International Competition Network

Antitrust Enforcement in Regulated Sectors Working Group

Subgroup 2: Interrelations between antitrust and regulatory authorities

REPORT TO THE FOURTH ICN ANNUAL CONFERENCE

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Preface

(1) In the aftermath of the Third Annual Conference[1], the AERS Sub Group n°2 scrutinised further the issue of interrelation between antitrust and regulatory authorities. In order first to continue the stocktaking work and second to stimulate reflection amongst its members, the Sub-Group used the questionnaire below.

AERS (II) 2004-2005

Questionnaire

1) Which functions are currently conducted by which regulators or competition agencies ?

2) Are the relationships of co-operation between the competition authority(ies) and the sectoral regulators regulated by the law or just voluntary?

3) The impact of federal, state and local governments' jurisdiction on regulators interrelations.

4) What is the role carried out by the concerned Ministry, when a regulatory authority operates in the related sector?

5) To which extent is the autonomy of competition authorities and regulators affected by their dependence on Government or Parliament for funding, rule making powers of Government, etc. : how can this impact their respective functions and interrelations?

6) What kind of contribution does the competition agency receive from the sectoral authority when deciding on cases involving operators in regulated sector? Does the contribution of the sectoral authority take into account exclusively the specific interests characterising the respective sectors (the pluralism in the media, the stability in the banking sector, etc.) or include also a judgement about the lawfulness of the case from the competition point of view? Examples.

7) What kind of contribution is given by the competition agency to the sectoral authority? Does it concern some specific topics (the definition of the relevant market, the existence of dominant positions, etc.) or can it cover other aspects of the regulation, relevant from a competition point of view? Examples.

8) How do competition agencies and regulatory bodies interrelate in regulated sectors that are considered services of general interest, especially with regard to matters such as universal service obligations, exclusive or special rights, and essential facilities?

9) Which functions could better be conducted by each type of regulators given the level of economic development and the extent of sectors opening ? Why would sector regulators or competition agencies be better placed ?

10) Would there exist an optimal « core business » for each kind of agency by sector? What antitrust and regulatory authorities can do the better : effects on their interrelations.

[1] www.internationalcompetitionnetwork.org/annualconferences.html

(2) The Sub-Group received contributions from 10 ICN competition authorities (State Competition Commission from the Republic of Armenia, Competition Bureau of Canada, Competition Commission of India, Italian Competition Authority, Directorate General for Competition of the European Commission, Fair Trade Commission of Japan, Fair Trading Commission of Barbados, Bundeskartellamt –Germany-, Antitrust Division of the Department of Justice -United States of America-, DGCCRF -France-.

Preliminary remarks

I. Institutional versus substantial issues

(3) The relations between antitrust agencies and regulators constitute a key chapter of both regulatory governance and competition policy. A significant amount of work has already been done in relation to them during the recent years. As evidenced by a quick glance at the references listed in the recent OECD documents, one can no longer regard the interface between antitrust and regulation as "*a veritable no man's land for students and practitioners alike*[2]". Against this background, antitrust law enforcement in regulated sectors still raises two different kinds of questions:

(4) First, a number of issues can be grouped under the heading of the justification of sectoral economic regulation:

i) Is there a need for a "sectoral economic regulation" distinct for common competition law?

ii) To what extent may sectoral regulation deviate from common competition law ?

iii) For which purposes?

iv) How long?

v) Under which conditions?

[2] [Emphasis added]. Extract from the Briefing Paper n°5/2003 of the CUTS (Centre for Competition, Investment & Economic Regulation), "Competition and Sectoral Regulation Interface".

(5) The second category of topics concerns the way sectoral regulation ought to be enforced. This overall issue breaks down into many institutional sub-items, the two main ones being:

i) The scope of jurisdiction of the agencies;

ii) Their cooperation with antitrust law enforcers.

(6) Although Sub-Group n°2 was more particularly in charge of the second one, these two groups of questions are in fact closely related. Quite often reservations about the role of sector regulators call into question sectoral regulation itself. More generally, devising an institutional framework for the relations between antitrust agencies and sector regulators is about striking a balance between competition law and sectorial regulation. It goes without saying that such decision depends largely on the responses to the first set of questions. Hence the institutional and substantial chapters of antitrust enforcement in regulated sectors are unavoidably intertwined, meaning that the former is to be addressed in relation with the latter.

II. Outstanding previous works

(7) To begin with, some of the points highlighted by the ICN report to the Seoul Conference of April 2004 are worthwhile recalling in substance:

i) By and large, the current need for economic regulation stems from the non-competitiveness of markets which at the outset were monopolistic. Markets changes over time require that this regulation be adaptable.

ii) Breaking up antitrust law enforcement into different sectoral branches is somewhat at odds with the objective of making non-competitive sectors subject to common antitrust law.

iii) In terms of institutional frameworks[3], there is a wide diversity of models. There are certainly no countries where the current framework can be regarded as finally settled. The "optimal solution" varies from country to country and across industries within the same country.

iv) Early and regular interrelations between authorities, plus the greatest possible degree of exclusive jurisdiction are relevant ways to address the inherent drawbacks of overlaps and duplications. There are various forms of cooperation and means to avoid inconsistencies and to streamline proceedings.

[3] i.e. antitrust agencies and sector regulators' respective functions and their co-operation.

(8) It is also worth briefly recalling the gist of the recent OECD "issues paper" concerning "relationship between competition authorities and sectoral regulators"[4].

i) Competition authorities and sector regulator should be on the same side since: a) economic growth is enhanced by competition b) many of their objectives converge.

ii) The key elements for pro-competitive regulation are : a) that such pro-competitive regulation be supported by the central government, b) that instruments of cooperation be implemented by both antitrust authorities and regulators, c) an overall principle of competition law enforcement across sectors.

iii) Competition authorities and regulators have different "core competencies", however for a number of issues the determination of each body's ideal role is regarded as still unclear.

iv) Even though they are not generally enforcers of sectoral regulation, competition agencies can still provide valuable inputs for the enforcement of such regulation.

v) There is a variety of instruments for encouraging cooperation between competition authorities and sector regulators, a mixture of which can be valuable for improving the process and outcomes of cooperation. These tools range from giving statutory powers to the competition agency for some aspects of sector regulation to informal exchange of information.

vi) There is a need to ensure a consistent application of competition laws throughout sectors.

ICN main conclusions

I. Diversity of models calls for a mixed appreciation.

(9) On the one hand, the diversity of institutional frameworks is arguably not a problem in itself. Nevertheless sub-optimal regulatory outcomes remain a serious concern in the field of antitrust enforcement in regulated sectors .

[4] For more details, see DAF/COMP/GF(2005) 2, OECD February 2005.

A. Diversity is not a problem in itself.

(10) There is a fairly wide range of possible ways to organise the relations between competition agencies and sector regulators. Admittedly, the performance and efficiency of existing systems as comprehensive competition-oriented regulatory frameworks differ across jurisdictions. Such acknowledgement immediately raises the issue of whether one particular model amongst the existing ones is intrinsically superior to the others. Perhaps future developments will settle this argument. For the time being, though, empirical evidence is clearly lacking for a definitive conclusion. The reason for this seems to be threefold:

a) First, part of the current institutional diversity is nothing but pointless from the standpoint of competition. As already stated by the AERS 2005 report, each national standard of interrelation between industry regulators and competition authorities *"is heavily influenced by the country's legal framework*". All the features of such framework are not equally relevant to its pro-competitive nature. The overall impact of some of them is still disputed. No doubt, there are some details that factor into the structure and competencies of antitrust and regulatory agencies in specific jurisdictions that are immaterial to the goal of a competition-driven economy.

b) Second, significant points remain unclear. For example everyone agrees that delineating the scopes of jurisdictions is a sensitive and important issue, yet the ideal width of such jurisdictions is still a blurred picture giving rise to hesitations. Persistent wonders are reflected in the above-mentioned recent OECD "issues paper". According to the OECD, whilst antitrust agencies are better suited in a number of instances (let alone competition law oversight) "*as for wholesale regulation, retail regulation, public service regulation and dispute resolution, the ideal role of competition authorities and regulators is less clear. [emphasis added]. In certain countries, such as Australia and the Netherlands, competition authorities have more direct roles in some of these areas of regulation. In absence of sector regulators, especially in non-OECD countries, competition laws are often invoked to govern unregulated sectors*".

c) Third, as recently emphasised by the OECD, it is essential that pro-competitive regulation be supported by the central government. This means that any model for the relations between antitrust agencies and regulators must be assessed in light of its relevant context. Whether or not an overall regulatory framework is pro-competitive depends on a number of other factors. This makes it all the more difficult to set out a comprehensive qualitative ranking of the existing models for antitrust and sectoral agencies' relations, even though some undesirable regulatory outcomes are well identified (see below).

B. Sub-optimal regulatory outcomes remain a serious concern.

(11) However, the issue of institutional organisation does not call for pure relativism. Although not a problem in itself, institutional diversity nevertheless partly evidences underlying problems. For most antitrust agencies, the relations with sector regulators is an ongoing issue and remains an important challenge. Such challenge breaks down into two primary concerns.

1) Competition versus regulation

(12) The first concern is when competition is stifled by sectoral regulation. One must bear in mind that historically, the relations between competition agencies and sectoral regulators have often been rather fractious. At the outset, the reason for this lies in the traditional tension between competitive and regulatory approaches. As stressed by the CUTS 2003 study, the emphasis of competition law is on what undertakings should not do, whereas regulation does the reverse and tells market agents what to do.

a) Convergence should be possible.

(13) As underlined by the OECD[5], competition authorities and sector regulators with pro-competitive goals in mind should naturally converge towards common, basic competition principles. That is because i) pro-competitive regulation enhances economic growth ii) and many of their objectives are in fact very similar, if not identical. As stated by one member of Sub-Group n°2[6]:

> *"There are instances of complementarity between a regulator and an antitrust authority (i.e. both are important, each in its own right) and instances of potential conflict (either one could be used in a given case). The major difference between economic regulation and antitrust is that regulators address the question of market power directly (for example restraining the possibility of pricing a monopoly service below a certain threshold), while antitrust authorities only indirectly (for example prohibiting a merger to monopoly, or impeding the monopolisation of a contiguous market). Under an antitrust statute monopoly profits are generally addressed by enhancing competition, while a regulator would directly intervene, reducing monopoly profits.*
> *There are instances where a regulator and a competition authority pursue the same objective. For example in terms of providing access to an essential facility, where the objective of a regulator and that of a competition authority are very similar, an antirust authority would intervene only ex-post sanctioning exclusionary practices, while a regulator would also intervene ex.-ante, directly establishing the*

[5] See the above-mentioned 2005 issues paper.
[6] Italian Competition authority.

maximum access price for the regulated company. The two prices would not necessarily be the same, since the objectives pursued are not necessarily exactly the same".

(14) One interesting, albeit very atypical, example of such interaction concerns the telecoms sector in the EU, described in the EC response to the questionnaire. In the new EU telecoms framework, the European Commission is consulted on certain types of draft regulations by telecoms regulators in the EU Member States, and its reaction, which can be binding in certain cases, is prepared jointly by the Competition and Information Society Directorates General. A similar pro-competitive evolution of regulation has been evident in the banking sector, through the work of the Basle Committee*, inter alia.*

(15) The European Commission also underlines the following:

"*Since regulation has been increasingly determined by a competition policy perspective, using both regulatory and competition tools cannot be seen as inconsistent. Competition instruments and regulatory tools are complementary means. They deal with a common problem and try to achieve a common aim. The problem is high levels of market power and the likelihood of it being abused, and the aim is putting the end user at the centre of any economic activity". (...) In short, within the EU, competition has already been shaping regulation: it is the latter which has been adapting itself to suit the philosophy and the approach of the former. Regulatory policy cannot be seen any more as independent of competition policy: it must be seen as a part of a broader set of tools of intervention in the economy based on competition principles of analysis."*

b) However, full convergence remains an ideal to be reached

(16) It is also acknowledged that in many instances relations between antitrust agencies and sector regulators are not optimal and that convergence is still a long way off. In February 2005 at the OECD Global Competition Forum, Pr. Alan Fels[7] underlined that often the real life scenario was non ideal relationships. Pr. Fels also stressed "*the importance of acknowledging that arrangements are not ideal and of making the best of the situation".* Also, according to one Sub Group n°2 Member[8]:

"Sector-specific regulators are more susceptible to being influenced by private interest groups ("regulatory capture"). Lobbyists can more easily focus their influence on sector-specific regulators than on cross-sectoral competition authorities. Similarly, industry interest groups may also be more successful in using government channels to indirectly influence the regulators' decisions as the sectoral regulators are likely to be less independent from government than the competition authorities".

[7] former president of the Australian antitrust agency.
[8] Bundeskartellamt.

(17) As underlined above, devising a sound framework for the relations between antitrust agencies and sector regulator is about blending the policies of two sets of rules. With this in mind, on clear point is the risk entailed by splitting competition law enforcement into sectoral branches. This is the well-known and much commented on risk of *fragmentation* of the enforcement of competition law among several entities. Hence the wider the scope of common competition law, the better. Should nevertheless a sectoral body be empowered to apply competition rules, it is then extremely important to put in place reliable mechanisms to avoid inconsistency. The less exclusive the antitrust agency's jurisdiction, the more indispensable such safeguards.

2) Enforcement costs

(18) The other main concern is that of a poor performance in terms of law enforcement consistency and timing. It is worth pointing out clearly the harmful effects of an ill-conceived regulatory framework[9]. Absent carefully tailored cooperation mechanisms (should they be formal or informal) overlapping jurisdictions may lead to inconsistencies, legal uncertainty, duplicative administrative burdens on the private sector, and useless litigation, thereby increasing administrative costs for companies and having a negative impact on consumer welfare.

(19) According to one Sub Group n°2 Member[10]:

> *"The creation of sector-specific regulators generally results in some of their tasks overlapping with those of the competition agency. This requires coordination efforts and may result in conflicts over competence and differing interpretations. Setting up new authorities involves high costs. These costs are all the higher as experience has shown that it is difficult to abolish authorities once they have been established. Where competition is introduced step by step to formerly monopolized industries, the regulatory authority would have to be abolished accordingly . In practice, this is unlikely to happen."*

[9] Concrete example are given in existing documents, notably the above-mentioned 2003 CUTS Study.
[10] Bundeskartellamt.

II. Short term priorities overshadow long term questioning

A. Short term priorities: pragmatic solutions.

(20) In the short run, the first and foremost priority for antitrust agencies should be to focus pragmatically on the concrete ways to ensure that sectoral regulation be pro-competitive to the greatest extent possible. The available tools at the disposal of antitrust enforcers to reach this goal have already been listed[11]. Aside from this, two points are worth underlining.

1. Institutional devices

(21) One issue that Sub-Group n°2 examined is that of a possible link between the delineation of the agencies' scope of jurisdiction and the modalities of cooperation. In other words: is one specific kind of cooperation or one specific mixture of cooperative tools (mandatory cooperation, joint appointments, staff transfers and exchanges, agreements to cooperate, information exchange, and so forth) more advisable depending on the allocation of tasks? Indeed, establishing a possible typology of jurisdictions' scopes together with indications as to the more suitable cooperation tools seemed useful and interesting.

(22) However such typology turned out to be difficult to create. One important hurdle is that the choice amongst the cooperation tools deserving consideration must not be made exclusively against the criterion of the agencies' respective scopes of jurisdiction. The overall background of the regulators' relation, including the legal framework of the country as well as the specifics of the sector at stake, must also be taken into account. Thus a case-by-case approach appears to be more relevant here than a too theoretical one.

2. Importance of informal relationships

(23) Beyond institutional cooperation devices, the second point worth underlining is the critical role played by informal contacts and so-called "*sua sponte"* comments. Interestingly, this is illustrated by the current practices in countries where antitrust enforcement in regulated sectors is organised differently: in addition to the formal opinions exchanged between regulators and the French Competition Council, the DGCCRF usefully exchanges

[11] See in particular the above-mentioned OECD "issues paper" concerning "relationship between competition authorities and sectoral regulators" [see: DAF/COMP/GF(2005) 2, OECD February 2005] and the 2004 AERS report of Sub Group n°3 [http://www.internationalcompetitionnetwork.org/seoul/aers_ch3_seoul.pdf]

views with them on an informal and regular basis; by the same token, in the United States of America:

> " *(...) the federal antitrust agencies often advise industry-specific regulators on non-merger matters that impact competition. This advice may be voluntary or, in some circumstances, required by statute. For example, the U.S. antitrust agencies, like any private person, may sua sponte file comments offering their competition expertise in regulatory proceedings before independent agencies. (...) In addition, industry-specific regulators and the DOJ can and do cooperate on and coordinate their respective merger investigations. There are no rules governing when or which agency may initiate the contact. Typically, such cooperation begins once the parties have filed with one of the agencies although in large cases, contact may occur even sooner. Although FCC rules generally require it to disclose any communications directed to the merits or outcome of a proceeding (absent a protective order allowing such information to be placed under seal), the rules contain an exception for meetings with the antitrust authorities.(...) While the FCC and the DOJ are thus free to meet and discuss theories of competitive harm, proposed remedies and timing, the DOJ may not disclose any information it has obtained via compulsory process from the parties or third-parties absent a waiver. Such waivers are useful in order to streamline the review process and avoid inconsistentresults".*

(24) Along the same line of thoughts, amongst his recommendations for aiming towards "the ideal" Prof. Fels included "share culture and values", "recognition, acceptance by the agencies of need to cooperate", and "sound, ongoing [emphasis added] cooperative relationships". No doubt the informal daily contacts between enforcers are one of the key conditions for ensuring such ongoing cooperative relationships, thereby spreading and fostering the competition culture among sectoral regulators.

