Symposium
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Analysing Competition Policy Globally

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1. INTRODUCTION

- The contribution of the public agency is partly judged by its 'output'. Public value also normally, however, depends upon some important additional factors including the fairness and quality of the process by which state power is used, (and also, often, by the fairness of the opportunities provided). Regarding process, the state confers considerable power on regulators and an important part of their contribution to public value is the proper exercise of that power, neither using it insufficiently nor excessively.

  Public sector "output" is a concept that is more conceptually complex and difficult to measure than in the private sector where the value of output is determined by the market. Public output is usually evaluated by reference to its contribution to an outcome e.g. a competitive, more efficient economy with lower prices and better goods and services. There is the difficult question of how to assess the link between output and outcome.

  Figure 2 suggests some of the elements which contribute to public value in the competition policy area.

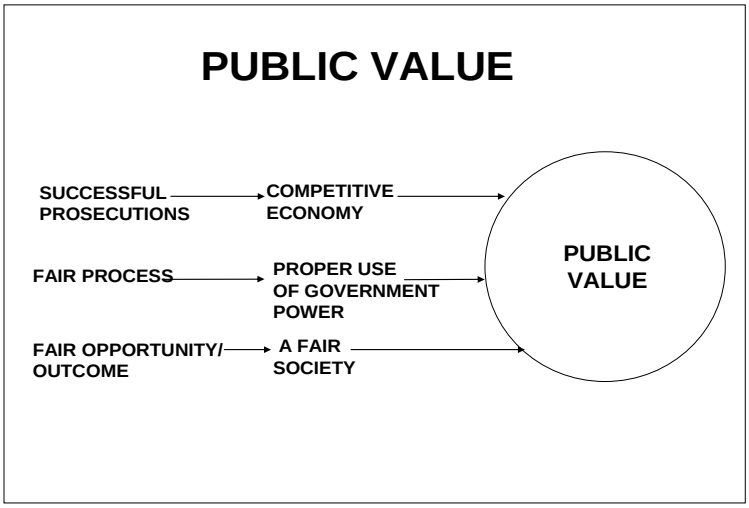

Figure 2 – Public Value

- 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 can be increased by decreasing the amount of input per unit of output (e.g. by saving resources) or by increasing

the quantity or quality of output with a given amount of input. Some regulators may get locked into increasing value by reducing inputs ignoring that they can add value by increasing output quantity or quality. Or they focus on increasing output without regard to input cost, including cost to those regulated.

The Authorising Environment

- The "authorising environment" refers to the sources of the values, laws, regulations, court decisions, budget allocations and unwritten rules which permit a competition regulator to act.

- The authorising environment is driven by interest group pressures, the media, social attitudes, political parties, the courts and so on. These factors are often unstable or changing, or the source of ambiguity, conflicting or ambiguous directives. Possible large and sudden changes in the mandate

Operating Capability

- Operating capability refers to the legal authority; physical, human and financial resources; governance, organisational structure and arrangements involved in carrying out the tasks of the regulatory authority.

- There are some economic policies where, once the law has been enacted, there is relatively little for the government to do e.g. a tax rate change. Competition law is quite different. Once the law has been enacted a plethora of activities must occur: the undertaking of investigations; decision making in the light of investigations; judicial processes including appeals; educational activities and so on. Operating capability is a large factor in its success.

