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Competition Policy in Regulated Sectors:
Focusing on the Institutional Design of the Relationship between Competition Authority and Sectoral Regulators

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Competition and Regulatory Regimes

Bernard J. Phillips and Sean Forrest Ennis[1]

Introduction

In the past, relationships between competition authorities and sector regulators have at times involved disagreements over regulatory approaches, with relatively poor mechanisms for ensuring that both regulators' and competition authorities' views are taken into account. On the one hand, regulators have sometimes been felt to act more in the interests of the firm(s) they regulate than in the interests of consumers or promoting competition. On the other hand, competition authorities have sometimes been felt to ignore broader social objectives apart from increasing competition and to lack adequate technical knowledge about highly complex sectors.

Fractious relationships are not inevitable. Competition authorities and sector regulators should be on the same side because:

- Economic growth is enhanced by pro-competitive regulation, as suggested by recent research by the OECD and others.
- Many of the objectives of competition authorities and regulators are in fact very similar. For example, regulators often focus on preventing "excessive pricing", ensuring access to essential facilities and ensuring that barriers to

[1] Mr. Phillips is Head, Competition Division, OECD. Mr. Ennis, co-author of this note, is Senior Economist, Competition Division, OECD. The views presented herein are those of the authors and not necessarily those of the OECD or any member government.

entry are reduced. These objectives are shared by competition authorities in most OECD jurisdictions.

- Potentially powerful pro-competitive reforms based on Competition Assessment methodology will require fruitful collaboration between competition authorities and regulators.

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.

In practice, not many countries have yet achieved this ideal. To the extent the ideal has not been reached, there are nonetheless a number of practical measures that governments can take to enhance pro-competitive regulation and improve the relationship between competition authorities and sector regulators.[2] This note outlines a number of these approaches.

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[2] OECD. 1999. Relationship between regulators and competition authorities. No. 22 in the series on Roundtables in Competition Policy, 1999. OECD: Paris. Available http://www.oecd.org/dataoecd/35/37/1920556.pdf ; OECD: Paris. The relationships have been examined in many previous competition law and policy peer reviews, such as OECD. Mexico: Progress in Implementing Regulatory Reform. OECD: Paris.--including through the OECD Regulatory Reform Review program, as well as in recent reviews of Norway (OECD. 2003. Regulatory reform in Norway: Modernising regulators and supervisory agencies. OECD, Paris.) and Mexico (OECD. 2004. Competition law and policy in Mexico: an OECD peer review.) OECD: Paris.

Key elements for increasing pro-competitive regulation include:

- The central government actively supports pro-competitive regulation;
- The central government requires that ministries and regulatory bodies review their laws and regulations for unnecessary restraints of competition;
- Instruments for co-operation are implemented by both competition authorities and regulators; and
- Overall principles of competition law enforcement are common across different sectors.

Broad government efforts to promote competition benefit the economy

The development of pro-competitive regulation and the lowering of regulatory barriers are of vital economic importance both for ensuring that the benefits of competition will accrue to domestic consumers and for ensuring that domestic companies will have cost structures that enable them to succeed in international trade. Sector regulation affects the cost and quality of many key inputs of production, such as telecommunications, energy and transport. Pro-competitive regulation enhances the ability of firms within a regulated sector to adapt to changed technology, choose low-cost means of production, adapt to consumer preferences and set prices that more closely reflect the variable costs of production. As a result, governments can benefit their economies by encouraging pro-competitive regulation.

Australia provides a good example of what can happen when a government as a whole seeks to promote competition and make regulations more pro-competitive. Nearly two decades of economic stagnation and decline relative to other OECD economies led Australia to embark on an ambitious reform program, including reform of financial and labor markets and of competition policy. The implementation of the competition component, Australia's ambitious and comprehensive National Competition Policy, has made since the mid 1990s a substantial contribution to the recent improvement in Australian labor and multifactor productivity and economic growth. Australia's Productivity Commission estimates that Australian households' annual incomes are on average around A$7,000 higher as a result of competition policy. Recent OECD reviews of Australia show that the Australian economy is still benefiting from the program of widespread and deep reforms that started in the 1980s and was especially intensive in the 1990s. These reforms made it easier to set macro policies in a stability-oriented medium-term framework. The combination resulted in a fifteen year long economic expansion period accompanied by low inflation, high resilience to external and domestic shocks, and very healthy public finances. Key benefits from these landmark reforms are:

- gross domestic product (GDP) growth since the turn of the millennium averaging above 3% per annum;
- with terms-of-trade gains, growth in real gross domestic income averaging over 4%, among OECD's best;
- unemployment rate falling to around 5%, the lowest level since the 1970s;

- inflation remaining within the target range;
- a string of budget surpluses;
- general government net debt being eliminated; and
- living standards steadily improving since the beginning of the 1990s , now surpassing all G7 countries except the United States.

