



Unilateral Conduct Working Group



Webinar on Evidence used in the enforcement against unilateral conduct

Thursday, 27 November 2025

15:00 – 16:30 CET (UTC+01:00)

Moderator

Vera Pozzato, Policy Officer, Antitrust Case Support and Policy, European Commission, DG COMP

Speakers

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This webinar will be recorded. The recording will be made available on the ICN webpage.

Participants will be muted at their entry. **For questions, please use the chat option.**

Evidence can (and should) be Fun!



Several stories about Gathering and Presenting
Evidence in Unilateral Conduct Cases

Jonathan (Yonatan) Cwikel, Adv.

Deputy Chief Legal Counsel (Administrative/Civil Affairs)

Jitters and Bugs



- Easy case
- Easy witness
- And still...

Key points

- We're different, but also the same
- Your case is going to court, so you better be ready

Be Creative

→ Creatively uncover evidence (literally)

Be Interesting



Lively evidence is lovely evidence

Be Surprising

→ Corner your witness with the power of their words

Conclusion

- Spice up your evidence and presentation
- But don't forget "the numbers"!

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Thanks!





Successful use of economic evidence in unilateral conduct cases

ICN UCWG seminar

*Pascale Déchamps, Partner
NGA to DG Comp (European Commission)*

27 November 2025



Topics covered



What is economic evidence?



What are the types of economic evidence and how to gather it?



What is it successfully used for?

- Defining markets and assessing the extent of market power
- Determining ability and incentives to engage in a particular conduct
- Assessing the existence of objective justification and (potential) anticompetitive effects



What is economic evidence?

- From **simple** indicators and mechanisms to **sophisticated** theories of harm and modelling
 - But **key is the framework** to apply to understand and explain firms' behaviour
 - Where the law is a priori form-based, economic reasoning is **effects-based**

- Combining economic reasoning with the legal frameworks helps **reduce over-enforcement as well as under-enforcement**
 - Two different conducts can lead to the same economic effect
 - Eg exclusivity contracts and loyalty rebates
 - The same conduct can have different economic effects depending on market circumstances
 - Exclusivity contracts covering only a small part of demand may not lead to foreclosure (and therefore no anticompetitive effect)

- The added value of economics is not in making everything more complicated and very case specific.
 - The case of economics is about 'how well the rules are grounded in economics' (Vickers 2005)
 - It is most effective when **providing educated presumptions** and pointers that can then be further investigated when doubts remain
 - Particularly true for smaller markets, where a dominant position can be more easily achieved and sustained
 - Competition economics has developed into an **analytical 'toolbox'** which can be used to **understand market outcomes and firm conduct**.
 - menus of possible theories of harm to competition which can be tested against the available evidence.
 - Economics is the framework for **organising and assessing this evidence**.
 - It questions the following aspects of the dominant firm's behaviour
 - Its ability to have anticompetitive effects
 - Its incentives in entering into an anticompetitive strategy
 - The potential objective justification underpinning the practice
 - The (potential) anticompetitive effects arising from the practice



What are the types of economic evidence and how to gather it?

Types of economic evidence

→ 'Raw' data

- **Market data** (eg industry reports) on volumes, sales, market shares, product range
- **Company data** (eg list and discounted prices, sales, product range, switching data, strategy)
- Ad hoc data collected for the needs of the investigation, eg customer surveys

→ Framing the data

- Providing **dedicated economic analysis and reports** on specific topics of interest
 - Such type of economic evidence needs to meet appropriate standards to allow for assessment, replication and hypothesis testing
- **Articulating the theory of harm in legal submissions** and ensuring consistency in reasoning with market facts
- Economists tend to disagree – economics is not a hard science
 - Combine economic evidence with other documentary evidence (eg internal documents)
 - If disagreements come from differences in facts, helpful to determine what the true factual landscape is and take a decision
 - If disagreements come from how to frame the facts, helpful to encourage decision makers to think through the reasons why a particular framework may be more appropriate than another