B. Long term questioning

(25) The Sub Group n°2 believes that even though it is admittedly a long term perspective, the relations between antitrust agency and sectoral regulators are likely to change over time. Hence this topic ought to be kept in mind, and at least reviewed for time to time from a general standpoint. One of the reasons for the evolving relations between competition agencies and regulators is the evolving nature of regulation itself. As mentioned in paragraph 13 above, this is often (but admittedly not always) in a pro-competitive direction. Such an evolution may well be the result of successful advocacy exercised by competition agencies and others. Pro-competitive regulation is not necessarily de-regulation, and it can make the role of regulators more, not less, important and interesting. But it always requires ever closer cooperation and interaction between regulators and competition agencies.

(26) In its conclusion, the above-mentioned CUTS document stated: "*there is no doubt that the debate as to whether sectoral regulation should be handled by competition agencies will, increasingly, become a moot point, even for developing countries where these new institutions are being established for the first time".* Be it as it may, one must distinguish two perspectives, namely the diachronic and the synchronic one.

(27) The relations of antitrust agencies and sector regulators is a fundamental institutional issue that many antitrust agencies face in their enforcement efforts and will likely remain so. It should continue to concern developing and developed countries alike. For developing countries, it will come up very concretely each time they will set up a regulatory framework in a given sector. For example, in the case of the Competition Commission of India:

> *"Section 21 read with section 19 and 20 of the Competition Act, 2002 provide that a Statutory Authority (regulator) may make a reference to the Commission, it may seek opinion of the Commission on competition issues, other than this, the Competition Act 2002 does not provide for cooperation between the Competition Commission of India and the sectoral regulators. Therefore, mechanisms for cooperation will have to be instituted". It is important to note that the electricity sector regulator has been empowered by statute to deal with competition issues in that sector. This may be of concern as and when the voluntary cooperation is required."*

(28) As to developed ones, without mentioning possible revamping of their models, this topic remains particularly important when the antitrust agency is deprived of a fully-fledged jurisdiction encompassing all sectors, including the so-called regulated sectors.

(29) Lastly, the future of economic regulation is an open issue. What can be modestly done at this stage is a non-exhaustive list of the parameters on which such future is likely to depend. *Inter alia*, two outstanding factors are i) the definition of the regulatory objectives going beyond competition, if any, and their blending with antitrust common rules ii) the features and the pace of the evolution of regulated markets competitive structure, that will be linked to technological changes. Admittedly, neither of these two parameters is easily predictable, let alone the impact of different approaches across jurisdictions.

ANNEX

ANTITRUST ENFORCEMENT IN REGULATED SECTORS

INTERRELATION BETWEEN ANTITRUST AND REGULATORY AUTHORITIES

CONTRIBUTIONS OF THE SUB-GROUP MEMBERS

STATE COMPETITION COMMISSION FROM THE REPUBLIC OF ARMENIA

Which functions are currently conducted by which regulators or competition agencies ?

Competition Authority

The State Commission on Protection of Economic Competition of the Republic of Armenia (hereafter "the Commission") was established on 13 January 2001 with general propuse to protect and promote economic competition, to ensure an appropriate environment for fair competition, to develop businesses and to protect consumer rights in the Republic of Armenia. The Commission was created according to the RA Law "On Economic Competition Protection" adopted on 6 November, 2000.

The general tasks of the Commission are protection and promotion of economic competition in order to bring about the development of businesses and protection of consumer rights; provision of appropriate environment for fair competition; to prevention, restriction and distortion of anti-competitive practices; control of the practices of protection of competition. In order to meet the mentioned objectives the Commission shall:

- exercise control over the adherence to the legislation on the protection of competition;
- consider the cases of infringement of the competition legislation and make decisions on such cases;
- keep a centralized register of economic entities with a dominant position;
- bring the cases of infringement of the competition legislation to court;
- participate in the drafting of legal acts concerning the development and state policy in the field of economic competition and present such in the due order;
- participate in the conclusion of interstate agreements falling within its competence;
- cooperate with the public bodies and non-government organizations of foreign states, as well as with international organizations;
- develop and implement measures preventing the infringements of the competition legislation;
- summarize the practice of application of the competition legislation and draw up proposals on improvement of this practice;
- ensure the publicity of its activity; publish a journal;
- carry out explanatory works among the public in order to let the public know about the sanctions provided for by present Law;
- carry out of other activities falling within its competence.

Regulators

The Law on “The public services regulatory body” was adopted in 2003. As state this Law the Public Regulatory Commission (PRSC) implemented regulation in public services sector. Public sector service includes components of the energy sector, which is the electrical energy system; thermal energy supply systems; the gas supply system; water system, includes components of quantity, quality, supply and demand of city water resources; supply of industrial water, purge of polluted water, extraction of waste waters; telecommunication (Electronic Communications). The PSRC is responsible for tariff setting and licensing of enterprises in the gas, electric and district heating sectors, water sector and telecommunication. The PRCP is independent of other state bodies in performing the tasks and functions provided for by the relevant Law.
The Regulation of the energy sector is a part of the state policies, aimed at balancing of the customers’ and Licensees’ interests by defining and supervising the market rules, for electricity, thermal energy and natural gas, the regulated tariffs, and the license conditions, as well as the creation of equitable conditions for the Licensees and to benefit the formation and development of a competitive market. The Ministry of Energy is a republican body of executive authority, which elaborates and implements the policies of the Republic of Armenia Government in the energy sector.

In the Republic of Armenia the Law on “Postal Communication” was adopted on 14 January, 2004. The Ministry of Transport and Communication is a republican body of executive authority, which elaborates and implements the policies of the Republic of Armenia Government in the transport, communication, and information technologies sectors. As state in the Law the responsible authority provide a wide range of services such as issue the license for providing postal communication services, sets indicative rates, maximum and minimum weight and size limits, conditions of acceptance of latter-post items, affair portrayal stamp, carries out the control above execution by a rule the license and others carry out of other activities falling within its competence.

The Law on “Aviation” was adopted on 20 May, 2002. According to this Law Civil Aviation Administration is republican body system of executive authority in aviation and air transport system (excluding military aviation) which implements the policies of Government of Republic of Armenia in aviation and air system; govern and controls operative aviation infrastructures, etc. The Civil Aviation Administration has a right to control infrastructures and services concerning only the safety and security of implementation of requirement of International Civil Aviation Organization which is endorsed by the Agreement of Airport Consensus.

The National Commission on the television and radio is independent body which has a status of governmental authority. The activities of the National Commission on the television and radio are governed by the relevant Law (see below table), the Statute of the Public Teleradio company and other legislative acts.

The activates of the National Commission concerns only issuing the license for private television and radio companies and controlling of their activities. The National Council of the public Television and Radio Company is other managing body. The members of the Council are appointed by the President of the republic of Armenia.

The Center Bank is in charge if regulating the banking sector. The Central Bank of the Republic of Armenia (hereinafter referred to as the Central Bank) shall be a legal entity the sole founder of which shall be the Republic of Armenia. In implementation of its tasks, the Central Bank shall be independent from the state authorities. Currently Armenian has a Securities Commission. There are two basic laws regulating the securities in Armenia, such as the Securities Market Regulation Law of 2000 (SMRL) and the Joint Stock Company Law of 1996.

N/N	Sector	Authority responsible for Anticompetition regulation	Sectoral Regulation		Adoption of the Law
			Regulatory body	Law	
1	Water, Gas, electricity distribution Telecommunication	State Commission for the Protection of Economic Competition of the Republic of Armenia	Public Regulatory Commission	The public services regulatory body Wate Code Law on Energy Electronic Communications	25 December, 2003 4 June, 2002 7 March, 2001 Draft Law
2	Postal Service	State Commission for the Protection of Economic Competition of the Republic of Armenia	Ministry of Transport and Communication	Postal Communication	14 January, 2004
3	Air Transport	State Commission for the Protection of Economic Competition of the Republic of Armenia	Civil Aviation Administration	Law on "Aviation"	20 May. 2002
4	Media, Telecommunication	State Commission for the Protection of Economic Competition of the Republic of Armenia	National Commission on the television and radio Ministry of Transport and Communication	Law on Television and Radio"	9 October, 2000
5	Financial sector	State Commission for the Protection of Economic Competition of the Republic of Armenia Central Bank	Central Bank Ministry of Finance and Economy Securities Commission	Law on "The Central Bank" "Banks and Banking", Bank Secrecy Securities Market Regulation Law Joint-Stock Companies Law	30 June, 1996 30 June, 1996 14 October, 1996 06 July, 2000 25 September, 1996

Are the relationships of cooperation between the competition authority(ies) and the sectoral regulators regulated by the law or just voluntary?

The relationship of cooperation between the competition authority and sectoral regulators is regulated within the scope of their competency when it is necessary. The competition authority and sectoral regulators are independent from other government authorities within the scope of their competence. There are no obligatory provisions in Armenia which are regulated the relationship of cooperation between the competition authority and sectoral regulators concerning promotion of competition.

According to the Law on "Administrative principles and administrative proceedings" (adopted on 18 December, 2004) the administrative bodies are obliged to provide mutual aid each other for implementing each activities. The mutual assistance will be provided pertaining to the request/application of the state administrative body. Beside this the Competition body and regulators have a legislative right to ask other state bodies and obtain relevant information.

The impact of federal, state and local governments' jurisdiction on regulators interrelations.

In the Republic of Armenia, executive authority is exercised by the Government, the powers of which are laid down in the Republic of Armenia Constitution and laws. The structure and procedures of the activities the Government are defined by a decree of the President of the Republic of Armenia upon presentation by the Prime Minister. Government policy for separate areas is developed and implemented by national executive bodies, which are established, reorganised and liquidated by a decree of the President of the Republic of Armenia at the proposal of Prime Minister. The national executive bodies are Armenian ministries, Government-affiliated public administration bodies.

In general, regulatory bodies are independent from other state bodies within they implementing their tasks and functions provided by the relevant law. The Regulatory body has authorisation to invite concerned Ministry to participate in their sessions when they discuss issues pertaining to adoption of tariff, tariffs for consumers, methodology for calculation of tariffs, sartorial frameworks, relevant conditions of licenses and other mandatory issues such as conditions and quality of providing services.

What is the role carried out by the concerned Ministry, when a regulatory authority operates in the related sector?

As mentioned, the regulatory authority is independent from other state bodies. Institutional autonomy, freedom from political influence on competition authority's activities and the ability to expert influence on political decisions is often interrelated. The role carried out by the concerned Ministry, when a regulatory authority operates in the relevant sector is fair and completely impartial, unbiased introduction of activates (cases) as well as providing fair information. Their obligation is to implement the provisions of legislation in proper way.

To which extent is the autonomy of competition authorities and regulators affected by their dependence on Government for funding, rule making powers of Government, etc. : how can this impact their respective functions and interrelations?

The competition Authority (The Commission) and Regulator bodies are independent within the scope of their competency. The Commission has submitted its estimate annual expenses, including salaries to the Government through Ministry of Finance and Economy. The Government includes the application in the State Budget oh the Republic of Armenia under a separate line and without modifications passes it to the National Assembly's decision. Each year the regulatory bodies also submit its estimate annual expenses to the Government according the previsions provided by the Budget Law[12]. Applications for budgetary financing of the independent Commissions are simply forwarded to the National Assemble. The Ministry of Finance and Economy doesn't have the power to suggest modifications to their submissions. According to the Law procedures estimate envisaged expenditures will guarantee to implement the tasks and functions provided by the concerned law in proper way. Usually provided financial recourses are not enough to effectively carry out its mandate. However some regulatory authorities such as Civil Aviation Administration also maintain an extra-budgetary account[13]. The shortages of budget can limit activities to carry out relevant tasks and functions effectively. The Government and National Assemble of the Republic of Armenia can indirect impact of activities of law enforcement agencies. It is worth to mention that each year the Competition and Regulatory authorities publish their annual work plan in the National Assemble. They also have a duty to publish the previous year's activity report in press.

[12] The Budget Law defines the budgetary system and regulates the process through budget formulation, discussions, approval and execution for each year.
[13] These types are not mutually exclusive and an institution may be able to keep both shortages of simultaneously.

What kind of contribution does the competition agency receive from the sectoral authority when deciding on cases involving operators in regulated sector? Does the contribution of the sectoral authority take into account exclusively the specific interests characterising the respective sectors (the pluralism in the media, the stability in the banking sector, etc.) or include also a judgement about the lawfulness of the case from the competition point of view? Examples.

The State Commission for the protection of Economic Competition of the Republic of Armenia operates 4 years. The Commission and other state bodies or Council are in position to influence current or proposed legislation through more or less formalised consultations, participation in the law-shaping process and the right to submit proposals and objectives. The issue concerning independence of the bodies has risen when the authorities investigated some cases. The Commission analyses and investigates cases by its own initiative or concerning the received applications/claims. The Commission doesn't have any obligation to ask the regulatory authority before decided on cases. The Commission has examined some case during which it decided to involve operators in regulatory sector. The Commission has used its mandate for mutual aid (see answer 2) and asked to the concerned regulatory to provide the necessary information pertaining to the cases in financial services, telecommunication, road-transport sector and others. The Commission based on facts and information, including the information provided by the sector regulatory body has made final decisions and recommendations which prevent the abuse of dominant position and alleged implementation of anti-competitive agreements.

How do competition agencies and regulatory bodies interrelate in regulated sectors that are considered services of general interest, especially with regard to matters such as universal service obligations, exclusive or special rights, and essential facilities?

The role of Competition Authority is important not merely as a Law enforcement agency but also as competition advocate. In this scope it is essential the cooperation between Competition Authorities and Regulatory which can develop the competition culture and foster protection of consumers rights. Currently in Armenia there is no cooperation mechanism which can ensure commitment and coordination between Competition Authorities and Regulatory. As a result of it test/ analysis the Commission has suggested recommendations to protect competition and regulate infringements or activities carried out by parties in given markets/sectors. (See cases in answer 7).

Which functions could better be conducted by each type of regulators given the level of economic development and the extent of sectors opening ? Why would sector regulators or competition agencies be better placed ?

Generally, Competition policy should not be restricted in its application. It should regulate industries as well as to general economy. Currently in many countries in some level of economic development value the liberalisation process. Services such as transport, energy, postal services and telecommunications have not always been as open to competition as they are today. It has also allowed consumers to benefit from lower prices and new services. In this case Armenian doesn't have relevant experience concerning situation in which regulated sector was exempt from the application of anti-competitive rules as the law on "Protection of Economic Competition" (adopted on 16 November, 2000) as well as the relevant sartorial regulatory legislation was adopted in not distance future.

Would there exist an optimal «core business » for each kind of agency by sector? What antitrust and regulatory authorities can do the better : effects on their interrelations.

One of the challenges that the Commission currently faces is establishing more efficient cooperation with the Regulatory authorities.

The most common institutional set-up between the regulatory and Competition authority follows a functional separation of regulatory and competition protection tasks and activities. This agencies will operate more transparency and will have clear mechanisms concerning their commitments, how to change the necessary information and will have clear operational principles of cooperation. The functioning of regulatory includes technical regulation, for which they need to have experienced and professional specialist. The regulatory and competition authorities will have clear mechanism for joint proceedings and for conducing invitations for hearing in order to make use complementary experts.

It is necessary to organise joint training for decision makers and staff which will support to increase institutional capacity.

The below mentioned activates will be conducted between antitrust and regulatory authorities to effects on their interrelations. The following activities which will clearly state in legislative procedures and rules:

- functional separation of the regulatory and competition protection activities/clearing mandate,
- Completion and regulatory authorities will guarantee transparency operation,
- the rules will set clearly deadlines for joint activities,
- clear rules for possibility to conduct joint proceedings in order to made use of complementary experts,

- mandatory implementation joint activities for creating and protecting fair competition environment.

It will worth to organising round table discussions and conferences for identifying general infringements and specifies the ways for opening up markets to competition.

In some extents of economic development periodically should be foster and modernise economic regulatory rules in specific sectors taking into account the technology.

FAIR TRADING COMMISSION OF BARBADOS

1. Which functions are currently conducted by which regulators or competition agencies?

Barbados' Fair Trading Commission (FTC) currently acts both as regulator for the majority of utilities within the island and as the authority responsible for the enforcement of competition legislation.