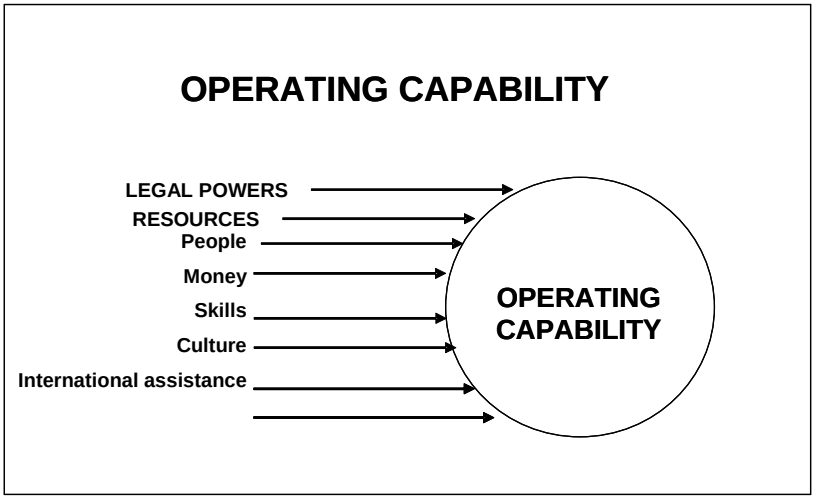

Figure 4 – Operating Capability

THE INTERRELATIONSHIP OF THE VARIABLES

If the three variables are in alignment, this is not necessarily cause for complacency e.g. the authorising environment may set a low public value on an important activity.

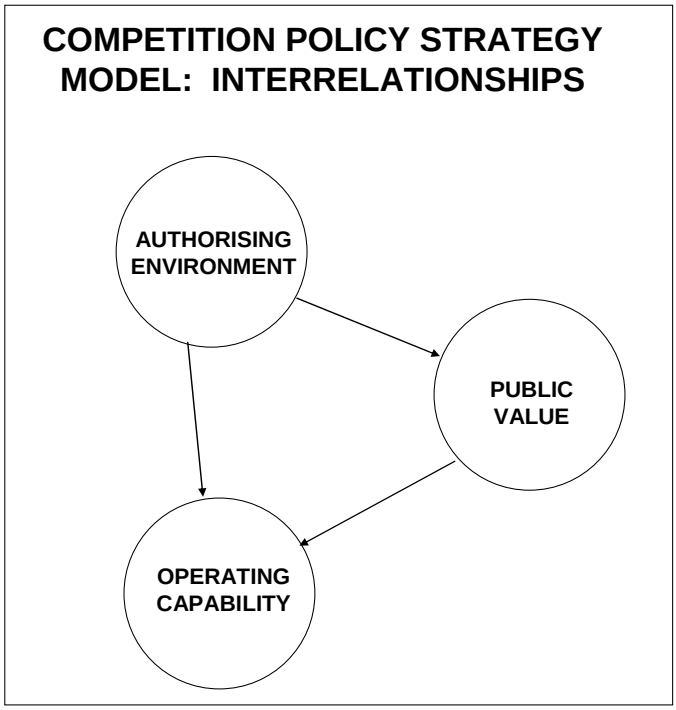

Figure 5 – A Competition Policy Strategy Model: interrelationships

However, more interesting is a misalignment. Misalignments tend to be unstable.

Public Value Misalignment with Authorising Environment

First, public value may be misaligned with the authorising environment. The vigour of the regulator in enforcing the law and achieving public value may upset interest groups that are important politically. This may have consequences – the government may weaken the law, reduce the resources of the regulator, alter its membership. Or the regulator may pull back on its activity. Or it may through advocacy bring the authorising environment into line with its expanded public value. If the regulator is independent, it has more ability to survive political tensions compared to otherwise.

In Australia in the early 1990s there was a low level equilibrium relationship centred on a low public value being achieved by competition law and policy. Efforts by the regulator to increase sharply the output of competition policy by more vigorous enforcement caused the public value to get out of line with the authorising environment. However, a vigorous program of publicity by the regulator had the

effect of altering the authorising environment and bringing its preferences more closely in line with the public value that was being achieved in practice by the regulator. Even so, there were and remain considerable tensions between public value and the authorising environment in Australia.

