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## Unilateral Conduct Working Group Questionnaire

**In case you have any questions on the questionnaire, please contact Elizabeth Kraus at the US FTC or Arno Rasek at the Bundeskartellamt. Please send the completed questionnaire by 31 October 2006 to [ekraus@ftc.gov](mailto:ekraus@ftc.gov) and [arno.rasek@bundeskartellamt.bund.de](mailto:arno.rasek@bundeskartellamt.bund.de), and provide a contact person who can answer possible questions on your response.**

Unilateral conduct is referred to as abuse of dominance under section 79 of the *Competition Act* (the “Act”):

79. (1) *Where, on application by the Commissioner, the Tribunal finds that*
- (a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,*
  - (b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and*
  - (c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,*

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

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

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

- (3.1) Where the Tribunal makes an order under subsection (1) or (2) against an entity who operates a domestic service, as defined in subsection 55(1) of the Canada Transportation Act, it may also order the entity to pay, in such manner as the Tribunal may specify, an administrative monetary penalty in an amount not greater than \$15 million.*

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

- (a) the frequency and duration of the practice;*

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*(b) the vulnerability of the class of persons adversely affected by the practice;*

*(c) injury to competition in the relevant market;*

*(d) the history of compliance with this Act by the entity; and*

*(e) any other relevant factor.*

*(3.3) The purpose of an order under subsection (3.1) is to promote practices that are in conformity with this section, not to punish.*

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

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

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

*(7) No application may be made under this section against a person*

*(a) against whom proceedings have been commenced under section 45, or*

*(b) against whom an order is sought under section 92*

*on the basis of the same or substantially the same facts as would be alleged in the proceedings under section 45 or 92, as the case may be.*

*R.S., 1985, c. 19 (2nd Supp.), s. 45; 1990, c. 37, s. 31; 1999, c. 2, s. 37; 2002, c. 16, s. 11.4.*

There are a variety of other provisions under the Act that deal with specific forms of conduct that may also fall under the purview of unilateral conduct. The Act has criminal provisions that deal with predatory pricing (s. 50(1)(c)) and resale price maintenance (s. 61), as well as civil provisions that deal with refusals to supply (s. 75) and exclusive dealing, tying, and market restriction (s. 77). In the case of s. 75 and s. 77, private action before the Tribunal is available to individuals under s. 103.1 of the Act.

S. 79 is a civil provision intended to encompass all forms of unilateral conduct, enforced by the Competition Bureau (the “Bureau”). Under certain circumstances all of the above forms of conduct can be looked at generally under s. 79. S. 78 of the Act outlines several examples of anti-competitive acts that may be reviewed under s. 79, including exclusivity, predation, and refusal to supply. This response will only focus on

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the objectives, standards, policies, and jurisprudence relating to unilateral conduct under s. 79.

**A. Objectives of unilateral conduct laws**

**1. With regard to your jurisdiction's unilateral conduct rules – e.g., rules concerning the prohibition of abuse of dominance or monopolization - please state the objectives of these rules (e.g., consumer welfare, efficiency, protecting the competitive process), and identify the source from the following, as applicable:**

**a. Constitution**

N/A

**b. Statutes**

The general objectives of the Act are set out in the legislation in the *purpose clause*, which articulates the intention of Parliament as to the purposes of the Act. There are no objectives assigned specifically to the unilateral conduct rules or abuse provisions. The Act's general objectives are listed under s. 1.1:

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

**c. Regulations**

Regulations specific to the airline industry were made under the Act in 2000 to deal with potential abuses of dominance by air carriers. The objective of these regulations is to distinguish certain predatory actions from vigorous competition, setting out an avoidable cost test for predation.

**d. Agency enforcement policy (e.g., guidelines, speeches)**

The Bureau's Abuse of Dominance Enforcement Guidelines (the "Guidelines") state that the objective of the abuse provisions is to promote effective competition where all firms have an opportunity to either succeed or fail on the basis of their ability to compete. The Guidelines state that the objective is not to protect the interests of any one competitor or group of competitors.

