effective Jan. 10, 2022 (87 Fed. Reg. 1070 (Jan. 10, 2021)) and to $50,120 effective January 11, 2022, (88 Fed. Reg. 1499 (Jan. 11, 2022).

[29] If parties inadvertently fail to file, the agencies generally will not seek penalties so long as the parties promptly submit corrective filings after discovering the failure to file, submit an acceptable explanation of their failure to file, and have not previously violated the Act.

MERGER ENFORCEMENT ACTIVITY[30]

The Department of Justice

In addition to litigating and investigating several significant non-merger antitrust enforcement matters, during fiscal year 2023 the Antitrust Division took steps to protect competition that resulted in mergers that were either blocked, abandoned, or restructured in light of the Division's concerns.[31]

The two proposed transactions that the Division successfully blocked in active litigation included the following:

In *United States v. American Airlines Group Inc.*,[32] the Division, joined by the Attorney Generals of the Commonwealths of Massachusetts, Pennsylvania, and Virginia, the States of Arizona, California, and Florida, and the District of Columbia, filed a civil antitrust action to unwind an unprecedented series of agreements between American Airlines and JetBlue designed to consolidate the two airlines' operations in Boston and New York City with effects resembling a merger.[33] At trial in October 2022, the Division proved that this extensive combination, which the companies called the "Northeast Alliance," eliminated competition between American and JetBlue on scores of routes to and from Boston and New York City. And the Division proved that the Northeast Alliance had harmed air travelers across the country by significantly diminishing JetBlue's ability and incentive to act as a disruptive maverick competitor, further consolidating the already highly concentrated airline industry. In July 2023, the U.S. District Court for the District of Massachusetts entered a permanent injunction dissolving the Northeast Alliance. American Airlines is appealing the District Court's ruling.

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[30] The cases listed in this section were not necessarily reportable under the premerger notification program. Given the confidentiality of information obtained pursuant to the Act, it would be inappropriate to identify the cases initiated under the program except in those instances in which that information has already been disclosed.

[31] Two merger enforcement matters, which were discussed in the 2022 annual report because they were initiated in fiscal year 2022, continued into fiscal year 2023. Those two matters, *United States v. ASSA ABLOY AB and Spectrum Brands Holdings, Inc.*, 1:22-cv-02791-ABJ (D.D.C. filed Sept. 15, 2022) and *United States v. Bertelsmann SE & Co. KGaA, Penguin Random House, LLC, ViacomCBS, Inc., and Simon & Schuster, Inc.*, 1:21-cv-02886 (D.D.C. filed Nov. 2, 2021) are not included in the fiscal year 2023 enforcement matters discussed in this section but are being mentioned for completeness. In the former, the U.S. District Court for the District of Columbia entered final judgment on September 13, 2023, requiring ASSA ABLOY, among other things, to divest assets and abide by other remedies. In the latter, the U.S. District Court for the District of Columbia's enjoined the proposed merger on October 31, 2022, and Penguin Random House and Simon & Schuster thereafter abandoned the proposed transaction.

[32] *United States v. Am. Airlines Grp. Inc.*, No. CV 21-11558-LTS, 2023 WL 4766220 (D. Mass. July 26, 2023).

[33] The Division previously had categorized this enforcement effort as a non-merger matter for purposes of its annual reporting, but reports it here as a merger matter, in part because of the court's finding: "The NEA [Northeast Alliance], of course, is not a merger. American and JetBlue remain separate entities. Both have operations that fall beyond the NEA's reach, and the agreement does not formally embody a complete combination of the partners' operations even within the NEA region. Nevertheless, as implemented by the parties, its effects resemble those of a merger of the parties' operations within the northeast in ways the Court will describe next." *United States v. Am. Airlines Grp. Inc.*, 675 F.Supp.3d 65, 89 (D. Mass. May 19, 2023) (on appeal to the First Circuit).

In *United States v. JetBlue Airways Corp.*,[34] the Division filed a civil antitrust lawsuit to block JetBlue Airways Corporation's proposed $3.8 billion acquisition of its largest and fastest-growing ultra-low-cost rival, Spirit Airlines, Inc. The Division's complaint was joined by the Attorneys General of the Commonwealth of Massachusetts, the States of New York, California, Maryland, New Jersey, and North Carolina, and the District of Columbia. The complaint alleged that Spirit's low-cost, no-frills flying option has brought lower fares and more options to routes across the country, making it possible for more Americans – particularly price sensitive consumers who pay their own fares – to travel. JetBlue's acquisition of Spirit would have eliminated the "Spirit Effect," where Spirit's presence flying on a route forces other air carriers, including JetBlue, to lower their fares. The deal also would have eliminated half of the ultra-low-cost capacity in the United States, ultimately leading to higher fares and fewer seats, harming millions of consumers on hundreds of routes. In January 2024, the U.S. District Court for the District of Massachusetts blocked the proposed takeover because it "does violence to the core principle of antitrust law: to protect the United States' markets – and market participants – from anticompetitive harm." Subsequently, in March 2024, JetBlue announced that it had abandoned the deal and would not pursue an appeal.

The Division's merger enforcement work also resulted in the abandonment or restructuring of several transactions after the Division raised antitrust concerns.

For example, in February 2023, Tenaris, S.A. and Benteler Steel & Tube Manufacturing Corp. abandoned Tenaris's proposed $460 million acquisition of Benteler after the Division raised concerns about the impact of the deal on competition. Both companies operate domestic steel mills that supply seamless tubing and production casing, important types of steel pipe used in the extraction of oil and gas. The deal would have increased concentration in an already concentrated industry, cementing Tenaris as the undisputed dominant player in the market.

In March 2023, the Division worked with the Federal Energy Regulatory Commission (FERC) to challenge Vistra Corporation's proposed acquisition of nuclear plants owned by Energy Harbor Corporation. The Division summitted a comment to FERC explaining that the proposed acquisition could substantially lessen competition and increase wholesale electricity prices. After the Division raised these concerns and FERC took further action, Vistra proposed a divestiture to address the Division's competitive concerns. The company offered to restructure its proposed acquisition by divesting that power plant in Ohio. In February 2024, FERC issued an Order mandating that divestiture.

In October and November 2022, the Division helped secure divestitures for two proposed transactions in the banking industry.[35] In October, US Bancorp and MUFG Union Bank

[34] *United States v. JetBlue Airways Corp.*, No. 23-10511-WGY, 2024 U.S. Dist. LEXIS 7509 (D. Mass. Jan. 16, 2024).
[35] Based on these divestiture commitments, the transactions were approved pursuant to orders of the Federal Reserve Board. Order Approving the Acquisition of a Bank, FRB Order No. 2022-22 (Oct. 14, 2022); Order Approving the Merger of Bank Holding Companies and Determination on a Financial Holding Company Election, FRB Order No. 2022-20 (Oct. 25, 2022).

("Union Bank") agreed to a divestiture of three of Union Bank's full-service branches after the Division raised concerns that the proposed merger was likely to substantially lessen competition in retail and/or small business banking products and services. Then in November, Columbia Bank and Umpqua Bank agreed to divestitures to remedy the Division's concerns that the proposed merger was likely to substantially lessen competition in retail and/or small business banking products and services in local markets in California, Oregon, and Washington.

The Federal Trade Commission

During fiscal year 2023, the Commission challenged 16 mergers that, as proposed, would violate the federal antitrust laws, including several blockbuster multi-billion dollar deals. In four cases, the Commission initiated administrative or federal court litigation, and ten mergers were abandoned after the Commission raised concerns about their potential for eliminating beneficial competition. The Commission also accepted consent orders that require divestitures and other strong relief in two merger cases.[36] As discussed below, two of these litigated matters were also settled by Commission order during FY 2023. In Intercontinental Exchange/Black Knight, the Commission ordered divestitures and in Amgen/Horizon Therapeutics, the Commission imposed strong prohibitions to prevent the merger from causing harm.

In *Microsoft/Activision*,[37] the Commission filed an administrative complaint challenging Microsoft's $69 billion proposed acquisition of Activision. The Commission also authorized staff to seek a preliminary injunction in federal court to maintain the status quo pending the outcome of the administrative trial. The complaint alleged that with control over Activision's blockbuster gaming franchises, Microsoft would have both the means and motive to harm competition by degrading Activision's game quality or player experience on rival platforms, limiting access to Activision's content, or withholding content from competitors entirely—resulting in a walled garden rather than an open market. On July 10, 2023, the U.S. District Court for the Northern District of California denied the Commission's request for a preliminary

[36] Other merger cases discussed in prior annual reports also required significant Commission resources during FY 2023. They are not included in the numbers referenced in this report but are being mentioned for completeness and because of their programmatic significance. For example, in December 2023, the Fifth Circuit affirmed the Commission's findings that Illumina's acquisition of Grail lessened competition through the potential foreclosure of a key input by the sole supplier, which would lead to chilled investment by firms reliant on those inputs for their own competitive success. *Illumina, Inc. v. FTC*, 88 F.4th 1036, 1055 (5th Cir. 2023). After the ruling, Illumina determined to divest its interest in Grail. In January 2023, a district court denied the Commission's motion to enjoin the proposed merger between virtual reality giant Meta and Within Unlimited, the VR studio that marketed the leading VR fitness app and in February the Commission dismissed its related administrative complaint. In July 2023, the Commission issued an order vacating the ALJ's initial decision in the administrative litigation challenging an alleged unlawful agreement between Altria Group, Inc. and Juul Labs, Inc., ending the matter. After the Supreme Court's April 2023 decision in *Axon Enterprise, Inc. v. Fed. Trade Comm'n.*, et al., 598 U.S. ----, 143 S. Ct. 890 (2023), that remanded the petitioners' constitutional challenges back to district court for further proceedings, Commission withdrew its administrative complaint challenging the consummated merger of Axon and its rival VieVu, makers of body-worn camera systems used by police departments.

[37] *In the Matter of Microsoft Corporation and Activision Blizzard, Inc.,* FTC Dkt. C-9412 (complaint filed on Dec. 8, 2022), https://www.ftc.gov/legal-library/browse/cases-proceedings/2210077-microsoftactivision-blizzard-matter.

injunction. That decision is on appeal to the U.S. Court of Appeals for the Ninth Circuit. The Commission's administrative proceeding concerning these claims is scheduled to begin three weeks after the Ninth Circuit issues its opinion.

In *Intercontinental Exchange/Black Knight*,[38] the Commission filed an administrative complaint challenging Intercontinental Exchange's (ICE) $13.1 billion proposed acquisition of Black Knight and heading off potential price increases for homebuyers. The Commission also authorized staff to seek a preliminary injunction in federal court to maintain the status quo pending the outcome of the administrative trial. The complaint alleged that the proposed merger would give ICE, the largest provider of home mortgage loan origination systems (LOS), control over its top competitor, Black Knight. Because Black Knight is also a vertically integrated business with its own LOS, the complaint also alleged that the merger would have allowed ICE to raise costs to lenders, which would then be passed to homebuyers. If consummated, the combined company would have had the means and incentive to drive up costs, reduce innovation, and reduce lenders' choices for tools necessary to generate and service mortgages. After the Commission filed its complaint, the Commission secured a consent order requiring Black Knight to divest its Optimal Blue and Empower businesses to Constellation Web Solutions, a provider of mortgage-related tools. The order also prohibits the parties from enforcing any noncompete or non-solicit provisions against employees. Following a public comment period, the Commission approved the final order on November 3, 2023.

In *Amgen/Horizon Therapeutics*,[39] the Commission filed an administrative complaint challenging Amgen's $27.8 billion proposed acquisition of Horizon. The Commission also authorized staff to seek a preliminary injunction in federal court to maintain the status quo pending the outcome of the administrative trial. The complaint alleged that the proposed merger would enable Amgen to leverage its large portfolio of drugs to pressure insurance companies and pharmacy benefit managers into favoring Horizon's two monopoly products – Tepezza and Krystexxa, used to treat thyroid eye disease and refractory gout, respectively, thereby harming patients who rely on these treatments for their health and quality of life. After the complaint was filed, the Commission secured a consent order prohibiting Amgen from bundling any Amgen product with either of Horizon's Tepezza or Krystexxa products. In addition, Amgen may not condition any product rebate or contract term related to an Amgen product on the sale or positioning of either Tepezza or Krystexxa. Following a public comment period, the Commission approved the final order on December 13, 2023.

In *IQVIA/Propel,*[40] the Commission filed an administrative complaint challenging the world's largest provider of health care data, IQVIA's, $700 million proposed acquisition of

[38] *In the Matter of Intercontinental Exchange and Black Knight, Inc.*, FTC Dkt. C-9413 (complaint filed on March 9, 2023), https://www.ftc.gov/legal-library/browse/cases-proceedings/221-0142-intercontinental-exchange-incblack-knight-inc-matter.

[39] *In the Matter of Amgen Inc. and Horizon Therapeutics PLC,* FTC Dkt. C-914 (complaint filed on June 22, 2023), https://www.ftc.gov/legal-library/browse/cases-proceedings/231-0037-amgen-inc-horizon-therapeutics-plc-matter.

[40] *In the Matter of IQVIA Holdings Inc. and Propel Media, Inc.,* FTC Dkt. C-9416 (complaint filed on July 17, 2023), https://www.ftc.gov/legal-library/browse/cases-proceedings/2210196-iqvia-holdingspropel-media-matter.

Propel Media, alleging that the proposed merger would lead to increased healthcare prices. The Commission also authorized staff to seek a preliminary injunction in the U.S. District Court for the Southern District of New York. The complaint alleged that the proposed merger would give IQVIA a market-leading position in programmatic advertising targeted to doctors and other healthcare professionals. IQVIA and Propel are both vertically integrated companies with large healthcare datasets. According to the complaint, post-merger, IQVIA's ownership of both datasets would have raised the incentive to withhold key information to prevent rival companies and potential entrants from effectively competing. After a two-week evidentiary hearing and closing arguments, the District Court granted the Commission's preliminary injunction. Shortly afterwards, the parties abandoned the transaction.

The Commission's merger enforcement work also resulted in the abandonment of various transactions in light of antitrust concerns.

The proposed merger of the State University of New York Upstate Medical University and Crouse Health System, Inc. presented substantial risk of serious competitive and consumer harm in the form of higher healthcare costs, lower quality of care, reduced innovation and access to care, and lower wages for hospital workers. FTC staff had an active investigation into the effects of the proposed merger and had voiced opposition to a request by the parties for a certificate of public advantage, also known as a COPA, which could have shielded the merger from antitrust laws.[41]

CalPortland Company's proposed acquisition of rival cement producer Martin Marietta Materials, Inc. was presumptively illegal under the Merger Guidelines and would have reduced the number of cement suppliers in Southern California from five to four, further concentrating an already concentrated market.[42]

Boston Scientific and M.I. Tech abandoned their proposed transaction in response to investigations by FTC staff and international antitrust enforcers. The proposed merger raised competitive concerns that could have affected doctors and patients.[43]

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[41] Press Release, Fed. Trade Comm'n, *Statement of Elizabeth Wilkins, Director of the FTC's Office of Policy Planning, on the Decision of SUNY Upstate Medical University and Crouse Health System, Inc. to Drop Their Proposed Merger* (Feb. 16, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/02/statement-elizabeth-wilkins-director-ftcs-office-policy-planning-decision-suny-upstate-medical.

[42] Press Release, Fed. Trade Comm'n, *Statement Regarding the Termination of CalPortland Company's Attempted Acquisition of Assets Owned by Rival Cement Producer Martin Marietta Materials, Inc.* (Apr. 28, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/04/statement-regarding-termination-calportland-companys-attempted-acquisition-assets-owned-rival-cement.

[43] Press Release, Fed. Trade Comm'n, *Statement Regarding the Termination of Boston Scientific Corporation's Attempted Acquisition of a Majority Stake in M.I. Tech Co., Ltd.* (May 24, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/05/statement-regarding-termination-boston-scientificcorporations-attempted-acquisition-mi-tech.

CooperCompanies' decision to abandon its proposed acquisition of Cook Medical Holdings, LLC's reproductive health business following a full-phase investigation by FTC staff helped ensure continued competition in critical reproductive health markets.[44]

The Commission also accepted for public comment and finalized consent orders in the following two merger matters.

In *Tractor Supply/Orschein*,[45] the Commission challenged Tractor Supply's $320 million proposed acquisition of Orschein. According to the complaint, the proposed merger would have harmed competition among farm stores in the Midwest and South that sell products for small farmers, ranchers, and landowners. To remedy this concern, the Commission issued a consent order requiring Tractor Supply to divest some Orschein stores and Orschein's corporate offices and its Missouri distribution center to Bomgaars, an Iowa-based farm store chain, and some other stores to Buchheit, another chain with farm stores in Missouri and Illinois. Following a public comment period, the Commission approved the final order on December 2, 2022.

In *EQT/Quantum*,[46] the Commission challenged EQT's $5.2 billion proposed acquisition of Quantum. According to the complaint, Quantum and EQT are direct competitors in the production and sale of natural gas in the Appalachian Basin, the largest natural gas-producing region in the United States. The proposed merger would make Quantum one of EQT's largest shareholders and give Quantum a seat on EQT's board of directors, which the Commission alleged would violate the antitrust laws and harm competition in this industry. The complaint also alleged that, by making Quantum one of EQT's largest shareholders, the deal would give Quantum the ability to sway EQT's competitive decision-making and access EQT's confidential and competitively sensitive information. According to the complaint, by enabling Quantum to communicate directly with EQT, access and exchange confidential business information, and influence or direct EQT's competitive actions or strategies, this arrangement would create an unfair method of competition in violation of the FTC Act. In addition to the proposed transaction, the complaint addresses a pre-existing joint venture between EQT and Quantum called The Mineral Company (TMC), which is involved in purchasing mineral rights in the Appalachian Basin. According to the complaint, this joint venture relationship raises additional concerns regarding anticompetitive information exchange and harms competition in the acquisition of mineral rights. To remedy these concerns, the Commission issued a consent order prohibiting Quantum from occupying an EQT board seat to prevent an interlocking directorate.

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[44] Press Release, Fed. Trade Comm'n, *Statement Regarding Termination of CooperCompanies' Attempted Acquisition of Cook Medical's Reproductive Health Business* (Aug. 1, 2023), https://www.ftc.gov/news-Pevents/news/press-releases/2023/08/statement-regarding-termination-coopercompanies-attemptedacquisition-cook-medicals-reproductive.

[45] *In the Matter of Tractor Supply Company and Orschein Farm and Home LLC,* FTC Dkt. C-4776 (final order issued on Dec. 2, 2022), https://www.ftc.gov/legal-library/browse/cases-proceedings/211-0083-tractor-supply-companyorscheln-farm-home-llc-matter.

[46] *In the Matter of QEP Partners, LP, Quantum Energy Partners VI, LP, Q-TH Appalachia (VI) Investment Partners, LLC, and EQT Corporation,* FTC Dkt. C-4799 (final order issued on Oct. 10, 2023), https://www.ftc.gov/legal-library/browse/cases-proceedings/2210212-qep-partnerseqt-corporation-matter.

The consent order also requires Quantum to divest its EQT shares. This order marks the FTC's first case in 40 years that enforces Section 8 of the Clayton Act, which prohibits interlocking directorates, an arrangement that occurs when an officer or director of one firm simultaneously serves as an officer or director of a competing firm. In addition, the consent order imposes other provisions to prevent anticompetitive information exchanges, immediately unwind the problematic TMC joint venture, protect competition, and ensure the effectiveness of the consent order. Following a public comment period, the Commission approved the final order on October 10, 2023.

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Prior to the HSR Act, businesses could, and often did, consummate transactions that raised significant antitrust concerns before the agencies had an opportunity to review them. This practice forced the agencies to engage in lengthy post-acquisition litigation, during the course of which the transaction's anticompetitive effects continued to harm competition; furthermore, if effective post-acquisition relief was not practicable, the harm continued indefinitely.

Leadership at both agencies commend staff of the Commission and the Department of Justice, including the FTC's Premerger Notification Office, for their diligent and dedicated efforts to identify and investigate mergers and acquisitions that may substantially lessen competition or tend to create a monopoly and to pursue law enforcement before injury can arise. The Commission and the Antitrust Division salute the tireless work of their excellent staffs in protecting the American public from unlawful mergers and acquisitions.

LIST OF APPENDICES

LIST OF EXHIBITS

APPENDIX A

SUMMARY OF TRANSACTIONS

FISCAL YEARS 2014 – 2023

PUBLIC

APPENDIX A
SUMMARY OF TRANSACTIONS BY FISCAL YEAR

	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023
Transactions Reported	**1,663**	**1,801**	**1,832**	**2,052**	**2,111**	**2,089**	**1,637**	**3,520**	**3,152**	**1,805**
Filings Received[1]	**3,307**	**3,585**	**3,674**	**4,083**	**4,188**	**4,142**	**3,249**	**7,002**	**6,288**	**3,515**
Adjusted Transactions In Which A Second Request Could Have Been Issued[2]	1,618	1,754	1,772	1,992	2,028	2,030	1,580	3,413	3,029	1,735
Investigations in Which Second Requests Were Issued	**51**	**47**	**54**	**51**	**45**	**61**	**48**	**65**	**47**	**37**
FTC[3]	30	20	25	33	26	30	23	42	25	26
Percent[4]	1.9%	1.1%	1.4%	1.7%	1.3%	1.5%	1.5%	1.2%	0.8%	1.4%
DOJ[3]	21	27	29	18	19	31	25	23	22	11
Percent[4]	1.3%	1.5%	1.6%	0.9%	0.9%	1.5%	1.6%	0.7%	0.7%	0.6%
Transactions Involving a Request For Early Termination[5]	**1,274**	**1,366**	**1,374**	**1,552**	**1,500**	**1,507**	**1,133**	**2,124**	**1,345**	**780**
Granted[5]	1,020	1,086	1,102	1,220	1,170	1,107	861	417	5	0
Not Granted[5]	254	280	272	332	330	400	272	1,707	1,340	780

[1] Usually, two filings are received, one from the acquiring person and one from the acquired person when a transaction is reported. Only one application is received when an acquiring party files for an exemption under Section 7A (c)(6) or (c)(8) of the Clayton Act.

[2] These figures omit from the total number of transactions reported all transactions for which the agencies were not authorized to request additional information. These include (1) incomplete transactions (only one party filed a complete notification); (2) transactions reported pursuant to the exemption provisions of Sections 7A (c)(6) and 7A(c)(8) of the Act; (3) transactions which were found to be non-reportable; and (4) transactions withdrawn before the waiting period began. In addition, where a party filed more than one notification in the same year to acquire voting securities of the same corporation, e.g., filing one threshold and later filing for a higher threshold, only a single consolidated transaction has been counted because as a practical matter the agencies do not issue more than one Second Request in such a case. These statistics also omit from the total number the transactions reported secondary acquisitions filed pursuant to §801.4 of the Premerger Notification rules. Secondary acquisitions have been deducted in order to be consistent with the statistics presented in most of the prior annual reports.

[3] These statistics are based on the date the Second Request was issued and not the date the investigation was opened.

[4] Second Request investigations are a percentage of the total number of adjusted transactions. The total percentage reflected in Figure 2 may not equal the sum of reported component values due to rounding.

[5] These statistics are based on the date of the HSR filing and not the date action was taken on the request.

APPENDIX B

NUMBER OF TRANSACTIONS REPORTED AND

FILINGS RECEIVED BY MONTH

FOR

FISCAL YEARS 2014 - 2023

APPENDIX B

TABLE 1. NUMBER OF TRANSACTIONS REPORTED BY MONTH FOR FISCAL YEARS

	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023
October	124	144	168	163	174	211	151	202	432	172
November	159	157	243	215	207	254	206	400	575	207
December	108	122	157	148	160	157	164	204	279	170
January	125	118	117	153	170	150	154	210	233	139
February	114	140	127	153	141	145	138	278	206	150
March	100	128	125	146	178	156	136	322	221	122
April	140	131	129	150	140	163	72	261	218	114
May	157	152	168	209	222	191	57	299	211	139
June	150	155	150	191	177	161	117	299	202	145
July	162	170	140	146	180	170	110	329	184	146
August	151	216	166	219	223	173	170	353	197	162
September	173	168	142	159	139	158	162	363	194	139
TOTAL	**1,663**	**1,801**	**1,832**	**2,052**	**2,111**	**2,089**	**1,637**	**3,520**	**3,152**	**1,805**

APPENDIX B
TABLE 2. NUMBER OF FILINGS RECEIVED[1] BY MONTH FOR FISCAL YEARS

	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023
October	247	289	345	329	336	421	298	454	870	346
November	325	322	483	416	417	505	413	825	1,187	467
December	211	239	314	297	319	308	329	364	552	287
January	244	244	236	307	316	287	309	399	431	273
February	236	257	249	298	304	295	269	564	407	226
March	195	252	265	302	338	308	270	616	440	243
April	271	265	249	290	285	335	145	524	434	225
May	315	305	331	402	424	365	137	623	420	273
June	304	322	304	388	365	349	212	573	407	301
July	323	327	284	291	364	306	208	659	365	279
August	292	425	339	446	433	358	336	717	407	319
September	344	338	275	317	287	305	323	684	368	276
TOTAL	**3,307**	**3,585**	**3,674**	**4,083**	**4,188**	**4,142**	**3,249**	**7,002**	**6,288**	**3,515**

[1] Usually, two filings are received, one from the acquiring person and one from the acquired person, when the transaction is reported. Only one filing is received when an acquiring person files for a transaction that is exempt under Sections 7A(c)(6) and (c)(8) of the Clayton Act.

EXHIBIT A

STATISTICAL TABLES

FOR

FISCAL YEAR 2023

DATA PROFILING HART-SCOTT-RODINO PREMERGER NOTIFICATION FILINGS AND ENFORCEMENT ACTIONS

TABLE I
FISCAL YEAR 2023[1]
ACQUISITIONS BY SIZE OF TRANSACTION (BY SIZE RANGE)[2]

TRANSACTION RANGE ($MILLIONS)	HSR TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS[3]				
	NUMBER[4]	PERCENT	NUMBER		PERCENT OF TRANSACTION RANGE GROUP			NUMBER		PERCENT OF TRANSACTION RANGE GROUP		
			FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
50M - 100M	2	0.1%	0	0	0.0%	0.0%	0.0%	0	0	0.0%	0.0%	0.0%
100M - 150M	173	10.0%	5	2	2.9%	1.2%	4.0%	0	0	0.0%	0.0%	0.0%
150M - 200M	227	13.1%	10	5	4.4%	2.2%	6.6%	1	0	0.4%	0.0%	0.4%
200M - 300M	293	16.9%	21	1	7.2%	0.3%	7.5%	8	0	2.7%	0.0%	2.7%
300M - 500M	259	14.9%	14	8	5.4%	3.1%	8.5%	2	1	0.8%	0.4%	1.2%
500M - 1000M	364	21.0%	26	21	7.1%	5.8%	12.9%	6	3	1.6%	0.8%	2.5%
Over 1000M	417	24.0%	48	24	11.5%	5.8%	17.3%	9	7	2.2%	1.7%	3.8%
ALL TRANSACTIONS	1,735	100.0%	124	61	7.1%	3.5%	10.7%	26	11	1.5%	0.6%	2.1%

TABLE II
FISCAL YEAR 2023[1]
ACQUISITIONS BY SIZE OF TRANSACTION[2] (CUMULATIVE)

TRANSACTION RANGE ($MILLIONS)	HSR TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS[3]				
	NUMBER[4]	PERCENT	NUMBER		PERCENTAGE OF TOTAL NUMBER OF CLEARANCES			NUMBER		PERCENTAGE OF TOTAL NUMBER OF SECOND REQUESTS		
			FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
LESS THAN 50M [5]	0	0.0%	0	0	0.0%	0.0%	0.0%	0	0	0.0%	0.0%	0.0%
LESS THAN 100M	2	0.1%	0	0	0.0%	0.0%	0.0%	0	0	0.0%	0.0%	0.0%
LESS THAN 150M	175	10.1%	5	2	2.7%	1.1%	3.8%	0	0	0.0%	0.0%	0.0%
LESS THAN 200M	402	23.2%	15	7	8.1%	3.8%	11.9%	1	0	2.7%	0.0%	2.7%
LESS THAN 300M	695	40.1%	36	8	19.5%	4.3%	23.8%	9	0	24.3%	0.0%	24.3%
LESS THAN 500M	954	55.0%	50	16	27.0%	8.6%	35.7%	11	1	29.7%	2.7%	32.4%
LESS THAN 1000M	1,263	72.8%	72	33	38.9%	17.8%	56.8%	17	3	45.9%	8.1%	54.1%
ALL TRANSACTIONS	1,735	100%	124	61	67.0%	33.0%	100.0%	26	11	70.3%	29.7%	100.0%

TABLE III
FISCAL YEAR 2023[1]
TRANSACTIONS INVOLVING THE GRANTING OF CLEARANCE BY AGENCY

TRANSACTION RANGE ($MILLIONS)	CLEARANCES GRANTED TO AGENCY			CLEARANCE GRANTED AS A PERCENTAGE OF:							
				TRANSACTIONS IN EACH TRANSACTION RANGE GROUP			TOTAL NUMBER OF CLEARANCES PER AGENCY		TOTAL NUMBER OF CLEARANCES GRANTED		
	FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
50M - 100M	0	0	0	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%
100M - 150M	5	2	7	2.9%	1.2%	4.0%	4.0%	3.3%	2.7%	1.1%	3.8%
150M - 200M	10	5	15	4.4%	2.2%	6.6%	8.1%	8.2%	5.4%	2.7%	8.1%
200M - 300M	21	1	22	7.2%	0.3%	7.5%	16.9%	1.6%	11.4%	0.5%	11.9%
300M - 500M	14	8	22	5.4%	3.1%	8.5%	11.3%	13.1%	7.6%	4.3%	11.9%
500M - 1000M	26	21	47	7.1%	5.8%	12.9%	21.0%	34.4%	14.1%	11.4%	25.4%
Over 1000M	48	24	72	11.5%	5.8%	17.3%	38.7%	39.3%	25.9%	13.0%	38.9%
ALL TRANSACTIONS	124	61	185	7.1%	3.5%	10.7%	100.0%	100.0%	67.0%	33.0%	100.0%

TABLE IV
FISCAL YEAR 2023[1]
TRANSACTIONS IN WHICH SECOND REQUESTS WERE ISSUED

TRANSACTION RANGE ($MILLIONS)	INVESTIGATIONS IN WHICH A SECOND REQUEST WAS ISSUED [3]			SECOND REQUESTS ISSUED AS A PERCENTAGE OF:								
				TOTAL NUMBER OF TRANSACTIONS			TRANSACTIONS IN EACH TRANSACTION RANGE GROUP			TOTAL NUMBER OF SECOND REQUEST INVESTIGATIONS		
	FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	FTC	DOJ	TOTAL
50M - 100M	0	0	0	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%
100M - 150M	0	0	0	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%
150M - 200M	1	0	1	0.1%	0.0%	0.1%	0.4%	0.0%	0.4%	2.7%	0.0%	2.7%
200M - 300M	8	0	8	0.5%	0.0%	0.5%	2.7%	0.0%	2.7%	21.6%	0.0%	21.6%
300M - 500M	2	1	3	0.1%	0.1%	0.2%	0.8%	0.4%	1.2%	5.4%	2.7%	8.1%
500M - 1000M	6	3	9	0.3%	0.2%	0.5%	1.6%	0.8%	2.5%	16.2%	8.1%	24.3%
Over 1000M	9	7	16	0.5%	0.4%	0.9%	2.2%	1.7%	3.8%	24.3%	18.9%	43.2%
ALL TRANSACTIONS	26	11	37	1.5%	0.6%	2.1%	1.5%	0.6%	2.1%	70.3%	29.7%	100.0%

TABLE V
FISCAL YEAR 2023[1]
ACQUISITIONS BY REPORTING THRESHOLD

THRESHOLD[6]	HSR TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS[3]				
	NUMBER	PERCENT	NUMBER		PERCENT OF THRESHOLD GROUP			NUMBER		PERCENT OF THRESHOLD GROUP		
			FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
$50M (as adjusted)	96	5.5%	0	0	0.0%	0.0%	0.0%	0	0	0.0%	0.0%	0.0%
$100M (as adjusted)	160	9.2%	2	5	1.3%	3.1%	4.4%	0	0	0.0%	0.0%	0.0%
$500M (as adjusted)	24	1.4%	0	4	0.0%	16.7%	16.7%	0	0	0.0%	0.0%	0.0%
25%	3	0.2%	0	0	0.0%	0.0%	0.0%	0	0	0.0%	0.0%	0.0%
50%	631	36.4%	64	33	10.1%	5.2%	15.4%	13	10	2.1%	1.6%	3.6%
ASSETS ONLY	225	13.0%	35	3	15.6%	1.3%	16.9%	8	0	3.6%	0.0%	3.6%
NCI	596	34.4%	23	16	3.9%	2.7%	6.5%	5	1	0.8%	0.2%	1.0%
ALL TRANSACTIONS	1,735	100.0%	124	61	7.1%	3.5%	10.7%	26	11	1.5%	0.6%	2.1%