In the European Union there is strong support from the authorising environment for competition law, partly because the basic law is embedded in the treaty. There is not much possibility of, nor pressure for a fundamental change of European competition law. On the other hand, the authorising environment is not strong at national level within many parts of the European Union. This can lead to weak national laws and enforcement, and some pressure to weaken community law9(dd)3.9(c l)5.4(a)3.9(w is

Operating Capability Misalignment with Public Value

Another misalignment may be between public value and operating capability.

Figure 7 – Misalignment

In Australia resources have generally come into line with the needs of the regulator to achieve public value – though with a time delay. The expanded litigation output of the Australian Competition and Consumer Commission, for example, at first involved the achievement of higher output with given resources but in due course the government voted much higher resources to the Commission.

In the European Union the operating capability of the Commission has been a serious problem. It seems that the authorising environment simply will not make more resources available to an overstretched Commission. The Commission has sought to extract higher value from its limited operating capability by cutting back

system of the FTC probably restricts its contribution to public value. A somewhat wasteful feature of the US system (and many other countries) is the seemingly unnecessary system of premerger notification which ties up public and private resources quite heavily. Both the Australian and UK experience demonstrates that a system of formal premerger notification seems unnecessarily wasteful of resources. The law does not need to make notification compulsory. The many mergers which do not raise competition questions would then proceed at no cost. The existence of appropriate incentives – the threat of post-merger forced divestiture and of fines for anticompetitive mergers – ensures pre-merger notification of mergers that could harm competition.

Co-Producers

Sometimes those implementing the strategy receive help (or hindrance) from others in achieving desired outcomes, as shown in Figure 8. Co-producers of public value include business, consumers, the legal profession, the courts, regulators of other countries, international agencies, private litigants, state governments, other national regulators, other governments providing foreign assistance and/or cooperation and so on. In this paper we will focus on

In the United States coproduction is somewhat problematic. For the most part private enforcement adds to public value and can be a part substitute for public action when there are budget cutbacks. State governments are co-producers which some see as creating positive value whilst others see them as creating negative value. Likewise, in order to achieve public value, the competition regulator need to receive helpful cooperation from other regulators. As we shall see later, it also faces some difficulties in securing cooperation from international co-producers of

Some forms of consumer protection, however, harm competition. They may restrict entry, for example through licensing and this may ultimately harm competition and consumers. In such situations, consumer protection policy is a co-producer of negative value.

From the perspective of consumer protection policy, competition policy is also a co-producer of value. It brings considerable benefits to consumers through preventing anticompetitive behaviour. Also the best solution to many problems perceived as requiring consumer protection regulation is actually the promotion of competition.

In the United States and Australia, but not the European community, consumer protection law enforcement at national level is integrated with competition law. This maximises the possibility of constructive coproduction. In Australia their coexistence in one entity has also enabled the regulator to gain general public recognition and support as the consumer's friend, building a stock of political capital that has helped carry it through unpopular merger decisions and periods of big business criticism.

A related organisational issue is whether consumer protection agencies should be independent prosecutors or adjudicative bodies? Should they also be national policymakers who propose consumer protection laws and policies, advise executive and legislative arms of government, and evaluate all laws and policies in terms of their effect on consumers. Do the functions complement one another or conflict? Is this bringing together too many functions in one body? If fragmented, is one left with too small a policy arm hindered by lack of size and market knowledge? In Australia, leaving national consumer protection policy in the hands of a small unit of a major Commonwealth Government department with other priorities has hindered policy development: the policy analysis has been done by an agency that is not close to or knowledgeable about market realities.

Figure 9 – Consumer protection policy

3. THE PUBLIC VALUE FROM CURBING INTERNATIONAL ANTICOMPETITIVE BEHAVIOUR

a) Introduction

This part of the paper focuses on whether there would be prima facie

Global cartels harm consumers and business customers, have undesirable effects on resource allocation, and rarely have offsetting efficiency or other benefits. There would be public value both at domestic and global level from their removal

c) Global Mergers

In recent times there has been a spectacular increase in the extent of international merger activity. These mergers may add to global economic efficiency and/or they may detract from competition.