The FTC was established by the Fair Trading Commission Act CAP 326B in 2001 and took over the work of the Public Utilities Board (PUB) in the same year. The PUB was the regulator for utilities in Barbados until 2001. The FTC's mandate is significantly wider than that of the PUB. The Acts which fall under the FTC include:

- the Utilities Regulation Act CAP 282,
- the Telecommunications Act CAP 282B,
- the Fair Trading Commission Act CAP 326B,
- the Fair Competition Act CAP 326C and
- the Consumer Protection Act CAP 326D.

Barbados' competition legislation came on stream primarily to prepare for the onset of the Caricom Single Market and Economy (CSM&E), an arrangement that is expected to be implemented throughout the Members States of the Caribbean Community (Caricom) by 2006.

The island's competition legislation is directed towards prohibiting:

- anti-competitive business practices generally
- anti-competitive business agreements and arrangements

- abuses of dominance
- mergers where any anti-competitive effects are not outweighed by substantial offsetting benefits

The sectors which the FTC currently regulates are electricity and telecommunications under the provisions of the Utilities Regulation Act and the Telecommunications Act respectively. It is expected that the FTC's mandate will be expanded to regulate the water and natural gas sectors in the near future.

The Utilities Regulation Act sets out:

- the standards of service that operators should attain
- rate setting principles
- duties to provide adequate service
- complaints procedures
- the procedures to be followed by operators to obtain approval for the issuance of securities
- penalties for non-compliance with orders of the FTC and
- miscellaneous provisions such as obligations for operators to keep books

The Telecommunications Act sets out:

- licensing requirements in respect of public and private telecommunications
- guidelines for network interconnections and reference interconnection offers
- universal service obligations
- rate setting mechanisms
- spectrum management provisions
- numbering for telecommunications carriers
- technical standards for telecommunications equipment and technicians
- guidelines on construction works by the carriers
- offences and penalties
- radiocommunications standards
- compliance standards
- procedures to be followed to request reviews of decisions made under the Act and
- miscellaneous provisions on issues such as the rights of the Crown and refusals to transmit private telecommunications messages

2. Are the relationships of cooperation between the competition authority(ies) and the sectoral regulators regulated by the law or just voluntary?

The Fair Competition and Utilities Regulation Units within the FTC deal with separate and distinct aspects of the operations of the regulated industries. On occasion, officers from one unit may assist the other on certain issues. This will generally involve the officer in question

providing technical expertise on issues that have arisen under the particular unit's legislation e.g. the Economist assigned to the Fair Competition Unit may assist the Utility Regulation Unit in performing economic analyses of issues that arise under the Utilities Regulation Act.

There is no legislation which sets out how the two units should interface.

3. The impact of federal, state and local governments' jurisdiction on regulators interrelations.

Barbados' government is not subdivided into federal, state and local agencies. Any directives on regulators' interrelations would come from the core national Government, which does not currently have an impact on the regulators' interrelations.

4. What is the role carried out by the concerned Ministry, when a regulatory authority operates in the related sector?

The role of the Ministry when regulatory authorities operate in related sectors are outlined in the Utilities Regulation Act and the Telecommunications Act. In the relation to the Utilities Regulation Act, the Minister, and by extension the Ministry, is responsible for :

- designating the utility services to be regulated by the Utilities Regulation Act
- considering recommendations from the FTC on whether certain sectors should be exempted from all or any of the provisions of the Utilities Regulation Act where the service provider can establish that the market for the utility service supplied by the service provider is effectively competitive. The Ministry has the final say on whether the sector should be exempted either on its own initiative or on the recommendation of the FTC
- Consulting with the FTC and the service providers on rules proposed by the FTC on :

    - the procedure for the conduct of reviews, the hearing of complaints, and other proceedings before the FTC and
    - the keeping and submission of books, accounts, financial and other records by the service provider

- granting approval for the FTC to make regulations prescribing any matter or thing that is required by the Utilities Regulation Act to be prescribed

In relation to the Telecommunications Act, the Minister, and by extension the Ministry, is responsible for :

- the management and regulation of telecommunications in Barbados
- develop and review telecommunications policies for the promotion of the objectives of the Telecommunications Act

- publishing the policies as determined in accordance with the Telecommunications Act
- ensuring compliance with the Crown's international obligations with respect to telecommunications
- issuing licences in respect of the provision of telecommunications services
- determining the category of telecommunications services that are to be subject to regulation
- specifying the policy to be applied to each category of telecommunications services
- maintaining a register of each category of licences issued under the Telecommunications Act
- monitoring and ensuring compliance with the terms and conditions that are applicable to each licensee
- specifying the interconnection policy
- planning, managing and regulating the use of spectrum in Barbados and or between Barbados and elsewhere
- planning, managing and regulating numbering in Barbados in accordance with the National Numbering Plan
- informing the public about matter relating to telecommunications

5 To which extent is the autonomy of competition authorities and regulators affected by their dependence on Government for funding, rule making powers of Government, etc. : how can this impact their respective functions and interrelations?

The independence of the FTC is affected only to the extent that the Government sets the policy which the FTC is required to follow.

6. What kind of contribution does the competition agency receive from the sectoral authority when deciding on cases involving operators in regulated sector? Does the contribution of the sectoral authority take into account exclusively the specific interests characterising the respective sectors (the pluralism in the media, the stability in the banking sector, etc.) or include also a judgment about the lawfulness of the case from the competition point of view? Examples.

The Fair Competition Unit generally receives information on technical aspects of the operation of the regulated sector that would aid in performing a competition related analysis.

For example, in analysing a case of anti-competitive conduct in the telecommunications sector, the Fair Competition Unit may seek guidance from the Utility Regulation Unit concerning the technicalities of how businesses in the sector are structured or on how and at what points costs are incurred.

7. What kind of contribution is given by the competition agency to the sectoral authority? Does it concern some specific topics (the definition of the relevant market, the existence of dominant positions, etc.) or can it cover other aspects of the regulation, relevant from a competition point of view? Examples.

Any assistance that the Fair Competition Unit gives to the Utility Regulation Unit is unlikely to deal with competition issues when these issues fall squarely under the Fair Competition Unit.

It has occurred in the past that the Economist has provided technical assistance to the Utility Regulation Unit on issues arising in the implementation of Barbados' Price Cap Mechanism for the operator enjoying a monopoly in the telecommunications sector.

In addition, the Telecommunications Act requires that the FTC be responsible for the regulation of competition between all carriers and service providers in accordance with the Telecommunications Act to ensure that the interests of consumers are protected. It is possible that the officers of the Utility Regulation division may, in some instances, lack expertise in regulating competition between the carriers and, therefore, seek the assistance of those in the Fair Competition Unit.

The FTC is also required to give regard to the need for the promotion of competition in determining whether to approve or refuse reference interconnection offers and in settling interconnection disputes.

The FTC's current position is to make officers in all divisions available to assist the others when their expertise is needed.

8. How do competition agencies and regulatory bodies interrelate in regulated sectors that are considered services of general interest, especially with regard to matters such as universal service obligations, exclusive or special rights, and essential facilities?

The Fair Competition and Utility Regulation Units have not cooperated on these issues to date. However, as previously mentioned, the FTC's current position is to make officers in all divisions available to assist the others when their expertise is needed.

COMPETITION BUREAU OF CANADA

1. Which functions are currently conducted by which regulators or competition agencies?

The Competition Bureau's responsibilities are set forth in *Competition Act*. The Act is a law of general application with the purpose of promoting and protecting competition in Canadian markets. It contains both civil and criminal provisions dealing with matters such as mergers, abuse of dominance, exclusionary business practices and collusive arrangements among competitors. With some exceptions, the *Competition Act* applies generally to private business and Crown agent activity in Canadian markets unless the "regulated conduct defence", discussed further in the following questions, applies.

The Competition Bureau has authority under its legislation, sections 125 and 126, to make representations in federal and provincial regulatory proceedings in respect of competition. In the case of federal regulatory reviews, the Bureau has a statutory right to make such representations. At the provincial level, this authority is subject to approval by the provincial regulatory authority. It may be noted that sections 125 and 126 do not require regulatory bodies to take into account or act on Competition Bureau representations. They are free to accept, reject or ignore them. However, in practice, Bureau representations tend to be given serious consideration by regulatory authorities

Functions performed by regulators vary from sector to sector and, in many cases, province to province depending on their statutory authority. Regulatory concerns may be much broader than those of competition legislation and may reflect a wide variety of public interest concerns.

For example, under the federal *Telecommunications Act*, all **telecommunications** carriers are under the jurisdiction of the federal regulator, the Canadian Radio-television and Telecommunications Commission (the "CRTC"). The CRTC is responsible for administering this legislation, which sets out the policy framework for the sector. The objectives of Canadian telecommunications policy as set forth in the Act include:

(a) to facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions;

(b) to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada;
(c) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications;
(d) to promote the ownership and control of Canadian carriers by Canadians;
(e) to promote the use of Canadian transmission facilities for telecommunications within Canada and between Canada and points outside Canada;
(f) to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective;
(g) to stimulate research and development in Canada in the field of telecommunications and to encourage innovation in the provision of telecommunications services;
(h) to respond to the economic and social requirements of users of telecommunications services; and,
(i) to contribute to the protection of the privacy of persons.

In connection with the above policy, a key function of the CRTC has been the regulation of essential or "near essential" facilities to prevent the exercise of market power to attain higher prices and to prevent the use of control over these facilities to restrict entry by competitors into potentially competitive telecommunications markets. Under the *Telecommunications Act* the CRTC has the authority to forbear from the regulation of dominant firms when it finds there is or will likely be sufficient competition to protect the interests of end users. The CRTC has exercised its regulatory forbearance powers in important areas of the Canadian telecommunications sector including, for example, long distance telephone service. The Bureau expects the CRTC to look at the local phone market this year to determine the framework it will apply.

Electricity Markets in Canada, for jurisdictional and other reasons, have traditionally been segmented along provincial lines. Outside of certain aspects of trans-border and interprovincial trade, regulation of electricity systems in Canada is by provincial regulatory agencies. With the exception of Saskatchewan, these regulatory agencies have independent regulatory authority. The scope of this authority varies from province to province depending on, among other matters, the extent to which the provincial electricity market has been opened to competition. The less open to competition the market, the greater the role of the regulatory agency.

In all provinces, regulation of transmission and distribution, the core electricity sector essential facilities, resides with the sector regulator. Where markets have been established, regulation of competitive supply offers by tends to be less prevalent although a regulated rate offer may be provided as a benchmark for competition. Regulation for other purposes, such as demand supply management to achieve environmental goals, generally resides with the regulator.

Regulation of the **Financial Sector** is divided between the federal and provincial governments. The federal government has the power to incorporate banks and to regulate banking. The power to regulate the securities industry rests with the provincial governments. The regulation of trust, loan and insurance companies is shared by two levels of government. The major areas of economic regulation are: 1) control of entry and exit, such as incorporation and licensing at

various federal and provincial levels, capitalization requirements, restrictions preventing specific institutions from operating in specific markets, regulation of composition of assets and liabilities, across lending institutions, and approval to wind down, 2) ownership requirements for various categories of financial institutions, 3) mergers and acquisitions, and 4) special regulations for foreign financial institutions.

The line between matters falling under the jurisdiction of regulators and the competition authority is not always clear. Substantial overlap may exist between the roles of competition authorities and regulators particularly during the initial phases of the transition to competitive markets. For example, in the telecommunications sector, both the CRTC and the Bureau have jurisdiction in relation to marketing practices. In the Ontario electricity sector, there is broad scope for overlap between the responsibilities of market surveillance authority and the Competition Bureau in the areas of abuse of dominance and conspiracy and between the Ontario Energy Board and the Bureau in relation to mergers and marketing practices.

2. Are the relationships of cooperation between the competition authority(ies) and the sectoral regulators regulated by the law or just voluntary?

Activities that are regulated may not be subject to certain provisions of the *Competition Act* due to the "Regulated Conduct Defence" (the "RCD"). The RCD protects conduct from application, for example, of the criminal conspiracy provisions, if the conduct is authorized by valid provincial legislation. Broadly speaking, the RCD is an interpretative tool developed by the courts to resolve apparent conflicts between provincial and federal laws. The Bureau's approach to the RCD is to first, determine whether the Act and a provincial regime are in conflict. The RCD may only be engaged where there is clear operational conflict between the provincial regime and the Act, such that obedience to the regime means contravention of the Act. The Bureau next considers whether the language of the *Competition Act* provision in question would allow for the application of the RCC.

Where conduct is subject to the RCD, the Bureau may exercise its statutory authority to intervene, outlined above, to make representations in respect of competition. Otherwise, with certain exceptions, the relationships between the Bureau and regulators tend to be voluntary and not regulated by law. Some exceptions are as follows. In the Canadian air travel sector, legislation for the review of mergers prescribes roles for and relations between the Bureau and the Minister of Transport and the Governor-in-Council in relation to the review and approval of mergers. Proposed amendments to the Act would further clarify these roles and relations and extend the model to the review of all modes of transport under federal jurisdiction. The Minister of Finance must approve bank mergers in Canada and has the unique authority under section 94 of the Competition Act to prevent the Competition Tribunal from issuing any order in those circumstances where he has certified that a transaction among banks is in the public interest. However, while the authority of both the Commissioner and the Minister of Finance are spelled out in the Competition Act and the Bank Act, both acts were silent on how the Commissioner and the Minister should interact and how this process should unfold. The Bureau and the Minister of Finance have developed a process to deal with mergers in the banking sector. That

process was detailed in our submission to the AERS subgroup on interrelations between antitrust and regulatory authorities. In the Alberta electricity sector, the Market Surveillance Administrator is required to refer matters to the Competition Bureau that may contravene the *Competition Act*.

3. The impact of federal, state and local governments' jurisdiction on regulators interrelations.

The Constitution Act outlines basic areas of provincial versus federal jurisdiction in Canada. The implications for regulation at the federal versus the provincial level can differ importantly from sector to sector. As noted above, all telecommunications carriers in Canada are subject to federal legislation. In the electricity sector, in contrast, while international and interprovincial trade are subject to federal jurisdiction, most regulation tends to take place at the provincial level.

4. What is the role carried out by the concerned Ministry, when a regulatory authority operates in the related sector?

In the telecommunications sector, the federal government is responsible for the determination of the public policy goals of regulation and appoints sector regulators. However, in applying these goals and deciding matters, the CRTC is independent. Similar circumstances apply in regard to the most open provincial electricity markets in Canada, Alberta and Ontario, which have independent sector regulators. A different situation applies, for example, in regard to the regulation of bank mergers in Canada. While the Competition Bureau and the Office of the Superintendent of Financial Institutions play important roles in the analysis of these mergers, responsibility for the approval of bank mergers resides with the Minister of Finance. Similarly, with respect to the approval of major airline mergers in Canada, responsibility resides with the Governor in Council.

5. To which extent is the autonomy of competition authorities and regulators affected by their dependence on Government or Parliament for funding, rule making powers of Government, etc.: how can this impact their respective functions and interrelations?

With respect to substantive decision-making in respect of the administration and enforcement of the Act and advocacy, the Commissioner of Competition is statutorily independent. Effective competition law and policy is considered to be a key part of the Canadian economic framework. Funding of the Bureau is based on its requirements to carry out its related responsibilities and the priority assigned to competition policy in relation to other federal government areas of policy concern. The impact of the need for government funding may have on the independence of other regulatory agencies is uncertain.

Government legislation and rule-making powers ultimately determine the specific goals and objectives of regulators as well as their authorities and level of independence in seeking to achieve these objectives. This authority can affect the potential application of competition law in regulated sectors by bringing the RCD into play. In other cases, it may create the potential for overlap between the Bureau and sector regulators. The Bureau's approach to managing overlap is outlined in the response to question 9 below.

6. What kind of contribution does the competition agency receive from the sectoral authority when deciding on cases involving operators in regulated sector? Does the contribution of the sectoral authority take into account exclusively the specific interests characterising the respective sectors (the pluralism in the media, the stability in the banking sector, etc.) or include also a judgement about the lawfulness of the case from the competition point of view? Examples.

The resolution of cases under Canadian competition law is based on the specific competition related tests embodied in the *Competition Act*. Regulatory agencies may provide the Bureau with information that is relevant to the resolution of such matters (e.g., empirical data obtained through a market monitoring function). There have also been cases where the Bureau has discussed matters with sector regulators to take advantage of their sector expertise to assist in our investigation. Contributions that regulators may wish to provide on matters that are not relevant to the tests under Canadian competition law or concerning the application of the law would not bear on the resolution of related case matters. In this regard, the Bureau is independent.

7. What kind of contribution is given by the competition agency to the sectoral authority? Does it concern some specific topics (the definition of the relevant market, the existence of dominant positions, etc.) or can it cover other aspects of the regulation, relevant from a competition point of view? Examples.

