

A Model of Antitrust Regulatory Strategy

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I. INTRODUCTION

There is a great deal of literature concerning the law and economics of antitrust, but relatively little concerning its application and strategic management by regulators. There is even less literature that considers antitrust within a broad and systematic framework of analysis. Such a framework needs to take account of the following factors: (1) the character and goals of antitrust law; (2) the political environment; (3) the operating capabilities and limitations of the regulator; (4) the relationship of the agency to other organizations; and (5) the relationship of all these factors.

Strategic management involves the fundamental decisions and actions that shape and guide what an organization is, what it does, and why it does it. It requires a broad approach that emphasizes an organization's mission and the means of attaining that mission, while being aware of the future implications of present decisions. Accordingly, the strategy of an organization focuses on the role and activities of the regulator as a whole, and on the relationship of individual cases and matters to the general approach of the regulator.

This Article provides a model for the analysis of the strategy, organization, and management of antitrust agencies, based on the variables above and their interrelationships. It does not set out a specific strategy or organization plan, but rather a framework to use in devising such a plan. To accomplish this goal, this Article will use models commonly utilized in the analysis of business strategies, adapted to take account of the special features of the antitrust regulatory world.¹ An application of the model is made in relation to Australia's experience of a period of vigorous enforcement of the antitrust law, focusing on some of the links between the increased activities of the regulator and the political environment.² The Article also includes a

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1. See *infra* Part II (discussing Strategy Models).

2. See *infra* Part V (applying the models to the Australian experience).

short discussion of the strategic issues that arise for a regulator in seeking co-operation from other parties (called “co-producers”).³

II. STRATEGY MODELS

There are three main variables that comprise the private sector strategy model: output, market demand, and operating capability. Understanding these variables enables a regulator to craft a competition policy to fit the particular needs of the public.

A. *A Private Sector Model*

We can begin the process of establishing a strategy model for an antitrust regulator by building on strategy models that have been devised for the private sector. We shall consider the most basic of these models—the so-called “three circles” model, widely used in business schools—and consider whether in adapted form it can be of value in considering antitrust regulation. The most basic private sector strategy model focuses on three key variables and their relationships: (1) output, or value added; (2) market demand; and (3) operating capability, as set forth in Figure 1.⁴

Figure 1: A Business Strategy Model

3. See *infra* Part VI (discussing cooperation with “co-producers”).

4. This is an adaptation of the extensive treatment in MARK H. MOORE, CREATING PUBLIC VALUE: STRATEGIC MANAGEMENT IN GOVERNMENT (1995).

As can be seen from Figure 1, the model identifies three fundamental variables for strategy. These are the value added by a firm (or sometimes the profit generated), the market demand, and the operating capability of the firm. The approach is to analyze each of these variables in depth independently, and also to consider their interrelationships, e.g., does value added match demand, and if not, what are the consequences? The arrows shown in Figure 1 indicate some key causal relationships. Market demand dictates the measure of output and the organizational capability required to produce that output. The effectiveness of the firm is highlighted by the interrelationship between the variables. For example, the value added may not match demand in some way, or operating capability may not be sufficiently equipped to support the value added dictated by demand. In sum, the model is essentially a diagnostic tool providing a checklist of key strategy factors. But it also has normative uses if it is determined that the aim is to maximize the value added or profitability of a business.

B. Key Questions for Regulatory Bodies

The private sector model requires adaptation for its application to antitrust regulation. First, the concepts of value and bottom line profit in the private sector are clear and measurable, whereas in the public sector, the concept of value is more complex, multidimensional, often contested, and usually not easily measured.

Second, the counterpart to the market, as arbiter and regulator of the value of the activities of private sector firms, is the “authorizing environment,” or the political environment from which the regulator and the law derives its authority, resources, and legitimacy. The signals coming from this market are less clear than the price and quantity demanded signals coming from the private sector market.

Third, the operating capability of a regulator has some similarities and some differences with the private sector. While both business and regulators focus on resources, skills, culture, and other underlying drivers of capability, there are some special features of how the public sector works. In particular, the operating capabilities of a regulator are determined not only by its available resources but also by the coercive powers afforded to it by law. The appropriate and effective deployment of these powers is an important part of the regulator’s operating capability.

Despite these differences, the underlying notions of a business strategy model relate directly to questions that arise for regulatory

bodies. The business strategy model identifies the value added by an organization, and therefore the objectives of the organization, as well as its relationship to a governing environment and the link of its operating capability to value added. The application of the business strategy model to regulatory bodies is clear if we set out the key questions facing a competition regulator.

There are typically three key questions for a regulator in any country, developed or developing: (1) what *should* be done (i.e., what would be of value to the public?); (2) what *may* be done (i.e., what does the legislation permit or require to be done?); and (3) what *can* be done (i.e., what is operationally possible, given the resources and powers available to the regulator?). These are similar questions to those asked in the private sector model. In other words, the key questions for a competition regulator can be framed in a similar manner to those shown in the private sector model. Accordingly, as explained below, the private sector model can be adapted for use by regulators.

C. An Antitrust or Competition Law Regulatory Strategy Model⁵

Adapting the model for antitrust or competition law strategy depends on a few key variables. The first variable is the public value, or the value to the public or community or nation. The second variable is the authorizing environment, i.e., the political environment that gives rise to legislation, regulation, resources, and other political requirements that are the source of authority and legitimacy for the regulator and values that govern the work of the antitrust regulator. The third variable is the operating capability, which includes the powers and resources of the regulator.

This model is shown below in Figure 2, and its elements are discussed in detail. The arrows suggest a line of causation, principally from the authorizing environment to public value and operating capability. As we will see in the following part, the model can be used for diagnostic purposes and/or normative purposes.

5. The model in this Article is especially inspired by the work of the faculty of the Kennedy School of Government at Harvard University, in particular Professor Mark Moore of that faculty, and of colleagues (including Professor Mark Moore) at the Australia and New Zealand School of Government, who have developed models of public administration which are themselves readily adaptable to regulatory strategy. See MOORE, *supra* note 4; JOHN ALFORD, *ENGAGING PUBLIC SECTOR CLIENTS: FROM SERVICE-DELIVERY TO CO-PRODUCTION* (2009).

Figure 2: Antitrust or Competition Law Regulatory Strategy Model

III. THE VARIABLES

This Part of the Article discusses the nature of each variable briefly. It is contended that each variable is a useful focus in itself for regulatory strategy analysis.