From another perspective, more multinational firms are becoming exposed to

The policy requirements are more complex than with respect to cartels. Mergers

cases can clearly be frustrated by failures to enforce competition policy properly, eg, if the regulator does not exist or fails to take action to stop anticompetitive practices. Second, it is important to note the reverse relationship. Trade policy can be highly anticompetitive. For example, nearly all forms of import protection whether they be quotas, tariffs, anti dumping laws and so on can reduce competition and damage consumer interests. Trade policy can be usefully regarded as an area of competition policy that has gone badly wrong! It is

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f) Intellectual Property Laws

Intellectual property laws are an interesting example of the interaction of trade, competition and regulatory laws. Intellectual property law has in some cases been captured by the interests of producers in countries which are net exporters of intellectual property. In particular, the statutory restrictions on parallel imports under copyright law have enabled massive unjustified price discrimination between countries, have hindered and distorted competition, and imposed draconian restrictions on international trade. [2]

Although there is no relevant international treaty, most countries have enacted laws which effectively prevent retailers from freely importing, for purposes of retailing, products with copyright attached to them such as CDs, books, computer software programs, pharmaceuticals and quite often a range of other copyrighted (and in some cases) patented products. Generally the laws state that no one can import a copyrighted product for the purposes of resale without the approval of the holder of the copyright owner (which approval is not normally given). There is usually no restriction on individuals importing products for their own use as long as they do not resell. This is a very substantial regulatory restriction on international trade. (Note, that it should be distinguished from commercial arrangements which may establish exclusive distribution arrangements). The restriction confers exclusive

[2] *Having regard to their far-reaching effects it is surprising that they are not discussed in work by the Chicago law and economics movement, including the latest work by Landes and Posner (The Economic Structure of Intellectual Property Law (Harvard University Press 2003)).*

rights, in some cases monopoly rights, to import certain products. Often the markets are narrow and the general climate of competition in them is affected by the import restrictions. Massive international price discrimination has occurred as a result. Whilst there may be some areas of market failure or market imperfection in relation to distribution, (e.g. free riding on promotional efforts by the copyright owner), they do not seem sufficient to justify the restrictions. As to market failure that would arise from the copying of products based on intellectual property, these problems are overcome by the existence of copyright laws which prohibit copying by non-owners. There seems to be no case, once a product is released on the market validly in accordance with copyright law, for there to be regulatory restrictions on its international distribution, especially restrictions of this magnitude. There does not seem to be a valid case for the restrictions based on the view that the restrictions facilitate price-discrimination that rewards creativity, discovery and invention. Issues of piracy are best dealt with by appropriate sanctions.[3]. Nor does the slowly increasing effect of international internet purchasing by a growing minority of consumers alter the argument of principle, nor the harm to domestic retailers.

Intellectual property laws provide some examples of legislative restrictions on international trade that unnecessarily harm competition. There would be value in their abolition.

[3] See Allan Fels and Jill Walker, "The Market for Books and the Importation Provisions of the Copyright Act", University of Melbourne Law Review, 1990.

Extraterritorial application of laws can encounter significant practical difficulties and can be counterproductive in reducing cooperation in other countries, and in actually triggering blocking laws and actions (as happened in the Westinghouse case).

Figure 10: Go it alone approach

Convergence

Convergence refers to the spread of best practice from one country to another**.**

Convergence encounters relatively few difficulties in the authorising environment from which officials come. It enhances the contribution of coproduction to public value. However, its contribution is also limited. It has not, at this stage, led to the full adoption of such laws in many countries. In any case it principally serves to strengthen and improve domestic competition laws. It does not directly take up the challenges of anticompetitive foreign laws and behaviour.

They harness the power of co-producers to add to public value as show in Figure 11.