Gathering economic evidence

→ From complainants

- Typically the first to provide information on market definition, market shares, and conduct
- If they do not, they should be asked whenever possible
- **Beware of bias** in favour of narrow market definition and strong anticompetitive effects, sometimes with fragile theory of harm in-between
 - Their (difficult) situation may be the result of other factors than an anticompetitive behaviour by the dominant firm

→ From defendants

- RFIs with request for data
- Internal documents containing relevant information (eg board minutes, marketing presentations, business unit performance reports)
- **Beware of bias** in favour of wide market definition, strong objective justifications, weak alternative explanations for market changes

→ From public sources

- Especially for market definition and trends
- Sector specific publications (can be requested from parties if costly)
- Broker reports for the defendant, complainant and competitors
- **Beware of limitations** like differences in approach between business analysts and competition authorities and sometimes the poor quality of the underlying data
- Though with limitations, can be a useful and reliable source of information, especially to ask more specific questions to avoid elusive answers

→ Developing internal expertise

- **Triangulate and cross-check**



What is economic evidence used for?

Defining markets and assessing the extent of market power

- To establish dominance, economic analysis can focus on two key contributors:
 - Limitations to substitutability and
 - Entry barriers that insulate the firm in question from competitive pressures

Market definition

- About determining the product and geographic space the firm operates in
 - Substitutability of demand a key driver
- Can be assessed using economic reasoning and evidence collected on the market:
 - Product characteristics and price differences, customer surveys, event analysis, switching studies, tender analysis
- Beware of the 'cellophane fallacy': the existence of a dominant firm may lead to the definition of a market that is wider than it should be if there was competition

Market power

- About market shares, barriers to entry and other determinants of competition
 - Small market shares (lower than 40%, or higher threshold elsewhere) can be used as a safe harbor to dismiss dominance
 - Situation of competitors (eg relative market shares)
 - Level of barriers to entry
 - Other determinants may be relevant depending on cases
 - Existence of over-capacity or capacity constraints
 - Existence of trade flows in and out of the relevant market
 - Possibility of vertical integration



What is economic evidence used for?

Determining ability and incentives to engage in a particular conduct

- Basic assumption underpinning all economic reasoning:
 - **Firms are profit maximising**
 - They would not engage in a practice unless it results in higher profits
 - Now or later
 - In the same market or in another market
 - Reasoning mirrors the one used in merger control
 - Economic evidence helps articulate the **causal link between the practice and anticompetitive effects**: there are no other good explanation for market outcomes but the identified practice
 - In many jurisdictions, the legal framework has been adapted to take into account the concepts of ability, incentives to induce anticompetitive effects through a particular behaviour
- **Ability**: is the practice capable of inducing foreclosure?
 - Eg are there alternative sources of supply?
- **Incentives**: is the practice profit maximising?
 - Eg Foreclosure means foregoing some sales and margins somewhere. Is it compensated by higher sales somewhere else (or later)?
- The matter of the **as-efficient-competitor (AEC) principle** and **the AEC test**
 - Capability is all about determining whether an as-efficient-competitor would be able to compete with the dominant firm
 - If not, the practice is capable of having anticompetitive foreclosure effects
 - It is a useful framework that requires looking at
 - **Contestable demand**
 - Eg How much of the market is prevented from switching due to the practice?
 - The **magnitude of the potential distortion**
 - eg how large would the price discount need to be to match the dominant firm's? How long are the contracts? Do they have staggered end dates?
 - The AEC test is an economic exercise that compares the dominant firm's prices with its own costs: if prices exceed costs, the intuition is that an as efficient competitor can match these prices and the practice is not anticompetitive
 - However, such tests raise significant implementation challenges
 - It is possible, for some types of practices, to have anticompetitive foreclosure effects without 'sacrifice' in the form of price below cost
 - Such tests are now considered less useful (at least in the EU)
 - But the overall framework of thinking about how an as efficient competitor would be able to develop remains relevant and insightful



What is economic evidence used for?

