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SUBMISSION: RESPONSE TO

DECEMBER 15, 2021

The focus of this brief submission is to address arguments and claims made in the consultation paper related to the concepts of fairness and equity within Canada's competition policy. We focus on specific points raised in the paper related to the purpose and guiding principles of the Competition Act.

In sum, we understand that Professor Iacobucci argues that including fairness objectives of the Act, of which there are many, leads to indeterminacy in the law. This indeterminacy is the result of potential conflict between the various objectives that would be included in a purpose statement focused on fairness.

We agree that indeterminacy is a valid problem that should be addressed. Not only does it lead to unpredictability in the application of the law but leaving it to the Tribunal to balance different objectives is also inappropriate. Forcing the Tribunal to balance objectives according to its own preferences is undemocratic as we are of the view that it should be up to the electorate, not technocrats, to decide the priorities of this important legislation.

Where we diverge from Professor Iacobucci is in the proposed solution to the indeterminacy problem whereby the purpose statement should be refined to focus on only one objective – economic efficiency. We have two points to make in response.

First, we believe that it is possible for purpose statement based on economic fairness to be crafted which addresses many of the problems pointed out by Professor Iacobucci. We recognize that the example of a purpose clause based on fairness is meant to be illustrative. However, it is clear that attempting to capture every "progressive" idea for the purpose of competition law in one statement will lead to confusion and indeterminacy. That being said, to date no one that we are aware of has put forward an alternative purpose statement for the Act that could be analyzed for the purposes of Professor Iacobucci's analysis. Our point here is that while an efficiencies-centric purpose statement can resolve the indeterminacy problem, the discussion paper does not prove that a purpose statement based on non-efficiency considerations is naturally indeterminant.

Our second, more fundamental point, is that the problem of indeterminacy is not only the result of the Act's purpose statement. The way that conduct under the civil provisions of the Act (we are including the merger provisions in this) is evaluated is another, and arguably more important, aspect of the indeterminacy problem. The so-called "rule of reason" substantive test

by which civil conduct is assessed naturally lends itself to indeterminacy problems when there are multiple objectives. It requires the Commissioner to undertake an in-depth analysis of the conduct to find evidence of negative effects (either current or likely to occur in the case of mergers). When the purpose statement allows for multiple, often conflicting, negative effects to be considered, indeterminacy is bound to arise.

Another solution to the indeterminacy problem is to reform the substantive tests associated with the civil provisions so that they are more rule-based, or what some call *per se* tests. In her summary of Laura Guttuso work, Jedlickova describes this approach to evaluating anticompetitive conduct as the deontological approach common to EU law, in contrast to the consequentialist approach employed in Canada and elsewhere. The deontological approach would not require the Commissioner to assess the effects of the conduct. Rather the conduct may be deemed to be anticompetitive based on its character. Assessing conduct based on its characteristics rather than effects avoids the problem of the Tribunal or Commissioner having to weigh the various relevant effects of the conduct. The deontological approach has the added benefit of perhaps being more predictable in general.

Critics of the more deontological approach to evaluating conduct may argue that it is unsophisticated and does not align with (neoclassical) economic theory. They may also argue that deontological law may lead to over-enforcement or Type I error. That is, conduct that is benign or even pro-competitive may be inhibited by the law. In contrast, Type II error (under-enforcement), which may be more likely under a consequentialist substantive test, is less damaging because over time competitors may erode (or even be incentivized by) the market power gained by the firm undertaking the conduct.

It is worth noting that some more recent competition law scholarship has challenged the conclusions arising from the traditional "error cost" analysis described above.[1] However, more relevant to our argument, we hold the view that a deontological approach is not unsophisticated or inferior to a consequentialist approach. Rather, deontological tests are based on different assumptions of the nature of markets and competition; namely, that markets are not naturally competitive and self-correcting and that firms tend to monopoly. There is room to debate to what extent these assumptions hold in real life, and we do not open the debate here.

[1] For example, see:

Baker, J. (2015). Taking the Error out of "Error Cost" Analysis: What's Wrong with Antitrust' s Right.

Hovenkamp, H. (2021). Antitrust Error Costs.

Ultimately, what we would like to see in the Canadian competition policy space is further discussion and engagement on the purpose and design of competition law that extends beyond the traditional players that have informed competition policy in this country for the last several decades. This engagement could include a citizen's assembly (we credit Vass Bednar with this idea) that enables non-experts to engage with the issues and discuss what the purpose of the Act ought to be. This broader engagement should be part of a wholesale review of the Act that aims to modernize the legislation based on changes in the economy and the needs of people in Canada.

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