In addition, Australia's competition reforms, plus robust monetary and fiscal policy frameworks, have increased the economy's resilience to a series of major shocks over the last decade:

- the Asian crisis in the late 1990s;
- the global downturn at the turn of the millennium;
- a major drought;
- the end of a house price boom; and
- the current commodity price boom.

More generally, pro-competitive regulation has been shown to enhance employment, increase productivity growth and promote investment.

- *Employment.* Nicoletti and Scarpetta find that product-market regulation has an impact on employment.[3] They estimate that pro-competition policy developments in New Zealand and the United Kingdom have added around 2.5 percentage points to their employment rate over the period the period 1978-1998. Countries with more modest reforms, such as Greece, Italy and Spain have only added between 0.5 and 1 percent to the employment rates through such reforms.

- *Productivity growth.* Nicoletti and Scarpetta find that "reforms promoting private governance (i.e., privatization) and competition ... tend to boost productivity. In manufacturing the gains to be expected from lower entry barriers are greater the further a given country is from the technology leader. Thus, regulation limiting entry may hinder the adoption of existing technologies, possibly by reducing competitive pressures, technology spill-overs, or the entry of new high-tech firms. At the same time, both privatization and entry liberalisation are estimated to have a positive impact on productivity in all sectors.... These results ... point to the potential benefits of regulatory reforms and privatization, especially in those countries with large technology gaps and strict regulatory settings that curb incentives to adopt new technologies."[4]

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[3] Nicoletti, Giuseppe and Stefano Scarpetta. 2001. Interactions between product and labor market regulations: do they affect employment? Evidence from OECD countries. OECD Economics department working papers.

[4] Nicoletti, Giuseppe and Stefano Scarpetta. 2003. Regulation, Productivity, and Growth: OECD Evidence. World Bank Policy Research Working paper No. 2944, January 2003.

- *Investment.* Alesina, Ardagna, Nicoletti and Schiantarelli find that "tight regulation of the product markets has had a large negative effect on investment. The data for sectors that have experienced significant changes in the regulatory environment suggest that deregulation leads to greater investment in the long-run," and "[t]he implications ... are clear: regulatory reforms, especially those that liberalise entry, are very likely to spur investment."[5]

Primary government tasks in regulated sectors

The primary potential government tasks faced in regulated sectors are among those below:[6]

- *Technical regulation:* setting and monitoring standards, managing license, and implementing sanctions so as to assure compatibility and to address privacy, safety, reliability, financial stability and environmental protection concerns;

[5] Alesina, A., S. Ardagna, G. Nicoletti, and F. Schiantarelli, National Bureau of Economic Research. 2003. *NBER Working Paper No. 9560: Regulation and Investment.* Available: http://www.nber.org/papers/w9560.pdf

[6] This note does not discuss the issue of broader structural changes in governance, such as structural separation between competitive and non-competitive businesses or privatization, as these changes often involve more parts of government than competition authorities and sector regulators. Such changes are discussed in the note, "Bringing competition into regulated sectors." OECD. 2005b. *DAF/COMP/GF(2005): Bringing competition into regulated sectors.* 25 January. 1. Available: http://www.oecd.org/dataoecd/11/24/34339715.pdf.

- *Wholesale regulation:* ensuring non-discriminatory access to necessary core facilities, especially network infrastructures. By regulating the way in which natural monopolists provide access to their facilities, it is possible for governments to improve economic welfare by promoting lower access prices and greater supply;

- *Retail regulation:* measures to mitigate monopoly pricing or behaviour at the retail level;

- *Public service regulation:* measures to ensure that all consumers, regardless of social status, income or geographical location, have access to goods that are deemed of special social value, as with universal service obligations;

- *Resolution of disputes:* quasi-judicial powers may result in faster resolution of disputes than could be provided by a non-specialized court; and

- *Competition oversight:* controlling anticompetitive conduct and mergers. Competition regulation has a number of goals, one of the most important being efficient operation of markets. It seeks to prevent abuses of market power that result in unduly high prices, less innovation, lower choice and lower quality.

Increasingly, policymakers recognize that regulations should be designed to minimize their harmful effects on competition. For example, public service regulations designed to ensure universal access to services have frequently overstepped their original purpose and have served as a basis for preventing competition by protecting incumbents from entry. These entry prohibitions ensured that the incumbent would be

able to cross subsidize from high profit products to low profit or money losing products. In fact, such restrictions on competition are often not necessary because universal service obligations can be met in the presence of competition.[7]

Competition authorities and regulators have different core competencies

Competition authorities and sector regulators have different core competencies. These core competencies influence the types of tasks best accomplished by each.