TABLE VI
FISCAL YEAR 2023[1]
TRANSACTION BY ASSETS OF ACQUIRING PERSON

ASSET RANGE ($MILLIONS)	HSR TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS[3]				
	NUMBER	PERCENT	NUMBER		PERCENT OF ASSET RANGE GROUP			NUMBER		PERCENT OF ASSET RANGE GROUP		
			FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
Below 50M	224	12.9%	0	1	0.0%	0.4%	0.4%	0	0	0.0%	0.0%	0.0%
50M - 100M	20	1.2%	0	3	0.0%	15.0%	15.0%	0	0	0.0%	0.0%	0.0%
100M - 150M	23	1.3%	0	0	0.0%	0.0%	0.0%	0	0	0.0%	0.0%	0.0%
150M - 200M	24	1.4%	0	1	0.0%	4.2%	4.2%	0	0	0.0%	0.0%	0.0%
200M - 300M	158	9.1%	4	0	2.5%	0.0%	2.5%	0	0	0.0%	0.0%	0.0%
300M - 500M	117	6.7%	9	4	7.7%	3.4%	11.1%	0	0	0.0%	0.0%	0.0%
500M - 1000M	157	9.0%	7	3	4.5%	1.9%	6.4%	0	1	0.0%	0.6%	0.6%
Over 1000M	1,012	58.3%	104	49	10.3%	4.8%	15.1%	26	10	2.6%	1.0%	3.6%
ALL TRANSACTIONS	1,735	100.0%	124	61	7.1%	3.5%	10.7%	26	11	1.5%	0.6%	2.1%

TABLE VII
FISCAL YEAR 2023[1]
TRANSACTION BY SALES OF ACQUIRING PERSON

SALES RANGE ($MILLIONS)	HSR TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS[3]				
	NUMBER	PERCENT	NUMBER		PERCENT OF SALES RANGE GROUP			NUMBER		PERCENT OF SALES RANGE GROUP		
			FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
Below 50M	170	9.8%	1	2	0.6%	1.2%	1.8%	0	0	0.0%	0.0%	0.0%
50M - 100M	61	3.5%	1	2	1.6%	3.3%	4.9%	0	0	0.0%	0.0%	0.0%
100M - 150M	53	3.1%	3	2	5.7%	3.8%	9.4%	0	1	0.0%	1.9%	1.9%
150M - 200M	52	3.0%	3	0	5.8%	0.0%	5.8%	0	0	0.0%	0.0%	0.0%
200M - 300M	49	2.8%	3	1	6.1%	2.0%	8.2%	0	0	0.0%	0.0%	0.0%
300M - 500M	108	6.2%	6	3	5.6%	2.8%	8.3%	0	0	0.0%	0.0%	0.0%
500M - 1000M	154	8.9%	4	6	2.6%	3.9%	6.5%	1	3	0.6%	1.9%	2.6%
Over 1000M	848	48.9%	102	45	12.0%	5.3%	17.3%	25	7	2.9%	0.8%	3.8%
Sales Not Available[7]	240	13.8%	1	0	0.4%	0.0%	0.4%	0	0	0.0%	0.0%	0.0%
ALL TRANSACTIONS	1,735	100.0%	124	61	7.1%	3.5%	10.7%	26	11	1.5%	0.6%	2.1%

TABLE VIII
FISCAL YEAR 2023[1]
TRANSACTION BY ASSETS OF ACQUIRED ENTITIES[8]

ASSET RANGE ($MILLIONS)	HSR TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS[3]				
	NUMBER	PERCENT	NUMBER		PERCENT OF ASSET RANGE GROUP			NUMBER		PERCENT OF ASSET RANGE GROUP		
			FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
Below 50M	250	14.4%	12	4	4.8%	1.6%	6.4%	2	1	0.8%	0.4%	1.2%
50M - 100M	197	11.4%	9	4	4.6%	2.0%	6.6%	1	0	0.5%	0.0%	0.5%
100M - 150M	165	9.5%	14	2	8.5%	1.2%	9.7%	0	0	0.0%	0.0%	0.0%
150M - 200M	92	5.3%	6	1	6.5%	1.1%	7.6%	0	0	0.0%	0.0%	0.0%
200M - 300M	157	9.0%	12	5	7.6%	3.2%	10.8%	4	0	2.5%	0.0%	2.5%
300M - 500M	146	8.4%	10	4	6.8%	2.7%	9.6%	2	2	1.4%	1.4%	2.7%
500M - 1000M	177	10.2%	17	7	9.6%	4.0%	13.6%	3	2	1.7%	1.1%	2.8%
Over 1000M	388	22.4%	28	23	7.2%	5.9%	13.1%	7	4	1.8%	1.0%	2.8%
Assets Not Available[8]	163	9.4%	16	11	9.8%	6.7%	16.6%	7	2	4.3%	1.2%	5.5%
ALL TRANSACTIONS	1,735	100.0%	124	61	7.1%	3.5%	10.7%	26	11	1.5%	0.6%	2.1%

TABLE IX
FISCAL YEAR 2023[1]
TRANSACTION BY SALES OF ACQUIRED ENTITIES [9]

SALES RANGE ($MILLIONS)	HSR TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS[3]				
	NUMBER	PERCENT	NUMBER		PERCENT OF SALES RANGE GROUP			NUMBER		PERCENT OF SALES RANGE GROUP		
			FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
Below 50M	305	17.6%	19	3	6.2%	1.0%	7.2%	2	1	0.7%	0.3%	1.0%
50M - 100M	277	16.0%	15	5	5.4%	1.8%	7.2%	5	0	1.8%	0.0%	1.8%
100M - 150M	160	9.2%	10	5	6.3%	3.1%	9.4%	3	1	1.9%	0.6%	2.5%
150M - 200M	132	7.6%	6	3	4.5%	2.3%	6.8%	2	1	1.5%	0.8%	2.3%
200M - 300M	161	9.3%	9	5	5.6%	3.1%	8.7%	1	1	0.6%	0.6%	1.2%
300M - 500M	144	8.3%	12	7	8.3%	4.9%	13.2%	0	2	0.0%	1.4%	1.4%
500M - 1000M	152	8.8%	13	6	8.6%	3.9%	12.5%	3	1	2.0%	0.7%	2.6%
Over 1000M	326	18.8%	29	22	8.9%	6.7%	15.6%	8	4	2.5%	1.2%	3.7%
Sales not Available [10]	78	4.5%	11	5	14.1%	6.4%	20.5%	2	0	2.6%	0.0%	2.6%
ALL TRANSACTIONS	1,735	100.0%	124	61	7.1%	3.5%	10.7%	26	11	1.5%	0.6%	2.1%

TABLE X
FISCAL YEAR 2023 [1]
INDUSTRY GROUP OF ACQUIRING PERSON

3 DIGIT NAICS CODE [11]	INDUSTRY DESCRIPTION	NUMBER [4]	PERCENT OF TOTAL	% POINTS CHANGE FROM FY 2022 [12]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS [3]		
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL
000 [13]	Not Available	241	13.9%	-1.1%	1	1	2	0	0	0
111	Crop Production	2	0.1%	0.0%	0	0	0	0	0	0
112	Animal Production	2	0.1%	0.1%	0	0	0	0	0	0
115	Support Activities for Agriculture and Forestry	1	0.1%	0.1%	0	1	1	0	0	0
211	Oil and Gas Extraction	38	2.2%	1.0%	2	0	2	1	0	1
212	Mining (except Oil and Gas)	3	0.2%	0.0%	0	0	0	0	0	0
213	Support Activities for Mining	10	0.6%	0.4%	0	0	0	0	0	0
221	Utilities	39	2.2%	0.8%	1	3	4	1	1	2
237	Heavy and Civil Engineering Construction	14	0.8%	0.0%	0	0	0	0	0	0
238	Specialty Trade Contractors	20	1.2%	0.3%	0	2	2	0	0	0
311	Food and Kindred Products	35	2.0%	0.5%	6	4	10	1	2	3
312	Beverage and Tobacco Product Manufacturing	12	0.7%	0.3%	2	0	2	0	0	0
315	Apparel Manufacturing	3	0.2%	0.1%	0	0	0	0	0	0
321	Wood Product Manufacturing	9	0.5%	0.1%	1	0	1	0	0	0
322	Paper Manufacturing	12	0.7%	0.3%	0	2	2	0	1	1
323	Printing and Related Support Actitivies	3	0.2%	0.1%	0	0	0	0	0	0
324	Petroleum and Coal Products Manufacturing	10	0.6%	0.3%	2	0	2	1	0	1
325	Chemical Manufacturing	96	5.5%	-0.1%	24	4	28	4	1	5
326	Plastics and Rubber Manfuacturing	15	0.9%	0.2%	1	0	1	0	0	0
327	Nonmetallic Mineral Product Manufacturing	11	0.6%	-0.1%	2	2	4	1	0	1
331	Primary Metal Manufacturing	12	0.7%	0.2%	1	0	1	0	0	0

TABLE X
FISCAL YEAR 2023 [1]
INDUSTRY GROUP OF ACQUIRING PERSON

3 DIGIT NAICS CODE [11]	INDUSTRY DESCRIPTION	NUMBER [4]	PERCENT OF TOTAL	% POINTS CHANGE FROM FY 2022 [12]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS [3]		
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL
332	Fabricated Metal Product Manufacturing	13	0.7%	-0.5%	0	0	0	0	0	0
333	Machinery Manufacturing	31	1.8%	0.1%	1	5	6	0	1	1
334	Computer and Electronic Product Manufacturing	25	1.4%	0.2%	4	0	4	1	0	1
335	Electrical Equipment, Applicance, and Component Manufacturing	9	0.5%	-0.1%	0	1	1	0	0	0
336	Transportation Equipment Manufacturing	21	1.2%	0.2%	0	3	3	0	0	0
337	Furniture and Related Product Manufacturing	2	0.1%	0.0%	2	0	2	1	0	1
339	Miscellaneous Manufacturing	20	1.2%	-0.1%	4	0	4	1	0	1
423	Merchant Wholesalers, Durable Goods	71	4.1%	-0.8%	6	3	9	1	1	2
424	Merchant Wholesales, Nondurable Goods	85	4.9%	0.9%	8	2	10	3	0	3
425	Wholesale Electric Markets and Agent and Brokers	3	0.2%	0.1%	0	0	0	0	0	0
441	Motor Vehicle and Parts Dealers	22	1.3%	-0.1%	0	0	0	0	0	0
442	Furniture and Home Furnishing Stores	2	0.1%	0.1%	0	0	0	0	0	0
444	Electronics and Appliance Stores	2	0.1%	0.0%	0	0	0	0	0	0
445	Food and Beverage Stores	3	0.2%	-0.1%	2	0	2	1	0	1
446	Health and Personal Care Stores	9	0.5%	0.2%	4	1	5	1	1	2
447	Gasoline Stations	9	0.5%	0.4%	5	0	5	0	0	0
448	Clothing and Clothing Accessories Stores	7	0.4%	0.0%	2	1	3	0	0	0
451	Sporting Goods, Hobby, Book, and Music Stores	4	0.2%	0.2%	0	0	0	0	0	0
452	General Merchandise Stores	3	0.2%	0.0%	0	0	0	0	0	0
453	Miscellaneous Store Retailers	1	0.1%	-0.3%	0	0	0	0	0	0
454	Nonstore Retailers	10	0.6%	0.0%	1	0	1	0	0	0

TABLE X
FISCAL YEAR 2023 [1]
INDUSTRY GROUP OF ACQUIRING PERSON

3 DIGIT NAICS CODE [11]	INDUSTRY DESCRIPTION	NUMBER [4]	PERCENT OF TOTAL	% POINTS CHANGE FROM FY 2022 [12]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS [3]		
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL
481	Air Transportation	2	0.1%	-0.1%	0	0	0	0	0	0
482	Railroad Transportation	1	0.1%	0.0%	0	0	0	0	0	0
483	Water Transportation	8	0.5%	0.4%	0	2	2	0	0	0
484	Truck Transportation	12	0.7%	0.3%	0	0	0	0	0	0
485	Transit and Ground Transportation	5	0.3%	0.2%	0	0	0	0	0	0
486	Pipeline Transportation	8	0.5%	0.1%	0	0	0	0	0	0
488	Support Actitivies for Transportation	19	1.1%	-0.3%	0	0	0	0	0	0
492	Couriers	2	0.1%	0.1%	0	0	0	0	0	0
493	Warehousing and Storage	2	0.1%	0.0%	0	0	0	0	0	0
511	Publishing Industries (except Internet)	50	2.9%	-1.5%	0	2	2	0	1	1
512	Motion Pictures and Sound Recording Industries	8	0.5%	0.1%	0	0	0	0	0	0
515	Broadcasting (except Internet)	5	0.3%	0.1%	0	1	1	0	0	0
517	Telecommunications	10	0.6%	-0.1%	0	1	1	0	0	0
518	Internet Service Providers, Web Search Portals, and Data Processing Services	15	0.9%	-0.7%	1	1	2	0	1	1
519	Other Information Services	12	0.7%	-0.3%	1	2	3	0	0	0
522	Credit Intermediation and Related Activities	31	1.8%	-0.4%	0	0	0	0	0	0
523	Securitites, Commodity Contracts, and Other Financial Investments and Related Activities	183	10.5%	-0.1%	2	5	7	1	0	1
524	Insurance Carriers and Related Actitivities	63	3.6%	-0.2%	2	4	6	0	1	1
525	Funds, Trusts, and Other Financial Vehicles	38	2.2%	0.4%	0	0	0	0	0	0
531	Real Estate	9	0.5%	-0.3%	0	0	0	0	0	0
532	Rental and Leasing Services	12	0.7%	-0.1%	1	0	1	0	0	0

TABLE X
FISCAL YEAR 2023 [1]
INDUSTRY GROUP OF ACQUIRING PERSON

3 DIGIT NAICS CODE [11]	INDUSTRY DESCRIPTION	NUMBER [4]	PERCENT OF TOTAL	% POINTS CHANGE FROM FY 2022 [12]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS [3]		
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL
533	Lessors of Nonfinancial Intangible Assets (except Copyrighted Works)	13	0.7%	0.2%	2	1	3	1	0	1
541	Professional, Scientific, and Technical Services	115	6.6%	-1.6%	10	2	12	3	0	3
551	Management Companies and Enterprises	3	0.2%	-0.1%	0	0	0	0	0	0
561	Administrative and Support Services	53	3.1%	0.2%	0	0	0	0	0	0
562	Waste Management and Remediation Services	11	0.6%	0.0%	0	1	1	0	0	0
611	Educational Services	6	0.3%	-0.2%	2	0	2	1	0	1
621	Ambulatory Health Care Services	29	1.7%	-0.1%	2	0	2	0	0	0
622	Hospitals	27	1.6%	0.8%	16	0	16	2	0	2
623	Nursing Care Facilities	2	0.1%	0.0%	1	0	1	0	0	0
624	Social Assistance	1	0.1%	0.0%	0	0	0	0	0	0
711	Performing Arts, Spector Sports, and Related Industries	5	0.3%	0.0%	0	3	3	0	0	0
713	Amusement, Gambling, and Recreation Industries	8	0.5%	0.3%	0	0	0	0	0	0
721	Accommodation	1	0.1%	-0.2%	0	0	0	0	0	0
722	Food Services and Drinking Places	12	0.7%	-0.1%	1	0	1	0	0	0
811	Repairs and Maintenance	9	0.5%	0.0%	1	0	1	0	0	0
812	Personal and Laundry Services	3	0.2%	0.1%	0	0	0	0	0	0
813	Religious, Grantmaking, Civic, Professional, and Similar Organizations	2	0.1%	0.1%	0	1	1	0	0	0
		1,735	100.0%		124	61	185	26	11	37

TABLE XI
FISCAL YEAR 2023[1]
INDUSTRY GROUP OF ACQUIRED ENTITIES

3 DIGIT NAICS CODE[11]	INDUSTRY DESCRIPTION	NUMBER[4]	PERCENT OF TOTAL	% POINTS CHANGE FROM FY 2022[12]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS[3]			NUMBER OF 3 DIGIT INTRA-INDUSTRY TRANSAC-TIONS[14]
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	
000[13]	Not Available	61	3.5%	-0.1%	11	0	11	2	0	2	0
111	Crop Production	2	0.1%	0.0%	0	0	0	0	0	0	0
115	Support Activities for Agriculture and Forestry	1	0.1%	0.0%	0	1	1	0	0	0	0
211	Oil and Gas Extraction	43	2.5%	1.1%	1	0	1	0	0	0	16
212	Mining (except Oil and Gas)	12	0.7%	0.4%	0	0	0	0	0	0	1
213	Support Activities for Mining	13	0.7%	0.3%	0	1	1	0	0	0	2
221	Utilities	48	2.8%	0.8%	0	1	1	0	1	1	3
236	Construction of Buildings	4	0.2%	0.0%	0	0	0	0	0	0	0
237	Heavy and Civil Engineering Construction	11	0.6%	-0.2%	0	0	0	0	0	0	0
238	Specialty Trade Contractors	27	1.6%	0.2%	0	1	1	0	0	0	3
311	Food and Kindred Products	41	2.4%	0.2%	2	5	7	1	1	2	5
312	Beverage and Tobacco Product Manufacturing	9	0.5%	-0.2%	2	0	2	1	0	1	0
313	Textile Mills	1	0.1%	0.0%	0	1	1	0	0	0	0
315	Apparel Manufacturing	1	0.1%	0.0%	0	0	0	0	0	0	0
321	Wood Product Manufacturing	11	0.6%	0.0%	1	1	2	0	0	0	0
322	Paper Manufacturing	9	0.5%	0.1%	0	1	1	0	1	1	0
323	Printing and Related Support Actitivies	3	0.2%	-0.2%	0	0	0	0	0	0	1
324	Petroleum and Coal Products Manufacturing	7	0.4%	0.2%	4	0	4	2	0	2	2
325	Chemical Manufacturing	84	4.8%	0.9%	11	4	15	1	0	1	0
326	Plastics and Rubber Manfuacturing	11	0.6%	-0.5%	1	0	1	0	0	0	1
327	Nonmetallic Mineral Product Manufacturing	10	0.6%	0.1%	3	0	3	1	0	1	3

TABLE XI
FISCAL YEAR 2023[1]
INDUSTRY GROUP OF ACQUIRED ENTITIES

3 DIGIT NAICS CODE[11]	INDUSTRY DESCRIPTION	NUMBER[4]	PERCENT OF TOTAL	% POINTS CHANGE FROM FY 2022[12]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS[3]			NUMBER OF 3 DIGIT INTRA-INDUSTRY TRANSACTIONS[14]
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	
331	Primary Metal Manufacturing	10	0.6%	0.1%	0	1	1	0	0	0	2
332	Fabricated Metal Product Manufacturing	17	1.0%	-0.3%	1	2	3	2	0	2	0
333	Machinery Manufacturing	34	2.0%	0.5%	0	3	3	0	1	1	2
334	Computer and Electronic Product Manufacturing	37	2.1%	-0.1%	1	1	2	0	0	0	0
335	Electrical Equipment, Applicance, and Component Manufacturing	10	0.6%	-0.1%	0	0	0	0	0	0	0
336	Transportation Equipment Manufacturing	26	1.5%	0.1%	3	1	4	1	0	1	0
337	Furniture and Related Product Manufacturing	1	0.1%	0.0%	0	0	0	0	0	0	0
339	Miscellaneous Manufacturing	25	1.4%	0.2%	8	0	8	1	0	1	0
423	Merchant Wholesalers, Durable Goods	96	5.5%	0.1%	2	4	6	0	1	1	3
424	Merchant Wholesales, Nondurable Goods	89	5.1%	0.8%	9	2	11	3	1	4	5
425	Wholesale Electric Markets and Agent and Brokers	3	0.2%	0.1%	0	0	0	0	0	0	0
441	Motor Vehicle and Parts Dealers	22	1.3%	0.1%	1	0	1	0	0	0	3
442	Furniture and Home Furnishing Stores	1	0.1%	0.0%	1	0	1	1	0	1	0
444	Electronics and Appliance Stores	3	0.2%	0.0%	0	0	0	0	0	0	0
445	Food and Beverage Stores	3	0.2%	-0.1%	2	0	2	1	0	1	0
446	Health and Personal Care Stores	14	0.8%	0.6%	4	1	5	1	0	1	0
447	Gasoline Stations	11	0.6%	0.4%	6	0	6	0	0	0	2
448	Clothing and Clothing Accessories Stores	8	0.5%	0.2%	2	0	2	0	0	0	0
452	General Merchandise Stores	4	0.2%	0.1%	0	0	0	0	0	0	0
453	Miscellaneous Store Retailers	3	0.2%	0.0%	0	0	0	0	0	0	0
454	Nonstore Retailers	23	1.3%	0.0%	3	0	3	0	0	0	0

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					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	
481	Air Transportation	6	0.3%	-0.3%	0	0	0	0	0	0	1
483	Water Transportation	5	0.3%	0.1%	0	2	2	0	0	0	2
484	Truck Transportation	15	0.9%	0.5%	0	1	1	0	0	0	0
485	Transit and Ground Transportation	4	0.2%	0.0%	0	0	0	0	0	0	0
486	Pipeline Transportation	13	0.7%	0.1%	1	0	1	2	0	2	0
488	Support Actitivies for Transportation	20	1.2%	-0.4%	0	0	0	0	0	0	0
492	Couriers	1	0.1%	0.0%	0	0	0	0	0	0	0
493	Warehousing and Storage	9	0.5%	0.0%	0	0	0	1	0	1	0
511	Publishing Industries (except Internet)	111	6.4%	-2.4%	3	3	6	0	1	1	2
512	Motion Pictures and Sound Recording Industries	9	0.5%	0.0%	0	1	1	0	0	0	0
515	Broadcasting (except Internet)	8	0.5%	0.1%	0	0	0	0	0	0	0
517	Telecommunications	24	1.4%	0.5%	0	4	4	0	0	0	0
518	Internet Service Providers, Web Search Portals, and Data Processing Services	37	2.1%	-1.4%	0	0	0	0	0	0	0
519	Other Information Services	17	1.0%	-1.0%	1	0	1	0	0	0	0
522	Credit Intermediation and Related Activities	32	1.8%	-0.4%	0	0	0	0	0	0	3
523	Securitites, Commodity Contracts, and Other Financial Investments and Related Activities	71	4.1%	0.7%	0	2	2	0	0	0	4
524	Insurance Carriers and Related Actitivities	57	3.3%	-0.2%	1	0	1	0	0	0	5
525	Funds, Trusts, and Other Financial Vehicles	3	0.2%	-0.2%	0	0	0	0	0	0	0
531	Real Estate	11	0.6%	-0.3%	0	0	0	0	0	0	0
532	Rental and Leasing Services	17	1.0%	0.0%	2	0	2	0	0	0	0
533	Lessors of Nonfinancial Intangible Assets (except Copyrighted Works)	15	0.9%	0.0%	2	1	3	0	0	0	0

TABLE XI
FISCAL YEAR 2023[1]
INDUSTRY GROUP OF ACQUIRED ENTITIES

3 DIGIT NAICS CODE[11]	INDUSTRY DESCRIPTION	NUMBER[4]	PERCENT OF TOTAL	% POINTS CHANGE FROM FY 2022[12]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST[3] INVESTIGATIONS			NUMBER OF 3 DIGIT INTRA-INDUSTRY TRANSAC-TIONS[14]
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	
541	**Professional, Scientific, and Technical Services**	186	10.7%	-0.9%	11	4	15	2	2	4	1
551	**Management Companies and Enterprises**	1	0.1%	0.0%	0	0	0	0	0	0	0
561	**Administrative and Support Services**	50	2.9%	-0.5%	0	2	2	0	0	0	2
562	**Waste Management and Remediation Services**	26	1.5%	0.7%	0	4	4	0	0	0	0
611	**Educational Services**	14	0.8%	0.0%	1	1	2	0	0	0	0
621	**Ambulatory Health Care Services**	33	1.9%	-1.0%	8	2	10	1	2	3	0
622	**Hospitals**	22	1.3%	0.4%	13	0	13	2	0	2	2
623	**Nursing Care Facilities**	4	0.2%	0.0%	1	0	1	0	0	0	0
624	**Social Assistance**	4	0.2%	0.0%	0	0	0	0	0	0	0
711	**Performing Arts, Spector Sports, and Related Industries**	11	0.6%	0.2%	0	3	3	0	0	0	1
713	**Amusement, Gambling, and Recreation Industries**	15	0.9%	0.4%	0	0	0	0	0	0	1
721	**Accommodation**	2	0.1%	-0.2%	0	0	0	0	0	0	0
722	**Food Services and Drinking Places**	12	0.7%	0.1%	1	0	1	0	0	0	0
811	**Repairs and Maintenance**	15	0.9%	0.1%	0	0	0	0	0	0	1
812	**Personal and Laundry Services**	5	0.3%	0.1%	0	0	0	0	0	0	0
813	**Religious, Grantmaking, Civic, Professional, and Similar Organizations**	1	0.1%	0.0%	0	0	0	0	0	0	0
		1,735	100.0%		124	61	185	26	11	37	79

[1] Fiscal year 2023 figures include transactions reported between October 1, 2022 and September 30, 2023.

[2] The size of transaction is based on the aggregate total amount of voting securities, non-corporate interests and/or assets held by the acquiring person as a result of the transaction and are taken from the response to Item 2(d)(iii), 2(d)(vii), and 2(d)(ix) of the Notification and Report Form.

[3] These statistics are based on the date the Second Request was issued.

[4] During fiscal year 2023, 1,805 transactions were reported under the HSR Premerger Notification program. The smaller number, 1,735, reflects the adjustments to eliminate the following types of transactions: (1) transactions reported under Section 7A(c)(6) and (c)(8) (transactions involving certain regulated industries and financial businesses); (2) transactions deemed non-reportable; (3) incomplete transactions (only one party in each transaction filed a compliant notification); and (4) transactions withdrawn before the waiting period began. The table does not, however, exclude competing offers or multiple HSR transactions resulting from a single business transaction (where there are multiple acquiring persons or acquired persons).

[5] The total number of filings under $50M submitted in Fiscal Year 2023 reflects corrective filings.

[6] In February 2001, legislation raised the size of transaction from $15 million to $50 million with annual adjustments beginning in February 2005. As of FY 2017, the threshold categories include non-corporate interests (NCI), encompassing transactions in which the acquiring entity acquires 50% of more of the non-corporate interests of the acquired entity. In addition, the 2023 Merger Filing Fee Modernization Act introduced additional filing fee tiers and new filing fees. Both the filing fee tiers and the filing fees are adjusted annually along with the jurisdictional thresholds.

[7] The category labeled “Sales Not Available” includes newly-formed acquiring persons, foreign acquiring person with no United States revenues, and acquiring persons who had not derived any revenues from their investments at the time of filing.

[8] Assets of an acquired entity are not available when the acquired entity’s financial data is consolidated within its ultimate parent.

[9] Sales of an acquired entity are taken from responses to Item 4(a) and (b) (SEC documents and annual reports) or item 5 (dollar revenues) of the Premerger Notification and Report Form.

[10] This category includes acquisition of newly-formed entities from which no sales were generated, and acquisitions of assets which produced no sales revenues during the prior year to filing the Notification and Report Form.

[11] The 3-digit codes are part of the North American Industrial Classification System (NAICS) established by the United States Government North American Industrial Classification System 1997, Executive Office of the President, Office of Management and Budget. The NAICS groups used in this table were determined from responses submitted by the parties to Item 5 of the Premerger Notification and Report Form.

[12] This represents the deviation from the fiscal year 2022 percentage.

[13] This category includes transactions by newly-formed entities.

[14] The intra-industry transactions column identifies the number of acquisitions in which both the acquiring and acquired person derived revenues from the same 3-digit NAICS code.

EXHIBIT B

Summary letters required by Section 102(c) of the Merger Fee Modernization Act of 2022, including the information required under Sections 102(a) and (b) of the MMA.

PUBLIC

UNITED STATES OF AMERICA

Federal Trade Commission

WASHINGTON, D.C. 20580

Office of the Chair

July 1, 2024

The Honorable Jim Jordan
Chairman, Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

The Honorable Jerrold Nadler
Ranking Member, Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Thomas Massie
Chairman, Subcommittee on the Administrative State, Regulatory Reform, and Antitrust
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Lou Correa
Ranking Member, Subcommittee on the Administrative State, Regulatory Reform, and Antitrust
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Jordan, Ranking Member Nadler, Chairman Massie, and Ranking Member Correa:

On behalf of the Federal Trade Commission and the Justice Department's Antitrust Division (collectively, the Agencies), please find below the summary required by Section 102(c) of the Merger Fee Modernization Act of 2022 ("MMA"), including the information required under Sections 102(a) and (b) of the MMA.

Summary of the FY2023 HSR Annual Report

In fiscal year 2023, 1,805 transactions were reported under the Hart-Scott-Rodino Antitrust Improvements (HSR) Act, which is in line with the number of transactions reported over the past 10 years, excluding the record high number of transactions reported in fiscal years 2021 and 2022. Nearly one-fourth of the transactions reviewed by the Agencies were valued over $1 billion, continuing a trend in recent years towards larger and more complex transactions.

During fiscal year 2023, the Federal Trade Commission took enforcement actions against 16 deals: four in which the Commission initiated administrative or federal court litigation; ten in

which the transaction was abandoned or restructured after the Commission raised concerns about the threat they posed to competition; and two in which it issued consent orders for public comment. The Antitrust Division took enforcement actions against 12 deals: two that were blocked through lawsuits in U.S. district court; ten in which the transaction was abandoned or restructured after the Antitrust Division raised concerns about the threat they posed to competition.

Section 102

(a)(1) The amount of funds made available to the Federal Trade Commission and the Department of Justice, respectively, from the premerger notification filing fees under this section, as adjusted by the Merger Filing Fee Modernization Act of 2022, as compared to the funds made available to the Federal Trade Commission and the Department of Justice, respectively, from premerger notification filing fees as the fees were determined in fiscal year 2022.

FY23 Total Fee Estimate (Oct – Feb) – prior fee structure

October –	$21,337,500
November –	$24,665,275
December –	$17,167,600
January –	$18,577,550
February (adjusted) –	$19,775,010

Total (Oct – Feb): $101,522,935

FY23 Total Fee Estimate (Mar – Sept) – applying prior fee structure

210 Tier 1 Transactions @ $45,000 =	$9,450,000
482 Tier 2 Transactions @ $125,000 =	$60,250,000
231 Tier 3 Transactions @ $280,000 =	$64,680,000

Total (Mar – Sep): $134,380,000

If the MMA did not apply, total collections for FY23 would have been **$235,902,935**, with **$117,951,467.50** made available to the FTC and **$117,951,467.50** made available to the Department of Justice.

Actual Filing Fee Revenue for FY23 was **$343,628,165.01**, with **$171,814,082.51** made available to the FTC and **$171,814,082.50** made available to the Department of Justice.

Difference due to MMA: +$107,725,230.01

(a)(2) The total revenue derived from premerger notification filing fees, by tier, by the Federal Trade Commission and the Department of Justice, respectively.

RESPONSE: See Appendix A, attached.

(a)(3) The gross cost of operations of the Federal Trade Commission, by Budget Activity, and the Antitrust Division of the Department of Justice, respectively.

RESPONSE:

Gross Cost of Operations		
FTC		
(Dollars in Millions)	FY 2022	FY 2023
Consumer Protection	193	218
Antitrust	166	200
TOTAL	359	418
DOJ, Antitrust Division		
(Dollars in Millions)	FY 2022	FY 2023
Antitrust	208	220

(b) (1) for actions with respect to which the record of the vote of each member of the Federal Trade Commission is on the public record of the Federal Trade Commission, a list of each action with respect to which the Federal Trade Commission took or declined to take action on a 3 to 2 vote; and

RESPONSE: There were no such actions during FY23.

(b)(2) for all actions for which the Federal Trade Commission took a vote, the percentage of such actions that were decided on a 3 to 2 vote.

RESPONSE: Zero percent during FY23.

If you or your staff have additional questions or comments, please do not hesitate to contact Jeanne Bumpus, FTC Director of the Office of Congressional Relations, at (202) 326-2946 or Slade Bond, DOJ Deputy Assistant Attorney General, Office of Legislative Affairs, at 202-616-8795.

Sincerely,

Lina M. Khan
Chair, Federal Trade Commission

Appendix A: HSR PREMERGER FILING FEES
FY 2023 SUMMARY REPORT
PREPARED BY FEDERAL TRADE COMMISSION

FY 2023 Fee Collections and Income											
Filing Fee Thresholds	**$92M - < $184M**	**$184M - < $919.9M**	**$919.9M or Greater**	**$111.4M - < $161.4M**	**$161.5M - < $499.9M**	**$500M - < $999.9M**	**$1B - < 1.9B**	**$2B - < $4.9B**	**$5B or Greater**	Other Amounts	TOTAL
Filing Fee	**$45,000**	**$125,000**	**$280,000**	**$30,000**	**$100,000**	**$250,000**	**$400,000**	**$800,000**	**$2,250,000**		
Filings	254.0	396.0	133.5	182.5	432.0	163.5	93.0	52.0	32.0	NA	1,738.50
Fees Collected	11,430,000	49,500,000	37,380,000	5,475,000	43,200,000	40,875,000	37,200,000	41,600,000	72,000,000	7,291,466	345,951,466.01
Refunds										(2,323,301)	(2,323,301.00)
Net Fee Income	11,430,000	49,500,000	37,380,000	5,475,000	43,200,000	40,875,000	37,200,000	41,600,000	72,000,000	4,968,165	**343,628,165.01**

FY 2023 Fee Distribution:	Year-to-Date
DOJ	171,814,082.50
FTC	171,814,082.51
Total Distributed Fees	343,628,165.01

The first three tiers cover October through February and the last six tiers cover February through September.

