Intelligence MEMOS

From: Peter Glossop

To: Canada's Competition Law Community

Date: June 21, 2022

Re: Damages for Abuse of Dominance: a Necessary Reform

Currently, the Commissioner of Competition is the only person who can bring proceedings to stop a dominant firm from engaging in anti-competitive acts that prevent or lessen competition.

Bill C-19, the Budget implementation bill, would allow a business to seek leave from the Competition Tribunal to bring an abuse of dominance case.

Under the bill, if the business successfully establishes the elements of an abuse of dominance, the Competition Tribunal can order the firm abusing its dominant position to cease its unlawful behaviour and to pay an administrative monetary penalty (AMP) of up to $10 million, or up to "three times the value of the benefit derived from the anti-competitive practice, or, if that amount cannot be reasonably determined, 3 percent of the person's annual worldwide gross revenues."

Perversely, the AMP would go to the government, and not the business that successfully demonstrated that it had suffered competitive injury. There is no provision for the government to transfer any of the AMP to the damaged business as compensation.

While some argue that an ability to seek an AMP in a private case gives the complaining firm leverage and an incentive to act as a "private sheriff," the "sheriff" would have to put its own funds at risk to bring the case, face the prospect of an adverse costs award if unsuccessful, and even if successful ultimately obtain no compensation, only an injunction.

This may not be a sufficient incentive to commence proceedings. Without the ability to obtain damages, a victimized firm is left less than whole.

A business cannot expect the Commissioner to challenge a dominant firm's conduct. Historically, the Commissioner has brought very few abuse cases to the Tribunal.

A solution is to permit complainants to by-pass the Commissioner's gate-keeping function and to seek remedies (including damages) directly from the dominant firm. Indeed, private enforcement in the United States, which permits private firms to seek treble damages for monopolistic behaviour has yielded virtually all of the leading US cases.

The expanded AMP provision in Ottawa's Bill does little to encourage private enforcement. If a firm has suffered significant financial losses, then injunctive relief and an AMP do not make the firm whole. Without the possibility of damages, anti-competitive behaviour may not be deterred adequately. Competition may not be fully restored. The abusing firm will retain its unlawful profits.

The existing damages model in section 36 of the *Competition Act* for criminal offences could be adapted to civil cases. Under section 36, private parties may sue for "loss or damage proved to have been suffered" plus the full cost of their investigation and proceedings.

Other jurisdictions permit damages to be recovered in private enforcement. Article 3 of the European Union's 2014 Damages Directive enables private parties to recover compensation for actual loss and loss of profit for abuse of dominance and has been implemented by EU member states.

Section 82 of Australia's *Competition and Consumer Act* permits a firm to recover loss or damage suffered in a misuse of market power case. Moreover, a firm may seek a court order that it will not be liable for the costs of the dominant responding party if the case is reasonable, has significance for other persons and the firm would otherwise be deterred from bringing the case because of its financial disparity with the respondent.

This provision should be considered in reforming Canada's statute. There has been an increase in private actions before Australian courts alleging misuse of market power, likely due to amendments to the substantive misuse provision in 2017.

Some commentators fear that the availability of damages will encourage meritless cases and chill aggressive competitive behaviour. This argument does not stand up to scrutiny. Bringing a commercial lawsuit is expensive, time-consuming and complex.

For example, the availability of damages for breach of contract does not encourage meritless cases in the courts. On the contrary, meritless cases are discouraged because a losing party is liable to pay costs to the successful party in the Canadian court system. In an abuse case, the loser would be liable for costs even if it does not obtain leave from the Tribunal to advance its case.

There is no compelling reason to deny a private firm full compensation for anti-competitive harms suffered because of an abuse of dominance. The Bill should be amended by removing the right of a private party to seek an AMP and substituting it with a right to claim damages in line with the formula in section 36 of the Act. This right should be extended to private cases under the other civil reviewable practices for which injunctive relief is currently the only private remedy available.

Peter Glossop is a recently retired competition lawyer.

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