This approach is also reflected in the Bureau's Enforcement Guidelines for the Abuse of Dominance Provisions as Applied to the Retail Grocery Industry, as well as the

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recent Draft Information Bulletin on the Abuse of Dominance Provisions as applied to the Telecommunications Industry.

**e. Case law**

In *Nielsen* (1995), the Tribunal ascribed the following purpose to the abuse of dominance provisions:

"It is important in interpreting legislation to keep in mind the purpose of the legislature. What then is the purpose of sections 78 and 79 of the Act? It is not controversial, and it was not disputed before me, that the sections are intended to deal with abuses by dominant firms. The government's explanatory guide neatly summarizes the role of the provision:

Anti-competitive behaviour on the part of dominant firms imposes artificial restraints on the competitive process, impeding the market from efficiently allocating resources. In a healthy, dynamic economy, goods and services are supplied by the firms which can produce them most efficiently and adapt to the ever-changing demands of the marketplace. The proposed abuse of dominance provision will ensure that dominant firms compete with other firms on merit, not through the abuse of their market power. The provision is of particular importance for the protection of consumers, new entrants and, in particular, the small business community.

These sections were intended to rectify some of the problems which had made the previous criminal law offence of monopoly largely ineffective. These included the fact that there was nothing inherently criminal in the pursuit or maintenance of a monopoly, the high burden of proof required of the Crown to prosecute successfully in a criminal context, the focus of the section on "public detriment" rather than on the anti-competitive conduct and the lack of flexible remedies."

There is, however, little jurisprudence which specifically interprets s. 1.1 and its application. Two recent decisions from the Federal Court of Appeal considered its application to mergers and abuse of dominance cases: *Superior Propane* (2001) and *Canada Pipe* (2006), respectively. In the latter, the Court held that in determining whether competition likely would be substantially greater "but for" the impugned conduct, the analysis must be sufficiently flexible to allow for a full assessment of all relevant factors, and must be reflective of the different objectives of the Act.

**2. Are non-competition influences (such as promotion of industrial policy or distributive welfare) incorporated in these objectives? Please describe any such influences.**

In terms of unilateral conduct, no. As previously mentioned the purposes of the Competition Act are articulated in s. 1.1 of the Act, which outlines four main objectives which may be summarized as follows: improving the efficiency of the Canadian

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economy, international competitiveness, protecting the competitive process and balancing consumer interests. However, in terms of mergers, the Federal Court of Appeal determined that distributive welfare, namely a “weighted total welfare” standard for mergers, was consistent with the purpose clause of s. 1.1.

**3. If there are multiple objectives, how are these balanced or reconciled?**

In applying the abuse of dominance provisions the Competition Tribunal and the Courts will usually apply the plain meaning of the text of the law without having recourse to the objectives of the Act. It is only in a case where some ambiguity arises as to the meaning of the section that the objectives of the act are, typically, used as one of the elements to be considered in resolving the ambiguity.

In *Superior Propane*, the Federal Court of Appeal addressed the issue of the multiple objectives associated with s. 1.1. The Court recognized that “not all of the stated objectives can be served at the same time, nor are all necessarily consistent.” Where the objectives are considered and there is a conflict between them then one must look, *inter alia*, to the act as a whole as well as the particular provision and its context to determine whether one objective is preferred. The Federal Court of Appeal did not provide guidance as to how to balance or reconcile multiple objectives in the context of the abuse provisions.

**4. How has your jurisdiction balanced the risks associated with over-deterrence (detering efficient, pro-competitive conduct as a result of excessive intervention) with the risks associated with under-deterrence (permitting anti-competitive conduct as a result of too little enforcement) in choosing its objectives for unilateral conduct rules? Is this choice affected by the nature of your economy?**

As indicated previously, there are no objectives specifically applicable to the unilateral conduct rules. The general objectives in the Act have little application to the possibility of over- or under-deterrence. The Bureau considers these issues in its application of s. 79 itself, on a case-by-case basis.