1. Sector regulators

Sectoral regulation is frequently overseen by sector regulators. Sector regulators typically have extensive, ongoing knowledge of the technical aspects of the products and services that are regulated. Sector regulators are likely better suited to technical regulation than competition authorities.

For example, in telecommunications, when adjacent spectrum is operated by two entities, there is a technical possibility that signals of one entity may interfere with those of the other. While some would suggest that a common law system could resolve any disputes related to interference,[8] policy makers have generally preferred to create an administrative body with oversight of interference issues. Sector regulators are well-suited to setting rules that will reduce interference or for overseeing parties' claims of undue interference from neighbouring spectrum. At times, though, even technical

[7] OECD. 2004. Non-commercial service obligations and liberalisation. No. 45 in the series on Roundtables in Competition Policy, OECD: Paris. Available: http://www.oecd.org/dataoecd/43/35/33691140.pdf.

[8] *See, for example,* Coase, R. 1959. The Federal Communications Commission. *Journal of Law and Economics* 2:1-40.

regulations can affect the conditions of competition, so competition policy issues can arise even with technical regulation. For example, rules on interference limit the number of potential competitors within a spectrum band. When technical regulations impact conditions of competition, there may be reason to involve competition authorities in design and oversight of such regulations.

Historically, regulators have often been closely related to ministries that manage or managed incumbent firm(s). Perhaps as a result, regulatory agencies are sometimes perceived as taking actions that appear to serve the interests of the firm(s) being regulated. Greater independence both from political power and the regulated sector are crucial for avoiding these perceptions. In many countries, regulatory institutions have indeed increased their levels of independence.

Enforcement by sector regulators may be better suited when:

- Fast, definitive resolutions are needed;
- Ex post enforcement creates excessive uncertainty;
- Scientific and technical expertise is required to assess merits of arguments;
- The standards of proof required for competition law cases would not be met for achieving the socially desired regulatory outcomes; and
- Structurally similar situations are repeated and consistent basic rules are desired.

2. Competition authorities

Competition laws are frequently broadly overseen by competition authorities. The skills necessary for delineating relevant markets, assessing likelihood of harm to competition, assessing entry conditions and assessing significant market power are particularly well-suited to the expertise of competition authorities. While regulators may have skills in these areas, it is usually the case that competition authorities have a greater breadth of experience in competition law oversight and are adept at applying the competition law to different products and services. Competition authorities are best suited to competition law oversight.

In the process of applying competition laws in regulated sectors, competition authorities can often benefit from the technical expertise of sector regulators and should seek to co-operate with sector regulators to benefit from this expertise.

Competition laws frequently include abuse of dominance provisions that apply to "excessive" prices. In jurisdictions with such laws, abuse of dominance may be construed to limit monopoly pricing, a topic also of concern to regulators.[9]

Enforcement by competition authorities may be better suited when:

- Defining markets for regulatory purposes is necessary;
- Ex ante regulatory enforcement risks distorting market outcomes, stifling new products and more generally creating costly errors;

[9] *See* OECD. 2005a. *DAF/COMP/GF(2005): Abuse of dominance in regulated sectors*. 3.

- Markets will not require ongoing oversight; and
- Products of interest are subject to strategic manipulation that cannot be foreseen through regulation.

As for wholesale regulation, retail regulation, public service regulation and dispute resolution, the ideal role of competition authorities and regulators is less clear. In certain countries, such as Australia and the Netherlands, competition authorities have more direct roles in some of these areas of regulation. In absence of sector regulators, especially in non-OECD countries, competition laws are often invoked to govern unregulated sectors.

3. Competition authorities can provide valuable input for those tasks for which they are not primary enforcers

Even when competition authorities are not the best qualified institution to make determinations related to topics such as ongoing price, revenue, technical or other regulation, competition authorities do nonetheless have skills that are useful for some parts of regulation and that should be used as part of the regulatory process in key economic sectors. For example, many economic regulations are predicated on the idea that one or more firms in a product market have the ability to profitably raise prices. Regulators have not always made reasoned determinations of market power, while competition authorities are skilled in the reasoning related to product market definition. In the European Union, a recent electronic communications package was

adopted in February 2002, including Directive 2002/21/EC.[10] This package identifies a three-step approach of:

- Identification of relevant markets;
- Determination of operators considered to hold significant market power; and
- The possibility of imposing ex ante obligations on specific operators considered to be dominant within the pre-defined markets.

