Intelligence MEMOS

From: Paul A. Johnson

To: Competition Policy Watchers

Date: April 13, 2023

Re: **Canada Should Not Restrict Competition with Bright Line Rules**

The federal government is currently re-examining Canada's *Competition Act*. Such re-examination is natural and useful – especially given the paucity of Canadian competition jurisprudence, which can give a single decided case outsized significance and cause widespread repercussions. Notably, meanwhile, the re-examination has been launched against the backdrop of growing calls to invigorate competition law enforcement.

In its discussion paper, the government has invited comments on one candidate approach to invigorate competition law enforcement: the adoption of so-called "bright line rules" modeled on European laws that will shortly come into effect. That moniker has surface appeal – even more so when considering the discussion paper translates the term as "*règles très claires*." After all, shouldn't all laws aim to clearly demarcate what is prohibited and what is not?

Aside from the appeal of the name, such bright line rules represent blanket bans on certain types of marketing (self-preferencing) and new product introductions (copycatting) by certain firms (gatekeepers). Such a blanket ban is remarkable because self-preferencing and copycatting is ubiquitous even in circumstances where there is no plausible anticompetitive concern. As but one example, Home Hardware has developed (copycatted) a proprietary brand of paint, which it promotes (engages in self-preferencing).

Even proponents of bright line prohibitions agree that self-preferencing and copycatting can enhance competition and benefit Canadians. But if self-preferencing and copycatting enhance competition and benefit Canadians in some cases, one must acknowledge the potential for similar beneficial effects even if used by "gatekeepers." Not that all instances of copycatting and self-preferencing are necessarily procompetitive; it simply points to the need to analyze each instance with available evidence, which is the opposite of what a bright line rule would require.

In that light, is there good evidence that bright line rules would benefit Canadians by prohibiting anticompetitive conduct without stopping too much procompetitive conduct? My consideration of that question, detailed in my longer public consultation submission answers that question in the negative. (My work to prepare that submission was supported by the US Chamber of Commerce, which did not dictate or restrict my comments, which means they are not necessarily theirs.)

Some firms certainly do combine their scale with innovative use of data to anticipate and meet evolving customer needs at a low price. A bright line rule would block any firm deemed a "gatekeeper" from taking certain steps to do so; tangible and real benefits enjoyed by consumers would be lost. Proponents of bright line rules acknowledge that loss, but say it is needed to address the mere possibility of some kind of harm at some point in the future. A central motivation for bright line rules is to head off such possibilities, which cannot be discerned with a traditional evidence-based analysis.

Sacrificing today's tangible and real benefits in favour of avoiding the possibility of some unspecified harm at some unspecified point in the future represents a radical shift for competition policy.

In my view, it's bad policy.

Bright line rule proponents also sometimes echo complaints from small firms who find it very difficult to compete against larger competitors that have lower costs and, as a result, can charge lower prices for higher quality goods and services. This complaint is grounded in a subjective notion of fairness and not in competition. After all, it is competition that increases sales by firms that deliver substantial value at the expense of those that do not. Competitors lacking the wherewithal to compete effectively are sometimes propped up by government intervention but never by competition: competition in no way guarantees a level playing field. While bright line rules certainly could protect and promote certain firms and harm and restrain others – almost certainly at the expense of consumers and competition – that prospect should be anathema to competition policy in Canada.

I am not throwing a wet towel over any plans to invigorate competition law enforcement. Despite claims to the contrary, increased enforcement plainly does not require bright line rules. For example, without my endorsing their specific recommendations, the Competition Bureau's own comments suggest multiple ways to invigorate competition law enforcement while, notably, nowhere recommending the use of bright line rules.

Although trite to say, the details of a competition policy refresh really do matter. If the government does ultimately decide to invigorate competition law enforcement, adoption of bright line rules should not be part of the package.

Paul Johnson is a member of the C.D. Howe Competition Policy Council and owner of Rideau Economics. From 2016-2019, he served as the T.D. MacDonald Chair in Industrial Economics at the Competition Bureau.

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