

Cross-Country Comparison of Competition Rules/ Institutions and the Interface with Utility Regulation

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Competition Policy Nexus with Regulated Industries

Major Dimensions:

1. Structure

- Break-up or unbundling decisions at time of privatization
- Mergers and acquisitions
- Scope of business restrictions (concession terms)

2. Entry

- Defining and reasonably accessing essential facilities

3. Conduct

- Pricing
- Collusion
- Abuse of dominant position

Narrow Definition of Competition Policy (or Antitrust Policy in the U.S.)

Body of laws and regulations governing business practices:

- Horizontal or vertical agreements between enterprises
- Abuse of dominant position / Monopolization
- Mergers and acquisitions

Broader Definition of Competition Policy

Myriad of Government Policies that impact competition at both local and national level

- Consumer protection
- Trade liberalization (import competition)
- Foreign investment regulation
- Intellectual property (technology licensing)
- Bankruptcy

Broader Scope for Harmonization of National Policies

- Concept of extra territoriality
- Bilateral cooperation arrangements
 - (US/ Canada, US/ EU, France/ Germany)
- Issue of confidentiality of information
- Sub-regional and regional agreements (e.g., Mercosur, EU)

- International codes, OECD
- WTO

Goal of Competition Policy

- Preserve and protect the process of competition not competitors
- Maximize economic efficiency (both allocative and dynamic)
- Sometimes “public interest” objectives included:
 - regional development
 - promotion of small business
 - export promotion
 - decentralization of decision-making

Scope of Competition Policy

- Should cover all business practices whether public or private including privatized infrastructure that is to operate in competitive markets
- Should provide proper interface with statutes regulating natural monopolies (e.g., with essential facilities)
- Can be divided into laws dealing with enterprise conduct (horizontal and vertical) and structure
- Needs to differentiate exclusionary from competitive conduct

Enterprise Conduct

Horizontal

Naked restraints between/among enterprises that are ‘per se’ illegal

- Bid rigging
- Price fixing
 - Agree on prices and quantities overtly or covertly
 - Cooperatively restrict output and charge monopoly prices
 - But sometimes difficult to prove
- Market Segmentation
- Customer Allocation

But some agreements have pro-competitive effects (R+D cartels, joint purchasing agreements) that need rule of reason (facts and circumstances) test.

- Could also have block exemptions under EU law (know-how and patent licensing, exclusive distribution agreements)

Vertical Restraints

Non-price:

- Exclusive dealing (seller agrees to supply buyer on condition buyer only purchase from seller)
 - Could be efficiency gains but may be offset by market foreclosure
- Refusal to deal (in infrastructure context, essential facility is part of production facility that competitor must use to produce in the market)
 - Examples include facility with large economies of scale, network access to local exchange, certain IP rights
 - Issues relate to definition, terms of access, and relative incentives for essential facility owner and competitors to develop assets
- Tying (seller offers product A on condition buyer also purchase product B) could lead to market foreclosure
- Full line forcing (supplier requires dealer to carry all supplier's products)

Price:

(Contractual agreements between supplier and purchaser/retailer in both upstream and downstream markets)

- Resale Price Maintenance (RPM), - supplier conditions sale on controlling distributor's price
 - EU sees this as per se violation given regional integration objective whereas US is closer to rule of reason
 - But EU has block exemptions for exclusive distribution, purchasing and franchising (see new EU Green Paper on Vertical Restraints -1997)

Abuse of Dominant Position (AOD)

Relatively large firms can engage in anti-competitive conduct by preventing entry or forcing exit of competitors.

- Predatory pricing (sell at below cost in short term to drive rivals out of market)
- Raising rivals costs
- Price discrimination for non-cost reasons that are predatory
- Issue of whether large firm is simply more efficient

Structure:

Impact of inter-corporate transactions involving horizontal or vertical mergers, takeovers, joint ventures, asset transfer, and conglomerate transactions on competition.

- Prerequisites for analysis:
 - Number and size distribution of sellers and buyers
 - Defining the geographic and product market
 - Nature of entry barriers
- Use of pre-notification procedures

Recommended Institutional Principles

- Independence
- Separation of investigation, prosecution and adjudication functions
- System of checks and balances with rights of appeal and review of decisions and facts on legal and economic grounds
- Proceedings should be transparent while safe guarding sensitive business information of a competitive nature
- Cases should be resolved expeditiously
- Proceedings should be accessible to all affected parties with provisions for introducing expert testimony and evidence
- Competition authority should have advocacy function particularly with respect to formulation of economic regulatory policies including privatization and infrastructure regulation
- Should also play a wider role in government economic decision-making including international trade, foreign investment, consumer protection and intellectual property

