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Global Forum on Competition

THE RELATIONSHIP BETWEEN COMPETITION AUTHORITIES AND SECTORAL REGULATORS

Contribution from BIAC

-- Session II --

This contribution is submitted by BIAC under Session II of the Global Forum on Competition to be held on 17 and 18 February 2005.

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SUMMARY OF DISCUSSION POINTS

Presented by the BUSINESS AND INDUSTRY ADVISORY COMMITTEE (BIAC)
TO THE OECD GLOBAL FORUM ON COMPETITION

SESSION 2: RELATIONSHIP BETWEEN COMPETITION AUTHORITIES AND SECTORAL REGULATORS¹

1. BIAC welcomes the opportunity to provide its views to the fifth meeting of the Global Forum on Competition concerning the relationship between competition authorities and sectoral regulators. BIAC commends the Secretariat for addressing this increasingly important issue.

1. Introduction

2. Evolving historically from concerns with firm size and perceived dominance as a threat to markets and to the political system, legislation was enacted to regulate conduct in particular industries; *e.g.*, railroads in the United States. The legislation afforded specialised agencies authority to regulate competition, often overlapping responsibilities vested in the traditional antitrust agencies.² Part of the concern with “bigness” derived from fear of “excessive” (“predatory”) competition, leading to statutory and regulatory restrictions on low-level pricing and limitations on market entry.

3. Specialised agencies were also created to deal with the competitive functioning of industries in markets which were believed to embrace public assets and/or “natural monopolies,” for example, airspace and airlines and, initially, spectrum and broadcast communications.

4. The allocation of responsibilities among the governmental bodies is often imperfect, placing responsibilities in the hands of regulators who were not by training or orientation adept at assessing the likely competitive impact of a proposed transaction or particular conduct. Competitive markets require efficient and effective allocation of enforcement responsibility between competition agencies and sectoral regulators, with careful consideration going to the relative advantage that each brings to the enforcement arena.³

5. Certain sectoral government agencies have been allocated specialised authority for competition assessment and enforcement in designated regulated or semi-regulated industries.

For example, in the U.S. the role of the sectoral government agency varies from concurrent jurisdiction between the Department of Justice (DOJ) and the Federal Communications Commission (FCC) to pre-emptive jurisdiction over mergers in a specific industry, for example, railroad mergers and international airline alliances. This is by no means a phenomenon unique to the United States; the allocation of competition enforcement jurisdiction to sectoral regulators is evident in national legal structures the world over.⁴

6. The decisions made by these specialised agencies are sometimes at odds with the recommendations and decisions of the antitrust enforcement agencies. Overlapping jurisdiction and different standards of review can, at times, result in different outcomes for the same transactions, or at least additional requirements being imposed by one or the other agency.⁵

- The standard of review mandated for use by sectoral agencies is often a “public interest standard” as opposed to the “substantial lessening of competition” standard or the “abuse of dominance” standard used by most antitrust authorities.
- Multiple review by both antitrust and sectoral agency can also result in an unnecessary delay of the closing of a transaction.⁶

7. The issue of antitrust authorities and sectoral regulators was directly addressed to the DOJ by the International Competition Policy Advisory Committee (ICPAC) in its study and recommendations on the future of international antitrust policy.⁷

- A majority of the ICPAC members recommended removal of the oversight authority for the competition aspects of merger review from the sectoral agencies.⁸
- In offering this recommendation, the ICPAC majority explained that overlapping sectoral and generalised agency authority threatens:
 - efficient review;
 - substantive international convergence;
 - case-by-case cooperation; and
 - consistency and transparency.⁹

8. The increasingly global nature of transactions militates in favour of consolidation of authority for competition aspects of merger review solely with the antitrust agencies.

2. Global significance of multiple enforcement review

9. The overlapping of sectoral and generalised antitrust review has global significance. The costs of enforcement multiplicity are apparent not only in countries with established antitrust regimes but with increasing importance in newly established market economies and in countries implementing the transition from comprehensive public utility regulation to competition.

For example, the frictions and complexities presented by the possibility of merger inquiries in sixty to seventy jurisdictions presents in itself an extraordinarily daunting challenge to expeditious and consistent enforcement.