**5. With regard to exemptions or exceptions to your laws specific to unilateral conduct (for example, for regulated sectors, government entities, purchasers, or exercise of intellectual property rights), please identify the exemption or exception and explain whether and how its goals differ from the objectives of your general unilateral conduct law and how the jurisdiction balances or reconciles these factors.**

Although the Act is a law of general application, some sectors are expressly exempted from the application of the Act such as collective agreements between employers and employees and amateur sport. However, government-owned corporations engaged in commercial activities are not exempt. The courts have also developed a principle of interpretation called the “regulated conduct doctrine” (“RCD”) that may immunize impugned conduct from application of the Act. In terms of the rules on unilateral conduct, there is a specific exception dealing with intellectual property rights, and specific regulations that apply to airlines, as mentioned above.

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**a. Regulated conduct doctrine**

This doctrine may come into play when conduct that contravenes the Competition Act is authorized, expressly or impliedly, or required by another federal, provincial or municipal legislative regime. As set out in the recent Technical Bulletin on Regulated Conduct, in determining whether conduct regulated by other legislation will be pursued under the Act, the Bureau will consider “the purpose of the Act and any law said to be applicable to the conduct, the interests sought to be protected by both laws, the impugned conduct, the potentially applicable provisions of the Act and of the other law, the parties involved, and the principle of statutory interpretation applicable to the case.” The Bureau will also consider whether the Act and the other legislation are able to co-exist.

With regard to the application of RCD to unilateral conduct rules, no substantive judicial guidance exists; the RCD is effectively in the criminal law enforcement context. Until there is further judicial guidance, the Bureau will carefully determine on a case-by-case basis whether the RCD immunizes the impugned conduct from the application of the Act.

**b. Intellectual property rights**

S. 79 (5) of the Act provides an exception for exclusive rights provided by intellectual property (“IP”), the legitimate exercise of which will not constitute an anti-competitive act:

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

The Bureau considers both IP law and competition law to be necessary for a market to function efficiently. IP rights provide incentives for investment in the development of technology and the creation of new products. Similarly, the Bureau applies the Act to anti-competitive conduct that impedes efficient production and the creation and diffusion of goods and technologies. Both IP law and competition law are designed to promote a competitive marketplace in this regard, and the goal of this exception is to ensure that competition law does not chill innovation where its application may not be appropriate.

At present, there is an absence of meaningful jurisprudence dealing with the interface between competition law and intellectual property. However, the Bureau has published enforcement guidelines on how it will approach the interface between competition law and IP law.

**6. If the objectives of, or exemptions or exceptions to, your unilateral conduct rules are influenced by the nature of your economy (e.g., small, transition, or recently-**

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liberalized), please explain.

At the time when the *Combines Investigation Act* underwent major revisions and became the *Competition Act* (1986), the Canadian government recognized the importance of liberalized trade as well as the prevalence of many small and medium-sized enterprises in the Canadian economy. The government also recognized that Canada is a much smaller economy with higher concentration levels relative to the United States, Canada's largest trading partner. These factors were important considerations in drafting the objectives of s. 1.1, and remain important today.

**7. If the objectives of, or exemptions or exceptions to, your unilateral conduct rules have been substantially reviewed or revised, please describe any change and the reason.**

N/A

**8. Are there institutional features (e.g., the possibility for a ministry to overrule competition agency decisions or the requirement the competition agency consult with other governmental agencies) that affect your agency's ability to achieve the objectives of the unilateral conduct rules? If so, please explain.**

The Bureau is an independent law enforcement agency charged with enforcing the Act. As the Bureau conducts its investigations confidentially, it is not required to consult with other governmental agencies in pursuing an abuse of dominance case under s. 79.

Under s. 10(1)(c) of the Act, the Minister of Industry may instruct the Bureau to pursue an inquiry where the Minister believes there may be a contravention of the Act. Similarly, under s. 22(4), the Minister may review any decision by the Bureau to discontinue an inquiry pursuant to the Act. If, in the Minister's opinion, circumstances warrant further investigation, the Minister may instruct the Bureau to make further inquiry.