Assessing the existence of objective justification and (potential) anticompetitive effects

Objective justification

- Some practices may be **economically justified** to achieve a particular objective
 - Eg some exclusivity, for small firms, may help them secure trading partner investment that may otherwise not be undertaken
 - Same holds for the launch of new products by large firms, for which demand is ex ante uncertain
- However, for a particular objective to be taken into account in the context of a unilateral conduct assessment, it needs to be
 - **Necessary**: the effects cannot be achieved with fewer anticompetitive effects with a different behaviour
 - **Proportionate**: the effects cannot be achieved with a lighter version of the same practice
- Economic evidence helps **quantify alleged effects** as well as **test the underlying rationale**
 - Strong reliance on internal documents as evidence of the alleged benefits of the practice

Potential and actual anticompetitive effects

- In case of multiple practices, the assessment includes all of them together
- Finding foreclosure is not enough, it needs to be anticompetitive
 - Vigorous competition can clearly undermine competitors – better products at cheaper prices mean consumers switch.
 - Conduct is only anti-competitive if it impairs the abilities of actual or potential rivals to compete in ways which differ from normal competition ‘on the merits’.
- For example, if the practice is capable of foreclosing, but there is no one that would actually compete absent the practice, there is no anticompetitive effect
- What would be the situation absent the practice?
 - **Counterfactual analysis** always useful – economic analysis and reasoning helps build strong factual and counterfactual scenarios
 - Also helps to figure out **how to solve the potential issue** (eg with commitments)

Useful references



- *Economic analysis and evidence in abuse cases*, Background note by Simon Roberts, OECD 23/03/2022
- *Commission staff working paper best practices for the submission of economic evidence and data collection in cases concerning the application of articles 101 and 102 TFEU and in merger cases*, DG Comp, 17/10/2011
- *Final Report of Economic Evidence Task Force*, by Jonathan B. Baker, M. Howard Morse and Co-Chairs of the Economic Evidence Task Force, 01/08/2006



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**Collection and review of internal documents in unilateral
conduct cases**

Presented to-
**ICN Unilateral Conduct Working
Group**

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Senior Legal Advisor
Luthra and Luthra Law Offices India

Unilateral Conduct by a dominant enterprise in India is prohibited



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- Conduct of an Inquiry is a pre-condition before passing of an adverse sanction and/or imposition of penalties.
- Unilateral Conduct involves 4 steps:
 - i. Charged party is an enterprise;
 - ii. Enterprise is dominant in the relevant market;
 - iii. Indulges in one or more abusive conduct; and
 - iv. It has appreciable adverse effect on competition, market, consumer.
- On receipt of information/reference/ suo motu, the CCI may form a *prima facie* view that there exists a case of unilateral conduct (UC) requiring investigation.
- CCI is mandated to send the alleged matter of UC to DG along with material in its possession for investigation.
- DG in carrying out investigation is blessed with powers of a Civil Court while trying the suit and these include, (i) calling of information, (ii) summoning and enforcing the attendance and examining him on oath, (iii) production of documents, evidence on affidavit,(iv) examination of witness and (v) requisition of public records.
- DG can undertake search and seizure after approval from CMM, Delhi
- DG is mandated to abide by “principles of natural justice”.



Dominance is not per se bad. Apart from market share of the enterprise, the CCI may look at size, resources, and importance of competitors, commercial advantage over competitors, dependence of consumers, government company, countervailing buying power, economic contribution.

Abuses are imposition of unfair or discriminatory prices (including predatory price, limiting production, denial of market access, contract subject to unrelated obligations, leveraging dominance from one market to another).

Internal documents of enterprise are essential – they provide direct evidence, strategic intent, rationale and internal decision-making process.



Collection of internal documents

- DG on examination of *prima facie* view assigns a case to one of his Additional/Joint DG who works under his direction/supervision.
- Ordinarily, in the first instance, DG calls for information/documents relating to the charged party, its products, market share, product wise details of competitors, along with their market share, details of upstream and downstream market, list of customers, email dumps, copies of communications, agreement with verticals, price list and details of sale promotion schemes including details of board and KMPs and such other specific information as may be required to find abusive conduct.
- Every care is taken by DG to ensure that commercial sensitive information does not become public.
- To comfort the person, to share the information/ documents without hesitation mechanism of masking the confidential information exists.
- Third parties, statutory authorities can also be asked to furnish information/documents and they also have the privilege of claiming confidentiality.
- Penalty gets triggered if party fails to furnish, or suppress or mutilate or destroy information/document.