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PUBLIC

UNITED STATES OF AMERICA

Federal Trade Commission

WASHINGTON, D.C. 20580

Office of the Chair

July 1, 2024

The Honorable Dick Durbin
Chair, Committee on the Judiciary
U.S. Senate
Washington, D.C. 20510

The Honorable Lindsey Graham
Ranking Member, Committee on the Judiciary
U.S. Senate
Washington, D.C. 20510

The Honorable Amy Klobuchar
Chair, Subcommittee on Competition Policy, Antitrust, and Consumer Rights
Committee on the Judiciary
U.S. Senate
Washington, D.C. 20510

The Honorable Mike Lee
Ranking Member, Subcommittee on Competition Policy, Antitrust, and Consumer Rights
Committee on the Judiciary
U.S. Senate
Washington, D.C. 20510

Dear Chair Durbin, Ranking Member Graham, Chair Klobuchar, and Ranking Member Lee:

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Lina Khan

Lina M. Khan
Chair, Federal Trade Commission

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Filing Fee	**$45,000**	**$125,000**	**$280,000**	**$30,000**	**$100,000**	**$250,000**	**$400,000**	**$800,000**	**$2,250,000**		
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Exhibit 19 to the Cross-Examination of Professor Tadelis

Before the
Federal Trade Commission
Washington, DC 20580

In the Matter of	)
	)
Google, Inc.	)
and	)
DoubleClick, Inc.	)
	)

Second Filing of Supplemental Materials in Support of Pending Complaint and Request for Injunction, Request for Investigation and for Other Relief

INTRODUCTION

1. On April 20, 2007, the Electronic Privacy Information Center ("EPIC"), the Center for Digital Democracy ("CDD"), and the U.S. Public Interest Research Group ("U.S. PIRG"), filed a Complaint with the Commission requesting an injunction and investigation alleging that Google, Inc. ("Google"), and DoubleClick, Inc. ("DoubleClick"), are engaging in unfair and deceptive trade practices that will be exacerbated by the proposed merger of the two companies.[1]

2. The Petitioners stated that the "the increasing collection of personal information of Internet users by Internet advertisers poses far-reaching privacy concerns that the Commission should address. Neither Google nor Doubleclick have taken adequate steps to safeguard the personal data that is collected. Moreover the proposed acquisition will create unique risks to privacy and will violate previously agreed standards for the conduct of online advertising."[2]

3. The Petitioners described the importance of privacy protection, the impact of Internet search engines, the Federal Trade Commission's review of the previous DoubleClick matter, the business practices of Google, the business practices of Doubleclick, and the violation of section 5 of the FTC Act, including Google's deceptive trade practice, Google's unfair trade practice, as well as the consumer injury that would result from the merger. The Petitioners concluded:

> Google's proposed acquisition of DoubleClick will give one company access to more information about the Internet activities of consumers than any other company in the world. Moreover, Google will operate with virtually no legal obligation to ensure the privacy, security, and accuracy

[1] EPIC, Center for Digital Democracy, and U.S. PIRG, In the matter of Google, Inc. and DoubleClick, Inc., Complaint and Request for Injunction, Request for Investigation and for Other Relief, before the Federal Trade Commission at 1 (Apr. 20, 2007), *available at* http://www.epic.org/privacy/ftc/google/epic_complaint.pdf.
[2] *Id*. at 1.

> of the personal data that it collects. At this time, there is simply no consumer privacy issue more pressing for the Commission to consider than Google's plan to combine the search histories and web site visit records of Internet users.[3]

4. The Petitioners respectfully requested the Commission to provide relief and specifically to:

> Order DoubleClick to remove user identified cookies and other persistent pseudonymic identifier from all corporate records, databases, and data sets under the control of DoubleClick prior to the transfer to Google, unless DoubleClick obtains explicit affirmative consent, following an opportunity for the individual to whom the data concerns to inspect, delete and modify the data.
>
> Order Google to present a public plan for how it plans to comply with such well established government and industry privacy standards as the OECD Privacy Guidelines.
>
> Order Google to provide for reasonable access to all personally identifiable data maintained by the company to the person to whom the data pertains.
>
> Order Google to present a public plan for how it plans to comply with such well established government and industry privacy standards as the OECD Privacy Guidelines.
>
> Order Google to provide for reasonable access to all personally identifiable data maintained by the company to the person to whom the data pertains.
>
> Order Google to establish a meaningful data destruction policy and require that Google destroy all cookies and other persistent identifiers resulting from Internet searches that are or could be personally identifiable once the user terminates the session with Google.[4]

5. The Petitioners stated:

> Pending an adequate resolution of the issues identified in this Complaint, as well as other matters that may be brought to the Commission's attention, the Commission should use its authority to review mergers to halt Google's proposed acquisition of DoubleClick.[5]

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[3] *Id*. at 10.
[4] *Id*. at 11-12.
[5] *Id*. at 12.

6. On June 6, 2007, the Petitioners filed Supplemental Materials in support of the Complaint. In the Supplemental Materials, the Petitioners stated that since the filing of the initial Complaint, the New York State Consumer Protection Board wrote to the Commission in support of the Complaint, the Article 29 Working Group of the European Union had announced an investigation into Google's privacy practice practices and specifically its extensive retention of personal information, and that Google itself acknowledged that the Commission had undertaken a Second Request of the proposed acquisition of DoubleClick, which based on previous actions by the Commission, is a strong indicator that the Commission will move to block or modify the deal.[6]

7. The Supplemental Materials provided further detail on the information that Google collects about its users, the ways in which Google uses that information, and the privacy impacts of Google's many commonly used services. The Supplemental Materials described similar aspects of DoubleClick's business model and operations. The Petitioners explained that there are unique privacy issues raised by the proposed combination of the Internet's largest search engine and the Internet's largest advertising company.

8. In the Supplemental Materials the Petitioners stated further "Google fails to follow generally accepted privacy practices such as the OECD Privacy Guidelines."[7]

9. In the Supplemental Materials the Petitioners provided addition information on FTC authority and stated specifically that the "FTC has the authority to review privacy issues as part of its merger review process."[8]

10. In the Supplemental Materials the Petitioners stated "the detailed profiling of Internet users raises profound issues that concern the right of privacy, the accountability of large corporations, and the operation of democratic government."[9]

11. In the Supplemental Materials the Petitioner respectfully restated their request for the relief set out in the April 20, 2007 complaint and further requested that the Commission grant additional relief including:

> Order Google to give a user the right to obtain knowledge, in a reasonable and timely manner, of whether or not the data relating to the user is processed and if it is processed, information to the purpose of the processing.

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[6] EPIC, Center for Digital Democracy, and U.S. PIRG, In the matter of Google, Inc. and DoubleClick, Inc., Supplemental Materials in Support of Pending Complaint and Request for Injunction, Request for Investigation and for Other Relief, before the Federal Trade Commission at 1 (Apr. 20, 2007), available at http://www.epic.org/privacy/ftc/google/supp_060607.pdf.
[7] *Id*. at 6.
[8] *Id*. at 15.
[9] *Id*. at 19.

Order Google to provide, in a reasonable and timely manner, the logic involved in any automatic processing of data concerning that user.

Order Google not to retain user data in a form that permits the identification of data subjects for longer than necessary for the purposes for which the data were collected.

Order Google to institute an "opt-in" approach to collecting user information. If Google allows a user to "opt-in" before collecting personal data in order to personalize the search experience, Google should implement the same system with regards to a user's privacy options.

Order Google to allow individuals reasonable access to their personal information, along with the ability to edit and delete that information.

Order Google to stipulate to never engage in behavioral tracking.

Further order Google not to sell personally identifiable information.

Order Google to implement a functional and secure system of anonymizing stored user data. Anonymized data remains traceable to the individual user, as demonstrated when America Online inadvertently leaked the search records of 658,000 Americans.124 Google must implement a technique that truly anonymizes this data, either by erasing more the last octet of the IP address, erasing the IP address completely, assigning randomized numbers to the data, or developing an alternative technique that will render tracing the data back to the individual source impossible.

Order Google to cease storage of IP addresses. The search engine functionality would not be impaired if a search engine did not store any user information at all. Condition the merger on Google and DoubleClick maintaining separate databases of user information.

Order Google to craft, disclose, and implement a security plan that will maintain, protect, or enhance the privacy, confidentiality, or security of all personally identifiable information.

Order Google to implement remedies and a system of accountability in the event of a breach, and to disclose to the public the extent to which it cannot or will not protect the privacy, confidentiality, and security of all personally identifiable information.

12. The Petitioners stated:

Pending an adequate resolution of the issues set out in this Complaint, in the April 20, 2007 Complaint, and other matters that may be brought to

the Commission's attention, the Commission should use its authority to review mergers to halt Google's proposed acquisition of DoubleClick.[10]

13. The Petitioners reserved the right to amend their Complaint and Supplement as new facts emerged regarding Google, DoubleClick, and the merger of the two companies.

14. The Second Supplement in Support of the Pending Complaint supplements the Petitioner's April 20, 2007 and June 6, 2007 filings, incorporate by reference the earlier statements, and allege new facts supporting the position that Google and DoubleClick have engaged in unfair and deceptive trade practices in violation of Section 5 of the Federal Trade Commission Act, that the FTC has the authority to consider consumer privacy interests as part of its merger review authority, that Google and Doubleclick have failed to establish adequate privacy safeguards to protect the interests of Internet users, and that pending the establishment in fact of such protection, the Commission should block the proposed merger.

15. The Petitioners reserve the right to further amend the Complaint as new facts emerge regarding Google's acquisition of Doubleclick.

ADDITIONAL FACTS

Actions by Interested Parties Since June 6, 2007 Supplement

16. On August 21, Google began selling display ads to select videos running on YouTube, which Google bought less than 10 months beforehand.[11] According to the Wall Street Journal, "YouTube's new format is a semitransparent ad that appears on the bottom 20% of the video. The ad shows up after a video plays for 15 seconds, and disappears up to 10 seconds later if the viewer doesn't click on it. Viewers can either click to close the ad right away or to watch the commercial."[12] YouTube is the most popular online video site, and Google is now its exclusive server of display rich media advertising.[13] If it were not clear before, it is clear now that Google and DoubleClick are competitors, because they both serve display ads.

17. On June 8, it was reported that Google's takeover of Feedburner will mean that the RSS syndicator for 432,000 publishers will now have "guaranteed loads of extra consumer and publisher data, along with new strategies for monetizing and optimizing its delivery systems, according to Brent Hill, vice president of

[10] *Id*. at 21.
[11] Posting to YouTube Blog by the YouTube Team, *You Drive the YouTube Experience*, Aug. 21, 2007, http://www.youtube.com/blog?entry=rQpNsTzbgqM.
[12] Emily Steel, *YouTube to Start Selling Ads in Videos*, Wall St. Journal, Aug. 22, 2007, at B1
[13] In July, YouTube had 55.1 million unique visitors. Press Release, Nielsen/NetRatings, Nielsen//NetRatings Reports Topline U.S. Data For July 2007, Aug. 13, 2007, *available at* http://www.nielsen-netratings.com/pr/pr_070813.pdf.

advertising services at FeedBurner. 'From the advertising side, there's a lot of room ahead in terms of monetization and optimization, which Google is going to expose us to,' Hill said ... 'We'll be learning how to incorporate their analytics and monetization strategies for advertisers.' Much remains to be learned about RSS users and their consumption habits, according to Hill."[14]

18. On June 10, Google sent a letter Article 29 Data Protection Working Party stating that Google will cut the period that it retains user data from a maximum of 24 months to a maximum of 18 months.[15] This was a response to the Working Party's May 16 announcement that it had begun an investigation into Google's privacy practices and specifically its retention of personal information. The Working Party asked Google whether the company has "fulfilled all the necessary requirements" to abide by EU privacy rules.[16] Google had previously announced that it would begin retaining user data for a maximum of 18 to 24 months.[17]

19. On June 21, the Article 29 Data Protection Working Party announced that it would expand its initial investigation into Google's privacy practices, specifically its retention of personal information. The Working Party would review "search engines in general, and scrutinize their activities from a data protection point of view, because this issue affects an ever growing number of users."[18]

20. On June 20, Nielsen/Netratings announced its May U.S. Search Share Rankings and Google again topped the list, with a 56.3 percent share of U.S. searches.[19] Yahoo was a distant second with 21.5 percent; MSN had 8.4 percent, AOL had 5.3 percent, and Ask.com had 2.0 percent. The other companies listed in the Top 10 (My Web, Comcast, EarthLink, BellSouth, and Dogpile.com) all had less than one percent share.

21. On June 21, in a response to a complaint filed by CDD and US PIRG in November, the Federal Trade Commission announced that it "will hold at least one Town Hall meeting to learn more about behavioral targeting and related

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[14] Gavin O'Malley, *FeedBurner Ad Leader On What Google Deal Means*, MediaPost Publications, June 8, 2007.

[15] Letter from Peter Fleischer, Global Privacy Counsel, Google Inc., to Peter Schaar, Chairman, Article 29 Data Protection Working Party in Response to Working Party Investigation of Google's Privacy Practices, June 10, 2007, *available at* http://www.epic.org/privacy/ftc/google/gres_a29_061007.pdf; Posting to Google Blog by Peter Fleischer, Global Privacy Counsel, *How long should Google remember searches?*, June 11, 2007, http://googleblog.blogspot.com/2007/06/how-long-should-google-remember.html.

[16] Letter to Peter Fleischer, Privacy Counsel, Google Inc., from Peter Schaar, Chairman, Article 29 Data Protection Working Party, May 1, 2007, *available at* http://www.epic.org/privacy/ftc/google/art29_0507.pdf.

[17] Posting to Google Blog by Peter Fleischer, Global Privacy Counsel, and Nicole Wong, Deputy General Counsel, *Taking steps to further improve our privacy practices*, Mar. 14, 2007, http://googleblog.blogspot.com/2007/03/taking-steps-to-further-improve-our.html.

[18] Press Release, Article 29 Data Protection Working Party, June 21, 2007, *available at* http://ec.europa.eu/justice_home/fsj/privacy/news/docs/pr_21_06_07_en.pdf.

[19] Press Release, Nielsen//Netratings, Nielsen//Netratings Announces May U.S. Search Share Rankings, June 20, 2007, *available at* http://www.netratings.com/pr/pr_070620.pdf.

consumer protection issues."[20] CDD and US PIRG's complaint urged the FTC to immediately begin investigating online advertising practices. "The data collection and interactive marketing system that is shaping the entire U.S. electronic marketplace is being built to aggressively track Internet users wherever they go, creating data profiles used in ever-more sophisticated and personalized "one-to-one" targeting schemes," the groups said.[21]

22. On June 27, in a letter to the European Commission, consumer organizations, including BEUC, urged an investigation into the proposed merger of Google and DoubleClick. This merger means that "Google could monopolize the on-line advertising business, thereby restricting competition and raising privacy concerns over control of consumer data," the groups said.[22] The situation is unique because, "Never before has one single company had the market and technological power to collect and exploit so much information about what a user does on the Internet."

23. On July 6, the European Commission Directorate on Competition announced that it would review Google's $3.1 billion merger with Internet advertising company DoubleClick.[23] Google has not yet officially filed for review, but the European Commission Directorate has already sent questionnaires to competitors and customers concerning the proposed merger.[24] This is separate from the inquiry by the Article 29 Data Protection Working Party.

24. On July 16, Google announced that its "cookies" (files that allow a Web site to record your comings and goings, usually without your knowledge or consent) would automatically delete after two years if a user doesn't return to a Google site.[25] If a user does return within the two-year period, the cookie will "auto-renew" for another two years, and the "auto-renewing" could continue indefinitely, well past the year 2039, when the current Google cookie is set to expire.

25. Google dominates search, according to a July 18 report that noted, "Google continues to garner a much larger percentage of media spend than its percentage of searches, and thanks to a recent algorithm tweak, now extracts greater revenue

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[20] Letter from Lydia B. Parnes, Fed. Trade Comm'n, to Jeffrey Chester, Exec. Dir., Center for Digital Democracy, and Ed Mierzwinski, Consumer Program Dir., US PIRG, Regarding Complaint Concerning Unfair and Deceptive Online Marketing Practices, June 21, 2007, *available at* http://www.epic.org/privacy/ftc/google/ftc_cdd_062107.pdf.

[21] Center for Digital Democracy and US PIRG, *Complaint and Request for Inquiry and Injunctive Relief Concerning Unfair and Deceptive Online Marketing Practices Before the Fed. Trade Com'n*, Nov. 1, 2006, *available at* http://www.democraticmedia.org/PDFs/FTCadprivacy.pdf.

[22] Letter from European Consumer Groups to Neelie Kroes, Commissioner, European Comm'n, on Proposed Acquisition of DoubleClick by Google, June 27, 2007, *available at* http://www.epic.org/privacy/ftc/google/beuc_062707.pdf.

[23] Matthew Newman, *Google's Bid for DoubleClick to Be Reviewed by European Union*, Bloomberg News, July 6, 2007.

[24] *EU questions Google customers over DoubleClick*, Reuters, Sept. 6, 2007.

[25] Posting to Google Blog by Peter Fleischer, Global Privacy Counsel, *Cookies: expiring sooner to improve privacy*, July 16, 2007, http://googleblog.blogspot.com/2007/07/cookies-expiring-sooner-to-improve.html.

per search than any engine … In June, Google received 76% of media spend but only 60% of searches across its network. During the same time period, Yahoo earned just 18.3% of media spend while receiving 34% of searches across its network."[26]

26. Also on July 18, DoubleClick detailed its new advertising exchange product. "The DoubleClick Advertising Exchange service has one of the most sophisticated and broad set of targeting options available. The exchange supports standard online targeting elements including time of day, day of week, user location, et cetera. In addition, buyers can target using DoubleClick's proprietary solutions including a three-tier content categorization, site genre and site maturity. Buyers can target participating sites by name or, alternately by using IDs, target sites that are participating anonymously. The exchange also allows buyers to leverage their own data by targeting based on their own user information."[27] DoubleClick also said there was seamless integration of the products. "DoubleClick Advertising Exchange is tightly integrated with DoubleClick's existing DART ad management platform, enabling yield maximization across sales channels for sellers, as well as shared creatives, advertisers, Spotlight Tags and audience targeting for buyers."[28]

27. Google recently expanded the data used in targeting users, including behavioral approaches. As ClickZ explained on July 31, "A few weeks ago, Google began delivering ads based not only on the current search, but also on the searches immediately preceding it, and sometimes a combination of more than one recent query, according to Nick Fox, Google's group business product manager for ads quality. Fox told ClickZ this week that the feature, which has no official name, aims to capture a more robust understanding of user intent and thereby deliver a better ad … Google's Fox … added the company is looking at other possible tracking and targeting methods to capture 'full intent,' including, perhaps, cookies."[29]

28. On August 2, the Canadian Internet Policy and Public Interest Clinic at the University of Ottawa ("CIPPIC") filed a complaint urging the Canadian Commissioner of Competition to investigate the proposed Google-DoubleClick merger "on the grounds that it is likely to prevent or lessen competition substantially in the targeted online advertising industry."[30] CIPPIC Director Philippa Lawson said, "Through the merger, Google-DoubleClick will gain unprecedented market power, with which they can manipulate online advertising prices. Advertisers and web publishers will have no real choice but to choose

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[26] Gavin O'Malley, *Search Spending Flat, With Google Disproportionate*, MediaPost Publications, July 18, 2007.
[27] Nanette Marcus, *Ad Exchanges at a Glance*, iMedia Connection, July 18, 2007.
[28] *Id.*
[29] Zachary Rodgers, *Google Targets Search Ads on Prior Queries, à la Behavioral*, ClickZ, July 31, 2007.
[30] Canadian Internet Policy & Public Interest Clinic, *Section 9 Application for an Inquiry into the Proposed Merger of Google, Inc. and DoubleClick Inc.*, Aug. 2, 2007, *available at* http://www.cippic.ca/uploads/Google-DC_s.9_CompAct_complaint_FINAL.pdf.

Google's advertisement platforms in order to remain visible in the e-commerce market."[31] CIPPIC cited Petitioner's original Complaint and Supplement, as well as the ongoing European investigations into the merger.

29. Also on August 2, a Google Product Manager told Investor's Business Daily, "Google gets nearly all of its revenue from selling text-based ads that appear near search results. But about half the market is made up of graphical display ads, also known as banner or branding ads. The display ad market is too big for Google to ignore, said Susan Wojcicki, a Google product manager, during the meeting. 'We are focused on the branding market,' she said. The online ad market is 'search and display – and there isn't a lot after that,' she said."[32]

30. On August 7, a report from equity firm Veronis Suhler Stevenson predicted that Internet advertising would overtake television, radio and newspapers to become the No. 1 advertising medium in four years.[33] Online advertising is predicted to grow by more than 21 percent per year to reach $62 billion in 2011.

31. On August 9, a DoubleClick Vice President explained in an interview that his company does "the most video on the Internet" and was "the second largest rich media vendor."[34]

32. On August 22, the Australian Competition and Consumer Commission ("ACC") began a review of the proposed Google-DoubleClick merger.[35] On August 27, the ACCC sent a letter to online publishers, digital agencies and other Internet service groups asking for opinions on the effect the proposed merger would have in the Australian market.[36] The ACCC detailed 10 questions, including whether the deal would give Google-DoubleClick the "incentive and/or ability to foreclose: a. rival search engines; and/or b. other providers of advertising services to online advertisers and publishers."

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[31] Press Release, Canadian Internet Policy and Public Interest Clinic, CIPPIC calls on Competition Commissioner to review Google-DoubleClick merger, Aug. 2, 2007, *available at* http://www.cippic.ca/uploads/file/CIPPIC_Media_Release_-_Google-DoubleClick_-_Competition_Filing_-_02August2007.pdf.

[32] Video, Cell, Display Ads Get More Google Focus. Investor's Business Daily. Aug. 2, 2007.

[33] Veronis Suhler Stevenson, *Shift to Alternative Media Strategies Will Drive U.S. Communications Spending Growth in 2007-2011 Period*, Aug. 7, 2007, *available at* http://www.vss.com/news/index.asp?d_News_ID=166.

[34] Zachary Rodgers, *Questions for Ari Paparo, VP of DoubleClick Rich Media*, ClickZ, Aug. 9, 2007.

[35] Australian Competition & Consumer Comm'n, *Google Inc - proposed acquisition of DoubleClick Inc.*, Aug. 22, 2007, *available at* http://www.accc.gov.au/content/index.phtml/itemId/788097.

[36] Letter from Gabrielle Ford, Australian Competition & Consumer Comm'n, to Online Publishers, Digital Agencies and Other Internet Service Groups Asking for Opinions on the Effect Proposed Google-DoubleClick Merger Would Have in the Australian Market, Aug. 27, 2007, *available at* http://www.accc.gov.au/content/trimFile.phtml?trimFileName=D07+79501.pdf&trimFileTitle=D07+79501.pdf&trimFileFromVersionId=796864.

Studies Regarding Privacy Concerns With Google and DoubleClick

33. On June 9, Privacy International published the study *A Race to the Bottom: Privacy Ranking of Internet Service Companies* and ranked Google dead last for privacy among top Internet Companies.[37] Not one of the other 22 companies surveyed (including AOL, Microsoft and Yahoo) "comes close to achieving status as an endemic threat to privacy" as Google, said Privacy International.[38]

34. On July 17, Scott Cleland, President of Precursor LLC, published a report that explained how the proposed merger would create a monopoly for access to Internet information and substantially lessen competition. "With [about] 60% share of each of their respective technology platforms, search and display, technologies which are mutually-reinforcing, the combination would enable a horizontal merger to monopoly, which would harm users, advertisers and content providers with higher prices and less choice."[39]

35. On August 30, the Economist magazine published a cover story analyzing Google's history and business practices. The Economist summarized the risk, "Google could soon, if it wanted, compile dossiers on specific individuals."[40] The Economist explained, "[Google] could use a person's search history and advertising responses in combination with, say, his location and the itinerary in his calendar, to serve increasingly useful and welcome search results and ads. This would also allow Google to make money from its many new services. But it could scare users away."[41]

36. Also on August 30, the Economist published an editorial on Google detailing the privacy and security questions raised by the company's growing dominance of the Interney. "One obvious strategy is to allay concerns over Google's trustworthiness by becoming more transparent and opening up more of its processes and plans to scrutiny."[42]

CONCLUSION

37. The massive quantity of user information collected by Google coupled with DoubleClick's business model of consumer profiling will enable the merged company to construct extremely intimate portraits of its users' behavior.

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[37] Privacy Int'l, *A Race to the Bottom: Privacy Ranking of Internet Service Companies*, June 9, 2007, *available at* http://www.privacyinternational.org/article.shtml?cmd%5B347%5D=x-347-553961.
[38] "Without appropriate safeguards, this database could, for example, be made available without consumers' knowledge or consent to secondary users, including vendors of personal data, as well as made public as evidence in litigation or through data breaches." New York State Consumer Protection Board, "Consumer Alert: Take Action to Protect Your Privacy," May 2007, *available at* http://www.consumer.state.ny.us/consumer_alert_take_action_may07.htm.
[39] Scott Cleland, President, Precursor LLC -- A Techcom Industry Research and Consulting Firm, *Googleopoly: The Google-DoubleClick Anti-Competitive Case*, July 17, 2007, http://googleopoly.net/.
[40] *Inside the Googleplex*, Economist, Aug. 30, 2007.
[41] *Id.*
[42] *Who's afraid of Google?*, Economist, Aug. 30, 2007.

38. The detailed profiling of Internet users raises profound issues that concern the right of privacy, the accountability of large corporations, and the operation of democratic governments.

39. If it was not clear before, it is clear now that Google and DoubleClick are competitors, as they both sell display advertising in the online advertising marketplace. In addition to the far-reaching privacy issues discussed in this Second Supplement and the previous filings, the merger could be blocked simply on anti-trust grounds.

40. As more information is learned about Google's business practices and the absence of meaningful privacy safeguards, government officials, privacy and anti-trust experts, journalists, and consumers are scrutinizing the proposed merger with greater intensity.

41. The failure of the Federal Trade Commission to act in this matter will have profound consequences on the future of the Internet and the interests of American consumers.

RESTATED REQUEST FOR RELIEF

42. The Petitioners restate the requests for relief set out in the April 20, 2007 Complaint and June 6, 2007 Supplement.

43. Pending an adequate resolution of the issues set out in this Second Supplement, the June 6, 2007 Supplement, the original April 20, 2007 Complaint, and other matters that may be brought to the Commission's attention, the Commission should use its authority to review mergers to halt Google's proposed acquisition of DoubleClick.

Respectfully submitted,

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Filed: September 17, 2007

Exhibit 20 to the Cross-Examination of Professor Tadelis

PUBLIC

FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

For Release

Federal Trade Commission Closes Google/DoubleClick Investigation

Proposed Acquisition Unlikely to Substantially Lessen Competition

December 20, 2007

The Federal Trade Commission today announced that it will not seek to block Google Inc.'s proposed $3.1 billion acquisition of Internet advertising server DoubleClick Inc. In a 4-1 vote to close its eight-month investigation of the transaction, the Commission wrote in its majority statement that "after carefully reviewing the evidence, we have concluded that Google's proposed acquisition of DoubleClick is unlikely to substantially lessen competition."

Although interested parties have raised concerns about the proposed acquisition's impact on consumer privacy, the Commission observed that such issues are "not unique to Google and DoubleClick," and "extend to the entire online advertising marketplace." The Commissioners further wrote that "as the sole purpose of federal antitrust review of mergers and acquisitions is to identify and remedy transactions that harm competition," the FTC lacks the legal authority to block the transaction on grounds, or require conditions to this transaction, that do not relate to antitrust. Adding, however, that it takes consumer privacy issues very seriously, the Commission cross-referenced its release of a set of proposed behavioral marketing principles that were also announced today.

The Commission statement, authored by Chairman Deborah Platt Majoras and Commissioners Jon Leibowitz, William E. Kovacic and J. Thomas Rosch, focused on the agency's antitrust review of the proposed acquisition, which, as in all horizontal merger investigations, was based on the standards set forth in the joint FTC/Department of Justice Horizontal Merger Guidelines. Applying these guidelines, as well as Commission policy and case law in evaluating non-horizontal theories, agency staff analyzed three principal theories of potential competitive harm. First, it sought to determine whether Google's acquisition of DoubleClick threatened to eliminate direct and substantial competition between the two companies. Its thorough analysis of the evidence showed that the companies are not direct competitors in any relevant antitrust market, eliminating the need for further analysis.

Next, because mergers and acquisitions may also eliminate beneficial potential competition, the agency examined the implications of Google's continuing efforts to enter the third party ad serving markets. If these efforts had the potential to eliminate a competitor that was uniquely positioned to

have a pro-competitive effect on these markets, that would raise antitrust concerns. The agency's evidence, however, showed that current competition among firms in this market is vigorous, and will likely increase. The evidence also indicates that Google's entry, even if it were to be successful, likely would not have a significant impact on competition. Therefore, the elimination of potential competition also did not raise antitrust concerns.

Finally, the agency evaluated whether Google's acquisition of DoubleClick could harm competition by allowing Google to exploit DoubleClick's position in the third party ad serving markets to the benefit of Google's ad intermediation product, AdSense. In some instances, according to the Commission, a proposed transaction may allow a dominant seller of one product to harm competition in the market for a related complementary product, for example, by exclusively bundling – or otherwise tying together – its product with the acquired firm's product after the acquisition. Such a strategy, however, can only be anticompetitive if the merged firm has market power.

As explained in the Commission's statement, because the evidence failed to show that DoubleClick has market power in the third party ad serving markets, it is unlikely that Google could effectively foreclose competition in the related ad intermediation market following the acquisition. The evidence also showed that it was unlikely that Google could manipulate DoubleClick's third-party ad serving products in a way that would competitively disadvantage Google's competitors in the ad intermediation market. Further, the evidence demonstrated that any aggregation of consumer and competitive data resulting from the acquisition is unlikely to harm competition in the ad intermediation market. These factors resolved any competitive concerns related to these markets.

The statement concluded, however, "The markets within the online advertising space continue to quickly evolve, and predicting their future course is not a simple task. Accounting for the dynamic nature of an industry requires solid grounding in facts and the careful application of tested antitrust analysis. Because the evidence did not support the theories of potential competitive harm, there was no basis on which to seek to impose conditions on this merger. We want to be clear, however, that we will closely watch these markets and, should Google engage in unlawful tying or other anticompetitive conduct, the Commission intends to act quickly."

The Commission vote to close the investigation was 4-1, with Commissioner Pamela Jones Harbour voting no and issuing a separate dissenting statement and Commissioner Jon Leibowitz joining the Commission statement, but also issuing a separate concurring statement. In his statement, he noted "both the serious vertical competition issues raised by Google's proposed acquisition of DoubleClick as well as the substantial privacy issues that, though in part brought to light by the deal, clearly transcend it." In her statement, Commissioner Harbour wrote, "I dissent because I make alternate predictions about where this market is heading, and the transformative role the combined Google/DoubleClick will play if the proposed acquisition is consummated."

Copies of the statements and the newly issued self-regulatory privacy principles can be found at www.ftc.gov. The FTC's Bureau of Competition works with the Bureau of Economics to investigate alleged anticompetitive business practices and, when appropriate, recommends that the Commission take law enforcement action. To inform the Bureau about particular business practices, call 202-326-3300, send an e-mail to antitrust@ftc.gov, or write to the Office of Policy and Coordination, Room 394, Bureau of Competition, Federal Trade Commission, 600 Pennsylvania Ave, N.W., Washington, DC 20580. To learn more about the Bureau of Competition, read "Competition Counts" at http://www.ftc.gov/competitioncounts.

Contact Information

MEDIA CONTACT:
Office of Public Affairs
202-326-2180

Exhibit 21 to the Cross-Examination of Professor Tadelis

Canadian Internet Policy and Public Interest Clinic
Clinique d'intérêt public et de politique d'internet du Canada

FOR IMMEDIATE RELEASE

CIPPIC calls on Competition Commissioner to review Google-DoubleClick merger

Ottawa, ON – August 2, 2007 – The Canadian Internet Policy & Public Interest Clinic (CIPPIC) at the University of Ottawa is requesting that the Competition Commissioner review the proposed merger between Google and DoubleClick. In an application for an inquiry filed with the Commissioner today, CIPPIC alleges that a merger between Google and DoubleClick will prevent or substantially lessen competition in the online targeted advertising market by combining Google's keyword search dominance with DoubleClick's leadership in display advertisement serving and behavioural targeting advertisement products.

"A Google-DoubleClick merger will greatly affect electronic commerce," notes CIPPIC director Philippa Lawson. "Through the merger, Google-DoubleClick will gain unprecedented market power, with which they can manipulate online advertising prices. Advertisers and web publishers will have no real choice but to choose Google's advertisement platforms in order to remain visible in the e-commerce market."

CIPPIC submits that the Google-DoubleClick merger will have the following anti-competitive effects in the Canadian market:

- Google-DoubleClick will dominate online ad-serving to websites and the monetization model for accessing internet content;
- Google-DoubleClick will be able to manipulate the targeted online advertising market to raise advertising prices;
- the merger creates barriers to market entry and removes vigorous and effective competition by Yahoo! and Microsoft;
- buyers will not be able to counter Google-DoubleClick's market power as web publishers and advertisers will have to choose Google in order to be visible in the e-commerce market; and
- consumers will have no real ability to choose services other than those served by Google, as users will not be able to avoid websites serving Google-DoubleClick ads.

The letter is posted at CIPPIC's website at http://www.cippic.ca/uploads/Google-DC_s.9_CompAct_complaint_FINAL.pdf. American and European public interest groups have already launched similar requests for review on competition grounds in their respective jurisdictions.

About CIPPIC: CIPPIC is the Canadian Internet Policy and Public Interest Clinic, Canada's only technology law clinic. CIPPIC was established in 2003 at the University of Ottawa, Faculty of Law, Common Law Section. CIPPIC's mandate is to advocate for balance in policy and law-making on issues arising out of new technologies.