**9. Please describe any difficulties that your jurisdiction has experienced with its objectives for unilateral conduct rules. Based on your experience, what, if any, suggestions (including selection of other objectives) would you have for your or other jurisdictions, and why?**

See question A.3 regarding the potential ambiguity over interpreting multiple, sometimes conflicting objectives. To date, however, the Bureau has not difficulties with s. 79 as a result of the objectives of the Act. At the same time, to this point the Bureau has no strict policy or case law for reconciling these objectives clearly or favouring one objective over another with respect to a particular provision, such as s. 79. The purpose of s. 79 is to prohibit any abuse of dominance that substantially lessens or prevents competition, and it is up to the Bureau, and ultimately the Tribunal, to decide what this constitutes.



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because this is consistent with the promotion of efficiency and recognizes the importance of property rights. The focus of the legislation is on the abuse of market power through anti-competitive practices such that this market power is either maintained or enhanced. The Act contains other provisions that can apply to the acquisition and the creation of market power such as the merger and conspiracy provisions.

**3. Does your law contain or do you use a market share threshold at which you presume single-firm dominance/substantial market power and/or as a “safe harbour”?** yes/no

There is no statutory market share threshold in the Act. The Tribunal has stated that an 80% market share is a *prima facie* indicator of market power and would require evidence of ease of entry to overcome. The Tribunal has also stated that a market share below 50% will not give rise to a *prima facie* finding of dominance. It has stated, however, that a market share of 25% falls well short of a level required to indicate market power.

To date, the market shares of dominant firms in contested s. 79 cases have been very high, with all above 80%. However, the Bureau states in its Guidelines that it considers a market share of 35% will normally not give rise to concerns under s. 79, and that if a firm has a market share in excess of this threshold the Bureau will normally continue its investigation. For cases involving joint dominance, the corresponding threshold is a 60% combined market share for the entities in question.

**If so, please respond as applicable:**

- What is the market share level of the dominance presumption? \_80% market share\_\_\_\_\_
- Is the dominance presumption rebuttable? yes/no
- What is the market share level of the safe harbour? \_below 35% market share\_\_\_\_\_
- Is the safe harbour absolute (*i.e.*, dominance/substantial market power cannot be found below the specified percentage level)? yes/no
- What is the legal basis of the presumption statute /**case law**/guidelines
- What is the legal basis for the safe harbor? statute /case law/**guidelines**

**4. Does your competition law enable the competition agency to intervene against unilateral conduct at a level below the dominance/substantial market power threshold ?** yes/no

Because the Act has no statutory dominance thresholds, the Bureau’s decision to intervene in an allegation of an abuse of dominance is done on a case-by-case basis. The Bureau may examine any matter but it must make a determination that market power exists in order to continue its examination of the matter.

**5. Does your jurisdiction’s analysis of dominance/substantial market power first require that a relevant product and geographic market be defined?** yes/no

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Within s. 79 (1)(a), the phrases “throughout Canada or anywhere thereof” and “a class or species of business” have been defined by the Tribunal as the relevant geographic and product markets, respectively. These must first be defined before a position of dominance within those markets can be assessed.

**6. Which of the following criteria do you use for the assessment of single-firm dominance/substantial market power?<sup>1</sup>**

- |   |        |
|---|--------|
| - Market share of the firm and its competitors        | yes/no |
| - Market position and market behavior of competitors  | yes/no |
| - Durability of market power                          | yes/no |
| - Barriers to entry or expansion                      | yes/no |
| - Economies of scale and scope/network effects        | yes/no |
| - Buyer power   | yes/no |
| - Access to upstream markets/vertical integration     | yes/no |
| - Access to essential facilities                      | yes/no |
| - Market maturity/vitality                            | yes/no |
| - Financial resources of the firm and its competitors | yes/no |
| - Profits of the firm                                 | yes/no |
| - High prices (at absolute or comparative level)      | yes/no |

**Please specify any other criteria that you use to assess single-firm dominance/substantial market power.**

Market share and barriers to entry, as mentioned above, are the primary indirect evidence the Bureau and the Tribunal consider in assessing whether or not a firm or group of firms holds a dominant position. High market share coupled with the presence of barriers to entry will often be sufficient to support a finding of market power. In its Guidelines, the Bureau states that it will look at other factors, such as the extent of technological change within the relevant market, the extent of excess capacity, and customer or supplier countervailing power. Factors such as economies of scale, sunk costs, regulatory barriers, network effects, and market maturity are considered when assessing barriers to entry. The distribution of the market among the dominant firm’s competitors is also relevant; a firm with a high market share may be more able to exercise market power when it faces a disparate group of small rivals compared to a single larger competitor.

