Intelligence MEMOS

From: David Vaillancourt

To: House of Commons Industry Committee

Date: April 26, 2021

Re: A Private Right of Action for Abuse of Dominance

The abuse of dominance provisions of the *Competition Act* have historically been under-enforced. Harmful conduct by monopolists has gone unchecked for too long. The Canadian abuse of dominance regime is not working and needs to be overhauled.

Currently, the Commissioner of Competition is the only one who can bring abuse of dominance proceedings against Canadian monopolists. The abuse of dominance provisions of the *Competition Act* should be amended to allow private litigants to do so as well.

Abuse of dominance involves acts undertaken by a dominant firm against competitors that substantially lessens or prevents competition. A "dominant firm" (a monopolist) generally means a firm with more than 50-percent market share. Abuse of dominance is about a monopolist using its position to squeeze out the competition and maintain or enhance its own market power.

When a victimized competitor has a problem with an anti-competitive monopolist, their only option is to make a complaint to the Commissioner of Competition. If the Commissioner of Competition decides not to move forward with the matter, there is nothing the victimized competitor can do.

The Commissioner has to be very selective with abuse of dominance cases he brings forward. Abuse of dominance tends to take a back seat to enforcement of the criminal provisions of the *Competition Act* (including price fixing and bid-rigging), as well as merger review. The explosion of digital documents over the past decade has exponentially increased the costs of prosecuting abuse of dominance cases, which presents an additional barrier to robust enforcement.

The Commissioner publishes annual statistics about complaints he receives under the *Competition Act*'s various civilly reviewable provisions. The vast majority, about 80 percent most recently, concern abuse of dominance.

In 2019-2020, there were 467 complaints about civilly reviewable matters. Out of those complaints, only 11 investigations were commenced, which turned into three inquiries. Enforcement activities were also limited. There was one case with a consent order, one case with an alternative case resolution, and one case, a prior-year legacy matter, was before the Competition Tribunal. The 467 complaints have not (as yet) yielded a single contested Application.

The under-enforcement of the abuse of dominance provisions is not new. Since 1986, there have only been 14 abuse of dominance proceedings brought before the Competition Tribunal. The Commissioner of Competition does not have the resources needed to robustly police monopolists in Canada. Even the recent boost to the Commissioner's budget announced in the 2021 federal budget is unlikely to materially change the enforcement direction of the abuse of dominance provisions for the reasons noted above.

The under-enforcement of the abuse of dominance provisions is causing injury not just to competitors, but to competition generally, and to Canadian consumers. It is clear that the current abuse of dominance regime is not working. Change is needed.

Enforcement would be enhanced if there was a private right of action, where victimized competitors could hold monopolists to account. Even the threat of a private action would encourage a change in behaviour by monopolists to avoid litigation – these cases do not necessarily need to end with a trial.

Several other reviewable matters in the *Competition Act* already allow a private right of action with leave of the Competition Tribunal, including refusal to deal, and price maintenance. Section 103.1 of the *Competition Act* sets out the mechanics for seeking leave of the Tribunal and could be easily amended to include private right of action.

Private litigants should also be allowed to make a claim for damages suffered as a result of anti-competitive conduct. Behavioural remedies alone might not be sufficient incentive for private parties to incur the significant costs of prosecuting an abuse of dominance proceeding. More victimized competitors would be willing to pay for legal proceedings if there is some chance of monetary recovery.

(It should be noted that the C.D. Howe Institute's Competition Policy Council **discussion** did not reach a consensus on damages, but some did support, their application.)

Both the US and Europe permit private actions. In fact, private action is the primary method of enforcement for monopolization in the United States.

When a monopolist acts in an anti-competitive way, it hurts consumers in the long run by damaging competition. Less competition means higher prices, and lower quality for consumers. Allowing private abuse of dominance proceedings would be pro-competition, pro-consumer, and would bring Canada in line with its international peers.

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This Memo is extracted from a submission to the House of Commons Standing Committee on Industry, Science and Technology.