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Abuse of Dominance: Why Fine?

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What is the purpose of imposing monetary penalties on companies that engage in abuse of dominance?

To Canadian practitioners, this is an important question. Canada's *Competition Act* was reformed to permit the imposition of administrative monetary penalties against companies that engage in abuse of dominance. However, Canada's Competition Bureau has not issued guidelines explaining the circumstances in which administrative monetary penalties will be sought, or how they will be quantified. In addition, there has been little judicial consideration of administrative monetary penalties under the *Competition Act*. The coherent administration of these monetary penalties in Canada will require an answer to this question.

This paper briefly describes Canada's adoption of administrative monetary penalties for abuse of dominance and raises some questions about their purpose in light of the statute's words and purpose, as well as the experiences of other jurisdictions that impose monetary penalties for abusive conduct.

Monetary Penalties and Abuse of Dominance in Canada

In 2009, Canada's *Competition Act* was substantially reformed and modernized. Among other things, all forms of abuse of dominance were decriminalized and an administrative monetary penalty was created.

The administrative monetary penalty was intended to operate as a deterrent, not as a sanction or penalty.[2] The statute emphasized the deterrent purpose of the administrative monetary penalty in two ways. First, the penalty was capped at $10 million except in the case of recidivists, for whom the cap was set at $15 million. Second, the statute explains that the penalty is intended to "*promote practices by that person that are in conformity with the purposes of* [the abuse of dominance provision] *and not to punish that person*."[3] These two aspects of the statute focus on the specific conduct of the respondent company. This is a strong suggestion that the policy goal of the administrative monetary penalty is specific deterrence of the respondent company only; these aspects of the statute do not suggest that general deterrence of all market participants is a policy goal of the statute.

The statute requires that the Tribunal (the specialized court in which the abuse of dominance section is litigated) take into certain factors when determining whether to impose an administrative monetary penalty and in determining the amount. These factors are the conduct's effect on competition, gross revenues from the conduct, actual or anticipated profits from the conduct, the financial position of the respondent, the respondent's history of compliance with the statute and "*any other relevant factor*."

By setting a penalty that is based on a respondent's revenues and profits from the abusive conduct, as well as the respondent's financial position and history of compliance, the statute focuses the penalty on ensuring that the respondent is deterred from engaging in the conduct again – once again, this is specific deterrence. However, requiring that the penalty be set with reference to the effect on competition appears to be a concern with broader public policy goals (i.e., ensuring the protection of competition). This is not obviously related to the respondent's conduct or deterring it from re-engaging in that conduct in the future, but it is consistent with the *Competition Act*'s "purpose" clause, which explains that the statute is intended to "*maintain and encourage* *competition in Canada in order to promote the efficiency and adaptability of the Canadian economy*" and "*provide consumers with competitive prices*," among other things. Since a penalty can also be set with reference to "*any other relevant factor*", there is a real possibility that the door is open to the setting of administrative monetary penalties for the purposes of also achieving general deterrence among all market participants, not only deterrence specific to the respondent.

Although the Competition Bureau updated its policy guidance to explain how it would administer the abuse of dominance provision, it has offered no guidance about when it would seek administrative monetary penalties or how it would calculate them.[4] This has left a gap in an understanding of how the law will be applied – specifically, whether administrative monetary penalties are to be imposed and set for the purposes of achieving specific or general deterrence. The existence of the gap has only been highlighted by the very small amount of consideration administrative monetary penalties have attracted from Canadian courts since they were made available. Indeed, there have only been two cases of any note, each of which appears to contradict the other on this topic.

