Intelligence MEMOS

From: Paul Johnson

To: Competition Policy Watchers

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Re: Let's Keep Competition the Focus of Canada's *Competition Act*

New voices are challenging competition policy's status quo by advocating expansion of its goals to protect and promote, not only competition, but public interest goals like equality, free speech, and even democracy.

As it considers reforms to its *Competition Act*, Canada would be best served by resisting these appeals.

The objective of modern competition policy for mergers and restrictive trade practices is materialistic and simple. In short, it seeks low prices for high quality goods and services. It is of no consequence whether many small firms or a few large firms achieve that objective. Similarly, no judgment is made about the social value of the products and services at issue – high quality and low prices are the objective even for goods that may have adverse social impacts.

But calls from across the political spectrum have challenged that orthodoxy claiming that free speech and even democracy should be prioritized. To be clear, these are different from, but not necessarily at odds with calls to intervene more aggressively in markets. As a recent wave of legal challenges to Big Tech companies in the United States has demonstrated, enforcement can become more vigorous without a change in objective. But we are now hearing calls for competition policy to aim for new objectives.

Even institutions not known for their radical agendas have made the case for competition policy to take a harder look at advancing objectives other than competition. The OECD, an international organization composed of democratic market economies, while avoiding calling for wholesale changes to the objectives of modern competition policy, has highlighted how agencies can prioritize enforcement to promote gender equality. Canada's Competition Bureau has supported the OECD in these efforts to "see if there are opportunities to promote gender equality with competition enforcement and policy."

But make no mistake about it: prioritization or selection of cases to promote a non-competition objective would represent a major change for modern competition policy. Because case selection is determined by the objective of the competition policy, a change in case selection implies a change in the objective.

Thus, cases that are a priority for an enforcer using a competition lens exclusively will not generally remain a priority with another focus. Conversely, cases deemed to have an insufficient impact on competition to pursue could go to the front of the line. Because different non-competition objectives will imply different and conflicting priorities, specific objectives would have to be identified.

What would they be? Would they change based on the government's agenda? Would they change at the discretion of the Commissioner of Competition? Would they be made permanent and inflexible through codification in the *Act*?

Setting those difficult issues aside, the fundamental problem with calls to incorporate broader public interest perspectives into competition policy for mergers and restrictive trade practices is that competition enforcement is almost never a good tool to achieve an objective beyond competition.

Consider a merger of firms in the oil and gas industry that is anticompetitive in that it is judged likely to result in higher prices. Incorporating climate concerns into an enforcement decision would weigh against challenging such a merger because the higher prices that would result ought to lower emissions.

But doing so ignores that taxation is a better policy instrument to combat climate change. After all, instead of blessing an anticompetitive merger, which would increase the merged firm's profits, a tax could lead to the same higher price but would also produce revenues to fund investment in greener technologies to reduce emissions further.

Beyond this "square peg-round hole" problem, addressing non-competition issues through competition policy also thrusts enforcers into a new position where they are forced to determine – with limited or no consultation with the public – what is in the public interest.

Public interest questions are inherently controversial. For example, even if everyone agrees that climate change is real and costly, there remains an important and complex debate about society's response. Current debates about how large technology firms affect democracy, free speech, privacy, and even public health are just as complex and contentious.

In Canada, contentious questions about public policy are determined by politicians, who are ultimately disciplined by voters. The Competition Bureau can and does play an important role by providing advice on competition to politicians and regulators who consider that narrow advice in making broader determinations about the public interest. But asking Canada's unelected Competition Commissioner to make those determinations alone is a step too far.

We should keep the Competition Bureau focused on competition.

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

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