

Six Principles for Limiting Government-Facilitated Restraints on Competition

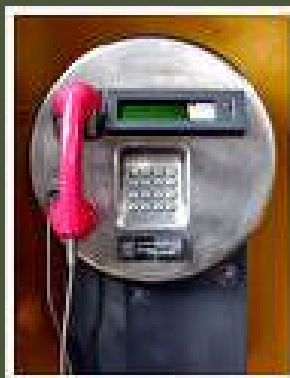


Dr. Michal S. Gal, Adv. Inbal Faibish
University of Haifa, Faculty of Law

Strategic Firm-Authority Interaction in Antitrust,
Merger Control and Regulation

ACLE workshop, University of Amsterdam, 16 March 2006

Introduction



What *institutional role* competition authorities and courts can play to ensure that regulatory boundaries are not overstepped ?

Layout

1. Justifications and Motivations for Government-facilitated Restrictions on competition
2. Navigating the Interface Between Competition Authorities and Regulators
3. **The proposed six principles**
4. The prerequisites for the principles application
5. Conclusion

Justifications and Motivations for Government-facilitated Restrictions on competition

1. **Welfare-enhancing** justifications for Government-Facilitated Restraint

Market Failure  Regulation

Justifications:

- Information asymmetries
- externalities
- distributional issues

Competition and Regulation
overlap

(Most of the time)

Justifications and Motivations for Government-facilitated Restrictions on competition

2. **Welfare-reducing** State-Facilitated Restraints

- Political pressures on legislatures and regulators
- interests of specific sectors in the economy
- conservative regulation and respond to market dynamics
- Focus on certain narrow goals of the legislator

Competition Law INVOLVEMENT NEEDED

Navigating the Interface Between Competition Authorities and Regulators

- Institutional competence of competition authorities
 1. significant expertise and experience in analyzing the competitive impact of many types of conduct
 2. limiting political pressures on legislatures and regulators
- The problems with giving competition law enforcement institutions precedence:
 1. highly specialized and on-going knowledge areas
 2. balance competing considerations

competition authorities should not be given precedence in all cases

Six Principles for Limiting Government Facilitated Restraints on Competition

- 1. Competition Advocacy at the Legislative Stage**
- 2. Mandatory Role in Regulatory Proceedings**
- 3. Ensuring Optimal Scope of General Doctrines**
- 4. Institutional Standing in Judicial proceedings**
- 5. Ensuring Regulatory Oversight**
- 6. Harmonization of Regulatory Regimes**

Costs

- resources in studying the existing or proposed regulatory scheme by the competition authority
- evaluating or regulatory effects and merits

Justification

These costs serve to limit the existence or the effects of welfare-reducing regulation, which might be very costly.

Principle 1

Competition Advocacy at the Legislative Stage

The effectiveness of advocacy at the legislative stage depends on a mix of four main conditions:

1. the timing of consultation,
2. the compulsory or non-compulsory status of the consultation,
3. the degree of abidingness of the recommendation,
4. the strength of the existing competition culture

The conditions for effective competition advocacy

1. Information procedure
2. compulsory status in the legislative process
3. advocacy activities

1. Competition Advocacy at the Legislative Stage
2. Mandatory Role in Regulatory Proceedings
3. Ensuring Optimal Scope of General Doctrines
4. Institutional Standing in Judicial proceedings
5. Ensuring Regulatory Oversight
6. Harmonization of Regulatory Regimes

Principle 2

Mandatory Role in Regulatory Proceedings

1. The authority should be informed in a timely and comprehensive manner of any regulatory issue which might significantly affect competition -
 - **Automatic standing that will empower it to intervene in any regulatory proceeding that it deems might harm competition unnecessarily, except where specifically provided in the relevant legislation**
2. Not binding view of the authority, and yet –
 - **Authority should be mandated to justify its decisions**
 - **Governmental dispute resolution process**

Principle 3

Ensuring Optimal Scope of General Doctrines

Limiting the scope of any general doctrine which immunizes regulatory processes from antitrust scrutiny, beyond the scope that best serves social welfare.

1. Competition Advocacy at the Legislative Stage
2. Mandatory Role in Regulatory Proceedings
3. **Ensuring Optimal Scope of General Doctrines**
4. Institutional Standing in Judicial proceedings
5. Ensuring Regulatory Oversight
6. Harmonization of Regulatory Regimes

Principle 4

Institutional Standing in Judicial proceedings

Because a regulatory measure is likely to be based more on policy considerations than on strictly competition considerations, there is higher possibility to be subject to less stringent judicial review.

The authority should be granted standing in judicial review proceedings and be allowed to submit its comments to the courts in order to protect the public interest ("**amicus curiae**")

1. Competition Advocacy at the Legislative Stage
2. Mandatory Role in Regulatory Proceedings
3. Ensuring Optimal Scope of General Doctrines
4. Institutional Standing in Judicial proceedings
5. Ensuring Regulatory Oversight
6. Harmonization of Regulatory Regimes

Principle 5

Ensuring Regulatory Oversight

Is the regulatory regime in place that either has, or is likely to, review and control the challenged conduct while taking into account all relevant considerations?

1. Competition Advocacy at the Legislative Stage
2. Mandatory Role in Regulatory Proceedings
3. Ensuring Optimal Scope of General Doctrines
4. Institutional Standing in Judicial proceedings
5. **Ensuring Regulatory Oversight**
6. Harmonization of Regulatory Regimes

Principle 6

Harmonization of Regulatory Regimes

Where an activity is authorized or compelled by a validly enacted legislation, it should be afforded immunity from the application of competition law.