10. Consistency in antitrust enforcement is an important component of cooperation efforts.

- It is necessary to allow national governments to establish common policies and procedures with foreign counterparts and to work together on assessing individual transactions.
- There is no formal mechanism by which foreign competition authorities can share information with sectoral regulators as they can with their competition authority counterparts.¹⁰
- It is difficult for one country to encourage foreign governments to cure imperfections in their competition policies and procedures when their system is more decentralised with different substantive standards implemented by different government bodies.

3. Problems associated with multiple enforcement review

11. Significant costs arise in the allocation of competition enforcement responsibility to regulators whose primary governmental role and analytical expertise lies outside established competition policy objectives and analytical norms. Inconsistent and contradictory enforcement creates a climate of business uncertainty, the cost of which is borne not only by business,¹¹ but also by national economies and the competitive markets of which they are a part.¹²

- Multiple review by both antitrust and sectoral agency can give rise to uncertainty and demonstrable adverse effects, including not only easily recognised impacts, such as unnecessary delay of the closing of a transaction, but also effects with more far-reaching consequences for national economies, such as negative effects on the attraction of private risk capital, the promotion of new entry, trade liberalisation, and the overall cultivation of a culture of competition.
- Government's allocation of competition enforcement responsibility authority to competition agencies ensures that competition enforcement is conducted under a framework of sound, established economic analysis and policy objectives.
- In those instances where additional industry expertise is required, antitrust agencies can and do cooperate with sectoral regulators but base their decisions, ultimately, on economic results, as proper antitrust analysis dictates.
- In areas of pre-emptive or concurrent competition enforcement jurisdiction, it should be incumbent upon sectoral regulators to assess decisional factors such as market definition, market share, entry, and costs, based on established competition principles and standards.

12. Multiple review of the same transaction may make the grounds for individual decisions less transparent.

- Because of the "public interest standard," sectoral regulators often have authority to give effect to social welfare or industrial policy considerations that extend beyond the traditional focus of antitrust analysis.
- It may be difficult to determine whether traditional antitrust concerns or social welfare objectives motivated the sectoral regulator's decisions.
 - Removal of competition analysis from the sectoral agencies' purview would make their policy and political motivations more transparent.
 - Transparent decision-making is an important constraint on the exercise of discretion by public officials.

13. Efficient use of government resources also counsels toward consolidation of responsibilities within the competition agency. Competition specialists with expertise in a particular industry can be utilised in matters that do not require such expertise. For instance, an industrial organisation economist with a specialisation in telecommunications law that resides in the competition authority can be assigned to assist on generalised competition matters during periods when telecommunications matters do not demand his or her time. Exclusive or duplicative human resources in the regulatory authority do not permit the most efficient use of these human resources.

4. Alternative approaches to multiple enforcement review

14. There are several different approaches which can be considered regarding the division of duties between antitrust and sectoral agencies.

- The oversight duty for competition policy can be removed from sectoral regulators and vested solely with the federal antitrust agencies. For example, the role of sectoral regulators in merger review, if any, would be limited to industry specific, non-competition-based analysis.¹³
 - Antitrust agencies could be assigned with the responsibility of reviewing competitive effects and conceiving possible remedies, the sectoral regulator could be given the responsibility of monitoring the remedy.
 - This approach would align the antitrust review standards of previously regulated firms with competition standards in other market sectors.
 - In transitional sectors, such as those undergoing deregulation, price and access regulation may continue as a prominent feature of a regulatory scheme designed to help make the transition to a fully competitive market. In those instances, sectoral regulators have an important and appropriate role, but one that, if conducted properly, will eventually yield to competition enforcement. In many such instances, regulatory oversight functions will exist relative to the stage of transition to a fully competitive market, during which the responsibilities of competition enforcement agencies and regulators will shift accordingly.¹⁴
 - There may be an apparent inconsistency in allocating regulatory review between two agencies and expeditious treatment. If the assignment of responsibility is clear, however, between the antitrust agency (competition issues) and the sectoral agency (other issues), the review can take place simultaneously with minimal delay.
- The antitrust agency can retain ultimate antitrust authority; however, the sectoral agency can prepare and promulgate its own views on the competition aspects of a transaction.
- Jurisdiction can be coordinated between the antitrust and sectoral agency regarding competition issues and either agency can block a transaction.¹⁵
 - This approach raises the problem of delay and piling on, since the responsibility for competition issues overlaps.
 - If there is coordinate jurisdiction, there should be fixed timetables.
- The sectoral agency can be assigned the ultimate authority with structural input from the antitrust agency.
 - However, as history has shown, input from the antitrust agency is not always honoured or respected.¹⁶
 - An improvement would require the sectoral agency to specify reasons for a departure from the antitrust agency's recommendation and any such findings would be subject to independent review.