A. Public Value

Any public sector organization exists or should exist in order to create value to the public. Public value is a concept that refers to the collective value created for the public of a country by a government through services, laws, regulation, and other action.⁶ Public value refers to anything that is of value to the public, and therefore, it is ultimately defined by citizens themselves. Public value can be positive, negative, or nil. Public value can be achieved by the private sector through its provision of goods and services that the public demands. But this is outside the scope of this Article except to the extent that the regulator's actions affect private sector production.

Public value may be compared with private sector value, but there are some substantial differences. Broadly speaking, the private sector is judged by its results as measured by immediate output (as valued by the

6. GAVIN KELLY ET AL., UK CABINET OFFICE, CREATING PUBLIC VALUE: AN ANALYTICAL FRAMEWORK FOR PUBLIC SERVICE REFORM 4 (2002), *available at* http://www.cabinetoffice.gov.uk/media/cabinetoffice/strategy/assets/public_value2.pdf.

market). In the public sector, the contribution of a public agency is also judged in large part by the results it achieves most often as measured by its immediate outputs, e.g., successful prosecutions (or even by its inputs, such as resources employed). There may be a single, simple “output” or set of “outputs.” This may, in practice, be measured by some indicator of output, such as the number of successful court cases (a somewhat controversial indicator). However, an added complication is that the public sector is best judged, where possible, by its contribution to economic or social outcomes. For example, a successful competition regulator would be seen as contributing to the outcome of a competitive, more efficient economy with lower prices and better goods and services. In some cases, a measure of this may be claimed savings or benefits to consumers. However, such outcomes are not under its full control and are affected by many other forces. It is also often difficult to determine the link between the activities and the outputs of an agency, and the outcomes.

Unlike in the private sector, where it is mainly results that count, value does not stop here for the public sector. Public value does not normally rest on some notion of output or outcome. For most public sector activities there are a number of additional features that contribute to its value to the public.

The first such feature is the public value in the fair and proper use of government power. Proper process and ethical behavior in the exercise of the coercive powers of the state are valued highly by the community. The responsible use of power contributes to community trust in government. How effectively government power is used in the process of getting (or not getting) results is typically an important factor in the community’s judgment of the value of the government’s activities. Failure to apply power properly is highly disapproved of by the public.

The considerable coercive power given to regulatory bodies, including competition agencies, affords ample scope for both proper and improper use of authority. Typically, regulators have the power to investigate, litigate, recommend, and in many cases impose fines and other remedies. They can also permit or prohibit citizens and organizations from undertaking certain activities.

A key element of public value for regulators, then, concerns how responsibly and properly government power is used. Power should not be exercised in an *ultra vires* manner, nor through an excessive, disproportionate, or bullying manner. A regulator that obtains results or detects unlawful behavior by illegal or improper use of investigatory powers, e.g., unauthorized phone tapping or by oppressive behavior, is generally seen as contributing negative value to the public.

Nor should there be a failure to exercise power: it detracts greatly from the public value of a regulator if the regulatory agency fails to apply the law and its associated sanctions in the way that the legislature intended and the community expects. Generally, there are fewer safeguards for the public from the failure to use power than from the excessive use of it. In the most developed countries, the underutilization of power is usually a more significant (if less recognized) problem than the overuse of power because the latter has many safeguards already in place.

The distinction between achieving outcomes or results that add to public value, and following proper process, is useful in categorizing the behavior of regulatory agencies and of individual personnel within them. Some agencies and individuals seem to be at times focused entirely on process—they have legislation to follow, investigations to conduct—yet they pay insufficient attention to the amount and quality of outputs and outcomes that they should be pursuing. Other agencies may focus unduly on achieving results, at the expense of proper process. An appropriate balance between outcomes and process is required.

Another use of the distinction between results and process is that regulators find that if they are successful in obtaining beneficial outcomes, their critics will often focus on allegedly poor process. For example, when competition regulators manage to get cartels fined, or executives imprisoned, critics of the agencies would not attract much support if they criticized the substantive outcome. Instead, critics usually focus on the processes that have been employed. For example, they claim bullying in negotiating sanctions (“plea bargaining”) or unfair publicity. Likewise, where agencies place a heavy emphasis on process they may be criticized for poor outcomes.

The other dimension of public value in nearly every field of government activity is fairness—regarding either process or outcome. The field of competition law has some special features in this respect. Clearly, there is an important need for fair process. But should there be other elements of fairness? Does the community, for example, expect that the results brought about by the intervention of competition regulators will add to fairness in the community? If one looks at other fields of government policy, such as education, health, and policing, the fairness factor is always present and it is often pursued at the expense of seemingly larger or better outcomes and outputs.⁷ Competition policy seems, in some respects, unfair. For instance, it can put people out of

7. For a discussion of the issues, see JULIAN LE GRAND, *THE OTHER INVISIBLE HAND: DELIVERING PUBLIC SERVICES THROUGH CHOICE AND COMPETITION* 12–13 (2007).

business or work. On the other hand, there are fairness-enhancing aspects of competition policy: it provides opportunities for competitors who might not otherwise be able to compete because of the actions of monopolists or cartelists. For better or worse, fairness plays a role in the politics of competition law.

Figure 3 attempts to bring together the various elements of public value: results, fair and proper use of government power, and fairness.