In the first case, the Commissioner sought administrative monetary penalties against a company for engaging in misleading advertising; the misleading advertising provisions of the statute also permit administrative monetary penalties using language that is substantially similar to the abuse of dominance provisions. In that case, the Court wrote that the penalty "*must be imposed for the purpose of promoting compliance with the Competition Act. An administrative monetary penalty cannot be imposed with a view to punishment or deterring others who might contemplate making unsubstantiated performance claims*."[5] In other words, administrative monetary penalties are set for the purposes of achieving specific deterrence only, not general deterrence. This focus on specific deterrence was important to the calculation of the penalty ultimately imposed by the Court. In particular, the Court accepted that because the respondent operated a legitimate business, it was unlikely to have engaged in a cost-benefit analysis of whether the profits to be made from the misleading representation would outweigh the ultimate monetary penalty because of the reputational consequences of violating the *Competition Act*, and so a larger fine was not necessary to deter the respondent from engaging in the same conduct in the future.[6]

In the second case, the Commissioner sought administrative monetary penalties against a recidivist (the respondent companies had been subject to a civil prohibition for the same abusive conduct more than ten years earlier). During the litigation, one of the respondents sold its business; it argued that no order could be made against it because it was no longer dominant in the market, and that absent such an order no administrative monetary penalty could be imposed because it would necessarily be punitive. The Tribunal disagreed, finding that even though the respondent had exited the market the administrative monetary penalty was not automatically punitive. In the brief passage of the decision dealing with administrative monetary penalties, the Tribunal noted that the effect of the anti-competitive conduct was one factor that it would be required to consider in assessing an administrative monetary penalty.[7] The Tribunal's focus on this factor alone – which appears to be focused on general deterrence rather than specific deterrence – appears to acknowledge that specific deterrence may not have been possible in this case (having exited the market, the respondent no longer occupied a dominant position and could not have re-engaged in the conduct) but that an administrative monetary penalty may nevertheless have been appropriate in the circumstances of the case.

Experiences in Other Jurisdictions

Whether administrative monetary penalties are for the purposes of achieving specific or general deterrence is, therefore, a question that has yet to be answered in Canada. Uncertainty about the purpose of monetary penalties for abuse of dominance, however, is not unique to Canada.

United States

In the United States, section 2 of the Sherman Act creates a criminal felony for monopolization or attempted monopolization for which a fine of up to $100 million can be imposed on a corporation. However, there have been no prosecutions under section 2 brought by the Antitrust Division of the U.S. Department of Justice in several administrations, and it has been even longer since fines have been sought.[8] In addition, there are no guidelines for imposing fines for monopolization; instead, the government has acknowledged that, "[t]*here is no consensus… about the harmfulness of other types of antitrust offenses, which furthermore are rarely prosecuted and may involve unsettled issues of law. Consequently, only one guideline, which deals with horizontal agreements in restraint of trade, has been promulgated.*"[9]

In addition, the Federal Trade Commission can enforce the antitrust laws civilly and seek equitable relief. U.S. courts have recognized that equitable relief can include monetary penalties in the form of disgorgement or restitution.[10]

The FTC issued a policy statement on monetary equitable remedies in 2003.[11] The policy provided that the FTC would exercise its discretion to seek a monetary remedy by giving consideration to three factors. First, the FTC would seek a monetary remedy where a violation is objectively "clear" *ex ante*; novel violations of the antitrust laws were less likely to meet this "clearness" standard. Second, the FTC would only seek monetary remedies where there was a clear basis for calculating the amount. Third, the FTC would consider the value of seeking monetary remedies for accomplishing the purposes of the antitrust laws by reference to other remedies to which the defendant parties might be exposed. All of these factors suggested that disgorgement as a remedy was for the purpose of achieving specific, rather than general, deterrence.

This understanding of how monetary penalties were to operate was removed, however, when the FTC withdrew its policy statement in 2012. Four commissioners explained that the policy created an "*overly restrictive view of the Commission's options for equitable remedies*" and that the policy had "*chilled the pursuit of monetary remedies in the years since the statement's issuance*."[12]