For further information, see:

Electronic Privacy Information Center coverage of the Google-DoubleClick merger
- http://www.epic.org/privacy/ftc/google/

Joint complaint by the Electronic Privacy Information Center, Center for Digital Democracy, and U.S. PIRG to the Federal Trade Commission in the United States
- http://www.epic.org/privacy/ftc/google/epic_complaint.pdf
- http://www.epic.org/privacy/ftc/google/supp_060607.pdf (supplement)

European consumer group BEUC letter to the European Commission
- http://www.epic.org/privacy/ftc/google/beuc_062707.pdf

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Exhibit 22 to the Cross-Examination of Professor Tadelis

PRESS RELEASE

Statement of the Department of Justice's Antitrust Division on Its Decision to Close Its Investigation of Google Inc.'s Acquisition of Admeld Inc.

Friday, December 2, 2011

For Immediate Release

Office of Public Affairs

WASHINGTON – The Department of Justice's Antitrust Division issued the following statement today after announcing the closing of its investigation into the proposed acquisition of Admeld Inc., an online display advertising service provider, by Google Inc.:

"The Antitrust Division obtained extensive information from Google, Admeld and a wide range of market participants in connection with its merger investigation of the proposed transaction. After a thorough review of the evidence, the division concluded that the transaction is not likely to substantially lessen competition in the sale of display advertising.

"Although the Antitrust Division concluded that this particular transaction was unlikely to cause consumer harm, the division will continue to be vigilant in the enforcement of the antitrust laws to protect competition in display and other forms of online advertising.

"The division's investigation focused on the potential effect of the proposed transaction on competition in the display advertising industry. Both Google and Admeld provide services and technology to web publishers that facilitate the sale of those publishers' display advertising space. Google is a diversified software company whose offerings for publishers include an advertising exchange, an advertising network and an ad server. Admeld operates a supply-side platform (SSP) that helps publishers optimize the yield from their display advertising inventory.

"The investigation determined that web publishers often rely on multiple display advertising platforms and can move business among them in response to changes in price or the quality of ad placements. This use of multiple display advertising platforms, commonly called "multi-homing," lessens the risk that the market will tip to a single dominant platform. In addition, there have been recent SSP and advertising exchange entrants in the display advertising industry. These were significant considerations in the division's decision to close the investigation.

"Given Google's significant presence in search, as previously noted during our 2010 investigation involving Microsoft/Yahoo! and 2008 investigation involving Google/Yahoo!, the Antitrust Division also carefully evaluated whether Google's acquisition of

Admeld would enable Google to extend its market power in the Internet search industry to online display advertising through anticompetitive means. The division will continue to rigorously enforce the antitrust laws to ensure that transactions affecting evolving markets such as display and other forms of online advertising, as well as search, do not inhibit competition or innovation in any way.

"Google Inc., based in Mountain View, Calif., operates the largest Internet search engine in the world and one of the largest display advertising platforms. Google derives revenue primarily from advertising, both as a publisher itself and as an intermediary between advertisers and other publishers. Aside from advertising-related products, Google's software offerings include a smartphone operating system, web-based email and mapping programs. In 2010, Google had revenues of approximately $29 billion.

"Admeld Inc., established in 2007 and based in New York City, operates one of the largest SSPs in the display advertising industry. Admeld offers a combination of services that include usage of its own advertising exchange, facilitating interaction with advertising networks and general advisory services. In 2010, Admeld raised approximately $30 million."

The division provides this statement under its policy of issuing statements concerning the closing of investigations in appropriate cases. This statement is limited by the division's obligation to protect the confidentiality of certain information obtained in its investigations. As in most of its investigations, the division's evaluation has been highly fact-specific, and many of the relevant underlying facts are not public. Consequently, readers should not draw overly broad conclusions regarding how the division is likely in the future to analyze other collaborations or activities, or transactions involving particular firms. Enforcement decisions are made on a case-by-case basis, and the analysis and conclusions discussed in this statement do not bind the division in any future enforcement actions. Guidance on the division's policy regarding closing statements is available at www.justice.gov/atr/public/closing/index.html.

Updated February 5, 2025

Component

Antitrust Division

Press Release Number: 11-1567

Related Content

PRESS RELEASE

Texas Man Sentenced to 11 Years in Prison and Ordered to Pay $2M Fine for Conspiring to Monopolize International Transit Industry, Fix Prices, Extort $9.5M, and Launder Money

June 11, 2025

PUBLIC

Office of Public Affairs

U.S. Department of Justice

Exhibit 23 to the Cross-Examination of Professor Tadelis

Competition Bureau completes extensive investigation of Google

News Release

Bureau continues to monitor competition issues in the digital economy

April 19, 2016 — OTTAWA, ON — Competition Bureau

The Competition Bureau announced today that it is closing its investigation into a number of allegations of anti-competitive conduct by Google. These allegations related to Google's online search, search advertising and display advertising services in Canada.

Details of the investigation are available on the Bureau's website in a comprehensive position statement in line with the Bureau's core values of openness and transparency.

The Bureau conducted an extensive review of allegations that Google engaged in conduct with the intention to exclude or disadvantage its competitors, contrary to the abuse of dominance provisions of the *Competition Act*.

The Bureau found evidence to support one of the allegations against Google: that the company used anti-competitive clauses in certain types of contracts that negatively affected advertisers, with the intent to exclude its competitors. Google made changes to these terms and conditions in 2013, in response to

similar concerns raised by the United States Federal Trade Commission (FTC). In response to the Bureau, Google has agreed not to reintroduce the clauses in Canada, and has agreed not to introduce any other clauses that may have the same effect in its English-language and French-language contracts. As a result of these changes, advertisers have more flexibility to use competing advertising platforms, allowing for greater search advertising competition.

The Bureau did not find sufficient evidence of a substantial lessening or prevention of competition in the market to support the other allegations.

Quick facts

- The Bureau's inquiry focused on facts and evidence related to allegations of anti-competitive conduct affecting the Canadian marketplace.
- As part of its investigation, the Bureau consulted with industry and economic experts and conducted over 130 interviews with a broad range of market participants, including competitors, publishers and advertisers.
- The Bureau analyzed large volumes of information collected from stakeholders and information supplied by Google, which was obtained under an order of the Federal Court.
- The Bureau also consulted with international counterparts including the FTC and the European Commission throughout the investigation.

Quote

> "Data-driven companies play an important and growing role in Canada's economy. We will continue to monitor firms in the digital economy to ensure they do not engage in anti-competitive conduct. Should new evidence come to light of anti-competitive conduct that may affect the Canadian marketplace, by Google or any other market participant, I won't hesitate to take appropriate action."
>
> John Pecman,
> Commissioner of Competition

Related Information

- Competition Bureau Statement Regarding its Investigation into Alleged Anti-Competitive Conduct by Google

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Telephone: 819-997-4282
Toll free: 1-800-348-5358
TTY (Teletypewriter) (hearing impaired): 1-866-694-8389

www.competitionbureau.gc.ca

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The Competition Bureau, as an independent law enforcement agency, ensures that Canadian businesses and consumers prosper in a competitive and innovative marketplace.

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Hon. Navdeep Singh Bains | Competition Bureau | Information and Communications

Date modified:

2016-04-19

Exhibit 24 to the Cross-Examination of Professor Tadelis

Investigation into alleged anti-competitive conduct by Google

Position Statement

See the news release that corresponds to this position statement.

OTTAWA, April 19, 2016 — Today, the Commissioner of Competition (Commissioner) announced that he has discontinued an investigation into allegations that Google Inc. (Google) engaged in conduct contrary to the abuse of dominance provisions of the *Competition Act* (Act). This statement summarizes the extensive investigation conducted by the Competition Bureau (Bureau) in its review of allegations that Google engaged in anti-competitive business practices related to online search, search advertising and display advertising services in Canada.

On this page

Executive summary

Market context

The collection, analysis and use of data is increasingly becoming an important source of competitive advantage in the digital economy, driving innovation and product improvement. In this vein, certain firms may become large by benefiting from a first-mover advantage and accessing marketplace data that enables them to offer an attractive product to consumers. The size of a business, however, even one that dominates a particular market, does not, of itself, raise an issue under the Act. A strong market position may be gained in a number of legitimate ways, including by competing vigorously, even aggressively, and offering consumers something that is preferred to the offerings of rivals. However, any steps taken by a dominant firm to hold onto or enhance that market position

through anti-competitive conduct that inhibits the ability of competing firms to grow their customer base by competing on the merits may raise concerns under the abuse of dominance provisions in the Act.

For both businesses and consumers, online search and search advertising markets are critical for access to, and participation in, the digital economy. Given the importance and rapidly evolving nature of the digital economy the Bureau is vigilant in investigating allegations of anti-competitive conduct in this sector. Anti-competitive activity by a dominant firm, particularly in an industry characterized by "network effects" [1], may negatively affect competition, and may inhibit the development of an open, dynamic and innovative digital marketplace for consumers and businesses.

Investigation background

Following the receipt of complaints, the Bureau opened an inquiry in 2013 to investigate Google's conduct related to online search and search advertising. Over the course of this inquiry the Bureau received additional complaints regarding Google's conduct in the online display advertising sector, which prompted a further review.

To properly test the allegations, the Bureau took a number of steps to determine the relevant facts. [2] The Bureau consulted with industry and economic experts and conducted over 130 interviews with a broad range of market participants, including competitors, publishers, advertisers, original equipment manufacturers, wireless carriers and firms that provide online advertising solutions. The Bureau also analyzed a substantial volume of information collected from various stakeholders and obtained an order under section 11 of the Act compelling Google to provide documents and written returns of information.

In conducting its investigation, the Bureau also consulted and worked with international counterparts, including the U.S. Federal Trade Commission (FTC) and the European Commission. The Bureau's review was focused on the facts and evidence related to alleged anti-competitive conduct affecting the Canadian marketplace.

Summary of Bureau conclusions

During its investigation, the Bureau examined whether Google possesses market power in the markets for online search, search advertising and display advertising, and whether Google used that market power to exclude or otherwise disadvantage its rivals. Specifically,

the Bureau examined allegations that Google engaged in several practices intended to raise its rivals' costs, inhibit their ability to expand and generally make it more difficult for them to compete. These allegations are described in detail below.

As a result of an in-depth investigation, the Bureau concluded that Google used anti-competitive clauses in its AdWords Application Programming Interface (API) Terms and Conditions. The Bureau concluded that these clauses were intended to exclude rivals and negatively affected advertisers. Google has removed these clauses and has provided a commitment to the Commissioner not to reintroduce them (or others which have the same effect) for a period of five years. With respect to the other allegations of anti-competitive conduct, the Bureau did not find sufficient evidence that Google engaged in these practices for an anti-competitive purpose, and/or that the practices resulted in a substantial lessening or prevention of competition in any relevant market.

However, the Bureau will be closely following developments with respect to Google's ongoing conduct, including the results from investigations of our international counterparts. More generally, the Bureau will continue actively monitoring the digital marketplace given its importance to innovation and the economy. As stated in the Bureau's 2015-2018 Strategic Vision, the Bureau will deter or prevent anti-competitive conduct hindering the emergence of innovation. The Bureau will not hesitate to take appropriate action should new evidence come to light of anti-competitive conduct by Google that may affect the Canadian marketplace.

Search and search advertising review

Background

Google is a multinational company that offers a number of internet-related products and services, including its search engine and related search advertising services. Canadian internet users rely on search engines to find information, consume entertainment, and shop for products and services. Search engines function by indexing web pages; when a user types words into a search engine, the search engine reviews its index and provides the user with various results related to the query, including a list of web pages ranked in order of relevance. Users do not pay to use search engines, but they provide search engines with important data with each search query, and when they click on the links provided in response to those queries. Search engines typically analyze this user data to optimize their search algorithms and display more relevant results.

When a search engine displays its search results, it may also place ads on its search engine results page (SERP). Advertisers can pay to have their ads placed on a SERP in response to specific queries in order to target consumers with advertisements for products and services that are relevant to them. Search engines earn revenues primarily from the sale of these ads. Search engines also gather and analyze information from users who click on the ads, allowing them to provide even more targeted, relevant ads to users and charge advertisers accordingly.

As a result of the above, the online search and search advertising markets are characterized by “network effects”: the more users and advertisers use a given search engine, the more it is able to leverage data to improve its product and, by extension, attract more users and advertisers.

In addition to its general search engine, Google operates several specialized search engines such as Google Maps and Google Flights. These specialized search engines are known as “vertical” search engines. They provide users with information about a specific topic, such as shopping, travel, or weather.

Analysis

Under Canadian competition law, abuse of a dominant position occurs when a dominant firm or a dominant group of firms in a market engages in a practice of anti-competitive acts, with the result that competition has been or is likely to be prevented or lessened substantially. [3]

Based on information gathered throughout the investigation, the Bureau concluded that the primary relevant markets are online search and search advertising services in Canada. However, given the nature of certain allegations (e.g. search manipulation) the price and non-price effects of the alleged business practices may be felt in other relevant markets (e.g. the market for online local review services in Canada).

Google’s search engine accounts for the vast majority of search queries that are made by Canadian users and search advertising purchases that are made by businesses in Canada. Based on information gathered throughout its investigation, including the high market shares that Google has in Canada and high barriers to entry in the search engine market, the Bureau concluded that Google possesses market power in the markets for online search and search advertising services in Canada.

During its investigation, the Bureau considered allegations that Google used its dominant position in the markets for online search and search advertising in order to exclude rivals (e.g., competing general and vertical search engines). Specifically, the Bureau examined allegations that Google engaged in the following conduct:

1. **AdWords API Restrictions** — preventing advertisers or other third parties from effectively engaging in "cross-platform" search advertising campaigns between Google and other search engines;
2. **Search Manipulation** — the manipulation of Google's search results, so that Google-related links appear higher in what is presented to users, and/or that competitor-related links appear lower than they otherwise would in an objective ranking based on the relevancy of these links;
3. **Preferential Treatment of Google Services** — the preferential treatment of Google's services (Google Maps, Google Flights, etc.) compared to the services of competitors on Google's SERP;
4. **Syndication Agreements** — entering into long-term agreements with websites that create search entry points for Google directly on the websites (e.g., search toolbars "powered by Google" on news websites) and/or restrict the manner in which ads are displayed on third party websites in response to search queries;
5. **Distribution Agreements** — entering into long-term agreements with hardware manufacturers and software developers to set Google as the default search engine (on smartphones, personal computers, browsers, etc.); and
6. **Other Allegations** — denying competitors access to a high-quality YouTube mobile application; and tying the sale of ads on tablets and personal computers to the sale of ads on mobile phones.

The Bureau's conclusions with respect to each of these allegations were based on a careful review of the facts and evidence relevant to the Canadian market.

1. AdWords API restrictions

Firms in the digital economy can use "Application Programming Interfaces" to allow different programs to communicate with one another. For example, APIs ensure that mobile applications work on mobile devices by facilitating the communication between the application's software and the device's operating system. The Bureau considered allegations that Google's AdWords API Terms and Conditions prevented software

developers that help companies manage their search advertising campaigns (known as “licensees”) from easily transferring information between Google advertising campaigns and advertising campaigns on competing platforms. These AdWords API restrictions allegedly were making it more difficult for companies to advertise on multiple platforms (known as “multi-homing”). The problematic AdWords API clauses related to certain input and copying restrictions, which hindered the ability of licensees to multi-home, and by doing so, enable their clients to advertise on competing search engines.

Evidence collected by the Bureau supports the conclusion that Google used certain AdWords API clauses with the intent to exclude rival search engines. There did not appear to be any technical or efficiency justification for creating these restrictions. The evidence obtained also showed anti-competitive effects resulting from these AdWords API clauses. Market participants expressed serious concerns with these clauses, and provided the Bureau with evidence of the negative effects of Google’s AdWords API restrictions on their businesses, and on the market generally.

In 2013, Google made changes to its AdWords API Terms and Conditions in response to concerns raised by the FTC. However, Google’s commitment to the FTC did not specifically govern the manner in which it does business in Canada, nor did it apply to both its English-language and French-language AdWords API Terms and Conditions. As a result, in response to concerns identified by the Bureau, Google has committed to the Commissioner that it will not reintroduce these restrictive API clauses in Canada or introduce any other API clauses that may have the same effect, in either its English-language or French-language AdWords API Terms and Conditions, for a period of five years. The Bureau believes that, as a result of these changes, market participants are able to freely transfer advertising campaign data between competing search advertising platforms, which allows for greater multi-homing and, by extension, competition in search advertising.

2. Search manipulation

The Bureau considered allegations that Google alters its search results to exclude rivals that provide competing services (e.g., maps, local reviews, travel) and provide Google-related services with preferential placement that would not otherwise occur based on an objective ranking determined by relevance. Alterations to the algorithm that determines the ordering of search results on the basis of factors other than relevance could potentially harm websites that are moved further down the Google SERP by reducing traffic to these sites. This conduct could be considered anti-competitive if Google altered its

search results for the purpose of harming a competitor and if the conduct substantially prevented or lessened competition in a market. In addition to the potential impact on price in the market, the Bureau also focussed on non-price factors such as quality, convenience, value-added features, and, particularly, innovation in this rapidly-evolving space.

Although Google frequently makes changes to the algorithm it uses to rank search results, evidence obtained over the course of the investigation indicates that Google's changes are generally made to improve user experiences. For example, Google takes steps to demote websites that attempt to artificially increase their ranking in the search results independent of the quality or relevancy of their content. The Bureau did not find adequate evidence to support the conclusion that Google's changes to its search results were intended to exclude rivals in Canada.

The Bureau also sought evidence of the harm allegedly caused to market participants in Canada as a result of any alleged search manipulation. However, the Bureau did not find adequate evidence to support the conclusion that any alleged search manipulation was having an exclusionary effect on rivals (e.g., by materially affecting sales or revenue data of these parties in Canada), or that the conduct has resulted in a substantial lessening or prevention of competition in a market (e.g., a material impact on prices or impeding the development, diffusion and marketing of innovative services).

3. Preferential treatment of Google services

The Bureau considered allegations that Google promotes its own services on the SERP in order to exclude rivals. [4] For example, when a user searches for "Dentists in Halifax", Google may display a map or a collection of consumer reviews of local dentists in Halifax. Preferential treatment of Google services could include placing these services in prominent places on the SERP (e.g., inserting a Google Maps information box at the top of the page) or using graphics to draw users' attention to its services (e.g., using images or displaying Google services in an information box).

While Google often displays its services in prominent places on the SERP, the Bureau does not consider the provision of objective answers to be an anti-competitive act (e.g., providing a numeric response to the query "How tall is the Calgary Tower?"). In fact, providing objective answers in prominent places on the SERP is generally beneficial to consumers. However, a search engine's provision of answers that are more subjective in nature could be considered anti-competitive if this practice is engaged in by a dominant firm for the purpose of excluding rivals and with the result that competition is substantially

lessened or prevented. For example, the Bureau considered the potential effect that this practice may have on the incentive for firms to innovate and compete with Google in these markets and, particularly where competing services have superior quality, the potential harm to consumers in the form of reduced product quality, choice, or innovation.

The Bureau sought evidence of the harm allegedly caused to market participants in Canada as a result of any alleged preferential treatment of Google's services. The Bureau did not find adequate evidence to support the conclusion that this conduct has had an exclusionary effect on rivals, or that it has resulted in a substantial lessening or prevention of competition in a market.

4. Syndication agreements

Search engines enter into syndication agreements with third party websites. These agreements may perform two functions: (1) create search entry points directly on websites (e.g., Google search toolbars on news websites); and (2) govern the manner in which ads are displayed on the website, following a user's search query. Syndication agreements provide additional search entry points for users by placing the toolbar in a convenient place on the website, increase traffic to the search engine, and increase revenue for both the website and the search engine. [5]

The Bureau considered whether Google's syndication agreements exclude search rivals by denying them search queries that may have otherwise been made on their search engines and, by extension, denying them the "search scale" necessary to compete with Google. The Bureau also considered whether competing search advertising platforms were excluded as a result of the preferential placement of Google ads on third party websites.

Based on the information obtained over the course of the investigation, it does not appear that Google's syndication agreements have imposed significant switching costs on publishers or users. The evidence does not support a conclusion that Google's syndication partners are locked into long-term agreements that render the market significantly less competitive. On the contrary, Google and its rivals regularly compete for the business of third party websites, as evidenced by bidding activity, which may lead to websites switching search providers. The Bureau analyzed data related to publishers' use of multiple search engines over time and concluded that the switching activity was significant between search engines. With respect to users of websites that partner with Google, they can easily switch to a different search provider if they are unhappy with the syndicated search results.

Accordingly, the Bureau concluded that Google's syndication agreements have not resulted in a substantial lessening or prevention of competition in Canada.

5. Distribution agreements

Search engines also enter into distribution agreements with hardware manufacturers and software developers that set the default search engine on smartphones, personal computers, browsers, etc. Similar to syndication agreements, the Bureau considered allegations that distribution agreements exclude search rivals by denying them the number of searches necessary to compete with Google. [6]

The evidence obtained over the course of the investigation supports the conclusion that Google competes with other search engines for the business of hardware manufacturers and software developers. Other search engines can and do compete for these agreements so they appear as the default search engine. The Bureau analyzed data related to the use by hardware manufacturers and software developers of multiple search engines and concluded that the switching activity over time was significant and that these parties are able, for example, to ship multiple devices with different pre-loaded search engine defaults. Finally, consumers can and do change the default search engine on their desktop and mobile devices if they prefer a different one to the pre-loaded default.

Accordingly, the Bureau concluded that Google's distribution agreements have not resulted in a substantial lessening or prevention of competition in Canada.

6. Other allegations

Finally, the Bureau evaluated two other allegations related to Google's conduct in the markets for online search and search advertising in Canada. First, allegations were raised that Google prevented mobile competitors from accessing a high-quality YouTube mobile application. Second, concerns were raised that Google's "Enhanced Campaigns" forces advertisers that want to buy ads displayed on mobile devices to also buy ads on personal computers and tablets.

The Bureau did not uncover adequate evidence to support a finding that Google engaged in either of these practices to exclude rivals. The Bureau also did not find adequate evidence that these practices substantially lessened or prevented competition in Canada.

Display advertising review

Background

The online display advertising ecosystem comprises advertisers that purchase ad space from website publishers. The product they exchange is “display advertising inventory” where one unit of advertising inventory is an impression on a website. An advertiser can purchase display advertising inventory directly from the publisher or through indirect channels using real-time auctions. These real-time auctions (referred to as “ad exchanges”) are digital marketplaces that enable advertisers and publishers to buy and sell advertising space.

The purchase and sale of display advertising inventory was historically done through written commitments between advertisers and publishers to run a particular advertising campaign on a website. In recent years, “programmatic advertising” has emerged as a popular method of buying and selling display advertising inventory. This involves using automated systems to buy and sell display advertising inventory.

Google owns and operates leading technology products across the entire online display advertising ecosystem:

- **Publisher Side**: Google operates a popular ad serving tool called DoubleClick for Publishers (DFP), and a significant ad exchange, DoubleClick Ad Exchange (AdX). Ad servers are computer servers that allow publishers to manage their display advertising inventory and deliver ads on their websites. Ad exchanges are technology platforms that operate as online marketplaces, matching advertiser demand with publisher inventory programmatically.
- **Advertiser Side**: Google operates a demand-side platform called DoubleClick Bid Manager (DBM). Demand-side platforms are technology interfaces that centralize and aggregate the purchase of display advertising inventory for advertisers from multiple inventory sources, including from ad exchanges. In addition, Google’s AdWords is, arguably, one of the largest buyers of display advertising inventory.

Analysis

Given that the allegations described below relate to inventory sold through Google’s ad exchange, the Bureau focussed its review on the market for exchange-based online display advertising services in North America. While Google is a significant player, it is not clear

that it possesses market power in this space. Google operates leading products across the entire online display advertising ecosystem, which may give it an advantage over non-integrated competitors. However, the market is highly fragmented and features a number of new and existing competitors, which suggests that barriers to entry are low. That being said, given the limited number of well-established players in the market, barriers to expansion may not be low. Lastly, market participants provided evidence that it is easy to switch between competing ad exchanges, casting further doubt that Google has market power in this particular market.

Notwithstanding the uncertainty regarding Google's market power in this space, the Bureau considered allegations that Google engaged in conduct to exclude rivals such as competing ad exchanges and demand-side platforms. Specifically, the Bureau examined allegations that Google engaged in the following conduct:

1. **AdX Terms of Service** — amending its AdX terms of service to exclude competing ad exchanges;
2. **Enhanced Dynamic Allocation** — implementing a software setting in DFP that unfairly advantages Google over competing ad exchanges;
3. **Bundling** — inducing exclusive use by advertisers of multiple Google products through incentives; and
4. **Control of Information** — controlling information across the entire online display advertising ecosystem as a result of Google's end-to-end integration.

As described in greater detail below, the Bureau concluded that there is no compelling evidence to suggest this conduct has excluded rivals or harmed Canadian publishers or advertisers, or that it has resulted in a substantial lessening or prevention of competition in this market. The Bureau's conclusions with respect to these allegations were based on a careful review of the evidence obtained over the course of its investigation.

1. Google's AdX terms of service

If a publisher decides to use Google's AdX to sell its display advertising inventory, it must adhere to Google's AdX Seller Program Guidelines (the Guidelines). The Bureau considered whether the Guidelines require publishers, as a precondition to using AdX, to commit to exclusively directing their inventory through AdX, thereby excluding ad exchange rivals from competing effectively in this space.

Based on the information obtained over the course of the investigation, it is evident that publishers are not obligated to use Google's AdX exclusively, and in fact, have control over how their inventory is filled. The evidence also supports the conclusion that publishers commonly switch between ad exchanges, that it is not difficult for publishers to switch between ad exchanges, and that competing ad exchanges are growing in the exchange-based online display advertising market in North America.

Accordingly, the Bureau concluded that Google's AdX terms of service have not resulted in a substantial lessening or prevention of competition in this market.

2. Enhanced dynamic allocation

When Google's DFP receives a request for an ad from a website, under certain circumstances Google's Enhanced Dynamic Allocation (EDA) feature in DFP will check AdX (and only AdX) to see if any advertisers are willing to pay more for the ad impression. The Bureau considered allegations that this gives AdX an unfair advantage because it gives Google a right of first refusal on valuable ad impressions and because it reduces the number of ad impressions available for competing ad exchanges to bid on. The Bureau also considered allegations that the EDA feature in DFP may disadvantage publishers because DFP does not check other ad exchanges to see if they could obtain more value for their ad impressions.

The information gathered by the Bureau suggests that there has been no exclusionary effect on competing ad exchanges as a result of EDA. Moreover, publishers were not generally concerned about EDA owing to the benefits of the feature and the flexibility they retain notwithstanding EDA. In particular, publishers suggest that EDA is beneficial because it provides them with an opportunity to increase revenue. With respect to flexibility, publishers ultimately decide which ad exchanges to use and can set a "price floor" for each ad exchange. Lastly, EDA is optional, so publishers can decide for themselves whether or not to use this feature in DFP.

An advanced programmatic technique called "header bidding" has also emerged, giving publishers additional flexibility in filling their display advertising inventory. Prior to header bidding, publishers would prioritize their inventory sequentially (e.g. direct sales would normally have a higher priority level than indirect sales through ad exchanges). When a publisher's ad server received a request for an ad, it would check each priority level, one-by-one, to see, first, if any of its direct sales are appropriate to fill a given ad impression. If the publisher's direct sales were not appropriate, the publisher's ad server

would try to sell the ad impression at the next priority level all the way down to open auctions. Header bidding essentially gives all ad exchanges (including Google's AdX) a chance to compete across the publisher's entire display advertising inventory. This process brings the digital media industry closer to a single unified auction where demand sources compete side by side rather than sequentially, ultimately yielding higher revenues for publishers.

Accordingly, the Bureau concluded that EDA has not resulted in a substantial lessening or prevention of competition in the market.

3. Bundling

The Bureau also considered allegations that Google offers incentives to advertisers to encourage them to use only Google's services across the display advertising ecosystem. For example, complainants alleged that Google uses below-cost pricing and provides incentives for advertisers that use Google's demand-side platform (DBM) to also purchase inventory on Google's ad exchange (AdX). These practices allegedly foreclose the market to competing demand-side platforms.

Based on the information collected by the Bureau, the incentives that Google offers to advertisers are marginal and would not likely induce exclusivity. Many advertisers continue to use multiple demand-side platforms to meet their needs and there is no evidence that rivals have been excluded from competing effectively as a result of such incentives. The Bureau also did not find evidence that these practices substantially lessened or prevented competition in this market.

4. Control of information

The Bureau evaluated a general concern that Google's end-to-end integration across the entire online display advertising ecosystem gives it visibility into market price and volume information. The concerns were that Google may be in a conflict of interest (representing advertisers on one hand and publishers on the other) and that Google's access to superior information may enable it to engage in conduct to exclude rivals in each segment of the exchange-based online display advertising market.

The Bureau does not currently have reason to believe that the data Google has obtained from its offerings across the online display advertising ecosystem has been used to exclude a competitor. While Google's control of information across the ecosystem may be relevant

in determining whether or not it has market power, there is no allegation of a corresponding anti-competitive practice for the Bureau to evaluate.

Conclusion

The Bureau conducted an extensive investigation into allegations that Google engaged in a variety of anti-competitive business practices related to online search, search advertising and display advertising services in Canada. For the reasons set out above, the Bureau concluded that there is inadequate evidence to support a conclusion that Google's conduct, outside its practices related to the AdWords API Terms and Conditions, was engaged in for an anti-competitive purpose and/or that the conduct substantially lessened or prevented competition in Canada. In respect of its AdWords API Terms and Conditions, Google has provided a commitment to the Commissioner that resolves his concerns.

The digital economy, including the increasing competitive significance of data, will continue to play a crucial role for Canadian businesses and consumers. Robust competition policy and enforcement in this sector will nurture a competitive and innovative Canadian marketplace.

The Commissioner makes his enforcement decisions based on the available evidence. The Bureau will closely follow developments with respect to Google's ongoing conduct, including the results from investigations of our international counterparts. More generally, the Bureau will continue actively monitoring the digital marketplace. Should new evidence come to light of harm in the Canadian marketplace, whether through subsequent complaints or the Bureau's ongoing monitoring efforts, the Bureau will not hesitate to take appropriate action.

The Bureau, as an independent law enforcement agency, ensures that Canadian businesses and consumers prosper in a competitive and innovative marketplace. The Bureau investigates allegations of anti-competitive practices and promotes compliance with the laws under its jurisdiction, including the Act.

This publication is not a legal document. The Bureau's findings, as reflected in this Position Statement, are not findings of fact or law that have been tested before a tribunal or court. Further, the contents of this Position Statement do not indicate findings of unlawful conduct by any party.

However, in an effort to further enhance its communication and transparency with stakeholders, the Bureau may publicly communicate the results of certain investigations, inquiries and merger reviews by way of a Position Statement. In the case of a merger review, Position Statements briefly describe the Bureau's analysis of a particular proposed transaction and summarize its main findings. The Bureau also publishes Position Statements summarizing the results of certain investigations, inquiries and reviews conducted under the *Competition Act*. Readers should exercise caution in interpreting the Bureau's assessment. Enforcement decisions are made on a case-by-case basis and the conclusions discussed in the Position Statement are specific to the present matter and are not binding on the Commissioner of Competition.

For media enquiries:
Media Relations
Email: media-cb-bc@cb-bc.gc.ca

For general enquiries:
Enquiries/Complaints
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Footnotes

1 "Network effects" exist when the value of a product or service depends on the number of others who also use the product or service.

2 The Bureau applies analytical methodologies, and makes enforcement decisions, on a case-by-case basis. The methodologies and conclusions discussed in this statement are specific to the review of the allegations in question and are not binding on the Commissioner. The legal requirements of section 29 of the *Competition Act*, and the Bureau's policies and practices regarding the treatment of confidential information, limit the Bureau's ability to disclose information obtained during the course of an investigation

3 For more information, please see the Bureau's Enforcement Guidelines on The Abuse of Dominance Provisions.

4 The Bureau analyzed search manipulation and the preferential treatment of Google services as distinct but related allegations.

5 Revenues generated through syndicated search ads are shared between the website publisher and the search engine.

6 The Bureau's review regarding distribution agreements focussed solely on the search engine settings on various software and hardware devices.

Date modified:
2022-01-19

ontact the Competition Bureau

Exhibit 25 to the Cross-Examination of Professor Tadelis

Federal Court | Cour fédérale

Date: 20131224

Docket: T-2048-13

Ottawa, Ontario, December 24, 2013

PRESENT: THE CHIEF JUSTICE

IN THE MATTER OF the *Competition Act,* R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER OF an enquiry under section 10 of the *Competition Act* relating to potentially anti-competitive conduct by Google inc.;

AND IN THE MATER OF an ex parte application by the Commissioner of Competition for an order requiring Google Canada Corporation to produce records pursuant to paragraph 11(1)(b) and subsection 11(2) of the *Competition Act* and to make and deliver written returns of information pursuant to paragraph 11(1)(c) of the *Competition Act*.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

and

GOOGLE CANADA CORPORATION

Respondent

ORDER FOR THE PRODUCTION OF RECORDS AND WRITTEN RETURNS OF INFORMATION

UPON the *ex parte* application made by the Commissioner of Competition (the "**Commissioner**") for an Order pursuant to paragraphs 11(1)(b), 11(1)(c) and subsection 11(2) of the *Competition Act*, R.S.C., 1985, c. C-34, as amended (the "**Act**"), which was heard this day at the Federal Court, Ottawa, Ontario;

AND UPON reading the affidavit of Mark MacLachlan affirmed on 11 December 2013 (the "**Affidavit**");

AND UPON being satisfied that an inquiry is being made under section 10 of the Act relating to an alleged abuse of a dominant position by Google Inc. (the "**Inquiry**");

AND UPON being satisfied that Google Canada Corporation (the "**Respondent**"), has or is likely to have information that is relevant to the Inquiry;

AND UPON being satisfied that the Respondent's affiliate, Google Inc., has records relevant to the Inquiry:

1. **THIS COURT ORDERS** that the Respondent shall produce to the Commissioner all records and any other things specified in this Order, in accordance with the terms of this Order.