The Bureau's interventions to governments and sectoral authorities may deal with any aspect of regulation that can affect competition in the relevant markets. The Bureau has made hundreds of these interventions. Where competition analysis is directly relevant to the matters under consideration, for example in regulatory forbearance proceedings, the Bureau will provide analysis on such matters as market definition and the existence of dominant positions. However, Bureau interventions frequently deal with social, cultural, economic, environmental and other public policy issues that affect the degree and efficiency of competition in markets. In these cases, the Bureau's interventions are normally not to argue against these other goals or objectives. Rather, it is promote the achievement of these goals or objectives in the manner that least distorts competition, or in some cases, to demonstrate the competition and efficiency costs or benefits of a policy to be taken into consideration in determining whether it should be adopted or maintained. The list of related topics on which the Bureau has intervened is broad but, some illustrative examples include: advice on proper test for forbearance in telecommunications, the use of market incentives to achieve environmental goals and consumer protection and how to inform consumers in markets in transition from regulation to competition.

8. How do competition agencies and regulatory bodies interrelate in regulated sectors that are considered services of general interest, especially with regard to matters such as universal service obligations, exclusive or special rights, and essential facilities?

The foundation of this relationship is the RCD, discussed above. Where regulation exists, the Bureau performs a role as an advocate on how to achieve such goals as universal service and pricing of and access to essential facilities in the least anti-competitive way. Where the RCD does not apply the Bureau applies competition legislation as warranted.

Universal service has long been one of the key objectives of Canada's telecommunications policy. The Bureau has been at the forefront of advocating pro-competitive and more efficient alternatives for meeting the government's objectives for universal service in telecommunications. The *Telecommunications Act* also includes the objective of fostering increased reliance on market forces for the provision of telecommunications services. The CRTC has been active for many years, implementing a large number of decisions that have modified the Universal Service framework to reflect the opening of markets to competition.

9. Which functions could better be conducted by each type of regulators given the level of economic development and the extent of sectors opening ? Why would sector regulators or competition agencies be better placed ?

The Bureau, through its long-time involvement in industry restructuring, has developed a core set of principles for assigning and coordinating the respective agencies' roles and responsibilities. These principles form a continuum: starting from the initial decision to deregulate and continuing through to the development of measures for managing ongoing relations between the Bureau and the industry regulator.

The first, and most basic principle, is to put competitive market structures in place as soon as possible. Effective and efficient competition, where it can be implemented, is really the best mechanism for achieving the low-cost and innovative supply of products. Governments and regulators ultimately are responsible for the establishment of competitive market structures in making the initial move out of regulation.

The Bureau believes the analysis of competition issues should be performed the same way across the federal government. This means the Bureau and regulators applying the same economic analysis and competition policy principles in a clear and transparent manner. The Bureau has an essential role to play at this stage and it is better suited at developing competition principles for defining relevant markets and at determining guidelines for competition analysis and assessment of market power. Market definition is both an integral part of the Bureau’s mandate and activity for which it has substantial expertise.

The second principle supported by the Competition Bureau is to have regulators having an explicit role to promote competition. This objective should not be to promote competition for its own sake. Rather, as is the case under the purpose clause of our legislation, it should be to promote competition as a way to achieve the efficient and innovative production and supply of products, meeting consumers' demands at the lowest possible cost.

Giving the regulator a role to promote competition serves two important purposes. It places an onus on regulators to minimize restrictions on competition in order to achieve any other of their goals or objectives. In addition, it provides regulators, where they have the necessary authority, with a basis for ordering pro-competitive restructuring or deregulation.

Third, in industries in transition, there should be regulatory control over excessive pricing due to the market power held by market incumbents. If a previously regulated company has excessive market power, competition law cannot prevent the use that power to obtain high prices. In fact, simply setting high prices, in itself, is not an offence under our law. If this is to be prevented, regulatory oversight is necessary.

Fourth, if there are essential facilities in an industry, access to them should be subject to regulatory control. Essential facilities are facilities that businesses need access to in order to compete in a market, and that are natural monopolies. While in some sectors, such as airlines, the Competition Bureau has authority over essential facilities, we believe that this is more properly the domain of the sector specific regulator.

Fifth, even from the first opening of a market, competition law should be relied on to prevent anti-competitive business practices unless regulation is demonstrably better in this role. By the term anti-competitive business practices, the Bureau means practices that prevent or lessen competition in a market, as distinct from the mere exercise of market power to obtain high prices. Anti-competitive practices may include, for example, price-fixing, bid-rigging, use of fighting brands, price squeezing or the use of long-term contracts by a dominant company to prevent the development of competition in a market.

Sixth, effective mechanisms should be put in place to ensure that regulation is removed when its costs outweigh its benefits. These mechanisms may include either the sunsetting of regulation, or the use of regulatory forbearance provisions.

As a final guiding principle in moving from regulation to competition, it is important that measures for effectively coordinating the roles and responsibilities of the Competition Bureau and the regulator be put in place in order to minimize unnecessary overlap and duplication.

10. Would there exist an optimal « core business » for each kind of agency by sector? What antitrust and regulatory authorities can do the better: effects on their interrelations.

As noted in the above response, the Bureau supports regulation of pricing of access to essential facilities; and regulatory control over excessive pricing due to market power in markets in transition to effective competition. Competition law should generally be relied on to deal with anti-competitive business practices unless regulation is demonstrably better.

Regulation may be particularly effective in markets for dealing with anti-competitive practices in the initial stages of the transition to markets. Where there is a concern that an anti-competitive practice may restrict or prevent the development of competition in newly opened markets, regulators may have the authority to prevent incumbents or others from engaging in the practice. As markets mature and become effectively competitive, reliance should be increasingly placed on competition law disciplines. To this end, the Bureau generally recommends that regulators be required to forbear from regulation, as markets become effectively competitive or that the regulation includes a sunset provision.

In practice, the lines between roles of regulators versus the Bureau are not always clear and substantial overlap may exist. In such cases, where a matter may come under both agencies' jurisdiction, the Bureau's policy is to work with the regulator to avoid unnecessary overlap and duplication of efforts to deal with the matter. Information sharing becomes an important issue in cases where the Bureau is providing advice to regulators. Timely access to confidential information would ensure that the Bureau, when preparing its submissions to regulators, uses the most relevant, up-to-date information. Improved working relationships, through regular meetings at senior staff levels or staff exchanges, represent another opportunity for better information sharing between the Bureau and regulators.

DIRECTORATE GENERAL FOR COMPETITION OF THE EUROPEAN COMMISSION

1. Which functions are currently conducted by which regulators or competition agencies ?

National Regulatory Authorities (NRAs) are responsible for the domestic regulatory framework for electronic communications in the EU Member States. The European Commission, in its role as a competition authority (DG Competition) investigates and decides on restrictions of competition in all sectors, including telecommunications, where they have an appreciable effect on trade between member states. Furthermore, under the new regulatory framework for electronic communications, the European Commission has, as explained below, been given a role in the adoption of national-level regulations in the Member States, including, in certain cases, veto powers over proposed regulatory interventions. This latter role brings together the Competition DG and the Information Society DG.

2. Are the relationships of cooperation between the competition authority(ies) and the sectoral regulators regulated by the law or just voluntary?

The relations between the European Commission and NRAs are laid down in four Directives (and a number of accompanying provisions) adopted by the EU Council and Parliament on 7/3/2002, and which entered into force on 25/7/2003. These consist of a "Framework Directive" (2002/21/EC) on a common regulatory framework for electronic communications networks and services, an "Access Directive" (2002/19/EC) on access to and interconnection of electronic communications networks and associated facilities, a "Universal Service Directive" (2002/22/EC) on universal service and users' rights relating to electronic communications networks and services, and an "Authorisation Directive" (2002/20/EC) on the authorisation of electronic communications networks and services.
The accompanying provisions include in particular Commission guidelines on market analysis and the analysis of significant market power (SMP), and a Commission Recommendation on the relevant product and services markets (2003/311/EC).

5. The impact of federal, state and local governments' jurisdiction on regulators interrelations.

Not applicable – the relations between the NRAs and the European Commission in this field are stipulated by the EU Directives listed above.

6. What is the role carried out by the concerned Ministry, when a regulatory authority operates in the related sector?

Not applicable.

5 To which extent is the autonomy of competition authorities and regulators affected by their dependence on Government or Parliament for funding, rule making powers of Government, etc. : how can this impact their respective functions and interrelations?

The European Commission, is both financially and politically independent of the national governments of the Member States. The European Commission cannot comment on the level of autonomy of NRAs.

6. What kind of contribution does the competition agency receive from the sectoral authority when deciding on cases involving operators in regulated sector? Does the contribution of the sectoral authority take into account exclusively the specific interests characterising the respective sectors (the pluralism in the media, the stability in the banking sector, etc.) or include also a judgement about the lawfulness of the case from the competition point of view? Examples.

In investigating cases and adopting decisions in the sector of electronic communications, the Commission naturally acts against the background of the new regulatory framework described above, whose very purpose is to increase the application of competition analysis and industrial economics to this sector, with a focus on value of services to end users rather than technology. The protection of the end user against potential or real abuse of market power should be the goal of both competition and regulatory interventions, and the new regulatory framework aims to make the two kinds of intervention complementary.

Furthermore, before adopting decisions under the competition provisions of the EU Treaty, the European Commission must consult an Advisory Committee composed of the EU Member States. It is for the Member States to decide who will represent them on the Advisory Committee for any particular case (normally this is the national competition authority not sectoral regulators), and whether or not to seek input from a NRA in forming their view on the draft Commission decision submitted to them, if it concerns a sector which is regulated by an NRA at domestic level within the Member State.

7. What kind of contribution is given by the competition agency to the sectoral authority? Does it concern some specific topics (the definition of the relevant market, the existence of dominant positions, etc.) or can it cover other aspects of the regulation, relevant from a competition point of view? Examples.

This is laid down in the Framework Directive referred to above, which requires NRAs to carry out market analyses to establish the state of competition in relevant communications markets and identify any providers with Significant Market Power (SMP) in these markets. Once an operator has been deemed as having SMP, NRAs have to identify which specific obligations are appropriate to impose on that operator. Obligations can vary according to the nature and the source of the competition problem, which, combined with the wealth of possible remedies to be used, allows for a high degree of tailoring to specific circumstances.
NRAs must, however, conduct a 'national' and a 'Community' consultation on the measures they intend to take. Pursuant to Article 7 of the Framework Directive, NRAs have to make their draft regulatory decisions accessible to other NRAs and the Commission for comments. In most cases, other NRAs and the Commission have a period of one month within which they may make comments to the NRA concerned. However, when a draft measure would affect trade between Member States and either (i) aims at defining a relevant market which differs from those defined in the Commission's Recommendation on relevant markets or (ii) decides whether to designate or not an undertaking as having SMP, the Commission may within a further period of two more months require the NRA concerned to withdraw the notified draft measure mainly on grounds of incorrect application of the competition law principles enshrined in the new framework, such as 'market definition' and the assessment of single or collective dominance (the so-called 'veto powers' of the Commission).

It is important to emphasise that the Task Force in the Commission which analyses such draft regulatory measures includes representatives of both the Competition DG and the Information Society DG, in order to bring to bear the different relevant expertise of both those services.

As examples, on 15/12/04, 122 such draft regulatory measures have been notified to the Commission under the "article 7 mechanism" since its entry into force on 25/7/2003, and 3 negative decisions have been taken, preventing the draft regulation from entering into force. These include 2 decisions in which the Commission indicated that the NRA concerned had not provided sufficient evidence to conclude that the incumbent operator had no SMP in the relevant market and one decision in which the Commission found that the NRA concerned had not provided sufficient evidence to conclude that the incumbent operator had SMP. In all three

decisions, the Commission thus required the NRA concerned to withdraw the notified draft measure on the basis of an incorrect application of competition law in the assessment of SMP.

It should be emphasised that the new regulatory framework also covers relations between the various national sectoral regulators in the member States,by creating a "European Regulators Group". This has met several times,and has agreed, for example, on competition remedies to be used in the field of electronic communications[14].

8. How do competition agencies and regulatory bodies interrelate in regulated sectors that are considered services of general interest, especially with regard to matters such as universal service obligations, exclusive or special rights, and essential facilities?

The "Universal Service Directive" referred to above defines a minimum set of services of specified quality to which all end-users must have access, at an affordable price. The Directive also contains certain provisions on the financing of universal services. The EU Member States and their NRAs are to ensure the implementation of the Universal Service Directive within their territory, inter alia by imposing universal service obligations on undertakings and monitoring the respect of such obligations. The Commission monitors that Member States implement the Universal Service Directive correctly and ensures that the provision and financing of universal services does not distort competition.

9. Which functions could better be conducted by each type of regulators given the level of economic development and the extent of sectors opening ? Why would sector regulators or competition agencies be better placed ?

10. Would there exist an optimal « core business » for each kind of agency by sector? What antitrust and regulatory authorities can do the better : effects on their interrelations.

Combined reply to questions 9 and 10
The European Commission considers that the relationship between competition authorities and regulatory bodies established for the electronic communications sector, and described in the Commission's replies to questions 1-8 could hopefully become a model for other sectors.
This is because today, regulation is essentially economic regulation, and economic regulation is based on the perspective that intervention on the market is necessary and beneficial only when it offers the solution to certain sorts of market power, and in particular to market failures which derive from formerly monopolistic market structures.

Since regulation has been increasingly determined by a competition policy perspective, using both regulatory and competition tools cannot be seen as inconsistent. Competition instruments and regulatory tools are complementary means. They deal with a common problem and try to achieve a common aim.

[14] See Commission press release IP/04/258. Available at : http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/04/528&format=HTML&aged=1&language=EN&guiLanguage=en

The problem is high levels of market power and the likelihood of it being abused, and the aim is putting the end user at the centre of any economic activity.

Therefore, a regulatory framework solidly grounded on competition analysis principles could be the best approach to ex ante regulation of any sector of the economy still in need of regulatory intervention. The term 'sector-specific regulation' is already incorrect, and could become obsolete: because the same set of tools, the same competition-based philosophy and the same concerns may soon govern regulatory intervention in all sectors where some form of economic regulation can still be useful.

In line with this approach, the framework for regulation and competition in electronic communications described above is based on three concepts:

- *The first concept embodied in the framework is that the degree and the intensity of ex ante regulatory intervention must be proportional to the competition problem at hand: where markets are already, or are in the prospect of becoming, effectively competitive, existing regulatory measures will be withdrawn or be lighter.*
- *A second concept is that markets need to be analysed following competition analysis principles, from the very definition of the market, to the assessment of market power, to the identification of remedies to address the competition problems observed.*
- *A third concept can be described as the need to consider products and markets on the basis of their economic value rather than on their physical or technological or regulatory characteristics.*

In short, within the EU, competition has already been shaping regulation: it is the latter which has been adapting itself to suit the philosophy and the approach of the former. Regulatory policy cannot be seen any more as independent of competition policy: it must be seen as a part of a broader set of tools of intervention in the economy based on competition principles of analysis.

DGCCRF

1. Which functions are currently conducted by which regulators or competition agencies?

A clear-cut line is drawn between the functions of regulators and those of the competition authorities:

a) The competition authorities apply competition rules. They are not empowered to apply sectorial regulation.

b) Reciprocally, the regulators are not empowered to apply competition rules.

In other words there are neither concurrent jurisdictions nor crossed-competencies. This organization, which currently applies to all sectors, is now admittedly well established.

One may illustrate the foregoing with the examples hereafter, bearing in mind that aside from what is indicated below, these three regulators accomplish the classical task of giving technical opinions on a wide range of issues concerning their sectors (in particular at the occasion of orders, decrees, or bills)

1) Media.

The media regulator is the CSA[15]. Its main functions are to nominate the CEOs of state-owned broadcasters, to grant broadcasting licenses (radio and TV) and to manage frequencies. The CSA is also entrusted with an important watchdog function of monitoring rules on pluralism and programs' quality. Lastly it is in charge of dispute settlement concerning the commercial relationships between the editors of programs and the distributors.

2) Telecommunications.

The telecommunications regulator is the ART[16]. The ART manages frequencies and telephone numbers. It also monitors universal service' s requirements and regulates tariffs for universal service and interconnection. The ART is in charge dispute settlement, notably for interconnection and other technical issues linked to the access to transmission networks. It may impose penalties, including interim measures, fines and withdrawal of licenses, for non-compliance of service providers with their obligations. Lastly, the ART carries out market

[15] Conseil Supérieur de l'Audiovisuel.
[16] Autorité de régulation des Télécommunications.

analysis to identify operators which are in a dominant position, thus deserving specific rules and scrutiny[17].

3) Energy

The sectorial regulator of energy (gas and electricity) is the CRE[18]. The mission of the CRE is to ensure a transparent and non discriminatory functioning of the markets and public services for gas and electricity, through a fair access to networks and facilities. The action of the CRE is three-fold. First, the CRE makes proposals to the Ministry for the public networks tariffs and the funding of public service obligations, and gives opinions for a number of tariffs such as those applicable to final customers. Second, the CRE approves the unbundling and the transparency of accounts and monitors their application. Third, it is in charge of a dispute settlement mechanism covering mostly the issue access to networks.