The Bureau will also consider direct evidence of market power in assessing dominance. The Tribunal has accepted a 40% profit margin as an indicator of dominance in one case, as well as the ability to vary prices by region based on effective competition within those regions. However, in no case has the Tribunal found dominance on the basis of direct evidence alone; in every contested case under s. 79 to date, dominance has been found primarily on the basis of market share and barriers to entry.

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<sup>1</sup> The answer “yes” should be provided if you use this criterion (amongst other criteria) at least in some of your cases. Conversely, the answer “no” should be provided if in practice you have not ever used that criterion.

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Where abuse of dominance allegations involve a denial of access to an upstream market or “essential” facility, the Bureau must conclude that market power exists prior to declaring a facility “essential” and determining whether a denial of access may result in a substantial lessening or prevention of competition.

**7. Of the criteria that you use to assess single-firm dominance/substantial market power, which are the most important criteria?**

In every s. 79 case to date, whether contested before the Tribunal, resolved by consent order, or settled with the parties, dominance has been established, at a minimum, on the basis of market share and barriers to entry.

**8. Please explain how your authority evaluates each of the criteria that you use, and also how it weighs the different factors.**

The Bureau’s Guidelines state that any assessment of dominance will begin with analysis of market share and barriers to entry, followed by a consideration of any other market characteristics that may enhance or mitigate market power derived from market share and barriers to entry. Many of these factors are listed above, although the Bureau’s analysis may not necessarily be limited to those factors alone. Assessment of dominance is done on a case-by-case basis and the Bureau has no fixed process or strict weighted approach in considering all of these factors.

**9. How do you evaluate the competitive significance, if any, of intellectual property rights (patents, trademarks, copyrights, etc.) in assessing dominance/substantial market power?**

As mentioned above, the Bureau has published guidelines on the application of the Act to IP rights. It is the Bureau’s position that the right to exclude others from using a particular product or process through IP rights does not necessarily grant the owner of those rights market power. It is only after the Bureau has defined the relevant markets and examined factors such as market share and barriers to entry that it can conclude whether the owner of a valid IP right possesses market power. Technological change is also an important consideration. If effective substitutes for the IP have been or can be developed, or if there is a high probability that other participants in the market can otherwise “innovate around” or “leapfrog” the owner of that IP right, the Bureau will likely conclude that the IP has not conferred market power on its owner.

Consistent with its approach with respect to all other forms of property, the Bureau does not consider an owner of IP rights to have contravened the Act if it attained market power solely by possessing a superior quality product or process, introducing an innovative business practice, or by virtue of other exceptional reasons for performance.

**Is intellectual property presumed to create dominance/substantial market power in your jurisdiction?** yes/no

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**10. Does the assessment of dominance/substantial market power differ in a small or isolated economy from the assessment in a large or integrated economy? For example, might dominance in small markets be presumed at lower (or higher) levels of market share than in other jurisdictions? Do free trade agreements alter the assessment of dominance/substantial market power? If so, please explain why. [NB: Jurisdictions that do not consider themselves “small” economies are welcome to skip this question.]**

N/A

**11. Please explain briefly the link between the definition and assessment of dominance/substantial market power in your jurisdiction and the objectives of your unilateral conduct laws.**

S. 79 has no specific listed objectives, other than to prohibit the abuse of a dominant position that substantially lessens or prevents competition. The Bureau, in enforcing s. 79 in light of the objectives in s. 1.1 (see above section on objectives), concentrates on the effect that an abuse of dominance has on competition. Assessing dominance is one step in this process, but there is no direct link between how the Bureau assesses dominance and the objectives of the Act.