Enforcement

- Judicial or administrative review requires competent and accountable judges and staff, transparent and predictable processes and procedures, and timely results (efficiency)
 - Role of MMC in UK in regulatory concession amendments

Infrastructure Sectors that are Potentially Competitive

- Power Generation
- Gas Production
- Retail Supply of both Gas and Power
- Long-Distance and Mobile Telecommunications
- Rail Services

Infrastructure Sectors Usually Considered Natural Monopolies

- Water Distribution
- Power Transmission and Distribution (Not Retailing)
- Gas Transmission and Distribution (Not Retailing)
- Railway Infrastructure (Tracks)
- Roads

Table 1
Infrastructure Unbundling to Improve Competition ¹

	Market-Structure Reform	Country Examples
Power	Separating generation from transmission and creating competition in generation Permitting free entry in generation	Argentina, Australia, Colombia, New Zealand, UK The countries above plus the U.S.
Gas	Separating gas production and supply from transmission and distribution. Permitting free entry in gas transmission.	Argentina, Colombia, Mexico Chile, Germany, New Zealand.
Telecoms	Separating local from long-distance service. Permitting free entry in basic telecom services	Argentina, Hong Kong, US, Chile, New Zealand, UK
Rails	Separating infrastructure (track) from rolling stock Separating railway lines by geographical region	Sweden, UK Argentina, Mexico

Comparative Competition Policy

Institutional Frameworks: From Theory to Practice

U.S. Antitrust Institutional Framework

Federal:

A. Department of Justice (DOJ)

- Exclusive power to enforce Sherman Antitrust Act (conduct restraining trade and monopolization) involving commerce with two or more States or other nations
- Shared power for enforcement of Clayton Act with Federal Trade Commission
- Can initiate both criminal and civil actions but relies on federal courts for enforcement
- Investigations based on complaints from public or government officials
- Use of guidelines (e.g., mergers, international operations, intellectual property interface) to guide parties in addition to reporting requirements (Hart/ Scott/ Rodino)

¹ Taken from “Concessions - A Guide to the Design and Implementation of Concession Arrangements for Infrastructure Services”, PSD Department, World Bank, 1997 at 5.

B. Federal Trade Commission (FTC)

- Jurisdiction from Clayton Act etc. Designed to give more flexibility to antitrust standards but overlaps with DOJ with some specialization by sector
- Investigations initiated by public or government officials
- Performs function of prosecutor (whether to issue complaint) and adjudication (reviewing decision of administrative law judge)
- Can issue preliminary injunctions, advisory opinions, etc.

State:

- Nearly all states have own antitrust legislation and enforcement capacity as well as acting as “private” plaintiff in federal court.

Private:

- Private parties can bring civil suits in search of treble damages, injunctive relief and attorneys fees.

International:

- International Antitrust Enforcement Assistance Act (1994) designed to facilitate exchange of information

U.S. Antitrust and Telecommunications

Historical Setting

- Federal Communications Commission grants licenses (e.g., allocating spectrum) taking into account antitrust policy in its public interest calculus and has discretionary authority to enforce provisions of the Clayton Act applicable to common carriers.
- DOJ and FTC involved in analysis of telecommunications mergers that incorporates regulatory features (as part of consent decrees).
- DOJ participates in most important FCC rulemakings.

New Developments

- 1996 Telecommunications Act reflected rapid technological change in the industry and objective to deregulate and rely more on competition giving rise to issues of:
 - further blurring of competition role of DOJ and FTC and regulatory role of FCC putting premium on coordination and collaboration
 - greater potential for anticompetitive bundling
 - greater need for international cooperation
 - merger analysis to include new theories on product market definition, potential competition, unilateral effects, entry and efficiencies.

CANADA

Institutional Framework for Competition Policy

- Prior to 1976, statute was entirely criminal
- Emphasis on preventive compliance through issuance of advisory opinions, guidelines etc.
- Civil enforcement carried out through investigation of Bureau of Competition including on behalf of private citizens; powers include surprise searches and seizures.
- Competition Act of 1986 provides for single competition tribunal with powers of trial court with noncriminal jurisdiction throughout Canada (no provincial or local laws); tribunal composed of mix of judges and lay persons to blend legal, economic and industrial expertise. Issues of law appealable to federal court of appeal.
- Criminal provisions of the act are enforced by Attorney General usually on recommendation of Director of Bureau of Competition Policy (a division of the Department of Industry) with 5 years maximum imprisonment and \$10 million fines.
- Private rights of action only available for parties injured as a result of violations of criminal provisions of act but rarely invoked (compare difference with US legal system re treble damages, contingent fees, class actions, one-way cost rules, and civil juries)
- Act provides Bureau of Competition with right to intervene with respect to regulated industries
- Though legally not stated, Act has extraterritorial effect