Recommendation C(2003)497 on relevant product and service markets susceptible to ex ante regulation identifies 18 potentially regulated markets.[11] The national regulatory authorities are responsible for determining the geographic scope of these markets. The national regulatory authorities are then responsible for making determination of operators considered to hold significant market power or "dominance." Findings of significant market power will then be a pre-condition for ex ante obligations, as defined in the Access Directive.[12] The package would help focus regulation on products and

[10] European Parliament and the Council (2002) "Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (Framework Directive)," 7 March 2002 , 2002/21/EC. .http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_108/l_10820020424en00330050.pdf.

[11] European Commission. 2003. Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services. 11 February. C(2003)497. Available: http://europa.eu.int/information_society/topics/telecoms/regulatory/publiconsult/documents/relevant_markets/l_11420030508en00450049.pdf.

[12] Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on Access to and Interconnection of Electronic Communications Networks and Associated Facilities

services that are not fully competitive. It is expected that unnecessary regulations will be reduced. The national regulatory authority determinations are subject to review and comment by the European Commission; both in the development of the package and in reviewing determinations, DG Competition plays a significant role.

Instruments of co-operation that merit consideration

While broad government programs are not always possible, improved co-operation between competition authorities and sector regulators is more easily implemented than broad government programs and is valuable for ensuring both that regulatory agencies take appropriate account of competition concerns and that competition authorities take appropriate account of technical and other regulatory concerns. At times, co-operation may occur naturally without any institutional support. Even so, co-operation can usually be enhanced, to the benefit of regulatory decision making. A variety of instruments exist for encouraging co-operation between competition authorities and sector regulators. No OECD country has in place all the options listed below. However, adopting a mixture of some of these instruments can be valuable for improving the process and outcomes of co-operation. These include:

1. Giving statutory powers to the competition agency for some aspects of sector regulation

At times, regulations may continue to apply to products and companies even after the need for regulation has passed. However, for reasons of institutional inertia and survival, regulatory agencies may not relinquish outdated regulatory powers or institute new

(the "Access Directive"). 2002 O.J. (L 108) 7. Available: http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_108/l_10820020424en00070020.pdf

powers in response to changed market conditions. A number of laws and regulations therefore predicate the applicability of regulation on the existence of substantial market power.

An example of this can be found in the laws and regulations of Mexico. Determinations of substantial market power are made by the Competition Commission, not the sector regulator, for sectors stated by the Seaport Law of 1993, the Law on Roads, Bridges and Road Transport of 1993, the Navigation Law of 1994, the Railroad Services Law of 1995, the Federal communications Law of 1995, the Civil Aviation Law of 1995 and the Airport Law of 1995, and the regulations of natural gas of 1995 and of pension funds of 1996. The Mexican Competition Commission is responsible for assessing whether entities, such as incumbent telecom operator Telmex, have substantial market power over a product or service. Such a finding is needed prior to regulation of the company's product or service. The telecom regulator then has the ability to regulate operators declared to hold market power. However, should the competition authority in the future alter its ruling in response to changed market conditions and assess that a firm that formerly had substantial market power for a product no longer does, the regulator then has no further right to regulate the firm in that product. Besides assessments of market power, a second area in which the Competition Commission plays a role is in making determinations to authorize economic agents to participate in privatizations or in public auctions for concessions, licenses and permits.[13] These powers were substantially

[13] OECD. 1999. Relationship between regulators and competition authorities. No. 22 in the series on Roundtables in Competition Policy, 1999. OECD: Paris. 182. Available: http://www.oecd.org/dataoecd/35/37/1920556.pdf ; and OECD. 2004. Competition law and policy in Mexico: an OECD peer review. OECD: Paris. 16-17.

strengthened in 2006, with the passage of numerous amendments to the Mexican competition law. One key amendment granted to the Competition Commission the power to issue *binding opinions* on secondary regulation issued by regulatory agencies which have anticompetitive effects. In addition, the Competition Commission recently signed two collaboration agreements (a topic taken up below) with the Federal Commission for Regulatory Improvement (COFEMER) and the Office of the Federal Attorney for Consumer Protection (PROFECO) to integrate and coordinate competition, regulatory and consumer protection policies.

2. Competition authorities and regulators can be given concurrent powers of enforcement of the national competition law

One way to ensure that both technical expertise and competition law expertise can express their views is to provide concurrent jurisdiction, in which both sector regulators and a competition authority have the right to bring cases under the national competition law. The UK's Competition Act of 1998, for example, provides concurrent powers for sector regulators in electricity, gas, telecommunications, water and railways, among other areas. The UK's implementing regulation Statutory Instrument 2000 No. 260 does not permit the exercise of functions by an authority while the same functions are being carried out by another authority, avoiding double jeopardy. It requires that when one authority has or may have concurrent jurisdiction, that authority shall notify other authorities with jurisdiction in advance of taking action. The relevant authorities are then to decide among themselves who shall exercise powers in relation to a given case. In case agreement is not reached, the Director General of Fair Trading shall inform the

