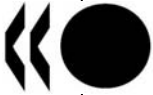


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Global Forum on Competition

THE RELATIONSHIP BETWEEN COMPETITION AUTHORITIES AND SECTORAL REGULATORS

Contribution from Allan Fels

-- Session II --

This contribution is submitted by Mr. Allan Fels (Dean, Australia and New Zealand School of Government) under Session II of the Global Forum on Competition to be held on 17 and 18 February 2005.

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1. The issues are important

1. Competition authorities generally believe that they face large challenges in their relationships with sectoral regulators.

2. This is why the issue is at the top of the Global Forum on Competition (GFC) agenda as well as being a major topic for the International Competition Network (ICN); it is why, whenever competition regulators or policy makers are invited to nominate topics for OECD or ICN conferences, they always vote for the topic ahead of others; it is why there have been so many previous discussions, and why there will be many more.

3. The reasons why the issue is seen as important will emerge today but, for a start on this discussion, I suggest three reasons:

- Some of the most important competition policy challenges arise in regulated sectors. Typically these are the sectors which more than any other require large injections of additional competition.
- There are considerable constraints on the ability of competition policy makers and regulators to take the necessary steps to achieve the best possible competitive outcomes. Many of the constraints arise from the existence of regulation and associated regulatory bodies.
- There is a close interrelationship between the work of competition bodies and regulatory bodies. Their work often overlaps. There is a need for cooperation but it can be difficult to achieve in practice. There may also be conflict. There may be competition for turf. Inevitably there are considerable tensions which exercise the minds of regulators.

4. The issue of the relationship between different arms of government is far from unique to competition and sectoral regulators. Modern discussions of government in nearly every country are dominated by such terms as “joined-up government”, “interagency collaboration”, “coproduction of public value”, “networked governance”, “connected government”, and “whole of government management”. The need for proper coordination between agencies arises in nearly all fields of government, at nearly all levels, and often between levels of government, whether relating to security threats, or intractable social issues such as drug dependence, or environmental issues, or rising community expectations for easier access to government by integrating service delivery. Not only are the policy challenges of integrating the work of regulatory bodies no more difficult than exist for other parts of government – indeed they look easier – but also they encounter a common attitude – the public does not lightly tolerate non-cooperation, conflict or turf battles between overlapping parts of government.

2. Today's Forum

5. Today's Forum provides an opportunity to advance discussions of the topic in two respects. First, the GFC provides the opportunity of considering how the issues play out in non OECD countries as well as OECD countries. The verdict is likely to be that the problems in non OECD countries are even greater than in OECD countries. Second, a great deal of previous discussion has related to what competition regulators and policy makers regard as the perfect outcome. It is useful to discuss ideal outcomes and so their nature needs to be debated, and proclaimed to policy makers. One reason is that many countries are gradually moving closer to ideal outcomes. However, equally important is to take the customary discussions a step further than in the past by acknowledging that the ideal outcomes desired by

the competition community are rarely achieved. We need to consider what the actual real world, non ideal relationships are; what problems they give rise to; how to live with them, how to make the most of an imperfect situation, as well as how to work towards getting it changed. The solutions to the problems of collaboration with other regulators cannot be fully analysed today, let alone be implemented but it will be valuable for the problems with the present arrangements – as well as the satisfactory features – to be laid out by as many competition regulators as possible, so that understanding can be advanced and some progress at the analytical level at least can start to be made.

3. Ideal Outcomes

6. The competition community tends to see something like the following as ideal:

- there should be no regulatory laws that restrict competition. But if they are absolutely necessary and there is no alternative, the restrictions on competition should be minimal;
- the competition body should have paramount decision making power in relation to any matters affecting competition.

7. A philosophy along these lines is reflected, for example, in today's BIAC paper.

8. The OECD Secretariat paper notes that competition authorities and sectoral regulators should be on the same side because:

- economic growth is enhanced by pro-competition regulation, and
- the objectives of competition authorities and sectoral regulators are very similar.

4. Competition Culture

9. It emphasizes the important point that “the ideal relationship between competition authorities and regulators is driven by a central government that promotes broad review of existing regulations with a pro-competitive lens, ensuring that a “competition culture” encompasses both sector regulators and competition authorities” (para 3).

5. Australia

10. This comment is undoubtedly influenced by Australian experience on which I will now briefly digress. The latest OECD EDRC review of Australia attributes a large part of its recent excellent economic results to the adoption of exactly this approach. The Governments of Australia – the Commonwealth (or national) Government and the State and Territory (or regional or provincial) Governments reached a general agreement in the 1990s to promote competition policy in all sectors, including regulated ones, to the maximum extent that it was in the public interest to do so – and competition WAS assumed to be in the public interest, unless the contrary was demonstrated publicly and transparently at an independent review. All laws and regulations that were anticompetitive were reviewed from this perspective with independent, public, transparent processes; exemptions from competition law were largely abolished and a culture of rigorous enforcement of competition law across all sectors was encouraged; monopolistic structures of public utilities, such as in energy, telecommunications faced rigorous reviews of their monopoly positions and some disaggregation followed. There was also a strong push for the competition regulator to take over economic regulation in telecommunications and energy, and this has largely happened, spreading a culture of competition to regulatory discussions. A key point in Australia's drive was strong pro-competitive pressure from the central, most powerful parts of government.