Review of documents

- The veracity of collected information/document is analysed and reviewed in light of:
 - Factual claims made in filings with authorities, information given in Chairman's Report, Boards Report and explanations attached to the proposed resolution.
 - Voluminous records are analysed, examined with the assistance of independent forensic agency or data analytics engaged by DG.
 - Opinions of sectoral regulators, as applicable are also taken into consideration by DG.
- Collected information including electronic records are cross-checked and for that assistance of data management wing of CCI is taken.
- With the approval of the CCI, the DG can call upon such experts, from the required fields of to seek his views on the documents collected and the conduct practiced.



Challenges in collection of documents

- Many a times, there is absence of formal documents, or contents of the document are unsigned or its data is ambiguous and the practice is based on informal understanding or arrangement.
- Document may lack clarity and is subject to different interpretation.
- The collected document may lack authenticity.
- Many a times, there is no evidence of meeting of minds or of human intervention.
- Legal profession privilege exists but, as per decisional practice, in-house legal counsels cannot claim privilege if questioned. Under the amended law, the Inhouse Counsel can be examined by the DG.
- Data privacy challenge: There remains capacity building constrains as well as development and awareness constrains to deal with cross-border flows and smart contracts.
- Data servers may lie outside India, and until recently, this was a huge problem to collect internal documents.

Best Practices



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- i. KMPs are examined on oath and the deponent is asked questions in relation to the terms of the document which may not be made available by the party. The deponent is not permitted to take the assistance of counsel at that time.
- ii. The amended law now empowers DG to call “In house Counsels” and his evidence can be recorded, overcoming the issue of privilege.
- iii. In order to maintain secrecy of search and seizure, the power granting search warrant lies exclusively with the Chief Metropolitan Magistrate, Delhi.
- iv. When Information is not forthcoming and is suspected to be mutilated, ‘search and seizure’ tool is deployed.
- v. Data privacy issues have been largely resolved by laying down parameters for claiming confidentiality
- vi. Submissions made by the charged company and KMPs must be signed by authorized official and duly verified and notarized.
- vii. Penalty can be imposed if the entity does not cooperate with the DG during the course of investigation.



Artificial Intelligence

- i. CCI is actively planning and developing its capacity to use AI
- ii. Data source tools to analyse large volumes of document/data.
- iii. CCI recognises that traditional analysis methods are insufficient.
- iv. While specific tools are not in public, the focus on technical skills indicate that the use of advance E-discovery is going to be there.
- v. CCI is encourages large companies to perform 'self audit' through the use of AI.
- vi. Coordination with Ministry of Information and Technology and DPDP Board is planner to harmonise standards.
- vii. CCI is collaborating with other contemporary competition authorities.



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Concluding remark:

“While markets differ significantly from one another, the evidence standards are high in all cases so the challenge remain on how to effectively collect evidence, successfully use it in specific cases, and how to interpret and present it before the authority in order for the case to be successful.”



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THANK YOU



COLLECTION OF EVIDENCE THROUGH INSPECTIONS IN UNILATERAL CONDUCT CASES

Ms. Mapato Ramokgopa
Divisional Manager, Market Conduct
Competition Commission South Africa

27 NOVEMBER 2025

CONTENT

1. UNILATERAL CONDUCT - PROVISIONS ON ABUSE OF DOMINANCE
2. OVERVIEW OF THE SOUTH AFRICAN ECONOMY
3. METHODOLOGY FOR INVESTIGATING UNILATERAL CONDUCT
4. INSPECTION EXPERIENCES RELATED TO ABUSE OF DOMINANCE
5. CONCLUSION