Figure 11: International cooperation

A major issue is how to make cooperation work well. In all fields of modern government the need for agencies to cooperate with other organisations to see

A number of elements may contribute to successful collaboration. The authorising environment attitude to the law is one. If good laws facilitating cooperation are enacted this creates the preconditions for success. Then there must be shared objectives and beliefs, the development of a coherent, comprehensive, workable strategy, appropriate cooperative working arrangements, resource commitments and so on. One of the key features of successful cooperation include shared values and common education and common working methods, much of which is the result of convergence and strong networking between the players. These are powerful factors in the world of antitrust law, and make cooperation relatively effective. Shared professional values of competition regulators may overcome narrow national considerations.

Regulators wishing systematically to achieve additional public value need to devote efforts to improve the management of their cooperation with overseas regulators and governments. (As an aside, a similar comment can be made about working cooperatively with other parts of government, especially other regulators such as utility regulators in areas such as communications, energy, water and transport). It is not just a matter of debating who has the greatest competence to deal with matters and recommending appropriate legislation. It is also important to accept the allocation of responsibilities, whatever they are, and to make them work well to maximise the benefits of co-production. This is an important priority.

There is at a general level reasonable support from the authorising environment for cooperation, but territorial struggles**,** different national interests and cultural and doctrinal differences between regulators can impose some limits.

After World War II the Havana Charter proposed an international trade organisation be established and that it should be accompanied on the competition side by multilateral regulation and review of restrictive business practices. However this was dropped following opposition by the US Congress which was concerned about the impact on US domestic sovereignty.

The OECD was later involved in a number of agreements which encouraged policies that blocked international anticompetitive behaviour but these were essentially not binding and not enforceable.

Another recent development has been the inclusion of competition related provisions in various GATT/WTO agreements. These include: the agreement of technical barriers for trade; provisions regarding surveillance of state trading enterprises; a general agreement on trade and services; the TRIPS agreement; the agreement on government procurement; the TRIMS agreement. These are significant, though ad hoc, developments.

Regarding the issues of the interaction of trade and competition policy discussed earlier, much of the intellectual input into this subject is coming from the OECD but the World Trade Organisation (WTO) has established a working group discussing issues about the interrelationship between trade and competition policy. During the deliberations of this group a number of proposals were put up for the establishment of a multilateral agreement. The European Union in particular made a far reaching proposal. This was opposed by the United States and a number of developing countries. Eventually the EU put up a compromise proposal. Its elements included:

a commitment by WTO members to a set of core principles regarding the application of competition law and policy, including transparency, non-discrimination and procedural fairness in the application of competition law and/or policy.

a parallel commitment by member governments to the taking of measures against hardcore cartels.

the development of modalities for cooperation between member states on competition policy issues. These would be of a voluntary nature, and could encompass cooperation on national legislation, the exchange of national experience by competition authorities and aspects of enforcement.

a commitment to ongoing support for the introduction/strengthening of competition institutions in developing countries in the framework of the WTO and in cooperation with other interested organisations and national governments.

the establishment of a standing WTO Committee on Competition Policy which would administer the proposed agreement and act as a forum for ongoing exchange of national experience, the identification of technical assistance needs and sources for such assistance etc.[5]

Despite the generality and softness of this proposal, concern arose on the part of some countries about the possible role of the WTO dispute settlement mechanisms

[5] Frederic Jenny, "Competition, Trade and Development Before and After Cancun", Fordham Corporate Law Institute 30th

in the framework, with some countries opposed even to limited application of the

The ICN focuses on antitrust issues only; it consists of enforcement agencies**,** not government departments; it has an emphasis on convergence; it directly includes developing countries as members; its work on mergers has harnessed a large private sector input and has had some impact on national practices. It is a project oriented, consensus bound, informal network. So far it has been highly productive but its focus has mainly been on improving global merger processes with some useful work on advocacy, technical assistance and capacity building in developing countries.