2. **THIS COURT FURTHER ORDERS** that the Respondent shall make and deliver to the Commissioner all written returns of information specified in this Order, in accordance with the terms of this Order.

3. **THIS COURT FURTHER ORDERS** that in order to facilitate the handling, use, and orderly maintenance of records and to ensure the accurate and expeditious return of records, other things specified in this Order and written returns of information produced pursuant to this Order, the Respondent shall comply with the following requirements:

   a. the Respondent shall produce records, other things and information in the possession, control or power of the Respondent and Google Inc.;

   b. the Respondent shall make and deliver all written returns of information in such detail as is required to disclose all facts relevant to the corresponding Specification in this Order;

   c. all written returns of information made by the Respondent shall be made under oath or solemn affirmation by a duly authorized representative of the Respondent;

   d. unless otherwise specified, the Respondent shall produce records created or modified during, or that concern, the period from 1 January 2011 to the date of issuance of this Order; and written returns of information in respect of the period 1 January 2010 to the date of issuance of this Order;

   e. the Respondent shall produce all records that are stapled or attached in any manner to a record that is responsive to this Order;

f. if a portion of a record is responsive to any Specification in this Order, the Respondent shall produce the record in its entirety, including any covering records and attachments to the record;

g. if a record is responsive to more than one Specification in this Order, the Respondent shall produce the record only once;

h. the Respondent may utilize de-duplication or email threading software or services to produce records pursuant to this Order if the Respondent identifies the proposed software or service to the satisfaction of the Commissioner and receives confirmation from the Commissioner that the Respondent may utilize that service or software;

i. each record or thing produced by the Respondent shall be an original or a true copy of the original;

j. the Respondent shall produce records in the order in which they appear in its files and shall not shuffle or otherwise rearrange records;

k. the Respondent shall identify all calendars, appointment books, telephone logs, planners, diaries, and items of a similar nature that are produced in response to this Order with the name of the person or persons by whom they were used and the dates during which they were used;

l. if the Respondent produces a record or makes and delivers a written return of information containing data that are recorded based on a period other than the calendar month or year, the Respondent shall identify in a written return of information the period used in the record or written return of information;

m. if a record contains information that the Respondent claims is privileged, the Respondent shall produce the record with the privileged information redacted and in accordance with paragraph 5 of this Order;

n. the Respondent shall produce all electronic records in their original format or as described below:

   i. the Respondent shall produce database records as a flat file, in a non-relational format, exported as a comma-delimited (CSV) text file;

   ii. the Respondent shall produce spreadsheets in MS Excel format;

   iii. the Respondent shall produce word processing files in MS Word or searchable PDF format;

   iv. the Respondent shall produce e-mail records and attachments in a native email format, such as Outlook Express EML format, Outlook MSG format, PST format, or searchable PDF format;

   v. the Respondent shall produce map records in a MS MapPoint or MS Streets & Trips format; and

   in the event that the Respondent cannot deliver an electronic record in a format described above, the Respondent shall produce the electronic record along with such instructions and other materials, including software, as are necessary for the retrieval and use of the record;

o. notwithstanding subparagraph 3(n), the Respondent may produce litigation application exports by providing a cross-reference file (e.g., CSV, Dii, or MDB database) and related images (e.g., single page TIFF files) and/or electronic records and, where available, additional field information (e.g., title, description,

date, etc.). Where feasible, the Respondent shall produce electronic records in the predefined Ringtail MDB format;

p. the Respondent shall produce electronic records on portable storage media that is appropriate to the volume of data (e.g., USB drive, CD, DVD, or hard drive) and that shall be identified with a label describing the contents. The Respondent shall produce files (e.g., native files or images or combinations of both) in batches of no more than 250,000 files;

q. before producing records pursuant to this Order, and in order to facilitate receipt of documents in electronic format, a representative of the Respondent responsible for producing electronic records in accordance with subparagraphs 3(n) to (p) of this Order shall contact François Brabant at (819) 994-5173 and provide particulars regarding how it will comply with subparagraphs 3(n) to (p) of this Order. The Respondent shall make reasonable efforts to address any additional technical requirements the Commissioner may have relating to the production of electronic records in accordance with subparagraphs 3(n) to (p) of this Order;

r. the Respondent shall define, explain, interpret or clarify any record or written return of information whose meaning is not self-evident;

s. the Respondent shall make all written returns of information, including those relating to revenues, costs and margins, in accordance with generally accepted accounting principles ("**GAAP**"), International Financial Reporting Standards ("**IFRS**"), or other accounting principles that the Respondent uses in its financial statements. Where the Respondent produces a record or makes and delivers a

written return of information using accounting principles other than GAAP or IFRS, the Respondent shall explain the meaning of all such accounting terms;

t. use of the singular or the plural in this Order shall not be deemed a limitation, and the use of the singular shall be construed to include, where appropriate, the plural; and vice versa; and

u. use of a verb in the present or past tense in this Order shall not be deemed a limitation, and the use of either the present or past tense shall be construed to include both the present and past tense.

4. **THIS COURT FURTHER ORDERS** that the Respondent shall make and deliver, in written returns of information, two indices in which the Respondent identifies:

a. all records (or parts of records) that are responsive to the Specifications in Schedule I of this Order for which no privilege is claimed; and

b. all records (or parts of records) that are responsive to the Specifications in Schedule I of this Order for which privilege is claimed.

The indices shall include the title of the record, the date of the record, the name of each author, the title or position of each author, each addressee and recipient, the title or position of each addressee and recipient, and the paragraphs or subparagraphs of Schedule I of the Order to which the record is responsive. In lieu of listing the title or position of an author, addressee or recipient for each record, the Respondent may make and deliver a written return of information listing such persons and their titles or positions.

5. **THIS COURT FURTHER ORDERS** that where the Respondent asserts a legal privilege in respect of all or part of a record, the Respondent shall, in a written return of information:

   a. produce, for each record, a description of the privilege claimed and the factual basis for the claim in sufficient detail to allow the Commissioner to assess the validity of the claim; and

   b. identify by name, title and address, all persons to whom the record or its contents, or any part thereof, have been disclosed.

Without restricting any other remedy he may seek, the Commissioner may, by written notice to the Respondent, at any time require the Respondent to produce records for which solicitor-client privilege is claimed to a person identified in subsection 19(3) of the Act.

6. **THIS COURT FURTHER ORDERS** that the Respondent shall make and deliver a written return of information confirming that the records produced pursuant to this Order were either in the possession of or on premises used or occupied by the Respondent or in the possession of an officer, agent, servant, employee or representative of the Respondent. If a record produced by the Respondent pursuant to this Order does not meet the above conditions, the Respondent shall make and deliver a written return of information explaining the factual circumstances about the possession, power, control and location of such record. The Respondent shall provide the same information for the records of its affiliate produced pursuant to this Order.

7. **THIS COURT FURTHER ORDERS** that the Respondent shall make and deliver a written return of information stating whether, upon having conducted a diligent search and made appropriate enquiries, it has reason to believe that the Respondent is not producing pursuant to this Order a record, thing, type of record or type of thing that was formerly in the possession, control or power of the Respondent or Google Inc. and that the record, thing, type of record or type of thing would be responsive to a Specification of this Order if the Respondent or Google Inc. had continued to have possession, control or power over the record, thing, type of record or type of thing. The Respondent shall state in this written return of information (a) when and how the Respondent or its affiliate lost possession, control and power over a record, thing, type of record or type of thing; and (b) the Respondent's best information about the present location of the record, thing, type of record or type of thing.

8. **THIS COURT FURTHER ORDERS** that the Respondent shall make and deliver a written return of information stating whether, upon having conducted a diligent search and made appropriate enquiries, it has reason to believe that the Respondent or Google Inc. never had possession, control or power over a record, thing, type of record or type of thing responsive to a Specification in this Order, that another person not otherwise subject to this Order has possession, control or power over the record, thing, type of record or type of thing, and that the record, thing, type of record or type of thing would be responsive to a Specification of this Order if the Respondent or Google Inc. possessed the record, thing, type of record or type of thing. The Respondent shall state in this written return of information the Respondent's best information about (a) the

Specification to which the record, thing, type of record or type of thing is responsive, (b) the identity of the person who has possession, control or power of the record, thing, type of record or type of thing, and (c) that person's last known address.

9. **THIS COURT FURTHER ORDERS** that the Respondent shall make and deliver a written return of information stating whether, upon having conducted a diligent search and made appropriate enquiries, it has reason to believe that a record, thing, type of record or type of thing responsive to this Order has been destroyed and that the record, thing, type of record or type of thing would have been responsive to a Specification of this Order if it had not been destroyed. The Respondent shall in this written return of information state whether the record, thing, type of record or type of thing was destroyed pursuant to a record destruction or retention policy, instruction or authorization and shall produce that policy, instruction or authorization.

10. **THIS COURT FURTHER ORDERS** that the Respondent shall make and deliver a written return of information stating whether, upon having conducted a diligent search and made appropriate enquiries, it has reason to believe the Respondent or its affiliate identified in Schedule I of this Order does not have records, things or information responsive to a Specification in this Order because the record, thing or information never existed. The Respondent shall, upon request of the Commissioner, make and deliver a further written return of information explaining why the record or thing never existed.

11. **THIS COURT FURTHER ORDERS** that where the Respondent previously produced a record to the Commissioner the Respondent is not required to produce an additional copy of the record or thing provided that the Respondent: (1) identifies the previously produced record or thing to the Commissioner's satisfaction; (2) makes and delivers a written return of information in which it agrees and confirms that the record was either in the possession of the Respondent, on premises used or occupied by the Respondent or was in the possession of an officer, agent, servant, employee or representative of the Respondent; and where this is not the case, the Respondent shall make and deliver a written return of information explaining the factual circumstances about the possession, power, control and location of such record; and (3) receives confirmation from the Commissioner that such records or things need not be produced. Where Google Inc. previously produced a record or thing to the Commissioner, the Respondent is not required to produce an additional copy of the record, provided that the Respondent complies with the three conditions above.

12. **THIS COURT FURTHER ORDERS** that where the Respondent produces records, things or delivers written returns of information that are, in the opinion of the Commissioner, adequate for the purposes of the Inquiry, the Commissioner may, by written notice, waive production of any additional records, things or information that would have otherwise been responsive to the Order.

13. **THIS COURT FURTHER ORDERS** that the Respondent shall make and deliver a written return of information that:

a. describes the authority of the person to make the written return of information on behalf of the Respondent;

b. includes a statement that, in order to comply with this Order, the person has made or caused to be made:

   i. a thorough and diligent search of the records and things in the possession, control or power of the Respondent and Google Inc.; and

   ii. appropriate enquiries of the Respondent's personnel and the personnel of Google Inc.; and

c. includes a statement that the person believes that the Respondent has complied with the terms of this Order.

14. **THIS COURT FURTHER ORDERS** that all the requirements herein, including the returns of records, things and written returns of information, shall be completed by 28 February 2014, provided that the production of records and things and delivery of written returns of information shall be conducted on a "rolling" basis, with the first production of records and things and delivery of written returns of information taking place no later than 31 January 2014.

15. **THIS COURT FURTHER ORDERS** that the Respondent shall produce all records and things and deliver all written returns of information to the Commissioner at the following address:

Competition Bureau
Civil Matters Branch
50 Victoria Street, 15th Floor
Gatineau, Quebec
K1A 0C9

Attention: Mark MacLachlan, Senior Competition Law Officer

16. **THIS COURT FURTHER ORDERS** that communications or inquiries regarding this Order shall be addressed to:

John Syme
General Counsel
Department of Justice
Competition Bureau Legal Services
50 Victoria Street
Gatineau, Québec
K1A 0C9
Phone #: (819) 953-3903
Fax #: (819) 953-9267

17. **THIS COURT FURTHER ORDERS** that this Order may be served by means of facsimile machine, electronic mail (with acknowledgement of receipt) or registered mail on a duly authorized representative of the Respondents or on counsel for the Respondents who have agreed to accept such service.

"Paul S. Crampton"
Chief Justice, Federal Court

SCHEDULE I

RECORDS TO BE PRODUCED PURSUANT TO PARAGRAPH 11(1)(b) AND SUBSECTION 11(2) OF THE *COMPETITION ACT*

Notice Concerning Obstruction

Any person who in any manner impedes or prevents or attempts to impede or prevent any inquiry or examination under the *Competition Act* (the "Act"), or who destroys or alters or causes to be destroyed or altered any record or thing that is required to be produced under section 11 of the Act, may be subject to criminal prosecution for obstruction of justice, contempt of court or other federal criminal violations. Where a corporation commits such an offence, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence may also be prosecuted. Conviction of any of these offences is punishable by fine or imprisonment or both.

Relevant Period

For the purpose of Schedule I, the Respondent shall produce records created or modified during, or that concern, the period from 1 January 2011 to the date of issuance of this Order, unless otherwise specified in this Schedule.

Definitions

For the purpose of Schedule I, the following definitions shall apply:

a. **"Act"** means the Competition Act, R.S.C. 1985, c. C-34, as amended;

b. **"Advertiser"** means any Person that purchases or otherwise obtains placement of an advertisement in any medium;

c. **"Affiliate"** has the meaning ascribed to it in section 2 of the Act;

d. **"Agreement"** means any Search Syndication or Search Distribution contract, agreement or arrangement that relates to those services being offered to Persons in Canada, excluding Online AdSense Agreements, between the Company and another Person;

e. **"and"** and **"or"** have both conjunctive and disjunctive meanings;

f. **"any"** means one or more, and is mutually interchangeable with **"all"** and each term encompasses the other;

g. **"API Licensee"** means any Person that has licensed the Company's AdWords Application Programming Interface;

h. **"Company"** means Google Canada Corporation, its Relevant Affiliates, predecessors, and all directors, officers, and employees of the foregoing;

i. **"Competitor"** means any Person, excluding the Company, that offers a product or service similar to those offered by the Company;

j. **"Control"** means "control" as defined in section 2 of the Act or the ability to direct the economic behaviour of another Person;

k. **"Draft Agreement"** means any Agreement proposed or drafted within the Relevant Period that has not yet been executed;

l. **"including"** means including but not limited to and **"include"** means includes but not limited to;

m. **"IP Address"** means a location-specific label assigned to devices that connect to the Internet;

n. **"Multi-Homing"** means the simultaneous use of multiple Search Advertising Platforms by an Advertiser or third party;

o. **"Online AdSense Agreement"** means any contract, agreement or arrangement between the Company and another Person entered into through a standard online process that relates to the Company's AdSense for Search program;

p. **"Person"** means any individual, firm, sole proprietorship, corporation, trust, unincorporated organization, association, cooperative (public or private), joint venture, partnership, governmental entity or other entity, whether alone or acting in concert with another Person;

q. **"Record"** has the meaning ascribed to it in section 2 of the Act;

r. **"related to"**, **"relating to"** or **"in relation to"** means in whole or in part constituting, containing, concerning, pertaining to, discussing, describing, analyzing, identifying or stating;

s. **"Relevant Affiliate"** means any domestic or foreign Affiliate of Google Canada Corporation that is engaged in or otherwise involved in the markets for search and search advertising in Canada;

t. **"Relevant Period"** means from 1 January 2011 to the date of issuance of this order, inclusively;

u. **"Search Advertising Platform"** means an online advertising technology that facilitates the sale and display of keyword-specific online advertisements that are returned in response to a Search Query;

v. **"Search Algorithm"** means the procedure that determines the ranking of websites or other relevant information on a Search Results Page;

w. **"Search Distribution"** means the supply and placement of a Search Tool on any software or hardware not controlled by the Company, including mobile devices and web browsers;

x. **"Search Engine"** means any service that generates a context-specific list of related websites or other relevant information in response to a user's input;

y. **"Search Query"** means any input submitted to a Search Engine for the purpose of obtaining a Search Results Page;

z. **"Search Results Page"** means a webpage generated in response to a user's input to a Search Engine that displays a list of related websites, advertisements or other relevant information;

aa. **"Search Syndication"** means the placement of a Search Tool on any website not controlled by the Company;

bb. **"Search Tool"** means any point through which a user can enter a Search Query;

cc. **"Senior Officer"** means any Person having or exercising the duties, functions or authority of chairperson, president, chief executive officer, vice-president, secretary, treasurer, chief financial officer, chief operating officer, general manager or managing director of the Company;

dd. **"Syndication Partner"** means any Person that places a Company Search Tool on any website not controlled by the Company; and

ee. **"Universal Search"** means the insertion of direct answers or enhanced functionality, beyond mere links to websites, within the space on a Search Results Page typically designated for non-paid search results. For greater certainty, this would include search result boxes such as the Company's Hotel Finder or other enhanced functionality search results that include sponsored or advertised listings.

[*Remainder of the page intentionally left blank*]

Specifications

1. Provide organization charts:

    a. showing Google Canada Corporation and its relationship to each of its Relevant Affiliates and their relationship to each other; and

    b. identifying the Senior Officers of the Company.

2. Provide monthly financial statements showing the Company's revenues, costs, profits and losses, or any similar or equivalent financial Records maintained by the Company in respect of the Company's search and search advertising business in Canada, audited where available and separated by business segment.

3. Provide all marketing, business, pricing and strategic plans, studies or analyses prepared or received by a Senior Officer relating to the markets for search and search advertising and the competitive position, including competitive advantages and disadvantages, of the Company and any Competitor.

4. Provide all marketing, business, pricing and strategic plans, studies or analyses prepared or received by a Senior Officer relating to the markets for search and search advertising and the negotiating, bargaining, or countervailing power of any Advertiser or API Licensee in relation to the Company.

5. Provide:

    a. all Agreements entered into or in force during the Relevant Period;

    b. the most recent version, as of the date of this order, of each distinct Draft Agreement;

    c. each distinct version of an Online AdSense Agreement between the Company and a Person with a primary billing address in Canada entered into or in force during the Relevant Period;

    d. all Records prepared or received by a Senior Officer, whether during or before the Relevant Period, relating to the Agreements specified in Specification 5(a) of this Schedule I and in Specification 3 of Schedule II, in respect of:

        i. the negotiation of such Agreements;

        ii. the purpose or business objective of such Agreements; and

        iii. the effect or potential effect of such Agreements on any Person in Canada or any Competitor servicing, or potential Competitor that could service, Canada in respect of search and search advertising; and

e. all Records prepared or received by a Senior Officer relating to the Draft Agreements specified in Specification 5(b) of this Schedule I, in respect of:

i. the negotiation of such Draft Agreements;

ii. the purpose or business objective of such Draft Agreements; and

iii. the potential effect of such Draft Agreements on any Person in Canada or any Competitor servicing, or potential Competitor that could service, Canada in respect of search and search advertising.

6. Provide all Records prepared or received by a Senior Officer relating to any requirement that prevents or impedes a Search Advertising Platform not controlled by the Company from placing advertisements on a Search Results Page returned in response to a Search Query submitted to a Company Search Tool on a website controlled by a Syndication Partner, in respect of:

a. the purpose or business objective of the requirement; and

b. the effect or potential effect of the requirement on any Person in Canada or any Competitor servicing, or potential Competitor that could service, Canada in respect of search and search advertising.

7. Provide all versions of the Company's AdWords API Terms and Conditions to which API Licensees with a primary billing address in Canada are or have been subject.

8. Provide all Records prepared or received by a Senior Officer relating to any requirement in any version of the Company's AdWords API Terms and Conditions, as identified in response to specification 6 of this Schedule I, that could prevent or restrict Multi-Homing (including, but not limited to, sections II.3.a, III.2.c.i, III.2.c.ii, and III.9 of the current version of Google AdWords API Terms and Conditions), in respect of:

a. the purpose or business objective of any such requirement; and

b. the effect of any such requirement on any Person in Canada or any Competitor servicing, or potential Competitor that could service, Canada in respect of search and search advertising.

9. Provide all Records prepared or received by a Senior Officer relating to the Company's introduction of AdWords Enhanced Campaigns, announced 6 February 2013, in respect of:

a. the purpose or business objective of AdWords Enhanced Campaigns; and

b. the effect or potential effect of AdWords Enhanced Campaigns on any Person in Canada or any Competitor servicing, or potential Competitor that could service, Canada in respect of search and search advertising.

10. Provide all Records prepared or received by a Senior Officer relating to the Company's implementation and modification of Universal Search, in respect of:

    a. the purpose or business objective of Universal Search; and

    b. the effect or potential effect of Universal Search on any Person in Canada or any Competitor servicing, or potential Competitor that could service, Canada.

11. Provide all Records prepared or received by a Senior Officer in respect of any actual or considered change to the Company's Search Algorithm for the purpose of lowering the placement of a Competitor's website or raising the placement of a Company website on a Search Results Page.

12. Provide all Records prepared or received by a Senior Officer relating to any situation where a Competitor was given less than full feature parity with the Company for mobile applications using the Company's YouTube service, in respect of:

    a. the purpose or business objective of this action; and

    b. the effect or potential effect of this action on any Person in Canada or any Competitor servicing, or potential Competitor that could service, Canada.

13. Provide all Records prepared or received by a Senior Officer relating to any requirement that prevents or impedes a Person from designating a Search Engine not controlled by the Company as the default Search Engine on a device using the Company's Android mobile device operating system, in respect of:

    a. the purpose or business objective of this requirement; and

    b. the effect or potential effect of this requirement on any Person in Canada or any Competitor servicing, or potential Competitor that could service, Canada.

14. Provide all Records prepared or received by a Senior Officer relating to any proposed or implemented commitments with respect to search and search advertising made by the Company to the European Commission or the United States Federal Trade Commission, in respect of potential and actual effects of such commitments on the Company's Canadian business, Persons in Canada or Competitors servicing, or potential Competitors that could service, Canada.

15. For each Agreement specified in specification 5(a) of this Schedule I provide records which, by their combination, whether created during or before the Relevant Period, are sufficient to show:

a. the number of Search Queries, originating from Canadian IP Addresses, processed pursuant to the Agreement;

b. the gross revenues accrued by the Company pursuant to the Agreement from Search Queries that originate from Canadian IP Addresses; and

c. the fixed and variable costs incurred by the Company for the provision of responses to Search Queries from Canadian IP Addresses pursuant to the Agreement.

16. Provide records related to Persons with a primary billing address in Canada that have entered into an Online AdSense Agreement with the Company which, by their combination, are sufficient to show:

    a. the number of Search Queries, originating from Canadian IP Addresses, processed pursuant to the Online AdSense Agreements;

    b. the gross revenues accrued by the Company pursuant to the Online AdSense Agreements from Search Queries that originate from Canadian IP Addresses; and

    c. the fixed and variable costs incurred by the Company for the provision of responses to Search Queries from Canadian IP Addresses pursuant to the Online AdSense Agreements.

17. For all API Licensees with a primary billing address in Canada and all API Licensees that develop a custom API AdWords client for use by customers in Canada, provide records sufficient to show:

    a. the name and primary billing address of each API Licensee;

    b. whether each API Licensee develops a custom API AdWords client for use by customers in Canada; and

    c. which version of the Company's AdWords API Terms and Conditions is applicable to each API Licensee.

18. Provide records sufficient to show the number of Advertisers in Canada and advertising agencies with customers in Canada that use the Company's Search Advertising Platform and the revenue accruing to the Company from those Advertisers or advertising agencies for each category of search advertising (e.g. desktop, mobile and tablet).

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SCHEDULE II

WRITTEN RETURNS OF INFORMATION TO BE MADE AND DELIVERED PURSUANT TO PARAGRAPH 11(1)(c) OF THE *COMPETITION ACT*

Notice Concerning Obstruction

Any person who in any manner impedes or prevents or attempts to impede or prevent any inquiry or examination under the *Competition Act* (the "Act"), or who destroys or alters or causes to be destroyed or altered any record or thing that is required to be produced under section 11 of the Act, may be subject to criminal prosecution for obstruction of justice, contempt of court or other federal criminal violations. Where a corporation commits such an offence, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence may also be prosecuted. Conviction of any of these offences is punishable by fine or imprisonment or both.

Relevant Period

For the purpose of Schedule II, the Respondent shall make and deliver written returns of information for the period from 1 January 2010 to the date of issuance of this Order, unless otherwise specified in this Schedule.

Definitions

For the purpose of Schedule II, the following definitions shall apply:

a. **"Act"** means the Competition Act, R.S.C. 1985, c. C-34, as amended;

b. **"Advertiser"** means any Person that purchases or otherwise obtains placement of an advertisement in any medium;

c. **"Affiliate"** has the meaning ascribed to it in section 2 of the Act;

d. **"Agreement"** means any Search Syndication or Search Distribution contract, agreement or arrangement that relates to those services being offered to Persons in Canada, excluding Online AdSense Agreements, between the Company and another Person;

e. **"and"** and **"or"** have both conjunctive and disjunctive meanings;

f. **"any"** means one or more, and is mutually interchangeable with **"all"** and each term encompasses the other;

g. **"API Licensee"** means any Person that has licensed the Company's AdWords Application Programming Interface;

h. **"Company"** means Google Canada Corporation, its Relevant Affiliates, predecessors, and all directors, officers, and employees of the foregoing;

i. **"Control"** means "control" as defined in section 2 of the Act or the ability to direct the economic behaviour of another Person;

j. **"Draft Agreement"** means any Agreement proposed or drafted within the Relevant Period that has not yet been executed;

k. **"including"** means including but not limited to and **"include"** means includes but not limited to;

l. **"IP Address"** means a location-specific label assigned to devices that connect to the Internet;

m. **"Online AdSense Agreement"** means any contract, agreement or arrangement between the Company and another Person entered into through a standard online process that relates to the Company's AdSense for Search program;

n. **"Person"** means any individual, firm, sole proprietorship, corporation, trust, unincorporated organization, association, cooperative (public or private), joint venture, partnership, governmental entity or other entity, whether alone or acting in concert with another Person;

o. **"related to"**, **"relating to"** or **"in relation to"** means in whole or in part constituting, containing, concerning, pertaining to, discussing, describing, analyzing, identifying or stating;

p. **"Relevant Affiliate"** means any domestic or foreign Affiliate of Google Canada Corporation that is engaged in or otherwise involved in the markets for search and search advertising in Canada;

q. **"Relevant Period"** means from 1 January 2010 to the date of issuance of this order, inclusively;

r. **"Search Advertising Platform"** means an online advertising technology that facilitates the sale and display of keyword-specific online advertisements that are returned in response to a Search Query;

s. **"Search Distribution"** means the supply and placement of a Search Tool on any software or hardware not controlled by the Company, including mobile devices and web browsers;

t. **"Search Engine"** means any service that generates a context-specific list of related websites or other relevant information in response to a user's input;

u. **"Search Query"** means any input submitted to a Search Engine for the purpose of obtaining a Search Results Page;

v. **"Search Results Page"** means a webpage generated in response to a user's input to a Search Engine that displays a list of related websites, advertisements or other relevant information;

w. **"Search Syndication"** means the placement of a Search Tool on any website not controlled by the Company;

x. **"Search Tool"** means any point through which a user can enter a Search Query;

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Specifications

1. Identify all Relevant Affiliates and provide a detailed description of each Relevant Affiliate's relationship to Google Canada Corporation.

2. For Google Canada Corporation and each Relevant Affiliate, provide:

    a. the Person's legal name and address;

    b. a detailed description of each of its principal business activities;

    c. a description of each of the principal categories of products, as defined by the Person in its day-to-day operations, that it produces, supplies or distributes; and

    d. for each principal category of products listed in response to Specification 2(c) of this Schedule II, provide:

        i. the total annual volume or dollar value of purchases from and sales to all suppliers and customers;

        ii. the twenty most important current suppliers, by expenditure, and twenty most important customers in Canada, by revenue, the contact names, telephone numbers and addresses of those suppliers and customers, and the annual volume or dollar value of purchases from and sales to those suppliers and customers; and

        iii. the geographic regions of sales.

3. Identify and provide a detailed description of any non-written Agreements entered into or in force during the Relevant Period.

4. For each Agreement specified in response to specification 5(a) of Schedule I and specification 3 of this Schedule II, provide, for each year of the Agreement, whether during or before the Relevant Period:

    a. the number of Search Queries, originating from Canadian IP Addresses, processed pursuant to the Agreement;

    b. the gross revenues accrued by the Company pursuant to the Agreement from Search Queries that originate from Canadian IP Addresses; and

    c. the fixed and variable costs incurred by the Company for the provision of responses to Search Queries from Canadian IP Addresses pursuant to the Agreement.

5. Provide, as a combined total for all Persons with a primary billing address in Canada that have entered into an Online AdSense Agreement with the Company:

    a. the number of Search Queries, originating from Canadian IP Addresses, processed pursuant to the Online AdSense Agreements for each year of the Relevant Period;

    b. the gross revenues accrued by the Company pursuant to the Online AdSense Agreements from Search Queries that originate from Canadian IP Addresses, for each year of Relevant Period; and

    c. the fixed and variable costs incurred by the Company for the provision of responses to Search Queries from Canadian IP Addresses pursuant to the Online AdSense Agreements, for each year of the Relevant Period.

6. For all API Licensees with a primary billing address in Canada:

    a. provide the name and primary billing address;

    b. identify which API Licensees develop custom API AdWords clients for use by customers; and

    c. identify which version of the Company's AdWords API Terms and Conditions is applicable to each API Licensee.

7. For all API Licensees that have a primary billing address outside Canada and develop a custom API AdWords client for use by customers that advertise to Canadians:

    a. provide the name and primary billing address; and

b. identify which version of the Company's AdWords API Terms and Conditions is applicable to each API Licensee.

8. Describe how the Company determines which version of its AdWords API Terms and Conditions is applicable to licensees conducting business in various parts of the world, including the treatment of Canadian API Licensees that conduct business in English or French.

9. For the Company's Search Advertising Platform, for each month of the Relevant Period and for each category of search advertising (e.g. desktop, mobile and tablet), provide, in electronic format, the revenue generated by Search Queries originating from Canadian IP Addresses, and the corresponding number of Advertisers or advertising agencies, by revenue range, in the following format:

Revenue range (in thousands of Canadian Dollars)	advertising agencies		Advertisers	
	# of advertising agencies	Total revenue from agencies (in Canadian Dollars)	# of Advertisers	Total revenue from Advertisers (in Canadian Dollars)
0-10				
10-20				
20-50				
50-100				
100-200				
200-300				
300-400				
400-500				
500-1,000				
>1,000				

Exhibit 26 to the Cross-Examination of Professor Tadelis

GOOGLE AD MANAGER

An update on first price auctions for Google Ad Manager

May 10, 2019 · 5 min read

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Jason Bigler
Director, Product Management, Google

Listen to article 8 minutes

We've heard from many of our partners that they want our help to simplify how they manage their revenue from advertising. That's why Google Ad Manager will be transitioning to a unified, first price auction this year. This change will simplify our publisher platform and create a fair and transparent auction for everyone, helping our partners create sustainable businesses with advertising. Today, we'd like to share additional details as we prepare to transition to a first price auction.

Reducing complexity

Currently, Ad Manager may run two different auctions for a specific ad. A second price, real-time bidding auction run with Authorized Buyers — which includes Google Ads, Display & Video 360 and other Demand Side Platforms — followed by a first price auction that compares the winning price from the second price auction with a publisher's guaranteed and non-guaranteed advertising campaigns, as well as bids from Exchange Bidding buyers. By switching to a unified first price auction, we can reduce this multi-stage process and provide all non-guaranteed advertising sources the same opportunity to win an auction.

After the transition, Ad Manager will have a single auction that compares the prices from a publisher's guaranteed campaigns with all of a publisher's non-guaranteed advertising sources — including real-time bidding partners (such as Authorized Buyers and Exchange Bidding partners) and non-guaranteed line items (including those that publishers use in their header bidding implementations). Going forward, no price from any of a publisher's non-guaranteed advertising sources, including non-guaranteed line item prices, will be shared with another buyer before

they bid in the auction. As has always been the case, all real-time bidding partners integrated with Ad Manager — including Google Ads and Display & Video 360 — will be notified of an auction at the same time.

Increasing transparency

Moving to a unified first price auction will allow us to provide additional auction transparency to both publishers and advertisers. Today, not all Authorized Buyers choose to share and receive bid data, resulting in gaps in historical auction data we can share with publishers and Authorized Buyers. When Ad Manager changes to a unified first price auction, we plan to require all Ad Manager partners to share and receive bid data. This change will allow us to provide publishers reporting on all bids submitted for their ads (including bids from Google Ads and Display & Video 360) and give all Authorized Buyers and Exchange Bidding buyers access to the price that was needed to win for auctions they submitted a bid to.

“Moving to a first price auction puts Google at parity with other exchanges and SSPs in the market, and will contribute to a much fairer transactional process across demand sources. The move also provides significantly greater information transparency to both advertisers looking to understand their working media dollars, and publishers looking to assess the fair market value of their supply.”

- Scott Mulqueen, VP Programmatic and Data Product Operations, Trusted Media Brands

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"Google’s move to first-price auctions and unified pricing is an opportunity to improve transparency throughout the ecosystem, including improved visibility of their own actions and practices, which I believe should benefit everyone.”

- Richard Caccappolo, Chief Operating Officer, MailOnline

"Brands and agencies are demanding a scaled, open, and unified approach to the modern marketing platform. MediaMath supports Google's effort to simplify the programmatic supply chain and provide more transparency in the media buying and selling process. These updates should help reduce friction between advertisers, publishers, and the broader tech ecosystem."