In cases in which both competition law and other regulatory rules may apply cumulatively, it might still make sense to apply a cost-benefit test to ensure that their parallel application furthers the public interest (*Trinko*).

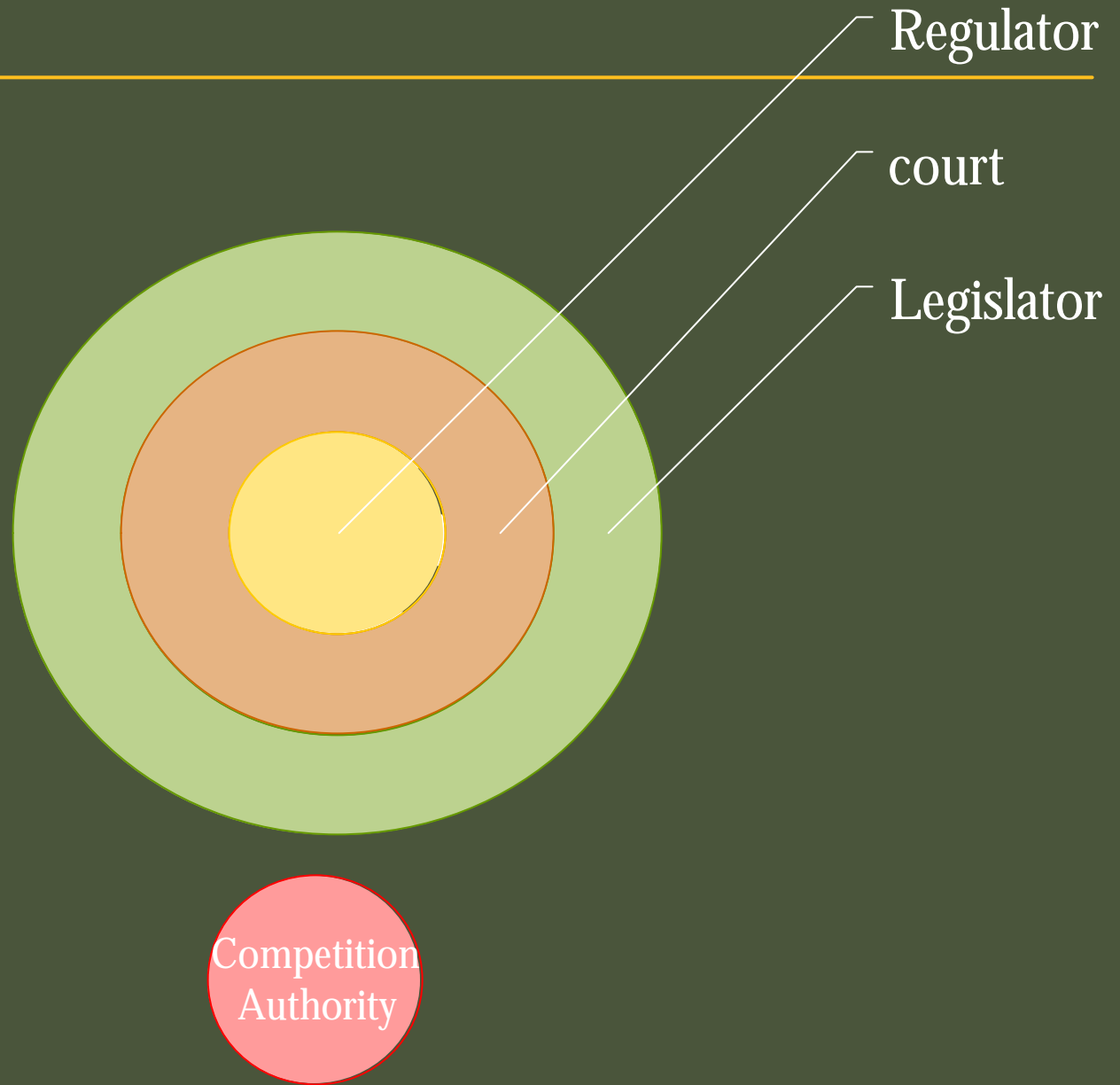
1. Competition Advocacy at the Legislative Stage
2. Mandatory Role in Regulatory Proceedings
3. Ensuring Optimal Scope of General Doctrines
4. Institutional Standing in Judicial proceedings
5. Ensuring Regulatory Oversight
6. Harmonization of Regulatory Regimes

Prerequisites

- Competition Authority competence
- Capacity to adapt to “winds of change”
- Competition tradition

Recommendation: Legal
Formalization of the Principles

summary



Conclusion

1. Regulation might, sometimes, restrain competition. Such restrictions may be necessary to increase social welfare.
2. Our paper seeks to address this problem through the tools available to competition law enforcers. We propose **six basic principles** that seek to define the possible synergies between competition agencies and regulators.
3. Where specific regulation exists, competition law should generally take a back seat. Yet competition agencies still have an important watch-dog role to play.
4. The existing rules in the EU has indicated that some of the proposed principles are already applied.



Thank you for your attention



For further comments or information <mailto:>

Dr. Michal S. Gal - mgalresearch@gmail.com

Inbal Faibish - inbalf@research.haifa.ac.il