BRAZIL

Competition Policy

- 1994 Law provides comprehensive coverage of conduct and structure violations for both public and private sectors
- Enforcement accomplished through three agencies:
 - CADE: independent administrative agency linked to Ministry of Justice
 - SDE: investigatory body linked to Ministry of Justice
 - MOF: Economic impact
- Right of appeal to federal courts (but not Minister)
- Use of consent decrees
- Private rights of action permitted
- Extraterritorial reach
- Harmonization issue in context of Mercosur (Argentina has no merger requirements in its Competition Law)

Nexus with Privatization and Regulatory Process

- Privatization of state-owned assets (e.g., steel, petrochemicals) required SDE and implicitly CADE approval from competition point of view (by decree)
- 1995 Concession Law provides for non-exclusivity except where technologically infeasible or economic reasons justify otherwise
- Early experience with utility concession (power) showed limited role for CADE/SDE, but this is expected to change in context of telecommunications concessioning/privatization

MEXICO

Competition Policy Framework

- 1993 Economic Competition Law provides comprehensive treatment of conduct and structure for both public and private sectors
- Anticipates active cooperation and coordination with NAFTA partners
Federal Competition Commission (FCC) is an “autonomous” body within Ministry of Commerce and Industry governed by 5 commissioners appointed for 10-year renewable terms
- FCC can investigate on its own or at request of private parties competition violations, adjudicate cases (Chinese Wall) and participate in the negotiation of treaties related to competition
Private rights of action exist but have been ineffective

Nexus with Privatization/ Regulatory Process

- Law empowers FCC to give advisory opinions on laws, regulations, resolutions and administrative acts regarding competition and free market access
- FCC involvement with regulation/ privatization included:
 - participation in preparation of regulation and studies for privatization of railways (e.g., dividing into 3 main lines) and commented on merger of UP and SP in U.S.
- Review of strategic alliances in deregulated natural gas, electricity generation and telecommunications sectors (terms for granting concessions and subsequent merger analysis)
- Participation in bidding rules for privatization (e.g., ports--including barring largest construction contractor from bidding on public port)

AUSTRALIA

Competition Policy

- Subsequently revised under 1995 amendments to introduce, amongst other things, new institutional structure and national access regime to services of essential facilities

- Comprehensive treatment of conduct and structure
- No criminal penalties
- Private rights of action for actual damages and injunctions

Interface with Competition in Essential Facilities

National Access Regime - methods of gaining access

1. Declaration (and arbitration)

- Business seeking access to infrastructure service applies to National Competition Council, an advisory body to have service “declared”. If relevant Minister agrees, business and infrastructure service then negotiate terms and conditions of access. If unsuccessful, go to arbitration under auspices of private arbitrator or the Australian Competition and Consumer Commission (ACCC).

Declaration Assessment Criteria:

- Access to the service would promote competition in at least one market (other than for the service)
- Uneconomical for anyone else to develop facility
- Facility is of national significance
- Access without risk to human health or safety
- Access not already subject to “effective” regime
- Access not contrary to public interest

2. Where an “effective” regime already exists (or has been certified), e.g., telecommunications carriers, gas transmission pipelines, and electricity grids which will exclusively cover access.

3. Undertakings

- Infrastructure operators can make formal undertaking to ACCC on terms and conditions of access which if accepted are binding

N.B. Australia Competition Tribunal can hear appeals on certain decisions made by Ministers of the ACCC on the Nat'l Access Regime

Key features of interface:

1. Careful delineation of economy-wide and industry-specific rules
2. Use of industry-specific interconnection rules rather than economy-wide competition law (c.f. Bolivia)
3. Use of economy-wide competition agency to administer industry-specific rules

NEW ZEALAND²

Characteristics of Competition Law:

- Commerce Commission combines regulatory and quasi-judicial authority
- Covers all activities “in trade” including utilities (export cartels, labor markets, etc. exempted)
- Light-handed threshold (e.g., dominance by a single firm for mergers)
- Regulation by threat (e.g., price controls)
- One regulator for all businesses
- Judicially based system - only courts can review for breach and private rights of action permissible
- Focus on behavior not structure
- Rule of reason based (exception of price fixing and RPM)
- Efficiency-based
- Distributionally neutral

Regulation of Utilities in New Zealand

- Corporatization/ Privatization
- Conceptual separation of contestable and non-contestable parts of utilities
- Statutory entry barriers dismantled
- Information disclosure requirements as means of monitoring performance
- Access to networks required on negotiated basis (NZ Telecom Court Case)
- Social obligations specified
- Absence of realistic import competition