### **C. State-created Monopolies**

**Throughout this section of the questionnaire, the term “state-created monopolies” refers to firms that are dominant or that have substantial market power due to state-imposed restraints of competition. In most cases, these firms were (or are still) owned by the state and the state did not (or still does not) allow for any private competitor. In an effort to avoid duplication with the ICN’s previous work, this project does not address the interface with network access or price-cap regulation implemented by a sector-specific regulator. Accordingly, we request that you do not focus on sectors that are/were regarded as “natural monopolies” and that are now subject to such regulation. Therefore, please answer the questions excluding references to the *telecoms, energy, water, and railways* sectors.**

#### **I. State-created Monopolies**

**1. What are the main sectors of your country in which state-created monopolies exist? Please describe important sector examples, including whether these monopolies are state-owned<sup>2</sup>, state-controlled<sup>3</sup>, state-enabled or facilitated<sup>4</sup>, recently privatized and/or liberalized, regional monopolies,<sup>5</sup> etc.**

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<sup>2</sup> Those undertakings that are 100% owned by the State.

<sup>3</sup> The control belongs to the State, without taking into consideration the amount of the % of the State share.

<sup>4</sup> E.g. where a monopoly exists due to exclusive rights granted by the state or due to state-imposed restraints of competition.

<sup>5</sup> Includes public/private undertakings that are granted exclusive rights within a certain region.

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At present there are very few federal state-created monopolies remaining in Canada. Although Petro-Canada and Air Canada were founded as federal Crown corporations, they were both privatized in the 1980s, and never operated without some private competition. Many of the remaining sectors subject to federal control are regulated natural monopolies such as local telecommunications services and postal services,<sup>6</sup> which are not considered state-created monopolies per the above. The most notable state-enabled monopoly in Canada is the Canadian Wheat Board, which has been incorporated by law as the sole domestic and international seller of Canadian wheat. Others include remaining federal ownership of some airports. It is worth noting that state-owned corporations are subject to the Act to the extent they are engaged in commercial operations.

There are several provincial monopolies in Canada, however, which vary from province to province. Health and drug insurance, auto insurance, alcohol control, and gaming are commonly provincially-run, and some provinces maintain Crown corporations in sectors such as energy and telecom.

**2. Please discuss the objectives behind the creation and/or perpetuation of state-created monopolies by providing specific examples from your jurisdiction. If the rationale for retaining the state-created monopoly was challenged (for example as a condition of membership in an international organization or to join an economic alliance or regional trade agreement) or has changed over time, please explain.<sup>7</sup>**

As an example, the Canadian Wheat Board (“CWB”) was incorporated under the *Canadian Wheat Board Act* “with the object of marketing in an orderly manner, in interprovincial and export trade, grain grown in Canada.” The CWB, as the sole marketer of wheat, purchases all wheat grown by Canadian producers and then sells it both domestically and internationally as a single-desk trader, with the intention of leveraging its size to obtain the highest prices for Canadian wheat, which are then distributed back to the farmers. However, some producers have stated they would prefer to market their own wheat outside the CWB for a variety of reasons. Recently, the federal government has been considering removing the CWB’s legislative authority as a single-desk trader. To date the Bureau has not been involved in this process.

**3. Are there any legal or practical restrictions or difficulties faced by your competition agency in antitrust enforcement against state-created monopolies? If yes, please provide details and/or sample cases, for example:**

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<sup>6</sup> Canada’s postal agency, Canada Post, faces competition in many mail delivery markets such as courier and business services, but retains exclusive privilege in the delivery of lettermail, subject to universal service and uniform rate requirements. As the Bureau has argued in the past, and as the OECD found in its 1999 study into postal competition, it may not be the case that all forms of final delivery to all areas are characterized by natural monopoly. However, to the extent that postal service in Canada remains regulated because of these considerations, the Bureau has not included it in this questionnaire.