6. Arrangements between regulators are usually less than ideal

11. In practice, however, many countries have not achieved the optimum outcomes desired by competition advocates. It is necessary to know why. It may be that, in part, competition advocates seek more than is reasonable, given the fact that governments pursue a variety of objectives other than competition ones. Also, as the secretariat paper points out, competition agencies and regulators may have different core competencies and should each separately do the tasks for which they are most suited. However, it is also the case that less than ideal outcomes reflect other factors – interest groups lobbying; a weak competition culture; failure of top policy makers to recognise the value of competition and the desirability of strong, effective competition agencies; a general lack of institutional capability in the public sector especially in developing countries; a slow emergence or non acceptance of truly independent regulatory agencies and so on.

12. Another factor, as noted in the Secretariat paper, is that governments see a number of regulatory tasks as being necessary in regulated sectors, including technical, wholesale, retail, and public service regulation, as well as dispute regulation and competition oversight itself. This mixture of activities with their many varying goals tends to obscure the need to adhere to competition principles as much as possible. It also creates complex institutional arrangements. Competition agencies and their goals are only a part of the brew.

13. How well the compatibility of competition and sectoral regulation bodies works out in different countries varies. In the United States, for example, there appears to be relatively strong public support for competition policy, and this can spill over into making it more likely that regulatory arrangements will be relatively more attuned than in many other countries to competition sensitivities. At the other end of the spectrum the difficulties seem large in developing countries.

14. In the end it is important that discussions of the relationship of competition agencies and national regulation acknowledge that in many cases arrangements fall short of ideal. It then becomes important to discuss practical ways of dealing with these situations rather than just complaining and advocating ideal arrangements that are not achievable.

7. Tasks for competition authorities who are not primary enforcers

15. The OECD secretariat paper seeks to do that by emphasizing the fact that competition authorities can provide valuable input for the tasks for which they are not primary enforcers. Instruments of cooperation that merit consideration include:

- giving statutory powers to the competition agency for some aspects of sector regulation e.g. determining whether there is substantial market power as a precondition for the applicability of regulation;
- giving competition authorities and regulators concurrent powers of enforcement of the national competition law;
- placing senior officials of competition agencies on oversight boards for sectoral regulation and vice versa;
- providing competition authorities with the standing to submit public comments on the application of regulations that require written responses by the regulator prior to final decisions;

- establishing a written framework which governs cooperation between sector regulators and competition authorities;
- encouraging personal transfers or exchanges between the sector regulator and competition authority;
- exchanging information informally between sector regulator and competition authority;
- head of competition authority can be given a cabinet level standing;
- regulator and competition authority can be unified, ensuring internal consistency with respect to competition decisions.

8. Consistency in Application of the Law

16. In addition, steps can be taken to ensure consistency in the application of competition laws. This would include:

- the appeals route for competition decisions should converge;
- regulatory impact assessment should take into account competition objectives, among other goals;
- competition authorities should be given the right to intervene with respect to existing and proposed regulations that are potentially harmful to competition.
- an absence of legislative obstacles to cooperation.

17. These conditions are often hard to realise. They need further study if there are to be good results when regulatory power spreads across more than one agency.

9. Productive Interagency Collaboration

18. Having identified these steps as desirable in an imperfect situation, we need to note some of the conditions under which interagency collaboration is conducive to productive relationships. They are:

- Shared culture and values - for example, a general culture of competition in the community that leads non competition agencies to see the value of competition. Likewise, competition agencies need to recognise the values and objectives which drive sectoral regulators. This is likely to lead to greater interagency agreement on objectives, and a willingness to cooperate.
- Strong direction from the most powerful parts of government that the agencies should collaborate effectively.
- Legislative recognition of the desirability of cooperation.
- A recognition and acceptance by agencies that they need to work together -on an ongoing basis – to achieve their goals.

- Agreement on the allocation of roles and responsibilities.
- A willingness to commit resources.
- A willingness to commit authority to problem-solving.
- Ongoing arrangements rather than ad hoc problem solving.
- Careful management of the political environment (which involves a wider number of forces than each agency is used to dealing with).

9. Conclusion

19. What is the important is to collect an inventory of problems in relationships of competition authorities and sectoral regulators; to acknowledge that in most cases the legislative allocation of powers and responsibilities of the competition authorities and sectoral regulators will be less than ideal; to identify the problems; and to analyse and implement solutions that maximise the public value of interagency collaboration.