15. At a minimum, the unifying principles applicable to all of the above alternatives should be:
- Fixed timetables should be established to avoid delay from duplicate review.
 - There should be transparency in the results, *i.e.*, a sectoral agency must provide an explanation for any departure from an antitrust agency's recommendation.
 - There should be transparency in the process, including a public statement of position by an antitrust agency.
 - There should be clarity of jurisdiction and authority as between sectoral regulators and competition authorities.

NOTES

1. Paper prepared by James Rill, BIAC Committee Vice Chair, Jane Comer, and Brenda Carleton, with substantial contribution from BIAC Committee members.
2. *See, e.g.*, in the U.S., Packers and Stockyards Act, 1921, 7 U.S.C. §§ 181-229 (2000); and Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79-79z-6 (2000).
3. *See, e.g.*, *Relationship between Regulators and Competition Authorities*, OECD Directorate for Financial Fiscal and Enterprise Affairs, Committee on Competition Law and Policy (DAFFE/CLP(99)8) available at www.oecd.org/dataoecd/35/37/1920556.pdf; and Paul Crampton, *Competition and Efficiency as Organizing Principles For All Economic and Regulatory Policymaking*, Address Before the First Meeting of the Latin American Competition Forum, (Apr. 7-8, 2003) at <http://www.oecd.org/dataoecd/43/26/2490195.pdf>.
4. A compendium of the experiences of various countries with respect to pre-emptive or concurrent competition enforcement jurisdiction is annexed to the Initial Report of the ICN's Antitrust Enforcement in Regulated Sectors Working Group. The information, prepared for presentation at the ICN's Seoul conference, is available for downloading from the ICN's website at www.internationalcompetitionnetwork.org.
5. *See, e.g.*, in the U.S., the FCC service requirements as a form of competitive concern in *Bell Atlantic/NYNEX*. *See also* the experience with sectoral regulation in Canada in the case of *Canada Pacific Ltd. /Cast North America, Inc.* and the opposing conclusions by the Competition Bureau and the (former) National Transportation Agency.
6. *E.g.*, in the U.S. case of *Univision/Hispanic Broadcasting Co.*, the DOJ reached its decision six months before the FCC, even though both agencies began reviewing the transaction at the same time.
7. The Committee was co-chaired by James F. Rill and Paula Stern. Committee members included the following leading representatives from the worlds of business, law, and academia: Zoe Baird, Thomas E. Donilon, John T. Dunlop, Eleanor M. Fox, Raymond V. Gilmartin, Vernon E. Jordan, Jr., Steven Rattner, Richard P. Simmons, G. Richard Thoman, and David B. Yoffie.
8. See Final Report, Department of Justice's International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust (hereinafter "ICPAC Report") at 154. The Advisory Committee was assisted in large part by a paper prepared for the Committee by William E. Kovacic, "The Impact of Domestic Institutional Complexity on the Development of International Competition Policy Standards," March 15, 1999. Note that in the U.S., entrusting competition policy exclusively to the federal agencies requires Congressional action.
9. ICPAC Report at 145-147.
10. The antitrust cooperation agreements between countries typically relate to notice and information sharing among antitrust authorities but not expressly to information exchange between antitrust authorities and sectoral regulatory agencies.
11. Companies must spend additional resources to inform themselves about the decision-making tendencies of two institutions rather than one, and when agencies apply dissimilar analytical techniques, businesses incur the expense to evaluate commercial plans and strategies under both enforcement approaches.
12. Concurrent or subsequent sectoral antitrust determinations elevate further the spectre of delay, cost and inconsistent results impeding the progress of what may well be pro-competitive, efficient transactions or, conversely, in the case of sectoral preemption authorise transactions which would merit antitrust challenge.
13. *E.g.*, in the U.S., Congress assigned antitrust authority over domestic airline mergers to DOJ.
14. *See, e.g.*, in the U.S., *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) and *Town of Concord v. Boston Edison Co.*, 915 F.2d 17 (1st Cir., 1990).
15. *E.g.*, the U.S. DOJ and FCC.
16. *E.g.*, compare authority over: 1) U.S. airline mergers before Congress vested authority with the antitrust agency; 2) railroad mergers, for example *Union Pacific/Southern Pacific*; and 3) international airline alliances.