From: Paul Johnson <paul@rideau-economics.com>
Sent: Wednesday, October 27, 2021 11:37 AM
To: Wetston, Howard <Howard.Wetston@sen.parl.gc.ca>
Subject: RE: A Consultation Paper -- Examining the Canadian Competition Act in the Digital Era

[*EXTERNE/EXTERNAL***]**

Hello Howard,

Thanks for sending along the material. I went through it quickly last night and found that I agree with the vast majority of what is there. I hope it'll be helpful for you in advancing debates about competition in the near future.

I won't comment on all the material with which I agree, but I'll mention a problem I perceive to be important that is not addressed in the paper. It concerns the balance of probabilities legal standard as applied to prevent cases where there is competition **for** the market. Many people are writing and talking about this issue – just last week, Krista McWhinnie made it a point of emphasis in her comments on a CBA panel. Ed touches on the topic starting at the bottom half of page 21 of the paper but doesn't get to the same conclusion I've come to. (And it's only been over the past few years that I've come to appreciate this point, which was driven home for me on a case I worked on while at the Bureau.)

Many people agree that due to very large economies of scale and scope as well as network effects, competition in digital markets is sometimes characterized as winner-take-all competition for the market. I believe that problems for enforcement arise in these situations. To illustrate, suppose an incumbent with market power is engaged in an anticompetitive act that prevents successful entry by a disruptive entrant. To condemn that conduct, we need to conclude that, on a balance of probabilities, the entrant would have had a substantial effect on competition but for the conduct. But that requirement immediately rules out situations where the entrant's success is not likely (i.e., less than 50% probability) regardless of the scale of the benefits of successful entry. Competition for the market represents exactly this kind of situation—any one entrant is unlikely to succeed, but doing so would have huge benefits. To illustrate further, suppose the entrant is successful with only probability 10% but, conditional on that success, the benefits to competition is $X. The curious thing is that $X can be arbitrarily large but will never meet the requirement of the balance of probabilities legal test. Anticompetitive effects are never "likely" even though in "expected value" (defined in the mathematical effect) the anticompetitive act could have huge anticompetitive effects (e.g., set X equal to a trillion dollars).

Of course, no business or person makes decisions only paying attention to events that are "likely" – I wear a seat belt in a car even though it's not likely that I will need it, Facebook may decide to prevent competition from a nascent competitor even though it's not likely that that competitor would succeed. Nevertheless, the balance of probabilities standard is fundamental to an awful lot of law.

This means that we end up putting no weight on any event that is not likely. But that is problematic in many digital prevent cases—successful entry is unlikely, but if it is successful, the benefits are huge (think of when Google won competition for the market of general search). In the United States, the Microsoft circuit court recognized this issue with language that is oftentimes quoted ("…it would be inimical to the purpose of the Sherman Act to allow monopolists free reign to squash nascent, albeit unproven, competitors at will—particularly in industries marked by rapid technological advance and

frequent paradigm shifts."). Nevertheless, that language has not done anything to change the "likely" standard or challenges the US agencies face in bringing prevent cases.

Perhaps most famously, this issue was raised in the Furman report submitted to the CMA, which introduced the notion of a "balance of harms" standard. That standard considers both the likelihood and the magnitude of the impact of, say, a merger in order to allow a competition authority "to intervene where it expects, on average, for the harm of the merger to be substantially greater than the benefits." While it's the same cost-benefit approach governments apply to lots of areas of regulation, the CMA rejected this approach due to "practical challenges in applying this kind of test in a transparent and robust way."

I agree with Ed that the Competition Act is "highly flexible" in many ways. However, the balance of probabilities standard is highly inflexible, which I believe can cause problems in these types of cases.

Best regards,

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