

Competition Bureau releases updated guidance on enforcement approach to property controls

JUNE 25, 2025 10 MIN READ



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On June 4, 2025, the Competition Bureau (the Bureau) published its finalized [guidance Competitor Property Controls and the Competition Act](#) (the CPC Guidance), regarding the application of the *Competition Act* (the Act) to competitor property controls. Competitor property controls (notably, exclusivity clauses and restrictive covenants) are provisions used in leases and other commercial real estate agreements imposing restrictions on the use of real property.

The CPC Guidance reflects the Bureau's generally skeptical stance towards the use of property controls, blending advocacy with an outline of their legal enforcement approach. While this advocacy-oriented tone may limit the CPC Guidance's utility from a strictly legal standpoint, the finalized version offers some notable improvements over the interim guidance issued in August 2024. Specifically, the CPC Guidance includes welcome clarity that property controls are not presumptively anti-competitive, and are only actionable under the Act if the applicable legal tests are satisfied. Additionally, the CPC Guidance provides more detailed insights into the Bureau's analytical framework, offering stakeholders greater predictability regarding enforcement priorities.

Property controls satisfying certain legal requirements can be challenged by the Bureau or private parties (having obtained leave) under the civil agreement provisions of Section 90.1, or the abuse of dominance provisions of Section 79 of the Act. Under Section 79, the Competition Tribunal can issue a prohibition order where a firm is both (i) dominant, and (ii) either (a) is engaged in a practice of anti-competitive acts or (b) its conduct has had or is likely to result in a substantial prevention or lessening of competition (SPLC) and the effect is not the result of superior competitor performance. If all three of these elements are satisfied, the Competition Tribunal can issue prescriptive orders, such as divestitures of assets or shares, or financial penalties, including substantial administrative monetary penalties and monetary relief based on the benefit derived from the anti-competitive conduct). Under Section 90.1, enforcement action can be taken, and similar remedies can be obtained in relation to arrangements between non-competitors that are likely to result in an SPLC where a "significant purpose of the agreement or arrangement, or any part of it, is to prevent or lessen competition in any market."

Key takeaways

1. The CPC Guidance acknowledges the limits of enforcement action under the Act.

In its interim guidance, the Bureau focused on “justification” as the principal basis on which all property controls would be assessed, and indicated that property controls can be justified only where required by a prospective tenant to proceed with an investment. In the CPC Guidance, the Bureau continues to advocate for the limited use of property controls (i.e., only where required to incentivize investment), but acknowledges that property controls that may not be “justified” from the Bureau’s perspective do not necessarily meet the legal requirements for anti-competitive conduct under the Act, and cannot, therefore, be subject to enforcement action under the Act. The Bureau has revised its guidance to reflect that, in cases where there is no dominant firm, the degree of market impact as measured under the SPLC test, irrespective of justification, will determine whether anti-competitive conduct for the purposes of the Act has occurred.

2. The CPC Guidance offers insight into how the Bureau will evaluate whether an SPLC has occurred as a result of a property control.

The SPLC test is a necessary precondition for enforcement under the civil agreement provisions of Section 90.1 and for obtaining a remedy, beyond a prohibition order, under the abuse of dominance provisions of Section 79. The CPC Guidance emphasizes that the assessment of any SPLC arising from property controls is inherently a fact-specific exercise, requiring an analysis of the property control’s effect on competition, and whether it creates, increases or protects the market power of one of the market participants, or is likely to do so.

The Bureau’s analysis focuses on the barriers to entry or expansion that the property control may impose on competitors of the party benefiting from the control, as well as the overall state of competition in the market. The Bureau may consider the following questions:

- Are there other competitors already in the market?
- How effective are competitors?
- Are there other feasible options for commercial real estate available to competitors?
- Would competitors be less effective if they used other commercial real estate?
- Does a competitor need to establish several stores in an area to be effective?
- Are there other barriers to entry or expansion that already exist that may compound the effects of the property control?

While the CPC Guidance could benefit from additional detail on how these factors will be weighed, the inclusion of some direction on the Bureau’s approach is a welcome development.

3. The CPC Guidance advocates that firms use property controls only where justified, and provides an overview of how justification will be assessed.

The Bureau also states that enforcement action will not be taken in relation to property controls that can be justified. However, unlike the interim guidance, the CPC Guidance acknowledges that, where an SPLC is not found, the absence of a legitimate justification will not be sufficient to contravene Section 90.1 or, where dominance is found, to obtain more than a prohibition order under Section 79. The CPC Guidance describes justification as including elements of both rationale and scope. The Bureau advises businesses to consider the following questions:

- Is the property control necessary to allow a new business to enter the market or to encourage a new investment?

The Bureau suggests that businesses ask themselves: "Are there other ways to allow for this entry or investment that do not make it more difficult for rivals to compete?" The CPC Guidance suggests such rationale should be considered both from the perspective of the prospective tenant and the landlord. For landlords, the Bureau recommends assessing whether an exclusivity clause is truly necessary. For example, if a landlord receives multiple offers from comparably suitable tenants to lease their space, and some require an exclusivity clause while others do not, the Bureau suggests that agreeing to an exclusivity clause may not be necessary under such circumstances. This comment is noteworthy because, in cases involving dominant firms, the legal assessment focuses on the rationale of the allegedly dominant firm alone. The inclusion of this broader perspective may reflect an advocacy-driven approach, as it appears in the general justification section of the CPC Guidance, and not in the discussion of enforcement under the abuse of dominance provisions. This distinction suggests the Bureau may be encouraging businesses to adopt practices that align with broader competition policy goals, even where the legal framework might not explicitly require such considerations.