Introduction

UNILATERAL CONDUCT – ABUSE OF DOMINANCE IN SOUTH AFRICA

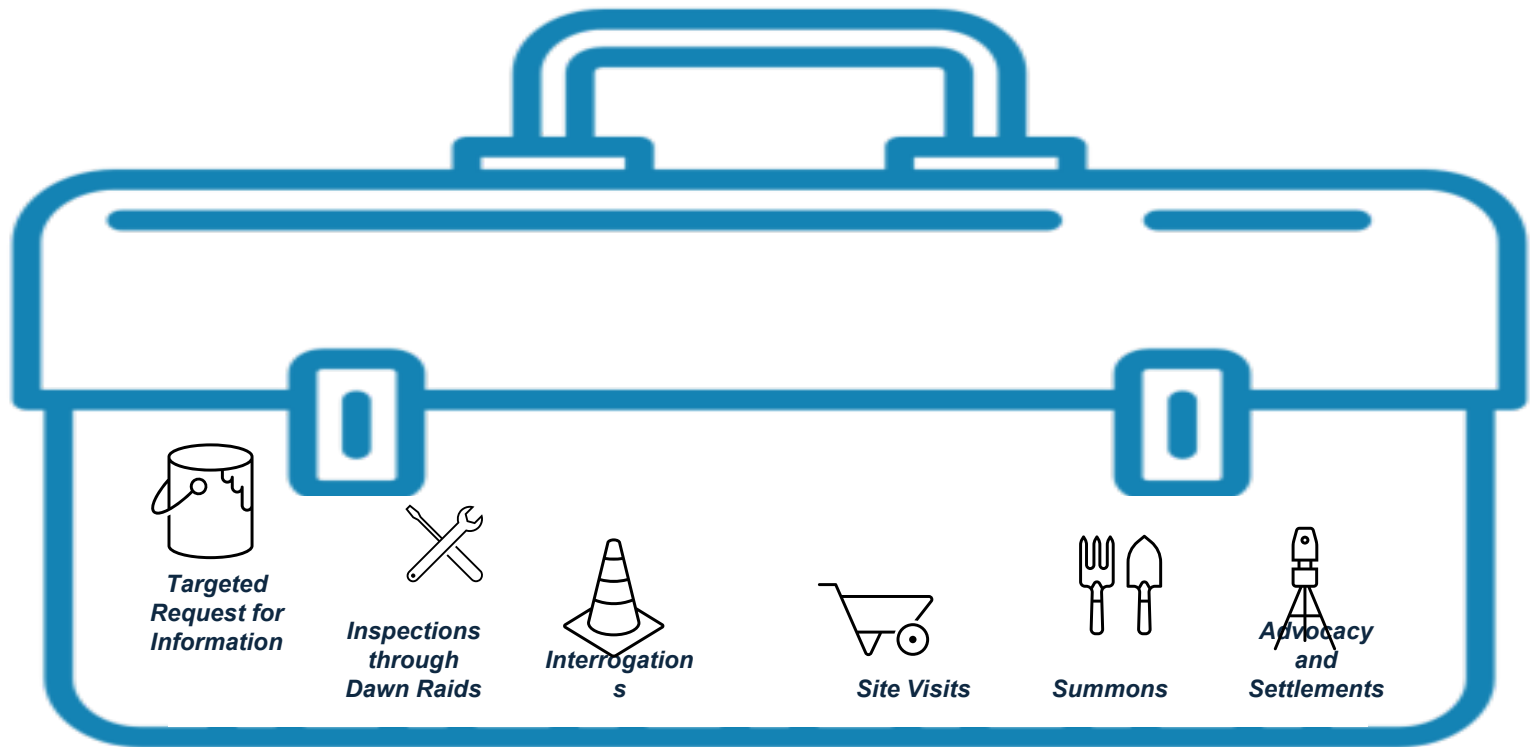
- Abuse of dominance (AOD) occurs when a dominant company, or a group of dominant companies in a market, engages in actions intended to remove or block competitors, or to deter new entrants, thereby significantly reducing or limiting competition.
- Sections 8 and 9 of the South African Competition Act cover abuse of dominance, including unilateral conduct such as
 - Charging excessive prices,
 - Engaging in price discrimination,
 - Denying competitors access to essential facilities,
 - Exclusionary practices like refusing to supply goods, persuading third parties to avoid dealing with competitors, predatory pricing, bundling, and acquiring scarce inputs.
- The Competition Act also permits consideration of Public Interest to promote the participation of SMMEs and Historically Disadvantaged Individuals in investigations related to AOD.

