

December 13, 2018

ARTICLE

Competition Bureau Initiates Predatory Pricing Investigation of WestJet Airlines Ltd

Canada's Commissioner of Competition (Commissioner) has launched an investigation into whether WestJet Airlines' low-cost carrier division, Swoop, is violating the *Competition Act* (Act) by selling flights at below-cost fares in order to force rivals out of the market.

Predatory Pricing — Facts

Although businesses might be surprised to learn that low pricing can run afoul of the competition laws, the Commissioner, who heads the Competition Bureau (Bureau), can seek to apply the Act's civil "abuse of dominance" provisions to a business deliberately setting the price of a product or service below cost and incurring losses, commonly known as "predatory pricing". Under these provisions, if the Commissioner can prove, among other factors, that the business' below-cost pricing was intended to eliminate, discipline, or deter entry or expansion of a competitor, with the expectation that the competitor would be driven out of the market (or not enter), the Competition Tribunal can issue an order prohibiting this predatory pricing from being offered and issue an "administrative monetary penalty" of up to \$10 million for a first offence, plus costs. Until 2009, predatory pricing could also be a criminal offence under Act, punishable by up to two years in prison, but the potential for criminal charges was removed from the Act in favour of its being dealt with solely under the abuse of dominance provisions.

Background

Flair Airlines, an Edmonton-based independent "ultra low-cost carrier", began scheduled operations in June 2017. WestJet introduced Swoop in September 2017, and its first flights were in June 2018. Subsequently, Flair contacted the Bureau to complain that WestJet and Swoop were offering seats on six routes that competed with Flair at prices that were so low that they had to be below cost, and alleged that this was done with the intent to force Flair and other low-cost competitors out of the market in violation of the abuse of dominance provisions of the Act. In a meeting with the Bureau on October 18, 2018, Flair alleged that WestJet/Swoop's anti-competitive conduct had forced it to withdraw its Edmonton to Hamilton route, and threatens its entire operation.

The Bureau appears to have been convinced that there may be merit to Flair's claim, as on November 7, 2018 it formally opened an inquiry into WestJet/Swoop's conduct, and on December 5, 2018, the Commissioner filed a motion with the Federal Court seeking an order requiring WestJet/Swoop to produce documents relevant to the intent behind certain pricing and capacity decisions, the competitive landscape on certain routes and the impact of WestJet/Swoop's decisions on competition. The motion also sought detailed transaction-level financial data, and an order requiring John Weatherhill, WestJet's Vice-President of Pricing and Revenue Management, to appear and answer questions about these issues under oath.

In the motion, the Commissioner states that its investigation is focused on three routes: Edmonton-Hamilton, Edmonton-Winnipeg and Edmonton-Abbotsford. As an example of the conduct alleged, the Bureau states that WestJet/Swoop did not fly the Edmonton-Hamilton route at all until shortly after Flair began its service in mid-2017. WestJet commenced service on the route shortly after Flair, and upon Swoop's introduction, it took over the route from WestJet and more than doubled its weekly capacity, and priced tickets at \$69 including taxes and fees. This amounted to an effective fare of \$28.59, which Flair believes to be well below Swoop's break-even cost.

What's Next

On December 11, 2018, the Federal Court granted the Commissioner's motion, meaning that in the coming months, the Bureau's investigation will continue and be buttressed by documents and information from Mr. Weatherhill's examination.

Ironically, in 2001, the Commissioner launched a claim for abuse of dominance against Air Canada on very similar grounds, claiming that Air Canada was attempting to use below-cost pricing to force WestJet, and now-defunct airline CanJet, out of the market. After over three years of legal proceedings, that case was eventually discontinued. Since then, the Bureau has shown little appetite to challenge predatory pricing in this manner, so it will be interesting to see how their investigation develops. Even if the Commissioner does bring a claim, the need to prove all of the elements required to establish predatory pricing means that it will be a challenging case to win, despite what might appear on their face to be seemingly predatory actions with respect to certain routes by WestJet/Swoop.

By: Denes A. Rothschild, Danielle Ridout, Subrata Bhattacharjee

Services: Competition & Foreign Investment Review, Aviation