- Could this property control last for a shorter period of time?

In the Bureau's view, the longer the property control exists, the less likely it is to be justified. Property controls should only remain in effect for as long as needed to protect incentives for market entry or investment.

- Could this property control cover less geographic area?

In the Bureau's view, the geographic area that the property control covers should be minimized to only cover what is necessary (e.g., it should not limit competition at neighbouring properties owned by the landlord).

- Could this property control cover fewer products or services?

In the Bureau's view, restrictions on competitor offerings should be limited to what is strictly necessary. The broader the scope of the restrictions, the less likely the Bureau will conclude that they are justified.

4. The CPC Guidance outlines how the Bureau will assess whether a firm is dominant in relation to its use of property controls.

The Bureau analyzes dominance on a case-by-case basis and may analyze dominance at a local, regional, or industry level, depending on how broadly competitor property controls are used and how competition occurs. For example, if an incumbent firm uses competitor property controls across a region where a new retailer would have to develop a local supply chain to serve several stores, the Bureau states it may be more likely to analyze dominance at a regional level. The Bureau will also consider the following factors:

- the ability of the property control to restrict competitors or competition
- the presence of effective competitors (often based on market share)
- barriers to entry in the market, including barriers to entry created by the property control
- the position of the firm in the broader industry
- evidence of bargaining leverage, including the ability to seek the competitor property control

The CPC Guidance further states that, in the Bureau's view, dominance "can be created by the competitor property control itself in cases where there is already a lack of existing effective competitors and it creates a significant barrier to competitors entering the market".

5. The CPC Guidance cautions strongly against the use of restrictive covenants.

Restrictive covenants are similar to exclusivity clauses, as they both limit the use of commercial real estate. However, unlike an exclusivity clause, a restrictive covenant is a restriction imposed on the land itself (instead of within the context of the commercial lease) that “prevents a purchaser or owner of a commercial property from using the location to operate or lease to operators of certain types of businesses that compete with a previous owner”. In the CPC Guidance, the Bureau states that restrictive covenants are viewed as particularly concerning as they can restrict the operators and use of the property by future owners for a long period of time. The Bureau advises it does not consider restrictive covenants to be justified outside of exceptional circumstances.

6. The CPC Guidance is clear that both landlords and tenants face exposure to enforcement action under the Act.

The Bureau indicates that the person who proposed or benefits from the property control typically will be investigated under the abuse of dominance provisions. In contrast, when investigating an agreement under Section 90.1, the CPC Guidance indicates the Bureau will usually investigate all parties to the agreement, including tenants and landlords (in the case of exclusivity clauses), and vendors and purchasers (in the case of restrictive covenants). Where a property control is challenged under Section 90.1, the available remedies include prohibition of the terms of the relevant property control and its enforcement, implementation of other measures if, and as required, to restore competition, and the imposition of financial penalties. However, different remedies may be sought for different parties, where appropriate.

7. The CPC Guidance is notable in that it includes the Bureau’s first comment on its approach to interpreting the “significant purpose” test in the recently introduced Section 90.1(1.01).

This provision permits enforcement action to be taken in relation to agreements or arrangements between non-competitors that are likely to result in an SPLC where a “significant purpose of the agreement or arrangement, or any part of it, is to prevent or lessen competition in any market”. The “significant purpose” test is new in the Act and is likely to be the subject of judicial interpretation. The CPC Guidance clarifies that the Bureau intends to place little focus on the “significant purpose” of such contractual terms (at least in relation to property controls), and instead intends to concentrate on the market impact of the property controls on the premise that “if the agreement has the effect of harming competition it will likely also have a significant purpose to do so.”

8. The CPC Guidance encourages businesses to review any new or existing property controls to ensure they are compliant with the Act and encourages “tenants, lessors, landowners, and former landowners to eliminate or modify competitor property controls that are not justified”.

The CPC Guidance does not comment on the fact that property controls contained in contracts remain legal unless there has been an order of the Competition Tribunal prohibiting them. The relevant provisions of the Act are reviewable practices and do not create an automatic illegality (as would a criminal offence).

Note that private litigants are not bound to follow the Bureau’s guidance when determining whether to seek leave and apply to the Competition Tribunal for remedies in respect of property controls under section Sections 79 or 90.1 of the Act. As such, it remains to be seen if private parties will adopt the Bureau’s position as outlined in the CPC Guidance, or if they will seek to test the Bureau’s enforcement position before the Competition Tribunal.

Osler's Competition, Trade and Foreign Investment and Real Estate groups continue to monitor this evolving topic. If you have any questions regarding the new amendments to the Act, or its implications for your business, please do not hesitate to reach out. Our team of expert lawyers would be more than happy to assist. For the latest insights, we also invite you to [subscribe to our Updates](#).