COMPETITION POLICY COUNCIL

COMMUNIQUÉ

October 20, 2016

Damage Control: Abuse of Dominance and the State of Private Remedies in the *Competition Act*

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

The federal government should cautiously expand the kinds of anti-competitive acts that private parties – and not just the Competition Bureau – can take legal action against in Canada to include abuses of dominance. However, the government should not otherwise lower existing thresholds for private parties to commence proceedings to enforce competition laws and should make no more than incremental changes to private rights of action. Although there was considerable difference of opinion regarding the extent and benefits of private party interventions, this is the majority view of the C.D. Howe Institute's Competition Policy Council, which held its twelfth meeting on October 11, 2016.

The Competition Policy Council comprises top-ranked academics and practitioners active in the field of competition policy. The Council, co-chaired by Benjamin Dachis, Associate Director, Research, at the C.D. Howe Institute and Adam Fanaki, Partner, Competition and Foreign Investment Review and Litigation at Davies, Ward, Phillips & Vineberg LLP, provides analysis of emerging competition policy issues. Professor Edward Iacobucci, Dean at the University of Toronto Faculty of Law and Competition Policy Scholar at the Institute, advises the program, which is also supported by Aaron Jacobs, Researcher, at the C.D. Howe Institute. The Council, whose members participate in their personal capacities, convenes a neutral forum to test different visions and to share views on competition policy with practitioners, policymakers and the public.

At Issue: Does the *Competition Act* allow appropriate recourse for private parties to seek remedies?

Background

Enforcement of Canada's *Competition Act* is generally the domain of the Commissioner of Competition, who brings cases on behalf of the public before the Competition Tribunal. However, some parts of the *Act* do permit private parties to bring certain cases before courts or the Tribunal. Most notably, the

Council members thank Paul-Erik Veel of Lenczner Slaght for providing a briefing note on the current state and potential options for reform of private action under the *Competition Act*.

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Act has since 1976 permitted private parties to seek compensation in the courts for losses or damages suffered due to conduct prohibited under the criminal provisions of the *Act* (including price fixing conspiracies and bid-rigging).

This has led to frequent class action suits seeking damages, usually following a guilty plea to price fixing in a related criminal case. These follow-on suits are tried by the courts, not by the specialised Tribunal. In 2013, the Supreme Court of Canada sanctioned for the first time class actions that involved indirect purchasers, which will likely expand the scope for price-fixing class actions going forward.[1]

Since 2002, private parties have also been able to bring cases under some of the reviewable conduct provisions in the *Act*, namely s. 75 (refusal to deal), s. 77 (exclusive dealing, tied selling, and market restriction), and, as of 2009, s. 76 (price maintenance). These cases are permitted only if the Competition Tribunal first grants the party leave to bring an application before the Tribunal. However, as of October 2016, these applications are rarely successful, with only two of the 24 applicants since 2002 proceeding to a decision (both of whom lost). Moreover, the *Act* currently provides applicants in these cases with only injunctive relief. That is, successful lawsuits can only result in a respondent stopping its conduct, without compensation to the applicant (an award of damages).

The remainder of the statutory provisions in the *Act* for reviewable conduct remain the exclusive domain of the Commissioner, which sets Canada apart from both the United States and the European Union where there is quite broad scope for private action on civil matters under competition law, although other procedural rules, such as the limited availability of class actions, currently render privately initiated complaints relatively less important in Europe.

The Council sought first to address whether these limitations on private action were appropriate. The Council considered whether private actions should be expanded to other statutory provisions, or alternatively if private rights of action are already too broad, and should be narrowed or rescinded.

Expanding Private Action under the *Act*

The question of whether the *Act* contains the right scope for private actions occupied the members of the Council for much of the discussion, with no clear consensus reached.

1 *Pro-Sys v. Microsoft, Sun-Rype v. Archer Daniels Midland, and Infineon Technologies AG et autres c. Option Consommateurs et autres*. And see C.D. Howe Institute Competition Policy Council. 2013. "Who Gets In? Class Actions and Indirect Purchasers in Competition Law." October 30.

The Case for Expansion: Council members in favour of expanding private litigation pointed to resource constraints at the Competition Bureau as a strong argument in favour of the need for additional enforcement through private parties. In theory, giving private citizens and companies the right to address harmful anti-competitive conduct directly can make society better off by reducing the kinds of anti-competitive behaviour that are difficult or expensive for the Bureau to pursue.