2. Are the relationships of cooperation between the competition authorities and sectorial regulators regulated by law or just voluntary?

The relationships between competition and sectorial authorities are formalized by law. The cooperation mechanisms provided for by the law are either mandatory or optional.

1) Media

The cooperation framework between the media regulator and the *Conseil de la Concurrence* (hereafter the Conseil) was established in 1986[19]. The CSA is required by statute to cooperate with the Conseil. Reciprocally, the Conseil must consult with it when assessing mergers or anti-competitive behaviors in the media sector. Such consultation allows the Conseil to benefit from the CSA' s technical expertise.

2) Telecommunications

A number of mechanisms have been devised to prevent possible conflicts or inconsistencies between the telecommunications regulator, namely the ART, and the Conseil, some of them being optional whilst others are mandatory. In any event the ART may always consult with the Conseil on its own initiative about any issue which falls under its competence. It is required to make such consultation prior to ruling that an operator holds a so-called "significant market power" on one particular market. In case of a dispute falling within the scope of jurisdiction of the Conseil, the ART, which may first carry out a mission of conciliation, must nevertheless refer such dispute to the Conseil should its conciliation mission fail. Reciprocally, the Conseil must inform the ART of the referrals made in the telecommunications sector and hear the ART' s opinion prior to any decision (including its own opinions given on mergers). Lastly, the ART

[17] See the new legal framework established by six European directives (so-called "telecommunication package")
[18] Commission de Régulation de l'Energie.
[19] by a milestone communication act. This cooperation framework has been revamped and strengthened in 2001.

must consult with the Conseil, as well as the European Commission, when carrying out its market analysis in view to identify operators which are in a dominant position, thereby deserving specific rules and scrutiny[20].

The route of appeal of the dispute settlement mechanism of the ART and that of the Conseil are converging before the Court of Appeal of Paris for economic matters.

3) Energy

In the field of energy, the cooperation between the CRE and the Conseil is by and large similar to that which prevails for telecommunications with the ART. The CRE is allowed by statute to seek guidance from the Conseil on any competition-related matter, this being optional. Under one circumstance, though, i.e. before approving the rules on the unbundling of accounts, consulting with the Conseil is compulsory. In the event of two parallel procedures relating to the same facts (for instance a possible case of abuse of dominance dealt by the Conseil which would be subject to a dispute settlement procedure handled by the CRE), possible inconsistencies are prevented by two mechanisms. First, the law provides for reciprocal referrals. The chairman of the CRE shall refer to the Conseil anti-competitive practices of which he is aware. As to the Conseil, it shall inform the CRE of all cases falling within its scope of competence. Such information is compulsory for disputes over the networks, including the interpretation of access contracts.

The route of appeal of the dispute settlement mechanism of the CRE and that of the Conseil are converging before the Court of Appeal of Paris for economic matters.

3. ***The impact of federal, state or local governments' jurisdiction on regulators interrelations.***

This question is pointless as to France, which local authorities (referred to as the "collectivités locales"), although empowered to make a number of regulations in their fields of competence, do not have any competence likely to induce the kind of interactions which are concerned by the issue of interrelation between competition and regulatory agencies. This being said, however, and for the sake of completeness, one may note that French local authorities are clearly bound to fully respect competition rules. Such obligation is imposed by a well-established case-law principle repeatedly confirmed by a number of rulings of the supreme administrative court[21]. It applies typically to the organization of local economic services such as water distribution and the likes.

4. ***What is the role carried out by the concerned Ministry, when a regulatory authority operates in the related sector.***

[20] See the new legal framework established by six European directives (so-called "telecommunication package")
[21] *The Conseil d'Etat.*

There is no general answer to this question. The precise role of the Ministry depends on the specifics of each regulated market and on the way regulation has been shaped. A first possible role of the Ministry corresponds to the shareholder role of the State for public undertakings in regulated sectors. A second possible role is the exercise of regulatory powers. These are more or less significant or residual depending on which regulated market is concerned. Energy is an example where the Ministry retains non residual regulatory powers, as opposed to Telecommunications. Indeed, in addition to the enforcement of technical regulations, such as for instance those relating to security (nuclear plants, dams, etc..), the Ministry determines tariffs for households customers and networks users (by contrast the tariffs applicable to the so-called "eligible customers", namely those who are free to purchase gas from the supplier of their choice, are free).

5. ***To which extent is the autonomy of competition authorities and regulators affected by their dependence on Government or Parliament for funding, rule making powers of Government, etc. : how can this impact their respective functions and interrelations*** **?**

The statutory independence of sectorial agencies in France is basically identical to that of the Conseil de la Concurrence.

6. ***What kind of contribution does the competition agency receive from the sectorial authority when deciding on cases involving operators in regulated sectors? Does the contribution of the sectorial authority take into account exclusively the specific interests characterizing the respective sectors (the pluralism in the media, the stability in the banking sector, etc.) or include also a judgement about the lawfulness of the case from the competition point of view? Examples***

Contributions received by the competition agency from sectorial regulators are oriented on the specifics of each regulated market.

First and foremost regulators allow the competition authorities to benefit from their technical knowledge of such markets when a particular sectorial expertise is required to assess the merits of arguments.

1) Telecommunications

For instance, in the field of telecommunications, a great deal of key elements on which the competition authorities rely to define their position originate from the ART (turnovers to assess market shares, accountancy data to check whether prices are cost-oriented, etc.) The ART is thus a regular provider of valuable information about the state and the functioning of markets.

Nevertheless, this does note exclude that the regulator may express in own assessment of the lawfulness of practices.

For example, in the event of a price squeezing for telecommunications services, the ART lays out its analysis of tariffs under competition law. Typically, it indicates whether or not it deems such tariffs to be predatory on the basis of its technical expertise. It also brings significant contributions to market definitions for the purpose of applying competition law.

One case deserving emphasis in the procedure in which the Conseil imposed interim measures on France Télécom concerning the access of ISPs to its quasi monopolistic facilities for the provision of ADSL internet services (Decision n°04-D-18 of May 13th, 2004 concerning the enforcement of the decision n°00-MC-01 of February 18th, 2000 concerning a request for interim measures of 9 Télécom Réseau). This is a particularly telling illustration of the utmost importance, from a technical point of view, of the opinions of the ART in the decisions of the Conseil.

By the same token, the opinions delivered by the CSA to the Conseil include both the specifics of the media markets and possible contributions to the legal assessment under competition law. For instance, in a recent case the CSA indicated to the Conseil its view about a possible abuse of dominance in the field of pay-TV platforms (Decision n°03-D-59 dated December 9th, 2003, complaint and request for interim measures of I>Télé and Canal Plus Group). The main fact was a significant decrease of the fees paid by a platform to a thematic channel. The issue at stake was a possible foreclosure of the market for the edition and commercialization of pay-TV thematic channels at the level of distribution by so-called multi-channel "bouquets". In the same procedure, the CSA provided the Conseil with key information on a number of relevant issues. The Conseil used its input concerning the market position of free-TV channel on the TV advertising market. It also relied on a in-depth comparative study of the revenues of thematic channels, a study which the CSA could provide thanks to its regulatory activities.

Another example worth mentioning is a case where the issue at stake was the access of third parties to the facilities of Télédiffusion de France (TDF), a provider of terrestrial broadcasting services (Decision n°02-MC-04 dated April 11th, 2002, request of interim measures of Antalis) . In this case the Conseil referred to and took into account the opinion of the CSA about the existence of a dominant position of TDF.

7. ***What kind of contribution is given by the competition agency to the sectorial authority ? Does it concern some specific topics (the definition of the relevant market, the existence of dominant positions, etc.) or can it cover other aspects of the regulation, relevant from a competition point of view ?Examples***

The particular features given by the competition agency' s contribution to regulators may vary over time and according to the sector at stake.

For example, in the field of energy, the Conseil de la Concurrence recently issued an opinion on the unbundling of accounts for gas (Opinion n°03-A-16 of September 5th, 2003 concerning the

unbundling of accounts of natural gas operators) and the DGCCRF responded to a consultation organized by the CRE on the notion of eligible customers. However some contributions may be provided on a more regular basis. Thus currently the CRE consults with the Conseil six times per year on average about tariffs.

Whilst under the former European legal framework the Conseil provided the ART with opinions on market power in view of the identification of the markets to be regulated, under the new one (Telecommunication package) its contributions are now mainly relating to the definition of relevant markets. Hence, typically, the recent opinion which was issued on the issue of whether online services ought to be regarded as belonging to the general telecommunications market.

On may note that in addition to the formal opinions exchanged between regulators and the Conseil, the DGCCRF exchanges views with them on an informal and regular basis.

8. How do competition agencies and regulatory bodies interrelate in regulated sectors that are considered services of general interest, especially with regard to matters such as universal service obligations, exclusive or special rights, and essential facilities ?

The regulatory framework applicable to the services of general interest is largely shaped by the European rules. With this in mind, though, competition agencies and regulatory bodies do interrelate in such markets.

Since the main examples cited above are sector with services of general interest, we refer to our previous answers and in particular to the answer to question 2, 6 and 7.

9- *Which functions could better be conducted by each type of regulators given the level of economic development and the extent of sectors opening ? Why would sector regulators or competition agencies be better placed ?*

There are two criteria against which it is asked whether the optimal organisation of the functions of regulators may be different:

- the extent to which a sector is opened,
- the level of economic development.

Concerning the first one, the question seems to call for a rather straightforward answer. Yes, at least in many instances, the need for sectoral regulation is linked to the low degree of the opening of a sector, hence to its uncompetitiveness. For instance in Europe the market power of incumbent operators is the key criterion for applying ex ante regulation in the field of telecommunications. More generally, market failure is one of the main justifications for regulation, albeit not the only one. Thus regulating the access to network in the sectors

characterized by natural monopolies and/or essential facilities and/or incumbent operators is a typical task of sectoral regulators.

It is more difficult to provide a straightforward answer concerning the part of the question relating to the issue of the level of economic development.

Admittedly, it is often acknowledged that the path towards a competition-oriented economy may have to be gradual. That is *inter alia* because a proper functioning of competition requires a wide range of in-depth reforms[22]. However, it seems difficult to assert convincingly that one particular model amongst the currently rather wide range of regulatory frameworks fits to developing economies whilst another one fits to developed countries. This can be fleshed out by the following remarks.

First of all, looking at the pros and cons of the different frameworks, many relevant parameters are not really related to the issue of development. Indeed, aside from market failure (e.g. the above-mentioned issue of access to essential facilities) sectoral regulation is justified by objectives going beyond competition (typically pluralism, safety rules, universal service). Such objectives concern developing countries and developed ones alike. The same is true for the acknowledgement that regulation often entails a risk of stifling competition, even though one may argue that such risk is greater in developing countries (see for instance the presentation of Professor Alan Fels at the OECD Global Competition Forum in February 2005.[23])

One point that is worth underlying is that entrusting a competition agency with a full competence to enforce competition law (including in regulated sectors) would not necessarily jeopardize progressiveness in the introduction of competition law. Indeed, depending on the legislator will, such progressiveness can be smoothly ensured in the context of a fully-fledged competence of the competition agency, provided that it is bound to take into account the impact of sectorial regulation. In fact, more than an issue of task allocation between regulators, this is a matter of legal organisation[24] and at the end of the day of political decision.

To conclude, in view of the goal of a competition-driven economy, it is advisable that competition agencies be to the greatest extent possible able to efficiently advocate competition in relation to regulated sectors, through adequate co-operation mechanisms, it being clear though that this is without prejudice to the fact that the introduction of competition law may have to be

[22] In particular, for the companies to compete genuinely, a clear, stable and market-oriented legal framework must be set in respect of the different aspects of their activities (i.e. commercial, financial, technical, etc.).
[23] OECD Global Competition Forum, session II, The relationship between competition authorities and sectoral regulators, by Professor Allan Fels, Australia and New Zealand School of Government.
[24] There is a number of means to built up a competitive framework step by step, such as the definition and possible widening of the scope of competition law, resorting to exemptions, for instance on a temporary basis, or to special rules prevailing over competition law, let alone the co-operation mechanisms between regulators.

carried out gradually. Aside from this overall orientation, the fact remains that there is not a unique model for allocating the regulatory functions between regulators. No doubt, choosing one of them depends on a number of factors linked to the specifics of each country, rather than merely on the state of development.

10. *Would there exist an optimal "core business" for each kind of agency by sector ? What antitrust and regulatory authorities can do the better : effects on their interrelations ?*

By definition, the optimal definition of the functions of a sectoral regulator depends on the specifics of the sector at stake. Sectors such as for instance those of banking, media or energy obviously fall short from raising identical regulatory issues, although belonging to the same "regulated sectors" category. The "core business" of a sectoral regulator is thus sector-specific (typically: network access and allocation of numbers for telecommunications; the granting of broadcasting licenses and the monitoring of pluralism in the field of media, etc.)

By contrast, the basic function of competition agencies (i.e. the enforcement of competition law) should not differ depending on whether they are acting in a regulated sector or not. What may vary, though, is the way such competition agencies must proceed to apply the rules.

a) First, they must benefit from the specialised expertise in the technical areas of the industry that is carried by the sector-specific regulatory bodies. This is indispensable since enforcement experience in regulated sectors repeatedly shows that scientific and/or technical expertise is quite often required to assess the merits of arguments put forward in competition cases.

b) Second and reciprocally, competition agencies must be able to provide sectoral regulators with an input whenever the enforcement of sectoral regulation raises issues such as market definition, entry conditions, significant market power and the likes. Such input is indeed valuable because of the unavoidable interaction between sectoral regulation and the functioning of the markets.

Lastly, the two key institutional mechanisms for dealing with the interface between competition law and sectoral regulation appear to be: i) some adequate co-operation tools to prevent inconsistency; ii) common routes of appeal in order to resolve the possible conflicts which may arise in spite of the preventive co-operation mechanisms.

BUNDESKARTELLAMT

1. **Which functions are currently conducted by which regulators or competition agencies ?**

In Germany the Bundeskartellamt enforces the ban on cartels and abusive practices and exercises merger control in accordance with its competencies under the Act against Restraints of Competition (ARC) and the European Community Treaty (EC), Articles 81, 82. Apart from the Bundeskartellamt, the competition authorities of the *Länder* (federal states) and the European Commission also act against infringements of competition which have an effect in Germany. While the competition authorities of the *Länder* exclusively deal with those cases where the alleged infringement does not reach beyond the borders of the state concerned, the Bundeskartellamt is responsible for the remaining cases. Those restraints which have an appreciable effect on trade between member states of the European Union, can also be prosecuted by the European Commission. German merger control is exclusively enforced by the Bundeskartellamt.

The Regulatory Authority for Telecommunications and Posts (RegTP) assigns frequencies and licences, regulates prices and access to the network of operators with significant market power, and enforces the sector-specific bans on abusive practices in postal and telecommunication services in accordance with the Telecommunications Act (TA) and the Postal Act (PA). The RegTP will soon be given additional oversight for electricity and gas network access under the new Energy Industry Act (EIA). The German government has decided on a draft of a new EIA (EIA-draft), the amendments are expected to come into force in mid 2005.

2. **Are the relationships of cooperation between the competition authority(ies) and the sectoral regulators regulated by the law or just voluntary?**

The cooperation between the Bundeskartellamt and the RegTP is regulated by law but has in practice developed much further than the legal ‘minimum’ requirements. In order to avoid diverging interpretations of competition and regulatory law, parallel competencies of the RegTP, the Bundeskartellamt and the competition authorities of the *Länder* were minimized, and the cooperation was specified in Section 123 TA, Section 48 PA and Section 58 EIA-draft.

The RegTP plays no role in Bundeskartellamt proceedings relating to cartel ban enforcement. Similarly, the Bundeskartellamt is generally not involved in RegTP activities which are of a more technical nature such as frequency and licensing, universal service, numbering etc.

The RegTP, the Bundeskartellamt and the competition authorities of the *Länder* are entitled to comment on each others' proceedings in several cases. Where the RegTP takes decisions in proceedings regarding access regulation, price regulation and other abusive practices, it is to give the Bundeskartellamt (or, for certain cases relating to the energy sector, the competition authority of the *Land* concerned) the opportunity to state its views in good time before closure of the case. Similarly, where the Bundeskartellamt investigates cases regarding abusive practices or second-phase mergers in the telecommunications or energy sector, it will give the RegTP the opportunity to state its views in good time before closure of the case. Both authorities will seek to achieve a consistent interpretation of the acts they enforce. They are to inform each other of all observations and findings which may be of significance to the discharge of their respective functions.

For market definition and market analysis in the areas of telecommunications and posts as well as for the determination of whether a vertically integrated energy supplier is covered by the EIA-draft (as well as regarding access refusal to gas networks according to the EIA-draft), the RegTP is to take decisions in consensus with the Bundeskartellamt. For market definition and analysis proceedings in telecommunications, the RegTP also needs to reach consensus with the European Commission in accordance with Directive 2002/21/EC (for details see the Commission's contribution to the subgroup).

3. **The impact of federal, state and local governments' jurisdiction on regulators interrelations.**

Not applicable.