In terms of our model, multilateral arrangements receive very limited support at all from the authorising environment and as a result their operating capability is very slight relative to what would be needed for the delivery of maximum global economic welfare through the promotion of competition. There are few signs at present that there will be significant progress at this level in this and the next decade.

Our conclusion is that the ICN and the OECD can contribute some useful work but there are major limitations. The authorising environment does not favour significant output. This is shown in Figure 12.

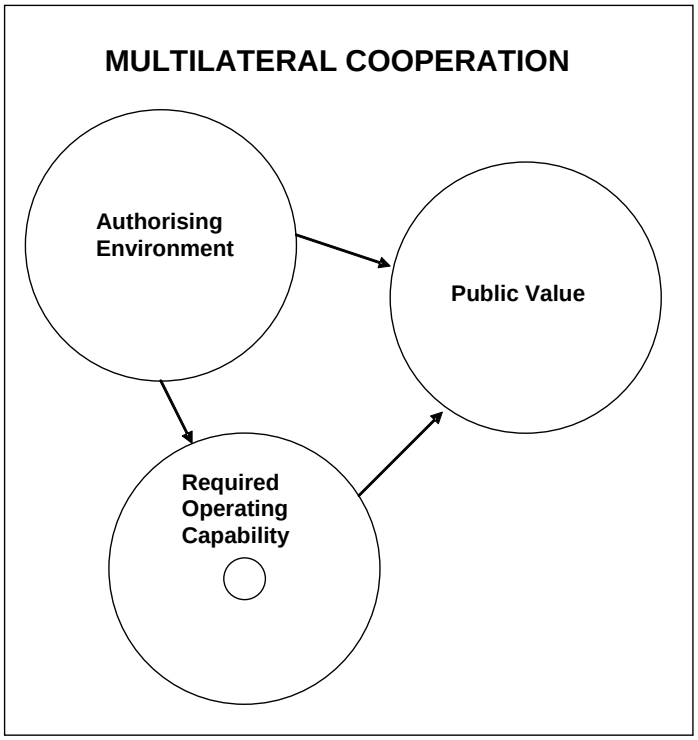
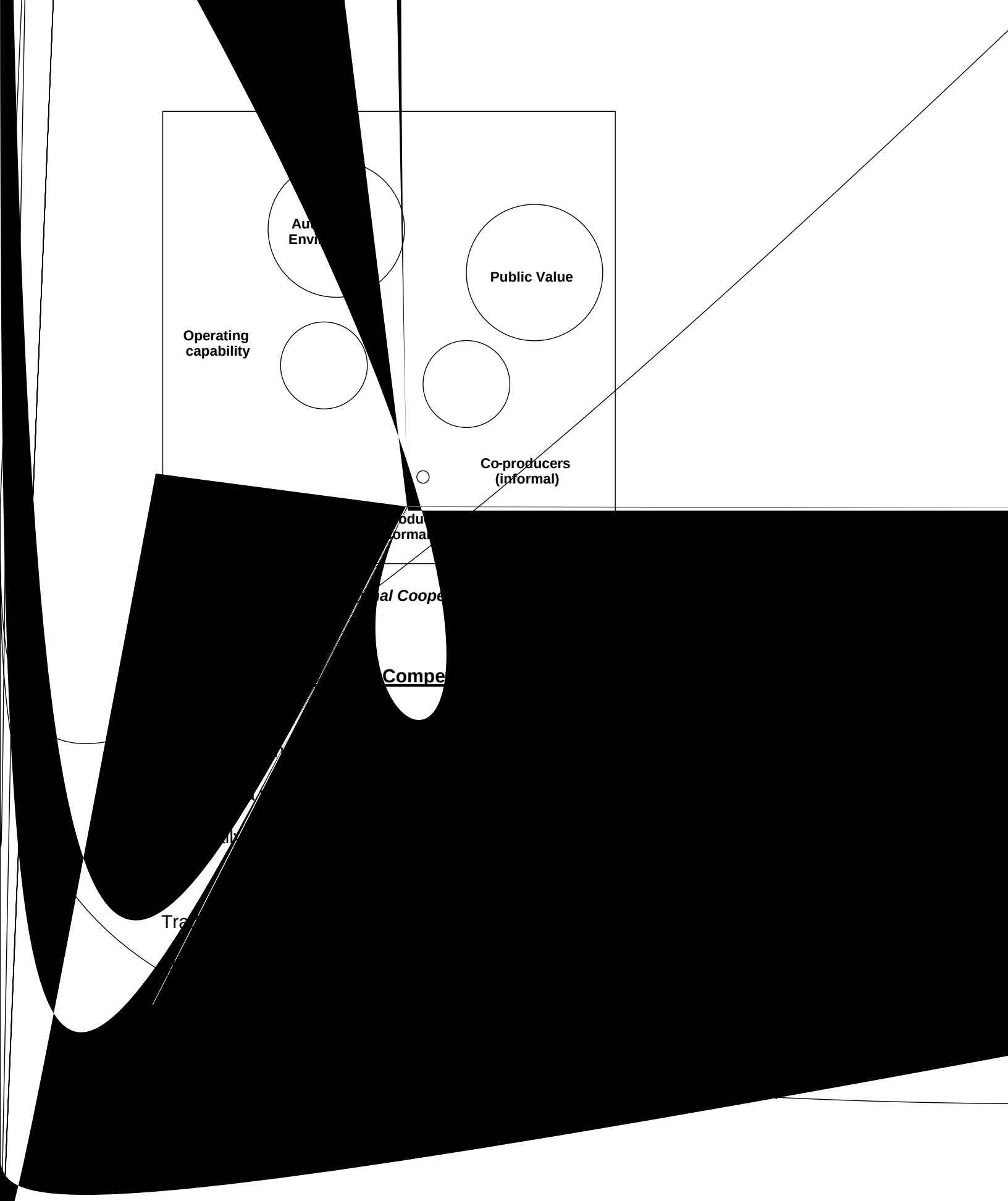