² Adapted from A. Bollard “Utility Regulation in New Zealand”, 1996

Table 2
Regulation of Utilities in New Zealand

Utility	Sector	Companies ³	Ownership ⁴	Source of Natural Monopoly ⁵	Type of Natural Monopoly	Information Disclosure Required ⁶	Other regulatory Requirements ⁷
Electricity	Generation	ECNZ, Contact	SOEs	-	-	Financial and operational	Price undertaking
	Transmission	Trans Power	SOE	High voltage lines	Stand alone	Financial, performance and operational	-
	Distribution	39 local companies	L.A., trusts, private	Low voltage lines	Vertically integrated	Financial, performance and operational	Transitional price control available
Gas	Extraction	Petrocorp, Shell, Todd	Private	-	-	-	-
	Transmission	NGC	Private	Higt pressure pipes	Vertically integrated	Accounting & performance	None
	Distribution	NGC & 4 companies	L.A., trusts, private	Low pressure pipes	Vertically integrated	Accounting & performance expected to be finalized in 1997	Price control until 1990
Telecommuni-cation	PSTN	Telecom, Clear	Private	Local loop	Vertically integrated	Inter-connection & prescribed service terms	Universal service obligation, price undertaking
	Cellular	Telecom, Bell South	Private	-	-	Inter-connection	-
	Distance	Telecom, Clear	Private	-	-	Inter-connection & prescribed service terms	-
	Interactual	Telecom, Clear, Telstra, Sprint	Private	-	-	-	-
Ports, airports	Ports	13 companies	L.A., some private	Some wharves	Horizontally integrated	-	-
	International airports	4 companies	L.A., govt, private	Some runways	-	-	-
	Domestic airports	Many	L.A., govt, private	Some runways	Horizontally integrated	Under review	Price consultation required
Water, etc	Water	Many	L.A.	Pipes	Vertically integrated	Local Government requirements	Local Government requirements
	Sewerage	Many	L.A.	Pipes	Vertically integrated	Local Government requirements	Local Government requirements

³ Only major operators mentioned

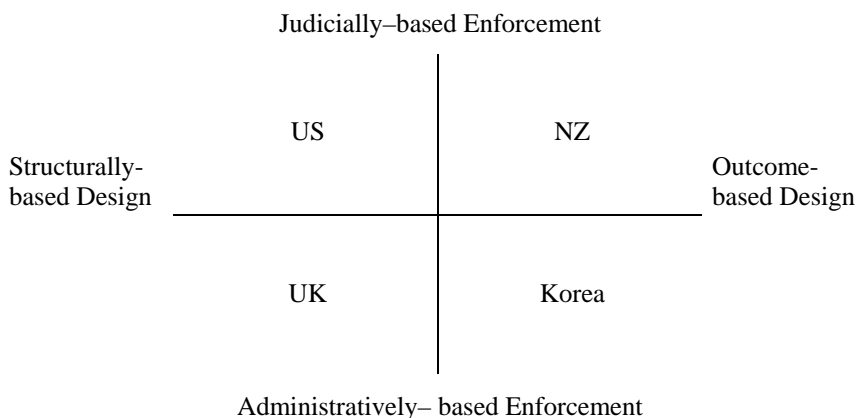
⁴ L.A.=Local Authority; SOE=State-Owned Enterprise; Govt=Central Government.

⁵ Principal areas of economic activity with some natural monopoly characteristics.

⁶ In addition to normal Companies Act requirements.

⁷ In addition to standard requirements of State-Owned Enterprises Acts.

Table 3
Indicative Mapping of Competition Laws⁸



Note: This figure uses the terms as follows:

- *Structurally-based design* uses market share thresholds for merger and per se rules for trade practices.
- *Outcome-based design* uses behavioral thresholds for merger and rules of reason for trade and practices.
- *Judicially-based enforcement* involves adjudication by courts/ tribunals with public/ private enforcement.
- *Administratively-based enforcement* involves adjudications by departments/ agencies with public enforcement.

Benefit/ Cost Analysis

(Probably Premature)

Benefits:

- Low regulatory costs of agency
- Low compliance costs of business
- Focus on single well-defined objective
- Consistency across sectors
- Reduced likelihood of regulatory capture
- Greater likelihood of “learning” across sectors
- Freight rates fell by 50%, residential phone rates dropped by 45% in real terms over years

⁸ Bollard and M. Pickford – “Utility Regulation in New Zealand”, 1996 at 20.

Costs:

- Lack of industry specific expertise
- Major enforcement costs through protracted litigation (e.g., telecom access price - Baumol-Willig) - and court reluctance to seek remedies (e.g., fines, injunctions) in absence of binding arbitration
- Credibility of regulation of threat
- Light handed regulation creates delays through court challenges for entry

