

Intelligence MEMOS



From: Tim Brennan

To: Canadian Competition Watchers

Date: August 26, 2021

Re: **ADDING GOALS TO CONSUMER WELFARE CAN UNDERCUT EVERYTHING**

Parliament is [considering](#) amendment to the *Competition Act*. The current US example suggests that these changes may include adding goals for competition enforcers to pursue beyond benefits to “consumer welfare,” currently their prime directive. Section 1.1 of the current *Act* mentions “small and medium sized enterprises hav[ing] an equitable opportunity to participate in the Canadian economy,” but jobs, inequality, privacy and sustainability are among new goals being proposed on either side of the border.

These should be kept out of competition law – the only tool in the policy toolbox to promote consumer welfare through competition. Adding these other goals, regardless of their merit, weakens that objective.

Moreover, as these other goals span the entire economy and society, they can and would be better addressed through legislation directed specifically toward them, for example, through small business loan programs, social insurance, and environmental protection. (I have addressed this issue in [professional journals](#) and, more recently, in an [essay](#) posted by the US Free State Foundation, from which this Memo is adapted.)

Competition law has had the goal of promoting consumer welfare through banning practices that would reduce competition. The short version of “consumer welfare” is keeping prices low, but practices that reduce product quality, marketing effectiveness, and innovation all fall within this standard. The aphorism summarizing the tradition has been that competition law is about protecting consumers, not competitors. A colleague long ago summarized this in what he called the First Theorem of Antitrust: “If a competitor complains about something, it must be good.”

In recent years, this tradition has [come under attack](#). Critics [cite](#) the growth of the Big Tech platforms, such as Google, Facebook and Amazon, which offer services to customers at a zero price. Under traditional practice, these companies would be deemed to be acting legally unless they engaged in practices that subverted competition that would have made consumers better off. However, under what has come to be called [neo-Brandeisian antitrust](#), antitrust became detached from concerns with political and economic fairness.

Many have [called into question](#) the veracity and relevance of the Neo-Brandeisian critique. Others have pointed out that moving away from the consumer welfare standard will make [antitrust unworkable in the courtroom](#). These critiques are sound, but I want to call your attention to another cause for concern that might give some pause to those applauding these developments.

Expanding the range of goals to pursue with antitrust, may end up not only doing a poor job protecting consumer welfare, but also impede achieving the equity, employment, fairness, and other social objectives motivating the critics of traditional antitrust – many of which I share with neo-Brandeisian critics. The simple version of the argument is a policy principle familiar to economists: The number of policy tools needs to equal the number of policy goals. If you try to address two or more problems with one policy tool – in this case, competition law enforcement – one will be ineffective at achieving either.

Competition law enforcement arises on only a case-by-case basis – we see only those mergers that are proposed or those cartels that are undertaken – whereas these other concerns pervade the economy. Other than very rare instances of price regulation, we have no policy to protect consumer welfare by deterring the deleterious creation of market power other than antitrust. Competition law ought not be subverted to promote economy-wide goals for which there are more effective economy-wide tools.

Advocates of expansion should address how much consumer welfare should we be willing to sacrifice to promote these other goals. To take but one example, one might be able to protect small stores in the name of “consumer choice” by limiting the ability of large big box or electronic retailers to expand operations, resulting in higher prices. How high should the price go? Not knowing the answer, I can imagine that the neo-Brandeisian response is that there is no trade-off. If there is no trade-off, then the neo-Brandeisian approach is nothing more than promoting consumer welfare, with some extra benefits on the side.

Advocates of expanding antitrust should realize that policy indignation is a scarce resource. If a star chamber of plutocrats ran the world, nothing would please them more than to have their opponents squander their energy on attacking them through competition law rather than policies that might really address inequality and other social ills. If you care about these other problems, please do not waste our energy by pursuing the ineffective path of *Competition Act* amendments.

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