These members point to the evidence following the 2002 reforms, which faced widespread opposition on the grounds that any private remedies under the *Act* would create a large volume of strategic and meritless litigation. Indeed, some Council members noted that the original introduction of limited private rights of action was meant to test the appetite for future expansion of private litigation, given concerns of costly US-style private antitrust litigation, complete with the ability of firms to seek damages in US courts of three times the amount of actual harm (treble damages). Since such a flood of cases has clearly not materialized, many Council members felt that this threat is no reason not to extend the ability of private parties to seek remedies in respect of additional provisions of the *Act*.

The Case Against Expansion: Those opposed to, or skeptical of, expanded private litigation, generally articulated doubts as to the need for more private rights of action, given that so few meritorious cases have come forward. Several also pointed to the chilling effects of private litigation on otherwise pro-competitive activity and the potential for private parties to use litigation strategically. That is, companies would have an incentive to commence – or threaten to commence – meritless lawsuits against a competitor in response to aggressive competition that in fact benefits consumers. Others noted that such strategic conduct is currently possible via complaints to the Bureau.

Most Council members agreed that, if private action were expanded under the *Act*, the best candidate for inclusion would likely be s. 79 (abuse of dominance) given that most other reviewable distribution practices (in ss. 75, 76 and 77) are already subject to private actions for injunctive relief before the Tribunal. A few members also pointed to s. 90.1, which covers competitor collaboration agreements, as another potential option. A majority – although far from a consensus – of Council members felt that the current regime of private rights of action for injunctive relief (but not damages) should be expanded to include s. 79 on abuse of dominance.

There was a consensus that private parties should not be allowed to challenge mergers. Members cautioned strongly against amending the *Act* to allow these challenges, since merger deals are typically very time sensitive, there is a well-functioning system of pre-notification and review by the Competition Bureau, and the risk of strategic litigation would be high.

The Requirement for Leave Applications

At present, private parties may submit an application for leave from the Competition Tribunal in order to bring cases under ss. 75, 76, and 77. A leave requirement filters out some of the most clearly unmeritorious claims from ever proceeding to trial. The Council was generally quite supportive of this requirement, and the role that it plays in eliminating meritless claims as early as possible. While many members of the Council were opposed to any expansion of private actions, there was a consensus that if there were such expansion, the current leave requirement in subs. 103.1 ought to apply.

Expanding the Recourse to Damages

One area of deep departure between Canadian and American competition law is in the potential for an award of damages in private competition law proceedings. In the United States, successful plaintiffs can generally seek treble damages for violations of competition law. By contrast, in Canada, damages are available in civil actions for criminal prohibitions of the *Act* such as price-fixing, but treble damages are not available. There was consensus on the Council that treble damages should not be introduced in Canada. A minority of the members expressed scepticism about the effectiveness of the current regime for private enforcement under s. 36. In particular, they queried the extent to which nominal plaintiffs receive damage awards, because individual awards are often for small amounts and actual indirect consumers are often difficult to identify.

With respect to private proceedings to enforce the reviewable conduct provisions of the *Act*, private applicants who win cases under ss. 75, 76, or 77 (refusal to deal, price maintenance, exclusive dealing, tied selling, and market restriction) are rewarded only by the Tribunal's order that the defendant cease the anti-competitive activity in question.

A minority of members of the Council were supportive of introducing damages for successful applications in connection with the reviewable conduct provisions of the *Act*, not only as an incentive to bring cases but also to more accurately reflect the substantive losses private plaintiffs might have suffered in the cases in question. However, the majority of members were concerned about the potential for damages to further increase the number of meritless cases brought by aggrieved competitors, and the chilling effect it might have on aggressive competitive activity in Canada. Allowing damages for tied selling, exclusive dealing and refusal to deal might require an amendment to those provisions since the current statute does not provide the ability to remedy behavior which is no longer ongoing.

Conclusion

Although Council members had a wide range of views on the subject, a majority of the Council felt that a private right of action should be introduced to provide private parties the ability to bring applications for injunctive relief related to abuses of dominance, subject to the requirement to first obtain leave from the Tribunal for the case to proceed. However, a majority of the Council concluded that private parties should not receive damages for proceedings before the Tribunal. Some members of the Council felt that the federal government would need additional information regarding the existence and, if present, the extent of the problem of a lack of enforcement against anti-competitive behaviour before proceeding with any further expansion of private litigation.

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

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