Secretary of State in writing. Authorities may make representations to the Secretary of State and the Secretary of State determines which authority shall exercise powers in relation to a given case. The Statutory Instrument also permits the transfer of functions to another authority from the one who initially exercises functions and permits the staff of one authority to act as staff of the authority with decision power for a given case.[14]

3. Placing senior official of competition agency on oversight board for sector regulator and vice versa

Placing senior officials from regulators in board positions for a competition authority or senior competition authority officials in board positions can be an effective tool for ensuring that institutions take account of each other's interests. The Australian Competition and Consumer Commission (ACCC) has associate commissioners in addition to the five permanent commissioners. Associate commissioners can include appointees from Commonwealth and State regulatory agencies. For example, associate commissioners have come from institutions such as the Australian Broadcasting Authority, the New South Wales Independent Pricing and Regulatory Tribunal and the Victorian Office of the Regulator General. At the same time, certain members of the ACCC have been appointed as associate members of the Australian Communications Authority.[15]

[14] HMSO (2000) The Competition Act 1998 Concurrency Regulations 2000 Staturory Instrument 2000 No. 260. HMSO: London. http://www.hmso.gov.uk/si/si2000/20000260.htm.

[15] OECD. 1999. Relationship between regulators and competition authorities. No. 22 in the series on Roundtables in Competition Policy, 1999. OECD: Paris. 107. Available: http://www.oecd.org/dataoecd/35/37/1920556.pdf.

4. Providing competition authorities with the standing to submit public comments on the application of regulations that require written response by the regulator prior to final decisions

Ensuring that competition authorities have an opportunity to air their views and that regulatory agencies must respond to these views can provide an important avenue for promoting competition. In Italy, most sectors are subject to the national competition law (Law No. 286 of October 10, 1990) as enforced by the Antitrust Authority (Autorità garante della concerrenza e del mercato). The exception is that in the banking sector, the sector regulator, the Bank of Italy, has the responsibility for the enforcement of the national competition law for agreements, abuses of dominant position and mergers. The competition authority nonetheless has the ability to submit its views on bank regulatory matters. After such a submission, the bank regulator must respond and cannot permit anticompetitive actions unless there are special circumstances (notably, system stability is at risk) and the competition authority agrees.[16]

5. Establishing a written framework that governs co-operation between sector regulators and competition authorities

One way to enhance co-operation over the long-term is to establish formal co-operation agreements. The Competition Authority of Ireland has instituted such formal agreements in accordance with the Competition Act of 2002, section 34(1). According to the Act, the purpose of enabling such agreements is to facilitate co-operation, avoid

[16] OECD. 1999. Relationship between regulators and competition authorities. No. 22 in the series on Roundtables in Competition Policy, 1999. OECD: Paris. 165. Available: http://www.oecd.org/dataoecd/35/37/1920556.pdf.

duplication of activities, and ensure consistency between decisions related to competition issues. The act requires that agreements contain:

- "a provision enabling each party to furnish to another party information in its possession if the information is required by that other party for the purpose of the performance by it of any of its functions",

- "a provision enabling each party to forbear to perform any of its functions in relation to a matter in circumstances where it is satisfied that another party is performing the functions in relation to that matter" and

- "a provision requiring each party to consult with any other party before performing any functions in circumstances where the respective exercise by each party of the functions concerned involves the determination of issues of competition between undertakings....". (Competition Act 2002, Section 34(3))

A number of co-operation agreements have been established in Ireland. The Competition Authority has agreements with the Broadcasting Commission of Ireland,[17] the Commission for Aviation Regulation, [18] the Commission for Communications

[17] The Competition Authority (TCA), Ireland. 2002. *Co-operation agreement between the Competition Authority and the Broadcasting Commission of Ireland.* 19 December. Available: http://www.tca.ie/ca_agreements/bci.pdf.

[18] TCA. 2002. *Co-operation agreement between the Competition Authority and the Commission for Aviation Regulation.* 19 December. Available: http://www.tca.ie/ca_agreements/car.pdf.

Regulation,[19] the Commission for Energy Regulation[20] and the Office of the Director of Consumer Affairs.[21] These co-operation agreements to ensure that the protections of confidentiality provided by one body are assured when that information is shared with another body and that information cannot be used for any purpose besides that for which it has been shared.