SOUTH AFRICAN ECONOMY IN CONTEXT

Key Characteristics of South African Economy

- High concentration and barriers to entry
- Low participation in highly concentrated sectors
- Presence of smaller, fringe companies struggling to grow
- SMEs represent majority of firms, 38% employment
- SMEs contribute 24% of taxable firm value
- 294 dominant companies across 31 sectors
- Dominant firms in critical sectors of the economy, agriculture and agroprocessing, healthcare, and the industrial sectors
- The concentrated nature of the South African economy increases its susceptibility to potential abuse

Toolbox of the Commission in the Enforcement of Abuse of Dominance investigations



INSPECTION – DAWN RAIDS

CCSA Search and Warrant Powers:

The legal authority for these raids is derived from Chapter 5, Part B of the South African **Competition Act 89 of 1998**

- Enter and search premises broadly
- Search any person with reasonable grounds
- Examine articles or documents on premises
- Seize relevant documents related to investigation
- Reproduce records from electronic systems
- Obtain a warrant if prohibited practice suspected
- Believe investigation-related items on premises

CCSA EXPERIENCE IN INSPECTIONS FOR ABUSE OF DOMINANCE

- The CCSA has typically **not conducted dawn raids in cases of abuse of dominance.**
- This approach is influenced by the complexity of the offence and the extensive legal and economic analysis involved.
- Dawn raids are mainly effective for uncovering covert cartel activities, allowing authorities to quickly seize direct evidence before it can be destroyed.
- Evidence for abuse of dominance cases tends to involve strategic, economic, and financial data from companies, reflecting their business behavior and methods of exploiting market power.

INSPECTIONS – FOR ABUSE OF DOMINANCE (CONT..)

- **Nature of the evidence:** Abuse of dominance cases often involve complex, long-term commercial strategies, economic data, and market analysis, rather than the "smoking gun" documents or direct communications typically found during a surprise search for cartel activity (e.g., price-fixing agreements or bid-rigging notes). The evidence for abuse cases is generally more analytical and often available through formal information requests.
- **High evidentiary burden:** Proving an abuse of dominance requires a significant legal and economic analysis to show a firm is dominant and that its conduct has a substantial anti-competitive effect that outweighs any pro-competitive gains. This is a higher and more complex legal hurdle than proving the existence of a *per se* prohibited cartel agreement, making evidence gathered through a single dawn raid less likely to be sufficient on its own.

INSPECTIONS – FOR ABUSE OF DOMINANCE (CONT..)

- **Historical difficulty in prosecution:** The CCSA has historically had a poor track record of successfully prosecuting abuse of dominance cases before the Competition Tribunal and higher courts, with many cases being closed, settled, or rejected. This has led the Commission to explore other mechanisms, such as market inquiries, to address structural issues in concentrated markets.
- **Legal challenges:** Search warrants for dawn raids can be legally challenged if the Commission does not have "reasonable grounds" to believe evidence of a prohibited practice exists on the premises. In the past, the High Court has set aside warrants where the Commission relied on insufficient evidence making the CCSA cautious on the use of this tool.
- The use in complex abuse cases where the initial suspicion might be harder to establish than in a clear-cut cartel case robustly.

CONCLUSIONS

- The Commission recognizes that conventional enforcement methods, such as dawn raids, can be useful in addressing entrenched structural obstacles.
- It has deployed numerous tools to combat persistent market concentration, as well as the market power and unilateral conduct resulting from it.
- Market concentration is a structural issue; it demands robust tools that go beyond detection of conduct – tools must enable implementation of meaningful structural remedies.
- However, due to the complexity and evidential demands of AOD cases—which require detailed legal and economic evidence—inspections have not been conducted by the CCSA.
- There has been a general sense of cooperation with requests for information, and where difficulties emerge, summons and interrogations have been effective.
- The tool has not been used for AOD, BUT IT REMAINS A TOOL available.