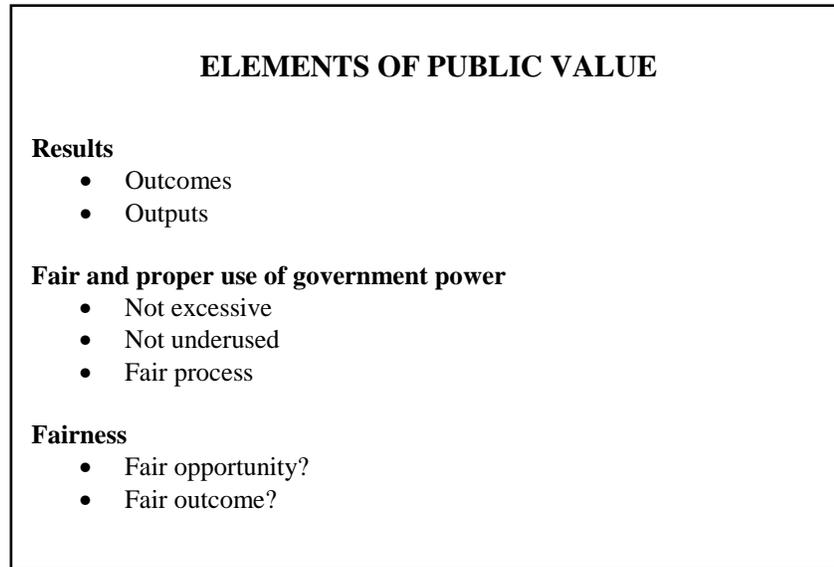


Figure 3: Elements of Public Value

The term “public value added” refers to the addition to, or subtraction from, the collective welfare of a country that results from a particular public policy or public institution. Value added is useful as a reminder of the need to evaluate net benefits—that is, the value of outcomes minus costs, including compliance costs, in achieving those results. It also draws attention to the fact that value added can be increased either by decreasing the amount of input per unit of output (e.g., by conserving resources) or by increasing the quantity or quality of output with a given amount of input.

Many discussions of regulatory strategy neglect one of the dimensions of value added. They may one-sidedly emphasize the value achievable by reducing inputs for a given output or the value of outputs, ignoring the input costs. Some regulators may get locked into increasing value by reducing inputs, but they ignore that they can add

value by increasing output, quantity, or quality. Alternatively, they focus on increasing output without regard to input cost.

An example of the application of this model in relation to competition law is shown in Figure 4.

Figure 4: Public Value of Antitrust or Competition Law

This Article is concerned with providing a framework within which the strategy of a regulator may be framed and reviewed. It does not seek to define or specify a specific strategy or mission. Accordingly, I shall only briefly discuss the objectives of competition law and the results that are sought. I simply note that there is agreement by most people associated with competition law about its general objectives. Generally speaking, an antitrust agency's objective is the promotion of competition or at least the removal of barriers to competition brought about by anti-competitive behavior. It does this with the aim of achieving economic efficiency and consumer and general economic welfare. There are some controversies about whether competition is a goal for its own sake or not, and whether consumer welfare or total welfare is the target. In practice, there are usually legislative and regulatory deviations from these agreed goals regarding small business protection and the promotion of fairness. Whatever these goals are, they are not absolute: their pursuit is subject to requirements regarding the circumscribed and proper exercise of power by the regulator.

Having determined the elements of public value, it is necessary to determine which specific outputs and outcomes are sought. This raises the question of measurement. Currently, measurement is a key factor in

nearly all fields of public sector management, and most departments and agencies measure outputs and outcomes, as well as inputs. Competition agencies are adopting measurement practices more widely.

There are, however, special problems in measuring output and outcomes and in evaluating their significance. Is a high rate of litigation—even successful litigation—a sign of success or failure? If the police force, for example, reported very large numbers of successfully detected murders, would it be judged as a success or a failure? Is the amount of cartel detection by a regulator a sign of success or failure? How is the effect of general deterrence to be measured? On what basis should the success of a merger law be judged? Also, many factors affect competitive outcomes in an economy. To what extent can these outcomes be attributed to the actions of a competition regulator? How quickly are complaints dealt with? Is a quick disposition of complaints desirable if it means that serious complaints are not fully investigated? These difficult questions imply not only a need to carefully design measurement programs and conclusions, but also a need to recognize that reliance on measurement without context can obscure what is ultimately a question of judgment and degree.

As indicated earlier, in setting out this framework I do not spell out a specific mission, purpose, or objective. These are important ingredients in a strategy statement. What is more important in this Article, however, is to bring out the underlying elements of a strategic framework and to note that a regulatory strategy needs to be related to the public value, the authorizing environment, and the operating capability elements in the model. This is often not done in practice, where there is often a rather technocratic focus on strategy plans, and critical influences such as the authorizing environment can go ignored or unmentioned.

B. The Authorizing Environment

The community is the ultimate arbiter of public value and of the legitimacy and authority of the regulator. Its preferences are expressed through legislation, rules and other directives, budgets, powers conferred on the regulator, as well as many implicit or explicit community values. Court decisions applying the law are also an important element.

In this section, we therefore turn to the authorizing environment and the question of the sources of authority and legitimacy that determine both public value and what the regulator is authorized to do.

Some regulators would contend that an analysis of the authorizing environment is irrelevant to their work. Their role is simply to carry out mandates from the authorizing environment. There is no need to go behind it and study its political influences. However, mandates from the authorizing environment are often unclear, incomplete, sometimes ambiguous, seemingly contradictory, and subject to frequent change; therefore, understanding the mandates requires an understanding of the authorizing environment. Also, anyone planning a strategy for the next few years for an organization needs to take account of what the authorizing environment might do in the future and what drives change.

This Article will not fully analyze the factors affecting the authorizing environment, but some general points are important to consider. First, an important characteristic of competition law is that it encounters contradictory attitudes by those affected by it. Most people and businesses want their suppliers, customers, and often their competitors to be subject to the stringent application of competition law. However, when the law is applied to them, they do not welcome it. It is usually harmful to their interests, and they put these ahead of any public interest considerations. They support competition law in general, but not its application to themselves.

Second, this inevitably leads to strong pressures against competition law. The size of the property rights involved in competition law is very large. The losers from competition are often powerful, while the winners may be unknown, dispersed, and weak. In just about every country there is opposition by big business lobbyists to the existence, strengthening, or vigorous application of competition law. If the law is well-established and not able to be abandoned, they seek to have its impact diluted. They may acquiesce in its general application but seek soft application or special exemptions and special deals.

Third, competition law normally involves substantial government intervention to achieve competitive markets, so-called “free competitive markets.” This is in some respects a paradox and it can create unusual constituencies that either favor or oppose competition law. Some pro-market-minded persons (libertarians) oppose competition law because too much intervention is needed. Conversely, those more skeptical of markets are often supportive of competition policy simply because it is seen as striking at big business, in their view a worthy target in and of itself.

Fourth, the authorizing environment is likely to differ from one country to another. In particular, the authorizing environment in a country with a newly established competition policy is likely to differ from that in a country with a well-established competition policy.

Newly established laws are often politically weak, as they lack established supporting constituencies. Likewise, the environment will differ depending upon the stage of economic development. Clearly, the political economy of developing countries will differ from advanced economies, not only because public institutions and processes are less robust, but also because such economies typically have less concentrated corporate sectors outside control of public authorities than is the case in the developed world. The absence of such constituencies changes the authorizing environment substantially.