Even when an explicit, bilateral written agreement does not exist, co-operation can be enabled by legislation. In France, the telecommunications law and the energy law enable cooperation between the regulators and competition authority. The telecommunications law enables consultation between the Autorité de Régulation de Télécommunications and the Conseil de la Concurrence. Similarly, the energy law suggests that conduct related to abuse of dominance or restrictive agreements will be referred by the energy regulator, the Commission de Régulation de l'Energie (CRE) to the Conseil de la Concurrence. The law also promotes consultation between the CRE and the Conseil de la Concurrence.[22]

[19] TCA. 2002. *Co-operation agreement between the Competition Authority and the Commission for Communications Regulation.* 16 December. Available: http://www.comreg.ie/_fileupload/publications/comreg0306.pdf.

[20] TCA. 2002. *Co-operation agreement between the Competition Authority and the Commission for Energy Regulation.* 13 December. Available: http://www.tca.ie/ca_agreements/cer.pdf.

[21] TCA. 2003. Co-operation agreement between the Competition Authority and the Director of Consumer Affairs. 11 April. Available: http://www.tca.ie/ca_agreements/odca.pdf.

[22] OECD. 2004. Regulatory reform in France. OECD: Paris.

6. Encouraging personnel transfers or exchanges between sector regulator and competition authority

Staff transfers between a competition authority and a regulator, whether unilateral or bilateral, can significantly improve the process of communication between a regulator and competition authorities. Staff transfers have occurred both at senior management levels and at normal staff level. For example, in the United States, the Chief of Staff of the Antitrust Division of the United States Department of Justice was appointed to be a commissioner in the telecommunications regulator, the Federal Communications Commission (FCC), and then proceeded to become the chairman of the FCC. In Finland, staff from the competition authority have found positions in regulators, such as the telecommunications authority. The transfers described above have occurred at senior levels. But transfers or exchanges can also happen at the staff level and can encourage improved communications at the staff level. Transfers or exchanges tend to work better when staff who are well known within an institution transfer to the other. In the United States, an exchange of economics staff between the United States Department of Justice's Antitrust Division and the FCC enhanced knowledge, communication and understanding between economic staff of the institutions.

7. Exchanging information informally between sector regulator and competition authority

When a competition agency seeks to comment on the activities of a regulator, it can often be valuable to contact the regulator before making any official comments, in order to find the right people to whom comments should be addressed and to better

understand reasons for regulations or proposed regulatory actions. At times, informal comments may be more effective than formal comments.

8. Head of competition authority can be given a cabinet level standing

Giving the chairperson of a competition authority a high-level status within top government hierarchy can be beneficial when independent regulators do not exist or when ministries retain many regulatory functions and maintain final decision powers. For example, in Korea, the Chairman of the Korean Fair Trade Commission has cabinet level standing within the government. Such standing can help to ensure that the competition authority is able to appeal directly to high level government for internal government dispute resolution and that competition authorities are not outranked by sector regulators.

9. Regulator and competition authority can be unified, ensuring internal consistency with respect to competition decisions

One way to ensure consistency in the approach towards competition law enforcement of a sector regulator and a competition authority is to merge the regulator with the competition authority. One example of merging a regulator with a competition authority occurs in the Netherlands, where the government has created chambers within the National Competition Authority (NMa) for sector regulation. The energy regulator in the Netherlands, the Office of Energy Regulation (DTe) is placed under the oversight of the competition authority, the NMa. DTe is responsible for the implementation and supervision of the Electricity Act of 1998 and the Gas Act of 2000. In 2004, the Office of Transport Regulation was set up as another chamber in the NMa.

The chamber model allows highly specialized knowledge related to sectors to exist within the structure of a competition authority focused on broad issues of improving competition.

Ensuring consistency in application of competition laws and policies

Ensuring consistency in application of competition law and policy across different sectors is an important goal. When competition authorities are responsible for competition law application in some areas and sector regulators are responsible in others, ensuring such consistency can be difficult. Consistency at a national level can help to ensure that international convergence of antitrust standards can occur, which is particularly important for ensuring that complex international transactions do not face a tangle of different rules that can weigh down transactions with excessive remedies. The United Kingdom has been one of the leading OECD jurisdictions in ensuring consistency.

1. Appeals route for competition decisions should converge

One practical and highly desirable method for ensuring such consistency is setting up a common appeals path, so that there is one court that has ultimate oversight of competition law cases, whatever their origin. This is particularly important in the United Kingdom, with concurrent jurisdiction between many sector regulators and the Office of Fair Trading (OFT), but is also important where sector specific laws may have competition impacts. In the United Kingdom, the Competition Appeals Tribunal is the common appellate body for decisions by the Competition Commission and by regulators with respect to application of competition law. In Poland, the Antimonopoly

Court has jurisdiction both over competition authority cases and over appeals of regulation. "The broader jurisdiction promises to ensure that policies are applied consistently in competition cases and in sectoral regulation. Originally, the Court only reviewed AMO decision. In 1997, it was given the power to hear appeals from the new Energy Regulatory Authority. The telecoms regulator was added in 2000, and the railway regulator in 2001."[23] In France, the path of appellate review of decision by the Conseil de la Concurrence and both the telecom and energy regulators is through a common court, the cour d'appel de Paris.