Since that time, the FTC has settled one monopolization case and obtained disgorgement.[13] In that case, the FTC sought disgorgement even though the monopolist was able to obtain a dominant position following transactions that had been reviewed under the *Hart-Scott-Rodino Act*. In a statement, the FTC explained that "[d]*isgorgement deters subsequent conduct simply by sending a message that wrongdoers, if caught, will not be able to profit from their wrongdoing*," emphasizing the general nature of the deterrence that would be accomplished from a monetary remedy in that case. By contrast, in a dissenting statement Commissioner Joshua Wright argued that monetary remedies in most monopolization cases risked over-deterrence, which risked chilling pro-competitive conduct (Commissioner Wright would only permit disgorgement where conduct had no plausible efficiency justification or where conduct that harmed consumers could not be effectively deterred through other means (such as treble damages suits)).[14]

European Union

The European Commission has power to impose monetary penalties on “undertakings” that violate Article 101 and 102 of the Treaty on the Functioning of the European Union.[15]

The Commission has issued guidelines that describe how it calculates fines for violations of competition law.[16] The guidelines state that fines are designed to achieve a deterrent effect for both the party that has engaged in the abuse of dominance and third parties (specific and general deterrence).[17] It is possible that this clarity is a result of the fact that the guidelines apply the same formula for calculating fines for both cartel conduct and abuse of dominance, which is unusual. While there is little uncertainty that cartel fines should achieve general deterrence, the format of the guidelines, which apply the same formula to the calculation of monetary penalties for all competition law violations (including abuse of dominance) have created a very clear statement about the purpose of fines for abuse of dominance.

However, there are at least two reasons to question whether the European Commission’s fines for abuse of dominance impose general deterrence.

First, it is notable that a prior iteration of the European Commission’s guidelines described certain types of abusive conduct as “serious”; this classification was an important step in the fine setting process under those now repealed guidelines.[18] However, while the current version of the guidelines identifies the type of conduct that is “*most harmful*” and will result in the heaviest fines, each type of conduct identified involves horizontal agreements; there is no mention of any type of conduct that could constitute abuse of dominance.

Second, the Commission’s own fining practice in abuse of dominance cases suggests a desire to achieve specific deterrence rather than general deterrence. Most notably, the European Commission has on occasion utilized its discretion not to fine firms in industries that had never before been subject to abuse of dominance findings and noting that, “*In light of existing case law <u>at the moment of the infringement</u>, it could reasonably be argued that it was not sufficiently clear to* [the defendant company] *that its behavior would constitute an infringement of the competition rules of the Treaty*” [emphasis added].[19] This practice evidences a concern that a fine in such circumstances would have no deterrent purpose since other firms would have a reasonable basis to believe that their aggressive conduct would not be illegal because it had never before been examined by the European Commission. This forbearance, however, has its limits. Notably, in 2009 the European Commission imposed a fine in excess of €1 billion on Intel.[20] However, even in that case, in calculating the fine the Commission focused directly on the defendant firm (including the familiar (i.e., not novel) nature of its infringement) and did not engage in broader considerations related to more general deterrence.[21]

Next Steps in Canada

There are no events on the legal horizon in Canada that are likely to create clarity about how administrative monetary penalties for abuse of dominance are intended to operate. In particular, there are no current cases before the Competition Tribunal alleging abuse of dominance where the Commissioner is seeking an administrative monetary penalty, which might provide the

Commissioner an opportunity to explain his policy or approach, or which might give the Tribunal the opportunity to expand upon the law of Canada.

Flexibility around monetary penalties is obviously attractive to the regulator. Indeed, the FTC was sufficiently attracted by the prospect of flexibility that it repealed its 2003 position statement. Such flexibility, however, does little to promote general understanding and predictability of the law among courts or market participants.

As a matter of law, the Commissioner of Competition is charged with the administration and enforcement of the *Competition Act*. The discharge of this obligation is one of the reasons the Competition Bureau has issued guidelines on a range of competition law topics including abuse of dominance, and brought appeals in important cases that define the scope of what constitutes an abuse of dominance under Canadian law.[22] The Commissioner should use his office – whether through the issuance of guidance or in pleadings in live litigation – to offer his position on when administrative monetary penalties for abuse of dominance will be sought, and how they will be quantified. This guidance should include a discussion of the purpose of administrative monetary penalties, including clarification of the important question of whether their purpose is for specific deterrence only or also for the purpose of achieving general deterrence.