- Jeremy Steinberg, Global Head of Ecosystem, MediaMath

How floor price strategy will change

Our shift to a unified, first price auction will require publishers to rethink how they use floor prices. In a second price auction, floor prices can be used to prevent advertisers from buying inventory below a specified price. But because of how second price auctions work — the highest bidder pays the second highest price — floor prices can also be used by publishers to increase the closing price of their auctions. This strategy is executed today when a publisher reviews their bid landscape data and compares it to their revenue reporting. If they notice that their auction closing prices (the auction second price) are significantly lower than their highest bids, oftentimes the publisher will raise their floor prices to increase their revenue in the short term. Over time, this behavior can erode trust in the benefits of a second price auction.

After transitioning to a first price auction, price floor strategies created to influence the second price auction closing will no longer be relevant. When approaching floor strategy, publishers should focus on understanding the true value of their inventory and adjust pricing based on their existing advertising deals and how buyers are valuing their inventory.

How pricing rules will change

In addition to impacting how publishers are using floor price rules, changing to a first price auction in Ad Manager requires a change in how our rules function. Our existing price rules that only apply to our second price auction will no longer work in a first price auction.

That's why we released a new feature to all publishers globally, called unified pricing rules. Our new unified pricing rules will help publishers more easily manage floor prices across all non-guaranteed partners. For example, instead of setting up the same floor prices in multiple places — in the auction in Ad Manager, and with their Exchange Bidding and other non-guaranteed advertising sources — which can take a lot of time and can lead to errors, a publisher can set up a single unified pricing rule to control pricing from one place. To maintain a fair and transparent auction, these rules will be applied to all partners equally, and cannot be set for individual buying platforms. We have set an initial limit of 100 rules, though as we roll out these changes we'll be working with our partners to understand if this limit can support all use cases, or if a higher limit is necessary.

"We welcome Google's move to first price auctions and unified pricing rules. These changes will help us simplify how we implement our most advanced pricing strategies between our header bidding partners, Ad Manager and Exchange Bidders. We believe this will help create a level playing field for non-guaranteed transactions and help us review the performance of our demand partners."

- Alex Payne, VP of Global Programmatic Solutions, VICE Media

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"We've built our technology to work with Ad Manager through Prebid and Exchange Bidding to help publishers monetize their inventory however they choose. We're glad to see Google shifting toward a more transparent and simplified approach to auctions, and we look forward to collaborating with them to ensure these changes are executed in a way that works for publishers and buyers alike."

- Tom Kershaw, Chief Technical Officer, Rubicon Project

The switch to unified pricing rules and a unified first price auction will help our partners simplify how they manage advertising revenue and increase transparency for everyone in the ecosystem. We understand these changes will impact how publishers operate their advertising businesses, so over the next few months our teams will be working with our partners to help them with this transition. We are excited to take this next step together.

POSTED IN:

Google Ad Manager

Exhibit 27 to the Cross-Examination of Professor Tadelis

Competition Bureau calls for businesses to report potentially anti-competitive conduct in the digital economy

From: Competition Bureau Canada

News release

September 4, 2019 – OTTAWA, ON – Competition Bureau

The Competition Bureau has published a call-out for information from Canada's business community about conduct in the digital economy that may be harmful to competition.

The Bureau is seeking information from businesses and other interested parties regarding certain strategies that firms may use to hinder competition in certain core digital markets, such as online search, social media, display advertising, and online marketplaces.

Companies doing business in digital markets, industry associations, venture capital firms and anyone else with insight into digital markets are likely to have valuable information on competition in these sectors.

The information shared with the Bureau will help further its ongoing efforts to detect, investigate and remedy anti-competitive conduct in the digital economy.

All information provided to the Bureau will be kept confidential. Those who wish to respond are invited contact the Bureau at any time by using the complaint or request for information forms on the Bureau's website.

Quick facts

- This call-out for information is part of the Bureau's efforts to ensure that Canadians realize the full benefits of competition in the rapidly growing digital economy.
- The Bureau will be engaging with Canada's business community and other interested parties over the coming months on specific issues and potentially anti-competitive conduct outlined in the call-out.
- Information provided to the Bureau will be used to inform potential investigations and/or the development of guidance to market participants on competition law enforcement issues relevant to digital markets.

Related products

- Competition Bureau call-out for information on potentially anti-competitive conduct in the digital economy

Contacts

Related products

- Competition Bureau call-out for information on potentially anti-competitive conduct in the digital economy

Contacts

For media enquiries, please contact:
Media Relations
Telephone: 819-994-5945
Email: media-cb-bc@cb-bc.gc.ca

For general enquiries, please contact:
Information Centre
Competition Bureau
Telephone: 819-997-4282
Toll free: 1-800-348-5358
TTY (hearing impaired): 1-866-694-8389
www.competitionbureau.gc.ca
Enquiries/Complaints
Stay connected

The Competition Bureau, as an independent law enforcement agency, ensures that Canadian businesses and consumers prosper in a competitive and innovative marketplace.

Search for related information by keyword: Competitiveness | Competition Bureau Canada | Canada | Protect your business | general public | news releases

Date modified: 2020-04-06

Exhibit 28 to the Cross-Examination of Professor Tadelis

Competition Bureau call-out to market participants for information on potentially anti-competitive conduct in the digital economy

- The Competition Bureau (**Bureau**) is seeking information from market participants about conduct in the digital economy that may be harmful to competition.
- This paper identifies a number of issues related to digital markets that the Bureau will be engaging market participants on over the coming months.
- Information provided to the Bureau will be used to inform potential investigations into anti-competitive conduct by firms in digital markets.
- The call-out is part of the Bureau's efforts to ensure that Canadians realize the full benefits of competition in the rapidly growing digital economy.

Competition issues in the digital economy

The Bureau is examining concerns that certain core digital markets, like online search, social media, display advertising and online marketplaces, have become increasingly concentrated, to the detriment of consumers and businesses.

The Bureau is seeking information from the market to understand whether, and if so why, this is the case. This paper explores two potential, and possibly complementary, explanations:

- **Digital markets may 'tip' to a dominant firm:** characteristics of certain digital markets may favour the emergence of a single winner or a small group of winners; and
- **Anti-competitive conduct rather than competition on the merits:** leading firms may not have achieved success by outperforming their competitors, but rather by executing anti-competitive strategies that target existing or potential rivals.

The following sections provide an overview of these issues and identify specific points of interest for the Bureau.

Characteristics of digital markets may lead to 'tipping'

The Bureau's 2017 discussion paper "Big data and Innovation: Implications for competition policy in Canada" stated that features of certain digital markets may ultimately favour the emergence of a single winner or small group of winners. Recent reports published by international authorities have supported this view. [1]

The tendency for a single firm, or a small group of firms, to take control of certain digital markets is referred to as 'tipping'. Tipping is most likely to occur where firms benefit from:

i. strong network effects;
ii. economies of scale and scope; and

The tendency for a single firm, or a small group of firms, to take control of certain digital markets is referred to as 'tipping'. Tipping is most likely to occur where firms benefit from:

i. strong network effects;
ii. economies of scale and scope; and
iii. access to large volumes of data.

I. Network effects may result in established products beating out new, higher-quality options

Network effects exist when the value or benefit to a particular user of a product or service depends on the number of other users. There are two broad types of network effects:

- **Direct network effects** occur when the value to a user of a product or service increases as more people use it for a similar purpose. For instance, consider a social media platform. It is more valuable to you if your friends and (maybe) family also use it. A search engine is also likely to be more valuable to you when more people use it. More users means more data, which can be used to improve the quality of search results.
- **Indirect network effects** may be present when a product or service brings together two or more distinct types of users – think, for instance, of an online marketplace that allows buyers to interact with third-party sellers. Indirect network effects occur when the value of a product or service to one user group increases with the number of users in another user group. In some cases, indirect network effects may be strong for users on one side of the market, but weak for users on the other side of the market. This is likely true of social media platforms and search engines: while advertisers benefit more when there are many users, users may not experience much, if any, additional benefit as the number of advertisers increases. In other cases, like with ride-hailing apps (riders and drivers), online marketplaces (buyers and sellers) and app stores (app purchasers and app developers), indirect network effects are likely strong for both types of users.

Where network effects are strong, markets may tend towards concentration, as both current and prospective users are likely to experience greater value with the more widely used product or service, perhaps even if it is inferior in quality. This presents a unique challenge for new entrants, known as the 'chicken-and-egg' problem: in order to attract users to a product or service it must be perceived as valuable, yet a product or service will not be perceived as valuable unless it has many users.

II. Economies of scale and scope favour the biggest firms

Firms that wish to compete in certain digital markets must often incur significant upfront costs in order to develop a high-quality product or service. After making these investments, however, firms are generally able to offer their product or service to the masses without having to incur any significant additional costs. These two characteristics define economies of scale: the average cost of supplying a product or service decreases sharply as the number of users grows.

While economies of scale tend to benefit customers through lower prices, they can also deter firms from attempting to compete in a market. As explained in the University of Chicago Booth School of Business' report:

> "[I] ncreasing returns to scale create barriers to entry: New firms cannot offer the quality of the incumbent without the same large-scale operation to pay for the fixed costs. But the firm can only achieve a large scale if quality is high. Thus, a potential entrant, foreseeing that it will not be profitable at the smaller scale, will not enter the market to challenge the incumbent". [2]

Larger firms can also benefit from economies of scope. A firm that already provides a variety of products or services can be more efficient at entering another product or service market than new entrants. For example, it may be less costly for a firm that controls a leading search engine to capture other markets because it can take advantage of its existing resources. This may include using data it has already accumulated, leveraging its existing user base, or redeploying

> enter the market to challenge the incumbent". [2]

Larger firms can also benefit from economies of scope. A firm that already provides a variety of products or services can be more efficient at entering another product or service market than new entrants. For example, it may be less costly for a firm that controls a leading search engine to capture other markets because it can take advantage of its existing resources. This may include using data it has already accumulated, leveraging its existing user base, or redeploying technologies to help ease expansion.

III. Access to large volumes of data can help keep competitors at bay

In many digital markets, data is a key input needed to develop high quality products and services. We expect search engines, for instance, to produce better results when they receive a high volume of search queries on a wide variety of topics. This potential benefit of data, known as a user feedback loop, is one of two ways that a data-rich incumbent can use its bounty to beat rivals. User feedback loops occur when firms are able to use data collected from their users to improve the quality of their product or service, in turn attracting more users.

Incumbent firms can also separate themselves from rivals by using their data to improve the quality of targeted advertising on their platform. As incumbent firms take advantage of their data to improve the quality of targeted advertising on their platform, advertisers will be willing to pay more for advertisements. This provides incumbents with additional money to reinvest in improving the quality of its product or service. Known as a monetization feedback loop, this is another way for incumbent firms to attract more users by taking advantage of data.

As incumbents take advantage of user and monetization feedback loops, it becomes harder for rival firms with less, or no, data to keep up. This is nicely explained by the Law Society of Scotland in its submission to the UK's Digital Competition Expert Panel:

> "[A]s data is power, those already large, often global, businesses which are able to utilise existing data effectively, have advantages in terms of maintaining their existing position and further increasing their market share. This will inevitably pose a barrier to new entrants (without any such data) or even smaller competitors". [3]

Collectively, these market characteristics may lead to less competition

While each of the three factors identified above may individually 'nudge' a market towards a single winner or a small group of winners, it is their collective presence that is most likely to push a market towards concentration. Not only that, but once a market has tipped, these same factors increase the odds the market will stay that way by making it more costly for new, upstart firms to capture part – or all – of the market.

Given that these factors are often present in digital markets – making these markets prone to tipping and harder to contest – it becomes all the more important for the Bureau to be able to identify and take action against any anti-competitive strategies that may be adopted by incumbent firms to shield themselves from competition. If not addressed in a timely fashion, such strategies – which effectively prevent competition on the merits – are likely to make it that much more difficult for new firms to successfully compete in the market, as discussed below.

Anti-competitive strategies may be effective – and particularly profitable – in digital markets

Since certain digital markets tend towards a 'winner takes all' outcome, firms in these markets have a strong incentive to adopt strategies that increase the likelihood the market tips in their favour, and stays that way.

In this race to the finish line, firms are likely to focus their efforts on trying to 'outcompete' their rivals by developing better products and services, to the benefit of their users. Some firms, however, may conclude that competing on the

Since certain digital markets tend towards a 'winner takes all' outcome, firms in these markets have a strong incentive to adopt strategies that increase the likelihood the market tips in their favour, and stays that way.

In this race to the finish line, firms are likely to focus their efforts on trying to 'outcompete' their rivals by developing better products and services, to the benefit of their users. Some firms, however, may conclude that competing on the merits will be too costly, or insufficient on its own, to claim – and keep – the market. For these firms, anti-competitive strategies that target existing or potential rivals may appear particularly attractive.

In the digital world, the Bureau anticipates that anti-competitive strategies will likely aim to achieve one or both of the following objectives:

- **Protecting a 'core' market:** certain anti-competitive strategies may attempt to prevent rivals from capturing a firm's core market. This would include, for instance, efforts to prevent or impede the emergence of a rival search engine, online marketplace or social media platform.
- **Capturing adjacent markets:** firms may also adopt anti-competitive strategies in order to capture markets related to a core market under their control. This would include, for instance, efforts by a firm that controls a leading search engine to systematically push its search users towards its own navigation or restaurant review products, rather than those offered by rivals.

Some of the potential strategies firms may adopt to achieve these objectives include:

- **Refusal to deal:** this occurs when a firm that controls an important input or channel refuses to provide access to actual or potential competitors. Possible examples include:
    1. a social media platform providing a subset of its data to firms so that they can offer complementary products on the platform, but cutting off access once it starts offering its own similar products; or
    2. a dominant online marketplace removing popular products and services from the platform in favour of selling its own offerings.
- **Self-preferencing:** this occurs when a firm that controls a platform props up its own products and services over those of its rivals. Possible examples include:
    1. an online marketplace manipulating its rankings so that its own products and services appear above those offered by rivals; or
    2. as described above, biasing search results to favour products and services owned by the online search company.
- **Margin squeezing:** this occurs when a firm that controls an important input or channel is only willing to provide it to actual or potential rivals at a price that makes it difficult, if not impossible, for them to compete in an adjacent market. This could occur, for instance, where a firm that controls an app store, but that also develops apps itself, charges customers $5 for its own apps while charging rival app producers a commission of $5 each time they sell an app.
- **Most favoured nation requirements:** this occurs when a firm explicitly or implicitly prohibits its suppliers from providing rivals with better prices or other trade terms. This could occur, for instance, where a hotel-booking website prohibits hotels from offering better rates to rival hotel-booking websites.
- **Creeping acquisitions:** this occurs when a firm buys out actual or potential rivals, resulting in less head-to-head rivalry in the market. Unlike the other strategies described above, which tend to harm rivals, this strategy may, in some circumstances, actually benefit both the incumbent and its rivals, through reduced competition and large payouts, respectively.

The Bureau recognizes that, in many cases, the types of conduct identified above will not raise competition concerns and may, in fact, promote competition in the short and/or long run. For instance, such conduct may result in lower prices or

Grouping acquisitions: this occurs when a firm buys potential rivals, resulting in less head-to-head rivalry in the market. Unlike the other strategies described above, which tend to harm rivals, this strategy may, in some circumstances, actually benefit both the incumbent and its rivals, through reduced competition and large payouts, respectively.

The Bureau recognizes that, in many cases, the types of conduct identified above will not raise competition concerns and may, in fact, promote competition in the short and/or long run. For instance, such conduct may result in lower prices or ensure that firms' incentives to innovate remain strong. As such, when reviewing these types of conduct, the Bureau's focus will be on the unique facts of each case, with a view to determining whether the conduct is more likely to harm or enhance competition in the short and/or long run.

In making this determination, the Bureau is likely to place significant weight on three key factors:

i. whether the firm engaging in the conduct appears to have durable market power, in the sense that it has, and is likely to maintain, significant control over a market;
ii. whether there is compelling evidence that the firm was actually engaging in the conduct for a pro-competitive or efficiency enhancing purpose, and whether these benefits were realized; and
iii. whether prohibiting the conduct at issue is likely to dampen incentives for firms to invest in innovation.

Sharing information with the Competition Bureau

The Bureau encourages all market participants in the digital economy to share their experiences and perspectives on the issues raised in this paper.

Information provided to the Bureau may be used for the following purposes:

- to support the commencement or further development of an investigation into alleged anti-competitive conduct;
- to inform how the Bureau analyzes anti-competitive strategies in the digital economy; and
- to inform potential guidance to market participants on competition law enforcement issues relevant to digital markets (for instance, in a form similar to the Bureau's various enforcement guidelines).

There are three main ways for sharing information with the Bureau:

i. Interested parties are invited to provide written submissions by November 30, 2019, through the online form on the Bureau's website, or by sending an email to CBDigitalEconomy-BCEconomieNumerique@cb-bc.gc.ca. The Bureau will treat all submissions as confidential. Parties are encouraged to focus their submissions on the following topics:
    - Potential explanations for why certain digital markets have become (and appear to remain) highly concentrated, which will help the Bureau in its efforts to distinguish anti-competitive conduct from conduct that may be pro-competitive or competitively neutral.
    - Identification of past or ongoing conduct in the digital economy that may raise competition concerns, including but not limited to the types of conduct identified in this paper.
    - A description of how this conduct has impacted, or is likely to impact, the ability of rivals to effectively challenge the incumbent firm(s).
ii. The Bureau expects to schedule meetings with market participants in the fall in a number of Canada's innovation hubs. Parties interested in such meetings are encouraged to contact the Bureau. During these meetings, the Bureau will explain its role as the enforcer of Canada's competition laws, and provide market participants with an opportunity to identify conduct of concern in the digital economy.
iii. Interested parties can also contact the Bureau at any time by submitting a complaint or a request for information on the Bureau's website.

- A description of how this conduct has impacted, or is likely to impact, the ability of rivals to effectively challenge the incumbent firm(s).

ii. The Bureau expects to schedule meetings with market participants in the fall in a number of Canada's innovation hubs. Parties interested in such meetings are encouraged to contact the Bureau. During these meetings, the Bureau will explain its role as the enforcer of Canada's competition laws, and provide market participants with an opportunity to identify conduct of concern in the digital economy.

iii. Interested parties can also contact the Bureau at any time by submitting a complaint or a request for information on the Bureau's website.

Footnotes

1 See, in particular, the reports prepared by or for the University of Chicago Booth School of Business, the Digital Competition Expert Panel in the United Kingdom, the Directorate General for Competition of the European Commission and the Australian Competition and Consumer Commission.

2 See page 14.

3 See the Digital Competition Expert Panel's report, cited above, at pages 34-35.

Date modified: 2022-01-19

Exhibit 29 to the Cross-Examination of Professor Tadelis

Our Year in Action

Safeguarding Competition in a Digital World

2019-2020 Annual Report

Canada

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Message from the Commissioner

As we reflect on the past year, it is clear that the Canadian economy is more digitally focused than ever before, and the growth of our digital and data-driven economy will likely only accelerate in the years ahead. As a result, the Competition Bureau's vision—to be a world-leading competition agency that is at the forefront of the digital economy and champions a culture of competition in Canada—is more important now than ever before. We set out this vision in our *2019-2020 Annual Plan* and in our *Strategic Vision for 2020-2024*. It will guide us as we build our capacity in the digital economy and deliver the benefits of competition to Canadians.

The Bureau is taking a proactive approach to competition enforcement and advocacy. Our goal is to help Canadian consumers and businesses reap the benefits of competition in the digital economy. To that end, at the beginning of the year, we indicated that we would vigorously enforce and promote competition where it matters most to Canadians, in areas such as telecommunications, health and biosciences, and infrastructure. We have done just that. For example, a strong telecommunications sector is key within the digital economy and, over the past year, we have completed comprehensive studies into the wireless and broadband industries. We also participated in proceedings and consultations at the federal and provincial levels on device financing and cellphone bill transparency. Our goal throughout was to provide objective, evidence-based advice, guided by the principle that effective, sustainable competition is the best way to lower prices, improve choice and deliver high-quality networks to Canadians.

Over the last year, we have also taken a number of enforcement actions in the online world. Our case against Ticketmaster for alleged misleading pricing claims led to a settlement that included a $4 million penalty and $500,000 towards our investigative cost. We also negotiated our first temporary consent agreement, which stopped travel retailer FlightHub from using false or misleading marketing practices in online flight sales. Through actions like these, we continue to send a strong message of deterrence against false or misleading claims online and to promote consumer trust in the online marketplace.

In addition to these major enforcement and promotion actions, we hosted an international Data Forum in the spring of 2019. The event focused on strategies for competition enforcers to collaborate and keep pace with digital platforms and privacy concerns.

In July 2019, we announced the appointment of our first Chief Digital Enforcement Officer (CDEO). The CDEO has already helped to advance initiatives to modernize our processes, be digital-by-design, and provide employees with new tools to enforce the law. We also stepped up our proactive intelligence gathering efforts by expanding the role of our Merger Notification Unit to detect non-notifiable mergers that could raise competition concerns.

I am thankful for the exceptional commitment of the Bureau's employees in delivering on these goals. We have a small but mighty team of determined and dedicated professionals, and I am proud of the important work we have advanced in the past year to serve the public interest of Canadians.

Matthew Boswell

Commissioner of Competition

Who we are

Our responsibilities

Headed by the Commissioner of Competition, the Competition Bureau (the "Bureau") administers and enforces the *Competition Act*, the *Consumer Packaging and Labelling Act* (except as it relates to food), the *Textile Labelling Act* and the *Precious Metals Marking Act* (collectively referred to as the Acts).

Our vision

To be a world-leading competition agency, one that is at the forefront of the digital economy and champions a culture of competition for Canada.

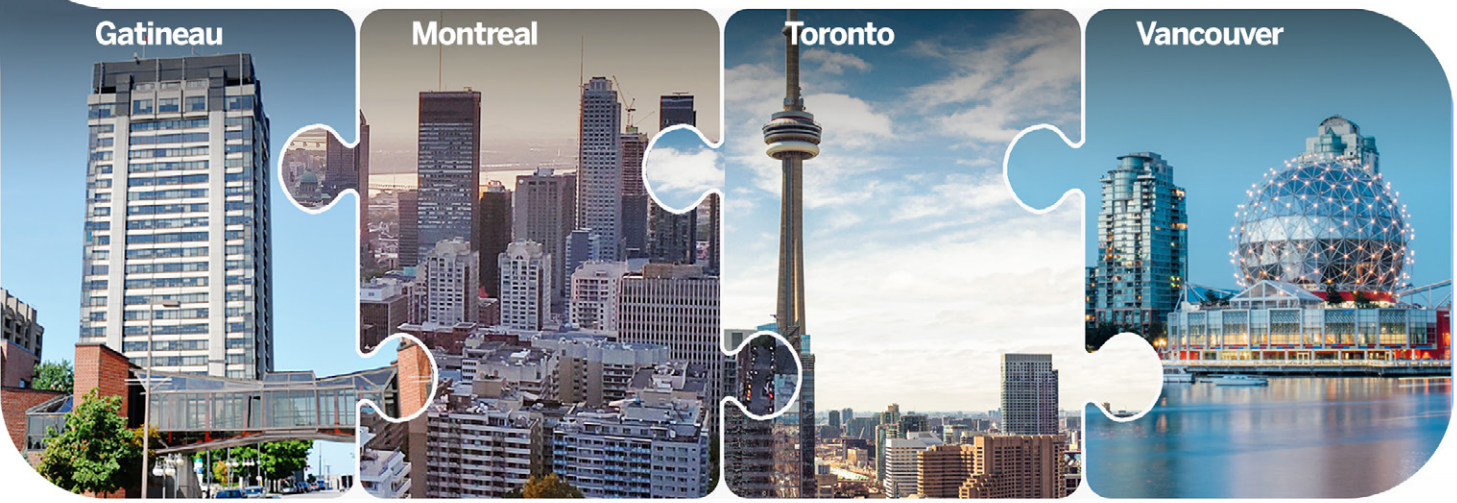
Our mission

To promote and protect competition for the benefit of Canadians, the Bureau will administer and enforce the Acts with fairness and predictability, to:

- Prevent and deter anti-competitive behaviour and deceptive marketing practices
- Review mergers to ensure they do not harm competition
- Empower Canadian consumers and businesses
- Promote competitive markets across Canada

Our structure

Our organization is headquartered in Gatineau, Quebec, and has regional offices in Montreal, Toronto and Vancouver.



Budget and people

Budget for 2019-2020:
$53.7 M[1]

Full time employees for 2019-2020:
382

[1] Following the 2018 revised filing fee for pre-merger notifications and requests for advance ruling certificates, the Bureau's budget includes material expenses relating to employee benefits and accommodations. In 2019-2020, this represented a cost of approximately $2.8M for the Bureau.

What we achieved

Highlights

May 2019

- The Hudson's Bay Company agreed to pay a $4 million penalty and $500,000 towards investigative costs to settle the Bureau's ongoing litigation relating to advertising and pricing practices for sleep sets.
- The Bureau advocated for greater competition in the wireless industry in submissions to the Canadian Radio-television and Telecommunications Commission (CRTC).

June 2019

- A former executive from engineering firm Dessau pled guilty to rigging bids on city of Gatineau's infrastructure contracts.
- The Bureau challenged Thoma Bravo's acquisition of oil and gas reserves software firm Aucerna.
- Ticketmaster agree to pay a $4 million penalty and $500,000 towards investigative costs to settle the Bureau's ongoing litigation relating to misleading pricing claims for online tickets.

July 2019

- A former executive from Cima+ and a former executive from Genivar (now WSP Canada) pled guilty to an infrastructure bid-rigging case in Gatineau.
- The Bureau hired a new Chief Digital Enforcement Officer to help keep pace with the digital economy.
- The Bureau and other competition authorities of the G7 countries released a Common Understanding highlighting opportunities and challenges raised by the digital economy.

August 2019

- The Bureau published a market study on competition and consumer habits in Canada's high speed Internet industry.
- The Bureau advocated for more competition in Ontario's liquor industry in an open letter to the Minister of Finance of Ontario.
- The Bureau preserved competition for oil and gas reserves valuation and reporting software by reaching a settlement in Thoma Bravo's acquisition of Aucerna.

September 2019

- The Bureau called on Canadian businesses to report potentially anti-competitive conduct in the digital economy through its Digital Outreach consultation.
- The Bureau enhanced information-gathering efforts on non-notifiable mergers by creating the Merger Intelligence and Notification Unit.

October 2019

- The Bureau hosted a trilateral meeting with its American and Mexican counterparts that focused on competition law enforcement and advocacy in the digital economy.
- The Bureau entered into a temporary consent agreement with FlightHub to protect consumers from false or misleading representations that result in hidden fees being charged for flights.

November 2019

- A fourth engineering executive pled guilty to bid-rigging that cheated the City of Gatineau out of an estimated $1.8 million.
- The Bureau made an additional submission to the CRTC regarding competition in the wireless sector.

December 2019

- The Bureau sent letters to over 100 companies and marketing agencies that work with social media influencers, advising them to review their advertising practices.
- The Bureau challenged Parrish & Heimbecker's acquisition of a grain elevator from Louis Dreyfus in Virden, Manitoba.

January 2020

- The Bureau preserved competition in Western Canada's hydrogen peroxide market by securing a remedy following its review of Evonik's proposed merger with PeroxyChem.

February 2020

- StubHub agreed to pay a $1.3 million penalty for advertising unattainable prices for event tickets.
- The Bureau appeared before the CRTC to advocate for our policy recommendation and address the CRTC's questions.

March 2020

- The Bureau took action to stop weight loss claims by seller of 'WeightOFF Max!' and 'Forskolin Nx'.
- Engineering firm Roche ltée, Groupe-conseil (now Norda Stelo Inc.) was ordered to pay a $750,000 penalty in a settlement for bid-rigging on contracts in Québec City and Lévis.

- The Bureau concluded its review of Air Canada's proposed acquisition of Transat with a report outlining its competition concerns delivered to the Minister of Transport.
- The Bureau issued a statement regarding enforcement during the COVID-19 pandemic.

High impact and consumer-focused enforcement

Supporting competition in the digital economy

The digital sector is the fastest growing sector in Canada. Digitalization has forever changed the way we interact and has transformed the consumer and business landscape. While strong competition enforcement is a cornerstone of any thriving economy, protecting competition and consumer trust in the digital economy is more important than ever. For Canada's digital economy to continue to thrive, consumers need to trust the online marketplace.

Digital economy cases

41 commenced
40 ongoing
34 concluded

Being upfront about the true cost of tickets

Canadians spend billions of dollars online every year buying tickets to their favourite sporting and entertainment events. It is critical that they have confidence that the prices they see online are the ones they will pay. In June 2019, we settled our case against Ticketmaster and affiliated companies over alleged misleading pricing claims for online ticket sales. Our investigation found that the prices advertised were unattainable because Ticketmaster added mandatory fees in the later stages of the purchasing process. Ticketmaster agreed to pay a $4 million administrative monetary penalty (AMP) and $500,000 towards our investigative costs.

In February 2020, we also reached an agreement with StubHub over concerns about its advertising of unattainable prices for online tickets. We found that consumers could not buy tickets at the prices the company advertised because it charged additional mandatory fees. Unless consumers clicked or tapped to turn on optional filters to see prices that included the fees, the fees were only revealed at later stages of the purchasing process. StubHub agreed to pay a $1.3 million AMP and to ensure that prices for tickets to events in Canada include all mandatory fees throughout the ticket purchasing process.

Both of the investigations into Ticketmaster and StubHub followed our past warning issued to the ticketing industry, calling on all ticket vendors to review their marketing practices and to display the true price of tickets upfront.

Protecting consumers from hidden fees

Too often, consumers find great online travel deals only to realize the deals are no longer affordable or available by the time they have selected their flight. In October 2019, we took action to protect consumers from false or misleading representations that led to hidden fees for flights. While we continue to investigate the marketing practices of FlightHub Group Inc., we reached a temporary consent agreement that prohibits the company from using false or misleading marketing practices on flighthub.com and justfly.com. We continue to investigate representations for seat selection and flight cancellations, which lead to hidden fees, and allegations that some prices increase after consumers select their flights.

Calling on businesses to report anti-competitive conduct in the digital economy

In September 2019, we called on Canadian businesses to provide us with information on potentially anti-competitive conduct in the digital economy. Over 25 businesses and business associations responded to our call-out. Some of the issues highlighted in our call-out included business strategies that may harm competition, such as: refusals to deal, self-preferencing, margin squeezing and creeping acquisitions. The information we received may be used to inform and support future investigations into alleged anti-competitive conduct in digital markets.

Cracking down on social media influencer marketing

In today's digital world, many consumers follow the day-to-day activities of online personalities who share their interests and whose opinions they respect. These personalities, known as "influencers", are an important source of information for their followers, subscribers, and readers who value their unique points of view on products or services. With the reliance on influencer marketing set to be a continuing trend, businesses and influencers need to be transparent when advertising on social media so that consumers can easily recognize when content is actually an advertisement.

In December 2019, we sent letters to close to 100 companies and marketing agencies involved in influencer marketing in Canada, advising them to review their marketing practices to ensure that they respect the law. We made it clear that influencers need to disclose the relationships they have with a business, product or service they promote. Among other things, we asked them to clearly state if they receive money or commissions, free products or services, discounts, free trips or tickets to events, or have a business or family connection with the brand. We also highlighted the importance of having reviews and testimonials that are honest and based on actual experience.

Influencer awareness campaign

In January 2020, we held a month-long social media awareness campaign for influencers and businesses who work with them to promote their products. This included providing daily tips to help influencers understand their advertising obligations when they promote a product or give testimonials and reviews. The campaign garnered significant attention from marketing associations, entrepreneurs, influencers and journalists.

Ensuring truth in advertising

Deceptive marketing practices hurt Canadians and lower trust in the marketplace. To help ensure that markets work well for all Canadians and to maintain trust in the digital economy, we continued to take action against deceptive marketing conduct and encouraged companies to play by the rules.

Deceptive marketing

$9.3 million in administrative monetary penalties (AMPs)
6 consumer and business alerts

Making sure the price is right

When companies promote their products and services at sale prices, it is against the law to entice consumers with misleading references to a false "regular price". In May 2019, we concluded our case against the Hudson's Bay Company which agreed to pay a $4 million AMP and $500,000 towards our investigative costs for its pricing and marketing practices of sleep sets in Canada. Our investigation, which began in 2017, found that the Hudson's Bay Company was offering sleep sets at inflated regular

prices and then advertising deep discounts on these prices, suggesting significant deals to consumers. As part of the registered consent agreement, the Hudson's Bay Company will ensure the marketing of its sleep sets complies with the *Competition Act* (the "Act") and maintain a compliance program to minimize the risk of future breaches of the Act.

Bringing competition in the health care and bio-sciences sector into focus

Competitive prices and services for health care and medication are essential for Canadians' health and well-being. This year, we continued to take action to ensure these sectors remain competitive by focusing our outreach to key stakeholders in the pharmaceutical industry. We tackled misleading advertising in health and performance products and services and cracked down on conduct that harms competition in the industry.

In July 2019, we completed an investigation into the supply of vaccines for a provincial public vaccination program. This involved allegations that a vaccine manufacturer was trying to restrict off-label use of its products, through a provision in a procurement contract that could have prevented public authorities from using other products and resulted in higher costs for provinces. Ultimately, we concluded that there was no violation of the Act given that the conduct did not materialize. However, if we become aware of similar practices in the future, we will not hesitate to pursue enforcement action to put a stop to the conduct. Following our investigation, we published a position statement to provide guidance to the pharmaceutical industry and ensure this conduct is deterred.