2. Regulatory impact assessment should take into account competition objectives, among other goals

Increasingly, central governments engage in regulatory impact assessments in order to ensure that new regulations are necessary and that their benefits exceed their costs, and that other alternative regulations would not succeed equally well. One portion of these assessments should include the impact on competition. The United Kingdom has developed this approach with a significant role held by the OFT. According to the Cabinet Office's Regulatory Impact Unit, all Regulatory Impact Assessments "must include a Competition Assessment, except where the proposal solely affects the public services. The Cabinet Office describes a Competition assessment as one to "Provide an assessment of the competition impacts for each option (talk to OFT)."[24] The OFT has

[23] OECD. 2002. Regulatory reform in Poland: The role of competition policy in regulatory reform. http://www.oecd.org/dataoecd/3/2/27067452.pdf. OECD: Paris. 26.

[24] UK Cabinet Office. 2005. *UK Checklist: Regulatory Impact Assessment Checklist*. Available: http://www.cabinetoffice.gov.uk/regulation/ria-guidance/content/ukchecklist/index.asp, January 27, 2005.

published its own "Guidelines for Competition Assessment.[25] Alternatively, the Cabinet Office releases a quick summary of key features of a competition assessment. The test proceeds in two stages: first assessing whether there are potentially significant competitive effects from a regulation and second, if there are, performing an in depth analysis. With respect to a detailed analysis, the Cabinet Office states that "Carrying out this assessment can be complex and requires an understanding of competition issues. You will need the help of your departmental economists and should also consult the Regulatory Review Team at the OFT who will provide help with the competition analysis, as well as with drafting the assessment."[26]

Better still, central governments should require that all economically significant laws and regulations, whether existing or proposed, should be reviewed for unnecessary restraints on competition. The OECD has developed a methodology which will enable officials in line ministries who are not competition experts to perform such reviews. The first version of the methodology, called the Competition Assessment Toolkit, which appeared in February 2007, has already been put to use in a number of jurisdictions. The Toolkit is described in Box 1 below.

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[25] Office of Fair Trading (OFT), United Kingdom. 2002. *Guidelines for policy makers completing Regulatory Impact Assessments.* London: OFT. Available: http://www.oft.gov.uk/NR/rdonlyres/A7138977-6FE2-45DE-BE32-3AB6E767664A/0/oft355.pdf.

[26] UK Cabinet Office. 2005. *Competition assessment.* January 27. Available: http://www.cabinetoffice.gov.uk/regulation/ria-guidance/content/competition/index.asp.

Box 1. The Competition Assessment Toolkit

Competition assessment is an evaluation of regulations, rules or laws to (1) identify those that may unnecessarily inhibit competition and (2) revise them so that competition is NOT unduly inhibited. The approach is designed to help identify policies that may unnecessarily restrain market activity and develop less restrictive policies that still achieve government objectives. The policies to be examined can be new, as is typically the case in Regulatory Impact Analysis, or pre-existing. The parts of government involved can be at a national, regional or local level.

The approach works in two steps. In the first step, a simple checklist can be applied to the policies under examination. This simple screen can be applied very quickly and does not require extensive data in order to answer questions. If the screen suggests that a policy has the potential to unnecessarily restrict competition, then we proceed to the next step, a full competition assessment. The extent of this competition assessment may differ across policies, for example because the seriousness of the concerns differ or because the size of the sectors affected differs. The OECD's Toolkit provides some initial guidance on how this deeper analysis can occur. At times, agencies may wish to seek help from relevant experts in other parts of government.

Competition Assessment Checklist

One of the main elements of the Toolkit is the Competition Assessment Checklist. The checklist uses a set of threshold questions focused on three broad categories of effects that may restrict competition. For policy development, the Competition Checklist can help policymakers focus on potential competition issues at an early stage in the process. For existing regulations, the Checklist can help to identify those regulations that pose the greatest risk of unnecessarily inhibiting competition. The threshold questions are:

(1) Do policies restrict entry or exit from a supplying activity?
(2) Do policies restrict the freedom of suppliers to compete with each other?
(3) Do policies restrict the incentives of suppliers to compete with each other?

Making it difficult for new suppliers to start businesses creates a risk that market power will be created and competitive rivalry will be reduced. When the number of suppliers, or total industry capacity, declines, the possibility of collusion increases and the ability of individual suppliers to raise prices can be increased. These limits may arise through exclusive grants, licenses, or rules that exclude certain types of business from providing a product. The resulting decline in rivalry can reduce incentives to meet consumer demands effectively and can reduce long-term economic efficiency. While there are sound policy reasons why policy makers may sometimes limit the number or range of suppliers, these need to be weighed against the fact that ease of entry by new suppliers can help prevent existing suppliers from exercising market power.