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2 Pursuing a deterrent purpose only was made necessary by Canadian constitutional considerations; were the administrative monetary to operate as a sanction, it would require that criminal due process rights be afforded to a respondent (including the obligation to prove abuse of dominance beyond a reasonable doubt). See, *R v Wigglesworth*, [1987] 2 S.C.R. 541.

3 See, *Competition Act*, section 79(3.3). See also Government of Canada Competition Policy Review Panel, *Compete to Win: Final Report* (June 2008), at page 59, accessible online: https://www.ic.gc.ca/eic/site/cprp-gepmc.nsf/vwapj/Compete_to_Win.pdf/$FILE/Compete_to_Win.pdf.

4 See Competition Bureau, *Enforcement Guidelines on the Abuse of Dominance Provisions* (September 20, 2012), accessible online: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03497.html.

5 See *Commissioner of Competition v. Chatr Wireless Inc.*, 2014 ONSC 1146 at para.51.

6 *Ibid*., at para. 65.

7 See *The Commissioner of Competition v. Direct Energy Marketing Limited*, 2015 Comp. Trib. 2, at paras. 57 and 58.

8 For example, in the *Microsoft* case, the Antitrust Division sought Microsoft's break-up, among other things, as a remedy, but no fine.

9 See U.S. Sentencing Guidelines Manual, § 2R1.1 (Commentary), accessible online: http://www.ussc.gov/guidelines-manual/2015/2015-chapter-2-l-x#2r11.

10 See, *United States v. Grinell Corp.*, 384 U.S. 563, 577 (1966), where the court held that adequate relief in a monopolization case should both "*deprive the defendants of any of the benefits of the illegal conduct, and break up or render impotent the monopoly power found to be in violation of the Act*."

[11] See, Federal Trade Commission, *Policy Statement On Monetary Equitable Remedies -- Including in Particular Disgorgement and Restitution -- In Federal Trade Commission Competition Cases Addressing Violations of the FTC Act, the Clayton Act, or the Hart-Scott-Rodino Act* (July 31, 2003), accessible online: https://www.ftc.gov/public-statements/2003/07/policy-statement-monetary-equitable-remedies-including-particular.

[12] See, Federal Trade Commission, *Statement of the Commission Regarding Withdrawal of the Commission's Policy Statement on Monetary Equitable Remedies in Competition Cases* (July 31, 2012), accessible online: https://www.ftc.gov/system/files/documents/public_statements/296171/120731commstmt-monetaryremedies.pdf.

[13] See Federal Trade Commission, *In re Cardinal Health, Inc.* (April 17, 2015), accessible online: https://www.ftc.gov/system/files/documents/public_statements/637781/150420cardinalhealthcommstmt.pdf.

[14] See dissenting statement of Commissioner Joshua Wright, *In re Cardinal Health, Inc.* (April 17, 2015), accessible online: https://www.ftc.gov/system/files/documents/public_statements/637771/150420cardinalhealthwright.pdf.

[15] See Regulation 1/2003 (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ [2003] L 1, p. 1.

[16] See European Commission, *Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003*, OJ [2006] C 210, p. 2, accessible online: http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52006XC0901(01).

[17] *Supra*, note 16, at recital 4.

[18] See European Commission, *Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of Regulation No 17 and Article 65 (5) of the ECSC Treaty*, OJ C 9, 14.1.1998, p. 3–5, accessible online: http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:31998Y0114(01).

[19] See, C.38096 *PO / Clearstream (Clearing and Settlement)*, Commission decision of June 2, 2004, accessible online: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_38096.

[20] See, C.37990 *Intel*, Commission decision of May 13, 2009, accessible online: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_37990.

[21] *Ibid*., at paras 1760 – 1769.

[22] See, for example, *Commissioner of Competition v. Toronto Real Estate Board*, 2014 FCA 29.