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**CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS**

OECD Global Forum on Competition

**THE OBJECTIVES OF COMPETITION LAW AND POLICY
AND THE OPTIMAL DESIGN OF COMPETITION AGENCY**

-- CONSUMERS INTERNATIONAL --

This note is submitted by Consumers International under Session I of the Global Forum on Competition, to be held on 10-11 February 2003.

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NOTE ON THE OPTIMAL DESIGN OF A COMPETITION AGENCY

The optimal design of competition agencies and their role in society is an important one for consumers organisations. While many of the principles and issues identified in the questionnaire are ones that we recognise as important there are some that we would wish to focus particular attention on.

1. Advocacy

The concept of competition advocacy is of particular interest to consumers organisations. When consumers organisations think of advocacy it tends to be of a different nature to that normally talked of as advocacy by competition regulators. The difference and the reason for it are illuminating. In most discussions of advocacy it is taken to mean the role of a competition agency in influencing branches of government or regulatory bodies that have some role in influencing the competitive environment.

In contrast when consumers organisations talk of advocacy they mean convincing consumers, opinion formers, or politicians of the efficacy of a particular policy. The difference between the two definitions is an important one. The emphasis among competition regulators of the need to influence other branches of government with competition competency is an important one, but reflects the regulatory focus of many agencies. In contrast the consumers organisations' definition illustrates the more consumer focussed nature of those bodies.

This is not to say that the role of competition bodies in advocating reforms within government is not important. Far from it – this role is vitally important and should be key to the job of all competition agencies. However, it has to be recognised that the advocacy that is commonly talked about is only half the job. If a really effective and embedded 'competition culture' is the target then this can only be achieved with public support and acceptance. No regulator will be able to carry out their tasks in front of often hostile political and vested interests if they are not supported by public opinion.

In this light we would like to see more emphasis and study carried out in the OECD and elsewhere of the role of competition agencies and consumer organisations in the creation and embedding of competition cultures.

In summary:

- Advocacy efforts have to be focused on consumers organisations as the natural allies of competition regulators.
- Advocacy efforts must be focused on journalists and others likely to comment in competition cases.
- Advocacy must also be undertaken with other governmental and quasi-governmental agencies with a role in competition enforcement.
- All agencies with a role in competition policy should be required to liaise with competition agencies.

- Competition agencies should be allowed to publicly recommend changes to rules and regulations within the purview of other agencies.
- Significant efforts should be put in place to broaden the knowledge base within countries about competition policy.

2. Independence of competition authorities

As every competition regulator knows no competition regulator is entirely independent of political influence. The issue with independence is not its absolute nature, rather it is the degree of room for manoeuvre that the agency enjoys before the political influence becomes impassable. It is also a question of the mechanisms that are employed to channel political influence. In all such cases the best formula will involve a high degree of transparency. While transparency will not eliminate all political involvement or interference it will increase the costs of that interference. If a politician has untrammelled and secret access to a competition authority then the extent of the influence will be almost impossible to judge to outsiders. The temptation for the politician to interfere will increase the less visible that interference is.

The extent of the independence of the authority should not be limited to the exercise of its authority. There is considerable scope for influence to be misused in the appointment of senior staff. When the appointment of senior staff is as the whim of a politician then there is always the temptation to place people into position with specific agendas. In some cases that agenda can be to restrict the work of the agency or recant the actions of previous incumbents. Public confirmation processes for senior competition figures, of itself, necessitates the wider debate of their qualities and again increases the costs of interference for politicians.

Summary:

- Politicians should have no formal role in the adjudicatory process of competition agencies.
- The highest standards of transparency should be injected into the working of agencies to maximise the political costs of political interference.
- If competition agency senior staff are political appointees then the nomination and confirmation process should be as open and transparent as possible.

3. Consumer involvement in merger processes

It is very often in the analysis of a particular merger that the consumer interest can be most acutely identified. However, relatively few consumers organisations involve themselves in merger investigations. This is both for lack of resources and skills and as a result of a limited interaction of competition authorities with consumers organisations.

If consumers organisations can become more active in merger control then we think that the overall profile of competition policy will improve. Public acceptance of the regime and public debate about the regime will also improve. This will further help with reform processes and with the promotion of a competition culture within the countries concerned. There are a number of things that can be done by agencies and merging companies to help improve the situation. It has to be noted that consumers'

organisations also have a good deal of responsibility to ensure greater involvement and training for their members and Consumers' International is in the process of running a programme to do just this.

There is also a key role for business groups in educating the public about mergers. In almost every significant public merger business groups will produce public relations materials to convince journalists of the efficacy of their case. While such documents can help a little with public discussion of mergers we think that more is needed.

In all significant mergers cases competition authority produce a basic outline of questions for the merging parties and interested third parties. We would favour the publication of these basic outline questions alongside the uncontested market share data and recent history of the sector.

Summary:

- Mergers can be a useful route into the analysis of markets for consumers organisations.
- Efforts should be made to use mergers as the basis for relationships between consumers organisations and competition agencies.
- Competition agencies should publish a brief outline of the key concerns in the merger alongside basic, relevant market share information.
- Companies proposing mergers should produce a justification of their mergers

Appendix

The Competition Authority's relations to other governmental bodies

1. Regional organisations for competition policy

1.1 *Comments*

In many parts of the world we see regional competition authorities as playing a centrally important role in the development and enforcement of competition law and policy. This is particularly the case in areas of the world with large numbers of small, developing countries. We also see the experience gained in the EU on competition enforcement as powerful evidence of the cross-border nature of many competition problems.

2. Sectoral agencies

2.1 *Comments*

We see no hard and fast rules for co-competency enforcement of competition rules. Provided that the rules of co-operation are negotiated clearly between the competition authority and the other bodies (normally specialist sectoral regulators) then the system can function perfectly well. Indeed, the sectoral regulation system has the advantage of employing sufficiently expert staff as to make the task of a more general regulator difficult.

3. Inter agency co-operation

3.1 *Comments*

We think that both formal and informal contact is important between regulators. The ideal situation occurs when the formal processes of consultation are supplemented by more general co-operation and discussion. There is also a need for the system to be subject to external scrutiny, indeed to external shocks, provided by consumer organisations empowered to challenge decisions and trigger investigations.

4. Influence and independence

4.1 Consultation with the Competition Authority

4.1.1 Comments

We think that there should be compulsion on all government bodies with a remit of interest to the competition authority to consult with the authority prior to enactment of measures. However, we think that this compulsion can have a negative effect if the compulsion is simply to consult rather than take any notice of.

5. Advocacy initiatives?

5.1 Comment

We think that advocacy is key to the success of a competition authority. However, we are a little concerned that advocacy can be narrowly defined as working only within the governmental and administrative system. We see the advocacy taken forward by the authority in relation to wider civil society as being key to the strengthening of competition culture. In turn this can strengthen the position of the competition authority in its dealings with government and other regulators.

6. Independence from political influence in individual cases of competition law enforcement?

6.1 Comments

As mentioned above the greater the degree of independence from political influence for the competition regulation, the better for consumers the results generally are.