Regulation can *affect the ability of suppliers to compete* in a variety of ways. These can include advertising or marketing restrictions, setting of certain standards for product or service quality and controls over prices at which goods or services are sold. These limits can reduce the intensity and dimensions of rivalry, yielding higher prices for consumers and less product variety.

Regulations can affect supplier behaviour not only by changing the suppliers' ability to compete, but also by *changing the incentives of suppliers to act as vigorous rivals*. Two of the main reasons why suppliers may compete less vigorously are first, that some regulations

How can the Competition Assessment Toolkit be used to help competition and regulatory agencies? For competition agencies, the toolkit can be used as a framework for its competition advocacy function, where it provides advice to government or the legislature on new or existing laws or regulations. It could also be used as a framework for analysis when if the authority is assigned the task of providing competition expertise as part of an RIA process. For regulatory agencies, the toolkit framework could be incorporated into their procedures in its current form or customized to focus on the issues specific to the sectors for which the agency is responsible. (The Toolkit is, by its very nature, not focused on individual sectors.) For example, agencies might wish to prepare a sector specific manual for their own internal use. Regulatory agencies can use the materials as a basis for training or discussion within the agency. Finally agencies can use the Toolkit as a reference tool to maximize their ability to perform assessments in house.

The Toolkit is only a beginning however. It is a beginning in two senses. First, it is new, it is in its first version, and there will no doubt be many areas where it can be improved. Second, when the Toolkit suggests that there is a problem, human creativity will be the source of solutions. The Toolkit cannot provide extensive guidance on particular solutions, as these vary substantially across sectors. At times, agencies with specific regulatory functions may not have personnel with relevant expertise about competition in house. Then it will be worthwhile for them to seek help from other parts of government, such the competition agency. The competition agency should recognize the high value of providing input, when it is solicited, and devote real resources to this area, even if the outputs are difficult to measure.

3. Competition authorities should be given the right to intervene with respect to existing and proposed regulations that are potentially harmful to competition

At the stage of preparing new regulations or reviewing existing regulations, giving the competition authority the right to intervene helps to promote pro-competitive regulation. In the United Kingdom, the OFT can study both proposed and existing regulations. It can then issue a public report stating its views about what problems may exist in the regulation(s). Once this report has been issued, the government has undertaken to respond publicly within 90 days. In Korea, the KFTC is active in the process of eliminating anti-competitive regulation The KFTC chairman is a member of the Regulatory Reform Committee, and senior staff are on its subcommittees. The Korean statutory requirements for inter-agency consultation are comprehensive: Other government agencies are to consult in advance with the KFTC, or advise the KFTC of the particulars, when they intend to issue an act, decree or order that would restrain competition, by authorising conduct that would otherwise constitute an illegal collaboration or that would limit the number of firms in the market. The consultation process appears to have improved after the KFTC became independent, and again when its chairman's status was raised. This process has been reasonably successful, but the KFTC continues to identify items for improvement. Note that having a right to intervene is not the same as a requirement that the competition authority submit opinions on all new regulations. Most competition authorities do not have the resources to review all new regulations.

Conclusion

One of the most powerful mechanisms for achieving pro-competitive regulation is to improve the co-operation and co-ordination between sector regulators and competition authorities. Central government support for pro-competitive regulation is justified in order to enhance growth and develop an economy that is better able to resist economic shocks.

- Central government should encourage pro-competitive regulation, by taking actions such as:
    - Including pro-competitive regulation as part of a sector regulator's mandate;
    - Requiring regulatory bodies to review their laws and regulations for unnecessary restraints of competition;
    - Appointing regulators with a proven interest in competition; and
    - Giving competition oversight functions to the competition agency, with technical backup from the sector regulator.
- Instruments of co-operation between sector regulators and competition authorities should be adopted, such as:
    - Giving statutory powers to the competition agency for some aspects of regulatory reviews;
    - Placing senior official of competition agency on oversight board for sector regulator and vice versa; and

- Providing competition authorities with the standing to submit public comments that require written response by the regulator prior to final decisions.

- Mechanisms for ensuring domestic consistency in competition rules should be applied

  - To the extent that multiple agencies have competition oversight functions, a common appeal route should be created so that competition cases are governed by a common standard;

  - Regulatory impact assessment should take into account competition objectives, among other goals; and

  - Competition authorities should be given the right to intervene with respect to existing and proposed regulations that are potentially harmful to competition.