Thank you



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Canada

Bureau de la concurrence
Canada

Canada

ICN UCWG Webinar: Evidence used in the enforcement against unilateral conduct

Challenges in evidence gathering in unilateral conduct investigations

November 27, 2025

Production orders issued under section 11 of the *Competition Act*

- The Canadian Competition Bureau (**Bureau**) is an independent law enforcement agency that is responsible for the administration and enforcement of Canada's antitrust law, the *Competition Act* (**Act**).
- The Act provides the Commissioner of Competition (**Commissioner**) with formal information gathering tools:
 - The Commissioner may apply for a court order (typically through the Federal Court of Canada) to compel parties to provide records and information relevant to a Bureau investigation, pursuant to **section 11** of the Act.
 - To grant the court order, the Commissioner needs to satisfy that:
 - a) an inquiry (formal investigation) has been commenced; and
 - b) the person against whom the order is sought has or is likely to have information that is relevant to the inquiry.

Examples of challenges relating to section 11 productions

- The Bureau has observed challenges in section 11 productions, specifically in relation to:
 - a) privilege claims, and
 - b) production deadlines.
- Section 11 orders provide respondents with the ability to redact certain portions of a document or fully withhold the production of a document that is subject to **privilege** (e.g., solicitor-client privilege, settlement privilege, and litigation privilege).
- Section 11 orders specify the **timeline / deadline** upon which records and information sought by the order must be produced to the Bureau.

A. Issues with privilege claims

Overbroad claims of privilege

- The Bureau has observed that there has been a trend in section 11 productions where respondents claim privilege over a substantial percentage of relevant records.

Insufficient information to assess the validity of privilege claims

- Where a respondent claims privilege over a document, section 11 orders require respondents to provide the Bureau with a **privilege log**, which contains information on the documents over which privilege is claimed as well as the nature of the privilege claim.
- The Bureau has dealt with challenges where respondents do not provide sufficient information that would allow the Bureau to assess the validity of the privilege claim.

Tools to address issues with privilege claims

Informal / voluntary approach to correct improper privilege claims

- The Commissioner may resolve concerns over improper claims of privilege collaboratively with respondents (voluntary review).

Formal measures

- The Commissioner may file a motion to the Federal Court (pursuant to the Federal Court Rules) to compel the respondent to provide additional information to assess the basis of the privilege claims.
- In relation to solicitor-client privilege, the Commissioner may rely on section 19 of the Act to:
 - have a judicial member of the Federal Court review the contested privilege claims; or
 - have an independent referee (not a judicial member), with the consent of a respondent, to initially review the contested privilege claims and subsequently make a report to the Federal Court for records the referee believes contain any incorrect privilege claims.
- The Commissioner may negotiate, on a without prejudice basis, a process by which a third-party referee or arbitrator reviews contested privilege claims.

B. Issues with production deadlines

- Case law has established standard production deadlines as follows:
 - 60 days for simple or straightforward orders;
 - 90 days for more complex orders;
 - 120 days for rare and exceptional cases
- Challenges may arise when respondents seek to extend production deadlines, which may cause delays in our investigations



Tools to address issues with production deadlines

Informal / voluntary requests from respondents seeking the Commissioner's consent to extend production deadlines

- Respondents may seek the Commissioner's consent to extend court-imposed production deadlines

Dialogue with respondents

- Pre-application dialogue
- Pre-production dialogue and sample production

Formal measures

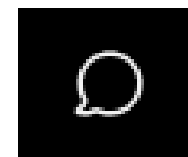
- Where respondents choose to file a motion to vary the production deadline of a section 11 order (through Federal Court Rules), the Commissioner may appear before the court to justify why an extension is not warranted
 - Case example: Amazon Canada recently sought to vary the terms of a section 11 order issued against it, specifically as it relates to the production deadline contemplated by the order



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Question & Answers



Please put your questions into the webinar chat window

To contact speakers for a follow-up question after the webinar, please write an email to:
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