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THE VERDICT

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# The Distortive Power of AMPs: Why the Competition Bureau Must Clarify Its Stance on Administrative Monetary Penalties

Report of the C.D. Howe Institute Competition Policy Council

The Competition Bureau should clarify how it will apply its powers under the *Competition Act* in seeking administrative monetary penalties for abuse of dominance. This is the consensus of the C.D. Howe Institute's Competition Policy Council, which held its third meeting on May 7, 2012.

The Competition Policy Council comprises top-ranked academics and practitioners active in the field of competition policy. Chaired by Finn Poschmann, Vice President, Research at the C.D. Howe Institute, the Council provides analysis of emerging competition policy issues. The Council, whose members participate in their personal capacities, convenes a neutral forum to test competing visions of competition policy and share views with practitioners, policymakers and the public.

*At Issue:* Amendments to the *Competition Act* in 2009 gave the Competition Bureau the power to seek administrative monetary penalties (AMPs) of up to $15 million from businesses it believes to have contravened the abuse of dominance provisions of the *Act*, which are non-criminal sections of that legislation. Subsequently, in March this year, the Bureau issued draft Enforcement Guidelines that were silent on the question of AMPs. At the May 7 meeting, the Council addressed the following questions: "Do Administrative Monetary Penalties make good policy? For what infractions? Are they constitutional? What are the costs, benefits, and options?"[1]

There was a range of views among the Council members about whether AMPs for abuse of dominance are ever appropriate. Some members contended that AMPs are appropriate as a deterrence mechanism. Others expressed the view that the possibility of a firm's being subject to AMPs would chill efficient arrangements. There was unanimity, however, on the point that the risks of over-deterrence associated with AMPs are real, and that it would be appropriate to know how the Bureau plans to approach the issue of AMPs in particular cases. Accordingly, the Council's key recommendation is that the Competition Bureau issue guidance and explain the basis on which it will assess the AMPs it seeks.

1 The Council would like to thank Grant Bishop, a student at the Faculty of Law, University of Toronto, for providing a briefing memo on the subject of abuse of dominance and AMPs to the Council.

## Abuse of Dominance and AMPs

Section 79 of the *Competition Act* seeks to prevent what is known as abuse of dominance, on the view that firms, if dominant in a given market, may seek to preserve or expand their market power in pursuit of extranormal profits, which would ultimately negatively affect consumers and be inefficient in the economic sense. The behaviours that lead to such an outcome may be viewed as anticompetitive.[2] The prohibited actions may involve predatory pricing, whereby incumbent firms temporarily lower prices to drive out competitors, and exclusionary practices, such as long-term contracts or vertical integration, intended to lock-up customers or suppliers.

The 2009 amendments to the *Act* empowered the Competition Tribunal, on application by the Bureau, to impose AMPs on a firm that it found to be abusing its dominant position. The provisions allow for an AMP of up to $10 million on an initial contravention and $15 million subsequently. The dollar amount of an AMP is to be based on factors such as the profits derived and the effect on competition, but may include factors unrelated to demonstrable market impacts. These include revenues from the practice, the financial position of the person against whom the order is made, and "any other relevant factor."

## The Council's View on Abuse of Dominance and AMPs

The Council felt that the current lack of clarity on AMPs in the Abuse of Dominance Provisions draft Enforcement Guidelines is undesirable for several reasons.

### The Vagaries of Defining Abuse of Dominance

Many practices, such as exclusive contracts, are efficient in certain contexts, but may be inefficiently anticompetitive in other cases. Defining when precisely a practice is anticompetitive and constitutes an abuse of dominance is not straightforward. For example, a practice of a firm may benefit its customers but, without being abusive in a legal or economic sense, disadvantage rivals.

The Council is concerned that the Bureau has become less forthcoming with guidance on its enforcement approach; a concern aggravated by the Bureau's silence on its approach to AMPs in its most recent draft guidelines on abuse of dominance. When the legitimacy of impugned conduct, the enforcement approach, and its possible financial consequences, are each unclear, there is a risk that businesses will not adopt practices that are efficient for fear of future legal condemnation, financial penalties, and harmful publicity.