Figure 12 – Multilateral cooperation

There is no realistic possibility of there being a world competition authority in the next few years at least but if it were somehow to develop the likelihood is that it would be a body with no real authority and with a kind of lowest common denominator approach to the adoption of competition principles and their enforcement. Thus, the authorising environment would establish a body with no operating capability. This can be represented diagrammatically (figure 13):

The OECD has also contributed heavily but this again occurs largely in the absence of formal agreements and a willingness of governments to support informal approaches.

There are differences between the OECD and the ICN. These are not so much in participation. The OECD Global Forum on Competition attracts a similar attendance to the ICN Annual Meeting. Rather the OECD is based on government representation, which usually includes regulators and key policy officials, whilst the ICN is based on regulators but not other government officials. The ICN is virtual and attracts a large work contribution from member countries voluntary papers, whilst the OECD has a productive secretariat and considerable country


Public Value
Operating capability
Co-producers (informal)

In these areas of policy the difficulty is not operating capability. There is no need for any operating capability to replace trade laws. It is just a matter of passing laws. The difficulty is with the authorising environment.

4. Conclusions

It seems obvious that in an era characterised by ever increasing degrees of economic interaction between countries with ever greater activity on the part of multi national firms**,** with global cartels and global market power**,** that some kind of international effort is needed to deal with some of the problems. National governments alone cannot deal with all global problems. Business is becoming increasingly organised on a global scale but competition policy is still largely

Finally, the debates about international elements of competition law and policy can be filtered in to the wider debate about globalisation. This debate is usually unduly simple. The supporters of globalisation welcome it uncritically while the critics see it as harmful. The perspective of competition policy is that globalisation can be of public value providing it is well regulated by an internationally based competition city.59 TDT*