An understanding of the authorizing environment requires an analysis of its drivers, including, but not limited to, interest groups, the media, social attitudes, political parties, and the courts. Some of the influences are shown in Figure 5, which also depicts the outputs of the authorizing environment such as laws, budget expectations, etc.

Figure 5: The Authorizing Environment

One approach to identifying the drivers of the authorizing environment is to identify affected interest groups. This is important, but it should be noted that there might be severe conflict within seemingly homogenous business groups. There are often conflicts between big and small businesses, and often between different sectors and companies within the same industry. However, some important

drivers cannot be characterized in interest group terms alone. For instance, government policy is necessary because governments are seen as responsible for the performance of the economy, and they need to establish competition laws to achieve good performance.

Random events can have an important effect upon the authorizing environment. In nearly every field of regulation, an unexpected and trivial event can trigger major changes. In Australia, for example, a row between a trade union-owned shop and a tire manufacturer in the 1970s triggered the almost overnight adoption of a prohibition on resale price maintenance.⁸ The role of small events in triggering major legislative and other outcomes has been analyzed by behavioral scholars of politics, law, and economics.

Numerous other factors are relevant. International influences can also be important: the Organisation for Economic Co-operation and Development (OECD), the International Competition Network (ICN), the International Monetary Fund (IMF), and the World Bank can be important drivers of the authorizing environment and of changes in laws and competition policy. And the stage of the economic cycle can drive the authorizing environment: antitrust law is often abandoned or weakened during periods of depression and war. Some contend that antitrust law is a “luxury good,” only applied in good economic times.⁹ The role of advocacy is important in most competition agencies unless they have a passive attitude to the authorizing environment—a matter not pursued in this Article. Further analysis would delve more deeply into the role and nature of advocacy regarding the likelihood of a mismatch between public value and the authorizing environment. Of particular importance would be the dynamic relationship between the regulator and its authorizing environment, discussed in Part III below.

To conclude on this subject, it is important that a strategic analysis takes account of the political environment of a competition agency. This is important even in the United States, but it is especially important in developing countries, where political problems and lack of support loom large as determinants of the nature of regulatory outcomes. From a normative point of view, it is also important to consider whether and how much an agency should or can influence the authorizing environment.

8. AUSTRALIAN TRADE PRACTICES: READINGS (John P. Nieuweunhuysen ed., 1976).

9. Daniel A. Crane, *Antitrust Enforcement During National Crises: An Unhappy History*, GLOBAL COMPETITION POL’Y, Dec. 2008, at 3, available at www.idrc.ca/uploads/user-S/12459370961D_Crane_paper.pdf.

C. Operating Capability

Strategy must also be formulated with reference to the operating capability of an agency. The analysis of public value and the authorizing environment may suggest a particular approach to the application of competition law. Governments may seek outcomes but not provide the resources or powers necessary to attain them. Experts may recommend analytical approaches or forms of evidence that are beyond the capability of the agency. But often this is not possible, given resource and skill limitations, limited legal powers, and the stage of development of an agency. Accordingly, it is necessary to analyze the operating capability of an agency and its scarcity of powers and resources as part of a strategy exercise.

Operating capability refers to physical, human, and financial resources, culture, and organizational structure and arrangements that exist to carry out the tasks of the regulatory authority or government agency. It also refers to the legal powers of the agency, e.g., the powers of investigation and decision-making. Accordingly, the notion of operating capability differs from that applicable to the private sector not only because of the many different characteristics of public sector work, such as industrial relations arrangements and accountability arrangements, but also because operating capability is affected by the legal instruments of coercive power available.

Figure 6 sets out operating capability and its components:

Figure 6: Operating Capability

Antitrust law requires detailed enforcement and administration. It differs from some other laws where, once enacted, there is relatively little for the government to do. For example, a tax rate change or an import tariff rate change, once enacted, requires relatively little implementation by the government: the law is changed at the stroke of a pen and nothing remains but for the market to get to work to reallocate resources. Competition law is quite different. Once the law has been enacted a plethora of activities must occur: the establishment and build-up of an organization, the undertaking of investigations, and decision-making in the light of investigations, judicial processes, educational activities, and so on.

Substantial regulatory institutions need to be set up for the implementation of competition law. They need to develop appropriate economic, legal, and managerial skills. In developing countries, they can benefit from technical assistance and help with capacity building. Regulatory institutions are usually in a weak position at the outset of the implementation process and this means in turn that the law must be limited in its aims and reach. In the initial stages, the regulatory institution must make hard choices about its priorities.

In most countries the courts have a key role. Courts may be viewed from two perspectives: as part of the authorizing environment for the regulator, and more broadly, as part of the operating capability of a competition law. Either way, they may or may not perform well and have good processes. Further, they often have difficulty with economics-related issues. Despite this, many countries accept courts as legitimate and broadly trusted forums for the resolution of important disputes over property rights.

IV. THE INTERRELATIONSHIP OF THE VARIABLES

The next step is to relate the three variables to one another. The arrows shown in our model indicate possible causation in the relationship between the variables: public value is, for example, determined by the authorizing element, so are the resources of the regulator. The amount of public value that is generated depends, among other things, on the operating capability of the regulator. In reality, there is often a two way relationship.

One possibility, as shown in Figure 7, is that the three circles, or variables, are aligned: that is, that the arrows run in straight lines from one circle to the next. If they are in equilibrium this is not necessarily cause for complacency, as exemplified by the authorizing environment setting a low degree of public value on an important activity.

Economics provides a well-known example of the non-optimality of equilibrium. Keynes pointed out in the 1930s that the world economy was in equilibrium. Demand and supply were perfectly balanced and showed no signs of changing their relationship.¹⁰ It was in fact in equilibrium at a 25 percent rate of unemployment. Likewise, as explained later in this Article, in the field of antitrust law, an agency may find that there is equilibrium at low value.