4. **What is the role carried out by the concerned Ministry, when a regulatory authority operates in the related sector?**

The RegTP is a higher federal authority within the scope of business of the Federal Ministry of Economics and Labour. Generally speaking, the Ministry's role is to set the overall agenda for regulatory policy in the energy, telecommunications and postal industries. More specifically, it drafts the acts (TA, PA, EIA) to be adopted by the Federal Parliament (*Bundestag*) and the Federal Council (*Bundesrat*). Similarly, the Ministry of Economics and Labour drafts various ordinances which accompany those acts.

5. **To which extent is the autonomy of competition authorities and regulators affected by their dependence on Government or Parliament for funding, rule making powers**

of Government, etc. : how can this impact their respective functions and interrelations?

The organisation structure of the Bundeskartellamt as an independent authority is based on several (currently eleven) sector-specific Decision Divisions. Similar to the way German courts work, each case is investigated by a case handler and decided on by a collegiate body composed of three members of the Decision Division: The case handler, the chairperson, and a third member of the Decision Division. The three members do not receive any orders and decide by majority vote. The high degree of independence of the Bundeskartellamt and its Decision Divisions was achieved through many years of case work which has gained general recognition and a continuous effort to maintain this independence. In order to avoid sector-specific influence and lobbying ("regulatory capture"), there are frequent personnel exchanges between the different Decision Divisions. External observers have described the independent institutional culture of the Bundeskartellamt as perhaps "the defining feature of German competition policy" (cp. OECD Review of Regulatory Reform in Germany, Paris 2004). Some limited governmental influence has been retained through the so-called 'ministerial authorisation' of mergers. Where the Bundeskartellamt prohibits a merger on competition grounds, the Ministry may authorise the merger in exceptional cases if its anti-competitive effects are outweighed by advantages to the economy as a whole or if the concentration is justified by an overriding public interest. This provision makes the consideration of non-competition-related factors transparent and thus ultimately contributes to the Bundeskartellamt's independence. In practice, this instrument has only been applied in a minuscule number of cases (less than 10 cases compared to 30.000 merger notifications since 1973).

The Ruling Chambers of the RegTP have been modelled on the Bundeskartellamt's Decision Divisions, their decisions are also taken by a collegiate body of three members. In contrast to the provisions of the ARC, there is no scope for a ministerial authorisation. Similar to the Bundeskartellamt, an important element of the RegTP's independence is that its decisions are subject to judicial review. There has been some criticism of the role of politicians in the RegTP's advisory board (*Beirat*). The German government's ownership share in regulated companies which is still very high bears the potential for interest conflicts between the dual roles as shareholder and regulator.

6. **What kind of contribution does the competition agency receive from the sectoral authority when deciding on cases involving operators in regulated sector? Does the contribution of the sectoral authority take into account exclusively the specific interests characterising the respective sectors (the pluralism in the media, the stability in the banking sector, etc.) or include also a judgement about the lawfulness of the case from the competition point of view? Examples.**

As explained above (question 2), the Bundeskartellamt gives the RegTP the opportunity to state its views in good time before cases are closed in which the Bundeskartellamt investigates abusive practices or second-phase mergers in the telecommunications or energy sector (Section 123 TA, Section 58 EIA-Draft). Thus the RegTP's main contribution provided for by law is an expert opinion on the specific cases at issue. The RegTP is free to comment on any aspect of a case. Thus the contribution of the sectoral authority takes into account both the specific interests characterising the respective sectors and a judgement about the lawfulness of the case from the competition point of view.

However, in practice the cooperation between the two authorities and the contribution of the sectoral authority go beyond the legal requirements. Outside formal proceedings, both inform each other about consumer complaints or general observations. Mutual information also takes place in informal ad-hoc meetings on general or specific topics. The Bundeskartellamt and the RegTP may also ask each other for formal assistance, which can be rendered either in the form of "Amtshilfe" (administrative assistance) or by asking the other authority for an expert opinion on a specific aspect of the proceedings. Joint proceedings have been infrequent so far but can be appropriate for making use of complementary expertise, e.g. the Bundeskartellamt may profit from the cost auditing and technical expertise of the RegTP.

Case Example: Provision of subscriber data

In a recent proceeding which was conducted in close coordination with the RegTP, the Bundeskartellamt achieved a reduction in the fees for Deutsche Telekom (DT) subscriber data. Subscriber data contain basically the name, address and telephone number of a subscriber. For customers such as larger companies with many extensions, these data can be quite complex. The data are necessary for the operation of directory assistance call centres or to issue printed directories. They are therefore a preliminary product which enables companies to compete with DT in directory services. The former Section 12 TA (now Section 47 TA) ruled that all German telecoms operators have to provide their subscriber data to other directory providers and may charge the cost of the efficient rendering of this service to directory providers. The Bundeskartellamt opined that charges above the efficient cost level would also constitute an infringement of the ban on abusive practices under the ARC.

The Bundeskartellamt asked the RegTP for expert assistance in determining the efficient cost level. This cooperation practically led to "joint proceedings", which proved successful. In August 2003, Deutsche Telekom agreed with retrospective effect from January 2003 to base its calculation of costs for the provision of subscriber data merely on annual costs amounting to a total of 49 million Euro, as opposed to the former cost base of 90 million Euro. The new basis of calculation resulted in a considerable reduction of costs for purchasers and therefore eliminated a significant obstacle for competitors. Due to the agreement with DT, the Bundeskartellamt has discontinued its abuse proceedings.

7. **What kind of contribution is given by the competition agency to the sectoral authority? Does it concern some specific topics (the definition of the relevant**

market, the existence of dominant positions, etc.) or can it cover other aspects of the regulation, relevant from a competition point of view? Examples.

According to Section 123 TA, Section 48 PA and Section 58 EIA-draft, the support provided by the Bundeskartellamt to the RegTP is two-fold. Its support is more substantial in the field of market definition and existence of dominant positions than in other aspects of the regulation.

As regards market definition and market analysis in the areas of telecommunications and posts as well as the determination of whether a vertically integrated energy supplier is covered by the EIA, the RegTP is to take decisions in consensus with the Bundeskartellamt. As regards market definition and market analysis proceedings in telecommunications, the RegTP also needs to reach consensus with the European Commission according to Directive 2002/21/EC. In practice, cooperation in the field of market assessment has involved much more than the mere act of asking the Bundeskartellamt for agreement. The intensity of cooperation varies by case and is mainly determined by the RegTP based on how much it wants to resort to the experience and opinions of the Bundeskartellamt. Often cooperation in market assessment starts at a very early stage, at the very beginning of an investigation, by drafting questionnaires, etc. The RegTP usually writes the initial drafts and the Bundeskartellamt comments on them. In this way, the authorities usually agree on solutions at a very early stage before any substantial disagreements may arise.

Where the RegTP takes decisions in proceedings regarding access regulation, price regulation and other abusive practices, it gives the Bundeskartellamt (and/or the competition authority of the *Land* concerned) the opportunity to state its views in good time before closure of the respective case. The Bundeskartellamt is free to comment on any aspect of the case, thus the expert opinion may include not only competition aspects but also comments on all regulatory aspects.

Case examples of those comments are manifold and include several hundreds of RegTP proceedings. On the whole, the Bundeskartellamt has agreed with most RegTP-decisions but has frequently criticized individual aspects of the decisions.

8. **How do competition agencies and regulatory bodies interrelate in regulated sectors that are considered services of general interest, especially with regard to matters such as universal service obligations, exclusive or special rights, and essential facilities?**

Sections 11-17 PA, Sections 17-19 EIA-Draft and Sections 78-87 TA impose several ‘universal service obligations’ for operators in the posts, energy and telecommunications industries and assign the enforcement of those provisions to the RegTP. The RegTP’s obligation to give the

Bundeskartellamt (and/or the competition authority of the *Land* concerned) the opportunity to state its views in good time before closure of cases regarding universal service obligations extends only to the energy sector but not to posts and telecommunications. These are regarded to be topics of a more technical and distribution-oriented rather than a competition-oriented nature. Thus the Bundeskartellamt has so far not dealt with those RegTP proceedings in depth.

For the same reasons, the Bundeskartellamt has not played a major role in most RegTP proceedings regarding licensing. An 'exception' applies to situations where a successful bid for a frequency licence or where the framework for frequency licence trading would harm competition in related markets (Sections 62 and 63 TA). For example, the Bundeskartellamt and the RegTP cooperated closely for the auction of UMTS licences. The Bundeskartellamt gave its comments on the procedures and conditions of the auction designed by the RegTP and advocated safeguards to ensure that at least one "new entrant" (i.e. a company which did not own one of the four licences for the German GSM network) would be awarded a licence. Subsequently, the Bundeskartellamt reviewed the accessibility of different companies to the bidding procedure on grounds of the ban on cartels as well as merger control.

In contrast, the Bundeskartellamt and the RegTP cooperate closely in the area of 'essential facilities' as this domain is at the core of Bundeskartellamt and RegTP interventions in the industries concerned . The details on how both authorities cooperate with regard to 'essential facilities' have been explained above (see answers to questions 1 to 7).

9. **Which functions could better be conducted by each type of regulators given the level of economic development and the extent of sectors opening ? Why would sector regulators or competition agencies be better placed ?**

Questions 9 and 10 are answered jointly (see below).

10. **Would there exist an optimal « core business » for each kind of agency by sector? What antitrust and regulatory authorities can do the better : effects on their interrelations.**

In general terms, the Bundeskartellamt opines that competition agencies may in many cases be better placed to perform 'economic' regulation (e.g. banning excessive and discriminatory pricing, mandating access pricing and other conditions for access to essential facilities, price squeezes, etc.), whereas regulatory agencies may in many cases be better placed to perform 'technical' regulation (e.g. licensing, universal service obligations, rights of way, spectrum assignment etc.).

There are various reasons why the Bundeskartellamt is sceptical of creating regulatory authorities in charge of 'economic' regulation in specific sectors while it is in favour of having the competition agencies apply general competition law in all sectors.

- Sector-specific regulators are more susceptible to being influenced by private interest groups ("regulatory capture"). Lobbyists can more easily focus their influence on sector-specific regulators than on cross-sectoral competition authorities. Similarly, industry interest groups may also be more successful in using government channels to indirectly influence the regulators' decisions as the sectoral regulators are likely to be less independent from government than the competition authorities .
- The creation of sector-specific regulators generally results in some of their tasks overlapping with those of the competition agency. This requires coordination efforts and may result in conflicts over competence and differing interpretations.
- Setting up new authorities involves high costs. These costs are all the higher as experience has shown that it is difficult to abolish authorities once they have been established. Where competition is introduced step by step to formerly monopolized industries, the regulatory authority would have to be abolished accordingly . In practice, this is unlikely to happen.
- The key argument, however, is that the instruments provided by general competition law are in many cases sufficient. Sometimes they are even more suitable for creating competition in previously monopolistic markets. The big advantage of general competition law over regulation is that it precisely does *not* provide for comprehensive ex ante price intervention. After all it is the very aim of markets to practise competition. Price control by the state prevents this.

The Bundeskartellamt has therefore spoken out against creating new sectoral 'economic' regulators. Where those sectoral regulators already exist, the Bundeskartellamt supports releasing the regulated industries from (ex ante) sectoral regulation and gradually making them subject only to general competition law . As expressed most prominently in Directive 2002/21/EC, sectoral regulatory obligations should not be imposed where competition law remedies are sufficient to address the problem.

COMPETITION COMMISSION OF INDIA

Q1. Which functions are currently conducted by which regulators or competition agencies ?

Ans. The following sectors have sector specific regulators in India :-

a) Capital Market – Securities Exchange Board of India (SEBI)
b) Insurance, both life and general – Insurance Regulatory and Development Authority (IRDA)
c) Telecommunication – Telecom Regulatory Authority of India (TRAI)
d) Electricity - Central Electricity Regulatory Commission (CERC)
e) Pension – Pension Fund Regulatory & Development Authority has been established by ordinance

In addition to the above, there is a proposal to set up a regulator in the Petroleum & Natural Gas Sector and Airports Regulatory Authority. Regarding Pension Regulator, the position is not clear at this stage.

Competition Commission of India was established in October 2003. The adjudication work is yet to start since some litigations were pending before the Hon'ble Supreme Court of India and those litigations having been disposed of by the Court on 20th January 2005, the Commission will gradually become functional in the coming months.

Also, the Government has established statutory authorities under different enactments for regulation of the media, the professions, air transport, financial services etc.

Q.2 Are the relationships of cooperation between the competition authority and the sectoral regulators regulated by the law or just voluntary ?

Ans. The Competition Commission of India is yet to be fully established as mentioned in answer to question No. 1 above. Section 21 read with section 19 and 20 of the Competition Act, 2002 provide that a Statutory Authority (regulator) may make a reference to the Commission, it may seek opinion of the Commission on competition issues, other than this, the Competition Act 2002 does not provide for cooperation between the Competition Commission of India and the sectoral regulators. Therefore, mechanism for cooperation will have to be instituted.

It is important to note that the electricity sector regulator has been empowered by statute to deal with competition issues in that sector. This may be of concern as and when the voluntary cooperation is required.

Q. 3 The impact to federal, state and local Governments' jurisdiction on regulators interrelations.

Ans. Almost all sectoral regulators as well as the Competition Commission of India have been established under the Acts of the federal Government. Only in the case of electricity sector, the State Governments have also established sectoral regulators within the limited jurisdiction of the States. All the regulators are autonomous bodies and independent of the Government but largely depend on Government funding. The federal Government has the power to supersede some of the sectoral regulators and also the Competition Commission of India. There is nothing in the law or in practice which sheds any light on the impact of the Government's jurisdiction on regulators interrelations.

Q.4 What is the role carried out by the concerned Ministry, when a regulatory authority operates in the related sector ?

Ans. As stated above, each regulator has independent jurisdiction in the related sector thus giving very wide jurisdiction to the Competition Commission of India whose jurisdiction runs across all sectors.

The concerned Ministry can supersede the Competition Commission of India as per statutory provisions which are intended to be used in exceptional circumstances.

The Ministry, along with other federal Ministries, State Governments and other statutory bodies, can seek opinion of the Competition Commission of India on various competition issues. However, opinion of the Competition Commission of India is not binding on the Ministry or authority seeking its opinion.

The Ministry has the authority to appoint the Chairperson and Members of the Commission and will also provide most of the funding requirements and has rule making power; the Ministry has, therefore, an intimate relationship which could impinge upon the Commission's independence at times.

Q.5 To which extent is the autonomy of competition authorities and regulators affected by their dependence on Government for funding, rule making powers of Government, etc. : how can this impact their respective functions and interrelations ?

Ans. The competition authority in India as well as the sectoral regulators is autonomous under their respective statute and many of these are largely or totally dependent on the Government funding; this will be case with the Competition Commission of India as well. The Competition Act, 2002 provides the Government the power to make rules on recruitment, service conditions, etc. of the Members. These factors are likely to impact the autonomy of the Competition Commission of India. Although there are provisions to safeguard the tenure of the Chairperson and the Members once having been appointed by the Government, there are no such guarantees on providing the minimum fund required to carry on its day-to-day operations.

Similar situation prevails in the case of the sectoral regulators.

Q.6 What kind of contribution does the competition agency receive from sectoral authority when deciding on the case involving operators in regulated sector ? Does the contribution of the sectoral authority take into account exclusively the specific interests characterizing the respective sectors (the pluralism in the media, the stability in the banking sector, etc.) or include also a judgment about the lawfulness of the case from the competition point of view ? Examples.

Ans. Since the Competition Commission of India is yet to commence its adjudication activities, nothing can be said about this question now.

However, the Central Electricity Regulatory Commission (CERC) is statutorily empowered to look into the competition issues in that sector. Since the enactment starts with a non-obstante clause, it could be interpreted that this provision in the concerned enactment could

be interpreted by some to override the provisions of the Competition Act, 2002; however, this issue is still to be resolved.

Q.7 What kind of contribution is given by the competition agency to the sectoral authority ? Does it concern some specific topics (definition of the relevant market, the existence of dominant positions, etc.) or can it cover other aspects of the regulation, relevant from a competition point of view ? Examples.

Ans. Since the Competition Commission of India is yet to start its adjudication process, not much can be said at this stage. The Competition Act, 2002 provides for references from other statutory authorities including sectoral regulators. However, the opinion of the Competition Commission of India is not binding on the authority seeking its opinion.

Q8. How do competition agencies and regulatory bodies interrelate in regulated sectors that are considered services of general interest, especially with regard to matters such as universal service obligations, exclusive or special rights, and essential facilities ?

Ans. Since the Competition Commission of India is yet to start its adjudication process, no comments can be given at this stage.

ITALIAN COMPETITION AUTHORITY

1 Which functions are currently conducted by which regulators or competition agencies ?

In Italy all sectors of the economy are subject to the antitrust law, irrespective of the extent of regulation. As for the institution in charge, the competition Authority has the power to apply the law to all sectors, except for banking where the competition law is enforced by the Italian central bank and the Competition authority has only an advisory role.
Therefore, except for banking, Italy adopted a functional division of competence, where the antitrust authority is responsible for enforcing the antitrust law, while the regulator is in charge of regulation. In other words, there are neither concurrent jurisdictions nor crossed-competencies.