Ensuring trust in natural health products

If claims are not tested and true, consumers are not getting what they paid for. Under the Act, claims about the performance or efficacy of a product must be based on adequate and proper testing conducted before the claims are made. In March 2020, we took legal action to stop Nuvocare Health Sciences Inc. and its President and CEO from making weight loss and fat burning claims in the marketing of certain natural health products. We asked the Competition Tribunal to issue a Temporary Order requiring Nuvocare to stop making the claims about some of their products. The order, granted in May 2020, will protect consumers from harm while we complete our ongoing investigation into whether the company's claims are supported by testing.

Remaining vigilant during the COVID-19 pandemic

As Canada responded to COVID-19, we adapted our operations and released a statement assuring Canadians that the Bureau remains vigilant against potentially harmful anti-competitive conduct by those who may seek to take advantage of consumers and businesses during these extraordinary circumstances. This includes scrutinizing evidence and taking appropriate action against companies or individuals engaging in deceptive marketing practices such as false or misleading claims about a product's ability to prevent, treat or cure the virus.

Putting a stop to bid-rigging

When bid-rigging happens in the infrastructure sector, Canadians pay the price. Bid-rigging is a criminal offence where two or more parties collude to influence a bidding process.[2] The lack of a true competitive process drives up prices for contracts and harms governments' investments in new infrastructure projects.

Bid-rigging investigation

3 guilty pleas by individuals involved in the conspiracy

Conditional sentences totalling **59** months and **260** hours of community service

$750,000 paid in corporate settlement pursuant to subsections 34 (2) and 34 (2.1) of the Act

In 2019-2020, we continued our efforts to protect government spending in infrastructure by stopping bid-rigging on procurement contracts for engineering services. As a result of our ongoing investigation, we obtained a settlement from engineering firm Roche ltée, Groupe-conseil (now Norda Stelo Inc.), which was ordered to pay $750,000 for rigging bids on municipal infrastructure contracts in the province of Quebec. This is the third settlement in this matter, as two other engineering firms were previously ordered to pay $1.9 million and $4 million respectively for their roles in the bid-rigging scheme. The investigation also led to three guilty pleas by former executives of engineering firms Cima+, Genivar, and Dessau for bid-rigging on City of Gatineau infrastructure contracts. They received conditional prison sentences totalling 4 years and 11 months, and court-ordered community service totalling 260 hours.

Working together to prevent collusion

Raising awareness among procurement officials and other stakeholders about bid-rigging is critical to ensuring that they take measures to prevent the likelihood of wrongdoing, recognize the potential red flags of bid-rigging and report suspicious activities to the Bureau. In 2019-2020, we provided 18 presentations on bid-rigging to the procurement community and other stakeholders, reaching an audience of approximately 750 participants who play key roles in government procurement. We also continued to promote the Federal Contracting Fraud Tip Line, which was launched in 2017, to help Canadians report suspected fraud, collusion, corruption or unethical behavior in Government of Canada contracting. We received 71 tips since April 1, 2019.

Compliance outreach

18 bid-rigging presentations
65 compliance outreach events
3 compliance publications
1 compliance program reviewed

[2] By agreeing upfront on who will win, not bidding or withdrawing so another will win, or taking turns at winning.

Stopping harmful conduct before it happens

Providing businesses with the information they need to comply with Canada's competition laws is an essential part of the Bureau's work. Compliance is a shared responsibility. Through our outreach activities, we provide small and medium-sized businesses with the knowledge and tools they need to develop or strengthen their compliance programs, which in turn deters harmful and potentially illegal practices before they take place. In 2019-2020, we led and participated in 65 compliance outreach events, with over 2,735 participants.

Merger reviews

Mergers can be a way to increase competitiveness throughout the Canadian economy. However, some transactions have the potential to harm competition and innovation. We review mergers of all sizes and in all sectors to identify and challenge those that pose a threat to competitive markets in Canada.

Mergers

234 merger reviews concluded

97% merger review service standards met

2 merger-related Consent Agreements

Preserving competition in oil and gas reserves valuation and reporting software

In August 2019, we successfully challenged a merger that could have led to a monopoly in the supply of reserves valuation and reporting software to Canadian oil and gas producers. During our review of Thoma Bravo's proposed purchase of Aucerna, we found that the companies' software (MOSAIC and Val Nav) competed vigorously with one another and were the only two reserves valuation and reporting software used by Canadian oil and gas companies. The loss of rivalry between the two would have likely led to higher prices, lower quality of services and less innovation with respect to these software, to the detriment of Canadian businesses. In August 2019, we signed an agreement with Thoma Bravo requiring it to sell its MOSAIC reserves valuation and reporting software business to an independent purchaser.

Protecting competition for local farmers in Manitoba

To protect and maintain competition for farmers near Virden, Manitoba, in December 2019, we challenged Parrish & Heimbecker's (P&H) acquisition of a primary grain elevator from Louis Dreyfus Company. The purchase gave P&H control of the only two grain elevators along a 180 km stretch of the TransCanada Highway and eliminated the

rivalry between two close competitors, which could have resulted in farmers in the Virden area earning less for their wheat and canola. To protect and maintain competition, we filed an application with the Competition Tribunal requesting that the Tribunal issue an order requiring P&H to sell one of the two elevators to an independent buyer. Safeguarding competition in this area will protect farmers from financial harm.

Maintaining competition in the airline industry

In March 2020, we concluded our review of Air Canada's proposed acquisition of Transat and outlined our significant concerns with the proposed transaction in a report to the Minister of Transport. Our review found that the proposed transaction would likely lessen or prevent competition in the sale of air travel or vacation packages to Canadians. Eliminating the rivalry between these two airlines would lead to higher prices, less choice and service, and a significant reduction in travel by Canadians on a variety of routes where their existing networks overlap. The report provided to the Minister of Transport will inform Transport Canada's public interest review of the proposed transaction as it relates to national transportation.

Proactive intelligence gathering

Notification provisions allow the detection of most – but not all – potentially anti-competitive mergers. In 2019, we expanded the role of our Merger Intelligence and Notification Unit, broadening our focus and stepping up our intelligence gathering efforts to detect non-notifiable mergers that could raise competition concerns. Our intelligence gathering captured transactions where there was no indication that the merging parties intended to voluntarily engage with us before closing. In a few instances, we also observed an increase in voluntary communications from merging parties and their counsel on non-notifiable transactions.

Promoting pro-competitive policies and regulations

Forward-thinking advocacy

Competition is an essential part of a thriving economy. As Canada's competition expert, we provide advice on how regulators and policymakers can promote pro-competitive policies and regulations. We also foster discussion on emerging competition policy issues. In the past year, we advocated for greater competition in the telecommunications, waste management, and liquor industries. We also held a Data Forum to discuss perspectives on how competition is impacted by our increasingly data-driven economy. Our efforts to promote competition are an essential part of supporting a competitive economy.

Advocacy

7 representations before regulatory bodies
18 other advocacy interventions

A study on competition in Canada's high-speed Internet industry

High-speed Internet is at the heart of Canada's rapidly growing digital economy. Canadians use the Internet every day to connect with friends and family, run their businesses, make purchases and stay informed. Healthy competition between high-speed Internet providers plays a key role in ensuring all Canadians can access and fully participate in the digital economy. In August 2019, we published the results of our study about competition and consumer habits in Canada's high-speed Internet industry. We found that many Canadians benefit from choice between Internet service providers. Although the majority of Canadian households continue to get Internet from traditional telecom companies, more than one million households use an independent provider for their high-speed connection. Regulations that allow independent providers to buy access to telecom companies' networks make it easier for Canadians to choose a plan that meets their needs and budget. The findings from our study will serve to inform regulatory reviews concerning high-speed Internet and help regulators and policymakers create policies where all Canadians can benefit from high-speed Internet options at competitive prices.

Broadband study in numbers

2,005 Canadian households surveyed
12 focus groups with participants from across Canada
42,000 comments from online surveys
20 written submissions from Internet service providers

More competition for mobile wireless services

In comparison to other countries, studies suggest that Canadians pay some of the most expensive rates in the world for wireless plans.

In 2019-2020, we advocated for more competition in the wireless industry to lower prices and improve choice for Canadians, by providing recommendations to the CRTC as part of its review of mobile wireless services in Canada. In our review of competition in Canada's wireless services markets, we found that prices differ greatly from one region to another and that the price of mobile plans continues to be higher where there is no strong regional competitor to Bell, Telus and Rogers.

In May 2019, we provided detailed strategies to the CRTC on how to encourage competition in this area, including improving roaming access for new entrants, reducing the cost of switching carriers by "decoupling" the costs of phones and plans and structuring future spectrum auctions differently to encourage competition.

In November 2019, we recommended the adoption of a Mobile Virtual Network Operator (MVNO) policy requiring Bell, Telus and Rogers to sell temporary access to their wireless networks to regional facilities-based carriers who intend to invest and further expand their own networks. We advanced that such a policy would lead to more competition on price, while avoiding the risk that network quality would decline. In February 2020, we appeared before the CRTC to advocate for our policy recommendation and address the CRTC's questions.

Keeping up with big data

In today's digital economy, data is a critical asset for any firm looking to innovate. At the same time, a handful of digital platforms controls vast amounts of data. Globally, there are concerns about data concentration in the digital marketplace and policymakers are increasingly concerned about how data is collected and used.

In May 2019, we hosted a one-day forum to foster discussion on competition policy in the digital era. The forum brought together more than 100 participants from the business, legal and academic communities, federal regulators and foreign competition authorities to discuss key issues such as digital platforms, privacy and data portability. It was also attended by the Minister of Innovation, Science and Economic Development Canada (ISED), the Honourable Nadveep Bains, who gave opening remarks and spoke about Canada's new Digital Charter. The forum was an opportunity to advance an important public policy dialogue and gather valuable insight from key stakeholders on the competition issues related to the digital economy, as well as possible solutions.

It also laid the foundation for the critical work the Bureau commenced shortly after receiving Minister Bains' welcome letter, to address the issues outlined in that letter in cooperation with the Strategy and Innovation Policy Sector at ISED such as: the impact of digital transformation on competition; emerging issues for competition in data accumulation, transparency, and control; the effectiveness of our competition policy tools and frameworks, and our investigative and judicial processes.

Increasing choice and lowering prices for liquor in Ontario

Ontario's current liquor policy limits the number of retailers who can sell alcohol and the price they can charge. This makes price competition difficult and limits the selection of product available to consumers. In an open letter to the Ontario Minister of Finance, the Commissioner encouraged the province to balance policy concerns such as public health and safety with the principles of competition in their review of the liquor policy. The Commissioner indicated that Ontario's consumers and businesses can benefit from a less restrictive system by allowing all retailers an equal opportunity to participate, encouraging competition on price, and supporting proper wholesale pricing. The end result would allow bars and restaurants to offer consumers a wider variety of products at lower prices.

A strong advocate for competition in waste management

When the British Columbia Minister of Environment and Climate Change Strategy requested our views on competition-related issues that could stem from the adoption of two waste management bylaws in Metro Vancouver, we advocated for competition and innovation. In an open letter to the Minister, we shared our concerns that adoption of these bylaws may lessen competition and innovation for waste management services in the Metro Vancouver area. We encouraged the Minister to consider whether Metro Vancouver's environmental objectives could be advanced and achieved through other means that would allow the area's residents to benefit from vigorous competition.

International collaboration

Today's digital and data-driven economy is truly borderless. To foster competitive and innovative digital marketplaces, it is more important than ever for competition agencies to share best practices and work together on enforcement and advocacy matters. Building and maintaining strong partnerships improves the Bureau's ability to deliver results for Canadians.

Collaborating with partners

19 international fora meetings and workshops
10 capacity building activities with international partners
2 international agreements signed

In 2019-2020, we continued building strong partnerships with other competition and law enforcement agencies to protect competition in Canada, tackle international anti-competitive activity, and promote the convergence of competition policies. In October 2019, we hosted a trilateral meeting with the heads of the U.S. Department of Justice Antitrust Division, the U.S. Federal Trade Commission and Mexico's Federal Economic Competition Commission, which focused on competition enforcement and advocacy in the digital economy. We continued to work with our international partners and share best practices by playing a leadership role in organizations, such as the Organisation for Economic Cooperation and Development (OECD), the International Competition Network (ICN) and the International Consumer Protection and Enforcement Network (ICPEN). In June and December 2019, we participated in the OECD Competition Committee meetings, as well as the Global Forum on Competition.

The ICPEN Presidency

In May 2019, it was announced that the Bureau will assume the ICPEN presidency from July 1, 2020 to June 30, 2021. During our term, we will focus on promoting truth in online advertising and building consumer confidence in the digital economy. To deliver on this, we will draw on our experiences in fraud prevention, big data, and marketing practices in the digital economy.

Tackling the challenges of the digital economy together

The rapid pace of innovation that is fueling the digital economy brings with it unprecedented opportunities for businesses and consumers worldwide. However, it also raises new questions and challenges from a competition perspective. In 2019, we met with competition authorities of the G7 countries and the European Commission to discuss the issues faced by competition agencies around the world and released a Common Understanding highlighting opportunities and challenges raised by the digital economy.

Gender and competition

We continued to champion research and global discussion on gender and competition. In November 2019, the Bureau participated in a panel discussion organised by the American Bar Association: "Competition Policy and Economics: What's Gender Got to Do With It?"

We are also undertaking work with the OECD to support research on gender and competition. The two-year project will focus on the relationship between gender and competition, how competition can contribute to gender equality, and how OECD countries can ensure gender inclusive competition law enforcement and policy.

Increasing cooperation on fair and effective procedures

Fair and effective procedures are essential to sound competition law enforcement and can increase opportunities for international cooperation. In May 2019, we helped found the ICN Framework on Competition Agency Procedures. The framework aims to foster fair, consistent and effective procedures in competition law enforcement around the world and encourages open communication and transparency between competition authorities about the rules governing their investigation and enforcement procedures.

Strengthening domestic relationships

Fostering strong and collaborative relationships with our domestic partners is essential to help ensure that Canadians can benefit from a competitive marketplace and consumers and businesses are safe from harmful conduct. Strong domestic partnerships allow for better collaboration, cooperation and information sharing on enforcement cases and other matters of mutual interest. In 2019-2020, we continued to build and strengthen relationships with key domestic stakeholders and existing partners, including by holding 190 meetings or calls with agencies, regulators and academics.

A strong voice for competition

In 2019-2020, the Commissioner and other Bureau senior officials gave five speeches highlighting the importance of competition, focusing on topics such as honest advertising in the digital age, the role of competition in the digital economy, and the impact of data on competition. This includes a speech given to the C.D. Howe, focused on how to build a culture of competition in Canada.

We also published a number of new or revised guidance documents to help Canadian businesses understand their obligations with the Acts we enforce and raise awareness of fraud and deceptive marketing so consumers can enjoy the full benefits of today's digital economy.

For example, in March 2020, we published volume five of the *Deceptive Marketing Practices Digest*, which focused on three marketing issues that impact consumers and businesses in the online marketplace: the collection of consumer data in exchange for "free" online products and services; unsubstantiated weight loss claims; and the advertising of unattainable prices in the car rental market. In June 2019, we also released updated guidance concerning compliance with the labelling statutes to help dealers of consumer textile articles containing filling or stuffing understand their labelling obligations.

Alerting Canadian consumers and businesses

Throughout the year, we published six alerts informing Canadian consumers and businesses about issues that matter to them. In August 2019, we alerted the public to fake government websites which attempt to scam Canadians out of money and personal information and provided tips on how to recognize these scams. In May 2019, we warned consumers about "forever prices" offered by telecom sales representatives, which actually refer to monthly promotional discounts and do not guarantee a fixed price.

Empowering Canadians

27% increase in social media followers
More than **1,100 posts** on Facebook, Twitter, LinkedIn and YouTube
659,971 visits to the Bureau's website
88 new or revised publications and press releases

Fraud Prevention Month

Fraud can target anyone. From young teens to the elderly, from consumers to big corporations, everyone is at risk. According to the Canadian Anti-Fraud Centre, in 2019, Canadians lost over $98 million to fraud.

In 2019-2020, we continued to fight fraud by helping Canadians stand up to scammers, supporting the activities of the Canadian Anti-Fraud Centre alongside our partners at the Royal Canadian Mounted Police and Ontario Provincial Police. In March 2020, we launched our 16th edition of Fraud Prevention Month, a nationwide awareness campaign led by the Bureau to help Canadians recognize, reject and report fraud. Working with our many partners, we shared tips on how to spot and stay protected against widespread scams, including digital fraud. We launched a social media campaign, participated in awareness events and published a consumer alert to warn Canadians about subscriptions traps related to free trial offers. While we had to halt the campaign in light of the COVID-19 pandemic, we still reached an estimated 22 million people on Twitter in only two weeks of activities. This represents an increase of 406% in engagements and 184% in impressions compared to the same period last year.

In mid-March, we refocused our efforts and messages around the COVID-19 pandemic. We worked with other enforcement partners to warn consumers about companies that are taking advantage of the public's fears by misleading consumers with the advertising and labelling of various products and services.

Investing in our people

Delivering on our mandate requires a highly skilled and diverse workforce. To ensure this, we continued to invest in our people, by equipping them with tools and the knowledge needed to perform at their best and providing them with opportunities to develop their skills and expertise. This included information sessions hosted by the Public Prosecution Service of Canada and the Canadian Bar Association on topics relating to competition law. We also improved efficiencies across the organization by deploying more modern and digital tools and information sessions to assist employees in using new technology in the workplace.

To support our teams, we continued our strong commitment to foster a healthy, inclusive, and civil workplace through our wellness campaigns and civility in the workplace programs. We promoted our core values such as transparency and respect by offering mandatory training on unconscious biases and harassment prevention to all employees. We also undertook various workplace wellness, diversity and inclusiveness initiatives. For example, we organized the Bureau's first Human Library, during which real people (books) were "loaned" to employees (readers) to challenge stereotypes and prejudices through dialogue. We also offered our employees free weekly yoga sessions, access to a mindfulness app, and laid the groundwork for a number of evidence based mental health pilot projects in the coming year. Finally, we launched the Bureau's Informal Network Program, which helps employees connect with colleagues and benefit from the diverse experience of their peers.

101 training and information sessions to develop employees' skills and expertise

50 events related to workplace wellness, official languages, diversity and inclusiveness

Modernizing our enforcement tools

In the summer of 2019, we hired a Chief Digital Enforcement Officer (CDEO) to help us keep pace with evolving technologies and business practices in the digital economy. Our new CDEO will help us implement new intelligence-gathering tools, such as advanced analytical models, algorithms, automated processes, and artificial intelligence capabilities, as well as develop a digital strategy.

Facilitating an innovative workplace

To keep up with the digital age and encourage creativity and innovation in the workplace, in 2019-2020, we established the Bureau Innovation Garage, a dedicated space for project teams and keen innovators to test new concepts, pilot big ideas and explore new technologies and methodologies.

A new Strategic Vision for the digital age

In February 2020, we published our *Strategic Vision for 2020-2024*, outlining how we will focus our efforts and renew our organization for the digital age. Our Vision will act as a roadmap for how we will build capacity in the digital economy and deliver the benefits of competition to Canadians. Our ability to achieve our vision centres on our greatest resource: our employees. As part of our Vision, we will invest in new dynamic tools and training to increase our capacity and ability to handle and analyze the vast amounts of data common to today's digitally-focused investigations.

Financial snapshot

The Bureau's budget for 2019-2020 was $53.7M[3], including $16.5M from user fees.[4]

Expenditures were $52.4M, consisting of $37M in salary for 382 full-time equivalent employees and $15.3M in non-salary expenses.

Table 1 presents the Bureau's authorized budget and expenditures for the year.

Table 1: Authorized budget expenditures for 2019-2020

Fiscal Year 2019-2020	Budget	Expenditures
Salary	**$37.3M**	**$37M**
O&M	**$16.3M**	**$15.3M**
Capital	**$86K**	**$86K**
Total	**$53.7M**	**$52.4M**

[3] Following the 2018 revised filing fee for pre-merger notifications and requests for advance ruling certificates, the Bureau's budget includes material expenses relating to employee benefits and accommodations. In 2019-2020, this represented a cost of approximately $2.8M for the Bureau.

[4] The Bureau collected $16,529,168 in user fees (including $16,519,668 from pre-merger notification and advance ruling certificates, and $7,000 in written opinions.)

Exhibit 30 to the Cross-Examination of Professor Tadelis

Court File No.

FEDERAL COURT

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34;

AND IN THE MATTER OF an inquiry under section 10 of the *Competition Act* into conduct by Google LLC and Google Canada Corporation reviewable under Part VIII of the *Competition Act;*

AND IN THE MATTER OF an *ex parte* application by the Commissioner of Competition for an Order requiring the Respondent to produce records pursuant to paragraphs 11(1)(b) and subsection 11(2) of the *Competition Act* and to make and deliver written returns of information pursuant to paragraph 11(1)(c) of the *Competition Act*.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

– and –

GOOGLE CANADA CORPORATION

Respondent

AFFIDAVIT OF STÉPHANIE GUITARD

Affirmed on October 12, 2021

I, STÉPHANIE GUITARD, an acting Senior Competition Law Officer with the Competition Bureau (the "**Bureau**"), of the City of GATINEAU, in the Province of QUEBEC, **AFFIRM THAT**:

1. I make this affidavit in support of an *ex parte* application for an order pursuant to section 11 of the *Competition Act*, RSC, 1985, c C-34 (the "**Act**") requiring Google Canada Corporation (the "**Respondent**") to produce records pursuant to paragraph 11(1)(b) and subsection 11(2) of the Act, and to make and deliver written returns of information pursuant to paragraph 11(1)(c) of the Act.

2. I am an authorized representative of the Commissioner of Competition (the "**Commissioner**") for the purpose of this application.

3. I have been employed by the Bureau as a Competition Law Officer since October 2018 and have acted as a Senior Competition Law Officer since May 2021. During this time, I have been involved in multiple investigations and inquiries under Part VIII of the Act. During the course of these investigations, I have interviewed market participants and reviewed records and information pertaining to these investigations and inquiries.

4. I am part of a team working on an inquiry under Part VIII of the Act regarding allegations that the Respondent and Google LLC (collectively "**Google**") have engaged in conduct contrary to Part VIII of the Act. Except where otherwise indicated, I have personal knowledge of the matters to which I depose. Where I do not have personal knowledge, I have set out the grounds for my belief.

I. THE COMMISSIONER HAS COMMENCED AN INQUIRY

5. The Commissioner is an officer appointed by the Governor in Council under section 7 of the Act and is responsible for administering and enforcing the Act.

6. On December 18, 2020, the Commissioner commenced an inquiry under subparagraph 10(1)(b)(ii) of the Act on the basis that he has reason to believe that grounds exist for the making of an order under Part VIII of the Act, specifically pursuant to sections 77 and 79 (the "**Inquiry**").

II. CIRCUMSTANCES OF THE INQUIRY

7. To date, the Bureau has gathered and assessed records and information from a variety of sources. This includes records and information obtained from market participants and foreign competition law enforcement, as well as publicly available materials such as corporate filings, industry reports and reports released by foreign competition law enforcement agencies. The statements made in this affidavit express the Bureau's understanding of the information gathered.

8. Google sells online advertising space to advertisers in Canada, among other places, through owned and operated properties such as Google Search, Gmail and YouTube. It also provides online advertising technology services to both advertisers and publishers in Canada who buy and sell online advertising space.

9. The Inquiry concerns conduct by Google in relation to online display advertising. Specifically, the Commissioner is investigating whether Google is leveraging its market power in the supply of in-stream video advertising space into adjacent advertising technology markets.

Background

10. Online advertising is described as consisting of two general categories of advertising: (i) search advertising, in which a user's search query may generate ads, and (ii) display advertising, in which ads are displayed alongside or within the content served to a user. Display

advertising includes a variety of ad formats from static image-based banner ads to video ads.

11. Publishers sell ad space on their websites, apps or social media platforms to advertisers in order to monetize the content they make available to users, often at zero-price to the user. Advertisers in turn purchase ad space available on websites, apps and social media platforms to promote their products to consumers.

12. Advertisers use different ad formats to fulfil different objectives set for an ad campaign. For example, some ad formats are used for general brand awareness while other ad formats are used to induce action from the consumer (e.g., visiting the advertiser's own website).

13. Digital ad space can be sold through deals negotiated directly between publishers and advertisers (or their ad agencies), much like traditional ad space. It can also be sold "programmatically", through automated methods that efficiently target audiences in real time.

14. A large volume of digital display and video advertising is now traded programmatically.

15. Programmatic advertising has led to a complex ecosystem of advertising technology, referred to as "ad tech", where a range of intermediaries facilitate the interaction between advertisers and publishers.

16. Ad tech providers include:

    a. *Demand Side Platforms ("**DSPs**")*: advertisers use DSPs to buy ad inventory from multiple sources and set the parameters of their purchasing decisions (e.g., details about the users to target, how frequently a user should be served a given ad, and the maximum bids to submit and pay for a given impression). DSPs use the

parameters set by advertisers to automatically bid on ad inventory made available through digital advertising marketplaces where the buy-side (i.e., tools for advertisers) and the sell-side (i.e., tools for publishers) connect;

b. *Advertiser Ad Servers:* advertisers and media agencies use advertiser ad servers to manage their ads, including to: store the ads, deliver the ads to publishers, keep track of delivered ads, and track campaign performance;

c. *Supply Side Platforms ("**SSPs**") and Ad Exchanges*: publishers use SSPs and ad exchanges to sell their ad inventory programmatically, acting as digital marketplaces where the buy-side and sell-side connect. SSPs and ad exchanges conduct real-time auctions for ad impressions by connecting to multiple DSPs, collecting bids from them and deciding which bid should be sent to the publisher's ad server, the software that will decide which ad is ultimately served. Although ad exchanges used to be separate ad tech, today they are often integrated into SSPs' offerings;

d. *Publisher Ad Servers:* publishers use ad servers to manage their ad inventory. Publisher ad servers decide which ad to serve based on the bids received from SSPs (i.e., publisher ad servers can connect to multiple SSPs) and any direct deals between the publisher and advertisers;

e. *Ad Networks:* ad networks aggregate ad space from publishers and match it to demand from advertisers. Unlike SSPs and ad exchanges, ad networks do not conduct real-time auctions on an impression-by-impression basis (i.e., the ad space is sold in aggregate); and

f. *Verification/Measurement providers*: advertisers use verification providers to ensure the quality of the inventory they purchase, from ensuring viewability of the ad to detecting fraud and ensuring the ad is seen in an environment deemed safe for the brand. Measurement providers can help advertisers understand how their campaigns are performing and optimize across platforms and ad formats.

17. In order to engage in programmatic advertising, advertisers and publishers will use multiple ad tech products. For example, advertisers will use an advertiser ad server to manage their ads and a DSP to bid on ad inventory from multiple publishers. Publishers will use a publisher ad server and an SSP for similar reasons. Both advertisers and publishers may also opt to use additional ad tech that offer, for example, enhanced targeting, analytical or measurement capabilities.

Google's Ad Tech Products across the Ecosystem

18. Google is a multinational technology company that is active in a wide range of online services and products, including a search engine (Google Search), a video-sharing platform (YouTube), a web browser (Chrome), operating systems (Android and Chrome OS), an email service (Gmail), and a web mapping service (Google Maps). Many of Google's products and services form part of a larger ecosystem where data obtained from users of one product or service may be used across all products and services.

19. Google is also active in online advertising in search, email, display and video. In the context of its online display advertising and online video advertising activities, Google is both a publisher and an intermediary. It is active in the industry through an ecosystem that includes the supply of:

a. Ad inventory on Google owned and operated properties, including in-stream video ad inventory on YouTube; and

b. Ad tech across most if not all levels of the supply chain, for both advertisers and publishers.

20. Google offers buy-side tools for large and small advertisers:

a. *Display & Video 360 ("**DV360**")*: a DSP used by large advertisers to buy non-search Google ad inventory (e.g., YouTube) and third party ad inventory programmatically through SSPs/ad exchanges; and

b. *Google Ads*: a buying tool smaller advertisers use to buy ad inventory on the Google Search Network, the Google Display Network (Google's Ad Networks) and/or other Google owned and operated properties (e.g. YouTube), but not through non-Google digital advertising marketplaces.

21. Google offers sell-side tools for publishers:

a. Google Ad Manager: the largest publisher ad server used by publishers to auction ad space on ad exchanges according to market participants; and

b. AdX: Google's ad exchange, one of the largest digital marketplaces managing real-time auctions between publishers and advertisers.

22. Google also offers a number of other services along the ad tech supply chain to both advertisers and publishers.

The Conduct under inquiry

23. According to market participants, YouTube is the largest source of online video ad inventory for advertisers in Canada. It is considered by

many advertisers as “must have” inventory because it offers access to a large audience and enables advertisers to combine the immersive storytelling of television advertising with the ability to use detailed data to target specific audiences.

24. Until 2016, at least a subset of YouTube video ad inventory was available for purchase through Google’s DSP as well as through third-party DSPs via Google’s digital marketplace, AdX.

25. On August 6, 2015, Google announced it would stop supporting YouTube video ad buying via AdX (i.e., through third-party DSPs) as of the end of that year.

26. Since 2016, Google has restricted advertisers’ programmatic access to YouTube video ad inventory to its own buying tools (DV360 and Google Ads), excluding rival third-party DSPs (hereinafter the “**Policy Change**”). Hence, advertisers that want to buy YouTube video ad inventory programmatically must use Google’s buy-side tools.

27. The Bureau has been advised that since the Policy Change, Google’s share of the DSP market has increased and DV360 has become the largest provider of DSP services.

28. Following the Policy Change, Google announced on January 20, 2017 that starting in 2017, it would be limiting the use of cookies and pixels on YouTube. Further to a subsequent announcement made on October 16, 2019, Google stopped allowing third-party pixels on YouTube (the “**Cookie/Pixel Limitation**”).

29. Third-party cookies and pixels are tools advertisers use to measure the performance of their ad campaigns and to optimize across platforms and ad formats. Market participants have advised the Bureau that the removal of third-party cookies and pixels has hindered advertisers' ability to identify and track users across the web and to obtain

measurement for their ad campaign when using DSPs other than DV360. The Bureau has been advised that the Cookie/Pixel Limitation has further enhanced the effects of the Policy Change on DSPs by making it more difficult for advertisers to multi-home (i.e., use more than one DSP on a single ad campaign).

30. Based on an assessment of the records and information gathered to date, I have reason to believe that Google has engaged and is engaging in conduct reviewable under Part VIII of the Act. Specifically:

a. Google possesses market power in one or more markets related to the supply of online advertising inventory in Canada and is engaging in a practice of anti-competitive acts involving the Policy Change and the Cookie/Pixel Limitation, and that these acts, independently and/or on a combined basis, substantially prevent or lessen competition or are likely to substantially prevent or lessen competition in a market (section 79 of the Act); and/or

b. Google is a major supplier of online advertising inventory in Canada and the implementation of the Policy Change has impeded the entry or expansion of rival DSPs, with the result that competition has been substantially prevented or lessened (section 77 of the Act).

31. In view of the foregoing, the Bureau requires further information to determine the circumstances surrounding Google's practices and whether, and the extent to which, these practices are impeding rival DSPs' successful expansion in Canada or parts thereof and depriving advertisers, publishers and ultimately consumers, of the benefits of competition in one or more markets, resulting in higher prices for ad tech services, reduced choice and/or fewer innovative products or services.

III. GOOGLE HAS, OR IS LIKELY TO HAVE, RECORDS AND INFORMATION

A. Google Canada Corporation has or is likely to have information relevant to the Inquiry

32. The Respondent, Google Canada Corporation, is a Nova Scotia unlimited liability corporation, with its registered office in Halifax, Nova Scotia and principal offices located in Toronto. Attached as **Exhibit A** is a copy of a search from Nova Scotia's Registry of Joint Stock Companies showing the corporate registration for the Respondent. The Respondent is a wholly owned subsidiary of Google LLC. Attached as **Exhibit B** is a document from Statistics Canada's Inter-Corporate Ownership Database showing Google Canada Corporation's relationship as a wholly owned subsidiary of Google LLC.

33. As part of its operations in Canada, the Respondent provides services to Canadian advertisers and ad agencies that include customer support for Google's DSP, DV360, as well as sales services for DV360 and YouTube ad inventory.

34. In a letter dated April 23, 2021, attached as **Exhibit C**, Google's Canadian counsel identified employees of the Respondent that have some involvement in the sale of in-stream video advertising on YouTube to Canadian advertisers and the sale of DSP services to Canadian advertisers.

35. Based on the aforementioned information relating to the Respondent's operations, information gathered and assessed by the Bureau in the course of the Inquiry, and direct communications with Google, the Respondent has, or is likely to have, records and information relevant to the Inquiry.

B. Google LLC has records relevant to the Inquiry

36. Google LLC is a limited liability company organized and existing pursuant to the laws of the State of Delaware. Based on the following, the Respondent is a wholly owned indirect subsidiary of Google LLC:

a. In a letter dated April 23, 2021 (Exhibit C), Google's Canadian counsel advised the Bureau that the Respondent is a wholly owned indirect subsidiary of Google LLC;

b. The Statistics Canada Inter-Corporate Ownership Database released December 8, 2020 (Exhibit B) also lists the Respondent as a subsidiary of Google LLC; and

c. The Respondent does not produce an annual report or audited financial statements. The results are reflected in the annual report and audited financial statements of Google LLC.

