

Intelligence MEMOS



From: Edward Iacobucci

To: Competition Law Observers

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Re: **THE COMPETITION BUREAU'S APPROACH TO THE GOALS OF COMPETITION POLICY**

What should be the goals of competition policy?

Headline inflation was up to 4.8 percent in December, all the Bank's core inflation measures increased (with two of the three above 3 percent), and the Bank's December Business Outlook Survey showed two thirds of firms expect inflation to remain above 3 percent for the next two years.

Section 1.1 of the *Competition Act* provides that promoting competition promotes efficiency, competitive prices and product choices, and tends to ensure that small and medium-sized enterprises (SMEs) have an "equitable" opportunity to compete.

In a recent [paper](#) to support Senator Howard Wetston's consultation, I expressed concern that the objectives found in the *Competition Act* may conflict with one another.

For example, efficiency may conflict with competitive prices where a merger lowers costs and raises prices.

After canvassing different options, and different arguments, I leaned to adopting a narrower efficiency focus in s. 1.1, while leaving pursuit of other important social objectives to other legal instruments.

Meanwhile, in a recent [statement](#), the Competition Bureau "strongly opposes" any change to s. 1.1. While there are reasonable arguments for the status quo, the Bureau instead offers arguments that are largely unconvincing.

Let us examine the most prominent of the Bureau's arguments.

It asserts that, "a singular focus on economic efficiency risks making the Act indifferent to the welfare of consumers, small and medium-sized enterprises, and other groups that are most vulnerable to anti-competitive conduct."

This is incorrect and reflects a misunderstanding of the merits of efficiency as a goal. Efficiency is a laudable social goal because it makes Canadians better off economically. And it is therefore not indifferent to the effect of anticompetitive conduct on people, consumers included. To the contrary, concerns about reductions in consumer welfare from anticompetitive behaviour and high prices that exclude consumers from the market lie at the heart of the efficiency analysis of competition.

Oddly, at the same time it says efficiency risks indifference to vulnerable groups' well-being, the Bureau implicitly accepts that promoting efficiency generally makes people better off. To explain, the Bureau states that, "when provisions of the Act are viewed through the lens of maintaining and encouraging competition, the objectives set out in the purpose clause rarely come into conflict."

This is reasonable as a descriptor of Canadian competition policy in practice to date. But to say, as the Bureau does, that the objectives rarely conflict is to say that adopting efficiency as the statutory motivation for promoting competition would have little practical effect on competition law's capacity to make citizens better off. This is not obviously a strong argument against adopting efficiency as the objective.

Given the Bureau's reasonable assertion that the goals do not often conflict, one might mistakenly conclude that the question of the goals of the *Act* is not especially important. Setting aside the fact that the goals do conflict in some cases, which is problematic in itself, to say that there has been little conflict between the goals is contingent on the way that competition policy has been administered in Canada.

There are potential conflicts between the different goals everywhere, especially between efficiency and fostering competition from SME's, but the law has marginalized these potential conflicts by hewing to an efficiency-oriented analysis.

As an example, if one were to elevate the prominence of the goal of protecting competition in order to benefit SME's, abuse of dominance law in Canada could simply focus on whether a dominant firm has hindered access to the market by a smaller rival, and if it has, the law could conclude that there was a substantial lessening of competition. That is, elevating the importance of SME's could have the *Competition Act* strive to protect competitors and call that protecting competition.

But that is not the way the case law has evolved. In [Nielsen](#), for example, in which a dominant firm prevented entry by a potential entrant by signing exclusive contracts with suppliers of a key input and buyers of the output, there was no controversy at all whether Nielsen excluded a smaller rival; the contracts did so on their face. But that was insufficient to establish abuse of dominance. Instead, in its case against Nielsen at the time, the Bureau provided a coherent and compelling theory of why the contracts inefficiently excluded competition and that gave rise to a successful abuse of dominance case.

The list of potential examples of how the law could have departed from efficiency based on s. 1.1, but has not because of an implicit emphasis on efficiency, is very long. An explicit focus in s. 1.1 on efficiency would simply avoid the indeterminacy that arises on occasion under the status quo, and would avoid alternative interpretations of s. 1.1 in the future that would emphasize the protection of inefficient competitors. While there are reasonable arguments in favour of a broader set of goals, the Bureau's arguments for the status quo that the goals do not conflict, and that efficiency is indifferent to consumers and other vulnerable groups, are unconvincing.

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