In particular the regulators operate according the following framework :

The *Bank of Italy* is in charge with the regulation and the supervision of the banking sector according the 1993 Banking Law. Its main functions are the supervision of banks and other intermediaries, the control of the payment system, the participation in the decision making of the

European Central Bank. Furthermore, the Bank of Italy is responsible for the application of the competition law to the banking sector.

The *Authority for electricity and gas*, created by the Law n. 481/1995, is in charge of the regulation and supervision of electricity and gas. It regulates final prices; it defines the technical modalities for accessing the infrastructure and it sets access prices for interconnection by third parties; it defines quality standards and the conditions of service operations.
The *Authority for communications*, created by the Law n. 249/1997, is in charge of regulation and supervision of the communication sector. It has powers to regulate final tariffs through a price-cap mechanism, to manage the frequency spectrum, to define quality standards, to identify the conditions of service operations and to approve interconnection charges. It has also a dispute settlements role, notably for interconnection and other technical issues linked to the access to the infrastructures. It may impose fines for non compliance on the obligations imposed to service providers and carries out market analysis to identify dominant operators in order to regulate them[25]. The communications Authority is also in charge of enforcing the law that guarantees the pluralism of information.

ISVAP - the supervisory body for private insurance, set up by law n. 576/1982, is in charge of the supervision of insurance and reinsurance undertakings. ISVAP's primary role is to control that insurance companies comply with technical, financial and accounting standards. ISVAP monitors the financial position of insurance companies, making sure that solvency margins are sufficiently high and that adequate technical provisions are in place so that potential liabilities are covered by adequate assets. ISVAP can adopt corrective or repressive measures against any undertaking infringing the regulatory rules.

The greatest advantage of a clear division of tasks between regulators and the antitrust authority is that the possibility of conflicts is strongly reduced. It also guarantees the uniform interpretation and coherent application of competition rules across the economy. Of course, the technical expertise of regulators can be of great help in the application of the competition law, helping in the definition of the relevant market, in the identification of a violation or in understanding the technical issues involved with the implementation of a proposed antitrust decision. At the same time, the expertise of the competition authority in designing pro-competitive regulations, can be used by regulators to identify less restrictive ways of regulation. Establishing a proper cooperation framework that operates both ways is therefore very important.

2. Are the relationships of cooperation between the competition authority(ies) and the sectoral regulators regulated by the law or just voluntary?

The extent of cooperation between the competition authority and sectoral regulators are in general regulated by the law.
Particularly:
- In the banking sector, the law, while giving the Bank of Italy the power to apply the competition law to banks, gives to the Authority a mandatory advisory role on every antitrust proceeding.

[25] See the Legislative Decree n. 259, 1° august 2003, which transposed the European directives in the communication sector issued on march 2002, the so-called telecommunication package.

- In the communications sector, Law 249/97 sets out specific rules for the cooperation of the two authorities. In particular, the regulator is obliged to inform the competition authority of any restriction of competition the regulator might have become aware of and the antitrust authority is obliged to ask the advice of the regulator on any proposed enforcement decision. Furthermore, the regulator must request the opinion of the competition authority in a number of regulatory decisions, such as those ascertaining: 1) the effective market power of telecom companies and 2) whether interconnection offers by telecommunications operators with considerable market power are justified. Finally, new obligations for the regulator to request the advisory of the Competition Authority (for example, definition of the relevant markets) were introduced by Legislative Decree n. 259/2003, which transposed the European directives in the electronic communications sector The purpose of this consultation mechanism is to provide the regulator with a competition-based assessment. Obviously, in practice the consultation may well be broader that envisaged; not only is the regulatory authority for communications free to ask the opinion of the competition authority above and beyond the instances explicitly envisaged by the law, but the latter may also on its own initiative issue an opinion in relation to restrictions of competition that may arise in the telecommunications sector for the implementation of sector-specific regulation.
In the insurance sector, art. 20 of the Law. N. 287/90 requires the competition authority to request the opinion of the sectoral regulator before issuing a decision. No special legislation requires the sectoral regulator to ask the competition authority for an advice.
In gas and electricity the regulator is obliged to inform the competition authority of any restriction of competition the regulator might have become aware of, but there is no obligation to request any advice, neither in antitrust, nor in regulatory decisions. In practice, however, the two authorities cooperate quite extensively.

3 ***The impact of federal, state and local governments' jurisdiction on regulators interrelations.***

No impact.

4 What is the role carried out by the concerned Ministry, when a regulatory authority operates in the related sector?

There is no general answer to this question because the specific functions of the Ministry depends on the characters of each regulated sector and on the way regulation has been designed. In some markets, the Ministry exercises regulatory powers which are complementary with those of the regulatory authority. For example, in the communication sector the Ministry has powers of technical regulation, subject to the advice of the regulatory authority. Particularly, the Ministry assigns frequencies and licenses, deliberates the national plan of frequencies; adopts the numeration plan; attributes the concessions; issues the authorisations; defines the quality standards, etc..

In the electricity and gas sector, the Ministry, besides of being in charge of the country energy policy, guarantees the safety and continuity of supply, indicates the general objectives of public service and efficient use of the resources, issues concessions, etc.

In any case, whenever the regulated company is State owned, the regulating Ministry is different from the one exercising ownership rights. In fact in Italy all ownership rights are exercised by Treasury, while the sectoral Ministries are in charge of regulation.

5 To which extent is the autonomy of competition authorities and regulators affected by their dependence on Government for funding, rule making powers of Government, etc.: how can this impact their respective functions and interrelations?

The Competition and the regulatory authorities are independent administrative authorities. They are not subject to political interference and their decisions are only subject to judicial review by the Courts. The autonomy and the independence of the Competition Authority and the sectoral regulators are ensured, *inter alia*, by the procedures for appointing their Chairmen and their Members, by the eligibility criteria used in their selection, by the fact that their mandate is not revocable, that their term is not renewable and that the Authorities are responsible for the management of their own budget. Of course, the Competition Authority and the regulators are dependent on Parliament for the total amount of funds at their disposal and this is quite an important factor. In principle, if the budget allocation is not sufficient for financing the normal functioning of the body, this can reflect negatively over the efficacy of its action. However, until the now these authorities have not suffered of shortages of funds.

6 What kind of contribution does the competition agency receive from the sectoral authority when deciding on cases involving operators in regulated sector? Does the contribution of the sectoral authority take into account exclusively the specific interests characterising the respective sectors (the pluralism in the media, the stability in the banking sector, etc.) or include also a judgement about the lawfulness of the case from the competition point of view? Examples.

The objective of the consultation procedure is to provide the recipient authority with the perspective of the specialized body (the regulator would provide its technical assessment of a an antitrust decision and the competition authority would provide a competition assessment of a regulatory decision). In broadcasting the procedure for consultation between the two authorities presumably reflects the instrumental link between the protection of competition and the protection of pluralism in the media.

It is important to emphasize that the two areas of action – sectoral regulation and competition law enforcement – are separate and distinct as to the objectives pursued and the assessment criteria, the competition authority objective is only competition, while regulators have to balance the interest of competition with others (continuity of supply, stability, pluralism etc.). The advice that regulators should provide on antitrust decisions is therefore related to these other interests or to other more technical issues, so that the competition authority can take those factors into account, particularly as regards the dynamics of competition, the technological developments in the supervised sectors and the interaction between sectoral regulation and business conduct.

7. What kind of contribution is given by the competition agency to the sectoral authority? Does it concern some specific topics (the definition of the relevant market, the existence of dominant positions, etc.) or can it cover other aspects of the regulation, relevant from a competition point of view? Examples.

In general, the competition authority provides always the regulatory body with a competition-based assessment of a regulatory proposal. Obviously, in practice the consultation may well be broader that envisaged in the legislation; not only is the regulator free to ask the opinion of competition authority above and beyond the instances explicitly envisaged by the law, but the competition authority may on its own initiative issue an opinion advocating pro-competitive changes in the legislation or in the regulation.

8. How do competition agencies and regulatory bodies interrelate in regulated sectors that are considered services of general interest, especially with regard to matters such as universal service obligations, exclusive or special rights, and essential facilities?

The regulatory framework applicable to the services of general interest is largely shaped by the European rules. With this specification, the Competition Authority and the regulatory bodies do interrelate in such markets.

9 Which functions could better be conducted by each type of regulators given the level of economic development and the extent of sectors opening ? Why would sector regulators or competition agencies be better placed ?

Questions 9 and 10 are answered jointly (see below)

10 Would there exist an optimal «core business» for each kind of agency by sector? What antitrust and regulatory authorities can do the better: effects on their interrelations.

Economic regulation implies the existence of some sort of market failure, originating from natural monopolies, information asymmetries and externalities. In all these cases, regulators are empowered to assure the correct functioning of the market, restraining the exercise of market power of the natural monopolist, introducing rules, for example disclosure obligations, to reduce the importance of information asymmetries, imposing obligations on individual behavior so as to make sure that the externality is internalised. In general, regulators intervene ex-ante, with provisions of a general nature, imposing certain type of conduct on enterprises.

On the contrary, antitrust enforcement applies legal provisions to the specific evidence of a case, performing an activity which is much more similar to that occurring in a Court proceedings. A regulator provides companies with some rules they have to follow, while an antitrust authority can only interpret existing rules applying them to the specific facts of a case.

There are instances of complementarity between a regulator and an antitrust authority (i.e. both are important, each in its own right) and instances of potential conflict (either one could be used

in a given case). The major difference between economic regulation and antitrust is that regulators address the question of market power directly (for example restraining the possibility of pricing a monopoly service below a certain threshold), while antitrust authorities only indirectly (for example prohibiting a merger to monopoly, or impeding the monopolization of a contiguous market). Under an antitrust statute monopoly profits are generally addressed by enhancing competition, while a regulator would directly intervene, reducing monopoly profits.

There are instances where a regulator and a competition authority pursue the same objective. For example in terms of providing access to an essential facility, where the objective of a regulator and that of a competition authority are very similar, an antirust authority would intervene only ex-post sanctioning exclusionary practices, while a regulator would also intervene ex.-ante, directly establishing the maximum access price for the regulated company. The two prices would not necessarily be the same, since the objectives pursued are not necessarily exactly the same. For example, in some jurisdictions an antitrust authority may only go as far as establishing exclusionary effects, while a regulator may also intervene so as to eliminate non-exclusionary monopoly profits.

FAIR TRADE COMMISSION OF JAPAN

1. Which functions are currently conducted by which regulators or competition agencies?

The competition authority in Japan, the Japan Fair Trade Commission, enforces Antimonopoly Act and executes competition policy. It makes policy recommendations and pursues co-ordination of law and ordinances in regulated sectors with a view to promoting fair and free competition in the said sectors.

Regulatory authorities establish regulations with a view to appropriate development of business under each Industry Law. (e.g., the electricity and gas sectors are regulated by the Ministry of Economy, Trade and Industry (hereinafter METI), telecommunications sector is regulated by the Ministry of Internal Affairs and Communications(hereinafter MIC).)

Please refer to Section 7. of our contribution made last year (Interrelations between antitrust and regulatory authorities: Report to The Third ICN Annual Conference, Antitrust Enforcement in Regulated Sectors Working Group, Subgroup 3) about summaries of regulatory framework in electricity, gas and telecommunications sectors and of development of regulatory reform in Japan.

2. Are the relationships of cooperation between the competition authority(ies) and the sectoral regulators regulated by the law or just voluntary?

There are no statutory provisions concerning procedures for addressing issues that arise between the competition authority and regulatory authorities. However "the Three-Year Program for Promoting Regulatory Reform and Privatization" decided by the Cabinet Decision in March 2004, clearly states that the JFTC will continue to conduct surveys on the status of competition in these sectors from the viewpoint of promoting competition when policy recommendations are deemed to be necessary, and will actively make proposals when there is room for improvement. For these regulated sectors, the regulatory authorities and the JFTC will consider a mechanism under which they can work together on the establishment and review of systems concerning competition, and will make related guidelines as necessary.

The JFTC published the guidelines to promote fair competition concerning electricity, gas and telecommunications in cooperation with regulatory authorities.

"Guidelines Concerning Appropriate Electric Power Dealings" (Issued in December 1999 and revised in July 2002. Prepared and made public in cooperation with the METI)

In order to make competition in the electricity sector well-functioned after the regulatory reform in this sector, the JFTC, in cooperation with the METI, prepared the guidelines describing the specific conduct which are desirable from the viewpoint of fair and effective competition and which are problematic on the Electricity Utility Law or the Antimonopoly Act, with respond to the cases assumed to impede competition in this sector and the concerns which the market participants have shown.

The JFTC, based on the practices on legal matters and the cases which had been brought to the JFTC or the METI after step by step liberalization was initiated in this sector, revised the guidelines. At this opportunity, a lot of examples of specific conduct which would violate the Antimonopoly Act were added in the guidelines.

"Guidelines Concerning Appropriate Gas Dealings" (Issued in March 2002 and revised in August 2004. Prepared and made public in cooperation with the METI)

In order to make competition in the gas sector well-functioned after the regulatory reform in this sector, the JFTC, in cooperation with the METI, prepared the guidelines describing the specific conduct which are desirable from the viewpoint of fair and effective competition and which are problematic on the Gas Utility Law or the Antimonopoly Act, with respond to the cases assumed to impede competition in this sector and the concerns which the market participants have shown.

The JFTC, based upon the practices on legal matters and the cases which had been brought to the JFTC and the METI after the amended Gas Utility Law enforced in 2004, revised the guidelines. At this opportunity, examples of specific conduct which would violate the Antimonopoly Act were added in the guidelines.

"Guidelines for Promotion of Competition in the Telecommunications Business Field" (Issued in November, 2001 and revised in December, 2002 and in June, 2004. Prepared and made public in cooperation with MIC)

In order to make competition in the telecommunications sector well-functioned after the regulatory reform in this sector, the JFTC, in cooperation with MIC, prepared the guidelines describing basic principle and conduct that would violate the Antimonopoly Act and the Telecommunications Law.−

The JFTC revised the guidelines added examples of regulation cases based on the practices on legal matters in December 2002. In addition, it reviewed and revised the guidelines with the amended Telecommunications Business law being enforced in April 2004.

3. The impact of federal, state and local governments' jurisdiction on regulators interrelations.

N/A

4. What is the role carried out by the concerned Ministry, when a regulatory authority operates in the related sector?

In Japan, competent authorities concerned Ministries regulate in their sectors respectively.

5. To which extent is the autonomy of competition authorities and regulators affected by their dependence on Government or Parliament for funding, rule making powers of Government, etc. : how can this impact their respective functions and interrelations?

The independence and neutrality of the JFTC's duties are clearly specified by the Antimonopoly Act. But as the JFTC is positioned as one of the administrative agencies of the Government, its budget and policy making process are subject to the framework of the Government.

Despite belt-tightening elsewhere in the Government, the number of JFTC's staff has been recently increasing by 30 to 40 every year from a viewpoint of importance of competition policy.

As mentioned above, the JFTC has maintained its independence to exercise its authority since before. However, in order to improve the status of the JFTC, the JFTC was transfered from an external organ of the MIC to an external organ of the Cabinet Office in April, 2004.

6. What kind of contribution does the competition agency receive from the sectoral authority when deciding on cases involving operators in regulated sector? Does the contribution of the sectoral authority take into account exclusively the specific interests characterising the respective sectors (the pluralism in the media, the stability in the banking sector, etc.) or include also a judgement about the lawfulness of the case from the competition point of view? Examples.

The JFTC conducts investigations into individual cases independently from anyone else. The JFTC may consider the characteristics of respective regulated sectors during the

investigations. But the JFTC proceeds the investigations based on its own initiatives and does not ask regulators for comments.

The JFTC set up the task-force within the Investigation Bureau of the JFTC to deal exclusively with individual cases in Information technology (IT) and public utilities sectors.

7. What kind of contribution is given by the competition agency to the sectoral authority? Does it concern some specific topics (the definition of the relevant market, the existence of dominant positions, etc.) or can it cover other aspects of the regulation, relevant from a competition point of view? Examples.

The JFTC has been conductding surveys and making policy recommendation from the viewpoint of the Antimonopoly Act and competition policy mainly in regulatory sectors. Furthermore, when a bill based on a Cabinet decision is submitted to the Diet, the customary practice for government agencies is to carry out the necessary co-ordination in advance. In this in-advance coordination process, when a regulatory authority prepares a bill, the JFTC makes coordination with the regulatory authority from the viewpoint of competition policy.