Figure 7: Antitrust Competition Law Strategy Model: Equilibrium Interrelationships

However, there may be a misalignment. Such misalignments tend to be unstable. Consider some of the possible disequilibrium relationships. First, public value may be misaligned with the authorizing environment. This is shown in Figure 8. The vigor of the regulator in enforcing the law and achieving public value may upset powerful interest groups. This may have consequences via the authorizing environment, and generate disequilibrium. This disequilibrium is unlikely to persist. Something must happen to correct the mismatch. The government may take steps to weaken the law, reduce the resources of the regulator, alter its membership, or direct what it must do or not do (whether lawfully or otherwise). In addition, the regulator may pull back on its activity or

10. JOHN MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY 23–34 (1936).

through its actions, advocacy, or education activities bring the authorizing environment into line with its view of public value. If the regulator is independent, it has more ability to survive political tensions compared to otherwise, but only for a time. This is because, ultimately, a regulator cannot exceed the source of its lawful authority in the authorizing environment. While the relationship between the two is dynamic, a regulator must give way to binding changes in the authorizing environment.

Figure 8: Misalignment of Public Value and Authorizing Environment

Second, another misalignment may be between public value and operating capability. This is shown in Figure 9. There may be great public value in having a full-scale competition law with all the bells and whistles of an advanced economy but if there is no operating capability to implement it, value may not be achieved. Another possible instance of mismatch exists where there is a global cartel that harms a country without the capacity to prosecute it. Public value can only be achieved by establishing operating capability; that is, the nature and extent of public value depends upon the nature and extent of operating capability.

Figure 9: Misalignment of Operating Capability and Public Value

V. APPLICATION OF MODEL

In this part, the Article will apply an aspect of the model to the enforcement of the Australian Trade Practices Act 1974 (Cth) (“the Act”). The modern Act was enacted in 1974 and although its essential structure has not changed since then, there has been considerable expansion and the addition of new functions. The Act prohibits anti-competitive conduct. In particular, it prohibits price fixing, bid rigging, and other such agreements between competitors. Unlike many countries, “authorization” of certain otherwise prohibited anti-competitive behavior is possible in advance (and granted sparingly) if the benefit to the public exceeds the detriment resulting from reduced competition.

The Australian Competition and Consumer Commission (ACCC) is the principle enforcer of the Act. It may investigate and litigate in the Federal Court of Australia in order to obtain injunctions, fines, damages (in some cases), and other possible orders. In addition to ACCC enforcement, for most sections of the Act, private enforcement is also possible and frequent. In many instances, a right of appeal to the Australian Competition Tribunal (ACT) arises from ACCC decisions.

The ACT is headed by a judge but its membership includes an economist and a person with business experience.

Unlike the antitrust law in many countries, the Act also encompasses consumer protection issues and the regulation of former utility monopolies (such as electricity, gas, and the telecommunications sector). The ACCC also administers the largely dormant prices surveillance laws.¹¹ With respect to national consumer protection issues, the ACCC is chiefly concerned with misleading or deceptive conduct or product safety. It also has the power to litigate against market conduct that is seen to be unconscionable, where a party to a contract had a “special disadvantage” to which the other took advantage such as to make the contract unfair, unjust, or unreasonable.¹² Recently, the Act has been extended to cover unconscionable conduct by businesses against businesses as well as by businesses against consumers. This is an example of unfairness considerations entering into the law.

The perceived strong operating capability of the ACCC has contributed to the view that the ACCC is a vigorous and capable law enforcement agency. Governments enacting new laws have therefore often decided to use the capacity and culture of the ACCC to get results. Thus, the ACCC was also involved in Goods and Services Tax (GST) price regulation for a time (although this legislation has now expired).¹³

As mentioned above, since 1995, the ACCC has increasingly regulated public utilities in the energy, telecommunications, and transport sectors. The ACCC plays the role of the Federal Communications Commission and the Federal Energy Regulatory Commission at least in respect to all competition and economic regulatory dimensions. By international standards, this is a unique feature of the Australian arrangements. This role was also conferred on the ACCC as a result of recognition of its operating capability—its economic sophistication and reputation for strong enforcement—and of ACCC “advocacy,” much of it behind the scenes.

11. See Trade Practices Act, 1974, Pt. VIIA, (Austl.) (containing dormant price surveillance laws).

12. *Commercial Bank of Austl. Ltd. v. Amadio* (1983) 151 C.L.R. 489.

13. See Trade Practices Act, Pt. V.B (containing transitional measures for the New Tax System introducing the Goods and Services tax). It operated between July 1999 and June 30, 2002. While it is still contained within the legislation, it has little or no application.

A. A Brief History of the Trade Practices Act

It took Australia nearly seventy years to enact an antitrust law that was both constitutional and effective. A strong antitrust Act (the Australian Industries Preservation Act 1906 (Cth)) was enacted at the turn of the century that was modeled on the Sherman Act in the United States. The new law was short-lived, being first emasculated on constitutional grounds in 1909,¹⁴ and then further limited in 1913 by a High Court and Privy Council skeptical about the benefit of competition and unwilling to move beyond generalities about “unreasonableness.”¹⁵ In 1965, the Liberal and National Party Coalition Government introduced a modest form of trade practices law. It had low public value, being aligned with the conservative authorizing environment. It too was found unconstitutional,¹⁶ and repealed in 1971. Its replacement, the Restrictive Trade Practices Act of 1971 (Cth) was in force for just over two years before being replaced by the modern Act.

The modern law, enacted in 1974, established the Trade Practices Commission (TPC), the predecessor of the ACCC.¹⁷ Initially, the Act had a very large effect on the behavior of Australian business. The law prohibited anti-competitive agreements and put a quick end to many cartels and other forms of anti-competitive conduct. It also had an impact on marketing and sales through its prohibitions on misleading and deceptive conduct. The achievement of public value was considerable, but it got ahead of the authorizing environment, and after the initial “big bang” there was a weakening of government support for the law and a corresponding contraction of activity by the Trade Practices Commission.

By 1991, the Act was not being applied very forcefully. Relatively few cases were being brought, and many of them involved smaller businesses. Nevertheless, the TPC was concerned with the prevalence of cartels, monopolies brought about by anti-competitive mergers, poor marketing practices, and the like. The TPC believed the existing antitrust framework achieved a low degree of public value—despite the fact that the Act, on its face, provided for higher public value. The

14. See *Huddart, Parker & Co. Proprietary Ltd. v. Moorehead* 36 (1909) 8 C.L.R. 330 (discussing the unconstitutionality of the Act).

15. See *Adelaide Steamship Co. Ltd. v. Attorney-General* (Cth) (1912) 15 C.L.R. 65; *Attorney-General (Cth) v. Adelaide Steamship Co.* (1913) 18 C.L.R. 30 (discussing the Australian Preservation Industries Act).