<sup>7</sup> *The relevant information for answering questions 2, 5 and 6 may not readily be available within your agency. In this case, it is not necessary for you to conduct a research effort.*

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- **Legal restrictions/scope of application: Is there a "state action defense" (i.e. competition law does not apply to state entities or state acts) or any special exemptions/exceptions for the state-created monopolies from the general antitrust law in your jurisdiction?**
- **Practical restrictions/difficulties: Please describe any practical restrictions that you have faced or may face in antitrust enforcement against state-created monopolies, such as instructions that your agency may receive from the government, political pressure, or overcoming vested interests.**

As mentioned in the objectives section above, the Bureau has recently published a Technical Bulletin on Regulated Conduct outlining enforcement of the Act with respect to conduct that may be regulated by another federal, provincial, or municipal law. With respect to a federal state-created monopoly as defined above, the Bureau will assess whether the Act and the other federal law(s) creating/enabling that monopoly can be read harmoniously, and whether the party can reasonably comply with both. With respect to potential anti-competitive conduct, therefore, the Bureau will apply the Act unless it can be determined that Parliament intended the other federal law prevail, either by clear language in the Act or by the other federal law authorizing or requiring the particular conduct, or, more generally, providing an exhaustive statement of the law concerning a matter.

Where a particular activity is regulated by a provincial law, the Bureau will consider whether the Act takes precedence through federal paramountcy or whether the regulated conduct defence applies, depending on whether the provincial law authorizes or requires the conduct in question. The Bureau will not refrain from pursuing regulated conduct simply because the provincial law may be interpreted as authorizing the conduct or is more specific than the Act, given that the Bureau's mandate is to enforce the law as directed by Parliament, not a provincial legislature or its delegate.

#### **4. How does the assessment of dominance/substantial market power of state-created monopolies differ from other dominance/substantial market power cases?**

The Bureau's assessment of dominance will not differ between regulated or state-created monopoly sectors and other unregulated sectors.

## **II. Privatization and Liberalization Process and the Advocacy Role of Competition Agencies**

#### **5. Please briefly describe the ongoing or past privatization and liberalization process in your country. Is there a specific legal framework for the privatization in your country (e.g. a specific privatization law)?**

As mentioned, most of Canada's state-created corporations such as Air Canada, and Petro-Canada were privatized more than twenty years ago. The Bureau has very little recent experience with privatization and, instead, has been involved primarily in the

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liberalization of regulated natural monopoly industries such as telecommunications and energy. Those experiences will be discussed below.

**6. What are the objectives of your government in the privatization and liberalization of state-created monopolies (for example, raising competition/consumer welfare, maximizing revenue from the sale, etc.)?**

The federal government may pursue a variety of objectives in privatizing or liberalizing certain sectors of the economy. The government is currently debating removing the CWB's legislative authority in the interests of providing wheat producers with more marketing options. As part of an ongoing move toward deregulation in telecommunications, the federal government recently issued a directive to the Canadian Radio-television and Telecommunications Commission ("CRTC") instructing them to rely on market forces to the maximum extent possible. When the federal government began selling airports to local authorities in the 1990s as part of its National Airport Policy, it stated that it intended to promote cost-efficiency and the matching of services to user needs through privatization. By transferring most airports from federal to private control, the government intended to subject airports to market discipline to directly meet the needs of their users, while also transferring the cost of operation from taxpayers to users.

**7. Is competition law applicable to privatization transactions (e.g. approval of interested bidders or the successful bidder under its merger control powers)?**

The Act enables the Bureau to review any transaction whereby control over, or a significant interest in, the whole or a part of a business of another person is acquired or established, to determine whether it is likely to result in a substantial lessening or prevention of competition. These transactions include all horizontal mergers and vertical and conglomerate transactions. In addition, the Bureau must be notified of all mergers that exceed certain size thresholds prior to completion. For example, the transactions involving the privatization of airports were reviewed by the Bureau.

**8. Please summarize the advocacy role of your agency in the privatization and liberalization of state-created monopolies, including as applicable:**

- **What are the legal instruments used by your agency for that purpose? To what extent are other government entities obliged or encouraged to seek the competition agency's opinion on or approval of privatization and/or liberalization proposals?**
- **To what extent does the advocacy role of your agency have impact on privatization and liberalization? Please provide examples of successes or failures if available.**

The Bureau has a policy role as advisor to the government on competition-related matters. As such, the Bureau has made frequent submissions on competition issues to government departments, the Governor-in-Council (Cabinet), and Parliamentary bodies. The Bureau also advocates competition policy in interventions before federal and

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provincial regulatory boards, commissions, and tribunals. This advocacy role is a statutory right pursuant to sections 125 and 126 of the Act.