Views on regulatory sectors based on the Antimonopoly Act which the JFTC presented recently include the followings ;

Trade of surplus electricity generated from waste biomass in line with commencement of the RPS system

With regard to trading electricity generated from new energy in line with the commencement of the RPS system (from April 2003) based on the Special Measures Law Concerning the Use of New Energy in Electric Power Retailers, the JFTC conducted a survey to gain an understanding of the situation surrounding the trade of surplus electricity generated from waste biomass. Taking the results of this survey, the JFTC presented the position of the Antimonopoly Act (August 2003) from the standpoint of preventing violations of the Antimonopoly Act with regard to future trade of electricity generated from waste biomass.
(Note: RPS (Renewables Portfolio Standard) system is intended to further expand the use of new energies by obligating electricity retailers to supply at least a certain percentage of new energy-related electricity each year in a manner that corresponds to the amount of electricity they sell.)

Views on Joint Operations of Highway Buses based on the Antimonopoly Act

Control over the adjustment of supply and demand in this sector was abolished through the introduction of the revised Road Transport Law in February 2002, and a change in the competitive environment and certain new entries have been seen in the highway bus business. In this environment, acts which could lead to the exclusion of new entrants were conducted by the entrepreneurs of the highway bus in Tohoku area in May 2003. In light of the foregoing, the JFTC presented its views on joint operations of highway buses based on the Antimonopoly Act in February 2004.

Views on mobile phone number portability based on the Antimonopoly Act

Telecommunication network firms, especially mobile phone operators has been voluntarily preparing for introducing mobile phone number portability in line with the guidelines published by MIC in May, 2004. On its introduction, it may be true that some types of agreements and exchanges of information among them would facilitate introduction of number portability. However, such agreements and exchange of information must not violate the Antimonopoly Act.

For this purpose ,the JFTC clarified its views on practices of firms on the introduction of mobile phone number portability from the viewpoint of the Antimonopoly Act to prevent anti-competitive practices.

8. How do competition agencies and regulatory bodies interrelate in regulated sectors that are considered services of general interest, especially with regard to matters such as universal service obligations, exclusive or special rights, and essential facilities?

As mentioned in 7, the JFTC, when regulatory authorities establish the regulation, has made coordination with them by proposing policy recommendation to them from the viewpoint of competition policy and published JFTC's study reports.

For example, in "the Study Report on Regulatory Reform and Competition Policy in the Telecommunications Business Field" published in November 2002, the JFTC made proposals concerning regulations in this sector as follows :

○ Regulations to make bottleneck facilities like customized local loop open are still necessaryas transitional regulations for introducing competition. However, it is essential for the regulator and the JFTC to jointly verify the progress of competition in the marketplace and review such regulations.

○ It is necessary for the JFTC to get involved in the process of reviewing regulations concerning universal services in the light of the effect on competition.

○ It is important to abolish *ex ante* regulations except above and to shift to *ex post* regulations.

9. which functions could better be conducted by each type of regulators given the level of economic development and the extent of sectors opening ? Why would sector regulators or competition agencies be better placed ?

Questions 9 and 10 are answered jointly(see below).

10. Would there exist an optimal1 core business1 for each kind of agency by sector ? What antitrust and regulatory authorities can do the better : effects on their interrelations.

Regulatory authorities may impose terms of license on new entrants under the provisions of respective business laws in light of consumer interest. The JFTC thinks that regulations should

not be excessive from the viewpoint of promoting competition in regulated sectors and that the terms imposed should be minimum.

Ex ante regulations imposed by regulatory authorities based on business laws such as access obligation to essential facilities (i.e. network facilities) may be necessary from the viewpoint of promoting competition. However, in principle, other regulations should not be imposed as ex ante and environment for fair and free competition should be ensured where enterprises may engage in their business activities. The competition authority can eliminate a conduct impeding or restricting competition on an ex post basis, when necessary by enforcing the Antimonopoly Act which aims at securing fair and free competition.

Japanese competition authority, the JFTC is independent of regulatory authorities. The JFTC is attached to the Cabinet Office which has cross-sector supervision, and makes its decision on individual cases independently. Competition authorities, taking charge of enforcing competition policy as a fundamental rule in market economy and having jurisdiction beyond specific sectors, should be placed in a distant position from regulatory authorities within the government. In other words, competition authorities should be able to exercise their duties independently of other authorities including regulatory authorities, formally and substantially.

ANTITRUST DIVISION OF THE DEPARTMENT OF JUSTICE

Which functions are currently conducted by which regulators or competition agencies?

In the United States, the various industry-specific regulators, such as the Federal Communications Commission ("FCC"), and the federal antitrust authorities, the Antitrust Division of the Department of Justice (hereinafter "DOJ") and the Federal Trade Commission ("FTC"), were created at different times with different authorizing statutes. Generally, regulatory programs were established with objectives beyond just protecting competition, objectives such as universal access and diversity of voices. Historically, industry regulators have been responsible for setting prices and issuing licenses whereas the U.S. antitrust agencies have focused solely on competition. However, the push toward deregulation of many industry segments in the United States over the past several decades, has led the regulatory agencies increasingly to emphasize competition analysis and respect for free market forces. This shift, in turn, has impacted the dynamic between the industry-specific regulator and the antitrust agencies. Increasingly, the industry-specific regulator and the antitrust agencies work cooperatively to protect and promote competition.

Are the relationships of cooperation between the competition authority(ies) and the sectoral regulators regulated by the law or just voluntary?

In the U.S., the federal antitrust agencies often advise industry-specific regulators on non-merger matters that impact competition. This advice may be voluntary or, in some circumstances, required by statute. For example, the U.S. antitrust agencies, like any private

person, may *sua sponte* file comments offering their competition expertise in regulatory proceedings before independent agencies. On the other hand, some statutes require the regulator to seek advice from the competition agencies in particular types of proceedings. One example of such a statute is the Telecommunications Act of 1996[26] which seeks to open all telecommunications markets in the United States, including local services, to competition. Section 271 of the 1996 Act conditions Regional Bell Operating Company ("RBOC") entry into the long-distance market on a showing that the RBOC's local market is open to competition. In making this determination, the Act requires the FCC to consult with the DOJ and accord "substantial weight" to the DOJ's analysis. While the FCC is required to accord "substantial weight" to the DOJ's evaluation, the FCC is not bound to follow the DOJ's advice.

In addition, industry-specific regulators and the DOJ can and do cooperate on and coordinate their respective merger investigations. There are no rules governing when or which agency may initiate the contact. Typically, such cooperation begins once the parties have filed with one of the agencies although in large cases, contact may occur even sooner. Although FCC rules generally require it to disclose any communications directed to the merits or outcome of a proceeding (absent a protective order allowing such information to be placed under seal), the rules contain an exception for meetings with the antitrust authorities.[27] While the FCC and the DOJ are thus free to meet and discuss theories of competitive harm, proposed remedies and timing, the DOJ may not disclose any information it has obtained via compulsory process from the parties or third-parties absent a waiver. Such waivers are useful in order to streamline the review process and avoid inconsistent results.

The impact of federal, state and local governments' jurisdiction on regulators' interrelations.

The U.S. Constitution empowers the U.S. Congress to preempt state law.[28] Preemption may occur in a number of ways, including when (1) Congress enacts a federal statute that expressly preempts state law; (2) there is a conflict between federal and state law; (3) it is physically impossible to comply with both state and federal law; (4) federal law contains an

[26] 47 U.S.C. § 151 *et seq.*

[27] 47 C.F.R. § 1.1200 et seq.

[28] *Louisiana Public Service Commission v. FCC,* 476 U.S. 355, 368 (1986).

implicit barrier to state regulation; (5) Congressional regulation is so comprehensive that it occupies the entire field of regulation; and/or (6) state law poses an obstacle to "the accomplishment and execution of the full objectives of Congress."[29] In addition to Congress, a federal agency acting within the scope of its congressionally delegated authority may also pre-empt state regulation.[30]

[29] *Id.* at 368-69.

[30] *Id.* at 369.

In the case of telecommunications, Congress set up a system of dual state and federal regulation. The Telecommunications Act of 1934 specifically grants the FCC the authority to regulate *interstate* telecommunications services, while reserving *intrastate* regulation to the states.[31] Where a service embodies both inter- and intrastate elements, it is generally subject to both federal *and* state jurisdiction, except when a state regulation interferes with or is inconsistent with federal rules or policies. In such a case, federal law will be said to preempt state law.

With respect to competition matters, most states also have antitrust authorities that enforce both state as well as U.S. federal antitrust law. Many of the state antitrust laws are modeled on the federal antitrust laws. Where there is both federal and state interest in a matter (such as the Microsoft case), the agencies work together through a Protocol agreement on cooperation.

What is the role carried out by the concerned Ministry, when a regulatory authority operates in the related sector?

In general, U.S. federal law addresses the competitive effects of business conduct in regulated industries in one of three ways. First, in a few limited instances, conduct is statutorily exempt from the antitrust laws. An example is the business of insurance, which is exempt under the McCarran-Ferguson Act.[32] In such cases, the regulated company is said to be expressly exempt or immune from the antitrust laws. Antitrust immunity may also be implied when there is a "clear repugnancy between the antitrust laws and the regulatory system."[33]

Second, certain types of conduct are evaluated only under the antitrust laws with respect to their possible effect on competition. For example, an industry-specific regulator may have jurisdiction to set prices, but not have the jurisdiction to criminally prosecute allegations of price fixing.

Third, there are categories of conduct over which the antitrust agencies and the industry-specific regulator have concurrent or shared jurisdiction, most frequently in the area of merger enforcement but also in some non-merger situations. Congress has decided whether to grant an industry regulator exclusive jurisdiction over competition matters within an industry or to establish concurrent jurisdiction between the industry regulator and the antitrust agencies on an industry-by-industry basis.

What kind of contribution does the competition agency receive from

[31] *See* 47 U.S.C. § 152.

[32] *See* 15 U.S.C. §1012(b).

[33] *United States v. Nat'l Ass'n of Securities Dealers, Inc.*, 422 U.S. 694, 719 (1975).

the sectoral authority when deciding on cases involving operators in regulated sector? Does the contribution of the sectoral authority take into account exclusively the specific interests characterizing the respective sectors or include also a judgment about the lawfulness of the case from the competition point of view? Examples.

What kind of contribution is given by the competition agency to the sectoral authority? Does it concern some specific topics or can it cover other aspects of regulation, relevant from a competition point of view? Examples.

In the United States, cooperation between the competition agencies and the sectoral authorities makes it more likely that uniform competition law is enforced where both agencies have concurrent or shared jurisdiction. This is true even when the goals of the sectoral authorities are broader than promoting competition. In the telecommunications sector, sectoral regulation and competition law enforcement work cohesively and complement one another. As mentioned above, one of the stated goals of the 1996 amendments to the Communications Act is to open the telecommunications sector to competition. Under the Act, the Federal Communications Commission ("FCC"), the industry-specific regulator for telecommunications, must determine whether transfers of telecommunications licenses and authorizations serve the public interest, convenience and necessity. The FCC's standard is broader than that employed by the competition agency, the Department of Justice's ("DOJ") Antitrust Division, which focuses purely on competition concerns. The two agencies also differ in their processes and timetables for reviewing mergers. Nevertheless, the two agencies' concurrent jurisdiction leads to cooperation on and coordination of their respective merger investigations.

Presently, there are no rules governing the extent or type of interaction between the two agencies. The cooperation between the two agencies occurs on an informal, rather than formal basis. Generally, cooperation begins once the parties have made required filings with the agencies, although in large cases contact may occur sooner. As discussed above, meetings between the two agencies are not required to be disclosed by the FCC as *ex parte* meetings. This exemption from the FCC rules recognizes and encourages cooperation among the two agencies. Typically, the FCC and DOJ meet and discuss relevant market definitions, theories of competitive harm, proposed remedies and timing. The antitrust agencies generally have greater investigative powers than the regulatory agency. In addition, consumers and competitors are more likely to complain to the antitrust agencies because of the strong confidentiality provisions that the antitrust laws provide. One of the benefits derived by both the regulatory and competition agencies from cooperation is that it allows each agency to avail itself of the other agency's expertise. This advantage is illustrated in the recent Cingular/AT&T Wireless merger.

On February 17, 2004, Cingular Wireless Corp. ("Cingular"), formed and owned by SBC Communications Inc. ("SBC") and BellSouth Corp. ("Bellsouth"), announced an agreement to acquire AT&T Wireless Services, Inc. ("AT&T Wireless") in the largest all-cash transaction in U.S. history. Under the proposed agreement Cingular paid AT&T Wireless shareholders $15 cash per common share, totaling approximately $41 billion. The combined firm is now the largest wireless carrier in the United States. The proposed acquisition required approval from the FCC for the transfer of spectrum and was subject to review by the DOJ. From the time the proposed merger was announced by the parties, the FCC and DOJ began informally cooperating. The two agencies met throughout the course of the summer to discuss theories of competitive harm, how to define appropriate markets, and to share industry information as well as ideas on how to conduct data studies. These meetings allowed the two agencies to avail themselves of the other agency's expertise. The FCC received a competition perspective from the DOJ and the DOJ took advantage of the FCC's technical expertise as it related to the wireless industry. This technical expertise was useful in evaluating the parties' efficiency claims. In addition, the FCC provided information regarding current spectrum holdings and the availability of additional spectrum in the future. The two agencies were able to communicate openly about information given to one or the other agency by the parties because the parties had granted a waiver allowing such information to be shared. This exchange resulted in more efficient use of the agencies' resources and reduced the burden to the parties of producing information.

In October 2004, the DOJ and FCC both approved the Cingular/AT&T Wireless merger, subject to divestitures by the parties of certain businesses, spectrum and partnership interests. The number of divestitures required by the DOJ and FCC were slightly different due to the differing standards of review. For example, the FCC required more divestitures in rural areas under its public interest standard. A common trustee was selected to oversee the assets required to be divested by both the FCC and DOJ until they could be sold. Cooperation between the agencies on the divestitures was useful to streamline the divestiture process and avoid having the agencies reach inconsistent outcomes. In addition, the DOJ was able to share its expertise on ordering and effectuating divestitures of full businesses in the wireless sector. Up to this time, the FCC had only required divestitures of spectrum.

As the above example illustrates, cooperation among the DOJ and the FCC reduces the opportunities for inconsistent outcomes, preserves the agencies' resources and reduces the burden on parties to produce information by limiting duplicative requests. Given the concurrent jurisdiction of the two agencies, cooperation ensures consistent and well-informed antitrust policies in the telecommunications sector.

9. which functions could better be conducted by each type of regulators given the level of economic development and the extent of sectors opening ? Why would sector regulators or competition agencies be better placed ?

10. Would there exist an optimal1 core business1 for each kind of agency by sector ? What antitrust and regulatory authorities can do the better : effects on their interrelations.

USDOJ response, questions 9 & 10

It is our experience that antitrust enforcement is most effective in dealing with problems created in markets that would, absent the targeted behavior, support competition. For example, antitrust enforcement is highly effective where its purpose is:

- to limit increased concentration and decreased competition through injunction of harmful mergers or with structural remedies like divestitures;

- to counter specific instances of abuse by a monopolist used to maintain a monopoly in a market that could otherwise support competition; and

- to limit harm to otherwise competitive markets that result from agreements among competitors.

What all these practices have in common is that a remedy generally can be developed that will allow the market to return to the state of competition that existed prior to the targeted practice, such that market forces – not continued monitoring by the government – will again determine prices and output. The U.S. antitrust laws are enforced through the general court system, not through a special economic court or administrative body. Such courts are able to craft and enforce remedies that prevent anticompetitive conduct or its reoccurrence through unambiguous prohibitions or structural remedies. However, remedies that require long-term and intensive or frequent monitoring are not well suited to administration by such courts.

In contrast, it is our experience that regulation by an expert regulatory body can be more effective in dealing with persistent market failure, such as markets that because of sustainable monopoly characteristics cannot structurally support competition. Of course, even where regulation is needed, care must be taken to accomplish its objectives without unintended consequences. (See the ICN paper on competitive advocacy.) Markets with persistent market power tend to be infrastructure industries with so-called natural monopoly characteristics like increasing returns to scale, such as electricity transmission and natural gas transmission. Where regulation is cost effective, monitoring and enforcing access conditions may be best handled by an expert regulatory agency with adequate knowledge and resources necessary to monitor and limit the exercise of market power on an ongoing basis. Furthermore, a regulatory authority may be able to promulgate narrow, industry-specific rules for access in a quasi-legislative procedure with public comments. The antitrust enforcement agencies do not have such tools; they enforce a general competition law against a subset of market participants through the court system on a case-by-case basis. Pursuing a remedy at an expert agency under industry specific access rules may be less time and resource consuming than pursuing antitrust litigation.

In sum, where market structure will not support competition due to persistent market failure, regulators may provide more effective remedies than antitrust enforcement. However, antitrust, rather than regulation is likely the better way to resolve problems in markets that can structurally support competition. While regulation may allow for a more procedurally efficient and quicker way of resolving individual problems than antitrust litigation, a well functioning market will usually be the least costly, most effective way to set price and allocate resources. Although antitrust enforcement's structural remedies may take longer to effectuate, they are more likely than regulation to return potentially competitive markets to a state in which market mechanisms can again take on the role of efficiently allocating resources.