Intelligence MEMOS

From: David Rosner and Josh Zelikovitz

To: Competition Tribunal and Members of the Bar

Date: November 9, 2023

Re: Let's Loosen the Barriers to Private Competition Complaints

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In June 2022, the *Competition Act* was amended to permit private applications alleging abuse of dominance.

Despite the reform, there has been no flood of litigation; instead, only a single private party has launched an application. Some commentators argue that absent the ability to recover damages, private parties have insufficient incentive to bring such applications. Others, including the Competition Bureau, note that private parties face a test for standing that permits few applications to proceed. In particular, the Competition Tribunal's requirement that a private party show that the allegedly anticompetitive conduct is substantially affecting the "entire business of the applicant, not simply [a single] product line affected" has the practical effect of denying standing to firms that sell multiple products but that suffer abuse in only one product line. Since most companies sell multiple products, few firms could ever win standing.

We were counsel to the applicant in the only private abuse of dominance application ever filed. Our client is a multi-product firm, but the abusive conduct it suffered only affected a single line of business. To support our client's standing, we set out a series of arguments why the test for standing should be lowered, not least permitting multi-product firms to seek relief for abuse of dominance that affects a single line of business. (Ultimately, the respondents in our client's case quickly ceased the complained about conduct and the application was discontinued.)

The *Competition Act* is under review, and we strongly advocate jettisoning the "substantially affecting" test for bringing a private case, since it serves no policy purpose. There are more effective ways of preventing the floodgates of litigation being opened, such as summary judgment motions with cost penalties or a requirement at the pleading stage that harm in a market be particularized (not just harm to a competitor). However, if the test for standing is retained – whether before the Tribunal or other courts – then our arguments to relax it are likely to be important for future cases. These included:

Distinguishing the Test. The Tribunal's requirement that an applicant must be substantially affected in its entire business originates from cases under the "refusal to deal" section of the *Competition Act*. While the statutory test for private standing in abuse of dominance cases and refusal to deal cases uses the same language, there is nothing in the Act that expressly requires the Tribunal to import its refusal-to-deal test for standing into the test for standing for abuse of dominance.

The Test is Based on an Incomplete Reading of an Old Case. The Tribunal's test for standing is imported from a 1989 decision involving an alleged refusal to deal (which did not involve a private applicant). We argued that the Tribunal had not properly interpreted that 1989 decision, which explained that it measured the impact of a refusal to deal based on the impact on a company's entire business because – in the facts of that specific case – the complainant's business was very small and there was no evidence to conduct a narrower analysis. However, the 1989 decision expressly left open the possibility of conducting a "disaggregated analysis" – that is, measuring whether the complained about conduct substantially affected a victim in a single line of business – in appropriate cases. We argued that it is appropriate to permit standing where a multi-product firm is substantially affected in a single line of business only, because there is no good policy reason to bar standing in such cases.

The Test Produces Absurd Results. Assume that our dient established a new subsidiary whose only business was the one that suffered the abuse of dominance, and the litigation was launched in the name of that subsidiary. Because of the narrowness of its business, there would be no question that the subsidiary was substantially affected in its entire business. It would be absurd and arbitrary (and there would be no policy reason) to grant the standing to the subsidiary, but to deny standing to its multi-product parent.

The Test is Inconsistent with the Supreme Court's Approach to Standing. The Tribunal's test for standing is inconsistent with the approach the Supreme Court of Canada has applied to standing in analogous contexts. The high court has consistently widened the class of litigants who have standing to bring private damages claims against cartels under section 36 of the *Competition Act*, on the basis that technical arguments ought not permit anti-competitive conduct to escape scrutiny – for example, granting standing to indirect purchasers and umbrella purchasers, the term for consumers who paid more because the price-fixing scheme created an price 'umbrella' and let non-conspirator firms raise their own prices.

Questions remain as to whether private parties have sufficient incentive to launch abuse of dominance litigation, absent the ability to recover damages, and Parliament should carefully consider the issue. Putting that aside, if the test for standing facing private parties is to be retained, then it should be relaxed sufficiently to permit more firms to have their day in court to test their claims.

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