Much of the Bureau's recent advocacy work has been in relation to the liberalization of regulated natural monopolies such as telecommunications and energy where regulation may distort or have anti-competitive effects on certain markets. For example, the Bureau has frequently intervened before the CRTC during proceedings on the deregulation of telecommunications services. The CRTC has adopted the Bureau's merger enforcement guidelines to define markets for the purposes of competition analysis and has given great import to past Bureau submissions on telecom liberalization and deregulation.

Past competition advocacy has also included input to appropriate government agencies regarding airports, airlines, rail, ports, financial institutions, dental hygiene, and broadcasting.

**D. General**

1. From among the following, how would you characterize your jurisdiction:  
**developed** / developing / transitioning?
2. Please provide English-language citations to or summaries or excerpts of legislative history, leading judicial or agency decisions, or articles that explain your jurisdiction's choice of its unilateral conduct law objectives, its definition and assessment of dominance/substantial market power and/or its approach to state-created monopolies and privatization.

The Act itself is available to read in whole on the Competition Bureau's website:

<http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1140&lg=e>

The Bureau's approach to assessing dominance in relation to unilateral conduct can be read in the Bureau's enforcement guidelines on the abuse of dominance:

<http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1251&lg=e>

The Bureau's approach to the interface between competition law and intellectual property rights can be read in the Bureau's IP enforcement guidelines:

<http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1286&lg=e>

The Bureau's bulletin on regulated conduct is also available on the Bureau's website:

<http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=2141&lg=e>

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Relevant jurisprudence on dominance is available from the Competition Tribunal. While the decisions contested under s. 79 are too lengthy to include here, select portions have been summarized above, and are also included in the Bureau's enforcement guidelines. The decisions themselves can be read at the Tribunal's website:

**Director of Investigation and Research v. The Nutrasweet Company (1990)**

[http://www.ct-tc.gc.ca/CMFiles/CT-1989-002\\_0176a\\_38IHV-12202004-3351.pdf](http://www.ct-tc.gc.ca/CMFiles/CT-1989-002_0176a_38IHV-12202004-3351.pdf)

**Director of Investigation and Research v. Laidlaw Waste Systems Ltd. (1992)**

[http://www.ct-tc.gc.ca/CMFiles/CT-1991-002\\_0072\\_38LSM-4132004-2121.pdf](http://www.ct-tc.gc.ca/CMFiles/CT-1991-002_0072_38LSM-4132004-2121.pdf)

**Director of Investigation and Research v. D&B Companies of Canada Ltd. (A.C. Nielsen) (1995)**

[http://www.ct-tc.gc.ca/CMFiles/CT-1994-001\\_0142a\\_45PGS-4152004-4447.pdf](http://www.ct-tc.gc.ca/CMFiles/CT-1994-001_0142a_45PGS-4152004-4447.pdf)

**Director of Investigation and Research v. Tele-Direct (Publications) Inc. (1997)**

[http://www.ct-tc.gc.ca/CMFiles/CT-1994-003\\_0204a\\_38LFB-472004-7743.pdf](http://www.ct-tc.gc.ca/CMFiles/CT-1994-003_0204a_38LFB-472004-7743.pdf)

**The Commissioner of Competition v. Canada Pipe Ltd. (2005)**

[http://www.ct-tc.gc.ca/CMFiles/CT-2002-006\\_0079b\\_38KCZ-9272006-4715.pdf](http://www.ct-tc.gc.ca/CMFiles/CT-2002-006_0079b_38KCZ-9272006-4715.pdf)

**The Commissioner of Competition v. Canada Pipe Ltd. (2006)**

<http://decisions.fca-caf.gc.ca/en/2006/2006fca233/2006fca233.html>

<http://decisions.fca-caf.gc.ca/en/2006/2006fca236/2006fca236.html>

Please note that *Canada Pipe* is currently under appeal.

Jurisprudence from the Federal Court of Appeal on the interpretation of s. 1.1, as referenced above, is available at the Court's website:

**The Commissioner of Competition v. Superior Propane Inc. and ICG Propane Inc. (2001)**

<http://decisions.fca-caf.gc.ca/en/2001/2001fca104/2001fca104.html>