### The Risk of Over-Deterrence from AMPs

The Council extensively discussed whether AMPs are suitable enforcement tools and, notwithstanding views on that question, whether the manner in which they are assessed is on sound constitutional grounds.

The constitutional issue arises if AMPs are penal in nature or consequence.[3] Canadian case law indicates that if a penalty is denunciatory – intended to redress a morally blameworthy wrong done to society – rather than

2 According to the Competition Bureau's draft Enforcement Guidelines on The Abuse of Dominance Provisions "Abuse of a dominant position occurs when a dominant firm or a dominant group of firms in a market engages in a practice of anti-competitive acts, with the result that competition has been or is likely to be prevented or lessened substantially" Competition Bureau. 2012. "The Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act)" Draft Enforcement Guidelines. March.

3 *R v Wigglesworth* (1987), 37 CCC (3d) (SCC); and *Martineau v MNR*, [2004] 3 SCR 737.

purely deterrent, the alleged offender must be tried in accordance with the due process requirements of section 11 of the *Charter of Rights and Freedoms*.[4] Because abuse of dominance is not a criminal offence under the *Competition Act*, the impugned conduct need be demonstrated only to a "balance of probabilities" standard of proof.

On this understanding of case law, if the AMP is punitive in character and is set according to factors that are not purely deterrent, then various constitutional protections must be available to the defendant, including a higher, "beyond a reasonable doubt," standard of proof. Among Council members there was no consensus on whether AMPs as currently assessed are constitutional, but there was consensus that the answer to this question is not obvious, in part because of the fuzzy legal distinction between penalties and deterrents.

There was some agreement among the Council that AMPs are a useful enforcement tool in at least some circumstances, but there was strong agreement that AMPs pose the risk of creating an unwanted chilling effect on behaviour.

Some members of the Council felt that AMPs are not an appropriate enforcement tool, as their presumed deterrence might be achieved through other remedies, such as cease and desist orders or changes to business practices or ownership structure. Reputational consequences of cease and desist orders also serve to deter unwanted behaviour.

On the other hand, some members were concerned that, absent AMPs, the *Act* would be toothless in dealing with abuse of dominance. On this view, AMPs are an appropriate deterrent given that the threat of a cease and desist order may not deter a firm from exploiting its market power in pursuit of short-run profits. Supporters of AMPs for deterrence purposes, however, recognized that finding abuse of dominance is an uncertain exercise, and would prefer to see the Bureau adopt a policy of pursuing AMPs only in the most blatant and clear cases. Otherwise, the risk of over-deterrence arises.

There was a consensus among members that the AMPs, if imposed, should respond only to blatant abuses of dominance, leading to the question of how the amount should be assessed. The *Act* currently allows the Tribunal to take into consideration arguably inappropriate factors when deciding on the amount of AMPs, such as the financial position of the defendant, which has nothing to do with the economic costs of the practice. In the Council's view, the Bureau should make clear its approach to AMPs on these important questions.

## Conclusions and Recommendations

Notwithstanding the disagreements on the merits of AMPs, there was strong agreement in the group that the current uncertainty over AMPs gives the Bureau leverage over the firms it pursues in an abuse of dominance case. A firm whose conduct is challenged has a greater incentive to settle – without litigation – rather than facing the possibility of a significant AMP in a contested proceeding. This may have resulted in firms' not pursuing competitive business practices, such as steep discounts, that might attract Bureau action even when evidence that the practice is anticompetitive is relatively weak.

While the Competition Bureau, in March 2012, released draft enforcement guidelines on the abuse of dominance provisions, they were silent on the question of AMPs. The Bureau should clarify how it will apply economic theory and empirical evidence in its determination of them.

4 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being *Schedule B to the Canada Act 1982 (UK)*, 1982, c 11.

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**Members of the Council participate in their personal capacities, and the views collectively expressed do not represent those of any institution or client.**

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*Not in attendance, May 7, 2012.