16. *Strickland v. Rocla Concrete Pipes Ltd.* (1971) 124 C.L.R. 468, 499.

17. It is worth noting that the Prices Justification Tribunal (later replaced by the Prices Surveillance Authority) was established in 1973. Eventually, in 1995 this body was folded into the Trade Practices Commission to form the Australian Competition and Consumer Commission.

trouble was that it was not being enforced vigorously enough. This could have resulted from the authorizing environment: the Labor government, like the predecessor Liberal National Party Coalition government, did not want big business challenged too much.

The Trade Practices Commission decided to step up its activities in a range of areas and thereby achieve what it saw as a much higher degree of public value. First, the Act was made more effective through vigorous and proper enforcement of its competition and consumer protection provisions, with more litigation and much higher penalties. This was achieved in a variety of ways. The Commission made an effort to break up cartels in overnight freight express, building products, vitamins, power transformers, and other high profile cases with multimillion dollar penalties.¹⁸ The Commission also reinvigorated the somewhat dormant consumer protection provisions of the Act. This included actions for refunds to thousands of indigenous people for improperly-sold life insurance policies; refunds of about \$100 million to 285,000 of the Australian Mutual Provident Society (an insurance company) customers over a misleading insurance policy; Telstra refunding \$45 million over misleading marketing for a wire repair plan; Target televising corrections for an advertising campaign; and intervention in the Olympic Games ticketing fiasco. The Commission also increased the number of cases per year from about five to fifty and increased the level of fines. This was brought about by successful settlement negotiations with business and associated advocacy to the courts by the ACCC, and a decision by the Australian Government to sharply increase the maximum level of fines, which had previously been at a ceiling of \$250,000 per offense (it was increased to \$10 million per offense and in recent times has been further increased; most recently in July 2009, after a long delay, criminal sanctions have been included in the Act).¹⁹ Finally, the Commission more aggressively used publicity to advance its goals. Few weeks passed without the TPC (now the ACCC) appearing on national television news, radio, or newspaper front pages, having a powerful effect on public opinion.

The second change was the extension of the law to all areas of business, including the previously exempt or ignored professions, public utilities, and agricultural marketing boards. This was achieved by the extension of the Act in 1995 following the National Competition Policy report chaired by Professor Hilmer, and by the subsequent high profile

18. Graeme Samuel, Chairman, ACCC, Address to Launch 25th Anniversary of Miller's Annotated Trade Practices Act (Mar. 29, 2004).

19. Trade Practices Amendment (Cartel Conduct and Other Measures) Act, 2009 (Austl.).

application of the Act to such newly covered entities as the Australian Medical Association.²⁰ This Commission also took action against the Royal Australasian College of Surgeons, seeking to put an end to its closed shop by opening up the processes of selection, training, and accreditation of hospital posts (although this was only partly successful because of a lack of complementary action by governments).

The third change was to press successfully for legislation in 1993 to alter the merger law from a dominance test to a substantial lessening of competition test. Previously, in order for a merger to be unlawful, a merged entity would need to be put in a position to “dominate” the market as a result of the merger. This threshold proved to be far too high, and was replaced with the lesser standard; that is, mergers that substantially lessen competition would infringe the Act. The fourth change was the application of competition law and principles to the field of intellectual property. This was achieved through the legislative removal of import monopoly restrictions for CDs, computer software, and the many products that used copyright on labels and packages to secure an import monopoly. An assault on the book industry’s import monopoly in the early 1990s was only partially successful. Also important, though not yet implemented, was the Ergas report recommending a cutback in the scope of the intellectual property exemptions from the Trade Practices Act.²¹

Fifth, the ACCC began to apply economic regulation to such monopoly, and near monopoly public utility infrastructure areas as telecommunications, energy, and transport. This particularly related to pricing and access issues. Sixth, the ACCC was involved successfully in relation to the introduction of the Goods and Services Tax in 2000. The ACCC, with much government encouragement, ran a very high profile campaign to deter business overcharging of consumers with the new tax.

Seventh, the Act was extended to provide enhanced protection of small businesses from unconscionable conduct. It also applied to trade union secondary boycotts, as happened for example in the 1998 national waterfront dispute, another “top of the news” action. Finally, greater public and business awareness and understanding of the Act were achieved by telling the story of successful ACCC cases through the

20. *See* ACCC v. Austral. Med. Ass’n W. Austral. Branch Inc. (2001) 114 F.C.R. 91 (applying the Act to the Australian Medical Association).

21. INTELLECTUAL PROP. AND COMPETITION REVIEW COMM., REVIEW OF INTELLECTUAL PROPERTY LEGISLATION UNDER THE COMPETITION PRINCIPLES AGREEMENT FINAL REPORT (2000).

media in all of its forms. The purpose of publicity, by raising public awareness, was to make the law work better, to gain more support for the law, and to help build a competition culture, thereby contributing to good economic performance, as well as strengthening the authorizing environment.

B. The ACCC in Strategic Terms

In my view, the ACCC sharply lifted public value during the 1990s. There were two challenges; the first related to the relationship of public value to the authorizing environment, and the second concerned the required increase in operating capability to contribute to higher public value.

The more interesting challenge was the relationship between the Commission and the authorizing environment. Given that the authorizing environment seemingly wanted low output from the Commission in the early 1990s, what happened when Commission output increased? Obviously when a regulator steps up output, this can cause misalignment between the value added circle and the authorizing environment circle, likely resulting in an unstable disequilibrium.

There are a number of possible scenarios resulting from misalignment. First, the disequilibrium persists for a time, perhaps assisted by the independence of the regulator, but will probably result in re-establishment of an equilibrium outcome. Second, the regulator reduces its output to bring it back into line with the authorizing environment. Third, the authorizing environment is put under pressure from interest groups acts such as legislation, budget cuts, appointments, or directives (lawful or otherwise) to reduce the output of the regulator. Finally, the authorizing environment adjusts and supports the new level of output. This change may be brought about partially or totally as a result of the actions of the regulator.

In fact, to a degree the authorizing environment changed. Much of the change was brought about by continuous major publicity generated by the regulators' actions and pursuit of publicity. This built public support for the ACCC's policies. The publicity also activated the small business and consumer lobby groups. The ACCC embarked on a significant education and awareness-raising campaign in relation to consumers, small businesses, farmers, and other interest groups. At any rate, these groups became a counter to big business interest groups.