37. Based on a reading of Alphabet Inc.'s Form 10K for the fiscal year ended December 31, 2020, attached as **Exhibit D**, I believe Google LLC earns advertising revenue from Google-owned and operated properties such as YouTube, which is made available to advertisers in Canada. The Bureau is also advised that Google LLC enters into global agreements for DV360 that apply to advertisers and ad agencies operating in Canada.

38. In the course of direct communications with the Bureau, Google's counsel confirmed Google LLC has a significant number of records and information that were produced to the Department of Justice, Antitrust Division in the United States ("**U.S. DOJ**") and that are "on point" in relation to the Commissioner's Inquiry. Google's counsel also identified a number of Google custodians believed to be relevant to the Commissioner's Inquiry, including custodians involved in the decisions made surrounding YouTube video ad inventory and AdX.

39. Based on the aforementioned information relating to its operations, publicly available information and records, and information gathered from market participants in the course of the Inquiry, Google LLC has records and information relevant to the Inquiry.

40. These records are of significance to the Commissioner's Inquiry as Google LLC made decisions regarding the Policy Change that apply in Canada.

IV. THE ORDER SOUGHT

41. In order to determine facts relevant to the Inquiry, the Commissioner seeks records and written returns of information from Google pursuant to paragraphs 11(1)(b) and 11(1)(c) and subsection 11(2) of the Act. These records and written returns of information are set out in Schedules I, II and III of the Order sought in this application (the "**Draft Order**", attached as **Exhibit E**).

42. Depending in part on the Commissioner's review of the records and other information received in the course of the Inquiry, including in response to this application, the Commissioner may seek subsequent section 11 orders against the Respondent as necessary to advance the Inquiry. This may include further applications under paragraphs 11(1)(a), (b), (c) and subsection 11(2) of the Act.

A. Records and Information

43. The specifications in the Draft Order elicit records and information that relate to matters relevant to the Inquiry, including the following:

a. The organizational structure and business operations of Google Canada and its affiliates;

b. The markets in which Google operates;

c. Whether Google is dominant in any of these markets;

d. The circumstances and motivations for Google's decision to withhold YouTube video ad inventory from third-party DSPs and for the Cookie/Pixel Limitation;

e. Whether Google is engaging, or has engaged, in a practice of anti-competitive acts; and

f. The potential or actual effects of Google's conduct on competition and the markets where potential or actual effects occur.

44. The specifications also elicit a limited number of records and information relating to Google's internal policies and guidelines counseling personnel on language to avoid in order to mitigate antitrust risk. Reference to the existence of such documents is alleged in a complaint filed against Google LLC in October 2020 by the United States Attorney General and attorneys general for a number of US States. **Attached as Exhibit F** is a copy of this complaint.

45. The Draft Order calls for the production of records from different time periods for different specifications. The Policy Change was publicly announced by Google in August of 2015, and accordingly, the Commissioner seeks records and written returns from January 1, 2015 on. However, according to information included in a complaint filed in December 2020 against Google LLC in the State of Texas by a number of State Attorneys General, internal deliberations related to the Policy Change are alleged to have started as early as 2013. Attached as **Exhibit G** is a copy of the Texas complaint where paragraphs 244 and 245 make reference to Google documents from 2013 that contemplate withholding YouTube from competing buy-side intermediaries. Accordingly, the Commissioner seeks a limited number of records from January 1, 2013 on.

46. As noted above, Google implemented restrictions on the use of certain tools used by advertisers to verify and measure their ad campaigns (the Cookie/Pixel Limitation) as early as 2017 and accordingly, the Commissioner seeks records and written returns related to these restrictions from January 1, 2017 on.

47. The Draft Order contemplates production of records and information within 90 days after the Order is served on the Respondent.

V. INFORMATION IN THE COMMISSIONER'S POSSESSION

48. The case team has conducted a review of the Bureau's files to determine whether the Bureau has records or information responsive to the Draft Order. Specifically, I and other officers engaged in a process whereby we undertook to determine if we had, to date, received in the context of the Inquiry records or information that could be considered responsive to the Draft Order. We also undertook to determine if there were other investigations or inquiries pursuant to which the Bureau has received records or information that could be considered responsive to the Draft Order.

49. The Bureau's Information Management System was searched for investigations and inquiries pursuant to which the Bureau may have received records or information that are responsive to the Draft Order. The case team also communicated with representatives of the Bureau's various enforcement branches in order to determine if there were any investigations or inquiries pursuant to which the Bureau received records or information that are responsive to the Draft Order.

50. Except as I have described below, I am satisfied that the Bureau is not in possession of records or information that are responsive to the Draft Order. Having conferred with members of the case team who had reviewed records or information in the Bureau's possession and having personally reviewed the documents which form part of the case file, I

believe that the records and information in the Commissioner's possession responsive to the Draft Order are accurately described below.

a. Records and Information previously provided by the Respondent

51. In 2013, the Bureau opened an inquiry to investigate Google's conduct related to online search and search advertising (the "**2013 Inquiry**").

52. On December 24, 2013, the Commissioner obtained an order under section 11 of the Act compelling Google to provide documents and written returns of information (the "**2013 Order**").

53. In response to the 2013 Order, Google Canada Corporation produced approximately 17,500 records between January 1, 2010 and December 24, 2013, only 1,658 of which fall within a time period contemplated by the Draft Order. The majority of these records are not responsive to the Draft Order given that the specifications of the 2013 Order sought records and information specific to Google's online search and search advertising business.

54. Targeted searches have revealed a limited number of documents such as business plans, forecasts and communications that are responsive to various specifications of the Draft Order. These documents do not provide adequate response to the relevant specifications of the Draft Order.

55. Over the course of the 2013 Inquiry, the Bureau also received additional complaints regarding Google's conduct in the online display advertising sector, prompting further review focussed on exchange-based online display advertising and whether Google had engaged in conduct to exclude rivals such as competing ad exchanges and DSPs.

56. The Bureau's review into online display advertising at that time did not extend to the Policy Change and therefore, no records or information responsive to the Draft Order were produced.

57. Beginning in 2020, the Bureau also reviewed Google LLC's proposed acquisition of FitBit.

58. In the context of its review of this acquisition, the Bureau issued a Supplementary Information Request ("**SIR**") on January 1, 2020. Pursuant to this SIR, the Bureau sought various records and information, including strategic documents and databases. In response to the aforementioned SIR, Google LLC produced approximately 89,000 records between December 16, 2017 and December 16, 2019.

59. Targeted searches have revealed a limited number of documents such as internal presentations and electronic communications that are responsive to various specifications of the Draft Order. As these documents are limited in number – fewer than 300 – these will not likely provide a full response to the relevant specifications of the Draft Order for the period covered by those productions.

b. Records and Information previously provided by third-parties

60. In the course of the Inquiry, another law enforcement agency provided the Commissioner with copies of transcripts of examinations of certain employees of Google or its affiliates (and the associated exhibits), namely Deborah Weinstein (Vice President of YouTube and Video Global Solutions), Robert Kyncl (Chief Business Officer of YouTube), Neal Mohan (Chief Product Officer at YouTube) and Rany Ng (a director of product management for video advertising).

c. Conclusions as to Records in the Commissioner's Possession

61. As described above, the records in the Commissioner's possession do not provide a sufficient response to the Draft Order.

62. Based on the aforementioned records and on information and records gathered during the Bureau's investigation to date, the Commissioner requires the records and information requested in the Draft Order from the Respondent in order to determine the facts relating to the Inquiry.

63. To the extent the Bureau is in possession of additional records or information responsive to the Draft Order, which I do not believe to be the case, paragraph 11 of the Draft Order nevertheless allows the Commissioner to forego the production requirements set out in the Draft Order provided certain conditions are met. Specifically, paragraph 11 in the Draft Order provides that:

> Where the Respondent previously produced a record to the Commissioner the Respondent is not required to produce an additional copy of the record or thing provided that the Respondent: (a) identifies the previously produced record or thing to the Commissioner's satisfaction; (b) makes and delivers a written return of information in which it agrees and confirms that the record was either in the possession of the Respondent, on premises used or occupied by the Respondent, or was in the possession of an officer, agent, servant, employee or representative of the Respondent; and where this is not the case the Respondent shall make and deliver a written return of information explaining the factual circumstances about the possession, power, control and location of such record; and (c) receives confirmation from the Commissioner that such records or things need not be produced.

VI. MATERIAL COMMUNICATIONS WITH RESPONDENT

a) Communications with the Respondent

64. On January 5, 2021, counsel for the Commissioner sent a letter to counsel for Google advising that the Commissioner had commenced the Inquiry.

65. On July 9, 2021, counsel for the Commissioner sent a letter to counsel for Google informing of the Commissioner's intention to seek an order pursuant to s.11 of the Act, and enclosed a copy of a proposed order (the "**Pre-Application Order**"). Attached as **Exhibit H** is a copy of this letter and the Pre-Application Order.

66. On July 14, 2021, counsel for the Respondent sent an email to counsel for the Commissioner, the content of which is detailed further below. This email is attached as **Exhibit I**.

67. On July 22, 2021, counsel for the Commissioner sent an email to counsel for Google to provide clarifications on the nature of the information requested by a number of specifications contained in Schedule II of the Pre-Application Order. Attached as **Exhibit J** is a copy of this email.

68. On July 23, 2021, I attended a conference call, along with counsel for the Commissioner and members of the case team, with counsel for the Respondent regarding the Pre-Application Order (the "**Pre-Application Call**").

69. On July 26, 2021, counsel for the Respondent sent counsel for the Commissioner written comments regarding the Pre-Application Order, including proposed changes to a number of specifications in Schedules I and II. This letter, and accompanying attachments, are attached as **Exhibit K**.

70. On July 31, 2021 counsel for the Commissioner sent counsel to the Respondent an email seeking clarifications regarding the Respondent's proposals. This email is attached as **Exhibit L**.

71. On August 5, 2021, counsel for the Commissioner sent counsel for the Respondent an email seeking further clarifications regarding the Respondent's proposed changes to the Pre-Application Order. This email is attached as **Exhibit M**.

72. On August 6, 2021, counsel for the Respondent sent counsel for the Commissioner written comments regarding the Pre-Application Order, addressing questions in emails dated July 31 and August 5, 2021 from counsel to the Commissioner. This letter from the Respondent, and the accompanying mark-up of the Pre-Application Order is attached as **Exhibit N**.

73. On August 13, 2021, counsel for the Commissioner sent an email to counsel for the Respondent to request a call with Google's data personnel. This email is attached as **Exhibit O**.

74. On August 25, 2021, I attended a conference call, along with counsel for the Commissioner and members of the case team, with counsel for the Respondent regarding the Commissioner's email of August 13, 2021 (Exhibit O).

75. On September 22, 2021, counsel for the Commissioner provided a copy and mark-up of the Draft Order the Bureau intended to file to counsel for the Respondent. Attached as **Exhibit P** is a copy of the email to counsel for the Respondent.

76. On September 29, 2021, counsel for the Respondent sent counsel for the Commissioner written comments regarding the Draft Order. Attached as **Exhibit Q** is a copy of the letter.

b) **Respondent's proposal**

77. As reflected in the Respondent's communications (Exhibits I and K), Google's business practices are the subject of an investigation by the

U.S. DOJ. The Respondent has indicated to the Bureau that in the context of the U.S. DOJ's investigation, Google LLC has produced a number of records believed to be responsive to the Pre-Application Order. In order to minimize the burden associated with a fresh collection and review of records in response to the Pre-Application Order, the Respondent proposed to leverage the work done to respond to the U.S. DOJ's civil investigative demands ("**CIDs**"). The Respondent *initially* proposed to add the following to the Pre-Application Order:

> Where the Foreign Affiliate previously produced a record or thing to the U.S. Department of Justice Antitrust Division ("U.S. DOJ") that is substantially responsive to a specification in the Order, the Respondent is not required to conduct a further search for records or things provided that the Respondent: (1) provides the responsive records or things produced to the U.S. DOJ to the Commissioner; and (2) makes and delivers a written return of information explaining the factual circumstances about the possession, power, control and location of such record or thing.

78. In an email of July 31, 2021 (Exhibit L), counsel for the Commissioner identified a number of questions and concerns relating to the Respondent's proposal and asked that clarifications be provided by August 5, 2021, including clarifications on:

a. How the Respondent proposed to leverage the work related to the CID so that it would result in records that are substantially responsive to the Pre-Application Order;

b. The status of the CID negotiations with the U.S. DOJ and whether any modifications had been made or were in the process of being made; and

c. What would be the incremental burden to the Respondent of proceeding with the application as drafted as opposed to the mechanism proposed.

79. The Respondent's August 6, 2021 response (Exhibit N) provided no answers to the Bureau's questions and no additional information to give the Commissioner assurances the proposal would result in a production that substantially complies with the Pre-Application Order. On the contrary, the mark-up of the Pre-Application Order accompanying the Respondent's response included the following revised language at paragraph 12 of the order :

> THIS COURT FURTHER ORDERS that where the Foreign Affiliate produced a record or thing to the U.S. Department of Justice Antitrust Division ("U.S. DOJ") prior to compliance with this Order that is responsive to a specification in the Order, provided that the Respondent (1) provides the responsive records or things produced to the U.S. DOJ to the Commissioner, and (2) makes and delivers a written return of information explaining the factual circumstances about the possession, power, control and location of such record or thing, the Respondent is not required to make enquiries of the Foreign Affiliate's personnel to produce additional records or things in the possession, control or power of the Foreign Affiliate that may otherwise be responsive to such specification. [emphasis added]

80. Whereas the language initially proposed by the Respondent provided for the production of U.S. records that are "substantially responsive" to the Order, Google's revised language removes this requirement and would allow Google to satisfy its Canadian production obligation by providing records that are not substantially responsive to the Pre-Application Order. The plain language of Respondent's proposal is that the Respondent could fully discharge its Canadian production obligation by providing a single record or thing that is responsive to the

Pre-Application Order. Under the Respondent's proposal, no inquiries would be made of Google LLC personnel and the Commissioner would be kept completely in the dark about the Google LLC records that are responsive to the Pre-Application Order but not produced.

81. The Respondent's mechanism is concerning to the Bureau not simply because of the discretion it affords Google in selecting responsive records but because the mechanism obscures the extent to which the Respondent's production to the Bureau reflects the records of Google LLC that are responsive to the Specifications of the Pre-Application Order.

82. The Respondent's August 6, 2021 response was also silent on the Commissioner's request for clarification on the incremental burden of proceeding with the application as drafted and leveraging the work Google has done (and perhaps continues to do) to comply with the CIDs (i.e., without the Respondent's proposed mechanism). In addition, during a call with the Respondent's representatives on August 25, 2021, counsel for the Respondent acknowledged that the Respondent would be able to leverage the work done to respond to the CIDs absent the proposed mechanism but, the mechanism would provide assurances it could not be faulted for doing so.

83. Other law enforcement agencies are also investigating Google or its affiliates with respect to topics in the draft section 11 and Google or its affiliates have provided records and information to those agencies.

84. Based on the above, the Commissioner is unable to determine the sufficiency of the records produced to the U.S. DOJ in relation to the Inquiry absent a review of such records. However, following the issuance of a waiver by Alphabet, Inc., its subsidiaries and affiliates in favour of the U.S. DOJ on August 9, 2021 (the "**Waiver**"), the Bureau is satisfied that a significant number of records produced to the U.S.

DOJ would be responsive to the Pre-Application Order. In the circumstances of this Inquiry, the Commissioner is prepared to receive and review such records before seeking further section 11 orders.

85. The Pre-Application Order has therefore been modified to limit a number of the requests under subsection 11(2) of the Act to the following specification:

> Provide all Records from the files of the custodians in Schedule VI relating to the Company's Advertising Technology Products or YouTube that were:
>
> 1) Created, received or modified during the period from January 1, 2013 and the issuance of this Order; and
>
> 2) Produced to the U.S. DOJ.

86. In light of this change, paragraph 3.d) of the Pre-Application Order relating to the Bureau's E-Production Guidelines was amended to include the following instructions specific to the request made in Specification 1 of Schedule III:

> Notwithstanding the foregoing, records produced in response to Specification 1, Schedule III of this Order shall be produced to the Commissioner in the form and with the metadata, load files and other information provided to the U.S. Department of Justice Antitrust Division ("U.S. DOJ") (e.g. including format, U.S. DOJ Bates numbers, source/attachment relationships, email threading and any other fields in Appendix B of the Bureau's E-Production Guidelines), and any privilege log.

87. While the Commissioner is making this change to address the concerns expressed by the Respondent with respect to burden, the Commissioner may not obtain the records he reasonably requires to advance the Inquiry. Because of circumstances specific to this case, the Commissioner is willing to receive production of the records and information produced to the U.S. DOJ as a first step; however, upon

review of the records received in response to this specification, the Commissioner may seek a subsequent section 11 order against the Respondent for additional records and information necessary to advance the Inquiry.

88. In its letter of September 29, 2021 (Exhibit Q), the Respondent submitted that the scope and nature of the records requested in Specification 1 of Schedule III of the Draft Order "*extend well beyond matters related to whether Google Canada is leveraging its market power in the supply of in-stream video ad inventory into adjacent markets*".

89. As emphasized by the Respondent, the Inquiry relates to whether Google is leveraging its market power in the supply of in-stream video ad inventory into adjacent markets. For the purposes of the Inquiry, "adjacent markets" include products along the ad tech supply chain, as contemplated in the Draft Order under the definition of "Advertising Technology Products".

90. As previously detailed at paragraphs 15 to 22 of this affidavit, the ad tech supply chain is a complex ecosystem consisting of a number of products that work together to facilitate the automated purchase and sale of advertising inventory online by advertisers and publishers. No single ad tech product works independently and Google is present across most, if not all, levels of the supply chain. Records relating to Google's market power across the supply chain as well as the effects of the Policy Change and the Cookie/Pixel Limitation across the ecosystem are topics the Commissioner is actively investigating as part of the Inquiry.

91. The Respondent has argued that conducting a fresh records collection process and document review in response to the Pre-Application Order would be excessive, disproportionate, and unnecessarily burdensome

"*in the context of the past burden incurred by Google LLC and the potentially duplicative time and expense involved*" (Exhibit K). It is to address the Respondent's stated concern with burden that the Commissioner is prepared to receive and review records produced to the U.S. DOJ in connection with products relevant to the Inquiry as a first step.

92. Lastly, the scope of the records requested in Specification 1 of Schedule III of the Draft Order came from Google's own letter to the U.S. DOJ (i.e. the Waiver). The Waiver authorizes the U.S. DOJ to share with the Bureau information and records relating to YouTube and Advertising Technology Products from the files of the custodians listed in Schedule VI of the Draft Order. A copy of the Waiver is attached as **Exhibit R**. In a letter dated October 7, 2021 (attached as **Exhibit S)** Counsel for the Commissioner notified the Respondent of the Bureau's intention to bring the Waiver to the attention of the Court. In a letter dated October 8, 2021 ("**Exhibit T**") counsel for the Respondent indicated that Google's waiver of confidentiality of certain documents were not intended to indicate that those documents are relevant to the Commissioner's Inquiry. The letter provides that the universe of documents and information subject to the Waiver extend beyond the information and documents relevant to the Inquiry

c) **Changes to the Pre-Application Order**

93. Following the Pre-Application Call and the receipt of written correspondence from counsel to the Respondent, the Commissioner made the following changes to the Pre-Application Order (attached as **Exhibit U** is a blackline of the Pre-Application Order showing these changes). Among other things, Schedule I of the Draft Order now sets out the records requested of Google Canada under subsection 11(1) of the Act and records sought under subsection 11(2) of the Act are

confined to Schedule III. The other changes made to the Pre-Application Order are as follows:

a. Changes made to the definitions of the Pre-Application Order were as follows:

   i. Advertiser Expenditure: A definition for "Advertiser Expenditure" was added to address a request for clarification from the Respondent relating to the use of the terms "advertiser expenditure" and "revenue". Any reference to expenditure in the Pre-Application Order was changed to "Advertiser Expenditure" and in instances where revenue information is requested, specific mention is made to the Company's revenue;

   ii. Advertising Inventory: To address the Respondent's comment related to the exclusion of search advertising, the definition of "Advertising Inventory" was amended to replace the words "digital advertising market" with the newly defined "Display Advertising Market."

   iii. Communications: The definition of "Communications" was removed as this category of records no longer appears in the Draft Order.

   iv. Company: The Respondent submitted that the definition of the Company included in the Pre-Application Order would require it to produce records for every employee of the entire Google organization around the world.

   With respect to the Respondent's suggestion that Google would have to search and produce records for "all employees", the Commissioner is only seeking information from Senior Officers about the Company's activities as set

out in the Draft Order. While the Commissioner disagrees with the Respondent's objection, the words "and each of their respective directors, officers, employees, agents and representatives" were removed from the definition of "Company" to address the Respondent's concerns.

As for the suggestion that the Respondent would have to search Google's entire organization, Schedule I of the Draft Order only seeks records in the possession, control or power of the Respondent and, Schedule III only seeks records in the possession, control or power of Google LLC that are either in connection with Canada or from the files of specific custodians.

v. Display Advertising Market: For reasons discussed above in relation to the definition of "Advertising Inventory," a definition for "Display Advertising Market" was added.

vi. DoubleClick for Publishers: A definition for "DoubleClick for Publishers" was added to address the Respondent's request for clarification with respect to Schedule II, Specification 20 (now Specification 19), replacing the term "publisher ad server."

b. Schedule I: During a call on August 25, 2021, the Respondent provided the Bureau with details on how it would practically respond to the Order under its proposed mechanism. Counsel for Google advised the Bureau that Google was prepared to do a fresh eDiscovery collection for Google Canada and relevant Google Canada employees based on the Pre-Application Order. Schedule I of the Draft Order is therefore similar to the Pre-Application Order but with certain changes addressing comments

raised by Google in pre-application dialogue. A discussion of the changes to Schedule I is as follows:

i. Preamble: The preamble to Schedule I had been removed from the Draft Order sent to the Respondent on September 22, 2021 following changes made with respect to the requests under subsection 11(2) of the Act. The preamble was reinstated in Schedule I of the Draft Order, and included in Schedule III, to address comments expressed by the Respondent in its letter of September 29, 2021 (Exhibit Q).

ii. Specifications 10, 11, 12, 13, 15, 19 and 20 (Specifications 19 and 20 previously 20 and 21): All references to "Reports and Communications" were amended to "all Records, excluding spreadsheets and data" to address the Respondent's request for clarification. The definition for "Communications" was consequently removed.

iii. Specification 16: The Respondent proposed to specify that the information requested relates to the display advertising market to clarify that the information requested excludes search advertising and is specific to the Display Advertising Market. A reference to "Display Advertising Market" was added to the specification.

iv. Specification 18: To address the Respondent's comments, the words "as applicable" were added when referring to the Company's Advertising Technology Product since the definition includes both buy-side and sell-side tools.

v. Specification 19: This specification was moved to Schedule III as the request falls under subsection 11(2) of the Act.

c. Schedule II: The Bureau has made the following changes to Schedule II, which seeks written returns of information relating to Canada:

i. Specification 3: The Respondent suggested a revision to limit the information requested to Projects that are "centrally recorded or maintained in a central database". Given that:

1. The Respondent has previously indicated to the Bureau that "Google does not maintain a database of projects that have been assigned a code name" that would permit the Respondent to respond to this specification; and

2. The Commissioner is aware of Google's use of code names for internal projects and the importance of obtaining descriptions of such Projects for the analysis of documents;

Specification 3 has been replaced with a provision in paragraph 3(j) of the Draft Order requiring that, the Respondent shall use best efforts to provide a complete written response within 10 days of receiving a written request from the Commissioner.

ii. Specification 9 (previously Specification 10): This specification was limited to the top 50 Canadian Advertisers by "Advertiser Expenditure relating to the Display Advertising Market" to address comments from the Respondent.

iii. Specification 10 (previously Specification 11): This specification was limited to the top 50 Publishers by

Canadian Advertiser Expenditure. Reference was added to the "Display Advertising Market" to address comments from the Respondent.

iv. Specifications 16(b), 18(b) and 20(b) (previously 17(b), 19(b) and 21(b)): These specifications were modified to include the clarifications provided to counsel for the Respondent in an email sent on July 22, 2021 (Exhibit J).

v. Specification 19 (previously Specification 20): The Respondent sought clarification on whether "ad server" refers to Google Ad Manager's ad server, also referred to DoubleClick for Publishers. A definition for "DoubleClick for Publishers" was added to address this, replacing the term "publisher ad server".

vi. Specification 20 (previously Specification 21): The Respondent submitted the specification is beyond the scope of, and not relevant to, the Inquiry. Given the complexity of the ad tech ecosystem, the Commissioner requires this information to advance the Inquiry.

The Respondent indicated to the Commissioner that Google associates the term "take-rate" to the advertising revenue it pays to publishers and proposed changes to that effect. The Commissioner seeks data on the price or fee of each Advertising Technology Product Google offers to both advertisers and publishers. The term "take rate" was therefore replaced with the more general "prices and/or fees each of the Company's Advertising Technology Products charge their customers".

94. Other comments and concerns raised by the Respondent have been considered by the Commissioner, however, for the reasons further detailed below, no changes were subsequently made to the order on the basis of those comments and concerns:

a. Definitions:

i. Google Ads: Where the definition provides that "*the Company need not produce Records and Written Returns relating exclusively to search advertising*", the Respondent proposed to add "data" to the exclusion. Considering "data" is included within the scope of Records and Written Returns, no change is made to this definition.

ii. Senior Officer: The Respondent proposed to add the words "*and who are employed by the Company or the Respondent*" to the definition of Senior Officer. I believe this language may exclude prior employees of the Company who may have had records relevant to the Inquiry. Consequently, no changes are made to this definition.

b. Schedule I

i. Specifications 5 and 6:

1. The Respondent suggested that Schedule I Specifications 5 and 6 could be combined into a single specification that requests records for each Relevant Product. These specifications pertain to different products, i.e., YouTube and buy-side tools DV360 and Google Ads, such that different Google personnel will have responsibility for these products. The Commissioner seeks to analyse records

produced in response to these specifications separately.

2. Specifications 5(b), 5(g), 6(b) and 6(g): The Respondent requested clarification that only records that pertain to a "Canadian Advertiser" need be produced since the preamble to Schedule I provides that non-Canada specific records need not be produced. I believe that this criticism misinterprets the preamble to Schedule I which seeks to ensure the production of country specific, continent specific and segment specific Records affecting Canada. Limiting requests to "Canadian Advertisers" would exclude relevant continent specific or segment specific Records.

ii. Specification 8:

1. In its letter dated August 6, 2021 (Exhibit N), the Respondent submitted that this specification will require the Respondent to conduct a fresh records collection process and document review search of the documents collected and produced to the US DOJ; therefore the Bureau should justify that such an expensive, time consuming and burdensome process is proportionate to the relevance of such records to the Inquiry. I believe this concern to be addressed by the changes made to the request under subsection 11(2) of the Act.

2. The Respondent proposed a substitution of the term "Reports" with "business plans, strategy and planning documents or presentations to

management or executive committees." I believe this limits the scope of the documents and excludes others that the Commissioner deems important and relevant to the scope of the Inquiry. The Respondent has not provided a compelling rationale or explanation for this proposed change. Accordingly, no change is made to this specification.

iii. Specifications 8, 9 and 10: The Respondent noted that records prior to January 1, 2014 may not be available and proposed changing the start of the relevant period to January 1, 2014 rather than January 1, 2013. Whether or not records prior to January 1, 2014 are available is a matter to be confirmed by the Respondent upon having conducted appropriate searches of the files of relevant custodians in response to the Order. Consequently, no change is made to this specification.

iv. Specification 11: The Respondent has submitted that: i) this specification is beyond the scope of, and not relevant to, the Inquiry; ii) producing this information would be excessive, disproportionate and unnecessarily burdensome as it would require a fresh records collection process and document review; iii) records previously produced to the US DOJ are not substantially similar to the records requested in this specification; and iv) there is no time limit to this request. As explained in paragraph 44 above, the Bureau is aware of the existence of internal policies and guidelines counseling personnel on language to avoid in order to mitigate antitrust risk. Such policies will inform the Commissioner on how to interpret documents regarding the overriding purpose of the alleged conduct.

The time limit for this specification is the Relevant Period. Lastly, I believe the changes made to the request under subsection 11(2) of the Act address any burden arising from this Specification as it will not necessitate a fresh collection and search of Google LLC's employees.

v. Specification 19 (now Schedule III, Specification 5): The Respondent objected to this specification on the grounds that it is beyond the scope of, and not relevant to the Inquiry, and would constitute a fishing expedition by the Bureau. The Respondent objected to the scope in two ways. First, the Respondent proposed limiting the competition authorities to which the Specification applied. The Respondent proposed limiting the records to examinations conducted on behalf of the U.S. DOJ rather than "any body enforcing competition laws". The Respondent also requested that the Specification be limited by the clause in the preamble to Schedule I which provides:

> Unless otherwise specified, the Company shall not produce segment specific Records that only concern segments other than the Americas, continent-specific Records that only concerns segments other than North America, or country-specific Records that only concern countries other than Canada, but for greater certainty, the Respondent shall produce all Records affecting the business or marketing practices of the Company in Canada, including any effect on the sale of Advertising Inventory that is used to serve advertising to users with Canadian IP addresses,

and the sale of Advertising Inventory to Canadian businesses (e.g. Records created in the United States that affect the Canadian market).

Given the global nature of Google's business, the case team anticipates that all such transcripts will assist the Commissioner in determining the facts relevant to his Inquiry into practices affecting Canada. Nevertheless, and as noted generally in paragraph 93.b.i above, the Bureau has added the above preamble to both Schedule I and in respect of Schedule III of the Draft Order to provide greater certainty that Specification 5 of Schedule III seeks information relevant to the application of the Act in Canada.

Second, with respect to the examinations conducted on behalf of the U.S. DOJ, the Respondent requested that this specification be modified to request only the portions of any examination, including any exhibits marked, that relate to the Inquiry. As noted in paragraphs 15-22 of this affidavit, programmatic advertising involves a complex ecosystem of interrelated services which Google is active throughout. I believe that where a portion of the examination is responsive to the order, the complete transcripts may be necessary to understand the complex and interrelated business lines, how and why decisions are made in this context, and their effects or likely effects in Canada. As such, the Commissioner requests the production of the entire transcripts where a portion of the document is responsive to the Pre-Application Order. Consequently, no changes are made to this specification.

c. Schedule II:

i. Specifications 16(c), 18(c) and 20(c) (previously 17(c), 19(c) and 21(c)): The Respondent submitted that it would not be able to respond to these specifications given the request is for data about specific advertisers who are identified only by legal entity names, without specific customer IDs. The Respondent noted that customers exercise discretion when filling out name fields in the Respondent's system. Thus, searching based on specific legal entity names may result in some relevant data not being captured.

During the call held on August 25, 2021, the Respondent noted that it can carry out searches on variations of company names for advertisers with an associated Canadian billing address. Given this alternate solution, the Commissioner did not remove the specifications.

d. Schedule III:

i. In its letter of September 29, 2021 (Exhibit Q), the Respondent submitted that the division between Schedules I and III results in confusion as to which Google entity is required to respond because many of the records requested in Schedule I will have to come from Google LLC. I believe this criticism is misplaced. Paragraph 3(a) of the Draft Order specifically provides that the Respondent shall produce records in *its* possession, control or power as set out in Schedules I and II, and that it shall produce records in the possession, control or power of its Foreign Affiliate, Google LLC, as set out in Schedule III. However, to provide the Respondent with even greater certainty,

references to the "Company" were replaced with the "Respondent" in the definition of "Google Ads", specifications 5(a), 6(a) and 7 of Schedule I, and specifications 2(d) and 16 of Schedule III.

95. The Respondent proposed a number of changes to the template order in mark-ups sent to counsel for the Commissioner on July 26, 2021 and August 6, 2021 (Exhibits K and N). Several of these changes would provide the Bureau with less assurance that the Respondent has produced the requested records and information. For example, the Respondent inserted phrases such as "to the best of its knowledge and belief" to a number of paragraphs of the template order (e.g. paragraphs 3.(e), 3.(f), 7 and 9). This template order has been issued by the Court on a number of occasions and the Respondent did not provide any specific rationale for these proposed changes.

96. The Respondent also asked that the following be added to paragraphs 3.(k) and 8 of the template order:

"to the extent that the disclosure of such personal information is not otherwise prohibited by applicable law."

These changes were rejected because the Bureau is only seeking business records. Furthermore, the Respondent did not identify the provisions of any laws that might prohibit it from responding to an order of this Court or the specific information it would seek to withhold from the Commissioner on this basis. In any event, insofar as the Respondent is concerned with privacy laws outside of Canada, the Draft Order has since been revised such that any records sought outside of Canada have already been produced to the U.S. DOJ or, in the case of the transcripts, another body enforcing competition laws.

97. The following changes were however made to the template Order:

a. Preamble of the Order, paragraph 3.h.: The words "belonging to either the Respondent or any of the Respondent's affiliates" were added.

b. Preamble of the Order, paragraph 4: The words "by the Respondent or any of the Respondent's affiliates" were added.

c. Preamble of the Order, paragraph 5: The words "on its own behalf or on behalf of any of the Respondent's affiliates" were added.

98. As noted above, the Commissioner may apply for further orders under section 11 of the Act in the Inquiry in relation to the Respondent and/or its affiliates. If appropriate, this may include seeking records or information removed from the scope of the Draft Order through the changes resulting from pre-application dialogue with the Respondent.

AFFIRMED REMOTELY BEFORE ME at the City of Gatineau in the Province of Québec this 12 day of October, 2021.

Raha Mohammad

Stéphanie Guitard

A Commissioner of Oaths

Raha Araz Mohammad
Commissioner of Oaths etc.
Province of Ontario
LSO P15816.