Intelligence MEMOS

From: Tim Brennan

To: Competition Policy Watchers

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Re: SHOULD "INTENT" BE A CONSIDERATION IN COMPETITION LAW?

The *Competition Act* sets out the rules businesses in Canada must follow to ensure that the give-and-take of competition serves the public and maximizes the potential for innovation and efficiency in the economy.

It is currently under review in Ottawa and a comprehensive discussion paper from the Department of *Innovation, Science and Economic Development (ISED), overseer of the Competition Bureau,* is open for public discussion until March 31.

As one who served as a visiting economist in the Bureau, I follow these developments closely, despite living south of the border. And I have additional interest because US competition law is also facing potentially extensive changes in perspectives and presumptions.

Many of the issues are complex and intensely controversial. Perhaps the issue on which there is the broadest consensus would be to reduce what the ISED calls "a high bar for intervention" that impedes action against anti-competitive practices.

I suggest that one aspect of competition law that makes the bar for intervention higher than it should be is the requirement (unfortunately coming into force in about three months), that "intent" be a part of the definition of an anti-competitive act. Such an addition is unnecessary and, particularly as recently modified, counterproductive.

The ISED report notes that the recently enacted Budget Implementation Act, 2022 amends the Competition Act to state that "anti-competitive act means any act intended to have a predatory, exclusionary or disciplinary negative effect on a competitor, or to have an adverse effect on competition."

As explained below – and as a recent Communiqué from the C.D. Howe Institute Competition Policy Council suggested – the reference to negative effects on competitors is troubling on its own because it is contrary to how competition operates.

Beyond that, the downside of an intent requirement is even broader.

A first reason to reject intent is that it is irrelevant. Suppose the Bureau could prove that a merger or practice harmed competition and injured the public, but could not prove intent. Should that merger or practice be allowed to continue? Requiring that intent be proven in addition to harm implicitly says that these practices should not be stopped.

Notably, there is no intent requirement to block an anticompetitive merger, nor is it needed. If the accumulated evidence and relevant economics predicts substantially higher prices, reduced quality, or slower innovation, the merger would be blocked. There is no more reason to require intent in other components of antitrust law.

A second reason to eliminate the intent requirement is the question of how to prove it. Competition cases are already hard. An "intent" requirement adds a need for psychological expertise on top of highly specialized aspects of the law and state-of-the-art technical economics used to predict anti-competitive outcomes. It means that enforcers, the Competition Tribunal and the courts will now have to read the minds of business executives to see what they meant to do.

A third reason is that an intent requirement is paradoxically anti-competitive, particularly with regard to "harm to competitors." The nature of competition is to come up with lower prices, higher quality, or innovative products to take market share away from competitors. A business acting competitively is likely to be rife with statements by managers and employees about how they want to beat their rivals, perhaps even to the point of driving them out of business.

Should Canadians, or anyone for that matter, prefer the opposite?

Suppose one found evidence that a business wanted to keep prices high, quality low, and reduced innovation with the intention to keep their rivals operating comfortably and preserve their market share. This should, and would, be taken as potential evidence of tacit and perhaps explicit collusion between competitors, also a violation of the *Competition Act*. What then, pray tell, is a firm supposed to intend to do?

Intent evidence may be relevant, but for showing anti-competitive effect. If executives intend to bring about an anti-competitive effect through a practice (or merger), they must believe that the practice would substantially lessen competition. This is essentially expert witness testimony to support a competition law case against the practice.

Intent is important in criminal settings. There, the enforcement goal is not just to deter a harmful practice, but also to prevent individuals prone to that harmful conduct from carrying it out in the future. This can be the case in some competition law settings, e.g., price fixing conspiracies. But that is not usually the case in normal competition proceedings under civil law, when one is balancing considerations to determine whether the harms of a particular practice outweigh any benefits.

Among the reforms ISED is considering includes "revisiting the relevance of intent." I hope it finds that a focus on intent is largely irrelevant, likely to reduce competition, and unduly raises the bar for bringing cases that would benefit the Canadian public.

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