A further element in the authorizing environment was the courts, which generally upheld ACCC actions. The ACCC was taking actions within the law and using its power properly. Business critics were

sometimes told by government that if they had complaints, they should take them to the courts. The shift in the authorizing environment thus reduced the mismatch between public value and the authorizing environment. Nevertheless this is an uneasy relationship. Once a regulator has litigation successes and apparent public support, interest groups, principally big business groups, step up their lobbying and public relations efforts to undo the apparent mandate of the regulator.

But the scenario set out in this Article does not apply to all regulatory situations. There are some regulatory situations where the authorizing environment's expectation of the regulator is ambivalent. This seemed to be the situation regarding the Australian Prudential Regulatory Authority (APRA), the prudential regulator of Australia's financial institutions. Although it had a clear statutory role, there was little doubt that the implicit and explicit messages coming from the government were that APRA was not meant to interfere very heavily at all with such powerful entities as banks and insurance companies. It seems to have followed the government's messages, even though the legislation seemed to require it to do more. However, a dramatic collapse of Australia's largest insurer, HIH, in the late 1990s, caused massive social dislocation. Within moments of the collapse, senior political figures such as the Prime Minister, the Treasurer, and the Premier of New South Wales condemned the regulator for its failure to carry out its duties, notwithstanding their own preceding role in discouraging serious regulatory activity on its part. The lesson is perhaps that the authorizing environment is fickle and prone to change and as a result, regulators are "damned if they do and damned if they don't" when it comes to applying the law seriously.

C. Independence

Most competition agencies around the world are independent from government. Does this make a difference in the analysis? Does independence mean that a regulator can act as it sees fit, providing it acts within the law?

Let us consider the four reasons for independence. First, the establishment of an independent agency to carry out a regulatory role is often intended as a sign by governments of their commitment to a particular policy. It contrasts with the simple adoption of a policy by a government, with implementation being in the hand of departments or ministries. There is less credibility and permanence about these arrangements and it is relatively easy to reverse their activities compared with those of an independent agency. The public and various interest groups pressing for a new policy often do not trust or support a

government unless it makes the more serious and less easily reversible decision to establish an independent regulator. Second, independent agencies act independently of politics. Third, independent agencies develop the necessary specialty skills. Finally, independent agencies tend to adopt relatively open, transparent, and independent processes compared to the normal processes of government.

The fact that an agency may be independent from a government does not provide complete assurance that the agency is immune from political pressures. No agency is completely independent. An agency normally depends on the government, or sometimes the legislature, for its appointments and resources. Because the government is able to change legislation and regulations, it may be able to issue directives openly or covertly.

Additionally, governments often set up independent agencies to symbolize an apparent commitment to policy. If an agency decides to display its independence, it may find its wings clipped quickly by the government. The story of many competition agencies in recent years is that governments established them as part of a symbolic show of commitment to competition law, but they have come to have an unintended quasi-constitutional role, seriously enforcing the law—often to the discomfort of their political creators. Accordingly, independence provides some buffer from political pressure, but it is not an absolute buffer if it falls out of line with the authorizing environment.

D. The Regulator and the Authorizing Environment

An antitrust regulator is able to affect the authorizing environment. First, it may do so through its actions, without any special public relations or lobbying campaign. Winning or losing cases, for example, generates a great deal of publicity and alters attitudes in the authorizing environment.

Second, the agency may embark on a policy of generating great publicity about its activities, especially regarding individual cases. The public has a right to know about the competition law and its application: people are entitled to know their rights as well as their obligations under the law. Publicity campaigns also have a powerful effect of spreading the culture of competition. Another important effect is to counter untruthful criticism made behind closed doors to politicians and others as part of attempts to weaken the role of the agency. In short, publicity can shift the authorizing environment in the direction of accepting output of high public value.

Publicity stems above all from strong enforcement, and in turn makes enforcement more effective. Publicity surrounding individual cases has important strategic uses. It educates all businesses, consumers, and government. It also makes compliance with the law more likely in all businesses, not just those involved in individual cases.

However, big businesses did not like the ACCC's publicity. The publicity has built strong public and small business support for the Act, the Commission, and for competition, thus hindering firms and industries that wanted the law and its application to be softened.

Was the publicity legitimate? The big business community was casting around for years to find some reasons why the public should not be informed. They tried to throw the "trial by media" slogan at the ACCC. The fact is, however, that hardly any of the ACCC publicity related to matters that had not already been to trial and settled. Had the ACCC engaged in trial by media over the years, there would have been court reprimands. There were not. The only occasion when there was an element of "trial by media" was during the GST period when the ACCC was explicitly authorized by temporary "shame" legislation to issue public notices condemning firms it considered had been overcharging.²² At one point, the ACCC unwisely cooperated in allowing photos of staff returning from a dawn raid to appear in the media, providing critics with an opportunity to play the "trial by media" card. Their push was resisted by Dawson Review of Competition Law, which proposed a fairly mild media code of conduct to be determined, if possible, by the ACCC with small and large businesses, consumers, and farmers.²³ Little came of it.

Furthermore, the operating capability of the Commission did not expand greatly other than through a merger with former Prices Surveillance Authority, whose substantial inherited resources were turned from price surveillance to trade practices law enforcement. The global budget of the combined entities, however, only slowly increased. Nevertheless, the Commission was able to conduct much more litigation from its existing resources than in the past. However, there were risks: had the Commission lost cases this would have caused financial difficulties. Also, the operating capability of the Commission was stretched. Nevertheless, in 2000 the government sharply increased the ACCC budget for dealing with GST pricing issues. There was a thirty

22. See A New Tax System (Trade Practices Amendment) Act, 1999, Pt. VB (Austl.) (containing powers allowing ACCC to issue public notices).

23. TRADE PRACTICES ACT REVIEW COMM., REVIEW OF THE COMPETITION PROVISIONS OF THE TRADE PRACTICES ACT, FINAL REPORT (2003).

percent rise in 2000.²⁴ When the legislation expired the Commission was able to keep the money (after a very thorough review by the Department of Finance and Administration, which concluded that the Commission had operated with insufficient resources for many years).

There are always interesting and important questions about the operating capability of the Commission. Its work is becoming more technical. In addition, it is dealing with enterprises which have more information than it does about the industry environment.

