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A seriously bad idea: The Competition Act is a jewel. It may need polishing, but allowing companies to take private disputes to the courts would be disastrous

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In today's fragile economic times, you would think the idea of amending legislation to expose Canadian business to the threat of millions of dollars in unmerited court actions would be dead on arrival. It should be. But it isn't.

Just such a possibility is being seriously looked at by the House of Commons Committee on Industry, Science and Technology, just wrapping up public hearings on Bill C-23, an act to amend the Competition Act and the Competition Tribunal Act.

By world standards, Canada's Competition Act is a jewel. Its economic and moral underpinnings are sound, and it is one of the most state-of-the art pieces of competition legislation in the world. It is the envy of many countries.

Updating the act is a time-honoured tradition. It's what keeps the legislation fresh and relevant. Over the last 25 years we have successfully amended the act regularly by taking the best of the numerous changes and recommendations brought forward for discussion. To our credit, we have also rejected a number of seriously bad ideas over the same period. This may be set to change.

At issue is the committee's apparent intent to provide a right for private companies to bring forward lawsuits relating to "reviewable practices" -- everyday business arrangements (such as who best to distribute your product, on what terms, where, etc.) which are almost always efficiency enhancing and pro-competitive, but which may, in certain limited cases, prove anti-competitive.

Reviewable practices are very different from offences, such as price-fixing, which the act also dealt with. By today's rules, reviewable practices are lawful, unless and until the Competition Tribunal prohibits them.

The proposed change is neither necessary nor desirable and is frankly not recommended by those in the United States who have considerable experience with the practice.

Under the present system, complaints relating to refusal to supply, tied sales, territorial restrictions and exclusive dealing are made to the Commissioner of the Competition Bureau. They are investigated and pursued if they appear to have merit.

The results have been exemplary. Indeed, no one is suggesting the commissioner has been refusing to bring forward cases that threaten the public interest in competitive markets. Cases have been tried, and where the facts have supported the allegations, the bureau has been successful. More importantly, the commissioner has played the vital role of identifying and filtering out unmeritorious complaints. This minimizes costs inflicted on marketplace participants whose activities are competitively neutral or pro-competitive.

The importance of having a public interest filter is clear when the potential for private litigation is understood. Over the last seven years, the bureau has handled a yearly average of 537 reviewable practice complaints of the sort the Industry Committee is looking at. And for the entire period, after every complaint had been scrutinized, less than 1% was ultimately found to be anti-competitive.

Under a new regime, which lets the complainants determine which cases proceed, this would all change. If proceedings were started by 5%, 10% or even 15% of complainants whose cases the commissioner had found unmeritorious, the Competition Tribunal would face from 27 to 81 new cases per year.

And at what cost! According to a survey by Deloitte & Touche prepared for the Competition Policy Group Report and submitted to the Committee, the average cost of defending a reviewable practice case comes in at a staggering $5.5-million (which must be added to the average cost of prosecuting a case -- estimated for the commissioner at $1-million a case). The Deloitte & Touche survey also found the Competition Tribunal's average operating cost for a case to be $685,000.

Based on these findings, published and given to the committee last week, the incremental costs of private reviewable practices litigation to the Canadian economy would be in the range of $137-million to $419-million per year. That's money that should be going into research and development, salaries, new jobs.

Before becoming Commissioner of the Competition Bureau, Konrad von Finkenstein made the case against introducing private sheriffs into the Competition Act. In 1997 he said, "... by taking the initiative for commencing ... civil proceedings for competition violations out of the hands of private parties, we have protected Canadian business from the constant threat of litigation that is possible under American law."

In comments prepared for the Competition Policy Group, Donald Baker, a former U.S. Attorney General in charge of the Antitrust Division, states clearly that "the idea of an expanded right of action for essentially private disputes is probably not worth the potential cost to Canada -- a cost that will be measured in private litigation (and counselling) costs, public costs for the courts and, most importantly, the costs of forgone business opportunities by legal uncertainty"

Competition law covers some of the least understood yet most important legal procedures impacting the Canadian economy. Competition legislation is designed to protect consumers from the failure of the market. It is not designed to protect business from the working of the market.

Yet, one of the committee's arguments for supporting private action is the supposed benefit of allowing private parties (e.g. competitors, distributors and the like) to bring their own actions in

cases where the bureau had decided not to initiate a tribunal proceeding because the conduct's "impact on competition is minimal and does not warrant public intervention." Given how well the current system works, the committee fails to explain why conduct that does not threaten the public interest in competition should be litigated or deterred.

The case is especially weak in the face of the realty that the proposed new right to sue will become a forum for strategic litigators -- those who can afford and will not be daunted by the enormous costs involved. Competition cases are among the most complex and expensive of all litigation matters. To suggest the proposed change will be of any realistic use, or even be accessible to small and medium sized business, is akin to promoting technicolour dreams.

But all of this does not mean that today's regime cannot be improved. Of course there is room for change, but within the regime that we have.

The bureau has never said it could not bring a meritorious case because it was short of resources. But if it says it could and should handle more cases with more resources, then the government should be sympathetic. This would be faster, more efficient and certainly fairer to small business, which would have great difficulty taking on court actions that routinely run into millions of dollars and drag on for years.

The bureau could clarify the "refusal to supply" provision which seems to generate a large number of unmeritorious complaints. There is no reason in the world why this practice should not carry the same "substantial lessening of competition" threshold as all others in the act.

And the commissioner could enhance his accountability, as he has done with mergers, by introducing service standards, including target timelines for the completion of investigations. For greater transparency, he could make available guidelines and clear enforcement policies for refusal to deal, tied selling, market restriction and exclusive dealing. And the bureau could commit to providing concise reasoned decisions on its conclusions on all complaints. The European Union's Competition Directorate uses this approach and it has provided invaluable and cost-effective jurisprudence on the enforcement standards likely to be applied.

There is no evidence the proposed private litigation amendment will solve problems. But there is every sign it will create new, very expensive ones. Canada does not need additional hurdles in the path to international competitiveness.

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