After 2000, the number of Commission staff members increased gradually from about 200 to 450 by 2003, and up to around 800 in 2009. Better funding for litigation was also provided. Much of this funding followed successful action by the Commission, and it enhanced the operating capability of the ACCC, bringing it into better alignment with its enhanced contribution to public value. Generally speaking, resources followed public value, not the reverse.

VI. CO-PRODUCERS

These days there usually is a fourth important question to be considered in most government agencies, including regulatory bodies. This concerns whether the outcomes that the government or regulator seeks to achieve require (or are hindered by) the actions of others. A key question is then: What cooperation is required from others to achieve the goals of the regulator? For example, cooperation of businesses is required in order to achieve compliance with the law. The cooperation of other parts of government is also required and so on. In this part, I will address the issue of “co-producer” contributions in a limited way.

There is an interesting contract with the private sector. In order to achieve its objectives, a private sector firm also needs to cooperate with other parties, e.g., suppliers of inputs. For example, this is most often done by means of market exchanges, in which the firm buys various inputs and other factors of production. If it is to be successful, the regulator needs to cooperate with many parties also, but its relationships with them are not usually conducted by simple market exchange relationships, e.g., paying for goods or services.

It is useful to extend the model, whether regulatory or private sector, to cover instances where those implementing the strategy need to receive help (or may sometimes receive hindrance) from others in achieving desired outcomes. Co-producers exist in many forms:

24. ACCC, ANNUAL REPORT 2000-01, at 5 (2001).

businesses, the legal profession, private enforcers of the law, other parts of government, foreign agencies, and the courts.²⁵

Figure 10: Antitrust or Competition Policy Strategy Model: Co-Producers

In the simple case as shown in Figure 10, co-producers can be seen as entities that can be harnessed to add to the operating capability of the regulator in order to achieve greater public value. If the regulator can persuade businesses to comply with the law then that increases the

25. Depending on one's perspective, the courts could belong to any one of several circles. For the regulator, they may be in either the authorizing environment or the co-producer circle. For the government official overseeing competition policy as a whole, they would be in the operating capability circle.

operating capability of the regulator and there is a higher public value that results from greater compliance with the law.

Figure 11 (Co-Producer Relationships (1)) suggests a somewhat more complex relationship between a regulator and a co-producer. Each may help the other achieve its objectives. In the case of business, cooperation with the regulator may help both business and regulator achieve their objectives. Likewise, cooperation between the regulator and another regulator may help both enhance their somewhat different kinds of public value.

Figure 11: Co-Producer Relationships (1)

The next diagram (Co-Producer Relationships (2)) draws attention to even more complex relationships because there may be other positive or negative features to the relationship between a regulator and co-producers. An important set of questions in regulation concerns the role of self-regulation, co-regulation, and absolute regulation. These issues are particularly problematic in regard to competition regulation because self-regulation raises the possibility of collusion.

Figure 12: Co-Producer Relationships (2)

VII. THE USE OF THE FRAMEWORK

Each variable in the model is important in itself. But its relationship with the other variables is of greater importance since each depends upon and is influenced by the others. A great deal of analysis of regulatory issues—whether by regulators, academics, lawyers, advisers, etc.—tends to focus on one variable or circle and to disregard the others despite their relevance.

Much discussion at seminars and conferences is about the public value of a particular action or policy, e.g., there would be high value from a particular merger law or from the application of the merger law in a particular, sophisticated manner. This may overlook that there is no mandate for such a law from the authorizing environment, or that there is no operating capability of implementing such a sophisticated approach. In addition, as has been mentioned, there is also a tendency to emphasize only the input or output side of value added, and to focus on narrow aspects of public value, e.g., on output measures without regard to questions of process, or vice versa.

Some discussions within regulatory bodies may focus entirely on what the authorizing environment will permit (whether this refers to the political environment or to the courts). Such discussions would often benefit from a greater focus on public value, and also on the possibility of causing shifts in that environment.

Yet other discussions within regulatory bodies focus entirely on operating capability without considering public value or the authorizing environment. The focus may be on maximizing the output given the operating capability. It may neglect, for example, that the authorizing environment could be well disposed to increasing the operating capability with changed laws or more resources if it was persuaded of public value. And sometimes, the operating capability of the regulator can be stretched, without requiring additional resources, by greater efficiency, more effective targeting, or by greater risk taking in litigation (many regulators are very risk averse regarding litigation). Our case study of the ACCC highlights some of the issues. Finally, some problems are seen as beyond the capability of an organization by virtue of ignoring the role of the co-producers.

VIII. CONCLUSION

This Article sets out a simple framework that provides a basis for the formulation of the strategy of an antitrust or competition law enforcement agency. A wide range of questions arise in analyzing and planning the functions and organizations of competition agencies. This Article seeks to provide a general framework within which the important details concerning the working of competition agencies can be considered from a strategic perspective. The fact is that strategic factors impinge on most major regulatory decisions.

A feature of the model is that it focuses on the three key questions which arise in every regulatory body. In essence, these are: (1) public value: what should be done; (2) the authorizing environment: what may be done; and (3) operating capability: what can be done. There is also a brief discussion of the role of co-producers of value.

It is useful to focus on all these variables in depth. In addition, the model emphasizes the importance of the linkages between these variables and uses the ACCC experience as a case study of how to apply the framework. This model is valuable as a diagnostic tool in analyzing and understanding the strategy of a regulator. But it also has normative uses.

This Article is useful for regulators and officials concerned with regulation in analyzing the work which they perform, for officials in government departments and ministers who may have to oversee the legislation and its general application by independent regulators. Furthermore, those affected by regulation (especially business and law firms) may find it helpful in understanding regulatory decisions.

This model has focused on antitrust or competition law and its enforcement. There is an equally important dimension to national competition policy: the strategy for dealing with the numerous government laws, regulations, policies, and actions that harm competition. A strategic analysis of this topic would have a much wider focus than this Article. In some countries, the regulator plays some role in these policies—usually a marginal one—as an advocate. This can be seen as an added function of the regulator, but this role is only a small part of the big picture.

This, in turn, takes us back to the question of what kind of competition policy there should be. In the United States, generally speaking, the antitrust regulators have a marginal role in dealing with anti-competition restrictions imposed by government laws and actions. A strategic analysis of the wider concept of a comprehensive competition policy that addresses both private sector and government-induced restrictions on competition—a policy much needed in most countries—would be outside the scope of this Article.